

The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?

Written by Delphine Nakache and Jessica Losier

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DELPHINE NAKACHE AND JESSICA LOSIER, JUL 25 2017

The current refugee crisis in the Mediterranean region is leading to proposals from some European Union (EU) Member States to establish asylum-processing centres outside of Europe, most probably in North Africa. This means that entry to Europe would only take place after a positive asylum decision has been made, and refugees would be resettled throughout Europe according to a quota system (Léonard and Kaunert, 2016). The idea is not new. It was first suggested by the United Kingdom in 2003, then taken over by Germany in 2005, and by Italy in 2007-2009. It is also directly inspired by the Australian model (the “Pacific Solution” (2001-2008) and “Operation Sovereign Borders” since 2013), under which all asylum seekers arriving by boat are intercepted and transported to detention centres in the Pacific island states of Nauru and Papua New Guinea (PNG), paid for by the Australian government, for health and security assessments. If found to be refugees, they remain there permanently, are resettled in another third country, or are offered temporary protection in Australia, but they never have the chance of being permanently resettled in Australia (Levy, 2010; Mackay, 2013; Pascouau, 2017).

Although Australia has, until now, not been found to be in breach of its domestic laws (High Court of Australia, 2016), there is substantial legal opinion that offshore processing of asylum applications violates states’ international obligations under the 1951 *Refugee Convention*, notably provisions on non-*refoulement* (art. 33) and on non-penalization for irregular entry (art. 31) (Carrera and Guild, 2017; Carter, 2016). In addition, the conditions of detention in Nauru and PNG’s refugee reception centres have long been criticized by the UNHCR and numerous international human rights organizations as being “inhumane”, “abusive”, and in violation of key essential international human rights protections (see for example, Amnesty International, 2013; UNHCR, 2015; Amnesty International and Human Rights Watch, 2016). And while the Papua New Guinean government decided in August 2016 to close all its detention facilities, Australia has not altered its offshoring processing policy with Nauru. In fact, the country now increasingly justifies its controversial policy as a means to reduce the number of deaths at sea and combat human trafficking (Archbold, 2015). [1]

The EU has not moved forward with any such proposals, at least until now. There are several “practical” reasons for this (such as, uncertainty as to which authority would be responsible for carrying out the processing of asylum claims in these third countries, or where the person would go after being recognized as a refugee – see Carrera and Guild, 2017). Most importantly, as the European Court of Human Rights has put it in various decisions impacting asylum seekers (ECtHR, 2008; ECtHR, 2012; ECtHR 2014; ECtHR, 2016) the EU’s legal responsibility does not stop at the EU’s physical borders. This means that EU Member States cannot avoid their responsibilities towards asylum seekers contracted under the *European Convention of Human Rights* (ECHR) by simply outsourcing their obligations. This, in and of itself, is a major distinction between Europe and Oceania, since the latter does not have a regional court equivalent to the European Court of Human Rights. At the same time, given “the less favourable socio-economic conditions and the relative lack of asylum expertise and reception capacities that characterise the countries where asylum processing centres could be established” (Léonard and Kaunert, 2016), it is hard to see how the EU would succeed in effectively monitoring what is happening outside of Europe.

While EU leaders are still unsure as to what should be done about the off-shore processing of asylum applications, it is important to note that the EU has increasingly ‘externalized’ its borders since the 1990s, especially through remote

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control policies (such as visa policies) and an extensive military and police presence that makes it difficult for the people who need international protection to reach EU territory (Ruhrmann and FitzGerald 2016, 5). A few years ago, the EU also entered into immigration agreements with Northern African countries such as Morocco and Tunisia, in order to reinforce these countries' capacities in the field of border management (in providing, for example, training and equipment to local border agents and coast guards) and to ensure that they will facilitate the return of their own national irregular migrants from Europe (the so-called "readmission agreements" – for more on this topic, see: Limam and Del Sarto, 2015; European Commission, 2013; see also EU-Morocco Mobility Partnership, 2013; EU-Tunisia Mobility Partnership, 2014). The EU is currently seeking to finalize similar agreements with Ethiopia, Mali, Niger, Nigeria, Senegal and has been actively trying to reinforce its collaboration with Horn of Africa countries (such as Djibouti, Kenya, Libya, Somalia and South-Sudan) to stem irregular migration to Europe (Netherlands Institute for Human Rights, 2017; Nielsen, 2016; OIM, 2014). But the recent deal with Libya illustrates that the long history of human rights abuse in some of these countries does not dissuade the EU from trying to reach its goal of reducing unwanted migration to Europe.

On the eve of the February 2017 EU summit in Malta, the President of the EU Council, Donald Tusk had promised the closure of the Central Mediterranean migration route into Europe (Toaldo, 2017). In line with this promise, the summit led to the signing of a *Memorandum of Understanding* between the Italian government and the new UN-backed Libyan government that aims precisely at "combat[ing] illegal immigration, human trafficking and contraband and [...] reinforcing the border security between the Libya State and the Italian Republic" (EU-Libya Memorandum of Understanding, 2017; see also ASGI, 2017). Despite Libya's instability (political power has been split in Libya between several rival governments and some of these governments do not recognize the memorandum as a "legitimate" agreement), the deal between Italy and Libya was endorsed by the EU in its *Malta Declaration* (see Council of the European Union, 2017).

The memorandum is a reiteration of the 2008 *Treaty of Friendship, Partnership and Cooperation*. The treaty, which was suspended in 2011 by the Italian authorities (see PERFAR, 2008; Watkins, 2011), already included an important section on Italy's financial support to Libya for migration containment – which led, for example, to Italy financing several immigration detention centres in Libya (Levy, 2010; Del Sarto, 2010; Global Detention Project, 2017). But the bilateral cooperation goes further this time, since Italy also promises to boost its financial and technical support to allow the Libyan Navy and Coast Guards to intercept more migrant boats in Libyan territorial waters and to improve health conditions in Libyan detention facilities where migrants will be sent once intercepted (*Memorandum of Understanding*, February 2017). Thus, while Italy's financial support to Libya was estimated in 2008 at approximately US \$30 million, it is now projected at US \$240 million (Merelli, 2017).

There are serious human rights concerns regarding the situation of migrants in Libya (Refugees International, 2017; UNHR and UNSMIL, 2016), and yet, the memorandum does not make any reference to the country's international legal obligations nor does it establish an *independent* monitoring mechanism. Libya is not party to the 1951 *Refugee Convention* and has no domestic law or procedure for considering asylum claims. According to legislation adopted under former Libyan leader Muammar Gaddafi, all individuals arriving in Libya without valid travel authorizations are deemed "illegal migrants" and must be locked in Libyan detention centres. The level of corruption among Libyan Coast Guards is very high (Transparency International, 2016), and migrants are regularly beaten, robbed and raped before being taken to detention centres (Amnesty International, 2014; Human Rights Watch, 2017; UNHR and UNSMIL, 2016; Toaldo, 2017). Once in detention, conditions are "inhuman, severely overcrowded and [unsanitary], without adequate access to toilets or washing facilities, food, or clean water" (UNHR and UNSMIL, 2016). Immigration detainees are regularly subjected to torture, harassment, physical violence (such as gunshot, knife injuries, along with many other visible wounds and head injuries), sexual exploitation and forced labour, with no formal registration, no legal process, no access to lawyers or any judicial authorities (see also Andrijasevic, 2006; Human Rights Watch, 2014; Peaceworks, 2016;).

In a press conference following the Malta Declaration, the President of the European Council advanced that the primary purpose of the declaration is to "help reduce the number of irregular migrants and save lives at sea" (European Council, 2017). Yet the scale of suffering at sea is only part of the perilous experience of migrants transiting through Libya. Those who are not subject to brutal detention and violent abuse at the hands of Libyan

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authorities and other criminal groups, often die crossing the Sahara (Kotsioni, 2016; UNHR and UNSMIL, 2016; UNDP, 2017; Merelli, 2017). As the United Nations High Commissioner for Refugees and the UN Support Mission in Libya have put it, “the situation of migrants in Libya is a human rights crisis. The breakdown in the justice system has led to a state of impunity, in which armed groups, criminal gangs, smugglers and traffickers control the flow of migrants through the country” (UNHR and UNSMIL 2016, p. 1). The proliferation of human smuggling and trafficking in Libya means that “migrants and refugees have become simply another commodity to be exploited in the broader resource predation carried out by armed groups that exercise effective control over the Libyan territory” (Micallef, 2017, p.vi).

Not only are the consequences for migrants considerable, but European states clearly fail in their stated objectives to reduce irregular migration since migrants’ massive human rights violations in Libya are one of the most important “push factors” for migrating to Europe. In other words, the fear for their lives is exactly what pushes migrants to try to cross the Mediterranean Sea as quickly as possible. According to recent data provided by the International Organization of Migration (IOM), the duration of stay of migrants in Libya before their crossing to Europe has drastically shortened in recent years and is now in many cases just a matter of weeks (Toaldo, 2017). This illustrates what many studies have consistently shown: that stricter border controls do not stop migrants from making the journey; it only makes their journey more dangerous (Bauman, 2002; Crépeau and Nakache, 2006; Nakache and al., 2015). Thus, not surprisingly, following the implementation of the 2016 EU-Turkey deal, which closed the eastern route of the Mediterranean Sea to Greece, an increasing number of migrants used the central Mediterranean route, which became the main itinerary to Europe in 2016, with more than 180,000 arrivals in Italy (Frontex, 2016; see also Amnesty International, 2017; Collet, 2016).

The 2017 Italy-Libya *Memorandum of Understanding* does not formally establish a “pushback” policy (i.e., intercepting migrants adrift in the Mediterranean and returning them directly to Libya, without first establishing their refugee status). This is what Italy did under the previous 2008 bilateral agreement, a practice ruled as illegal by the European Court of Human Rights in February 2012 (the ECtHR found that Italy was in breach of the ECHR prohibition of collective expulsion (article 4 of Protocol 4) and of the guarantees against refoulment (article 3) – see ECtHR, 2012). The new agreement is smarter, since pushback operations are now being transferred to Libyan authorities, which means that the Italian authorities will not bear direct responsibility for the overwhelming evidence of brutality against migrants in Libya. However, it remains to be seen whether Italy will be able to escape its indirect responsibility, under the *European Convention of Human Rights*, for the outsourcing of its migration responsibility to Libya. While only time will tell whether Italy holds such legal responsibility, under the European Court system, for putting the lives, rights, and dignity of migrants at risk, the EU’s current desire to circumvent international and regional law shows how low political dialogue has sunk and clearly betrays the values on which the EU was built. Evidencing the clear lack of political strategy and incentive when it comes to refugee protection, this agreement may “help to keep the problem out of sight and out of mind, but not to force it out of existence” (Bauman, 2002, p. 85).

As this article has shown, there are serious human rights concerns arising from the EU’s multilateral and bilateral efforts to foster cooperation with Libya in the field of migration. Before engaging Libya as a true partner in its “externalization” agenda, the EU must establish a mechanism that ensures an adequate assessment of individual protection needs and an independent oversight mechanism of the situation of migrant detention centres in Libya. If “grave abuses continue”, EU leaders must “be ready to suspend [their] training and cooperation in Libya” (Human Rights Watch, 2017). Italy’s unique geographic location at the coast of the Mediterranean Sea also provides an opportunity for the international community to criticize its dealings with asylum seekers trying to enter Europe by boat. But, clearly, Italy, like Greece, cannot be left alone to deal with the record number of migrants reaching their shores. A refugee quota plan was established by the EU in September 2015, but in December 2016, only 5% of its target for relocating refugees from Greece and Italy had been met (Rankin, 2016). Therefore, *all* EU Member states must do their due part in the process of reaching a more equitable sharing of asylum seekers’ responsibility. Because of the complex combination of both push and pull factors, it is also important to recognize that migration is likely to continue, despite growing mobility restrictions. Indeed, as the U.N. special rapporteur on the human rights of migrants rightly points out, the current repressive policies do not prevent migrants from arriving, they “serve only to create the perfect conditions for underground labour markets and smuggling rings to flourish” (Crépeau, 2017). Therefore, it is hoped that, in the longer term, EU leaders will develop policies and practices aimed at expanding the safe and legal ways in

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which migrants can reach Europe: this is the only means to save lives, reduce people smuggling, and ultimately restore the integrity of the asylum system.

Notes

[1] The decision by the PNG government to close its detention centres on the island of Manus was taken after the PNG Supreme Court ruled in April 2016 that the treatment of asylum seekers in Manus detention centre was “unconstitutional” (Supreme Court of Justice, 2016). Interestingly, in June 2017, the Australian government offered compensation totalling US \$53 millions to refugees detained in PNG between 2012 and 2016. While the Manus case was due to be heard in the Supreme Court of Victoria a few days later, Australia’s Immigration Minister indicated that it “strongly refutes and denies the claims made in these proceedings” (that is, that the 1,905 detained refugee claimants had suffered harm while in detention in PNG), but that, if the case had gone to trial, it would have cost “tens of millions of dollars in legal fees alone”. The Minister then concluded that this was a “prudent outcome for Australian taxpayers” (BBC, 14 June 2017).

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The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?

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The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?

Written by Delphine Nakache and Jessica Losier

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The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?

Written by Delphine Nakache and Jessica Losier

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The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?

Written by Delphine Nakache and Jessica Losier

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