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The EU's externalization of migration controls: the case of Turkey and Libya

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Academic Year 2022/2023

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INTRODUCTION

Over the last decades Europe, once a traditional emigration country has become a main destination country, due to the process of European integration.

The creation of the internal market and the post-World War II economic boom indeed reduced emigration to other continents while migration flows between Member States were progressively facilitated through the establishment of a series of measures such as the Schengen Agreement.

At the same time, with the disappearance of internal borders, the European Union began to progressively consider immigration from third countries a European issue. Starting in the 1990s, common rules were adopted on the conditions for entry and residence for work, study, and family reunification, and a Common Asylum Policy was introduced with the aim of providing minimum standards for the treatment of asylum seekers and their international protection applications.

Despite the progressive involvement of the EU, the resistance of Member States to cede sovereignty in the field of immigration has made the European migration policy largely incomplete and inefficient. The Dublin system in particular, which establishes criteria for determining the state responsible for an asylum application, came under heavy criticism as it proved inadequate in managing the 2015 crisis when over a million migrants arrived at the borders of the Union.

The shortcomings of the existing legislation became apparent as Member States prioritized their own interests over mutual support, leaving countries like Italy and Greece overexposed to migration flows which put enormous pressure on their asylum and reception systems.

As a result, the European Union was forced to reevaluate its immigration and asylum policies, resulting in the gradual "securitization" of migration, now increasingly viewed as a security threat.

Within this context, the EU has pursued a policy of "externalization" of migration controls, aimed at shifting the management of migrants outside the Union's external borders. To this end, the EU, but also Member States, adopted several agreements and partnerships with third countries, most notably Turkey and Libya, in order to block departures and facilitate the repatriation of illegal migrants.

Although such agreements must be implemented in full compliance with international norms and Union laws, numerous reports have shown how third countries often do not ensure a level of human rights protection comparable to European standards and often actually violate the rights of migrants and refugees, by subjecting them to arbitrary detention, torture, and other forms of ill-treatment.

Indeed, while these acts impose obligations on the parties involved, they have not been defined as international agreements but rather as "statement" or "memorandum" which therefore do not follow the regular procedures for the adoption of international agreements such as parliamentary control.

This lack of formality has thus allowed the EU and its Member States to delegate the migration management to third countries which are often not held accountable for their actions, and therefore to escape the legal and political responsibility of the violations of migrant's rights that may occur therein. Despite numerous documented violations of migrants' and refugee's rights both in Turkey and Libya, the EU continues to support this system, creating a vicious circle in which migrants are either intercepted at sea or repatriated to their country of origin without any guarantee of protection or access to fair and efficient asylum procedures.

The aim of this thesis is therefore to conduct a comprehensive analysis of the key aspects of the agreements concluded by the European Union and Italy, with a particular focus on the EU-Turkey Statement of 18 March 2016 and the Italy-Libya Memorandum of Understanding of 2 February 2017. The study aims to shed light on the controversies surrounding these agreements within the broader context of the EU's externalization of migration control and provide a deeper understanding of their implications for the EU's migration policies.

The first chapter presents therefore the general European framework of migration and asylum law, illustrating the main steps that the EU has taken to tackle the phenomena of migration and the developments that brought to the establishment of the Common European Asylum system which sought to establish a uniform approach for dealing with asylum applications across the EU. By analyzing the founding Conventions and Treaties, the chapter will explore the rights that migrants and asylum seekers enjoy under both European and International law and how they have to evolved throughout time.

The second chapter centers on the 2015 migration crisis and on how it exposed the flaws of the Dublin system and other existing approaches**.** In particular, it will analyze how the Union has responded to the crisis by progressively externalizing migration control through the adoption of several measures with third countries such as Mobility Partnerships, Visa Facilitation and Readmission Agreements, as well as the implementation of emergency mechanism, namely the reallocation and hotspot mechanisms, which aimed at distributing asylum seekers more fairly across EU Member States. The chapter will then evaluate the effectiveness and compatibility of these measures with EU law and international refugee law and assess the potential long-term consequences of externalizing migration control.

The third chapter presents the EU-Turkey relations and in particular, the steps that led to the signature of the EU-Turkey statement which aimed at restraining migration flows from Turkey to the EU by establishing several provisions such as the readmission of irregular migrants from Greece to Turkey.

The chapter will then analyze the controversies surrounding the agreements and the violations of human rights that have taken place under it.

The chapter will analyze the political and diplomatic factors that contributed to the agreement, including the EU's desire to manage migration flows and Turkey's desire for closer ties with the EU. The chapter will also examine the controversies surrounding the agreement, particularly regarding the violation of human rights and the criticism from humanitarian organizations as well as the impact of the Statement on migration patterns and the processing of asylum applications in Greece and other EU Member States.

Finally, the fourth and final chapter presents the bilateral agreements signed between Libya and Italy with a particular focus on the 2017 Memorandum of Understanding. The chapter will thus analyze the measures established by the agreement, such as the training programs for the Libyan Coast Guard and joint coastal patrols, as well as the challenges and issues that have arisen since its implementation.

Additionally, it will provide an in-depth examination of the critical aspects of the agreements, including the horrendous conditions faced by irregular migrants in Libya, carried out with Italian tacit compliance. The chapter will then analyze the ethical and legal concerns surrounding these agreements and their impact on the rights of migrants, as well as the implications for Italy's relationships with its European partners.

CHAPTER 1 - LEGAL FRAMEWORK OF THE EU ASYLUM AND MIGRATION POLICY

1. International Framework

Before talking about the European Union's (EU) legal framework on asylum and migration policy it is necessary to underline a series of developments within this field that occurred outside EU institutions but that nevertheless significantly influenced the subsequent European laws on asylum.

Asylum and migration policy was initially developed mainly as a result of the work of the United Nations as well as the Council of Europe which codified the right to asylum into a norm of international law. Within this context, the most important instruments are the 1951 Geneva Convention Relating to the Status of Refugees, together with its protocol of 1967 as well as the 1950 European Convention on Human Rights (ECHR) which established the principle of non-refoulement. Additionally, the abolition of internal borders following the Schengen Agreement, which was incorporated into the EU's legal framework only in 1999 with the entry into force of the Treaty of Amsterdam, prompted the need for common border control procedures such as entry and visa requirements and general rules on asylum.

It is thus crucial to acknowledge the various historical and legal developments that have had a significant impact on the current EU legal framework on asylum and migration policy and that still today continue to shape the EU's approach in managing migration flows.

1.1 The Geneva convention and the principle of non-refoulement

Following the two world conflicts, which forced millions of people to flee their homes, the need for an international agreement on how to deal with these flows of migrants in search of refuge arose.

Following a series of conferences, and a limited attempt by the League of Nations to establish a legal status for refugees[1], on the 28th of July 1951 the Geneva Convention relating to the Status of Refugees,[2] also known as the Refugee Convention, was adopted. Initially of temporary and regional nature, with a mandate restricted to European refugees and later amended by the 1967 Protocol[3] which removed geographical limitations, the Convention represents nowadays the first and most important treaty regulating the right to asylum and the status of refugees at the international level. While only twenty-six states participated in the original Convention, at present it has been ratified by 144 states.

[1] In 1920, following WWII, the League of Nations created the position of the High Commission for Russian refugees, later followed by a series of organizations and agreements such as the: the Nansen International Office for Refugees, and the Intergovernmental Committee on Refugees however its scope was limited to specific groups of refugees.

[2] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189.

[3] UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606.

The 1951 Convention and its 1967 Protocol are the only global instruments explicitly covering the most important aspects of refugee protection. Their provisions define the term "refugee", outline the rights of asylum seekers such as legal protection, assistance and social rights as well as the legal obligations of states to protect them. The Convention also recognizes the international scope of the refugee problem and the need for international solidarity and cooperation in trying to resolve it. [4]

Contrary to earlier instruments adopted in relation to specific situations, the Refugee Convention endorses a single universal definition of the term "refugee" in Article 1(2) as someone who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of 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".

The provisions of the 1951 Convention also include the so-called cessation and exclusion clauses, respectively in Articles 1C and 1F, which define the conditions under which a refugee ceases to be recognized as such and the situations excluding persons from the refugee status, for example in the case of individuals having committed war crimes.

In addition to giving a definition of refugee, the Convention contains a series of core principles and rights of refugees such as non-discrimination, the right to work, and most importantly the principle of non-refoulement. Defined in article 33 of the Refugee Convention the latter principle holds that: "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of the 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". The provision contained therein is designed to prevent states from returning refugees to those countries where their life of freedom would be at risk [5].

The principle of non-refoulement represents a cornerstone of refugee protection to the point that it has been recognized as a principle of international customary law[6], binding therefore even those states not parties to the convention[7], as proven by the fact that it has been incorporated in several international and regional treaties and reaffirmed in different resolutions adopted by the United Nations General

[4] United Nations High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, September 2011.

[5] Cherubini, F., "*Asylum Law in the European Union*". 1st ed. Routledge, 2014.

[6] A principle is recognized as customary international law if there is a general, consistent practice by States accepted and recognized as law.

[7] United Nations High Commissioner for Refugees (UNHCR), The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994.

Assembly. As a consequence, while the refugee convention does not automatically grant asylum seekers the status of refugee and indeed leaves states significant freedom in determining the refugee status[8], at the same time it prohibits them from returning migrants to countries where they would face risk of persecution. It is important to emphasize that the non-refoulement principle applies to all asylum seekers, even those who have irregularly crossed the borders of a state.

Article 33(2) of the Geneva Convention provides however for two exceptions to the prohibition on refoulement namely in case an individual constitutes a threat to the national security of the host country or if he has been convicted of a particularly serious crime and therefore constitutes a danger to the country.

Although the Refugee Convention does not include a mechanism for enforcement, the United Nations High Commissioner for Refugees (UNHCR), established through Resolution 319 (IV) on 3 December 1949, supports and upholds the Convention's principles. The UNHCR's mission is to ensure that everybody has the right to seek asylum and find refuge. A person who meets the criteria of the UNHCR Statute, therefore, qualifies for UN protection irrespectively of whether he finds himself in a country that is party to the Refugee Convention or has been recognized as a refugee.

Since all EU countries are parties to both the Convention and Protocol they are bound by their obligations.

1.2 European Convention on Human rights

At the European level, one of the earliest developments was the European Convention on Human rights.[9] After the Second World War, in order to put an end to the atrocities that had been experienced therein and to create a system capable of protecting human rights and promoting democracy, the Council of Europe was founded. Born in 1949 as a result of the Hague Congress, the Council of Europe is one of the oldest European organizations which today counts 47 Member States. Even though the Council constitutes an entirely separate body from the European Union, it counts all EU countries among its members.

In order to fulfill its purposes, the Council created a legal system for the protection and guarantee of human rights within Europe, namely the European Convention on Human Rights[10], signed in Rome on 4 November 1950 and entered into force on 3 September of the same year.

[8] States parties to the Convention have no obligation to grant the refugee status which therefore depends on the assessment of each state. This has resulted in significant disparities among States recognition rates.

[9] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

[10] Officially the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The convention did not contain any asylum-related norms, nevertheless it imposed some limits on the capacity of Member States to remove foreigners, thereby making it a relevant treaty in the context of EU migration and asylum law.

Initially proposed by Winston Churchill, the Convention was drafted on the basis of the United Nations Universal Declaration of Human rights and its objective was that of securing basic rights and freedoms for every citizen as well as prohibiting harmful practices such as torture. The Convention therefore not only granted rights to individuals but also imposed duties on states to protect them.

The creation of the ECHR led to the establishment, under article 19[11], of a safeguard legal body, namely the European Court of Human Rights (ECtHR), responsible for ensuring that states parties to the Convention respect their obligations and offering legal assistance to those persons alleging violations of it.

Differently from the Geneva Convention, the ECHR does not mention the right to asylum, which therefore rests within states, but it provides that states parties are obliged to comply with and protect the rights listed within the ECHR for all citizens, including migrants and asylum seekers.

As a consequence, states are not only required to act in conformity with the ECHR when enacting legislation but also to ensure that their officials and border authorities comply with its principles when exercising their migration control functions in order to guarantee the respect of refugees' and asylum seekers' human rights.

The most important provisions can be found in Art. 2, guaranteeing the right to life and Art. 3, prohibiting torture, inhuman or degrading treatment or punishment. Even though not directly mentioned it is clear how we can derive from Art. 3 a prohibition on refoulement similar to that of Art. 33 of the Geneva Convention. The ECtHR has indeed confirmed in its Soering Judgment[12] that removing a person to a country where he would face a real risk of torture, inhuman or degrading treatment or punishment would constitute a breach of Art. 3.[13]

Furthermore, differently from Art. 33 of the Geneva Convention, Art. 3 ECHR constitutes an absolute prohibition and thus permits no exceptions even in cases of threats to national security.

The Strasbourg Court has also ruled that diplomatic assurances from the destination state as well as domestic law safeguarding human rights, or the ratification of international human rights treaties are of no significance in cases of evidence of torture or inhuman treatment of migrants.[14]

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[11] Council of Europe and European Union, "*Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders",* 2020.

[12] ECtHR, *Soering v. United Kingdom* (Judgment), No. 14038/88 (7 July. 1989).

[13] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law*". Oxford University Press, 2016, p. 251.

[14] Ibidem.

In Hirsi Jamaa v Italy[15], the Human Rights Court has ruled that the Convention also applies to Member State's interceptions in the high seas which therefore cannot entail the removal of migrants to countries considered unsafe on the basis of Article 3 ECHR.

1.3 The Schengen Agreement and the Implementing convention

In the first decades following World War two migration and asylum law matters fell within the competence of Member States. In particular, prior to the Maastricht Treaty, the European Community institutions did not have any role concerning Justice and Home Affairs (JHA) matters which were therefore discussed exclusively among states' governments.

In the 1980s however, following the post-war economic recovery and the development of the European Single Market, the issue of migration acquired a supranational dimension and, as integration between Member States grew, the need for an agreement that would allow free movement of persons and workers arose. Within this context, the Schengen Agreement[16] was signed.

The first draft of the future Schengen treaty dates back to 1985, outside of the Community legal system. On 14 June of that year, in the Luxembourg municipality of Schengen, an agreement was signed between Belgium, the Netherlands, Luxembourg, France and Germany.

The agreement represents an international treaty between the five signing states through which the respective governments agreed to abolish internal border checks among them along with a list of measures necessary for its implementation, therefore, moving towards greater European integration.

A few years later, on June 1990 the Agreement was replaced by the Convention implementing the Schengen Agreement also known as the Schengen Convention which set out detailed rules on abolishing internal border checks while at the same time strengthening external border controls, harmonizing visa policy, and regulating movements of third-country nationals between signing parties together with a series of rules on preventing and restricting irregular immigration and allocating responsibilities for asylum applications.[17]

The Convention was also responsible for creating the Schengen Information System (SIS), a governmental database for security and border management within the European Union. Within the Schengen area, SIS coordinates the exchange of information between competent authorities regarding missing individuals, wanted individuals, illegal entrants, and lost or stolen passports, which once entered into the system become available to all authorities. [18]

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[15] ECtHR, *Hirsi Jamaa and Others v. Italy* (Judgment), No. 27765/09, (23 February 2012).

[16] European Union, Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement, 14 June 1985.

[17] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law*". Oxford University Press, 2016, p. 72.

[18] SchengenVisaInfo.com. "*The Schengen Information System – SIS"*, n.d.

Essentially, the Schengen rules were based on the premise that extensive "compensatory" measures, such as a common visa and return policy and the establishment of effective controls at external borders of signatories were required to prevent unauthorized entry into the Schengen area and to ensure that internal border checks could be abolished without compromising security. The Agreement and the Convention therefore not only abolished internal controls, thus introducing free movement of persons between state parties but at the same time created an external European border, transforming migration into a security issue and enhancing collaboration between national authorities on asylum and migration matters.

Throughout time more and more countries became signing parties, therefore expanding the Schengen Area which today counts 26 European Countries, including 22 of the 27 European Member States.

Despite being initially developed outside the EU, both the Schengen agreement and the Convention, which together form the "Schengen Acquis" are now part of EU legislation following the entry into force of the Treaty of Amsterdam in 1999.

Even though the Schengen Convention does not contain any legal provision concerning asylum law, it proved of enormous importance in providing a laboratory for the regulation of third-country nationals and the development of migration policies at the European level.

Over the past few years, however, despite being regarded as one of the most significant achievements of the European Union it has come under great pressure due to the massive influx of refugees and migrants into the country as a result of the 2015 migration crisis.

2. EU legal framework

Within the European Union, the process of developing a common EU asylum policy is relatively new. With the removal of internal borders following the Schengen Agreement and the increasingly complex challenges posed by rising migration influxes, it became evident that harmonized asylum laws and practices were necessary, as well as the eventual establishment of a common European asylum system.

Discussion on this matter first began in 1985 when a White Paper on the completion of the internal market was published by the European Commission highlighting the need to develop common principles on the management of external borders.

Nonetheless, due to Member States' reluctance to cede sovereignty over their national borders, progress towards the development of a common external border management policy was slow and often contentious.

Throughout time however, it became clear that common approaches were required as national policies could no longer adequately address the growing pressures that immigration was placing on the majority

of Member States. Within this context, the Maastricht Treaty, formally known as the Treaty on European Union will be signed, officially incorporating the issue of asylum and migration matters into the Community legal framework.

2.1 The treaty of Maastricht

Signed on the 7th of February 1992 and entered into force on the 1st of November 1992, the Maastricht Treaty[19] officially gave birth to the European Union and managed to establish a "formal intergovernmental" system for JHA cooperation.[20]

The Treaty introduced a new institutional framework, establishing and enhancing the powers of the European Parliament, the Council, the Commission as well as the Court of Justice and the Court of Auditors. But most importantly the Treaty introduced three distinct pillars, understood as distinct decision-making regimes: the supranational pillar of the European Communities (EC) and the two pillars of intergovernmental cooperation, namely the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs Policy. The third pillar in particular included competences to act in the areas of asylum, immigration, judicial cooperation in civil and criminal matters and police cooperation in order to better achieve the free movement of persons envisaged by the Single European Act.

The Union's objective was therefore to develop common action within these areas in order to provide citizens with a high level of safety within an area of freedom, security and justice (AFSJ) by creating rules on crossing the community's external borders, combating terrorism, crime and fraud, promoting judicial cooperation as well as controlling illegal immigration and developing a common asylum policy.[21]

The third pillar, as for the second, retained however an intergovernmental dimension due to the reluctance of Member States to fully surrender competences within this area. Nonetheless, certain provisions such as article K.9, which provided the possibility to transfer some common matters of interest from the intergovernmental third pillar to the community first pillar, allowed for the "communitarisation" of certain issues and the involvement of Community institutions. [22] In reality though, this provision was never applied.

The Council and the Commission were the primary actors who worked jointly within this field while Parliament only had the right to be informed and occasionally consulted, but because the Council,

[19] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992.
[20] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law"*. Oxford University Press, 2016, p. 8.
[21] European Parliament, "The Maastricht and Amsterdam Treaties | Fact Sheets on the European Union", March 2023.
[22] O'Keeffe, D., "The Emergence of a European Immigration Policy. Immigration Policy in Europe". *Immigration and Nationality Law Review* 17 (1995-96): p. 270.

composed of Member States' government ministers, was required to act unanimously, each Member State essentially had veto power, further underlining the intergovernmental nature of JHA matters.

In general, the most important provision of the Treaty can be found in Article K.1 which required Member States to cooperate in nine areas regarded as matters of "common interest", including asylum and immigration policy.

The Member States remained therefore sovereign in their respective immigration policies but political cooperation took place within the European institutional framework which could rely on new, although weak, instruments of cooperation adopted unanimously by the Council such as "common positions" and "joint actions" to be recommended to the Member States. Through these instruments the Council could thus define the Union's approach on a given issue and identify areas in which operational intervention by the Union was considered necessary.[23]

In practice however, very few measures on immigration or asylum issues were endorsed pursuant to this framework[24], resulting in the adoption of general, incomplete and often non-binding resolutions which highlighted Member States' unwillingness to cooperate within this field and to subordinate their national interests to those of the EU.

2.2 The treaty of Amsterdam

The signature of the Treaty of Amsterdam[25], formally known as the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, in October 1997 marked a turning point in the EU's asylum and migration policy.

The Treaty completely restructured the third pillar, transferring almost all subject areas of the latter dealing with immigration, asylum and judicial cooperation in civil matters to the first pillar, thereby transforming them into a supranational policy area. The remaining third pillar was thus left with a limited scope, covering only Police and Judicial Cooperation in Criminal Matters and retaining its original intergovernmental character.

As the result of this shift, a new title will be introduced into the EC Treaty, specifically Title IV on "Visas, asylum, immigration and other policies related to free movement of person" thereby granting the Community supranational powers to act within this field and paving the way for a future Common European Asylum System.

[23] Article 14 and 15, Treaty of Maastricht.

[24] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law"*. Oxford University Press, 2016, p. 9.

[25] Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997.

This "Community method" for immigration and asylum measures was however subject to a five-year transitional period during which the Commission and Member States shared a monopoly of initiative, the Council voted unanimously while the European Parliament was only consulted. After the end of this period, the Commission obtained the traditional monopoly over legislative initiative, the Council voted by qualified majority voting and the European Parliament became co-legislator together with the Council.

As a result of the Treaty, the EC gained powers pursuant to Article 63 to adopt "measures on asylum in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: asylum responsibility, reception conditions, the definition of refugee and asylum procedures" together with powers to adopt "measures on refugees and displaced persons within the following areas: minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection as well as promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons"[26] Importantly, Art. 63 EC envisaged a new category of asylum seekers different from that referred to in the Refugee Convention, namely "persons who otherwise need international protection" meaning persons who do not qualify for refugee status but that nevertheless are at risk of suffering serious harm in their country of origin[27], thereby expanding the scope of the article itself.

In addition, the Council was called to adopt "measures relative to conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion" as well as measures concerning illegal immigration and illegal residence.

The Treaty also led to the integration of the Schengen Acquis into the Community legal framework, leading to greater economic integration and cooperation among Member States.

In general, the significant changes introduced by the Treaty of Amsterdam represented an advance in European integration of immigration and asylum law, yet they remained limited concerning their scope and harmonization and did not bring the expected results.

[26] Peers, S., "Human Rights, Asylum and European Community Law". *Refugee Survey Quarterly* 24, no. 2 (2005): p. 24.
[27] Kaunert, C., and Léonard S., "The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?" *Refugee Survey Quarterly* 31, no. 4 (2012): p. 1–20.

Nevertheless, the European Council adopted a series of programmes of action in order to address the political direction of the development of JHA law and policy such as the 2009 Tampere Programme[28] which set out priorities for both the internal and external dimensions of the Union's migration policy.

2.3 The Treaty of Lisbon

The entry into force of the Treaty of Lisbon[29] on December 1st, 2009, definitely communitarised asylum and immigration law. If previously EU immigration and asylum law were largely governed by an intergovernmental approach, with the Lisbon Treaty EU decision-making was fully extended to those immigration law areas where it had not yet been applied, the EU courts' jurisdiction was expanded, and the level of human rights protection was increased by making the EU's Charter of Fundamental Rights binding and planning EU accession to the European Convention on Human Rights.

The Treaty merged the previously distinct European Community and the European Union, into a single entity, renaming the EC treaty the Treaty on the Functioning of the European Union (TFEU) and revisiting the TEU which now contains, other than the basic rules on the institutional foundations of the Union, detailed rules on the Union's Common Foreign and Security Policy (CFSP).

For what concerns JHA matters, the Treaty abolished the Third Pillar, therefore, transferring what remained of it to the First Pillar, reuniting the competences on police and judicial cooperation with visas, asylum, and immigration under Title V TFEU which now contains general provisions, rules on immigration and asylum as well as provisions on civil law, criminal law and policing. [30]

In particular, according to Article 67 TFEU, the European Union is to frame a common policy on asylum, immigration and external borders based on solidarity between the Member States.

Art 78 TFEU then grants specific competences, enabling the Union to adopt measures on:

a. a uniform status of asylum;
b. a uniform status of subsidiary protection;
c. a common system of temporary protection;
d. common procedures for granting and withdrawing asylum and subsidiary protection;
e. criteria and mechanisms for determining the Member State responsible for assessing an application for protection;
f. standards on reception conditions of applicants;

[28] Peers, S., "Eu Justice and Home Affairs Law (Non-Civil)" In *The Evolution of EU Law*, edited by Paul Craig and De Búrca G., 2nd ed. Oxford; New York: Oxford University Press, 2011, p. 274.
[29] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007.
[30] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law*". Oxford University Press, 2016, p.18

g. partnership and cooperation with third countries for the purpose of managing inflows of people;

It is important to mention that all asylum legal instruments are to be adopted in compliance with the "ordinary legislative procedure" which provides for qualified majority voting in the Council and co-decision with the European Parliament.

Article 80 TFEU then provides that the EU asylum and migration policies "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle."

The Treaty has also abolished the previous restrictions on the competences of the European Court of Justice (ECJ) therefore strengthening its role with respect to asylum and immigration policy. As a consequence, all lower courts are now allowed to refer questions of interpretation of validity to the ECJ on AFSJ matters.

Perhaps the most important provision can be found in Article 6 TEU which has given the Charter of Fundamental Rights of the European Union the same legal value as the Treaties, therefore, making it legally binding. In addition, Art. 6 provides for the Union's accession to the ECHR which "shall not affect the Union's competences."

2.4 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union[31] was proclaimed in 2000 with the objective of consolidating some fundamental civil, political, economic and social rights in a single text, applicable to all EU citizens and residents.

As stated in the preamble, the Charter seeks only to reaffirm reaffirms the existing rights deriving from the constitutional traditions of Member States and their international obligation as well as by the ECHR and other international human rights treaties such as the Social Charters adopted by the EU and the Council of Europe. The Charter, therefore, does not establish new rights or amend existing ones but restates them in order to make them more visible within the context of the European Union.

Initially conceived merely as a "declaration" it became legally binding in December 2009 with the entry into force of the Treaty of Lisbon obtaining, as established in Article 6 of the Treaty on European Union (TEU), the same legal status as the treaties. As a result, both EU institutions, as well as Member States, need to comply with the Charter when implementing EU law.[32]

Within the context of migration and asylum law, the most important provision of the Charter can be found within Art. 18 which establishes the right to asylum at the European level, to be guaranteed with

[31] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012.
[32] Article 51, Charter of Fundamental Rights.

due respect for the rules of the Refugee convention and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union. Art. 19 then prohibits the collective expulsion of aliens and reaffirms the principle of non-refoulement as established in Art. 3 ECHR.
Worth of note is also the provision contained in Article 47 which establishes the right to an effective remedy and fair trial as well as the availability of legal aid for those who lack sufficient resources, thereby proving central in preventing violations of migrants and asylum seeker's rights.
According to the Charter, the meaning and scope of the fundamental rights which it guarantees are the same as those outlined by the ECHR, but EU law is allowed to provide higher standards.[33]

2.5 The Common European Asylum System

As previously noted, the Treaty of Amsterdam, initially granted the EU powers to establish only "minimum standards" concerning immigration and asylum law, to be adopted within a period of 5 years. Yet, following the substantial rise in the numbers of asylum seekers within the EU towards the end of the 1980s and beginning of the 1990s, as a result of the dissolution of the Republic of Yugoslavia and the consequent crisis in Eastern Europe, asylum emerged as an increasing political and security issue, therefore driving policy change in EU states.
In 1999, at the Tampere European Council, EU leaders, after reaffirming the fundamental right to seek asylum, agreed to work towards establishing a Common European Asylum system to be based on the Refugee Convention and other international human rights standards, able to respond to humanitarian needs on the basis of solidarity.[34] These objectives, which were built on the basis of art 63 and 67 of the Treaty of Amsterdam, are now expressed in Art. 78 TFEU which states that: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."
With the adoption of the Tampere programme, the European Council established that the CEAS system had to be implemented in two phases: first through the adoption of common minimum standards in the short term which would then provide the basis for a common procedure and uniform asylum status applicable through the Union in the long run.[35]

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[33] Article 52, Charter of Fundamental Rights.
[34] Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999.
[35] Kaunert, C., and Léonard S., "The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?" *Refugee Survey Quarterly* 31, no. 4 (2012): p. 10.

This led to a first short-term round of legislation, the so-called first phase of the CEAS which lasted from 1999 to 2004 and established a series of provisions including "a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status."[36] In particular, the first phase of the CEAS compromised four directives and two regulations governing asylum and immigration law:

- The Temporary Protection Directive[37] (TPD) established provisions on immediate and temporary protection in the event of a mass influx of refugees and displaced persons from third countries.
- The Reception Conditions Directive[38] (RCD) lays down common minimum standards for the reception of asylum seekers such as the right to housing, employment, education, healthcare, and freedom of movement.
- The Dublin II Regulation[39], which replaced the previous Dublin Convention adopted in 1990, establishes the criteria and mechanism for determining which Member State is responsible for examining an asylum application. In general, the main principle underpinning the regulation is that the State responsible for processing an asylum application is the State in which the asylum seeker is present or through which he has entered the EU. The Regulation was also supported by another regulation establishing the European Asylum Dactyloscopy Database (EURODAC)[40], a system for storing and comparing asylum seeker's fingerprints in order to determine in which EU Member State the applicant first arrived and therefore which State is responsible for it.
- The Qualification Directive[41] (QD) lays down minimum standards for the qualification and status of third-country nationals and stateless persons who are refugees or persons who otherwise need international protection.

[36] Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999.
[37] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7 Aug. 2001.
[38] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6 Feb. 2003.
[39] Council Regulation (EC) 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, OJ L 50/1, 25 Feb. 2003.
[40] Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316/1, 15 Dec. 2000.
[41] 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, OJ L 304/12, 30 Sep. 2004

- The Asylum Procedures Directive[42] (APD) lays down several minimum standards and common procedures for granting and withdrawing refugee status as well as certain basic procedural guarantees such as the right to remain in the Member State pending the examination of the application, the right to a personal interview, the right to a lawyer and the right to appeal as well as guarantees and obligations regarding detention. In addition, the Directive also codifies some important concepts, namely that of "safe country of origin" (art. 36) and "safe third country" (art. 38). [43]

It is important to note that the Directives provided only for minimum standards, therefore, allowing Member States to introduce more favorable provisions.

After the end of the first phase, in November 2004 the Hague Programme, called for the second phase of the CEAS to be completed by the end of 2010, highlighting the EU's ambition to go beyond minimum standards and develop a single asylum procedure based on common guarantees and a uniform status for those granted asylum or subsidiary protection.[44] The Hague Programme in particular aimed at improving the "common capability of the Union and its Member States to guarantee fundamental, rights, minimum procedural safeguards and access to justice" as well as "to regulate migration flows and to control the external borders of the Union", to be achieved through the harmonization of laws and the development by the development of common policies.[45]

However, due to disagreements during the negotiations, the deadline for the completion of the second phase of the CEAS was postponed to 2012.

Besides the Hague Programme, the objectives of this second phase were set out in a policy plan on asylum issued by the Commission in 2008[46] and focused on increasing the level of protection and reducing the wide difference in Member States' recognition rates, meaning the percentage of persons from the same county of origin who were granted asylum, which often caused "secondary movements" of asylum seekers.[47]

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[42] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 Dec. 2005.

[43] Kaunert, C., and Léonard, S., (2012) "The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?", *Refugee Survey Quarterly*, 31(4), p. 11-12.

[44] European Parliament, "Asylum Policy | Fact Sheets on the European Union", June 2022.

[45] European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, 2005/C 53/01.

[46] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Region, Policy Plan on Asylum – An Integrated Approach to Protection across the EU, COM(2008) 360, 17 June 2008.

[47] Secondary movements occur when refugees or asylum-seekers move from the country in which they first arrived to seek protection or for permanent resettlement elsewhere. Because they are often irregular and uncontrolled secondary movements represent a major source of insecurity, undermining the stability of the Dublin system.

The policy plan therefore aimed at reviewing and updating the existing legislation so as to introduce improved and harmonized standards of international protection. In order to do so, between 2008 and 2009 the Commission proposed a series of amendments to the Dublin and Eurodac Regulations as well as amendments to the Qualification Directive and the Asylum Procedures Directive.

One of the most important achievements of the Hague Programme was perhaps the proposal for the establishment of a European Support Asylum Office[48] (EASO), later set up by Regulation (EU) 439/2010 of the European Parliament and of the Council, which was conceived to play a crucial role in guaranteeing a uniform application of EU asylum law by supporting Member States in the fulfillment of their international obligations as well as facilitating, coordinating and strengthening practical cooperation among Member States in the field of asylum.

Throughout this period the Court of Justice, particularly after the entry into force of the Treaty of Lisbon which removed restrictions on its jurisdiction, became a significant actor within immigration and asylum law and started to receive a series of requests for preliminary rulings and infringement actions concerning EU legislation. [49]

[48] Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

[49] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law"*. Oxford University Press, 2016, p. 239.

CHAPTER 2 - THE EUROPEAN MIGRATION CRISIS AND THE EXTERNALIZATION OF MIGRATION CONTROLS

1. The Dublin system

In 1990, as a result of the ad hoc working group on immigration whose purpose was to examine measures to achieve a common policy to eliminate asylum abuse, the Dublin Convention[50], also known as the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, was adopted.

Entered in force on September 1st, 1997, it was signed by twelve states namely Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the UK and Spain and will be later extended to other EU countries as well as to some states outside the union.

The main objective of the Dublin system is that of guaranteeing a third-country national the possibility of an asylum procedure while at the same time preventing the so-called "asylum shopping", the phenomenon where a third-country national applies for international protection in more than one EU member state. In order to do so, the Dublin Convention establishes a series of criteria for determining the country responsible for each asylum application which is usually the first country through which the asylum seeker entered the EU. This means that if an asylum seeker submits a request for international protection in another EU country, he/she will be sent back to the country that is responsible for considering the application.

In 2003, the Dublin Convention was updated and revised with the adoption of Dublin II[51], and then again modified in 2013 with the adoption of Dublin III.[52] While the principles of the two regulations remain the same, the Dublin III Regulation updates the former, with additional provisions to ensure a fair and effective system of international protection across the EU. The main difference lies therefore in the treatment of asylum seekers who enjoy greater rights and guarantees.

Dublin III indeed extended the scope of the regulation also to persons applying for subsidiary protection as well as the scope of family members to include married minor children and their parents. Furthermore, it expanded procedural rights concerning the protection of asylum seekers, including the

[50] European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention"), 15 June 1990.

[51] 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.

[52] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person.

right to information, the right to a personal interview, and special guarantees for minors[53] as well as provisions for an asylum applicant to appeal against a transfer decision.

Under the Dublin III regulation, the criteria for establishing responsibility are, in hierarchical order, the following:

1. Family reunification: If the asylum seeker has a family member legally present in an EU member state, that state is responsible for processing the application.
2. Issue of residence documents or visas: If the asylum seeker has been granted a valid residence document or a valid visa, the state issuing those documents is responsible for the examination of the application for asylum.
3. Illegal crossing of the territory of a Member State: If the asylum seeker has irregularly entered the EU through a particular member state and there is no evidence that they have subsequently entered another EU member state, that state is responsible for processing the application.
4. Visa waiver: If an asylum-seeker enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection.
5. Transit: Where the application for international protection is made in the international transit area of an airport of a Member State by an asylum-seeker, that Member State shall be responsible for examining the application.
6. If none of the above criteria applies, the member state in which the asylum seeker first lodged their application is responsible for processing it.[54]

Despite the above principles, according to Article 17 of the Dublin Regulation, Member States may have the right to examine an asylum application even if, in line with the criteria established therein, they are not legally responsible for it. This can be possible when the Member State in which the application for asylum has been lodged decides to examine it even if it's not its responsibility or in the case in which a Member State requests another one to examine an asylum application based on humanitarian reasons.

The Dublin system is indeed based on mutual trust, meaning on the assumption that each Member State complies with EU law and fundamental rights and that, therefore, it can be recognized as safe countries for third-country nationals. However, under article 3 of the Dublin regulation, a member

[53] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law"*. Oxford University Press, 2016, p. 303.

[54] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person.

state may examine an application for asylum if there are “substantial grounds" for believing that within the responsible member state, there are systemic flaws in the asylum procedure and in the reception conditions for applicants resulting in a risk of inhuman or degrading treatment.

The Dublin III regulation is then supported and reinforced by the Eurodac[55] fingerprint system which enables the transmission, storage, and cross-checking of the fingerprints of asylum seekers.

By providing a mechanism for identifying individuals who have already lodged an asylum claim in a Member State or who entered the EU illegally before moving to another Dublin State to claim asylum, Eurodac plays a crucial role in implementing the Dublin III Regulation and ensuring a fair and efficient allocation of responsibilities among EU Member States.

2. The 2015 refugee crisis

In 2015, as Europe faced an unprecedented arrival of refugees and irregular migrants, the Dublin System revealed itself to be ineffective and unsustainable in managing the crisis.

Europe had already started to register increasing numbers of refugees arrivals in 2010 due to a confluence of conflicts within the Middle East, particularly the wars in Syria, Afghanistan and Iraq, however, this number reached its peak in 2015 when around 1.3 million refugees applied for international protection in the then 28 Member States of the European Union (EU), a number more than double that of the previous year.[56] Of these, about half originated from Syria but also included a significant proportion of Afghans and Iraqis.

In addition, thousands of individuals died or were reported missing during these crossings.

This massive rise in migration was due mostly to increased movement across the “Eastern Mediterranean Sea route”[57]. The vast majority of refugees who entered Europe in that year, indeed did so by crossing the Aegean Sea from Turkey to Greece to then further move towards North Europe, generating an uncontrolled flow of secondary movements across the so-called “Western Balkan route”.[58] This situation created a significant challenge for European countries, leading to massive violation of both national and European regulation and to the consequent collapse of the Common European Asylum System, not appropriately designed for sustaining such an emergency.

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[55] Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of “EURODAC” for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316/1, 15 Dec. 2000.

[56] Connor, P., “Number of Refugees to Europe Surges to Record 1.3 million in 2015”. *Pew Research Center’s Global Attitudes Project* (blog), 2 August 2016.

[57] The Eastern Mediterranean route refers to the irregular migratory route to Greece, Cyprus and Bulgaria, primarily by way of Turkey.

[58] The Western Balkan route refers to the corridor used by irregular migrants to into the EU through several countries in the Balkans such as Albania, Bosnia and Herzegovina, Montenegro, Serbia etc.

The 2015 situation, therefore, not only created millions of displaced but represented the ultimate test to the EU migration and asylum system which proved unable to effectively respond to such an influx. As a result, the dramatic nature of this phenomenon prompted a series of conflicts regarding the implementation of general principles of EU law to the point that the EU had to amend its laws concerning the Schengen area, leading to the suspension of the free movement provision and in some cases to the reimposition of Member state's internal border controls.

Within this context, both the Dublin Regulation and the Principle of Solidarity and Fair Sharing of Responsibility, established in Art. 80 TFEU, demonstrated totally inadequate in managing a sudden increase in the number of people seeking protection.

As large numbers of refugees and asylum seekers entered the EU, some Member States, particularly Greece, Italy and Spain, found themselves overwhelmed with requests that were not able to effectively process, thus causing extended delays and overcrowding of reception centers. The state of first entry criteria established by the Dublin Regulation shifted indeed all the responsibilities of dealing with asylum applications towards the EU's external borders, mostly consisting of poorer Member States,[59] which therefore suffered the full burden of the crisis and became unable to guarantee appropriate standards of reception conditions. The ECtHR, for example, ruled that Greece frequently breached Article 3 ECHR prohibiting torture or other inhuman or degrading treatment as a result of its low standards on asylum procedures and reception arrangements.[60]

In light of these events, a revaluation of Dublin appeared extremely necessary in order to support the most geographically exposed countries.

Accordingly, the EU set forth, through the European Agenda on Migration, a series of emergency response measures as well as new objectives "to build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration". [61] This process was based on four pillars namely reducing the incentives for irregular migration by addressing its root causes, improving returns and dismantling smuggling and trafficking networks; saving lives and securing the external borders; establishing a strong EU asylum policy, and providing more legal pathways for asylum-seekers and more efficient legal channels for regular migrants.[62]

In addition, by way of derogation from the Dublin rules, a series of temporary laws on the relocation of asylum seekers, meaning the transferring of migrants from one Member State to another, were

[59] Barnard, C., and Peers, S., "*European Union Law"*. 3rd ed. Oxford University Press, 2020, p.848.
[60] ECtHR, *MSS v Belgium and Greece,* (Judgment), No 30696/09 (21 January 2011).
[61] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, 13 May 2015, COM(2015) 240.
[62] Radjenovic, A. and Apap, J., *"The Migration Issue*". Briefing, European Parliamentary Research Service, PE 635.542, March 2019.

adopted in order to alleviate the pressure on Greece and Italy from the disproportionate numbers of applicants arriving in their territories while at the same time trying to cut back migration flows through agreements with non-EU countries. To this end, under art. 78 TFEU which provides for the adoption of provisional measures "in the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries", the EU adopted two Decisions[63] introducing a quota system for the reallocation of refugees between the different countries based on factors such as GDP, unemployment rate, population size as well as the number of asylum applications already processed and resettled refugees.

Nevertheless, the relocation mechanism ended up becoming a political issue which did not function as expected. In particular, some Member States challenged the EU's decisions on relocation while many rejected applicants' requests on national security grounds thus creating tensions among the EU institutions. At the end of the two-year period envisaged by the plan only 29.144 refugees out of the initially planned 160.000 had been successfully relocated.

In addition to the relocation mechanism, the European Commission also presented the so called hotspot approach which provided for the establishment in Greece and Italy of a series of hotspots, intended as first reception facilities which aimed at improving coordination of the of the EU agencies' and national authorities' efforts at the external borders of the EU, in the initial reception, identification, registration and fingerprinting of asylum-seekers and migrants.[64] Again, the system did not work as expected and since their creation, the majority of hotspots have suffered from overcrowding and poor living conditions which created gaps in access to asylum procedures and led to concerns about the respect for human rights, particularly or vulnerable asylum seekers.

Finally, the Agenda on Migration tackled the Common European Asylum System by establishing a series of objectives such as improved standards on reception conditions and asylum procedures, a new monitoring process for the application of asylum rules as well as the implementation of a more effective approach against abuses and the strengthening of the Safe country of origin provisions. But above all the Agenda recognized the inefficiency of the Dublin system and the necessity of a revision of its parameters in order to achieve a fairer distribution of those in need of international protection. [65]

[63] Council Decisions 2015/1523 and 2015/1601.

[64] Luyten K., and Orav A., *"Hotspots at EU External Borders: State of Play*", Briefing, European Parliamentary Research Service, PE 652.090, September 2020.

[65] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, 13 May 2015, COM(2015) 240

3. The EU Externalization of Migration Policy

Within the context of the 2015 migration crisis, in order to prevent migrants and asylum seekers from reaching its borders, the EU adopted a policy of externalization of migration controls meaning a strategy aimed at shifting the responsibility of migration management to countries outside the Union's borders and most importantly outside its jurisdiction. In line with these objectives, the EU established partnerships and agreements with non-EU countries, such as Turkey and Libya, which however compromised the rights of migrants as well as the international obligations of states to protect them.[66]
The EU's cooperation with third countries, often in the form of informal agreements which circumvents EU legislation, has indeed led to "burden shifting" practices and therefore to tightened border controls as well as increased detention and deportation of irregular migrants often in breach of the principle of non-refoulement.
It is thus clear that, despite attempts to employ a preventive strategy, centered on human security and aimed at reducing the key drivers of migration, a control approach has ended up prevailing, inevitably leading to the failure to consider the human rights implications and the lives of migrants being put in the hands of regimes that are unable or unwilling to guarantee their rights.[67]
The EU's externalization of migration controls however is not new but has been pursued by the EU since the 1990s. Particularly after the removal of internal border controls following the Schengen Agreement, the EU has increasingly sought to minimize irregular migration, often perceived as a threat to national identity and welfare provisions. This process culminated in 2005 with the adoption of the Global Approach to Migration, then renamed the Global Approach to Migration and Mobility (GAMM) in 2011, which constitutes the "overarching framework of the European Union's external migration policy based on genuine partnership with non-EU countries and addressing all aspects of migration and mobility issues in an integrated, comprehensive and balanced manner."[68]
As a result, the EU launched a series of external migration dialogues and processes directed at outsourcing border controls to third parties through the adoption of policy tools made available to third countries to contain migration flows while simultaneously addressing the phenomena directly in countries of origin.

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[66] Frelick, B., Kysel I., and Podkul J., "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants". *Journal on Migration and Human Security* 4, no. 4 (2016): p. 196.
[67] Ceccorulli, M., and Fassi E., "*The EU's External Governance of Migration: Perspectives of Justice"*. 1st ed. London: Routledge, 2021.
[68] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility, COM (2011)743, 18 November 2011

Two distinct strategies emerged; the former involves the exportation of migration control instruments through agreements with third countries outside the EU. This cooperation often takes the form of bilateral agreements for the readmission of migrants and mobility partnerships. The latter strategy on the other hand consists in preventing migration by addressing its root causes in countries of origin through measures such as development assistance, foreign direct investment or support for refugee protection which would discourage migrants and asylum seekers from traveling to the EU. [69]

In light of these objectives the EU adopted, throughout the years, a range of measures aimed at sustainably managing and reducing migration flows through cooperation with third countries.

Some of these initiatives compromise:

- The Migration Partnership Framework (MPF), introduced in 2016, fully integrated the topic of migration into the European foreign policy by placing migration issues at the top of the EU's external relation priorities. In line with the objectives set forth by the European Agenda on Migration, the MPF sets forward a multi-dimensional approach aimed at establishing "a coherent and tailored engagement where the Union and its Member States act in a coordinated manner putting together instruments, tools and leverage to reach comprehensive partnerships (compacts) with third countries to better manage migration in full respect of our humanitarian and human rights obligations."[70] Through a set of both short-term and long-term goals, the MPF seeks therefore to strengthen the external borders of the EU, increase returns of irregular migrants to countries of origin and transit, address the root cause of migration as well as improve opportunities in countries of origin.
- The European Neighborhood Policy (ENP), established in 2004 and then reviewed in 2015. Its primary objective is to foster stability, security and prosperity in the EU's neighboring regions, both in the South and in the East. Additionally, it can serve as a tool for enhancing the partner countries' capacity to deal with asylum matters.
- The Joint Valletta Action Plan (JVAP), adopted in 2015 establishes a series of measures to enhance cooperation between African and European Countries to establish a framework for the sustainable management of migration. In order to do so, the Plan establishes five priorities namely development of benefits of migration and addressing the root causes of irregular migration and forced displacement, legal migration and mobility, protection and asylum,

[69] Boswell, C., "The 'External Dimension' of EU Immigration and Asylum Policy". *International Affairs (Royal Institute of International Affairs 1944)* 79, no. 3 (2003): p. 620.

[70] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, com/2016/0385, 7 June 2016

prevention of and fight against irregular migration, smuggling of migrants and human trafficking, and finally return readmission and reintegration.

- The New Pact on Migration and Asylum proposed in 2020 yet not in force, establishes the EU's agenda on migration for the years to come with the purpose of "providing a comprehensive approach, bringing together policy in the areas of migration, asylum, integration and border management."[71] It represents, therefore, an attempt to offer a proper response to the opportunities and challenges posed by migration in line with the EU values.

  The Pact proposes several key measures, such as improving border procedures, increasing cooperation with third countries, fighting against migrants' smuggling and establishing a new system for determining the Member States responsible for an asylum claim. It also aims to address the issue of secondary movements of asylum seekers within the EU, by introducing a system of mandatory solidarity among Member States. But most importantly the pact proposes an accelerated asylum border procedure by setting up a screening system applicable to third-country nationals who are apprehended crossing the EU external borders irregularly, are disembarked following a search and rescue operation, or apply for international protection at external border crossing points or in transit zones and do not fulfill the entry conditions.[72]

  The procedure needs to be concluded within five days, (ten days in case of a situation of crisis), during which individuals apprehended at the external borders are not authorized to enter the EU and thus are obliged to remain in "designated facilities" [73] In practice this means migrants arriving at the EU external border will be automatically detained without any judicial overview or access to a lawyer. On the basis of the screening, the third-country nationals will be channeled in the suitable procedure, which can be asylum, refusal of entry or return.

  In some circumstances, asylum procedures may be carried out directly at the border and must be completed within 12 weeks after which the asylum seeker has the right to enter the territory of a member state unless the application is rejected. In the latter case, a return procedure will follow which again must be completed within 12 weeks. In times of crisis, both the asylum and return border procedures may be extended by an additional 8 weeks each.

[71] European Commission, Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM(2020) 609, 23 September 2020

[72] European Commission, Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020.

[73] Carrera, S., "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum". *CEPS* No 2020-22, September 2020, p. 4.

Throughout the entirety of this period persons undergoing either an asylum border or return procedure are not allowed to enter the territory of a Member State thereby leading de facto to their detention for a period up to 6 months. [74]

It is thus clear how the Pact reinforces current trends on the externalization of migration controls by focusing on deterrence and containment, at the expense of human rights, especially the right to a fair and individual procedure.

3.1 Mobility partnerships, visa facilitation and readmission agreements

In line with what was previously stated it can be observed how from 2015 onwards, the EU has increasingly shifted strategy from primarily focusing on accommodating and integrating migrants within its borders to prioritizing the return of irregular migrants to their countries of origin. In order to do so, the EU has developed a series of tools aimed at transforming third countries into outpost border guards to prevent migrants from reaching the external borders of the EU.[75]

Among them, it is worth mentioning "Mobility Partnerships", which create a dialogue between the Union, certain Member States, and third countries on issues related to legal and illegal migration and the relationship between migration and development. They are thus conceived as the main comprehensive and long-term bilateral framework for facilitating policy dialogue and operational cooperation on migration management with third countries[76].

Mobility partnerships are informal, non-binding agreements between the EU, Member States and a third country establishing a series of objectives in line with the GAMM four pillars namely organizing and facilitating legal migration and mobility; preventing and reducing irregular migration and trafficking in human beings; promoting international protection and enhancing the external dimension of asylum policy; maximizing the development impact of migration and mobility. By combining the interests of the EU and third countries, mobility partnerships are therefore designed to facilitate the movement of people between the two in order to effectively manage migration flows while at the same time contrasting irregular migration. To date, nine mobility partnerships have been signed with Georgia, Moldova, Cape Verde, Armenia, Azerbaijan, Tunisia, Jordan, and Belarus.

In addition to mobility partnerships, the EU has concluded a series of Readmission agreements (EURAs) which aim at controlling and facilitating the return of irregular migrants and inadmissible

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[74] ECRE, and Heinrich-Böll-Stiftung, *"Reception, Detention and Restriction of Movement at EU External Borders"*, July 2021.

[75] Akkerman, M., *"Expanding the Fortress: The Policies, the Profiteers and the People Shaped by EU's Border Externalisation Programme"*. Transnational Institute, 1 May 2018, p. 12.

[76] European Parliament. Directorate General for Internal Policies of the Union, Vita, V., García Andrade, P., Martín, I., et al., "*EU Cooperation with Third Countries in the Field of Migration"*. Luxembourg: Publications Office of the European Union, 2015, p.30.

asylum seekers. Through these agreements, third countries agree to readmit their own nationals who have entered the EU illegally as well as non-nationals or stateless persons who have transited through their territory. In practice, however, cooperation with the EU on irregular migration is not always a priority for partner countries, thus challenging the effective implementation of EURAs.

To incentivize cooperation on migration issues, the EU has therefore pursued a range of measures, including visa facilitation agreements which provide for the exemption form visa fees and simplify terms and conditions for the issuing of visas to specific categories of people in exchange of concrete actions by third countries to address migration challenges and take responsibility for their nationals.

To date, the EU has concluded 18 Readmission Agreements with several countries among which Turkey as well as a series of non-binding readmission arrangements.

Along with the previously mentioned tools, the EU also makes use of softer policy tools, such as migration clauses included in cooperation and association agreements, as well as working arrangements made by Frontex and third countries on information exchange, joint operations, training and capacity building activities.

In recent years, the EU has also established a series of funds aimed at supporting the development of infrastructure and institutions outside the EU, in order to increase third countries' capability to manage migration and asylum flows. This is the case of the EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa[77] (EUTF for Africa), established in 2015 to address the root causes of irregular migration and displacement in Africa by supporting economic opportunities, security, governance, and resilience in countries of origin and transit. Similarly, the EU Facility for Refugees in Turkey was established in the same year to support Syrian refugees in Turkey and the Turkish government hosted them within the context of the EU-Turkey deal.[78] Overall, these measures constitute an example of burden-shifting in dealing with both irregular migrants and asylum processing into neighboring countries.[79]

While readmission and association agreements formally seek to enhance the capacity of third countries to manage migration while promoting human rights, protection, and development, in reality they raise serious concerns regarding the capability of third countries to effectively manage migrants and asylum seekers as they pose significant financial, administrative and social burdens on already weak infrastructures, thus prompting questions about the true intentions of such agreements.

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[77] Agreement Establishing the European Union Emergency Trust Fund for Stability and addressing the Root Causes of Irregular Migration and Displaced Persons in Africa, and its Internal Rules, 2015.

[78] European Commission, Commission Decision of 24.11.2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, C(2015) 9500 final, 2015.

[79] Yıldız, A., "*The European Union's Immigration Policy*". London: Palgrave Macmillan UK, 2016.

Additionally, the use of these policy tools to incentivize third countries to cooperate with the EU on irregular migration may further exacerbate existing inequalities in the global migration system, as these agreements tend to favor countries with stronger economies and political influence.
As a result, third countries often prove unable to provide protection and safety to displaced refugees leading to several human rights violations and arbitrary arrests as in the case of Libya where migrants often face torture, cruel, inhumane or degrading treatment.[80]

4. The "safe country" concept

As shown in the previous sections the EU external policies are intended to prevent individuals from reaching the EU by cooperating with third countries in the control of borders and ensuring that they will take responsibility for irregular migrants that manage to reach the EU's territory.
These practices have raised several concerns, primarily because a state's responsibility towards refugees is not fully realized until they enter its territory. Additionally, even though EU Member States are required to examine all asylum applications, they are not obliged to grant asylum to refugees and therefore can return individuals to third countries, provided that the principle of non-refoulement is respected.
Within this context, the notion of "safe third country" and "safe country of origin" become of utmost importance. According to Article 33 of the Asylum Procedures Directive[81], an EU Member State can declare an asylum application to be inadmissible if a country, outside the EU, is considered to be a safe third country for the applicant. Alternatively, as expressed in Article 31, a Member State can consider an asylum application unfounded or manifestly unfounded depending on several factors including the fact that the asylum seeker comes from a "safe country of origin" [82]
The concept of safe country of origin is defined in Article 36-37 and Annex I of the APD according to which a country is considered as safe if the asylum seeker is a national of that country or a stateless person habitually residing there and it can be shown that "there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU (Qualification Directive), no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict". Furthermore, the asylum seeker must not have submitted "any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international

[80] Ibidem.
[81] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 Dec. 2005.
[82] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law"*. Oxford University Press, 2016, p.233

protection". If a safe country of origin is identified, then the asylum seeker can be subject to an accelerated procedure in accordance with Article 31 or one conducted at the border in accordance with Article 43 APD.

On the other hand, the concept of "safe third country" is regulated in Article 38 of the APD according to which Member States can apply the concept where the competent authorities are satisfied that the asylum seeker will be treated in accordance with the following principles within the third country:

a. Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
b. There is no risk of serious harm as defined in QD;
c. The principle of non-refoulement in accordance with the Geneva Convention is respected;
d. The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;
e. The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. If these conditions are met, a Member State may consider an application for international protection to be inadmissible.

For the concept to apply the applicant must have a connection with the third country on the basis of which it would be reasonable for him/her to go there such as the presence of family members or previous prolonged stay or residence. The application of the safe third country provision is however subject to rules laid down in national law and thus left to the discretion of Member States which could involve the potential risk of arbitrary or inconsistent decision-making, leading to varying levels of protection for asylum seekers across different countries.

It is therefore clear how the effect of the "safe countries" concept is to deny the asylum seeker the opportunity to choose his/her host country and thus individual consideration of protection claims on the basis of a generic classification of some states deemed as safe.[83] By doing so, the EU Member States are no longer obligated to thoroughly review each claim and instead allocate responsibility to third-party states outside of the Union's jurisdiction. It is important to note that even though international law does not impose a duty on the asylum seeker to seek protection in the first safe country of arrival, the EU establishes this as a fundamental principle of its asylum law.

The notions of safe third country and third country of origin were indeed born out of the conviction that the uneven distribution of asylum seekers across the European Union was due to "asylum shopping" by applicants, who chose to travel to the Member State they perceived as more sympathetic

[83] Goodwin-Gill, G., McAdam J., and Dunlop E. "*The Refugee in International Law"*. Fourth edition. Oxford, United Kingdom: Oxford University Press, 2021, p. 449.

to their cause.[84] states indeed justify the safe country concepts by claiming that an individual genuinely fleeing persecution would seek protection in the first safe country they reach and that "secondary movements" are motivated by improved living conditions rather than for seeking international protection. This argument however assumes that general rules apply to every situation and overlook the individual circumstances of each asylum seeker thus not taking into account the possibility that a particular country may be safe for someone but unsafe for others.[85]

The safe country provision, therefore, ended up being a tool for interdiction, legitimizing measures undertaken with the purpose of preventing the entry of asylum seekers or repatriating them, before they could file a protection claim.[86]

In addition, the Commission has underlined that the concept of safe third country as defined in the APD requires that the refugee must have the possibility to receive protection in accordance with the Geneva Convention, but does not mandate that the safe third country has ratified that Convention without geographical reservation.[87] This means that countries such as Turkey, which Greece has designated as a safe third country, may still be considered as such despite international concerns over its ability to provide effective protection for refugees.

[84] Moreno-Lax, V., "The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties", in G.S. Goodwin-Gill, G., and Weckel P. (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects* - The Hague Academy of International Law Centre for Research (Martinus Nihoff, 2015) p. 665.

[85] Goodwin-Gill, G., McAdam J., and Dunlop E. "*The Refugee in International Law*". Fourth edition. Oxford, United Kingdom: Oxford University Press, 2021, p. 440.

[86] Ibidem.

[87] European Commission, Communication from the Commission to the European Parliament and the Council, on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, 10 February 2016.

CHAPTER 3 - THE EU-TURKEY STATEMENT

As discussed above, in 2015 the international community had to face an unprecedented flow of irregular migrants and asylum seekers which required solidarity, collaboration, and efficiency among states. In response, the European Union, rather than attempting to increase the availability of safe and legal routes for refugee, has focused on preventing people from entering its territories by concluding a series of agreements with third countries aimed at managing and reducing migration flows. Of these, the most significant was perhaps the EU-Turkey statement, which aimed to address the unprecedented number of irregular arrivals from Turkey to the Greek islands, exceeding half a million in October 2015. With Greece's protection and reception system already under severe pressure, finding a quick and immediate solution to reduce the number of irregular arrivals became of utmost importance.
It became therefore crucial to develop a greater dialogue with Turkey to jointly address the emergency and safeguard the dignity and human rights of those seeking protection. The agreement however was based on a number of controversial provisions, which sparked debate about the effective capacity of Turkey to provide adequate protection to asylum seekers and irregular migrants.

1. The Readmission Agreement

Since the late 1970s, Turkey's migration patterns have undergone significant changes. Due to political turmoil, security concerns, and economic downturn in neighboring countries, Turkey has transitioned from being a traditional emigration country to a destination country, but also a major transit route to Europe. In particular, since the outbreak of the Syrian civil war in 2011, Turkey has pursued an open-door policy towards Syrian refugees, becoming the world’s largest refugee-hosting country, with over 3.6 million registered Syrians. Simultaneously however, this massive influx of refugees has corresponded with an increase of migrants attempting to enter Europe.
As a result, the European Union, in line with its strategy of externalization of migration policies, sought to intensify cooperation with Turkey, leading in 2013 to the signing of a readmission agreement among the two. The aim of the agreement is to strengthen their cooperation in order to combat illegal immigration more effectively, to establish procedures for the identification and safe and orderly return of persons residing without authorization in Turkey or in one of the EU countries, and to facilitate the transit of such persons.[88]

[88] European Union, Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, OJ L 134/3, 7 May 2014.

In line with these objectives, Turkey is bound to take back irregular migrants of its own citizenship as well as third-country nationals who have entered the EU through its territory. Reciprocally, EU countries commit to the same with respect to Turkey, under the same conditions and limits. On the same date as the signature of the agreement, the EU presented Turkey with a visa liberalization roadmap which aimed to facilitate travel for Turkish citizens to the EU by gradually removing visa requirements.

The agreement required Turkey to meet certain conditions and standards related to border control, document security, and human rights, among others, before the visa requirements could be lifted. If these criteria were not met, and liberalization not achieved by April 2018, Turkey was given the right to withdraw from the Readmission Agreement.[89] Against this backdrop, on July 22, 2019, Minister of Foreign Affairs of Turkey, Mevlüt Çavuşoğlu, announced the suspension of the Agreement until the EU fulfilled its promise of establishing visa free travel for Turkish nationals.

2. The EU-Turkey Joint Action Plan

As previously mentioned, the 2015 migration crisis resulted in a significant increase in the number of migrants attempting to enter the EU, leading to the collapse of both the Dublin regulation and the Schengen agreement and highlighting the necessity of quick and efficient solutions. Given its strategic location, Turkey, therefore, emerged as a crucial partner in this effort, leading to the opening of a new period in EU-Turkey relations.

In October 2015, the Commission presented the EU-Turkey Joint Action Plan, subsequently activated during the November 29 EU-Turkey Summit, which, as in the words of the European Commission, reflects the understanding between the European Union (EU) and the Republic of Turkey to intensify their collaboration on support of Syrians under temporary protection and migration management in a coordinated effort to address the crisis created by the situation in Syria. [90] As a consequence, both sides agreed, with immediate effect, "to step up their active cooperation on migrants who are not in need of international protection, preventing travel to Turkey and the EU, ensuring the application of the established bilateral readmission provisions and swiftly returning migrants who are not in need of international protection to their countries of origin".[91]

Accordingly, the Action Plan puts forward a series of collaborative actions to be implemented by the EU and Turkey in order to complement the latter's efforts in managing the situation.

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[89] Benvenuti, B., *"The Migration Paradox and EU-Turkey Relations"*. IAI Istituto Affari Internazionali, 16 January 2017, p. 8.

[90] European Commission, EU-Turkey Joint Action Plan, October 2015.

[91] European Council, Meeting of Heads of State or Government with Turkey - EU-Turkey Statement, 29 November 2015.

More specifically the plan identifies three fundamental points necessary for the resolution of the crisis:

- addressing the root causes leading to the massive influx of Syrians
- supporting Syrians under temporary protection and their host communities in Turkey
- strengthening cooperation to prevent irregular migration flows to the EU[92]

In line with these objectives, the Plan agreed that the EU would support Turkey in hosting Syrian refugees by providing a financial aid of three billion euros. In exchange, Turkey committed to improving its migration management strategy by enhancing the implementation of laws, ensuring registration and documentation of migrants, providing access to public services for Syrians under temporary protection, and identifying and assisting vulnerable individuals. The EU would also support Turkey in preventing irregular migration and combat migrant smuggling by reinforcing the Turkish Coast Guard patrolling and surveillance capacity as well as providing support in organizing joint return operations by deploying a FRONTEX liaison officer to Turkey. Finally, the EU committed to undertake necessary actions for the progress of Visa Liberalization Dialogue that would allow a free visa regime for Turkish citizens.

3. The EU-Turkey Statement

Building on and updating the Joint Action Plan, on March 18, 2016, Turkey and the EU reached an agreement in the form of a "statement" therefore not intended to produce legally binding effects.[93]
The agreement indeed was not concluded according to the procedures provided by Article 218 TFEU, which constitutes the legal basis for the conclusion by the Union of international agreements but was informally negotiated by the President of the European Council and Turkish President Erdoğan. As a result, the EU-Turkey statement was never ratified or approved by any parliament, neither national nor European, and it was never published in the Official Journal of the European Union.
This informality thus allowed for a lack of transparency and accountability both in the decision-making process of the agreement and in the and in the implementation of its provisions.
The agreement also referred to as the EU-Turkey deal, intended to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk as well as to put an end to the irregular migration from Turkey to the EU.[94]

[92] Ibidem.
[93] Moreno-Lax, V., "The Migration Partnership Framework and the EU-Turkey Deal: Lessons for the Global Compact on Migration Process?", in Gammeltoft-Hansen, T., Guild, E., Moreno-Lax, V., Panizzon, M., and Roele, I., *What is a Compact? Migrants' Rights and State Responsibilities regarding the design of The UN Global Compact for Safe, Orderly and Regular Migration*, Lund, Raoul Wallenberg Institute of International Human Rights Law, 2017, p. 34.
[94] European Council, EU-Turkey Statement, 18 March 2016.

Consistent with this purpose it thus established nine provisions:

1. The return of all new irregular migrants crossing from Turkey to the Greek islands;
2. The resettlement of one Syrian refugee in Europe for every Syrian readmitted by Turkey from Greece;
3. The acceleration of the disbursement of the initially pledged €3 billion in support of refugees in Turkey;
4. The establishment of the Facility for Refugee Projects in Turkey to provide funding for education, health, and infrastructure projects;
5. The lifting of visa restrictions for Turkish citizens traveling to the Schengen Area;
6. The re-energizing of Turkey's accession process to the European Union;
7. The enhancement of cooperation between the EU and Turkey on counterterrorism and organized crime;
8. The intensification of humanitarian assistance to refugees along the Western Balkans route;
9. The strengthening of the implementation of the EU-Turkey readmission agreement.[95]

The repatriation of all unauthorized immigrants and the "one by one" principle are considered the two most significant developments in the agreement.

The first point emphasizes that all migrants who have crossed from Turkey into Greek islands will be returned to Turkey "in full accordance with EU and international law, thus excluding any kind of collective expulsion".[96] This guarantees that migrants will be safeguarded by international standards and the principle of non-refoulement.

Under the deal, therefore migrants arriving in Greece must be registered and their asylum applications processed according to the EU Asylum Procedures Directive and in cooperation with the UNHCR, however, because the statement is based on the assumption that Turkey is a safe third country the majority of asylum applications are deemed inadmissible on the grounds that migrants can be adequately protected there.[97] Importantly, the costs of the return operations of irregular migrants is be covered by the EU.

[95] Ibidem.
[96] Ibidem.
[97] On 7 June 2021, in a Joint Ministerial Decision (JMD), Greece unilaterally declared Turkey a safe third country for asylum-seekers originating from Syria, Afghanistan, Bangladesh, Pakistan and Somalia.

The second point introduces the "one-for-one" mechanism, whereby for every Syrian deported to Turkey from the Greek islands, another Syrian would be resettled directly in the EU from Turkey, based on UN Vulnerability Criteria,[98] up to a maximum of 72,000 people.

Priority will be given to those who have not previously entered or attempted to enter the EU irregularly, a provision designed to ensure that vulnerable Syrians are able to receive resettlement while at the same time discouraging irregular migration to the EU.

Under the Deal, Turkey also committed to take "any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU." In exchange, as established by point 3, the EU promised a funding of 6 billion euros to be allocated in the following years. Within this context, the EU Facility for Refugees in Turkey was established which coordinates the mobilization of the total budget. The Facility is designed to ensure that the needs of refugees and host communities in Turkey are addressed in a comprehensive and coordinated manner with a particular focus on humanitarian assistance, education, migration management, health, municipal infrastructure, and socio-economic support.[99] The amount was mobilized in two tranches, both from the EU budget and the Member States, amounting to a total of €3 billion for the 2016-17 period and a further €3 billion for the 2018-19 period. To date, the full operational budget of the Facility €6 billion has been committed and contracted, with more than €4.9 billion disbursed.[100]

Fundamental in the conclusion of the agreement was the re-energizing of Turkey's accession process to the European Union as it provided a framework for cooperation and engagement between Turkey and the EU on a range of issues. Turkey had been seeking to join the European Union since the 1980s, and the desire to join the EU has been a key driver of Turkey's foreign policy as the country has long seen EU membership as a way to modernize its economy and political system.

However, progress on accession has been limited since then, as Turkey's relations with the EU have become increasingly strained due to the fact that EU has accused and criticized Turkey for human rights violations and deficits in rule of law, incompatible with the Union's values. Ironically, the EU-Turkey Deal appears to contradict these very values, as it has been criticized for compromising the human rights of refugees and migrants in Turkey.

Nonetheless, the EU-Turkey deal was successful in reducing irregular arrivals and deaths at sea resulting in a nearly 98% drop in arrivals via the Eastern Mediterranean route in 2020, compared to

[98] The UN Vulnerability Criteria are a set of guidelines used by the United Nations High Commissioner for Refugees (UNHCR) to assess the needs and vulnerabilities of refugees and other displaced persons. They include legal and physical protection needs, medical needs, psychosocial needs, gender-related vulnerabilities, child-specific vulnerabilities, and elderly-specific vulnerabilities.

[99] European Commission, The EU Facility for Refugees in Turkey.

[100] Ibidem.

2015.[101] As a result, the number of migrant deaths at sea also decreased significantly, as did the activity of migrant smugglers. In particular, data provided by the UNHCR, revealed that in 2017, the number of sea arrivals in Greece was only 29,718, a figure significantly lower than of 856,723 in 2015 and 173,450 in 2016. Nonetheless, it seems that the decrease in Eastern Mediterranean arrivals coincided with an increase in irregular arrivals from the Central Mediterranean route to Italy.[102]

3.1. The controversies surrounding the deal

Despite the reduction in migration flows, concerns have been raised about the protection of refugees' rights and the ethical implications of externalizing border controls to third countries with a questionable human rights record. The return of irregular migrants to Turkey and the one-for-one mechanism appears indeed to be going against the fundamental principle of international and European asylum law and the protection of human rights.

In principle, according to EU law Member States must ensure that asylum seekers have their applications examined individually, objectively, and impartially.[103] The one-for-one mechanism however, despite favoring the most vulnerable people, seems to overlook this aspect, creating a sort of dichotomy between good and bad refugees which punishes those who attempt to reach Europe and those who do not. An approach which is incompatible with the foundations of asylum law, as a refugee's right to international protection cannot be subordinated to the means, be those legal or illegal, by which he or she has entered a country. Furthermore, this mechanism applies only to Syrians, going against the prohibition of discrimination based on country of origin, as outlined in Article 3 of the Geneva Convention on the Status of Refugees. Indeed, while all asylum seekers are readmitted to Turkey, only Syrians can be resettled in Europe, while all other potential beneficiaries would be forced to remain in Turkey, where, as we will see later, asylum procedures are often inadequate and protection standards insufficient. An issue that becomes even more critical if we consider that a significant proportion of migrants arriving in Turkey come from Afghanistan, Iraq, Iran, Pakistan etc. and thus often have valid reasons to apply for international protection.

Despite these controversies, the main problem of the EU-Turkey deal relies on the treatment of refugees in Greece, particularly within the context of hotspots.

As a result of the first point of the EU-Turkey Statement providing that all new irregular migrants arriving in Greece would be returned to Turkey the functioning of Greek hotspots was indeed

[101] European Council, Council of the European Union, Migration flows in the Eastern Mediterranean route, 9 February 2023.

[102] International Organization for Migration (IOM), "*Fatal Journeys Volume 3 Part 1: Improving Data on Missing Migrants"*. August 2017, p. 22.

[103] Article 8 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

profoundly altered. Initially conceived as reception facilities to identify and register asylum seekers, with the implementation of the statement hotspots were soon transformed into detention centers resulting in poor living conditions and breaches of fundamental rights of asylum seekers. As the number of stranded migrants in Greece increased, the hotspots quickly became overcrowded; despite having a total capacity of only 6,095 places, by September 2020, approximately 23,269 individuals were residing there, nearly four times over their original capacity.[104]

Moreover, in order to facilitate readmissions to Turkey, in March 2016, Greece imposed a geographical restriction confining migrants to the hotspot island throughout the entirety of the asylum procedures, including any appeals,[105] with the sole exception of vulnerable people or family reunification cases.

As a result, due to the slowness of the procedures and the ongoing influx of refugees, even if in lower propositions, conditions in hotspots rapidly deteriorated, affecting infrastructure and services, such as the supply of food and water, as well as sanitary facilities, waste management, and medical services.[106]

In October 2019 the Council of Europe Commissioner for Human Rights, Dunja Mijatović after a five-day visit to Greece described the situation as explosive: "There is a desperate lack of medical care and sanitation in the vastly overcrowded camps I have visited. People queue for hours to get food and to go to bathrooms when these are available. On Samos, families are chipping away at rocks to make some space on steep hillsides to set up their makeshift shelters, often made from trees they cut themselves. This no longer has anything to do with the reception of asylum seekers. This has become a struggle for survival".

With the spread of the Covid-19 pandemic, the situation was then further exacerbated as Greece suspended asylum procedures, including interviews and submissions of appeals, in order to prevent and control coronavirus. These conditions generated a series of protests and incidents culminating, on 8 September 2020 in a fire in the Moria center on Lesvos which burned down most of the camp leaving thousands of people without shelter. On that occasion, the Greek and European authorities promised that reception conditions would be improved and that there would be "no more Morias". Yet, instead of proposing alternatives to the camps and addressing the hotspots problem, the EU and Greece adopted a strengthened approach, continuing to focus only on containing the number of migrants and asylum seekers rather than finding new and effective ways to tackle the crisis.

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[104] Luyten K., Orav A., *"Hotspots at EU External Borders: State of Play"*, Briefing, European Parliamentary Research Service, PE 652.090, September 2020.

[105] Greece: Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC [Greece], 3 April 2016.

[106] Luyten K., Orav A., *"Hotspots at EU External Borders: State of Play*", Briefing, European Parliamentary Research Service, PE 652.090, September 2020.

As in the words of Amnesty International: "In the Greek islands the harrowing human cost of the deal is laid bare. Not allowed to leave, thousands of asylum-seekers live in a tortuous limbo. Women, men, and children languish in inhumane conditions, sleeping in flimsy tents, braving the snow, and are sometimes the victims of violent hate crimes". [107]

The EU-Turkey statement therefore not only resulted in a considerable increase in the number of persons trapped on the Greek islands but proved also ineffective in improving the rate of returns to Turkey. As of March 2020, according to the European Commission, only 2,735 migrants had been returned from Greek islands[108] while almost 27,000 Syrian refugees had been resettled from Turkey to EU Member States.

4. Turkish asylum and migration Framework

Turkey asylum law is primarily governed by two main instruments: the 1951 Geneva Convention Relating to the Legal Status of Refugees and its additional Protocol of 1967 and the Law on Foreigners and International Protection (LFIP)[109]. Adopted by the Turkish Parliament on April 4, 2013, as part of a policy choice to move towards the conditions for EU accession but also to cope with the growing number of Syrian refugees, the LFIP provides a comprehensive legal framework for asylum in Turkey and emphasizes the country's obligations towards individuals in need of international protection.

Since Turkey is home to refugees from Syria but also to a significant number of international migrants coming from Afghanistan, Iraq, Iran, etc., the Law on Foreigners and International Protection has established a dual asylum structure.

On the one hand, Syrians asylum seekers are provided with temporary protection, granted to foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection.[110]

On the other hand, asylum-seekers from other countries can be recognized one of three individual "International Protection" statuses:

1. "Refugees" as established by the 1951 Geneva Convention to which Turkey however maintains a geographical limitation according to which only those coming from European countries can, in accordance with article 1A of the Convention, be granted this status.

[107] Amnesty International., *"The EU-Turkey Deal: Europe's Year of Shame",* 20 March 2017.
[108] It is important to note that the returns have been suspended since March 2020 due to the COVID-19 pandemic and have not been resumed yet.
[109] Turkey: Law No. 6458 of 2013 on Foreigners and International Protection (as amended 29 Oct 2016) [Republic of Türkiye], 29 October 2016.
[110] Article 91, Law on Foreigners and International protection.

2. “Conditional refugees” which can be granted to foreigners coming from non-European countries which are allowed to temporarily reside in Turkey until they are resettled to a third country.[111]
3. “Subsidiary protection” which is granted to those foreign or stateless persons who cannot be qualified as refugees nor as conditional refugees but who are at risk of facing death penalty, torture or inhuman or degrading treatment, and serious threat if sent back to their country of origin or residence.[112]

Despite these different statuses however, as established by Article 4 of the LFIP, Turkey recognizes the principle of non-refoulement as set out in the Geneva Convention for all migrants regardless of their country of origin.

At the executive level, the LFIP established a new administrative structure for the management of migration affairs by setting up the Directorate General for Migration Management (DGMM) which is the central agency responsible for overseeing migration and asylum in Turkey, operating under the Ministry of Interior. The Directorate General is also responsible for laying down principles for the establishment of reception and accommodation centers to meet the accommodation, food, healthcare, social and other needs of applicants and international protection beneficiaries. On the other hand, foreigners subject to administrative detention or to a removal decision shall be held in removal centers managed by the Ministry of Interior.

Importantly, in Turkey, asylum-seekers are not provided with accommodation support and are therefore expected to find their own accommodations and bear the costs of it. Applicants considered vulnerable can nevertheless be accommodated in Accommodation centers or in state facilities in case of unaccompanied minors. However, there is currently only one Reception and Accommodation center operating in the country; this means that the majority of asylum seekers and refugees in Turkey are left to find their own shelter which proves deeply challenging due to a range of factors such as high rental prices and advance payment requirements. As a result, large numbers of applicants remain exposed to destitution and homelessness, or accommodation in substandard makeshift camps.[113]

The LFIP also establishes several procedural guarantees for asylum seekers, such as the right to access legal assistance, the right to appeal negative decisions, and the right to remain in Turkey during the appeal process. However, the implementation of these guarantees has been inconsistent and subject to

[111] Article 62, Law on Foreigners and International protection.
[112] Article 63, Law on Foreigner and International protection.
[113] Asylum Information Database, and European Council on Refugees and Exiles, Conditions in Reception Facilities (Turkey), February 2023. .

challenges. The registration process for asylum seekers has also been criticized for its lack of transparency and accessibility.

4.1 Temporary Protection and Syrian Refugees in Turkey

As stated above, within Turkish law Syrians are granted temporary protection, in line with Article 91 of the LFIP according to which: "Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey in a mass influx situation seeking immediate and temporary protection". Since 2011 therefore all Syrians, Palestinian refugees, and stateless persons living in Syria, including those who are not able to present any identification documents, are eligible, as a group, for temporary protection in Turkey. Syrians who have been returned from Greece to Turkey under the EU-Turkey Statement can also apply for it even though it is not guaranteed that they will be recognized this status. The legal bases for temporary protection are defined in the Temporary Protection Regulation[114] which, inspired by the EU's Temporary Protection Directive, sets out the rights and obligations of eligible persons.

Syrians are therefore entitled first and foremost to protection from refoulement as stated both by the LFIP and the Temporary Protection Regulation according to which "no temporary protection beneficiary shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion."[115] In addition, beneficiaries of temporary protection are to be provided with assistance in Turkey, which includes the right to stay within the country until a more permanent solution is found, protection against forcible returns to Syria, as well as access to fundamental rights and needs such as access to health, education, social assistance, and psychological support.[116] Nonetheless, these rights are limited to the province of registration which makes it difficult for Syrians moving in search of work to effectively enjoy them. Furthermore, due to the limited processing capacity of the Turkish asylum system, many refugees are often left in limbo, without access to proper legal and social protections.

Following the adoption of the Regulation concerning Work Permits of Temporary Protection Beneficiaries in 2016 Syrians were also granted a limited right to work which however has been difficult to implement for, according to the International Labour Organization, only a minority of

[114] Turkey, Temporary Protection Regulation, 22 October 2014.
[115] Article 6 of the Temporary Protection Regulation.
[116] Turkey, Regulation Concerning Work Permits of temporary Protection Beneficiaries, 11 January 2016.

Syrians hold a work permit and most of them are employed in low-paid and low-skilled jobs, often working long hours in unsafe environments and earning below the minimum wage.

In that same year however, the relationship between Turkey and Syrians has become more complicated following the signature of the EU-Turkey deal and there has been a decreasing level of acceptance and solidarity toward Syrian refugees alongside the politicization of the issue.[117] As a consequence, the ability of Syrians to enter Turkey has become more challenging due to increasing military action at the borders and suspensions of registrations in certain provinces.

While officially Turkey maintains an open-border policy for Syrian refugees, those without documents are indeed often denied access forcing them to undertake irregular entry paths by relying on smugglers. It has been reported that Turkish border guards have pushed refugees back, frequently through force and unlawful means including beatings and the use of firearms. Despite the commitments made by the Turkish government to uphold international human rights standards and protect the rights of migrants and refugees, multiple violations of the prohibition on refoulement as well as deportations, arbitrary detention, and episodes of physical violence have been reported over the years both by local and international NGOS.[118] Often the Turkish authorities disguise these illegal deportations as "voluntary returns," claiming that over several years, more than 315,000 Syrians have left of their initiative. As reported by Amnesty International however, Syrians consistently say they are being misled about the "voluntary return" forms they are being told to sign, or intimidated or beaten in order to make them sign.[119] Turkish law indeed does not specify the procedure by which these voluntary returns are assessed nor how often the UNHCR or other independent organizations are present at interviews to verify whether individuals are actually giving their free and informed consent to return to Syria.

Contrary to Turkey's claims it is thus likely that hundreds of Syrians within Turkey have been detained and transported against their will back to Syria. Upon re-entering Turkey, their identification documents are often canceled, leaving them unable to access essential services and at risk of deportation without legal recourse or remedy. [120]

Considering what was just said, is thus clear how Turkey can hardly be classified as a safe third country. Despite the fact that Turkey has enacted new asylum legislation and has ratified major human rights conventions, including the European Convention on Human Rights, the 1951 Refugee

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[117] European Commission, Directorate-General for Neighborhood and Enlargement Negotiations, Strategic Mid-Term Evaluation of the Facility for Refugees in Turkey (2016-2019/20), 6 July 2021.

[118] Global Detention Project "*Immigration detention in turkey a serial human rights abuser and europe's refugee gatekeeper*", October 2016; Amnesty International, "*Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey",* 16 December 2015**.**

[119] Amnesty International, *"Turkey: Sent to a War Zone: Turkey's Illegal Deportations of Syrian Refugees"*, 24 October 2019, p.5.

[120] Ibidem.

Convention and the Convention against Torture, its implementation of international human rights obligations has been problematic. The protection system in Turkey is unequal, and Syrian refugees in particular have been negatively affected. In recent years, Turkey has received billions of euros from the European Union to help manage the flow of migrants and refugees into Europe. However, this financial assistance is conditional on Turkey cooperating with the EU on border control operations and Turkish President Erdogan has even threatened to allow migrants to pass to the EU if the money is not delivered.

This practice of making humanitarian aid conditional on border security cooperation is problematic because it undermines the protection of fundamental rights, including the right to seek asylum.

Despite the notable decrease in irregular crossings to Europe since the implementation of the Statement, no progress has been made on the integration of Syrians in Turkey.

In order to ensure that refugees have access to fundamental rights and to manage migration flows more effectively, it is crucial to develop long-term solutions. This requires a comprehensive approach that takes into account the long-term nature of migration, and that includes policies designed to address the needs of migrants while also supporting states in managing the challenges of migration.

CHAPTER 4 - ITALY-LIBYA MEMORANDUM OF UNDERSTANDING

It is clear by now that in recent years migration has been of significant concern for the European Union leading to the establishment of cooperation agreements with third countries not just by the Union as a whole but also by individual Member States.

Between 2016 and 2017, after the implementation of the EU-Turkey deal which largely sealed off the Western Balkan route, the Central Mediterranean became the main transit zone for irregular entry into the EU on a route the IOM has dubbed "the deadliest route for migrants anywhere on Earth."[121]

Libya in particular, since the outbreak of civil war in 2014, has experienced the proliferation of armed and criminal groups, resulting in an increase in migrant smuggling and human trafficking which made it the main departure gate from Africa to the EU, mostly through Italy.

As a consequence, Italy has sought to reduce the flow of irregular migrants from Libya by signing the so-called Memorandum of Understanding. The agreement however has been highly controversial due to concerns over human rights violations and the vulnerability of migrants in detention centers in Libya. Although the International Criminal Court confirmed the existence of international crimes in Libya, and several international organizations appealed for the suspension of the Memorandum, the Italian government has maintained its support for the Memorandum of Understanding, arguing that it is necessary to address the ongoing migration crisis in the Mediterranean.

1. Historical overview of the agreements between Italy and Libya.

Discussions on migration between Italy and Libya date back to the late 1990s when the two started cooperating on several fronts. Already in December 2000 the two countries committed to assisting each other in fighting terrorism, drug trafficking, organized crime, and illegal immigration and to exchange information regarding migration flows. The content of the accord however was never published.

Despite formal pledges, the 2000 Agreement, did not have an immediate follow-up, as in the following years none of the measures stated were actually implemented, at least until 2007 when Italy and Libya signed in Tripoli two Protocols aimed at coordinating their efforts in regard to irregular migration.

The first protocol[122] was composed of only seven articles within which Italy and Libya reaffirmed the commitments made in 2000 envisaging, as established by Art. 1, "a stronger cooperation in the fight

[121] International Organization for Migration (IOM), *"Mediterranean Migrant Arrivals Top 43,000 in 2017; Deaths: 1089"*, 25 Aprile 2017.

[122] Protocol between the government of the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya, Tripoli 29 December 2007.

against the criminal organization engaged in human trafficking and exploitation of illegal immigration". These commitments were to be achieved by organizing sea patrolling with six Italian naval units temporarily leased to Libya which would carry out control, search, and rescue operations in the places of departure and transit of vessels dedicated to the transport of illegal immigrants, both in Libyan territorial waters and international waters, operating in compliance with the existing international conventions. Additionally, Italy committed to work at the European level to provide funding and support for border control measures in Libya to address illegal immigration as well as to promote cooperation between the EU and Libya on these issues.

On the same day as the former protocol, a second additional Protocol[123] was signed through which the parties defined the operational modalities of the agreement. It thus established that Italy would not only provide Libya with naval units but also with qualified personnel in order to instruct the Libyan personnel in conducting patrolling missions and to ensure the maintenance and efficiency of those naval units. Italy would bear the majority of the economic burden, including maintenance costs and compensation for any damage caused to Italian police personnel while Libya would bear the costs for fuel of the naval units.

Libyan authorities were therefore authorized to intercept boats of migrants and take them back to its coast before they could reach Italian territorial waters. By doing so, Italy would not have to take legal responsibility for migrants, nor would it have to return them to Libya thereby risking breaching international obligations. It is not clear, however, what Libya would do with those intercepted and returned to its territory. Nevertheless, none of the measures were actually realized due to the scarce collaboration by the Libyan authorities. [124]

One year later in 2008, the two countries signed a new agreement, the so-called "Treaty on Friendship, Partnership and Cooperation" (TFPC)[125], also known as the Treaty of Benghazi.

Signed on August 30, 2008, in Benghazi by the then-Italian Prime Minister Silvio Berlusconi and Libyan leader Muammar Gaddafi, the treaty officially marked the end of decades of hostility between the two countries. Italy and Libya, after reaffirming a series of general principles mainly deriving from international customary law or the UN Charter such as the respect for sovereign equality, prohibition of the threat or use of force, non-interference in internal affairs and the respect for human rights and fundamental freedoms, agreed to close with the past and end the disputes, most notably to put an end to the question of reparations of the colonial domain through a program of reparations of 5 billion

[123] Additional technical-operational Protocol to the Protocol between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya to deal with the phenomenon of illegal immigration, Tripoli 29 December 2007.

[124] Battista, G., "La collaborazione italo-libica nel contrasto all'immigrazione irregolare e la politica italiana dei respingimenti in mare". *Associazione Italiana dei Costituzionalisti* N. 3/2011, September 2011, p. 3.

[125] The Treaty on Friendship, Partnership and Cooperation between Italy and Libya, Benghazi, 30 August 2008.

dollars to be distributed in 20 years. In addition, they agreed to engage in regional cooperation envisaged in many sectors such as culture, science, economy, industry, energy, defense, and so on.
But most importantly the two agreed to fight against illegal immigration, most notably at sea.
Article 19 of the Treaty calls indeed for the implementation of previous agreements, in particular of the two Protocols signed in 2007, and for the implementation of a system for controlling the Libyan borders, jointly financed by Italy and the European Union. The two parties also agreed to collaborate in defining initiatives, both bilateral and regional, to prevent the phenomenon of illegal immigration in the countries of origin of the migratory flows.
At the same time as the ratification of the Treaty by the Italian Parliament in February 2009, the then Minister of the Interior, Roberto Maroni signed a new Protocol[126] in order to implement those signed in 2007, which defined the procedures necessary for enforcing the joint patrols both in Libyan territorial waters as well as international waters and establishing operations for the repatriation of irregular migrants. As a result, starting in 2009, Italian-Libyan cooperation became officially effective as Libya agreed for the first time to take a more proactive role in controlling illegal immigration by receiving migrants intercepted by Italian authorities in international waters, paving the way for pushback practices.[127]
Despite the cooperation between Italy and Libya in controlling illegal immigration, it is important to note that none of the protocols or agreements made a clear distinction between asylum seekers and other irregular migrants. This lack of differentiation became a major point of criticism, raising concerns about the compatibility of such practices with international law and human rights standards.

2. The Hirsi Jamaa sentence

As mentioned above, thanks to the 2009 Protocol the practice of pushbacks at sea officially began, involving not only irregular migrants but also those in need of international protection.
Even though there is no internationally agreed definition of "pushbacks" the special rapporteur on the human rights of migrants at the United Nations Office of the High Commissioner for Human Rights defined them as "various measures taken by states which result in migrants, including asylum-seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-

[126] The text of the agreement is however still confidential and there is no certainty about its content.
[127] Battista, G., "La collaborazione italo-libica nel contrasto all'immigrazione irregolare e la politica italiana dei respingimenti in mare". *Associazione Italiana dei Costituzionalisti* N 3/2011, September 2011, p. 5.

refoulement".[128] In February 2012, these operations of returning migrants rescued in the high seas to Libya conducted by Italian boats were condemned in a decision by the ECtHR known as "Hirsi Jamaa and Others v. Italy"[129]

Regarding the facts of the Hirsi sentence, on 6 May 2009, a group of about 230 individuals who had left Libya due to conflict and persecution was intercepted by Italian authorities within the search and rescue area of responsibility of Malta and returned to Tripoli. The applicants, a group of 24 migrants from Somali and Eritrea, later stated that during that voyage the Italian authorities did not inform them of their destination nor took steps to identify them. When they arrived at the Port of Tripoli, despite their objection, they were handed over to the Libyan authorities. The day after, the Italian Minister of the Interior held a press conference where he explained that the interception of vessels on the high seas and the return of migrants to Libya was a result of bilateral agreements signed with Libya in February 2009 and that the operation represented an important step in combating illegal immigration.[130]

The ECtHR, however, found that Italy violated several articles of the European Convention of Human Rights including the prohibition of inhuman or degrading treatment (Article 3), as migrants could be exposed in Libya to treatment in breach of the Convention, the prohibition of collective expulsions (Article 4 of Protocol No. 4), as the Italian authorities had not carried out individual assessments of the migrant's situations before returning them to Libya and finally the right to an effective remedy (Article 13).

Significantly, when the Italian government argued that the applicants had been intercepted in the high seas and thus had not come under Italian jurisdiction, the Court asserted that the applicants had been "under the continuous and exclusive de jure and de facto control of the Italian authorities". By doing so the Court ruled that the ECHR applies to a Member State's authorities even when they are operating on the high seas if they intercept persons who object to their removal to a country where they may face inhuman or degrading treatment in violation of Article 3.[131]

The Italian Government also argued that Libya was a safe host country as it had ratified both the International Covenant on Civil and Political Rights (ICCPR)[132] and the Convention Against Torture[133].

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[128] Special Rapporteur on the human rights of migrants, Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea. Office of the High Commissioner for Human Rights (OHCHR), 12 May 2021.
[129] ECtHR, *Hirsi Jamaa and Others v. Italy* (Judgment), No. 27765/09, (23 February 2012).
[130] Ibidem.
[131] Peers, S., "*EU Justice and Home Affairs Law: EU Immigration and Asylum Law"*. Oxford University Press, 2016, p.92.
[132] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[133] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465.

The Court however noted that numerous reports by international and non-governmental organizations showed that migrants within Libya were subjected to mistreatment during the relevant time period and that they were often at risk of being repatriated to their countries of origin. As a consequence, Libya could not be considered a safe place for migrants.

Following the sentence Italy therefore declared that the subsequent agreements would be concluded in accordance with the European Charter of Human Rights. The declaration however did not lead to the termination of the agreements with Libya but simply to a progressive externalization of border controls; instead of carrying out pushbacks itself, Italy now funds and delegates the responsibility to Libyan authorities to block departures and repatriate migrants, thus avoiding any responsibility for potential human rights violations.

3. The Memorandum of Understanding

In 2011, the Italian-Libyan relationship was inevitably shaped by the outbreak of a series of revolutionary uprisings and protests aimed at overthrowing the regime of Muammar Gaddafi.

As the protests intensified with demonstrators taking control of Benghazi the Libyan Government began to suppress them violently. This sudden escalation of violence drew condemnation from the international community, leading, in March of the same year, to a NATO intervention to protect civilians from the government's use of force.

The NATO intervention led to the eventual downfall of Gaddafi which however left the country in a state of absolute political and social turmoil, with various factions striving for power and control. As a consequence, two separate governments were formed, respectively based in Tripoli and Tobruk.

This situation opened the way to new waves of asylum seekers and migrants towards Europe and Italy in particular, resulting in the largest influx of seaborne migrants and asylum seekers that the country ever experienced. [134]

Within this context, the Italian government immediately sought to establish a dialogue with the newly emerged authorities. However, it was only in 2016, when the internationally recognized Government of National Accord (GNA) was established, that closer cooperation between the two countries resumed, leading to the signature of the Memorandum of Understanding (MoU).

Officially known as the "Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the

[134] Abbondanza, G., "Italy's Migration Policies Combating Irregular Immigration: From the Early Days to the Present Times". *The International Spectator* 52, no. 4 (2 October 2017): p. 85.

security of borders between the State of Libya and the Italian Republic"[135], the MoU was signed on February 2017 by the then Italian Prime Minister Paolo Gentiloni and the Head of the Libyan GNA Fayez al-Sarraj.

In the preamble of the Agreement, the Parties declare themselves aware of the transitional situation in Libya and the necessity to continue to support efforts aimed at national reconciliation, with a view to building a civil and democratic State, as only by doing so it will be possible to provide an effective response to challenges posed by illegal immigration. In addition, the two Parties reaffirm their commitment to fully implement the agreements previously concluded between them regarding migration, human trafficking, and border security.

The document is three pages long and consists of eight articles. The most important provisions however can be found in Articles 1 and 2 outlining the obligations of the parties.

Article 1 outlines the commitments of both parties to resume cooperation on security and irregular migration. Accordingly, Italy will provide support and financial investments in areas affected by illegal immigration as well as providing technical support to Libyan institutions in charge of the fight against illegal immigration.

Article 2 then further elaborates on the commitments that the two parties agreed to undertake. In particular, it foresees the completion of the land border control satellite detection system, the adaptation and financing of existing local reception centers, the improvement of illegal immigrants' needs through the supply of medicines and medical equipment, the training of Libyan personnel working in such centers, cooperation aimed at eliminating the causes of irregular immigration and support countries of origin in implementing development projects, support to international organizations in order to "continue the efforts that are also aimed at returning migrants" to their countries of origin", and finally the creation of development programs within the country.

The last article states that the agreement "has a validity of three years and it will be renovated by tacit agreement at the deadline for an equivalent period, unless a written notification is presented by one of the two contracting Parties at least three months before the deadline of the period of validity"[136]

Since then, the Memorandum has been extended twice and will remain valid until 2026, after which it will need to be renewed once again.

[135] Memorandum of Understanding on cooperation in the field of development, combating illegal immigration, human trafficking, smuggling, and strengthening border security between the State of Libya and the Italian Republic, Rome, February 2, 2017.

[136] Article 8, Memorandum of Understanding.

Even though the Memorandum adopts a very generic language, it is clear that the objective is that of reducing migration by outsourcing border control to Libya through a mechanism that follows the same logic as the pushbacks condemned in the Hirsi Jamaa sentence but that implements them by proxy. By providing Libya with boats and border control systems necessary to stem the flow of migrants, Italy does indeed finance Libyan authorities to carry out pushbacks before migrants can reach its coast and then transfer them into reception centers in order to carry out repatriation or voluntary returns to their country of origin.

In this regard, he MoU explicitly identifies forced returns as one of its goals, in a way that seems to go against the prohibition on refoulement. Indeed, while the Memorandum calls for its application in respect of the "international obligations and the human rights agreements to which the two countries are parties"[137], it does not mention any actions to identify potential asylum seekers, referring only to clandestine or illegal migrants without distinction, nor does it contain measures to ensure that returns will be carried out towards safe countries.[138]

4. Libyan asylum law

Despite having reduced migration flows, the real consequences of the Memorandum are devastating for migrants and asylum seekers.

Libya is not a State party to the 1951 Convention relating to the Status of Refugees, nor to its 1967 protocol. It has ratified key human rights treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment whose Art. 3 provides for the prohibition on refoulement as well as the ICCPR which aims to ensure the protection of civil and political rights and it is also a State party to the 1969 Convention of the Organization of the African Union (OAU)[139] governing the specific aspects of refugee problems in Africa as well as the African Charter on Human and Peoples' Rights.[140] Nevertheless, evidence shows that within the country refugees and migrants are subjected to widespread and systematic human rights violations.

Libya has indeed no national asylum law or asylum procedures. This means that individuals fleeing persecution have no formal mechanism to seek protection.

[137] Article 5, Memorandum of Understanding.

[138] Palm, A., *"The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?"* IAI Istituto Affari Internazionali, 2 October 2017.

[139] Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969.

[140] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981.

Indeed, while Article 10 of the Constitutional Declaration of 2011[141] recognizes the right to political asylum as well as the prohibition on extradition of political refugees, these provisions have not yet been incorporated into national legislation. Refugees and asylum seekers are therefore not distinguished from other migrants residing in the country, who are all considered as "economic migrants". As a result, refugees in Libya are not given any special treatment, as they are not recognized as a separate group entitled to a specific legal status.[142]

Although there is no dedicated national legislation for refugees, the situation of refugees, asylum-seekers, and migrants, in general, is regulated by a set of national laws. Of particular importance is Law 6 of 1987[143] on the organization of entry, residence, and exit of foreigners in Libya, which establishes that foreigners must possess a valid visa to enter, reside in and leave the country. As a consequence, those who entered irregularly or whose residence permit has expired are subject to deportation and may incur in a number of penalties such as the payment of a fine. The same happens if the migrant is caught in the act of leaving the country in front of the Libyan coast.

Later on, in 2010, Law No. 19 of 2010 on Combating Irregular Migration was adopted allowing for the detention, pending deportation, of migrants and refugees in an irregular situation. The law defines illegal immigration as the act of entering the country without permission as well as related acts such as bringing illegal immigrants into the country or helping them leave, transporting them within the country, concealing them from the competent authorities, and encouraging others to participate in any of these activities.

The law provides in particular that migrants have two months to regularize their situation after which they will be subject to detention with hard labor and to the payment of a fine to which deportation will follow. Article 10 however stipulates that at the time of arrest, migrants must be treated "in a humane manner, keeping their dignity and rights, without assault on their money or moveable property".

Nonetheless, as several human rights and humanitarian organizations, as well as UN agencies' reports show, the overwhelming majority of migrants and refugees are placed in indefinite detention pending deportation without being charged, tried, or sentenced under applicable Libyan laws. Arrest and detentions are therefore carried out arbitrarily, without any judicial oversight, and without any possibility for migrants to appeal against a decision.[144]

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[141] Libya's Constitutional Declaration, 3 August 2011.

[142] Hamood, S., "*African Transit Migration Through Libya to Europe: The Human Cost*". American University in Cairo, Forced Migration and Refugee Studies, 2006, p.19.

[143] The law was later amended by Law No. 2 of 2004 which introduced tighter penalties on illegal residence in and passage through Libya as well as penalties for smuggling.

[144] Sunderland, J., and Salah H., "*No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya*". New York, N.Y.: Human Rights Watch, 2019, p.14.

Particularly in the aftermath of the 2011 protest, migrants and refugees in the country were subjected to some of the worst atrocities committed both by state and non-state actors. With the outbreak of the civil war indeed powerful militias actively entered the business of human trafficking and smuggling, seizing control of the main migration routes in Libya and of detention centers. As a result, almost all foreign bodies, including UN agencies were forced to leave the country and found themselves unable to guarantee adequate protection for refugees. Migrants and refugees became therefore commodified, through kidnapping, arbitrary detention, extortion, and torture.[145]

It is thus clear that despite formal commitments, the human rights of migrants are systematically violated from the moment they enter Libya. After being intercepted, migrants are placed within detention centers formally managed by the General Directorate for Combating Illegal Migration (DCIM), a division within the Libyan Ministry of Interior but according to several reports, a significant number of individuals are transported to unknown locations under the control of human traffickers, armed groups, and militias affiliated with the state.

As shown by numerous non-governmental organizations including Amnesty International and Human Rights Watch, conditions within these centers are horrific as a result of overcrowding, lack of healthcare, and inadequate nutrition which amount to cruel, inhuman, or degrading treatment. Migrants and refugees interviewed by the United Nations Support Mission in Libya (UNSMIL) in the years 2017-2018 described conditions as unfit for habitation and unhygienic. People must often procure their own food or starve to death, and basic cleaning items are rarely, if ever, provided while the special needs of vulnerable people are not addressed.[146]

Migrants and refugees in Libya suffer therefore from severe physical and mental pain due to the harsh conditions in which they are held and the lack of basic necessities. Detainees are often forbidden to go outside or move freely, as they are locked in small rooms or cells with little or no space to lie down and often no lighting. Reports from migrants and refugees indicate extremely scarce provisions of food, and very little water as well as a lack of access to adequate medical assistance, causing many to suffer from health problems that are then further aggravated by the conditions in which they are detained.[147] In addition, migrants are systematically exposed to torture and other ill-treatment, including sexual violence, exploitation, abuse, and severe beatings,[148] often with the aim of extorting money from their families.

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[145] ECCHR, FIDH, LFJL, "*No Way Out: Migrants and Refugees Trapped in Libya Face Crimes Against Humanity"*, 23 November 2021.

[146] OHCHR, UNSMIL, "*Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya"*, 20 December 2018, p. 28.

[147] Ibidem.

[148] Amnesty International, *"Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants"*, 11 December 2017, p. 22.

As a result, countless migrants and refugees have been reported dead during detention after being shot, tortured to death, or simply left to die from starvation or medical neglect.[149]

Besides being held within these centers migrants also face significant risks of being deported back to their countries of origin, in clear violation of the principle of non-refoulement.

In his report to the UN Security Council in January 2021, UN Secretary-General Antonio Guterres also raised fears about the treatment of migrants in Libya: "The continued arbitrary detention of migrants and refugees in formal detention centers and at informal smuggler sites remains a critical concern. Refugees and migrants in Libya should be released from detention and provided with safe shelter. Libya is not considered to be a safe port of disembarkation for refugees and migrants. I urge relevant Member States to revisit policies that support the interception at sea and return of refugees and migrants to Libya."[150]

Due to the absence of a formal registration process, it is not possible to ascertain the precise number of individuals held within detention centers, nor for how long they have been detained. In addition, given the lack of legal oversight by Libyan prosecutors and legal remedies guards are able to act with total impunity and engage in practices contrary to international human rights laws such as torture and extortion. If migrants are not forcibly deported, few other options are able for them to leave the centers for example through Voluntary Humanitarian Return operations organized by IOM, or releases negotiated by UNHCR for individuals of concern to them. Nevertheless, due to the limited access granted to international organizations, these operations are rarely carried out. [151]

In addition to mistreatments within detention centers, violent and reckless conduct by the Libyan Coast Guard has also been documented during sea interceptions. As reported by Amnesty International officials conducting interception operations have used threats and violence against refugees and migrants on board boats, sometimes in order to steal their possessions.

In a number of other interceptions, Libyan officials ignored basic safety protocols and standards, putting refugees and migrants at risk as well as repeatedly harassing and intimidating NGO vessels providing rescue services in the central Mediterranean.[152]

This approach culminated in 2017 in the establishment of a Libyan Search and Rescue (SAR)[153] zone under the exclusive jurisdiction of Libyan naval authorities, in which no foreign ship has the right to

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[149] OHCHR, UNSMIL, "*Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya"*, 20 December 2018, p .6.

[150] UN Security Council, United Nations Support Mission in Libya - Report of the Secretary-General (S/2021/62), January 2021.

[151] Amnesty International, "*Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants"*, 11 December 2017.

[152] Ibidem, p. 36.

[153] A Search and rescue zone is an area where a coastal state has accepted primary responsibility (but not exclusive) to conduct search and rescue operations.

access without prior authorization. A spokesperson for the Libyan Navy clarified that the measure was specifically adopted "for NGOs which pretend to want to rescue illegal migrants and carry out humanitarian actions".[154] In reality, however, Libya lacks any of the essential requirements to take on the responsibility of managing a search and rescue area. Indeed, due to the fact that the country does not represent a safe haven in which to bring rescued people, the very existence of a Libyan SAR zone seems to represent a violation of international law but that nonetheless has been used by Europe, and Italy more specifically, to evade their obligations to rescue boats in distress and shift this responsibility onto Libya instead.

5. The European Union's support to the agreement

Besides Italy, the EU has also cooperated with Libya on migration.

The EU started engaging with Libya in 2004 when the European Commission led a technical mission in Libya to deepen its understanding of migration through the country and identify concrete measures for cooperation. A year later an "ad-hoc dialogue" on migration issues between the EU and Libya was established "to gradually develop concrete cooperation on such issues with the Libyan authorities."[155]

In May 2013 the EU Council established a Border Assistance Mission in Libya (EUBAM Libya) whose purpose is to "support the Libyan authorities to develop capacity for enhancing the security of Libya's land, sea, and air borders. The work is carried out through advising, training, and mentoring Libyan counterparts in strengthening the border services in accordance with international standards and best practices, and by advising the Libyan authorities on the development of a national Integrated Border Management (IBM) strategy."

In February 2017, through the Malta Declaration[156], EU leaders agreed on new measures to reduce irregular arrivals. In order to do so they committed to increase cooperation with Libya and to tackle migrant smuggling. Priority would be given to training and supporting the Libyan coast guard and other relevant agencies, dismantling the business model of smugglers, supporting local communities, ensuring adequate conditions for migrants, and promoting voluntary return. In that same meeting Member States expressed their support for the Memorandum, stating that "the EU welcomes the memorandum of understanding signed on February 2, 2017, by the Italian authorities and the President of the Presidency Council al-Serraj, and is ready to support Italy in its implementation".

[154] Ziniti, A., "Tripoli Istituisce Una Sua Zona Di Soccorso Sar: Le Ong Si Allontanano Dalla Costa Libica". *La Repubblica*, 11 August 2017.
[155] European Commission, 2664th Council Meeting Justice and Home Affairs Luxembourg, 2 June 2005.
[156] European Council, Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route, 3 February 2017.

To implement what was decided during the Malta Declaration in April 2017 the European Union Trust Fund for Africa disclosed a €90 million program to address the needs of migrants and support improved socio-economic development at the municipal level and local governance in order to reduce the drives of irregular immigration and combat smugglers.[157]

Additionally, on July 4, 2017, the Commission adopted a Plan to support the Italian Government in the administration of the migration phenomenon and to reduce departures via the Central Mediterranean route[158] which among other things included a commitment to enhance the capacity of the Libyan authorities through a €46 million project prepared jointly with Italy.[159] More specifically the Plan provides for the strengthening of the operational capacities of the Libyan coastguards through the support, training, equipment, repair, and maintenance of the existing fleet, the set-up of basic facilities in order to provide the Libyan coastguards with an initial capacity to better organize their control operations and to strengthen the operational capacity of the Libyan border guards along the southern borders most affected by illegal crossings.[160]

It is thus evident how, over the past decades, hundreds of thousands of migrants and refugees have suffered torture and other atrocities in Libya while those responsible have acted with absolute impunity. Despite the well-known violations and abuses of migrants and asylum seekers in Libya, Italy and the European governments have nevertheless chosen to cooperate and assist Libyan authorities. By doing so, Italy and the EU have not only contributed to those violations by providing fund training and equipment to Libyan agencies but have also prioritized actions aimed at containing refugees and migrants which however do not address its root causes and are not sustainable in the long term. Notwithstanding the efforts by UN agencies to aid refugees and migrants and despite formal commitments from the EU to provide humanitarian assistance and improve living conditions the truth remains that those intercepted by the Libyan Coast Guard are transferred to detention centers where they are held in cruel, inhuman, and degrading conditions.

The extensively documented crimes that have been, and continue to be, committed against them are widespread and systematic, requiring immediate action in order to ensure that migrants and refugees have access to protection, safety, and justice and to hold those responsible accountable for their actions.

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[157] European Commission, EU Trust Fund for Africa Adopts €90 Million Programme on Protection of Migrants and Improved Migration Management in Libya, 12 April 2017.

[158] European Commission, Central Mediterranean Route: Commission Proposes Action Plan to Support Italy, Reduce Pressure and Increase Solidarity. 4 July 2017.

[159] European Commission. 'EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya', 28 July 2017.

[160] Ibidem.

As a result, the failure of Italy and other European governments to prevent and put an end to human rights violations and address the underlying causes of migration, not only perpetuates these abuses but also undermines the very fundamental values the EU claims to protect.

CONCLUSION

In the light of what was discussed in the above chapters, it is thus evident that the phenomenon of migration is an extremely complex one, which inevitably poses challenges to states worldwide.

As stated in the introduction, in the last decades there has been a growing trend towards the securitization of migration, whereby migrants are increasingly viewed as a threat rather than as an opportunity, leading to policies that aim to exclude or limit their entry rather than focusing on their potential contributions to society.

As a consequence, in the last years the prevailing strategy has been one which increasingly seeks to force out or exclude migrants, a sort of "out of sight, out of mind" approach that instead of addressing the root causes of migration and trying to adopt new and comprehensive strategies, aims at building walls around the world and externalizing borders through questionable treaties in order to hide the problem, simply pushing it far from our eyes but without however resolving it.

The 2015 migration crisis in particular put a significant strain on the EU's asylum and immigration systems, highlighting the shortcomings of the existing norms and the need for a comprehensive approach to manage migration, aimed at ensuring full protection of the rights of migrants.

Although Article 80 of the Treaty on the Functioning of the European Union states that policies regarding border control, asylum, and immigration should be "governed by the principle of solidarity and fair sharing of responsibility among Member States, including its financial implications", Member States have ended up privileging their interests, leading to an asymmetry in terms of the distribution of the burdens arising from the management of asylum applications. The response to the crisis, therefore, was marked by a series of ad-hoc measures and short-term solutions that failed to address the underlying challenges and resulted in a series of abuses and violations.

Instead of focusing on more equitable solutions, the EU has prioritized its own security and self-interest at the expense of vulnerable migrants and refugees, adopting a shortsighted approach which not only fails to address the root causes driving migration but also perpetuates a system of inequality and injustice, exacerbating the very issues that drive people to leave their countries in search of safety and opportunity.

Managing the phenomenon of migration cannot be reduced to simply blocking migrants in third countries and externalizing borders. While agreements with third countries have certainly led to a significant decrease in the number of arrivals, the failure to link this approach with measures aimed at improving conditions in countries of origin has only temporarily blocked migration routes, resulting in the suffering and loss of thousands of lives.

This approach has led the EU to effectively turn a blind eye and to some extent even participate in the violations of migrant's rights, raising serious ethical concerns regarding the agreements' implications. As shown indeed by numerous reports, both in Libya and Turkey migrants are subject to various forms of abuse, exploitation, and human rights violations. And while these violations cannot be attributed entirely to the policies pursued by the EU and Italy, it is evident that the externalization of migration management has severely exacerbated the situation by enabling these violations to continue with limited accountability and oversight.

Moreover, the externalization of migration management, makes the EU extremely dependent on cooperation with third countries, which can decide to use this vulnerability to their advantage to achieve their political and economic objectives. This unpleasant situation occurred for example in 2020 when Turkish President Erdogan opened the borders to pressure Europe and obtain an increase in refugee funds. As a result, despite their at least temporary effectiveness, the externalization tools used by the EU entail significant risks both for its image and for its internal security.

The refugee crisis therefore not only jeopardizes the lives and dignity of migrants but also the core values of European integration which, it is worth recalling, was created in the aftermath of World War II in an attempt to protect the fundamental rights of people and make sure that the atrocities therein committed would never be repeated.

SUMMARY

Nel secondo dopoguerra, in seguito alle tragiche vicende che portarono milioni di persone a fuggire dalle proprie abitazioni in cerca di sicurezza, la comunità internazionale avvertì la necessità di redigere uno strumento che affermasse definitivamente il diritto degli individui ad essere protetti da guerre e persecuzioni.
Il risultato di tale processo fu la "Convenzione di Ginevra relativa allo Statuto dei rifugiati", un patto internazionale che stabilì il quadro giuridico per la protezione dei rifugiati e dei richiedenti asilo.
Inizialmente firmata da 26 stati e successivamente estesa a 144, la a Convenzione definì per la prima volta il termine "rifugiato", riconoscendo a costoro il diritto a ricevere protezione internazionale e a non essere respinti alle frontiere (il cosiddetto principio di non-refoulement), nonché il diritto a condizioni di vita dignitose, alla libertà di movimento e all'accesso all'assistenza medica e legale.
Inizialmente limitata alla protezione dei rifugiati Europei provocati dalla Seconda guerra mondiale, con il protocollo del 1967 la Convenzione venne poi estesa a livello globale e senza alcune limitazioni temporali, divenendo uno degli strumenti più importanti per la promozione e la protezione dei diritti dei rifugiati a livello internazionale.

A livello Europeo le iniziative legislative e politiche in materia di migrazioni iniziarono nel 1985 quando la Commissione Europea attraverso il cosiddetto Libro Bianco sottolineò la necessità di un'azione coordinata sui temi di ingresso, soggiorno e occupazione dei cittadini di Paesi terzi e in materia di visti.
Tuttavia, l'atteggiamento nazionalista degli Stati Membri, poco disposti a cedere le prerogative avute fino ad allora, unito alla mancanza di norme specifiche in grado di definire i poteri decisionali della Comunità Europea rallentarono il processo di armonizzazione delle politiche migratorie europee.
Col tempo, divenne sempre più evidente la necessità di approcci comuni poiché le politiche nazionali non erano più in grado di affrontare adeguatamente le crescenti pressioni che l'immigrazione esercitava sulla maggior parte degli Stati membri.
Vista l'impossibilità di giungere a un accordo a livello Europeo, un gruppo di stati formato da Francia, Germania, Belgio, Lussemburgo e Paesi Bassi cominciò a cooperare al di fuori del quadro istituzionale della Comunità Europea portando alla creazione, nel 1985 dell'Accordo di Schengen, poi seguito da un'omonima convenzione nel 1990.
L'accordo prevedeva l'eliminazione delle frontiere interne all'Unione e alcune norme comuni come la creazione di un visto uniforme per soggiorni di breve durata volti a garantire la libera circolazione dei

cittadini. Allo stesso tempo l'accordo stabiliva tuttavia una serie di misure compensative necessarie per rafforzare i controlli alle frontiere esterne, e conciliare libertà e sicurezza. Con l'entrata in vigore del Trattato di Amsterdam nel 1999 la Convenzione di Schengen verrà poi inclusa nel quadro istituzionale dell'Unione Europea.

A partire dagli anni 90, con la fine della guerra fredda, e in particolare dopo i conflitti nell'ex-Jugoslavia, grandi quantità di migranti si riversarono nei Paesi europei convincendo i Paesi membri della necessità di dar vita a una politica migratoria a livello comunitario.

Una prima risposta a questa necessità si ebbe con l'adozione del Trattato di Maastricht del 1992 che attribuiva all'Unione competenze per agire nei settori dell'asilo, dell'immigrazione, della cooperazione giudiziaria in materia civile e penale e della cooperazione di polizia al fine di raggiungere una migliore libera circolazione delle persone.

Nonostante ciò, le competenze in materia di immigrazione rimanevano comunque ancorate ad una dimensione intergovernativa (dove centrale è il principio dell'unanimità per l'adozione di ogni provvedimento), che si avvaleva delle istituzioni comuni per facilitare la cooperazione tra Stati ma dotata di ben pochi elementi sovranazionali.

Con l'introduzione del Trattato di Amsterdam, una delle più importanti innovazioni fu la parziale "comunitarizzazione" dell'immigrazione che consentì il passaggio della politica di immigrazione dall'area intergovernativa alla sfera comunitaria, conferendo alla Comunità Europea la competenza di adottare misure in materia di "Visti, asilo, immigrazione e altre politiche connesse con la libera circolazione delle persone". In seguito a questo sviluppo, la Comunità Europea ha posto come obiettivo la creazione di un sistema europeo comune d'asilo (CEAS) basato sul rispetto della Convenzione di Ginevra e del principio di non-refoulement, il quale stabilisce norme per il trattamento di tutti i richiedenti asilo e di tutte le domande di asilo nell'UE.

Con l'entrata in vigore del Trattato di Lisbona nel 2009, la politica di asilo è stata ulteriormente rafforzata e finalmente definita come comune, con l'obiettivo di garantire un'efficace protezione ai richiedenti asilo e alle persone bisognose di protezione internazionale. Inoltre, con l'entrata in vigore del Trattato di Lisbona, la Carta dei diritti fondamentali dell'Unione Europea ha acquisito valore giuridicamente vincolante, assumendo lo stesso valore dei Trattati e sancendo esplicitamente il diritto d'asilo e il divieto di respingimento.

Dal 2011, a seguito delle Primavere Arabe e delle conseguenti violenze in Siria e in altri paesi, il numero di domande di asilo nei paesi dell'Unione è cresciuto notevolmente, raggiungendo l'apice nel 2015 quando oltre 1 milione di persone sono sbarcate ai confini dell'Europa. Questo fenomeno

senza precedenti ha di fatto mostrato l'inadeguatezza ed inefficienza della legislazione vigente, portando ad una progressiva "securitizzazione" del fenomeno migratorio, sempre più percepito come una minaccia invece che come un'opportunità.

Di fronte a questa crisi, l'UE si è ritrovata ad affrontare diverse questioni riguardanti l'accoglienza dei richiedenti asilo e dei migranti, soprattutto per quanto riguarda la suddivisione degli oneri tra gli Stati membri. Paesi come l'Italia e la Grecia, situati in posizioni geografiche più vulnerabili, hanno difatti dovuto far fronte a un flusso migratorio senza precedenti, mentre altri paesi come la Germania, l'Austria, la Danimarca e la Svezia hanno temporaneamente reintrodotto i controlli alle frontiere interne, mettendo a dura prova la tenuta del sistema Schengen e sollevando dubbi sulla coesione dell'UE.

In questo contesto è emersa dunque la necessità di una riforma del sistema di Dublino.

Il sistema di Dublino stabilisce i criteri e i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale, definendo Stato competente quello in cui può meglio realizzarsi il ricongiungimento familiare del richiedente o quello che ha rilasciato al richiedente un titolo di soggiorno o un visto di ingresso in corso di validità. Dove non sia possibile designare lo Stato competente in base a tali criteri, la competenza ricade sul cosiddetto paese di primo ingresso. Ciò ha chiaramente creato una pressione sproporzionata sui Paesi situati lungo le frontiere esterne dell'UE, che ricevono la maggior parte delle domande di asilo e sottolineato la necessità di sistema più equilibrato.

Tuttavia, nonostante gli sforzi di revisione dei trattati in materia d'asilo e accoglienza e l'implementazione di meccanismi di emergenza quali il sistema di ricollocamento e la creazione di hotspot volti a mitigare gli effetti della crisi sui paesi più vulnerabili, la situazione ha evidenziato l'incapacità degli stati membri di collaborare in modo efficace per trovare soluzioni equilibrate, portando al diffondersi di politiche ostili nei confronti dei migranti insieme ad un generale sentimento di sfiducia nei confronti dell'Unione.

Il sistema di ricollocamento, ad esempio, prevedeva la ripartizione dei richiedenti asilo tra tutti gli Stati membri dell'UE, ma la sua efficacia è stata limitata a causa della scarsa adesione da parte di alcuni Stati membri. Allo stesso modo, la creazione di hotspot in Italia e Grecia, cioè centri di registrazione e accoglienza dei migranti, aveva lo scopo di facilitare la gestione del flusso migratorio, ma anche in questo caso i risultati sono stati limitati a causa della mancanza di risorse e di supporto adeguato da parte dell'UE.

Di conseguenza, malgrado l'art.80 del Trattato sul Funzionamento dell'Unione Europea disponga che le politiche relative ai controlli delle frontiere, all'asilo e all'immigrazione devono essere "governate dal principio di solidarietà e di equa ripartizione della responsabilità tra gli Stati membri, anche sul

piano finanziario" gli interessi degli stati membri hanno finito per prevalere, compromettendo l'efficacia delle misure adottate.

In risposta a tale emergenza, l'UE ha dunque adottato via via una politica di "esternalizzazione" dei controlli migratori, mirata a spostare la responsabilità dei migranti al di fuori dei suoi confini.
Questa strategia non rappresenta tuttavia una novità ma è stata attuata dall'UE fin dagli anni '90. In particolare, dopo l'abolizione dei controlli alle frontiere interne a seguito dell'Accordo di Schengen, la UE ha progressivamente intensificato i suoi sforzi per limitare l'immigrazione irregolare, considerata spesso una minaccia per l'identità nazionale e per i sistemi di protezione sociale. Questo processo è poi culminato nel 2005 con l'adozione dell'Approccio Globale alla Migrazione alla Mobilità, il quale rappresenta il "quadro generale della politica esterna dell'UE nel settore della migrazione e dell'asilo", basato sulla cooperazione con paesi terzi volta ad affrontare le cause profonde della migrazione, migliorare le condizioni di vita dei migranti, combattere il traffico di esseri umani e promuovere l'integrazione dei migranti regolari.
Con la crisi del 2015, e la conseguente necessità di risposte rapide ed efficaci, l'esternalizzazione è poi divenuto il principale strumento nella lotta contro l'immigrazione irregolare.
Sia gli Stati membri che l'UE hanno dunque stipulato accordi di riammissione volti al rimpatrio dei migranti irregolari in paesi terzi e altri strumenti volti a spostare la responsabilità del controllo delle frontiere al di fuori dell'Unione. Una tendenza poi rafforzata dal concetto di "paese terzo sicuro" e "paese d'origine sicuro" i quali prevedono che i richiedenti asilo possano essere respinti e rimpatriati nei paesi terzi o d'origine dove si presume che i loro diritti fondamentali siano rispettati e che non siano esposti a persecuzioni o torture, fornendo così una base giuridica per le decisioni di respingimento e rimpatrio e più in generale per la politica di esternalizzazione.
Il concetto di paese sicuro è stato tuttavia ampiamente criticato da diverse organizzazioni internazionali poiché non tiene conto della situazione individuale dei migranti e spesso non garantisce un reale accesso al diritto d'asilo né un'effettiva protezione o rispetto dei diritti umani.

In questo contesto, l'UE ha intensificato la cooperazione con la Turchia, principale paese di transito per i migranti verso l'Europa, portando nel 2016 alla firma della Dichiarazione UE-Turchia.
La Turchia aveva iniziato ad intrattenere dei rapporti con la Comunità Economica Europea (CEE) già negli anni '60. In seguito, con l'avvio dei negoziati di adesione della Turchia all'UE nel 2005, la questione della migrazione ha assunto una posizione sempre più centrale.
Con lo scoppio della guerra civile in Siria nel 2011, la Turchia ha adottato una politica di porte aperte nei confronti dei rifugiati siriani che cercavano asilo, ospitando milioni di rifugiati. Tuttavia, ciò ha

portato anche ad un aumento del flusso di migranti che cercavano di raggiungere l'Europa attraverso la Turchia, creando pressioni sulle relazioni tra i due. Nel 2013 il governo turco ha firmato con l'UE un accordo di riammissione dei migranti entrati nell'Unione attraverso il suo territorio in cambio della prospettiva di una futura abolizione dei visti d'ingresso per i cittadini turchi.

La crisi del 2015 ha però ulteriormente aggravato la situazione, portando all'adozione nel novembre dello stesso anno di un piano d'azione comune tramite il quale le due parti hanno concordato di intensificare la collaborazione per la gestione della migrazione regolare e irregolare.

Il piano in particolare prevedeva il sostegno ai rifugiati e alle comunità che li ospitano in Turchia, il rafforzamento della cooperazione al fine di prevenire i flussi migratori irregolari verso l'Unione europea, e un ingente sostegno economico da parte dell'UE alla Turchia.

Sulla base del piano comune, il 18 marzo 2016, la Turchia e l'Unione Europea hanno raggiunto un accordo, noto come "dichiarazione", dunque non destinata a produrre effetti legalmente vincolanti. La dichiarazione infatti non è stata conclusa secondo le procedure previste dall'articolo 218 del TFUE, che costituisce la base giuridica per la conclusione da parte dell'Unione Europea degli accordi internazionali, ma è stato negoziato informalmente dal Presidente del Consiglio Europeo Donald Tusk e dal Presidente turco Erdoğan. Questa mancanza di formalità ha quindi permesso all'UE di imporre obblighi alla Turchia e di trasferire su di essa il carico dei migranti, sfuggendo tuttavia alla responsabilità giuridica e politica delle violazioni dei diritti umani che possono verificarsi al suo interno.

Firmato con l'obiettivo di fermare il flusso di migranti irregolari dalla Turchia all'Europa e contrastare l'attività dei trafficanti, il punto cruciale dell'accordo è costituito dal principio secondo cui ogni migrante giunto irregolarmente sulle isole greche sarebbe stato riportato in Turchia e, contemporaneamente, gli Stati membri dell'UE avrebbero accolto un rifugiato siriano dalla Turchia per ogni siriano respinto dalle isole greche: il cosiddetto meccanismo one to one. In cambio l'UE ha promesso un finanziamento di 6 miliardi di euro alla Turchia per garantire l'accoglienza dei rifugiati siriani sul suo territorio.

La dichiarazione, che si basa dunque sull'assunzione che la Turchia sia un paese sicuro per i rifugiati ed i richiedenti asilo, è stata tuttavia oggetto di accesi dibattiti e critiche da parte di molte organizzazioni umanitarie ed internazionali le quali hanno denunciato le condizioni inumane e degradanti a cui sono sottoposti i rifugiati, non solo in Turchia ma anche negli hotspot greci, non sempre al sicuro da deportazioni e detenzioni arbitrarie. La Turchia difatti mantiene una limitazione geografica alla Convenzione di Ginevra secondo la quale il paese non riconosce come rifugiati coloro che provengono da regioni al di fuori dell'Europa, ma garantisce soltanto una protezione "condizionata" che garantisce una serie di diritti inferiori rispetto alla protezione internazionale.

Tuttavia, come mostrato da diversi report prodotti da organizzazioni quali Amnesty International e Human Rights Watch, la protezione dei rifugiati e il rispetto dei diritti umani sul territorio turco non sono sempre garantiti e anzi, spesso violati , soprattutto per coloro che si trovano in condizione di irregolarità.

La Dichiarazione UE-Turchia ha aperto la strada per altri accordi bilaterali, spesso posti margini del diritto europeo ed internazionale che, come per la dichiarazione, non seguono le normali procedure per l'adozione di accordi internazionali come il controllo parlamentare. Particolarmente noto è il Memorandum d'intesa tra Italia e Libia, che prevede il supporto dell'Italia nella formazione della cosiddetta Guarda Costiera libica per effettuare le missioni di ricerca e salvataggio, ma che di fatto sono spesso trasformate in operazioni di cattura e detenzione dei migranti, al posto della marina italiana.

Le relazioni tra Italia e Libia in materia di migrazione risalgono agli anni '90, quando i due Stati iniziarono una cooperazione volta alla lotta al terrorismo, alla criminalità organizzata, al traffico illegale di stupefacenti e di sostanze psicotrope ed all'immigrazione clandestina.

Nel 2007 i due paesi firmarono poi due protocolli volti a fronteggiare il fenomeno dell'immigrazione clandestina tramite il pattugliamento del Mediterraneo da parte della Libia con motovedette messe a disposizione dall'Italia. L'anno successivo i due firmeranno il Trattato di amicizia, partenariato e cooperazione volto a rafforzare gli sforzi nel contrasto ai flussi migratori verso le coste italiane.

A seguito della caduta del regime di Gheddafi nel 2011 e della conseguente guerra civile, le relazioni tra i due paesi si sono complicate anche a cause della proliferazione di gruppi armati e la frammentazione del potere sul territorio libico. Ciò ha reso ancora più difficile la gestione dei flussi migratori, con un aumento esponenziale degli arrivi di irregolari sulle coste italiane.

Nel 2017 si arriva dunque alla firma del Memorandum di Intesa, l'accordo con cui l'Italia e la Libia si impegnano ufficialmente a rafforzare la cooperazione, il contrasto all'immigrazione illegale e la sicurezza delle frontiere. Il Memorandum prevede, quindi, il potenziamento dei confini della Libia, la creazione di campi di accoglienza sul territorio (di fatto campi di detenzione) sotto il controllo del ministero dell'Interno libico, ed il supporto tecnico e tecnologico alla Guardia costiera libica tramite fondi, mezzi di pattugliamento e addestramento volti alla lotta contro l'immigrazione irregolare.

Attraverso il Memorandum, l'Italia trasferisce dunque il peso della gestione delle migrazioni alla Libia, finanziando quest'ultima per eseguire i respingimenti di migranti senza dover incorrere nella responsabilità di tali atti come successo nel 2012 con la sentenza Hirsi Jamaa, tramite la quale l'Italia era stata condannata dalla corte europea per aver violato la proibizione dei respingimenti collettivi e il principio di non-refoulement.

Come per la dichiarazione UE-Turchia anche il Memorandum è stato soggetto a numerose critiche basate sulla definizione della Libia come "paese sicuro". La Libia difatti non ha una legge sull'asilo ne ha ratificato la Convenzione di Ginevra sui rifugiati. Di conseguenza, tutti i cittadini stranieri, siano essi richiedenti asilo o migranti economici, sono incriminati per l'ingresso, il soggiorno o l'uscita illegale dal Paese, e puniti con la detenzione arbitraria a tempo indeterminato, senza alcuna tutela legale e spesso sottoposti a una serie di violazioni e abusi dei diritti umani, tra cui torture e altri trattamenti crudeli, inumani o degradanti, violenze sessuali e lavoro forzato. Nonostante ciò, con la Dichiarazione di Malta del 3 febbraio 2017, l'UE ha accolto con favore il Memorandum d'intesa, dichiarandosi pronta a sostenere l'Italia nella sua attuazione e di fatto permettendo alle guardie costiere libiche di intercettare uomini, donne e bambini e riportarli in Libia senza alcuna garanzia di protezione o rispetto dei diritti umani.

Alla luce di quanto discusso è evidente che il fenomeno delle migrazioni sia estremamente complesso e rappresenti inevitabilmente una sfida per gli Stati di tutto il mondo.
Nonostante le migrazioni siano un fenomeno antico quanto l'umanità stessa, che hanno permesso lo sviluppo culturale, economico e sociale di molte regioni del mondo, l'Unione Europea e gli stati membri continuano a considerare l'immigrazione unicamente in termini di contrasto ai flussi irregolari. Negli ultimi anni la strategia predominante è stata dunque quella di spingere sempre più i migranti da parte, secondo una logica di "lontano dagli occhi, lontano dal cuore" che invece di affrontare le cause profonde della migrazione mira a erigere muri intorno al mondo e ad esternalizzare le frontiere attraverso trattati con paesi terzi al fine di nascondere il problema senza risolverlo.
Le risposte a un fenomeno complesso e in continua evoluzione come la migrazione tuttavia non possono essere semplici o temporanee, ma richiedono una visione ampia e a lungo termine che tenga conto delle cause che spingono le persone a lasciare il proprio paese e ad affrontare viaggi drammatici e pericolosi nella disperazione.
Sebbene gli accordi con i paesi terzi abbiano certamente portato a una significativa diminuzione del numero di arrivi, è anche vero che il costo umano è stato devastante, causando sofferenza e perdita di migliaia di vite umane. Concludendo tali accordi, sia l'UE che l'Italia, hanno dunque attivamente partecipato alle violazioni dei diritti umani, andando contro i principi stessi su cui si basa l'Unione.
La crisi dei rifugiati mette dunque in pericolo non solo le vite e la dignità dei migranti, ma anche i valori fondamentali della comunità europea, inizialmente creata proprio nel tentativo di proteggere i diritti fondamentali delle persone dopo le atrocità della Seconda Guerra mondiale.

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