

# **SORTING, CONTAINMENT AND EXPULSION: THE HOTSPOTS APPROACH WORKING FOR THE EU**

**ADVOCACY BRIEF  
FROM THE *MIGREUROPE* NETWORK**

**2019**

The devastating shipwrecks in the Mediterranean Sea in April 2015 and Europe's "unwillingness to take action" in response have highlighted the failure of European asylum and reception policies. Faced with this crisis of humanity and solidarity, the European Union (EU) should have opened its borders and fulfilled its responsibilities for sea rescue operations. Instead, however, the EU has opted to further strengthen its external borders by adopting the hotspot approach with a framework that gives strict priority to security considerations. The present briefing calls on the EU and its Member States to put an end to migration policies that trample on the rights of persons in exile and to end the hotspot approach as matter of urgency.

# Background and key issues

The mechanism widely referred to as the “hotspot approach” was set up in 2015<sup>1</sup> in order to strengthen border control and prevent all access to the European continent by identifying and sorting migrants immediately after they reach the shores of Italy or Greece and by sending them back from these places (refoulement), in breach of their fundamental rights. **Today, this contrivance constitutes the new “model” of governance for the “management and control of migration flows” on the external borders of the EU.**

Widely described as “facilities for the reception and first reception in member states situated on the front line”, the hotspots essentially represent an old idea that has been repackaged. It essentially involves creating internment camps at the gateways to the EU, which Migreurop called out in 2016<sup>2</sup>. This mechanism adds to the blurring of boundaries between reception and detention and contributes to maintaining a dichotomy between so-called economic migrants and asylum seekers, entrenching discrimination and leading to numerous violations of fundamental rights.

**More than three years after it was put in place, the results of the “hotspot approach” are truly devastating: thousands of person are being confined in sordid conditions that are in breach of the right to respectful and humane reception provided for in European law<sup>3</sup>, while others are held in a profoundly insecure status and others still face arbitrary expulsion.**

The *hotspot approach*, which has never been clearly defined, has been established on the basis of mere press releases from the European Commission setting out its key characteristics. The doctrine quickly took root as a means of implementing a relocation process put forward by the European Commission, in a context described as a crisis situation involving a “mass influx” of migrants. Relocation refers to a programme to redistribute those asylum seekers identified at the external border of the EU across the entire territory of the EU<sup>4</sup>. The *hotspot approach* - which given its link to the relocation process should have been a temporary measure - further destabilised the already weak and struggling systems for asylum and reception in Italy and Greece, exacerbating the crisis surrounding the right to asylum in Europe.

1 Decision (EU) 2015/1523 of the Council of 14 September 2015 and 2015/1601 of the Council, 22 September 2015

2 Migreurop Brief #4 (2016) Des hotspots au cœur de l'archipel des camps, disponible sur [http://www.migreurop.org/IMG/pdf/note\\_4\\_en.pdf](http://www.migreurop.org/IMG/pdf/note_4_en.pdf)

3 <https://www.cire.be/relocalisation-des-demandeurs-de-protection-l-imposture-de-la-solidarite/> (in French)

4 In the area of asylum and immigration, article 78, para. 3 of the TFEU states that the Council may, based on a proposal from the Commission, adopt provisional measures for the benefit of the Member State(s) affected by a “sudden” inflow.

# Reception conditions that are an infringement of human dignity

In Italy, the hotspots act as both centres of first reception and places of confinement in which migrants find they are locked up and deprived of their liberty for several days while identification and registration procedures are carried out. These individuals are then transferred either to reception centres (when they are registered as asylum seekers), or to deportation centres (when they are considered “economic migrants”). The holding conditions in these facilities, which were not initially designed for this purpose but have been adapted to this function by the Italian authorities, are in breach of the principle of respect for human dignity.

One example of this situation is the hotspot on the island of Lampedusa, which was closed in March 2018 for refurbishment works on account of the premises being ill-suited to accommodation of individuals, the state of disrepair of sanitary facilities, the absence of dining areas, overcrowded spaces for adults and children, etc.<sup>5</sup> Italian non-profits<sup>6</sup> condemned these living conditions and the violation of numerous fundamental rights, such as delays in recording requests for international protection and cases of arbitrary detention<sup>7</sup>.

In its 2018 report, the Italian authority in charge of safeguarding the rights of detained persons condemned the uncertain legal status of these facilities, which fulfil different functions and continuously change functions (shifting between reception and deportation centres). The hotspots sometimes serve as “holding centres” where people are interned while they await deportation procedures on account of their “irregular” situation<sup>8</sup>.

Although, in Italy, reception conditions may vary from one hotspot to another, in the five hotspots located in Greece, conditions have drastically deteriorated since the EU-Turkey agreement was signed. In these overcrowded camps, thousands of people are forced to live in tents or in container camps all year round – far from meeting the criteria for basic material conditions of reception provided for in European law. Some people wait for months, or even one to two years before being able to file a request for international protection. Since 2016, **several international and European bodies such as the Office of the High Commissioner for Human Rights of the United Nations<sup>9</sup>, the High Commissioner for Refugees (HCR)<sup>10</sup>, the European Union Agency for Fundamental Rights, the Council of Europe and the Committee for the Prevention of Torture<sup>11</sup> have denounced the numerous rights violations of migrants in the hotspots** including sexual abuse, limited access to lawyers and information, significant delays in processing requests, appalling reception conditions (lack of security and hygiene, forced lack of privacy), failed assessment of vulnerabilities, etc. At the end of August 2018, the HCR urged the Greek government to take urgent measures to rectify the situation of asylum seekers on the islands of Samos and Lesbos<sup>12</sup>.

The appalling and inhuman conditions in which migrants are received in Greece are not only due to a lack of resources; they are also the result of a political drive that seeks to deter others in need of protection from attempting to reach the European continent.

5 [https://rm.coe.int/16807b6d56;http://www.asylumineurope.org/sites/default/files/resources/rapporto\\_cie\\_cpr.pdf](https://rm.coe.int/16807b6d56;http://www.asylumineurope.org/sites/default/files/resources/rapporto_cie_cpr.pdf)

6 Chiuso l'hotspot di Lampedusa-CILD, ASGI e IndieWatch: Condizioni disumane e violazioni dei diritti umani, disponibile sur <https://www.asgi.it/asilo-e-protezione-internazionale/hotspot-lampedusa-diritti-minori/> (in Italian)

7 Pourtant la Cour Européenne des droits Yet the European Court of Human Rights had already found Italy guilty of illegally detaining Tunisian migrants and holding them in degrading conditions in the Lampedusa centre in 2011 and for illegally organising their collective deportation. (Case of Khlaifia and others v. Italy, application n° 16483/12).

8 This supervisory body was baffled by the hotspots which seemed on the one hand to have a humanitarian purpose in providing first aid, assistance, information and first reception for those asking for international protection and, on the other as places for identification procedures/photo-signalling and the initiation of forced deportation. *Garante nazionale dei diritti delle persone detenute o private della libertà personale, Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia*, available at <http://www.garantenazionaleliberta.it/gnpl/resources/cms/documents/6f1e672a7da965c06482090d-4dca4f9c.pdf> (in Italian)

9 <https://www.ohchr.org/FR/NewsEvents/Pages/MigrantchildreninGreece.aspx>

10 UNHCR redefines role in Greece as EU-Turkey deal comes into effect <https://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>

11 <https://www.coe.int/fr/web/cpt/-/report-to-the-greek-government-on-the-visits-to-greece-carried-out-by-the-european-committee-for-the-prevention-of-torture-and-inhuman-or-degrading-tr?desktop=false>

12 The UNHCR condemned the decrepit sanitation facilities, daily abuse and growing need for medical and psychosocial care due to the deteriorating health of the people held there <https://www.unhcr.org/news/briefing/2018/8/5b88f5c34/unhcr-urges-greece-address-overcrowded-reception-centres-aegean-islands.html>

# Arbitrary detention and breach of the right to liberty

The right to protection from arbitrary detention and the right to liberty<sup>13</sup> are two fundamental rights governed by international and national texts. Yet, in Italy, following identification and registration of their request for asylum, migrants who have not been able to leave the hotspot they are in, fall victim to arbitrary detention, without any oversight by the judicial authorities nor access to any effective remedy.

In 2016, Amnesty International<sup>14</sup> shone a light on one case of detention that was in breach of Italian legislation and the guarantees it provides regarding restrictions on liberties, which were actually being used as a means of exerting pressure to force migrants to provide their fingerprints.

For its part, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), finding that large number of foreign persons are being imprisoned for long periods, examined the legal basis for the deprivation of liberty occurring in Italian hotspots in its April 2018 report<sup>15</sup>.

**In Greece**, detention is almost systematic for migrants arriving on the islands after March 20 2016, regardless of their nationality, gender, age or vulnerability<sup>16</sup>. Holding people in detention in this way for periods of up to 25 days (with the exception of minors) is said to be necessary for their identification. Nevertheless, those affected are not told why they are being detained, nor is there any judicial oversight whatsoever regarding their detention. After this period, migrants are authorised to move freely outside the camp whether they have been identified or not, but they may not leave the island where camp is located. They thus remain trapped in what are effectively open-air prisons on the Greek islands until a final decision is reached regarding their application for asylum<sup>17</sup>. With numerous claims being brought against these measures of deprivation of liberty, the Greek Council of State decided in its ruling of 17 April 2018 to lift these geographic restrictions on movement, which it deemed illegal and discriminatory. The Greek government's response followed swiftly in the form of a decree re-establishing these geographic restrictions, meaning that the ruling by the supreme administrative court of Greece has had no effect.

13 Article 5 of the ECHR

14 Amnesty International, Hotspot Italy. How EU's flagship approach leads to violations of refugee and migrants rights, November 2016 <https://www.amnesty.org/download/Documents/EUR3050042016ENGLISH.PDF>

15 The report recommended the establishment of basic legal guarantees in order to reduce the risks of refoulement of migrants and condemned the detention of unaccompanied minors. In addition, Aida Italy, the Association for Legal Studies on Immigration (ASGI) called attention to 80 unaccompanied minors in a state of deprivation of liberty in the Tarente Hotspot in July 2017; some of them had been held since May 2017 alongside adults in a single tent surrounded by high wire fencing and guarded by soldiers of the armed forces - without a written detention order or information about how to apply for asylum. They had no way of communicating with the outside world. For 14 of the children appeals were brought before the ECHR and were deemed admissible by the Court which demanded a response from the Italian government by 14 May 2018 <https://www.coe.int/en/web/cpt/-/anti-torture-committee-publishes-report-on-its-visit-to-italian-hotspots-and-removal-centres>

16 On the island of Samos, the situation is different; here people wait for several hours on arrival so they can be registered and are then led straight to the camp once their registration is complete.

17 *Le système des « hotspots » en Grèce : une politique migratoire européenne à l'origine de violations massives des droits humains, Témoignage d'avocat-e-s belges en mission en Grèce*, Revue du droit des étrangers - 2017 - n° 194 (in French)

# A sorting policy that represents an infringement of rights

The European agencies EASO, Frontex, Europol and Eurojust each have a role to play in the hotspots that have been set up on the main entry ways into European territory<sup>18</sup>. Their teams identify migrants, take their fingerprints and quickly register them on arrival in order to distinguish those who need protection from those which Europe would rather «be rid of» quickly. Ostensibly to «alleviate» Italy and Greece, the EU has put in place a relocation procedure, which takes the form of compulsory distribution quotas of asylum seekers across different member states.

Sorting «economic migrants» from asylum seekers is essentially streaming on the basis of nationality and expeditiously carried out with no regard for the procedural safeguards provided for by the rules of international law. Nationality thus becomes the main criterion for access being granted (or denied) to the system of international protection. Those originally from Nigeria, Gambia, Senegal, Morocco, Algeria and Tunisia were found to have been registered as «economic migrants» during the identification process, and then prevented from accessing the scheme for international protection<sup>19</sup>. In most cases, these individuals were never able to obtain legal advice, or meet with lawyers, who might advise them of their rights or the possibility of appealing against decisions to deny their request.

We have found that, in the hotspots, the number of civil servants working for Frontex is far higher than the number of officers working for the EASO – the agency tasked with handling asylum. This discrepancy between the means allocated to identifying registering and taking fingerprints from migrants and the resources allocated to handling asylum procedures is significant; the purpose of the hotspot approach is largely to stop secondary movements of migrants within member countries of the EU and ensure their effective return, rather than ensuring protection for those men and women who may need it.

By prioritising the streaming and identification of migrants over and above their protection, and coming under pressure from the European Union, **Italy has even committed acts of torture or inhuman and degrading treatment during operations to take fingerprints from migrants arriving on its shores**, in violation of article 3 of the ECHR. Amnesty International decried the situation in its 2016 report<sup>20</sup>.

<sup>18</sup> The EASO or European Asylum Support Office is responsible for screening and contributes to the processing applications from those directed towards an asylum procedure as quickly as possible. Frontex coordinates the return of those individuals who do not need. Europol and Eurojust provide their assistance to dismantle smuggling networks.

<sup>19</sup> They were subject to a differed expulsion order and placed in detention centres (when places were available). Aida Report, Country report: Italy 2017, available at <https://www.asylumineurope.org/reports/country/italy>

<sup>20</sup> <https://www.amnesty.org/download/Documents/EUR3050042016ENGLISH.PDF>

# Restricted access to asylum procedures

Among the many rights that are trampled on in the hotspots is the right to apply for asylum and to receive full and comprehensible information regarding the legal status of those affected. Yet, legal assistance, which is provided for in European law, is indispensable in order to prevent refoulement at the border and in order to fully exercise the right to request international protection.

**According to observations recorded by the La Cimade**, it is the border police that registers asylum seekers following summary interviews carried out with the support of experts from Frontex, sometimes in the presence of cultural mediators. This is a breach of Italian law which states that the admissibility and analysis of each request for international protection falls under the exclusive jurisdiction of the Italian Territorial Commissions. La Cimade further notes that, in certain cases, these interviews were carried out immediately after disembarkation, when the asylum seekers are physically exhausted after long, frequently violent, journeys. The absence of interpreters also has significant repercussions on their access to asylum procedures<sup>21</sup>.

**In Greece**, NGOs have continued to denounce a complex, vague and discriminatory system of procedures operating inside the Greek hotspot<sup>22</sup>. Migrants do not enjoy the rights guaranteed under what is known as the Asylum Procedures Directive<sup>23</sup>, such as systematic interview, with the presence of an interpreter, or assistance from a social and legal support worker. On the contrary, they may spend long periods of time in the camp without receiving any information about the asylum procedure or their rights in a language that they understand<sup>24</sup> - apart from the information provided by the NGOs in the field. Even when they do finally get an appointment for an interview, the interview date may be set for one or possibly even two years in the future!

**The lack of legal information and limited access to lawyers, the significant delays in recording and processing asylum applications, the inadequate assessment of vulnerabilities and the questionable role of European agencies inside the hotspots clearly represent a breach of the provisions set out in European Directives<sup>25</sup>.**

21 According to La Cimade, the form used by the Italian police has five options ("work," "joining family," "fleeing poverty," "asylum" and "other reasons") which are used to categorize migrants during their interview. According to this report, "asylum" features last in the list and on a separate section on the initial forms (Foglio notizie), furthermore, the way "asylum" is mentioned in the interview is not clear.

22 La Cimade, *L'approche hotspot : l'Europe en faillite sur les îles grecques* - <https://www.lacimade.org/lapproche-hotspots-leurope-en-faillite-sur-les-iles-grecques> Gisti, Accord UE - Turquie : la grande imposture, juillet 2016 <https://www.gisti.org/spip.php?article5454> (both in French)  
23 Directive 2013/32/UE of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

24 Norwegian Refugee Council, Oxfam, International Rescue Committee, The Reality of the EU-Turkey Statement : How Greece Has Become a Testing Ground for Policies That Erode Protection for Refugees, 17 March 2017, p. 3, <https://www.oxfam.org/sites/www.oxfam.org/files/bn-eu-turkey-statement-migration-170317-en.pdf>

25 *Le système des « hotspots » en Grèce : une politique migratoire européenne à l'origine de violations massives des droits humains, Témoignage d'avocat-e-s belges en mission en Grèce*, Revue du droit des étrangers - 2017 - n° 194 (in French)

26 According to the conclusions of the European Council of June 2018, the number of arrivals plummeted by 96% compared to 2015, <https://www.consilium.europa.eu/en/meetings/european-council/2018/06/28-29>

27 According to the project put forward by the European Commission, the purpose of these controlled centres that have been set up in Member States situated on the external borders of the EU is to stream migrants and asylum seekers arriving across the Mediterranean in order to then transfer them to another Member State (which would then undertake their care) or take action to deport them as quickly as possible. It is noteworthy that his mechanism seems to be a formal and across-the-board extension of the hotspot approach and raises the same questions as regards respect for the procedural guarantees and fundamental rights (notably access to information and legal advice), deprivation of liberty, identifying and protecting vulnerable persons and the removal of persons who are not eligible for asylum. See European Commission, Managing migration: Commission expands on disembarkation and controlled centre concepts, 24 July 2018, [https://europa.eu/rapid/press-release\\_IP-18-4629\\_en.htm](https://europa.eu/rapid/press-release_IP-18-4629_en.htm)

28 Regulation (EU) N°604/2013 of the Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

## A sign of the failure of European “solidarity”

Despite the compulsory nature of the relocation plan and according to data from the European Commission, as of 30 October 2018 just 12,706 people had been relocated from Italy, out of a total number of 34,953 who should have been resettled from this country; in Greece, just 21,999 people had been relocated of the target number of 63,302. The relocation plan initially provided for European states to admit 160,000 people seeking protection from Italy and Greece (this commitment was scaled down in 2016 to 98,000 people)<sup>26</sup>.

## The EU continues to pursue its rationale of sealing off borders and multiplies mechanisms for controls

The hotspot approach – initially intended to be a temporary measure – has been maintained despite the very considerable fall in the number of arrivals on European soil since 2016. Judging by the conclusions of the European Council of June 2018<sup>26</sup>, it is actually due to be bolstered, with plans to create “controlled centres” very similar to what the hotspots are today<sup>27</sup>. The fact that one year later this project has still not been implemented, does not make it any less of an illustration of the expressed intent of the European Commission and the European Council to make a mechanism which, as the hotspot approach has shown, is wholly incompatible with respect for the right of asylum and the principle of non-refoulement a permanent feature.

The “Dublin III Regulation”<sup>28</sup> unfairly shifts the burden of responsibility for handling asylum applications onto the first countries of entry into the EU and has contributed to the collapse of the systems in place for reception already barely able to cope, at the expense of migrants’ rights. Instead of relieving the countries on the southern border of Europe, the hotspot approach seems to have been designed only to deter migrants from coming to Europe; reducing the flow of migrants takes priority over everything else, notably matters relating to respect for individuals’ fundamental rights.

## Migreurop’s position

In light of the number, nature and recurrence of the violations that have been observed, **the hotspot approach to which these violations are inextricably linked must be terminated as a matter of urgency. Adherence to the international commitments undertaken by Member States require them to guarantee respect for the fundamental rights of all those arriving on European territory**, regardless of their migration status, in particular, the right to dignity, the right to freedom to come and go and the absolute right to not be subjected to torture or to inhuman or degrading punishment or treatment.

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# **THE EXTERNALISATION OF THE EUROPEAN UNION'S IMMIGRATION AND ASYLUM POLICIES**

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In order to keep migrants as far away as possible from the physical area under its control, the European Union (EU) has, since the early 2000s, pursued a policy of externalisation. This policy has led the EU to outsource management of migratory movements to so-called third countries (countries of origin or transit countries), without concerning itself with the consequences that this has for migrants themselves.

By means of subsidies, the EU and its Member States offload the obligations otherwise incumbent upon them by virtue of the international conventions they have ratified onto non-European countries. The goal is twofold: to facilitate forced returns and to stem migration at the source. This approach involves negotiating the return of migrants with countries of origin and/or transit, as well as multiplying the barriers to entry to prevent migrants reaching their destination or even their points of departure.

To achieve its goals, the EU has established a number of frameworks for multilateral cooperation: the Cotonou agreement in 2000; the Rabat process with West African countries in 2006; the Khartoum Agreement in 2014 with the countries of the Horn of Africa; more recently the Euro-African Summits (the last one was held in La Valletta (Malta) in 2015 and saw the creation of the Trust Fund for Africa in order to «tackle the underlying causes of migrations»); and sometimes for bilateral cooperation (between the EU and/or its Member State and the so-called third countries concerned).

## I. Understanding the concept of externalisation

For the EU, this means

– shifting procedures relating to border control off its own territory  
**(externalisation/offshoring)**

– having “third” countries take on all or part of the responsibility for a series of tasks it is duty-bound to fulfil by virtue of its international commitments  
**(externalisation/non-accountability)**

## II. The tools that make externalisation possible

### Operational tools

#### 1. VISA POLICY

Increasingly sophisticated and restrictive visa policy effectively moves the borders of EU member states to consular and embassies.

The keeping of electronic registers is now systematic through the gathering and recording of biometric data of each individual submitting a request for a visa. Since 2011, these data together with the fingerprints and head shots of individuals applying for a visa have been included in the European Visa identification system (VIS).

#### 2. EUROPEAN LIAISON OFFICERS

In addition to the **immigration liaison officers (ILO)** seconded by Member States to so-called third countries (of origin or transit) to facilitate the exchange of information regarding flows of irregular migration and itineraries used, there are also **aerial liaison officers**, who are assigned to foreign airports in order to carry out supplementary checks to those performed by the authorities of the so-called third country before boarding begins for a flight bound for Europe. Since 2017, **liaison officers from the European agency known as Frontex** have been deployed in Turkey (Ankara), Serbia (Belgrade) and Niger (Niamey), where they are tasked with border control and analysing the «migratory risk» on behalf of the EU.

#### 3. INTERCEPTIONS AT SEA

– *Frontex* : another boost to the agency's remit and resources (human, technical and financial) is planned for 2019, with a view to further securing Europe's borders and to more effectively deterring migrants and those seeking protection from reaching the bloc. However, rather than making it possible to save lives, the agency known as Frontex has actually introduced additional risks for persons in situations of migration. Its border control operations contributed to deviating migrant routes, which have become more dangerous and deadly as a result, and to cutting off people seeking to reach the EU further and further from the border, meaning that they are exposed to rights violations in countries from which they cannot escape. Since its creation Frontex has been exempt from any kind of independent scrutiny, and there is no effective mechanism that would allow it to be held to account in the event of human rights violations.

– *"Pull-back at sea"*: performed by EU partner countries as a way of establishing migration controls, in exchange for financial compensation.

– On the Mediterranean side, with Italy has closing its ports to rescue vessels, Libya has seen vast increases in its intervention capacity thanks to financial and logistical support from the EU and its Member States, Italy foremost among the list of donors. Although Libya is in any way a safe place, it now runs a search and rescue zone (SAR) and a coordination centre for sea rescues. Its coastguard - when it does respond to distress calls at all - behaves violently during maritime interceptions, putting lives in danger when it is supposed to be coming to people's aid and saving them from drowning. The individuals it "rescues" are then sent back to their point of departure and confined to camps in inhuman and undignified conditions against a backdrop of civil war.

1 <http://news.trust.org/item/20181026131801-1t7he/>

2 European Commission, Communication to the European Parliament, the European Council and the Council, "Managing Migration in All its Aspects : Progress under the European Agenda on Migration", Brussels, 4 December 2018, COM (2018) 798 final

- The same shirking of responsibility can be seen in Spain - which, in 2018, became the country with the highest number of arrivals on account of routes to Italy being cut off (Italy-Libya Memorandum of Understanding, 2017) - and Greece (EU-Turkey agreement, 2016). **Neighbouring Morocco** is encouraged to be Europe's constable, policing its own borders in order to protect Spain's and keep those migrants deemed undesirable at a distance. According to a hitherto unseen strategy aimed at "reducing migratory pressure", the Spanish Salvamento Maritimo now has the authority to disembark some of the migrants it rescues in what can only be considered refoulement operations - a flagrant contradiction of European and international law. But the EU wants to go further still. By establishing «regional disembarkation platforms» in the North African countries it hopes to screen migrants upstream of European waters and territory. Faced with the (perhaps provisional) refusal of Tunisia, Morocco and Algeria, the European Commission seems to have dropped this approach, claiming that these platforms were no longer on the agenda "and never should have been"<sup>1</sup>. This back-peddling, however, has been short-lived: the EU institution recently announced that "regional arrangements" had been agreed to stem migrant movements in the north, with Egypt potentially becoming a very useful ally.

## Political tools: agreements with so-called *third countries*

The EU has entered into many agreements with "third" countries in order to hinder migratory movements. Some of these are formal agreements (Community Readmission Agreements), others are informal (with Turkey, Libya, Afghanistan, Niger).

### 1. INFORMAL AGREEMENTS

With 17 readmission agreements signed between EU and the "third" countries, in addition to various bilateral agreements, we are now seeing a shift in the legal form the EU is choosing for such agreements. Rather than "formal" readmission agreements, which are adopted according to the rules set out in the treaties, the fashion is now for "declarations", "agreements" or "readmission arrangements", which include "detailed operational arrangements", whose goal is said to be "practical problem-solving"<sup>2</sup>.

#### ***The EU-Turkey statement (March 2016)***

One of the best examples of this new form of readmission is the agreement between the EU and Turkey, presented as a "joint statement" adopted on March 18 2016. According to this, all migrants arriving on the Greek islands from March 20 2016 onwards, including asylum seekers for whom Turkey is considered a safe third country, can be sent back to Turkey. For each Syrian sent back to Turkey another Syrian is supposed to be resettled in Europe from Turkey ("the 1:1 principle"). In addition, Turkey must ensure that it prevents any new migratory routes to Europe being opened from its territory. In exchange, the EU has undertaken cover the cost of the reception of Syrian refugees in Turkey (six billion Euro for the "facilities to support refugees in Turkey"), accelerate liberalisation of the Visa regime for Turkish nationals; and open a new round of negotiations for Turkish accession to the EU.

3 Report by AEDH, EuroMed Rights, FIDH, LDH: "Turkey, Human Rights Under Curfew", May 2016 – Available at: <https://euromedrights.org/turkey-human-rights-under-curfew/>

4 Amnesty International: "La Turquie renvoie des réfugiés syriens en Syrie", 1st April 2016 – (in French) Available at: <http://www.dw.com/fr/amnesty-la-turquie-renvoie-des-r%C3%A9fugi%C3%A9s-syriens-en-syrie/a-19158930>

5 Human Rights Watch: "Turkey: Border Guards Kill and Injure Asylum Seekers", 10 May 2016 – Available at: <https://www.hrw.org/en/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>

This statement, made public in a simple press release from the European Council, announced ambitious cooperation with the Turkish neighbour, seeking to "break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk".

As a result of this "statement" of March 18 2016, refugees have been pushed outside the borders of the EU, in breach of the principle of non-refoulement enshrined in the Geneva Convention.

In addition, in giving its approval to the return to Turkey of all migrants and asylum seekers whose applications have been deemed inadmissible, the EU has indicated that it considers Turkey to be a "safe" country. But a large number of NGOs have challenged this classification<sup>3</sup>, in light of the repressive environment that prevails in Turkey (muzzling and criminalisation of political opposition and any form of protest, detention of journalists, academics and lawyers who are likened to and treated as terrorists).

They also condemn the violation of the principle of non-refoulement<sup>4</sup>, and the serious violence against asylum seekers occurring on the Turkish borders .

### ***Italy Libya Memorandum of understanding (February 2017)***

A Memorandum of understanding between Italy and Libya was adopted on 2 February 2017 in order to ensure logistical support (provision of equipment: helicopters, patrol vessels, etc.) and financial support from Italy and the EU to the Libyan coastguard. In exchange the latter are to undertake operations for intervention at sea. Sometime prior to signing this memorandum, the Italian parliament adopted its law on the state budget for the financial year 2017 and the pluriannual budget for the three-year period 2017 to 2019, doing so on 11 December 2016. The very first article, in paragraph 621, provides for the creation of a fund for 200 million Euro, as part of the budget of the Ministry of Foreign Affairs and International Cooperation for the year 2017 with the purpose of "relaunching dialogue and cooperation with African countries", identified as priority countries for reasons of migration (departure and/or transit countries). By means of decree 4110/47 of 28 August 2017, €2.5 million from this fund has been earmarked for the transport and upgrading of Libyan surveillance vessels.

Thus, as Italian ports were being closed off, responsibility for maritime rescue was being delegated to Libya, itself in thrall to pandemonium. Europeans have continued to cooperate with a failed state in the name of migration control despite the numerous warnings on the fate of migrants coming from both international institutions and non-governmental organisations. Despite these warnings, no action has been taken to put an end to cooperation with Libya.

### ***Joint Way Forward UE-Afghanistan (October 2016)***

Over a period of just a few months, the EU-Turkey statement of March 18 2016 became the model for the EU's policy of externalisation of its borders. In a press release on June 7 2016 (COM/2016/0385), the European Commission lauded its merits stating that "its elements can inspire cooperation with other key third countries and point to the key levers to be activated".

In this way, the arrangement between the EU and Afghanistan, which was signed in October 2016, modelled itself on this example with a view to facilitating the return of migrants to this country while it is still at war. This informal agreement provides no specific guarantee as to the obligations of the contracting parties regarding respect

<sup>6</sup> The European travel document was instituted by Regulation (EU) n° 2016/1953 of the European Parliament and of the Council of 26 October 2016, OJ L 311 of 17 November 2016

for the fundamental rights of people affected by its implementation (notably returnees who have had their asylum applications rejected). Furthermore, it is broadly responsible for expediting the deportation of thousands of people to Afghanistan. In fact, the “joint way forward” allows EU countries to charter unscheduled flights to Afghanistan. A document annexed to this agreement, which was not published, features an “operational plan” providing for 10,000 “returns” per year (including forced and those known as “involuntary” returns). The agreement also stipulates that “special measures” will ensure that vulnerable groups (such as isolated minors) shall receive “protection assistance and adequate care throughout the process”. It also provides for the use of the European travel document (or *laissez-passer*). Part II of the agreement entitled “Facilitating the return process”, stipulates that all Afghans who are sent back to their country of origin must be in possession of a valid travel document. If the person being sent back does not have a valid passport, the Afghan authorities shall have four weeks to issue a consular travel document. Alternatively, if the Afghan authorities fail to respond within the four-week period, if the receiving Member State has evidence of the individual’s nationality it may issue an EU travel document (European *laissez-passer*)<sup>6</sup>.

## **2. DEVELOPMENT BLACKMAIL: THE EU-NIGER PARTNERSHIP**

Although for a long time Niger was overshadowed by its Libyan neighbour which had the special attention of the EU during the era of Col. Gaddafi and sat on the margins of negotiations over migration control, Niger is today at the heart of European policies on the matter.

In exchange for an international political guarantee and €140 million allocated by the Trust Fund for Africa, Niger’s main mission is to, on behalf of the EU, curb intra-regional migration – supposedly bound for Europe –, by “anchoring” populations in the country’s zones of departure and by facilitating repatriations from or to neighbouring countries. Despite the risk of destabilising part of the subregion, Niger, a transit country has thus come to embody the security-based approach and discourse of the EU, becoming a barrier country by deterring and criminalising migration. All of this has taken place in a region that has instituted free movement across its area (ECOWAS protocol) and despite the fact that the “transit economy” represents a key economic resource for the country’s population.

# III. The consequences of externalisation

7 <https://digitallibrary.un.org/record/1641963?ln=en>

The ramifications of these various forms of externalisation have been fairly well documented in terms of the fundamental rights violations of migrants that they engender. While these violations occur at the hands of third countries and are not committed directly by Member States or the European Union, they are nevertheless the direct consequence of constraints imposed upon these countries in order to meet the objectives of European immigration and asylum policy. This is notably the case when it comes to the right to leave one's own country, the principle of non-refoulement, the right to asylum, the right to life, the prohibition of inhumane and degrading treatment, crimes against humanity, imprisonment and the rights of the child. Member States and the EU shall not therefore be blameless as regards their objective responsibility in breaches of these rights.

As highlighted by the Special Rapporteur of the Human Rights Council in her report on extrajudicial, summary or arbitrary executions delivered to the General Assembly of the United Nations on 15 August 2017<sup>7</sup> :

*“ – To avoid mass migration across their borders, some States are relying on the policy of extraterritoriality to stop migrants before they reach their territory or come within their jurisdiction or control. Such policies may include assisting, funding or training agencies in other countries to arrest, detain, process, rescue or disembark and return refugees or migrants. These policies raise serious concerns when the recipient agencies or States are alleged to be responsible for serious human rights violations, including violations of the right to life.”*

*“ – By financing and training the very agencies that commit these abuses, funding States are potentially aiding and assisting loss of life. [...]”*

*“ – Funding initiatives to transit countries where human rights violations are endemic must be aimed at enhancing protection and must not aid or contribute to known violations in the name of migration or border control.”*

## Migreurop's position

The “external dimension” or in other words the externalisation of European immigration and asylum policies has reached unprecedented scale. The repeated, systematic and widespread violations of even the most basic rights, such as the right to life, the prohibition of inhuman or degrading treatment and non-refoulement, amongst others, have become commonplace. For this reason, respect for the human rights of persons in situations of migration must urgently be restored to their rightful place at the core of European policies. In order to allow civil society to fulfil its role, agreements with countries outside the EU must be subject to real transparency and democratic controls.

Finally, European and national bodies must be held accountable. Following the example of the ruling from the Permanent Peoples' Tribunal held in Paris in 2018, there is good reason to characterise their role in applying migration policies in general, and externalisation in particular, as complicit in committing crimes against humanity.

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