



Policy Briefs

May 2017

***The EU external policy on migration and asylum:
What role for Italy in shaping its future?***

Anja Valentina Palm

The present document is one of the outcomes of a research conducted by the Observatory in cooperation with the International Institute of Humanitarian Law, with the financial support of the Italian Ministry of Foreign Affairs and International Cooperation.

ABSTRACT

This Brief analyses the EU's external policy on migration and asylum and the trend of externalizing migration control to neighbouring countries. It highlights how the current pro-active momentum in EU policy represents a chance for Italy as a frontline country to direct on-going discourse towards long-term and protection-sensitive solutions.

Throughout the last years, and in response to the increase in flows entering European soil via the Eastern and Central Mediterranean routes, the EU has strengthened its attempts to reduce entries by externalizing migration control instruments and concluding agreements with neighbouring countries such as Turkey. More recently, Italy has resumed its cooperation with Libya signing a bilateral memorandum, which has been immediately endorsed and reinforced by the EU.

In doing so, to a certain extent an old externalization and securitization approach has been replicated, which has long demonstrated its shortcomings if not counterbalanced by protection and cooperation instruments. The lack of a long-term cooperation perspective, the inability of partners to provide for the security and proper treatment of migrants on their territory, the absence of intra-EU solidarity and the lack of differentiation of flows are just some of the problematic aspects such approach has been criticized for.

This Brief calls upon EU Member States, with a special emphasis on Italy and other frontline countries, to advocate for a common European external asylum and migration policy which moves away from securitization and externalization towards real cooperation with its neighbourhood and a protection-sensitive entry system. Concrete suggestions are formulated, aimed at reconciling the legitimate focus on border security with the safeguard of fundamental values and with the need to attain long-term results.

© Anja Valentina Palm (2017)

The Series "Policy Briefs" of the Observatory discusses in a synthetic and policy-oriented manner the current topics in the European debate, offering a contribution to the decision makers and to the community of experts and stakeholders. The views expressed in the Briefs are the views of the author and must not be deemed as representing the official or general position of the Observatory or of the University of Pisa.

Suggested quotation:

A.V. Palm, 'The EU external policy on migration and asylum: What role for Italy in shaping its future?', *Policy Brief*, May 2017, Observatory on European Migration Law, Pisa (<http://migration.jus.unipi.it>).

Observatory on European Migration Law

Policy Brief

May 2017

THE EU EXTERNAL POLICY ON MIGRATION AND ASYLUM: WHAT ROLE FOR ITALY IN SHAPING ITS FUTURE?

Anja Valentina Palm¹

1. Introduction: 2017, a precious occasion for fostering policy changes

Italy has long been at the frontline of external migration policy: a role that reflects its spirit of innovation and humanity, but also forcibly imposed by its geographical location at the external border of a Union that has not been able nor willing to bring forward a common policy. This has earned Italy both criticism and applause, and has made it a key figure in proposing new approaches to tackle the challenges determined by the migration influx that has been increasing since the outbreak of uprisings and civil wars in the European neighbourhood in 2011.

Following the EU-Turkey deal and the closing of the Balkan route, which have turned Italy once again into the main first country of entry, the government took on a particularly proactive role in 2016, culminating in the *Migration Compact* proposal. The change of government as well as of the Interior and Foreign Affairs ministers have not altered this approach: migration is still the top political priority, and between the end of 2016 and the start of 2017 there has been an increased dialogue in its southern neighbourhood (with a particular focus on Libya) concerning irregular migration and the fight against human smuggling.

2016 was also a fundamental year as far as external migration policies at the EU level were concerned: the conclusion of the EU-Turkey deal, the New Partnership Framework and the European External Investment Plan, together with the establishment of the European Border and Coast Guard Agency.

This pro-active *momentum* of European external policies can nevertheless lead towards diametrically different outcomes: either the reaffirmation of the externalisation and securitisation approach, or the first step towards a long-term protection sensitive system. The question consequently is how Italy can fuel and direct policy discourse towards long-term solutions in the midst of an ever-deteriorating European integration crisis. Indeed, the migration challenge has been identified by many as a fundamental catalyst for an unprecedented European governance crisis, which is threatening the European project: in this perspective, the erection of fences and walls in Eastern Europe and the re-

¹ Junior Researcher, Italian International Affairs Institute (IAI) and TEPSA; email: anja.palm@kcl.ac.uk.

introduction of temporary border controls in a number of key European countries merely represent a physical manifestation.

This historical moment, where the attention to borders and migration is at the centre of political debate, hides great potential and should consequently be proactively used to finally achieve an effective governance of migration flows towards Europe and a higher degree of security, while at the same time ensure access to international protection for those in need.

2017 is a year which sees Italy at the centre of the international stage as a chair of both the G7 and the OSCE Mediterranean Group: these opportunities should be taken to promote innovative proposals to develop a protection-sensitive migration management system which allows for a better control of European external borders and lives up to our international obligations.

As it is not foreseeable that the migration challenge will ebb in the next century, the elaboration of a long-term response represents a challenge that Europe cannot afford to ignore.

And Italy, which has long been in Europe's migration frontline, both geographically and politically speaking, could take up a crucial role. A careful mix of experimented practices and principled innovations is urgently needed, and Italy has every interest in promoting their adoption.

2. Analysing the current policy context

a. A long history of externalisation and securitization?

Throughout the last decades, the European Union has increasingly recognized the external dimension of migration policy to be crucial in its relations with third countries.² In the context of the *Global Approach to Migration*, first published in 2005, a great number of agreements have been concluded with States located along the main migratory routes.³ **In what has been defined as the 'externalisation of migration control', the EU has increasingly outsourced tools of border control to third countries** and 'externalized the barriers against irregular migratory movements to areas outside the physical territories of the States or of the whole of the European Union', creating a 'buffer zone' and integrating third States into the EU border control apparatus.⁴ Agreements with third countries have been focusing mainly on joint police operations and the enhancement of migration control instruments through funding and capacity building of the border control ability of countries of origin and transit. Another priority has been identified in the conclusion of readmission agreements, as to ensure the return of any irregular migrant through accelerated procedures and presumptions, which often risk coming at the cost of asylum and human rights protections.⁵

² For the evolution of the EU's external policy, see C. Boswell, 'The 'External Dimension' of EU Immigration and Asylum Policy', *International Affairs* (2003) Vol. 79, No. 3, pp. 619-638; S. Lavenex, F. Schimmelfennig, 'EU Rules Beyond EU Borders: Theorizing External Governance in European Politics', *Journal of European Public Policy* (2009) Vol. 16, No. 6, pp. 791-812.

³ Since 2011 the *Global Approach to Migration and Mobility*: European Commission, [Communication on the Global Approach to Migration and Mobility](#), COM (2011) 743 final, 18.11.2011.

⁴ Consiglio Italiano per i Rifugiati, [Access to Protection: Bridges not Walls](#), 10.2014, p. 12.

⁵ M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *International Journal of Refugee Law* (2008) Vol.18, pp. 601-629.

In order to incentivize third States to enter such agreements, the principle of conditionality has started to shape the EU's external relations since the early 2000s, both through the means of individual agreements and the platform of the *European Neighbourhood Policy*.⁶ This has determined the identification of cooperation on migration control by the third country as precondition for a profitable partnership and the deployment of development and other support initiatives by the EU.⁷

Additionally to the externalisation of migration control, the focus of EU external migration policy has been predominantly on strengthening external borders and combating irregular migration, reflecting the security concerns of Member States.⁸ Consequently, harmonization at the EU level has long been concentrated on locking down the Schengen area and intensifying migration and border control, without counterbalancing with adequate human rights protections. The development of 'integrated border management' has enhanced border control cooperation both at the external level, strengthening the capacity of neighbouring countries, and at the EU level through increasing centralization (see Frontex and the naval operations Triton and EUNAVFOR MED's Sophia) and the recent acceleration which has led to the establishment of a reinforced European Border and Coast Guard.

Even long before the migration 'crisis' was conceived as such by the European Union, Italy had been at the frontline of external migration policies, both because of its geographical location and its political activism aimed at solving the growing influx at its shores. The relations between Italy and Libya are a paramount example of such policies. Indeed, since 2000 there have been numerous agreements aimed at stopping migration flows departing from Libya's shores coupled with readmission agreements, such as the 2004 one in which Italy outsourced tools of migration control to Libya, financing 'structures meant to contrast irregular migration flows towards Italy'. The 2007 Protocols have further promised the training and funding of Libyan coastguard operations in exchange of Libya's efforts to 'fight irregular immigration'; measures further reinforced in the 2008 'Treaty of Bengasi' and in some amendments to the 2007 Protocols agreed in 2009.⁹ The undifferentiated returns that have been put in place on the basis of these agreements have been heavily criticized by human rights organisations and earned Italy a condemnation by the European Court of Human Rights.¹⁰

The collapse of these forms of cooperation due to the outbreak of the 2011 civil war has not hindered the shift back to this policy approach in 2017, choosing Fayez al Serraj's Government of National Accord as an interlocutor, notwithstanding its inability to secure sufficient political stability and the territorial control necessary to ensure the implementation of its promises.

⁶ S. Blockmans, 'The ENP and 'More for More' Conditionality: plus que ça change...', in G. Fernández Arribas, K. Pieters and T. Takács (eds.), *The European Union's Relations with the Southern-Mediterranean in the Aftermath of the Arab Spring*, CLEER Working Papers, No. 2013/3 (2013), pp. 53-59.

⁷ In that sense see: C. Tabur, 'Renewed Inter-institutional (Im)balance after the Lisbon Treaty? The External Dimension of the EU's Migration Policy', *Perceptions* (2013) Vol.18, pp.13-32, E. Collett, 'EU cooperation with third countries: rethinking concepts and investments', *Forced Migration Review* (2016) Vol.1, pp. 40-42; S. Prestianni, *Steps in the process of externalization of border controls to Africa, from the Valletta Summit to today*, ARCI, 06.2016.

⁸ D. Wunderlich, 'Towards Coherence of EU External Migration Policy? Implementing a Complex Policy', *International Migration* (2013) Vol. 51, pp. 26-40.

⁹ For a more detailed analysis of Italy-Libya relations see: N. Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean', *Bulletin of Italian Politics* (2009) Vol.1, No.1, pp. 125-133.

¹⁰ *Hirsi Jamaa and others v. Italy* (App. No. 27765/09) ECtHR [GC] Judgment of 23 February 2012.

b. The 2015-2016 biennium: have we gone any further?

The escalation of a number of conflicts in the European neighbourhood, including the ones in Syria and Libya, has determined a steady increase in migration flows, also due to the breakdown of previous externalisation agreements, such as the one between Italy and Libya. The rise in sea crossings from North Africa to Italy, Malta and Greece since 2011 have turned the Central Mediterranean Route into one of the most travelled and deadliest access ways to Europe, underlining the strategic importance of the North African region and highlighting how the EU cannot avoid cooperating with it.

Nevertheless, the attention to the migratory challenge has increased only as a consequence of the 2015 unprecedented peak in flows through the Western Balkan route into Northern European countries previously protected through the Italian-Greek 'buffer zone', leading to the crisis of the Schengen area's governance.

Consequently, and after decades of Member States' restraint, the discussion on migration policies has increasingly been raised to the supranational level. **This boosted dialogue has determined a range of proposals, concerning both internal burden sharing and an expanded common response at the external level. Due to the dramatic failure of the former, there has been an increased focus on the latter, putting cooperation with third countries to stop the flows high on the agenda, with a particular focus on Turkey.** Ankara has been identified as the main partner for immediate action due to the extremely high flows into Greece from its shores and its geographical position, which makes it the main entry gate to Europe from the East.

Following the 'success' of the deal in decreasing flows from Turkey, the proposal to extend such approach to other States along migratory routes to Europe has been increasingly voiced. Whilst many have argued that the deal cannot be flagged as having a favourable outcome, due to a high number of controversies that have emerged as to its compliance with European values and legal obligations,¹¹ for policy-makers the reduction of entries seems to prevail over humanitarian concerns. Further, many have remarked on the disproportionate level of attention and policy interventions dedicated to Turkey, and have demanded that the EU's external migration policy also tackles other regional settings interested by the flows. Indeed, whilst the November 2015 summit in Valletta between European and African Heads of State and Government had initially given hope for a new global approach, aimed at addressing root causes in Africa, enhancing legal migration and fostering protection, these expectations were not met due to the lack of actions following the promises, and the scarcity of the *EU Emergency Trust Fund for Africa* compared to the sums promised to Turkey.

Italy is one of the countries that has taken a strong position in promoting the need to extend and further develop such approach addressing States along the Central Mediterranean route, particularly in the North African region.¹² In April 2016, former Prime Minister Renzi proposed the so-called *Migration Compact* to the European Commission and to the Council.¹³ This policy document refers to how reinforced cooperation with countries of origin and transit is fundamental to the strategic management of migration flows, and how the EU-Turkey deal must not be a unique event but should be 'exported' also elsewhere to avoid an unbalance of resources and

¹¹ For an analysis of the flaws of the EU-Turkey deal see e.g.: S. Carrera, E. Guild, [EU-Turkey plan for handling refugees is fraught with legal and procedural challenges](#), CEPS, 10.03.2016; S. Peers, [The final EU/Turkey refugee deal: a legal assessment](#), EU Law Analysis, 18.03.2016.

¹² See e.g. Il Fatto Quotidiano, [Migranti, Alfano: 'Ok accordo Ue-Turchia, fare lo stesso con la Libia'](#), 21.04.2016.

¹³ Italian Government, [Migration Compact: Contribution to an EU Strategy for External Action on Migration](#), 15.04.2016.

political capital compared to other geographical areas not less impacted by the phenomenon.

As a response, the Commission has presented the *New Partnership Framework*, an overarching framework for tailor-made partnerships ('compacts') with third countries, which can be of different nature: from technical and legal agreements, to political memoranda for cooperation.¹⁴ In relation to the New Partnership Framework, the Commission has also published the *European External Investment Plan*, which aims at representing a framework for investment support in third countries, bringing together efforts from various organs of the EU, Member States and the private sector.¹⁵

These documents represent a joint European effort to build an external asylum and migration policy framework, and to finally address the African continent, in a more coordinated way. Niger, Nigeria, Senegal, Mali and Ethiopia have been identified as priority countries, and consequently, throughout the last months, they have been object of high-level visits by Commissioners and political leaders along with technical experts aimed at gaining an understanding of their priorities and willingness to collaborate.

Whilst it is clearly productive to attempt to establish a single framework for an EU-Member States joint approach, it is nevertheless disappointing to see how **most aspects of the 'innovative external migration policy', for which the EU-Turkey deal and the New Partnership Framework stand, essentially represent a practical implementation of the externalisation and securitisation approaches examined above.**¹⁶

Whilst some statements look interesting at a first glance (such as the declared will to foster dialogue on the strengthening of third countries' asylum systems and the generic openness to a discussion on legal avenues to reach the European soil), they nevertheless seem devoid of a genuine political will to put them into practice.

Indeed, a closer look at the policy documents and their first implementation clearly shows that the EU firstly heavily links back to the outsourcing of migration control, as financial and logistical support is oriented towards third countries' border control and migration management efforts. Secondly, the conditionality approach emerges even stronger from these instruments, due to the express reference to positive and negative incentives in development and trade policies bound to readmission agreements and migration management contained in the New Partnership Framework. Lastly, there is also a strong emphasis on the securitization approach, mentioning returns, border controls and the containment of migrants in the area of origin and transit as priorities.

Further, whilst acknowledging the success of the EU-Turkey deal in substantially 'closing' the Balkan route, the humanitarian and protection costs that come with this cannot be ignored, and these are clearly not sufficiently addressed in the recent European documents. Also, its legal nature and even more the question of attribution of

¹⁴ European Commission, [*On Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration*](#), COM (2016) 385, 07.06.2016.

¹⁵ European Commission, [*Strengthening European Investments for Jobs and Growth: Towards a Second Phase of the European Fund for Strategic Investments and a New European External Investment Plan*](#), COM (2016) 581, 14.09.2016.

¹⁶ For a critical analysis of the NPF see: Joint NGO statement ahead of the European Council, [*NGOs strongly condemn new EU policies to contain migration*](#), 29.06.2016; European Association for the Defense of Human Rights (AEDH), [*The obsession with migration. Or how the Commission wants to create new 'partnership frameworks' with third countries, by using all European policies to "protect" the EU from migrants*](#), 27.06.2016; P. Fiorilli, [*'New partnership framework with third countries': The Commission's three basic mistakes*](#), Euractiv.com, 09.06.2016.

responsibility is controversial, as the recent ECJ judgement demonstrates.¹⁷ Using it as a blueprint for relations with third countries is consequently highly questionable.

Concluding, both the EU-Turkey deal and the New Partnership Framework in most of their aspects substantially replicate the EU's trend of focusing on hampering migratory flows from entering its territory and containing them elsewhere, instead of addressing root causes, creating effective legal access to the Union and providing for adequate reception and protection of people in need. This is confirmed also by the Commission's implementation reports,¹⁸ which list return, identification missions, talks on readmission agreements and the reduction of flows of irregular migrants as examples of the policy's success. The European response further fails to recognize the fundamental objective of establishing relations with third countries which are truly bilateral and consequently risks failed cooperation in the long-term.

The limited innovative spirit of the New Partnership Framework has also been noticed by Italy, which has criticised it for being a poor replication of the Italian Migration Compact, affirming that it could even possibly have a countereffect due to its strong conditionality and the lack of the long-term approach that the Italian initiative had attempted.¹⁹ Voicing concerns over the reaction by African partners, Italy highlighted how, despite the presence of some conditionality and exchange mechanisms also in the Migration Compact, these were conceived in logic of creating occupation and development in countries of origin in order to stem push factors. In this perspective, the Renzi government had not only increased cooperation funds and created a *Fund for Africa* of €200 million, but also paid numerous visits to African countries to reinforce bilateral economic and political relations.²⁰

Particularly worrying is, nevertheless, the complete absence of credible proposals concerning the opening of legal migration channels both at the European and the Italian²¹ level in this biennium of increased attention to external migration policy. This represents a major failure, as there is a strong need for a shift in the EU's approach towards the understanding of the essentiality of regular alternatives to effectively stem irregular entries.

c. Early 2017 developments

As arrivals from the Central Mediterranean route have not decreased as a consequence of these joint actions, and, on the contrary, in 2016 Italy even reported a 15% increase in arrivals compared to 2015,²² Rome has decided to once again step forward on its own, engaging on the one hand in long-term relations and investments, being aware of the need of a structural approach in its southern neighbourhood, and on the other hand in decreasing flows in the short-term, as to immediately address raising public discontent.

¹⁷ The Court affirmed that the EU-Turkey deal is not to be considered an act of an EU institution but of its Member States in *Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v. European Council*, 28.02.2017.

¹⁸ European Commission, *Second Progress Report: First Deliverables on the Partnership Framework with third countries under the European Agenda on Migration*, COM (2016) 960 final, 14.12.2016 (further see *Annex 2*); European Commission, *Third Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*, COM (2017) 205 final, 02.03.2017.

¹⁹ In that sense see e.g. D. Giovinazzo, *Migration Compact, Calenda: proposta Ue non c'entra nulla con quella italiana*, *Eu News*, 07.07.2016; J. Massarenti, *Mario Giro: «Con il suo migration compact, la Commissione UE allontana l'Europa dall'Africa»*, *Vita International*, 23.06.2016.

²⁰ N. Pirozzi, 'Section 9: Sub-Saharan Africa', in E. Greco, N. Ronzitti, *Rapporto sulla politica estera italiana: Il governo Renzi, Edizione 2016*, 07.2016.

²¹ With the remarkable exception of the humanitarian corridors: see below, § 3.b.

²² Compare: IOM, *Flows to Europe 2015* and *Flows to Europe 2016*.

This twofold approach is nevertheless often not coordinated, and risks resulting in contrasting outcomes.

Whilst aiming at cooperating with multiple countries in the southern neighbourhood,²³ Libya, being the main departure country to Italy (accounting for more than 90% of departures), has once again been chosen as key interlocutor.²⁴ By the end of September 2016 there was already talk about a Maritime Rescue Coordination Centre and the EU started training the Libyan coastguard, and in early 2017 that cooperation sharply intensified.

The Gentiloni-Serraj memorandum of understanding signed on February 2nd 2017 is presented as the basis for a new phase of cooperation on irregular migration and human trafficking.²⁵ The memorandum not only revitalizes the heavily criticized 2008 agreement (in particular, Article 19 concerning the Italian and EU financing of Libyan border control to fight irregular migration), but it also expressly identifies the control and substantial shut down of Libya's Southern border (representing the main access point for Sub-Saharan migrants) as key objective of the collaboration. In order to stem flows, Italy promises training, funding and technical support such as satellite-supported communication infrastructure, but also the upgrade and funding of temporary reception camps entirely managed by the Libyan Interior Ministry for migrants waiting to be (voluntarily) returned to their country of origin.

Worryingly, whilst funds and medical assistance are promised, the overall issue of the human rights record of these sites is not even mentioned, as well as measures capable of mitigating the risk of violations (such as access for lawyers, NGOs, UNHCR, IOM or even for Italian officers) or the promotion of an adequate Libyan asylum system. Further, if the financing of different sectors (renewable energy, education, transport, infrastructure, etc.) to stem push factors is mentioned, it is still to be seen how much of the €200 million of the Italian Fund for Africa will be devolved to development instead of securitisation, the reinforcement of external borders to stem irregular flows being the fund's main objective.²⁶

In immediate response to this boosted dialogue, and following supportive statements by both Germany and particularly Malta, the Commission presented its contribution to the European Council 2017 Valletta summit, by proposing a package of measures to support the Italian initiative.²⁷ The document suggests the allocation of €200 million from the *EU-Africa Trust Fund* to be offered in exchange of Libya's efforts in managing migration flows by increasing the control of its territorial and maritime borders. Welcoming the Commission's proposal, the Malta Declaration *Addressing the Central Mediterranean route* – adopted at the informal meeting of 27 members of the European Council on 3 February 2017 – reiterates Italian and European commitments to strengthen borders, train Libya's coast and border guard and even mentions the possibility of joint operations to disrupt smuggling.²⁸ This policy choice has been strengthened further by

²³ See the agreements with [Tunisia](#) and, most recently and importantly, [Niger](#).

²⁴ UNHCR, [Italy Sea Arrivals Dashboard, January – December 2016](#), 31.12.2016.

²⁵ Italian Government, [Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana](#), 02.02.2017.

²⁶ Ansa, Migranti: [Alfano, 200 milioni al Fondo per l'Africa per stop alle partenze](#), 02.02.2017.

²⁷ European Commission, [Joint Communication to the European Parliament, the European Council and the Council: Migration on the Central Mediterranean route. Managing flows, saving lives](#), JOIN (2017) 4 final, 25.01.2017.

²⁸ European Council, [Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route](#), 03.02.2017.

an agreement between Libya's tribes reached at the end of March in Rome, which promises the monitoring of Libya's southern border.²⁹ Paradoxically, it is exactly the tribes in the South that have been in conflict over the last years regarding the control of smuggling routes, the latter representing an increasingly profitable business for them.³⁰

A somehow more holistic approach (at least in the rhetoric) seems to emerge from the first meeting of the new *Central Mediterranean Contact Group* on March 20th, which reunited EU Commissioner for Migration Dimitris Avramopoulos and Interior ministers from Italy, Austria, France, Malta, Germany, Slovenia and Switzerland as well as representatives from Algeria, Tunisia and Libya.³¹ This meeting, additionally to highlighting the importance of a coordinated Euro-Mediterranean action, indeed mentions the need to tackle root causes of migration, to contribute to the socio-economic development of countries of origin and transit and to ensure the wellbeing of asylum seekers and refugees. Nevertheless, in terms of concrete actions, it focuses on the first operational steps regarding the patrolling of Libya's coast by Italian-trained and equipped local coastguard officials and the pushback of those intercepted to local camps (generally assuring that this will take place 'in respect of their human rights').

Overall, these policy choices risk to result in a bipolar approach: whilst the importance of long-term projects tackling root causes is increasingly recognized and voiced, immediate actions are excessively focused on measures to stem flows without providing alternative access to protection. This results in a shift back to the concepts of externalization of migration control and securitization – exactly those aspects that Italy had so heavily criticized the EU's New Partnership Framework for. References such as 'supporting where possible the development of local communities in Libya [...] to improve their socio-economic situation' are extremely vague and clearly insufficient in the context of documents primarily focused on securitizing Libya's borders and preventing departures. No mention is made of increasing Libya's asylum capacities, alternative legal avenues to access Europe, the monitoring of reception camps, or even prospects for migrants pushed back towards Libya's Southern neighbours.

If some first results of these policies can be observed in the increase of people intercepted at sea by the Libyan Coast Guard (3.387 in the first three months of 2017, an increase of over 20% compared to the same period in 2016),³² there is great uncertainty as to if Italy's ambitions of a future migration cooperation with Libya will become real. Just recently the Tripoli Court of Appeal decided to temporarily suspend the effects of the Italian-Libyan memorandum of understanding on the basis of a lawsuit which questions both the authority of the Al-Serraj government to conclude such deal and the legitimacy of push-backs to the Libyan soil.³³ Similarly, the National Tebu Assembly rejected the outcome of the Rome agreement between Libyan tribes stating that the Tebu signatories were not truly representative of the community and that Italy was interfering in Libyan internal affairs.³⁴ Adding to this, Al-Serraj also already retraced his steps on the memorandum;³⁵ but also if he were convinced, his government is at present clearly incapable of ensuring sufficient territorial and executive control outside the capital.

²⁹ G. Longo, [Libia, le tribù del Sud siglano la pace e si impegnano a bloccare i migranti](#), La Stampa, 02.04.2017.

³⁰ Frontex, [Africa-Frontex Joint Intelligence Report](#), 04.2017.

³¹ Italian Government, [Migranti, il Gruppo di contatto per la rotta del Mediterraneo centrale diventa stabile](#), 20.03.2017 (including: [Gruppo di contatto, dichiarazione di intenti](#)).

³² UNHCR, [Libya: rescue at sea, monthly update](#), 03.2017.

³³ Libyan Express, [Tripoli Appeals Court suspends Libyan-Italian MoU temporarily](#), 22.03.2017.

³⁴ Libyan Express, [Tebu body rejects Rome deal with Tuareg and Awlad Suleiman](#), 06.04.2017.

³⁵ The Jordan Times, [Libya PM Sarraj accuses EU of reneging on migrant pledges](#), 11.04.2017.

Additionally to these implementation issues,³⁶ there is further the question as to this policy's congruity with European values and legal obligations. If the promotion of a replication of the EU-Turkey model elsewhere is already highly debatable, it is even more so concerning Libya, where there is an on-going civil war and where innumerable reports concerning systematic violations of (migrant's) fundamental rights have been published.³⁷ If the deaths in the Mediterranean Sea receive significant media attention, the considerably higher mortality rate along the migratory routes through the Sahara desert and in Libya itself is generally ignored.³⁸

Therefore, whilst at a first glance this policy might appear as a positive step, being the first joint European project that supports Italy's external policy-making in the Mediterranean and which prioritizes the southern neighbourhood, a realistic assessment of these solutions reveals that they are quite meagre if not even worrying.³⁹ Indeed, this approach seems to replicate a logic of shifting border control to other countries, far away from the sight of European public opinion and the reach of European lawyers and courts: a testimony of the lack of willingness to differentiate flows and provide real protection for those in need of asylum?

If border control and migration management are understandable objectives, and indeed fundamental to ensure internal security, these cannot come at the cost of EU fundamental rights. It is now well established that the liability for violations of the fundamental principle of *non refoulement* applies also outside the physical borders of Europe,⁴⁰ it can also not be the mere transfer of border control operations to third countries to determine a complete absence of responsibility of the financier and supporter of these actions. So as not to be in violation of international and European law, border control externalization must go hand in hand with the externalization of certain forms of international protection, meaning the creation of legal access channels. As will be emphasized later, policy considerations (in terms of effectiveness, long-term sustainability and return of investments) and legal arguments should therefore suggest a different approach. Indeed, the long-term objectives are currently being put at risk by the short-term policies conceived as the sole responses to mounting public pressure.

d. The more the better? The funding landscape

The increasing centrality that the migratory challenge has gained at the EU level has not only caused a rise in the total funds devoted to migration and security,⁴¹ but also a proliferation of instruments.

Taking the Libyan case, the EU funds various programmes through a number of channels, from 'classic' ones such as the European Neighbourhood Instrument (ENI) and the Instrument contributing to Stability and Peace (IcSP), to the *ad hoc* programme the EU-Africa Trust Fund (EUTF for Africa). According to the Commission the EU currently

³⁶ In this sense also see T. Abderrahim, A. Knoll, [The EU's migration cooperation with North Africa: will the carrot and stick approach work?](#), ECMPD Talking Points blog, 03.2017.

³⁷ See e.g. [Human Rights Watch](#), [OHCHR](#), [Amnesty International](#). There are further reports regarding migrants trading in [slave markets](#) and [torture episodes](#) in Libyan camps.

³⁸ According to the North Africa Mixed Migration Hub [Survey Snapshot Italy January 2017](#), according to the interviewees, 44% of reported deaths occurred in Libya, 38% in the Sahara desert and 'only' 15% in the Mediterranean sea.

³⁹ For an analysis of different scenarios for EU migration policy in Libya and its effects see: ACAPS, [Refugee/Migrant Crisis in Europe: Scenarios](#), Special Report, 04.2017.

⁴⁰ Hirsi Jamaa (n.10); Jaloud v. Netherlands (App. No. 47708/08) ECHR [GC] Judgment of 14 November 2014.

⁴¹ According to the [European Council](#) for the 2017 budget an 11.3% increase compared to 2016 has been foreseen.

provides around €120 million in bilateral support to Libya, of which €50 million go to 'migration-related projects' and €10.8 million are spent for humanitarian aid purposes (including support to internally displaced persons and refugees). Further, the EUNAVFOR Med Sophia Operation provides training to Libyan coastguard officials, and the EUBAM programme, with an annual budget of €17 million, assists Libyan authorities in border management. Adding to this, the Council has recently agreed to devote an additional €3.7 billion to European Investment Bank projects in third countries addressing root causes of migration and the needs of transit and host communities, as well as the launch of various programmes under the EUTF for Africa.

Whilst it is a positive sign that there is an increasing attention to the region and its development and stability needs, **the outcome of this multiplication of funding instruments and objectives risks to be a confusing and fragmented picture.** With the positive exception of the EUTF for Africa,⁴² it is indeed highly difficult for external observers to get the picture both of the total amount (due to cases of re-counting/re-allocation of funds) and of the single projects the money is spent for, being the instruments established under several policy fields and responding to different priorities.⁴³ This issue has also been raised by a recent European Parliament resolution, which criticizes the lack of transparency and underlines the need for a detailed overview of the numerous EU and MS funding programmes in external migration action. Further, the EP has challenged the increased use of *ad hoc* instruments (or, as defined by the Committee on Budgets, 'satellite budgetary mechanisms'), as they nullify the EP's control function and the unity of the budget.⁴⁴

Another critical pattern that has been followed by the EU is the '**comprehensive approach**' rhetoric (or the 'migration-development' nexus), which affirms that investing in development curbs migratory flows to Europe. Whilst the positive effect of development support on stemming migration to the EU is often over-estimated (as experts suggest that, at least in the short-term, a raise in income would actually further increase emigration),⁴⁵ this approach is further problematic, as it **lends itself for abuse.** Indeed, in practice the migration-development rhetoric has often resulted in the 'redirect[ion of] development instruments towards migration, thus diverting [them] from other priorities'.⁴⁶ A particularly striking example emerges from the latest figures on international development aid: whilst 2016 has seen an increase in development funds compared to 2015 (\$142,6 billion against \$131,6 billion), this increase is mainly due to infra-EU refugee reception costs being accounted (for a total of 10.8% of total ODA).⁴⁷ The 4% decrease in funds for least developed countries between 2015 and 2016 indeed demonstrates that it is not the mere increase in total funding to be indicative of the use that will be made of it. To this adds the EU's inclination to condition development assistance to migration curbing efforts by third states (as analysed in section 2 a), which contrast the *EU Consensus for Humanitarian Aid* guidelines, according to which

⁴² See the European Commission, [The EU Emergency Trust Fund for Africa, 2016 Annual report](#).

⁴³ L. Den Hertog, [Money Talks: Mapping the funding for EU external migration policy](#), CEPS Paper in Liberty and Security in Europe, No. 95, 11.2016.

⁴⁴ European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action [2015/2342(INI)]. A similar position had already been expressed by the EU Court of Auditors in the [Special Report No 9/2016: EU external migration spending in Southern Mediterranean and Eastern Neighbourhood countries until 2014](#), 03.2016.

⁴⁵ U. Dadush, M. Demertzis and G. Wolff, [Europe's role in North Africa: development, investment and migration](#), Brugel Policy Contribution No. 10/2017.

⁴⁶ EP resolution of 5 April 2017, § 76.

⁴⁷ C. Barbière, [La crise migratoire bouleverse l'aide européenne en 2017](#), Euractiv.fr, 11.04.2017.

‘humanitarian objectives must remain separate from political, economic, military or other objectives’.

The current European external migration action funding landscape consequently falls short on the aspects of coordination, transparency and coherence, revealing how not necessarily more means better, and calling for a restructuring of the current framework allowing for greater monitoring and coordination. Further, the tendency of the past to prioritize the security dimension of migration should be replaced by a stronger focus on legal migration, and a development policy not merely functional to the reduction flows.

In **Italy** there is even less access to data on the instruments and objectives of the 2.3% (€320 million) of the total budget allocated to migration related projects. **From the little readily accessible information⁴⁸ it appears that the bipolar attitude in confronting migration challenges** that has emerged in 2017 – aiming on the one hand at calming public opinion providing short-term fixes, and on the other at responding to the growing understanding among policy makers on the necessity to find long-term solutions – **is also reflected in the funding.** Indeed, if the rhetoric underlines the importance of long-term relations with partners and according to governmental sources Italy strongly invests in the stability of the neighbourhood and the Sahel region, publicly reported actions mostly reflect the short-term concerns. Indeed, additionally to the abovementioned agreements with Libya (with no details available as to the amount the Italian government promises to disburse), €50 million have been pledged to Niger at the end of March for border management and migration control operations, and will be conditioned to the reduction of flows.⁴⁹ Further, Foreign Minister Alfano openly affirmed that the goal of the €200 million Italian Fund for Africa is to ‘stop irregular migration flows’, underlining how ‘the reinforcement of third states’ borders indirectly reinforces the EU’s borders’.⁵⁰

3. Identifying critical points and recommending the way forward

The abovementioned approaches, which have been adopted both by Italy and, especially, by the European Union in its external migration policies, presents a number of severe issues which must be addressed in the near future in order to develop a long-term strategy that fulfils the objectives of managing migration whilst also ensuring protection to genuine asylum seekers and the respect of the EU’s human rights obligations.

The following section, dividing the matter into two overarching pillars – political and legal –, highlights how the lack of a long-term perspective and a multi-focal approach in external policy as well as the deficiency in intra-EU solidarity endanger the political dimension, and how the current status quo represents a legal challenge for the international protection system.

a. Political challenges: the lack of a long-term perspective and a multi-focal approach in the external dimension and of a common solidarity-based approach in internal policy

⁴⁸ Sources: institutional websites of the Ministry of Interiors and the Ministry of Foreign Affairs, Corte dei Conti, national and European press.

⁴⁹ C. Bertini, [*Dall'Italia 50 milioni al Niger per rinforzare le sue frontiere in chiave anti migranti*](#), La Stampa, 01.04.2017.

⁵⁰ Ministero Affari Esteri, [*La sfida della cooperazione, Alfano: la priorità è l'Africa*](#), 25.03.2017.

In terms of external relations, **the lack of a long-term perspective in tackling migration issues is one of the greatest concerns regarding a policy choice based on externalisation and securitisation.** The excessive focus on stemming numbers and shifting the burden elsewhere indeed addresses symptoms instead of causes and demonstrates a lack of permanent strategies of cooperation, which would by far be more beneficial for all interested parties. Outsourcing migration control in contexts of political and economic instability can also easily backlash and possibly result in exposure to diplomatic pressure (or political blackmailing) by third countries involved in the partnerships.⁵¹ Forcibly closing the Central Mediterranean route has high chances to result in a further deterioration of the current situation, worsening the humanitarian crisis in Libya possibly fuelling further instability and conflict and the opening of alternative (and more dangerous) routes.⁵² Lastly, sustaining third countries in their border and migration management efforts is nothing new: from EUBAM to a number of dialogues with Africa (from the 2000 Cotonou Agreement, to the 2006 and 2014 Rabat and Khartoum Processes) these approaches have never demonstrated to be particularly effective in reducing migratory flows.

Furthermore, **there is the risk of losing credibility at a global level, a risk which is particularly evident when there is an unbalance in identifying partners and allocating support:** this is the case concerning EU-Turkey relations, which have been perceived as being prioritized and funded far more in comparison to EU-Africa ones. The disappointment of many African governments is further fuelled by the long practice of not following up on promises with real actions, which has been causing mounting mistrust. Against this problematic background, it is very risky to exercise strong pressure on these countries to deliver results in terms of reduction of flows, as much as it can be dangerous to identify migration management as core goal to the detriment of other objectives.

The EU also needs to realize that it is not the sole player and possible partner in the region, and that putting forward excessive requests without counterbalancing them with interesting advantages for the partners can create further distance instead of bringing partners closer.⁵³ Indeed, other global actors such as China, Russia and the Gulf countries have increasingly focused their investments in the African regions challenging the EU's role as key partner, and operating through different strategies, less imprinted on conditionality and democratic State-building.⁵⁴

Another critical point is that, by clearly attributing more importance to migration management instead of access to protection, and by concluding agreements with countries which cannot ensure that human rights are effectively upheld, **the EU is losing its position in the world as human rights promoter and role model, and consequently also its political leverage on relevant topics in other countries.** It is indeed practically impossible for the Union to guarantee the full respect of fundamental rights of migrants and people in search of protection when it outsources control to third countries. This adds to the fact that, as a consequence of externalisation, recourse to EU human rights mechanisms is legally restricted and practically impossible.⁵⁵ These issues are even more

⁵¹ F. Pastore, *The Migration and Asylum Crisis as a Transformative Shock for Europe. Brief Thoughts on the Eve of the Next Summit*, IAI Working Paper 15|34, 09.2015.

⁵² See 'Scenario 3: Enforced closure of central Mediterranean route' in ACAPS, *Refugee/Migrant crisis in Europe: Scenarios*, 04.2017.

⁵³ M. Savino, 'Immigrazione e sicurezza: due paradigmi', in V. Militello, A. Spena (eds.), *Il traffico di migranti: Diritti, tutele, criminalizzazione* (Giappichelli, 2015).

⁵⁴ See e.g. B. Tsegay, *The Impact of China on Western's Policy towards Africa*, *HornAffairs*, 12.01.2017.

⁵⁵ F. Crépeau, *Regional Study: Management of the External Borders of the European Union and its Impact on the*

problematic in the case of Libya, where the new deal foresees strong cooperation with national police and border guards, which have a dreadful record of violation of migrant's rights, and where the country is not even a signatory State of the Refugee Convention.

In order to avoid these potentially negative outcomes in the Union's external relations, **it is firstly critical to shift away from an ego- or EU-centric approach towards a better understanding of partner's priorities, in order to conclude fair and balanced agreements that can survive temporary discrepancies.**⁵⁶ The recent EU-Turkey diplomatic crisis indeed demonstrates how the deal fails in laying a basis for real cooperation, and instead further fuels pre-existing mistrust and discontent, leading to a deterioration of the relation. In that sense, it is not only crucial to deeply comprehend the needs and aims of partner countries, but also to more broadly investigate on the effects that policies can have on all the stakeholders, both directly and indirectly impacted, starting from migrants and partner countries, but also extending to neighbouring countries as well as smuggler's networks. Also, the incapacity to grasp local realities and the complexity of flows is reflected in the logic of picturing them in an oversimplified manner as indistinctively aiming at Europe's shores; this results in the inability to realize how the externalisation approach also negatively affects infra-African (labour) migration, resulting both in ineffective (if not even counterproductive) migration management and in a potential violation of the ECOWAS right to free movement.⁵⁷

Secondly, **to maintain (and rebuild) the EU's position as international human rights promoter and credible global actor, high attention must be paid to the choice of partners and to the projects agreed upon.** From this perspective, and also because its financial possibilities are limited, the EU should mainly draw on technical support, training and trade incentives when counterbalancing its requests. This would indeed be more coherent with the long-term aim to address root causes, investing in the EU's Southern and Eastern Neighbourhood's stability and growth. Accordingly, efforts should be focused on State-building and stabilization of countries along the migratory routes to Europe, instead of on merely boosting their migration control capacity.

Thirdly, **policy coherence should replace conditionality:** if a more comprehensive approach to migration is indeed a crucial achievement, the real step forward would be a shift away from conditioning development support to migration control towards a deeper analysis of policy coherence. This would require an extensive assessment of the impact of a range of external policies (such as trade and agriculture) and of the role of international actors (including the private sector) on development and migration.⁵⁸

Lastly, as it cannot be simply assumed that third countries will be able (and willing) to provide reception and protection to migrants, and even more, that these would fulfil European standards, **the EU should use the opportunity of this enhanced interaction with third countries to promote the amelioration of their protection and reception systems.** The aim must be to support them in the construction of durable legal and

[Human Rights of Migrant](#), A/HRC/23/46, 24.04.2013, p.14.

⁵⁶ EEAS, [Review of the European Neighbourhood Policy](#), JOIN (2015) 50 final, 18.11.2015.

⁵⁷ See: F. Molenaar, F. El Kamouni-Janssen, [Turning the tide. The politics of irregular migration in the Sahel and Libya](#), CRU Report, 02.2017.

⁵⁸ In this sense see e.g. L. Kamel, [L'Europa e le sue tribù](#), *Huffington Post*, 11.04.2017; A. Stocchiero, *Per un Migration Compact in stile Italiano*, CESPI, 03.2017; CESPI, [Le relazioni tra Ue e Africa dopo il 4° Vertice del 2-3 aprile 2014](#), *Osservatorio di Politica Internazionale*, No. 102, 10.2014, p. 24.

structural solutions – but in order to do so, the EU first needs to represent a positive example itself, both when acting on its territory and abroad.

Concerning the internal dimension, **the lack of a common approach and readiness to engage elsewhere represents the main obstacle to an effective external migration policy.**⁵⁹ Whilst recent steps by the Commission that aim at the construction of a common regulatory framework, represent a positive development towards the recognition of a European responsibility to contribute to the promotion of durable solutions, this has not yet been followed by a uniform response by Member States. Indeed, there are some countries that are willing to engage in promoting effective responses, whilst others openly manifest their contrariety to ‘imposed’ solidary measures. This is particularly evident concerning the relocation project, which is far from being successful as is demonstrated by less than 14% of allocated places having been filled more than one and a half years from the launch of the project.⁶⁰

Further, the lack of consensus for a long-term and stable response has heavily shaped the EU’s external policy, based on an emergency-response approach, with policies being designed to provide immediate solutions to issues conceived as critical by the public. This lack of a common position also hampers the EU’s credibility in approaching partner countries, considering the legitimate doubts in the effective implementation of the promises it delivers. Currently, the situation is further worsened by the unstable political setting, the uncertainty as to the future constellation of power in the EU and the growing anti-EU sentiment, which are all hampering constructive discourse on long-term solutions.

The core of the challenge is consequently political, and requires a deep analysis of how to build consensus in public and what issues to address.⁶¹ In this perspective, **it is crucial to insist on the need of long-term solutions and to foster the understanding that the investment in the EU’s neighbourhood’s stability and growth is a step towards improved internal security.** Whilst the narrative has been imprinted on a dichotomy between security and humanity, this is highly misleading and must be challenged. It is not the construction of legal access ways that would endanger security: on the contrary, an EU-managed access system would ensure effective control of entries and information-sharing between Member States. Lastly, it is also fundamental to set realistic goals and adapt narratives accordingly, as the greater is the distance between talk and action, the wider the gap between public opinion and policy makers becomes.

b. Legal challenges: Putting at risk the right to international protection

In an era of increasingly ‘mixed flows’, externalisation and securitisation policy combined with the Schengen regime and the lack of effective legal entry channels, gives those in search of international protection virtually no other choice than to enter the European territory irregularly.⁶² The closing down of the EU’s external borders, together

⁵⁹ In that sense, see CESPI, Osservatorio di Politica Internazionale, *Flussi migratori, n.26, luglio-settembre 2016*, 09.2016. See also M. Di Filippo, ‘The reform of the Dublin system and the need to go beyond a simple restyling: a possible negotiating strategy for Italy’, *Policy Brief*, May 2017, Observatory on European Migration Law, Pisa (<http://migration.jus.unipi.it>).

⁶⁰ See European Commission, *Tenth Report on relocation and resettlement*, COM (2017) 202 final, 02.03.2017. See also M. Di Filippo, ‘The poor implementation of the EU relocation scheme and the actions for annulment of Decision No 1601/2015: the margins for reaffirming the rule of law’, *Policy Brief*, May 2017, Observatory on European Migration Law, Pisa (<http://migration.jus.unipi.it>).

⁶¹ S. Sagar, *Global Migration and Modern Regulation*, Migration Policy Institute, 05.2009.

⁶² V. Moreno Lax, ‘Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with EU Member States’ Obligations to Provide International Protection to Refugees’, *European Journal of*

with the requirement to be in EU territory to access international protection, has paradoxically resulted in the increase of irregular migration, trafficking, smuggling and deaths at sea.⁶³

This situation creates a *migration-asylum nexus which demonstrates a (voluntary) failure to differentiate people in need of international protection from other migrants, assimilating all in a 'class of (potentially illegal) immigrants and thus required to submit to general immigration conditions'*.⁶⁴ The distinction becomes relevant only once asylum seekers have accessed the territory irregularly, as part of such 'undifferentiated irregular movement'.⁶⁵ Keeping in mind the high complexity of operating such distinctions preventively, in particular due to the rising phenomenon of mixed migration, but also the debatable dichotomy between migrants-asylum seekers, **the different legal statuses of individuals cannot be ignored as of today's legal framework**. Indeed, the recognition of an individual as beneficiary of international protection is merely declaratory in nature, and, accordingly, Article 6 of the Refugee Convention suggests the exemption from certain bureaucratic requirements as a means to enable effective access to protection for refugees, recognizing the different legal qualification of the latter.

The question that consequently arises is: can passive interceptions of access, such as through visa policies or border control, result in the violation of the principle of *non refoulement*? In legal literature opinions differ, with some recent proposal for a broader interpretation of legal standards. For instance, Judge Pinto de Albuquerque affirms in the ECtHR Hirsi judgement, that international refugee or at least human rights law 'imposes on States a duty to protect [...] and failure to take adequate positive measures of protection will constitute a breach of that law'.⁶⁶ It appears indeed absurd to conceive the right to seek asylum as independent from refusal or obstruction of admission to territory, the latter being a necessary condition to escape the danger of persecution and to ask for recognition of status. **There are consequently increasing calls to conceive the two concepts as un-detachable and as a unique right to access territory to enjoy protection**.⁶⁷

A similar approach has led AG Mengozzi to affirm in his recent opinion that Member States have a positive obligation to issue humanitarian visas 'where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing persons seeking international protection to torture or inhuman or degrading treatment'.⁶⁸

However, whilst his plea to create legal access ways to Europe as an implementation of the humanitarian values at the core of the EU project itself is deeply embraceable, the

Migration and Law (2008) Vol. 10, No. 3, p. 323; M. Den Heijer, *Europe and Extraterritorial Asylum* (Hart, 2012) pp.172-179.

⁶³ For more detail on the influence of EU policy on the access to protection see: Médecins Sans Frontières, [Obstacle Course to Europe: A policy-made humanitarian crisis at EU borders](#), 12.2015.

⁶⁴ Consiglio Italiano per i Rifugiati (n. 4), p.315.

⁶⁵ A. Betts, 'Towards a Mediterranean Solution? Implications for the Region of Origin', *International Journal of Refugee Law* (2006) Vol. 18, p. 655.

⁶⁶ Hirsi Jamaa and others v. Italy (n. 10.)

⁶⁷ See in that sense: G. Noll, J. Fagerlund, [Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests](#), Danish Centre for Human Rights, 04.2002, p. 12; Den Heijer (n. 34), pp. 120-139; G. S. Goodwin-Gill, J. McAdam, *The Refugee in International Law* (Oxford University Press, 2007), pp. 387-388; S. Juss, 'Free Movement and the World Order', *International Journal of Refugee Law* (2004) Vol. 16, No. 3, pp. 289-335.

⁶⁸ [Opinion of Advocate General Mengozzi delivered on 7 February 2017, X, X v État belge](#) (Case C-638/16 PPU).

legal reasoning based on the Visa Code is questionable, as is demonstrated by the judgement of the ECJ refusing to follow his interpretation.⁶⁹ Furthermore, the fundamental decision of regulating legal access of asylum seekers would ideally require a systematic and shared approach, brought forward from and not to be forced upon Member States.

Nevertheless, even if as of the current state of play it might be lawful to limit access only to those who do not come from or have not crossed a so-called *safe country*, there is currently no instrument for the EU to operate such assessment before individuals access its territory. In response to this challenge the EU appears to have chosen the easier policy of hampering access for all, instead of elaborating proposals which enable such differentiation beforehand. Major humanitarian organizations such as the Red Cross have affirmed that the resulting denial of access to protection determines a violation of the universal right to asylum and of the prohibition of *refoulement*.⁷⁰

Whereas such conclusion may be controversial, it is undeniable that the answer to the problematic *status quo* cannot be in shifting legal responsibility to third countries' border and coast guard enhancing their capacities. Thus, the current immigration system, which applies to third country nationals regardless of the different legal status people requesting international protection embody, must be challenged. In that sense, it is necessary to underline that the dichotomy between security and humanity is not helpful, and that the externalisation of migration management can only be implemented if there is also an externalisation of protection.

In particular, **voluntary non-differentiation must be replaced by a protection-sensitive entry system**, which takes into account the State's obligations under international human rights and refugee law, ensuring that 'legitimate measures to control entry are not applied arbitrarily and that they allow asylum-seekers and other groups with specific protection needs to be identified and granted access to a territory where their needs can be properly assessed and addressed'.⁷¹

In order to manage flows and disrupt smuggling without harming the right to international protection, it is fundamental to focus on the creation of alternatives, through the development of the existing legal migration channels or by creating new ones. The supporters of this approach suggest that the creation of such channels of access has the potential to prevent human suffering and death along irregular routes, improve security and border management as well as challenge trafficking and smuggling networks.⁷² There is simply no way around the fact that the only solution to stop migrants crossing and dying in the Mediterranean is to offer them a feasible alternative. All other options are a quick fix that merely causes a shift of flows and the expansion of the smuggling business.

Legal access ways should be twofold: on the one hand, they should aim at an *ex ante* differentiation of claims in order to foresee regular access ways to EU territory for asylum seekers and, on the other hand, they should enhance entry possibilities for workers.

As far as entry channels for asylum seekers are concerned, there are various existing legal entry schemes that could be amplified, such as resettlement, family reunification,

⁶⁹ ECtHR (Grand Chamber), Judgment of 7 March 2017, *X, X v État belge* (Case C-638/16 PPU).

⁷⁰ Red Cross EU Office, *Position paper on the Right to Access to International Protection*, 17.11.2011.

⁷¹ UNHCR, *Protection-sensitive entry systems*, Chapter 3, 10-Point-Plan of Action, 2007.

⁷² European Agency for Fundamental Rights (FRA), 'Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox', *FRA Focus* (2015) No. 2.

humanitarian visas and private sponsorship.⁷³ Regarding resettlement, there should be the aim to upgrade the EU resettlement programme foreseeing more places and to work on its practical implementation. Another issue that must urgently be challenged is the conditionality which links the allocation of resettlement places to the degree of the third countries' effective collaboration – including *inter alia* collaboration in reducing irregular migration to the EU.⁷⁴ The choice of linking even an instrument such as resettlement so closely to the countries' efforts in curbing flows is indeed once again a demonstration of how the security concern is predominant and influences even a mechanism designed to provide legal access for those in need.

Contrarily to this narrative, **Italy has developed an outstanding example of genuine legal access way with the deployment of 'humanitarian corridors'** – a project co-managed by the Italian Interior Ministry and various religious NGOs which foresees the granting of humanitarian visas to people in vulnerable conditions.⁷⁵ This example not only has the potential to be implemented also in other European countries, as discussions with Swiss and German authorities and a first French replication demonstrate, but it stands out as a pioneer project for its potential to push for a cultural shift and the stronger involvement of civil society. In this regard, it is nevertheless critical not to imprint discourse on legal access channels on mere humanitarianism, but to develop an understanding of the necessity of enabling access to protection as an international obligation (or, at least, as a corollary resulting from a *bona fide* interpretation of the established obligations on human rights and refugee protection).

Pushing this discourse even further, the possibility of protected entry procedures (such as humanitarian visas or embassy asylum) as well as extraterritorial processing (generally framed as the processing of applications for international protection outside the territory of the potential host State) should be examined. These procedures could indeed represent a solution that strikes the balance between the management of migration and the compliance with the European and international protection framework if they are developed to ensure access to protection.

Concerning work-related migration, the EU has concentrated its efforts on high skilled workers through the Blue Card directive, which nevertheless does not correspond with the demands of the market for medium- and low-skilled workers as well as with the predominant level of migrant's qualification. In the past, Italy had developed an interesting approach also concerning this dimension, offering quotas for migrant workers in exchange of third countries' cooperation on readmission. Further, the annual '*decreto flussi*' represents an essential instrument that regulates work-related migration and residence permit conversions. Nevertheless, the 2017 edition (following 2016's trend) is very focused on seasonal work migration and only foresees 2.400 slots for self-employed and 500 slots for non-seasonal workers: this speaks for a lacking offer of long-term perspectives for those wishing to regularly access the country.

The importance of regular entry channels for workers is also determined by their potential to decrease abuses of the asylum system: indeed, as long as economic migrants are not offered effective access to labour migration, the abuse of the asylum system for non-protection reasons will not decline, leading to increasing loss of public and

⁷³ E. Collett, P. Clewett, S. Fratzke, [No Way Out? Making Additional Migration Channels Work for Refugees](#), MPI Reports, 03.2016; J. Kumin, [Welcoming Engagement: How Private Sponsorship Can Strengthen Refugee Resettlement in the European Union](#), MPI Reports, 12.2015.

⁷⁴ V. Chetail, [Looking beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System](#), European Journal of Human Rights, 2016, p. 584.

⁷⁵ The project foresees the arrival of about 1.500 people in 2016-2017: see [Comunità di S.Egidio](#) and [Chiesa Cattolica](#).

institutional support for asylum, and increasing the burden on coastal Member States for search and rescue, reception and processing of claims.⁷⁶

Policy makers should aim at spreading the message that the construction of European-managed regular access ways is the solution not only to humanitarian challenges, but also to security ones determined by uncontrolled entry flows, and a fundamental step in enforcing common security and anti-terrorism measures. Also, reducing the need for asylum seekers and other migrants to take irregular routes means curbing the revenues for smugglers and traffickers. This further implies a decline in possibilities for those criminal networks to feed other illegal activities, to engage in corruption and to create room for actions of armed groups and terrorist organizations. Lastly, it has to be remarked how a system generating irregularity not only impacts the life of migrants, but also the security of the general public inside our borders: the irregular legal status indeed determines a marginalisation of these individuals and a complete exclusion from the regular labour market which once again fuels increases prospects of involvement in criminal networks.⁷⁷

4. Conclusions and policy recommendations: understanding and responding to the double face of the migration challenge

Whilst it is certain that migration will be high on both the national and European political agenda also in 2017, the shape of the resulting policy is far less evident: will there be another fall-back into old externalisation and securitization approaches, or could this finally be the right moment for a long-term protection-sensitive system? Until today, only the security aspect of the twofold issue of migration has been tackled, whilst heavily neglecting the protection dimension. But without understanding the necessity of a double-faced response, solutions will always be only partial and incapable of effectively confronting the challenge.

Throughout the last years, **Italy has been very active both as sole player and as influencer of the EU's external policy response, but not always it turns out to be a firm example, giving rise to the question of whether it is living up to its promises.** Indeed, whilst highlighting the importance of multi-focal partnerships at the rhetorical level, in practice agreements have often resulted in being predominantly shaped according to Italy's own interest. In light of its strong criticism of the EU's New Partnership Framework due to the lamented lack of a long-term view, the strong conditionality and the EU-centric approach, the recent choice of re-establishing a partnership with Libya focusing predominantly on border control and migration management is indeed quite questionable.

Further, **even if Italy may want to develop a more long-term policy approach with Africa, it still falls short on the protection dimension.** Indeed, whilst being one of the few promoters of humanitarian corridors for asylum seekers, and in that sense acting as a role model, it is undeniable that individuals positively affected by these measures represent only a minimal share of the population in search of protection and that more structural interventions are urgently needed. Whilst Italy cannot do so alone, the increasing flows by sea and the narrow chances to obtain solidarity at the infra-EU level

⁷⁶ European Commission, [Towards More Accessible, Equitable and Managed Asylum Systems](#), COM (2003) 315, 03.06.2003, p. 12; E. Guild et al., [Enhancing the Common European Asylum System and Alternatives to Dublin](#), *European Parliament*, 07.2016, p. 11.

⁷⁷ P. Pinotti, [Clicking on Heaven's Door: The Effect of Immigrant Legalization on Crime](#), Baffi Center Research Paper No. 2014-154.

should push Rome to exert all its political influence on reorienting the direction of European external migration policy.

Italy is currently in an influential position, both because of the roles it will hold at the European and international level in 2017 and the momentum of success it is living in shifting the EU's attention finally towards the African region and promoting a more active role for the Union in the Mediterranean. This position should be used to further **encourage a coordinated response to the migratory challenge at the European level both in terms of internal solidarity and external responses, and to strengthen the consensus regarding a long-term approach.**

As far as the European external migration policy is concerned, the construction of a protection sensitive border and migration management system should be identified as the final goal. In that perspective, the following points should be singled out by Italy as priorities:

- concerning the external relations dimension:
 - o deep understanding of partner's priorities and interests,
 - o high attention to the choice of partners and promoted projects,
 - o foster policy coherence instead of conditionality,
 - o use of political leverage to aim at the amelioration of partner's protection and reception systems;
- concerning the internal policy dimension:
 - o aim at reaching wide consensus among Member States, also to increase the EU's political credibility,
 - o tackle the dichotomy security-humanity and build public consensus on the need of long-term solutions that address them jointly;
- concerning the legal dimension:
 - o break the *asylum-migration nexus* designing a protection-sensitive entry system,
 - o open or increase existing legal channels to strengthen security and border management and to prevent human suffering and death, both:
 - for asylum seekers,
 - and for medium- and low-skilled workers,
 - o subordinate any support for operational measures and enforcement action (for instance: border control, operations at sea, detention and reception structures) to the provision of legal safeguards enhancing transparency and accountability,
 - o when supporting the reinforcement of borders in the neighbouring areas (e.g. Libya, Tunisia or Egypt), tackle the issue of domestic asylum system standards in their Southern neighbours, where would-be asylum seekers might be pushed back or impeded to move from.

In order to effectively embark upon the abovementioned points, the **talk at EU level first urgently needs to shift away from the conception that solving the migration issue is a fast-achievable goal to be evaluated in the mere decrease of irregular entries.** Questions must dig deeper into causes and patterns, and responses aim at the heart of the problem: people escaping persecution, war or extreme poverty will not stop until they do not reach safety or a credible alternative.

Europe is consequently **at a cross-road**: will we keep on erecting walls through our internal and external policy or will we at least attempt to design a system that provides access to safety for those in need and allows us to better manage our security? Times are more than mature to finally take real steps towards the second option: the first has been long explored and has resulted in being high-priced for human life and ineffective in stopping flows. In a moment where solidarity and humanity are values which seem to have lost their momentum, **it is Europe's time to stand on the right side of history and live up to its fundamental values**. Italy should take the lead in indicating this direction.