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**Defining the Role of the European Union in Managing Illegal Migration in the
Mediterranean Basin: Policy, Operations and Oversight**

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Defining the role of the EU in managing illegal migration in the Mediterranean Basin: Policy, Operations and Oversight

Abstract

Illegal migration from and through Mediterranean partner countries to the European Union has increasingly been regarded as a security problem requiring a collective European response. While member states concerned about border sovereignty have been reluctant to allow greater EU involvement in this sensitive policy area, awareness that the scale of illegal immigration is beyond the capabilities of individual countries has grown amid concerns about terrorism and transnational organised crime. Current policy has left some southern EU member states overburdened, and concerns have been raised about the implications of militarised national responses for EU human rights law. An increased EU dimension in managing illegal immigration and protecting external borders has the potential to generate a more efficient and legitimate response, and yet given current political realities the EU's main role will remain complementary to existing member states' efforts.

Given the challenges of policy coordination in a multilevel governance framework, the EU's role in the management of illegal migration is based on actions at three levels: the policy level, where the EU facilitates common member state policy positions, the operational level, where the EU facilitates efficient implementation, and the oversight level where the EU ensures legitimate practices.

With regard to the policy and operation levels, the EU has been effective in facilitating a coherent policy debate among member states and its agencies have achieved some success in reducing illegal immigration, although certain shortcomings remain to be addressed. There is, however, an important problem at the oversight level. Bilateral cooperation with origin and transit states has long been a policy priority for EU member states, but these relationships lack a coherent institutional framework. Intransparency raises issues of consistency with the European Convention on Human Rights, and increases the potential for unsavoury incidents. Establishing, implementing and overseeing a common framework for bilateral management of illegal migration represents an opportunity for the European Union and its Mediterranean partners. This task may be best undertaken in the proposed Mediterranean Union, which offers a potential framework within which efficient and durable project-based cooperation could be incorporated.

Introduction

Illegal migration is a controversial, emotive issue that resonates in European society, media and politics. Increasingly, illegal migration has been portrayed as an urgent security threat because of its supposed relationship with organised crime and terrorism. Misinformation about illegal migration is widespread, while political actors have seized upon its tractability with voters. EU member governments have deployed various measures to fight illegal migration, including military and paramilitary measure to protect land and sea borders, hi-tech data collection and storage, and readmission agreements with third countries. These national responses to border enforcement and illegal migrant management have proved relatively effective in achieving a reduction in successful clandestine border crossings. And yet, the individual efforts of member states are unlikely to be able to continue to enforce Europe's frontiers efficiently as global push and pull factors. In recent years it has become more accepted in most member states that an increased EU dimension in managing illegal immigration and enforcing external borders has the potential to generate a more effective response, particularly since the Schengen agreement removed most internal border controls.

Although the EU's precise role in managing illegal migration is not yet clearly defined, its main function is threefold: improving policy efficiency through encouraging conformity of member state legislation; helping to reduce the security threat by providing common assets to support member state border control operations; and ensuring controversial policies and practices are conducted legitimately, according to both the rule of law and standards of conduct generally regarded as acceptable by European public opinion. To meet these three objectives, the EU operates on three levels: policy, operations and oversight. At each level the EU helps member states coordinate and integrate their existing efforts. The EU's primary role is to act as a policy 'clearing house', improving policy efficiency by providing member states with an institutional environment in which to coordinate their policy preferences. At the next level, the EU aims to improve border management by facilitating operational cooperation among member states and third countries through agencies such as FRONTEX and EUROSUR. At the third level, the EU oversees member states' adherence to European and international human rights conventions, especially with regard to their bilateral relations with third countries and their activities in enforcing border controls.

At the policy and operational levels the EU dimension has been effective at improving the efficiency and effectiveness of border management. While there is still no common EU migration policy, member states (and EFTA states) have engaged in a coherent policy debate

at the EU-level, most have signed up to the Schengen agreement, and there is a common understanding of what constitutes illegal migration to Europe. The European Commission is continuing to work towards defining common policies and practices for all EU member states. This process has been complemented and reinforced by the creation and increasing participation of the EU's newly-established common agencies for border and migration management, enhancing the effectiveness of existing national efforts. Although certain shortcomings on these two levels remain to be addressed, in general the increasingly common approach to enforcing European immigration laws has achieved some success in reducing the numbers of illegal migrants to Europe.

A number of concerns, however, can be raised with regard to the oversight level, where the EU endeavours to ensure legitimate practices, especially with regard to bilateral cooperation between member states and Mediterranean partner countries. The tendency of national governments, specifically those with strong preferences in this issue, to partake in bilateral cooperation agreements with south and east Mediterranean governments outside the system supervised by the EU, has raised issues regarding the consistency of some bilateral partnerships with European and international human rights law (Human Rights Watch, 2006; Baldwin-Edwards, 2006). While the task of overseeing EU member state agencies is complex enough, the challenge of ensuring standards are maintained in Mediterranean partner countries as well is even greater – especially as attempts to encourage Mediterranean partner governments to implement EU governance standards under the Euro-Mediterranean Partnership (EMP) have been resisted as interference in the internal affairs of sovereign countries.

The oversight of illegal migration cooperation would, therefore, be best addressed within an institutional framework that enables all interested countries – south and east Mediterranean as well as European – to participate in the formulation and implementation of policies and practices. What is required is a common set of standards and practices reached through mutual agreement, reflected in a code of practice to be incorporated in readmission agreements and in bilateral operational cooperation. These standards would be maintained under the supervision of a joint oversight body comprised of officials from Mediterranean as well as EU member countries. Although such a body would not have the ability to sanction, it would be able to examine breaches and issue reports. Such an arrangement would assist more efficient and legitimate cooperation in the management of illegal migration through a common set of

standards, better burden-sharing among non-EU and EU Mediterranean countries and non-Mediterranean EU members, and mutual oversight, rather than EU-only supervision.

The ‘Barcelona Process: Union for the Mediterranean’ (UPM), launched in spectacular fashion by French President Nicolas Sarkozy in Paris on 13 July 2008, could provide the overarching institutional framework for overseeing the management of illegal migration in the Mediterranean basin. The proposed UPM promises a much greater level of shared decision-making than has taken place since 1995 under the EMP. The UPM’s biennial summits, co-presidency and joint secretariat have the potential, if implemented fully, to introduce more ‘joint ownership’ to Euro-Mediterranean relations. The UPM’s project-based structure promises much in terms of enabling progress in areas of common interest. A Euro-Mediterranean illegal immigration oversight project, jointly designed and implemented, and managed as part of the UPM could enable more coherent, legitimate and in the long run, a more effective Mediterranean-wide approach to illegal migration management.

1. Some facts on illegal immigration to the European Union

As a result of increased global migration generally, intensified push factors in origin countries and attractive pull factors in destination member states, Europe is experiencing increasing legal immigration, which is paralleled by illegal immigration pressure as border controls tighten. Due to the clandestine nature of the phenomenon, reliable data on undocumented residency in EU countries is lacking and estimates vary widely. Estimating annual flows is more difficult still – most rely on estimations of total numbers based on a range of disparate and often non-corroborating sources. Much of the available information from official sources is several years old. A European Commission collation of member state border control data showed that in 1997 699,393 people were refused entry to EU-15 countries. This number had risen to 1,105,206 refused entries in 2001, the vast majority of whom were Moroccan citizens trying to enter Spain (European Commission, 2004). A late 1990s study based on the numbers of irregular migrants apprehended estimated that between 350,000 and 500,000 illegal migrants travel to the EU every year, joining an existing population of up to 8 million undocumented residents (Salt, 2000). A more recent OECD estimate puts the total number of illegal migrants at around 1% of the EU’s population, rising to 4% in southern European countries – around 4.5 million in total (OECD, 2007). Interestingly, data on legal migration is also a matter of interpretation: a recent report notes that official European figures count 5.635 migrants from the Arab countries and Turkey

registered in the EU, while the consulates of origin countries count 8.177 million, some of whom are illegal migrants for whom registration with their home country's embassy offers a meagre form of protection (CARIM, 2007). Such statistical discrepancies do not help objective analysis of a highly politically sensitive issue.

The figures on illegal migration across the Mediterranean are also somewhat patchy.¹ A study conducted by the International Centre for Migration Policy Development (ICMPD) estimated that 100,000-120,000 irregular migrants to cross the Mediterranean every year, of which 55,000 are citizens of Mediterranean partner countries, 35,000 are of sub-Saharan origin and 30,000 come from other regions, such as Asia (Simon, 2006). The most commonly used route for illegal migration is from Libya to Sicily, Malta and nearby islands and carries over 80,000 migrants per year, making Libya the primary departure and transit country (ICMPD 2004). Recent data from FRONTEX counts 1,230 arrivals in Malta and 7,889 in Lampedusa from January to August 2007, rising to 2,187 and 17,302 for the first seven months of 2008.²

Existing research does point to some important and often overlooked facts about of illegal immigration to the EU. First, only a minority of undocumented residents in member states entered the EU illegally. Illegal immigration across the Mediterranean by sea has attracted the most dramatic headlines: as one report put it, 'on arrival they make a far bigger impact than those who slip across land borders... Every time a party of wretched Africans is filmed landing ashore, it shows the public that illegal migrants are still coming.'³ However, clandestine entrances into the EU territory – especially by sea, but also by land or air – constitute only a small percentage of total illegal immigration. The vast majority of undocumented immigrants residing in member states enter the EU legally and then overstay their visas (Sciortino, 2004, OECD, 2007). According to the Italian Interior Ministry of Interior, only 10% of undocumented residents in Italy in 2002 arrived illegally by sea, 15% entered the country illegally by land, and the majority 75% overstayed short term visas. In 2004, illegal arrivals by sea were estimated to amount to approximately 4% of the entire undocumented population, increasing to 14% in 2005 and 13% in 2006 (Coluccello and Massey, 2007).⁴ It should be also noted that the main irregular migratory flows originate in

¹ An August 2008 request to EuroPol for estimates of the annual flow of illegal migration to the EU, and the total number of undocumented persons residing in the EU, was declined.

² August 2008 request to FRONTEX for estimates on the annual flow of illegal migration in the Mediterranean.

³ 'Italy and Libya: Undoing the damage', *The Economist* 2 August 2008.

⁴ See also Ministero dell'interno, *Lo stato della Sicurezza in Italia*, 2005, p. 41; Ministero dell'interno, *Note sulla sicurezza in Italia*, 2006, p. 16.

Eastern Europe, rather than in the southern Mediterranean countries, suggesting that an increased emphasis on Europe's southern borders is only a partial solution to the multifaceted problem of illegal immigration (European Commission, 2004).

Second, official concerns have been raised with regard to facilitated illegal immigration as a transnational organised criminal activity. It is often assumed that the same transnational organised criminal groups that facilitate illegal migration may use their experience to coordinate and finance other cross-border crimes. This has been illustrated by the experience of Turkey, a major transit country for illegal immigrants, and for drug trafficking into cities in Italy, France, Germany and the Netherlands.⁵ It is, however, difficult to define the extent of the relationship between organised crime and illegal migration precisely. There is no reliable data on the number of illegal immigrants involved in organised crime during or prior to their residency in the EU. While EUROPOL cites intensive involvement of organised crime groups in illegal migration, this relationship may not be as developed as perceived (Europol 2007). In Spain, smuggling or trafficking of migrants by organised transnational criminal groups has not been the major mechanism of migration. More than 75 percent of illegal residents in Spain did not rely on help from others in making their journey (Baldwin-Edwards 2002).

Furthermore, the link between illegal migration and transnational organised crime does not usually progress beyond trafficking of the migrants themselves. Although it is not unknown for people smugglers to be involved in other forms of organised crime (such as drugs and arms smuggling, international automobile thefts, or counterfeiting), such connections are rare. Most people traffickers supply the sex industry and are small, loosely affiliated organisations that rarely fit the conventional portrayal of organised criminal groups (Kaizen and Nonneman, 2007). Even when organised transnational criminal groups are involved, the nature of these groups, is not hierarchical or sophisticated, but rather is based on loose, often temporary, collaboration (Monzini et al., 2004; Coluccello and Massey, 2007). Researchers have also noted that illegal migration facilitated by organised criminal groups is much more common across Europe's eastern borders than across the Mediterranean (Pastore et al., 2007).

It is important to differentiate between the phenomena of migrant trafficking and smuggling. The UN Protocols on the Trafficking in Persons and Smuggling in Migrants make a distinction between the two concepts, defining smuggling as an act in which the state's

⁵ 'Turkish Organised Crime', Wordpress, 12 November 2007, www.worldpress.org/europe, accessed 14/8/2008.

borders and admission regulations are violated, while the phenomenon of migrant trafficking infers the infringement of the migrant's rights and freedoms (UN 2007). In the latter case, the migrants involuntarily become associated with transnational crime. Neither FRONTEX nor EUROPOL make much of the fact that in many cases illegal migrants are themselves victims of transnational crime, and that the relationship between the two groups is not always that of collaborative criminality. Many of those who are smuggled by organised criminal groups have to pay for the service with long-term, low-paid menial labour or, in the case of many women, forced prostitution (ICMPD, 2001).

Thirdly, media attention has engendered a widespread perception of poorly controlled borders that present a serious security problem for Europe (Lavanex, 2006). Since the shock of September 11, 2001, fears have been raised that organised criminal groups may attempt to smuggle not only economic migrants and refugees, but also potential terrorists (Demleitner 2008, Sarrica 2005). This fear has profoundly influenced border management policy in the EU, especially since the March 2004 Madrid train bombings (Widgren et al, 2005). The threat extends to all EU member states since internal EU border controls were lifted, and policymakers often speak of 'terrorism' and 'illegal migration' in the same breath.⁶ However, what little research that exists on the terrorism/illegal migration link suggests that the relationship is rather tenuous – especially as highly risky and unpredictable asylum and illegal migration routes are unlikely paths for bringing terrorists into the EU. Terrorists do not normally need to risk a one-way trip to Spain or Italy in an unseaworthy boat (Guild, 2003).

⁶ See, for example, Gunter Verheugen 'The European Neighbourhood Policy,' speech to the Prime Ministerial Conference of the Vilnius and Visegrad Democracies, Bratislava, 19 March 2004.

2. The policy level: the EU as a ‘clearing house’ for member state interests

Concerns about intensified illegal immigration pressure and poorly enforced physical borders that may serve as gateways for terrorists and transnational criminal groups affect government policy because they resonate with European voters. Nevertheless, effective management of illegal migration flows in a 27-member EU is beyond the capabilities of individual member states, and a community dimension to support national responses is required. EU-level involvement has the potential to generate a more coherent and efficient response to the problem of illegal migration. While the precise role of the EU in this issue is not yet clearly defined, its principal function is clearly to help improve efficient and legitimate management of the problem through the ‘communitarisation’ of the EU’s external borders. These tasks are to be achieved through facilitation of the coordination of member state policies, support for operations at the member state level, and oversight of bilateral partnerships between individual EU member states and Mediterranean partner countries.

The extent to which the EU dimension should supersede the actions of individual national administrations in the management of the illegal migration problem has been widely debated. A number of researchers have noted the inability of national administrations to effectively control their external borders, and have argued that migration policy should be decided at the EU level and implemented by common European border control agencies instead of national services (Monar 2006). Accordingly, the emergence and development of justice and home affairs (JHA) at the EU level, specifically in regard to its competencies in illegal migration and cross-border crime prevention, has been welcomed as a potentially effective and necessary response to increased migration pressure on the EU member states (Monar 2006, Lobkowitz 2002). However, the extent to which the management of illegal migration should be overtaken by common EU action is debatable. An important question is whether the EU could deal with this particular problem better than national border control services can, coordinating their activities through EU-level institutions and organisations where necessary. At least one scholar who addresses this question has argued that limited EU participation, which does not extend beyond policy coordination and facilitation of member state cooperation, is likely to be the most effective EU approach possible (Mitsilegas et al. 2003).

Some EU member states feel the pressure of illegal migration in the Mediterranean more than others. Southern EU member states, where most trans-Mediterranean migrants enter the EU,

unsurprisingly have stronger preferences on the issue. Spain, Italy and Malta have long emphasised the need for joint action on illegal immigration and border control, which would allow for a more effective burden-sharing mechanism among EU members.⁷ One of the central tasks of the Commission is to facilitate this common understanding by identifying the policy priorities of EU member governments and working out a solution that all can accept. The Commission has emphasised that a successful response to the pressure of illegal migration would be possible only under the condition of expedited and deepened cooperation based on common understanding of key issues among member states (European Commission, 2005b). External shocks can help: the Commission's response to discussions in the Council following the events of September 11 was to voice its intention to 'address the issue of illegal immigration with a comprehensive approach' and to create a joint EU illegal immigration policy (European Commission, 2001a) With specific regard to illegal immigration from African countries, the Commission saw the need for a coherent, collaborative and balanced approach. It identified strengthened cooperation among member states and partnerships with countries of origin and transit as the principal objectives and priorities in the management of illegal immigration (European Commission, 2005c).

The EU's primary institutional function is to acts as a policy 'clearing house' for member state preferences for policy responses on any given issue. The EU is designed to improve policy efficiency among member states by providing an environment in which member states can coordinate their bargaining. Common policy and more efficient decision-making are developed through the equilibration of heterogeneous actor preferences through negotiations. Normally, intra-EU bargaining is a structured process in which extreme member state preferences are reconciled or bought off with side payments, issue-linkage or old-fashioned political pressure. The outcome of this process is the emergence of a common position, sometimes late at night after marathon negotiating sessions involving member state and community level officials. Member states raise important issues (either formally in the European Council, or less formally when they see fit), which are incorporated in a union-wide discussion involving stakeholders. Sometimes debate takes place openly and is widely reported, sometimes it takes place behind closed doors. Policy issues often reach the implementation stage when the Commission prepares a Communication to the Council and

⁷ See Zapatero and his Greek counterpart ask EU for support in migration issues, Website of the Spanish Government, 10 July 2008, www.la-moncloa.es.

Parliament, based on consultation with member governments and its calculation of what an acceptable common position would be.

The common EU position on migration that has emerged from this bargaining process is contained in several policy documents and declarations. These include the 2005 ‘Global Approach to Migration’ which prioritised Africa and the Mediterranean. A Commission memo accompanying the 2007 declares Europe’s intention to develop an integrated approach to migration that:

‘strikes the right balance between labour market shortages, economic impacts, social consequences, integration policies and external policy objectives. In addition, it highlights that the concerns of EU citizens in this area need to be addressed. This approach fully respects the competencies of Member States and does not confer new powers to the EU.’⁸

Similarly, the 2005 - 2010 Hague Programme, which is directed towards making the EU an ‘area of freedom, security and justice,’ stresses the need to use community-level resources and economies of scale to support member states in managing migration, including their agreements with third countries.⁹

With regard to the management of migration in the Mediterranean, common EU positions are evident in the 1995 Barcelona Declaration, the EMP’s so-called ‘fourth chapter’ of cooperation on migration, social integration, justice and security introduced at the 2005 10th Anniversary Summit in Barcelona, and the May 2008 Communication proposing a Union for the Mediterranean (European Commission, 2008c). At the policy level precedence is given to deepened partnerships, active engagement and enhanced dialogue with key origin and transit countries. Bilateral cooperation between EU members and Mediterranean neighbours is regarded as providing the backbone of the fight against illegal migration, to be stiffened with Community resources where necessary. Importantly, the EU reserves for itself the responsibility of ensuring that legitimacy standards are maintained (European Council, 2007). Specifically, within the overall framework for cooperation with Mediterranean partner countries, the EU emphasises developmental projects and policies as long-term solutions to mounting migration pressures (Joffé 2008). The aim is to facilitate dialogue and integration among the relevant parties, while granting the EU as position of an overseeing transnational

⁸ See Memo/07/549, Brussels, 5 December 2007, available at www.euromed-migration.eu, accessed 15/8/2008.

⁹ For an excellent summary of the Hague Programme see www.euractiv.com.

actor. Within the Barcelona Process framework the EU endeavours to provide for an area of cooperation, zone of prosperity and a friendly neighbourhood through promotion of political and economic reform, sustainable development and trade liberalisation. Targeting root causes of emigration in origin and transit countries is regarded as the long-term solution for illegal migration and emphasis is put on reducing immigration into Europe through development support for partner countries (Joffé, 2008). Since 11 September 2001, security concerns have risen to the fore and the view that illegal migrants are a security problem has been a major influence on the implementation of European policies. EU member states less affected by the problem have not objected to southern EU members' renewed focus on securing their borders, so long as the link between migration flows and political and economic reform in Mediterranean partner countries is clearly acknowledged.¹⁰ This rhetorical link has in practice been ignored by European and Mediterranean partner governments, which have focussed on securing their borders in the short term (Schumacher, 2008).

3. The Operational Level: Facilitating and Coordinating Member state Operations

At the operations level the EU aims to improve the efficiency of the integrated management of the member states' physical borders by facilitating information-sharing and operational cooperation, and by rendering assistance to the existing activities and programs of national agencies. Essentially, the EU offers a support when the illegal migration problem extends individual member state capabilities (de Vries, 2007). To this end the EU has established communal agencies and institutions that are intended to provide organisational support and assist in technical cooperation among interested parties. The European Agency for the Management of Operational Cooperation at the External borders of the Member States of the European Union, better known as FRONTEX, both coordinates and supports member state operations. The European Surveillance System for Borders (EUROSUR) coordinates national border surveillance systems. The EU does not intend these agencies to supplant the existing efforts and assets of the member states, but rather to make available a 'common tool box' to address member states' day-to-day operational needs (European Commission, 2005 b).

An important tool in the box is the principle of information availability, which allows competent member authorities access to migrant and asylum information. The Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC function as cross-border systems that enable authorities to access personal data. SIS is an EU-wide

¹⁰ See, for example, the Five Year Work Programme agreed at the EMP 10th Anniversary Summit, Barcelona, 2005.

information system containing ‘alerts’ regarding certain third-country nationals, who may be refused entry into, or stay in, a member state. The SIS program facilitates informational interchange between national agencies and makes police and judicial cross-border cooperation in criminal matters easier. The VIS program allows for an exchange of data between member states on short-stay visas and is intended to contribute to the goal of fighting illegal immigration by supporting the common visa policy and checks on the visa applicants. Finally, EURODAC was established as a fingerprint database allowing officials to identify applicants who have in the past entered the EU without the necessary documents or those applicants who may have been previously convicted and/or detained.

These information inventories collate data gathered by the national agencies of individual member states as well as facilitating technical cooperation among member government agencies. Great emphasis is placed on the availability and synergy of technical instruments and border surveillance methods, as joint, integrated actions are likely to improve the efficiency of the member states’ border enforcement activities. The EU’s role in this area is centred on amalgamating or ‘pooling’ the material resources of member states and making them easily available to other partakers upon request. It is important to note, however, that participation in these as well as all other EU-organised coordination projects is voluntary and at the discretion of individual national governments. The EU exercises little real power over the extent to which national agencies participate in these programmes, and the Commission has recently acknowledged that all three of the systems discussed above are under-exploited. Many member states maintain separate but similar lists, resulting in duplication, overlapping and possible operational conflicts (European Commission, 2005 b). This may change if the Commission’s ‘border package’ information system comes into force, although this programme has met with considerable scepticism from experts who question its technical feasibility and its potential for intrusiveness (Guild et al, 2008).

FRONTEX is designed to support national governments in circumstances requiring increased technical and operational assistance. While recognising that responsibility for border control and surveillance lies within the competencies of member states, and acknowledging that national agencies will continue their individual efforts, FRONTEX is intended to facilitate practical cooperation by providing technical support and expertise. FRONTEX is not designed to respond to emergencies, but to help member states implement well-planned,

regular patrols.¹¹ In cases when member states are faced with ‘urgent and exceptional situations resulting from a mass influx of illegal immigrants’ and require assistance at their external borders, FRONTEX is authorised to deploy the Rapid Border Intervention Team (RABIT). The ‘toolbox’ for RABIT is the Central Record of Available Technical Equipment (CRATE), which collects information from surveillance assets belonging to member states. This information is put at RABIT’s disposal for a limited period of time on a voluntary basis and upon request from another member state.

Similarly, EUROSUR’s central function is clearly to facilitate voluntary cooperation based on the existing member state instruments where member states deem EU involvement will improve the effectiveness and efficiency of border management activities. EUROSUR is intended to prevent unauthorised border crossings and increase the security of the EU by contributing to the prevention of cross-border organised crime. The objective of this system is to ‘support the member states in reaching full situational awareness on the situation at their external borders and increase the reaction capability of their law enforcement authorities’ (European Commission, 2008 b)¹ EUROSUR is to be incorporated into existing member state surveillance systems and is intended to provide a common technical framework for streaming daily cooperation and communication between the national authorities. It is intended that EUROSUR will eventually replace national surveillance with a community-wide radar and satellite system (European Commission, 2006 b).

Although EUROSUR and FRONTEX are relatively young actors in the task of border policing and illegal migration management, they have already achieved success in reducing the number of successful clandestine crossings into the European southern states. During the first eight months of 2007, 72% fewer immigrants crossed to the Canaries and 41% fewer reached the countries of the central Mediterranean as compared to the previous year.¹² Specifically with regard to FRONTEX, in 2006 and 2007 approximately 53 000 persons were apprehended or denied entry at the border through the agency’s operations, more than 2 900 false or falsified travel documents were detected and 58 facilitators of illegal migration have been arrested. In joint operations facilitated by FRONTEX (Hera, Agios, Minerva and Poseidon), 34 905 illegal migrants have been intercepted and 9 671 have been diverted (European Commission 2008 a).

¹¹ Ilkka Laitinen, ‘Frontex: Facts and Myths’, 11 June 2007, available at www.frontex.europa.eu, accessed 15 August 2008.

¹² ‘Keep out: A special report on migration, *The Economist*, 3 January 2008.

The quantifiable results of FRONTEX have been described as ‘impressive’ by the Commission and consequently the agency has received a large increase in funding – from € 41 million in 2007 to €70 million in 2008.¹³ Nevertheless, the agency is new and its future evolution is not yet clear. First, although FRONTEX has been established as a support mechanism for member states and as a ‘common toolbox’ providing operational assistance upon request, to date only a modest use of equipment has been made. The potentials of CRATE have not been exploited to their full capacity and so far no member state has made a request for the deployment of a RABIT team. Second, although FRONTEX mandate thus far is explicitly to support member states, the Commission’s long-term recommendations for the agency envisage a major expansion of its competencies, including the ability to conduct operations with third countries (Jeandesboz, 2008).

Finally, in order to address the overburdening of certain states, the EU has established the External Borders Fund with a budget of 1820 million euros for 2007 – 2013.¹⁴ The Fund is a financial solidarity mechanism to support member states that incur heavy financial burdens and to share that burden around the EU. The money is allocated on the basis of criteria assessing the burden of each state with regard to external border control. While some structural obstacles hinder its effectiveness, the Fund has the potential to offer financial relief to overburdened member states, especially in southern Europe. It remains to be seen whether lessening financial pressure will facilitate a favourable environment for compliance with human rights regulations.

4. The Oversight Level: Monitoring Member states’ Partnerships with Third Countries

The EU’s role at the oversight level is to ensure that member state responses to illegal migration are conducted in accordance with generally accepted legitimacy standards. Legitimacy is a notoriously subjective concept and no attempt will be made to define or use it as a benchmark here. However, from a practical perspective the EU’s role in this area is to ensure member states’ compliance with European and international human rights conventions, especially with regard to national border enforcement practices and bilateral relations with third countries. Beyond this legal framework, the legitimacy of European border protection is also defined more subjectively by various means including media coverage, expert opinion,

¹³ FRONTEX’s annual budgets are published at www.frontex.europa.eu, accessed 15/8/2008.

¹⁴ See www.ec.europa.eu/justice_home, accessed 15/8/2008.

public responses to specific incidents and broad trends, and ultimately by voters' responses to their governments' policies.

From a legal point of view, the oversight of member state border enforcement is, at least in theory, relatively unproblematic – the European Court of Human Rights in Strasbourg is tasked with enforcing European human rights law. Although the European Convention on Human Rights and Fundamental Freedoms does not deal directly with illegal migration, courts in Europe and elsewhere have interpreted its general provisions in a way that protects people who are either expelled or prevented from arriving in Europe. Two well-established protections have been established: first, that no-one should be returned to a country where they face the risk of torture, or cruel, inhuman or degrading treatment (Phuong, 2007). Second, although member states have the right to protect their own borders and are not legally responsible for deaths or injuries indirectly caused by increased border protection measures, they do have an obligation to take appropriate steps to prevent deaths when there is reason to believe that a particular life is at risk (Spijkerboer, 2007). While the European Court of Human Rights has established as legitimate the right of member states to refuse access to their territory, it has emphasised that any measure they adopt in exercising this power must comply with human rights obligations (UK Parliament, 2006).

Bilateral cooperation with third countries: the Italy/Libya example

Several EU member states have stepped outside the EU framework and have developed their own bilateral anti-illegal migration arrangements with third countries. Readmission agreements between EU members and third countries are intended to facilitate the removal of illegal immigrants from European territory. These agreements require neighbouring countries to readmit their own nationals as well as nationals of another country who transited the neighbouring country on the way to the EU. In return, neighbouring countries get financial help with the costs of taking back and possibly resettling illegal migrants (Baldwin-Edwards, 2004). A second form of cooperation is operational, where EU member state border control agencies work closely with their counterparts in third countries. These bilateral arrangements exist in varying degrees of formality and have entailed cooperative relationships between European and Mediterranean partner security services, some of which have poor records in upholding international human rights standards (Lutterbeck, 2006). While these arrangements have not necessarily raised the incidences of deaths at sea or the possibility of unsavoury

incidents such as the shootings at Ceuta and Melilla in October 2005, they have raised the difficulty of dealing with such incidents transparently when they occur.

A good example of bilateral anti-illegal migration cooperation is provided by the Italian government. Influenced by internal political developments and the pressure exerted by the electorate, Italy has entered into cooperation with Libya under a framework of numerous bilateral agreements for curbing illegal migration and the joint patrol of the Libyan coastline. Libya and Italy signed an agreement to fight terrorism, organised crime, and illegal migration in 2000, and established a permanent liaison in 2003. The Italian government has reportedly provided substantial financial support to a Libyan migrant detention camp and has proposed creating more Libyan holding centres (Hamood, 2006) In return, Libya has tightened its border controls in recent years, arresting and deporting thousands of would-be migrants to Europe (Trucco, 2005). The partnership has been credited with a number of successes, such as the prevention of approximately 40,000 undocumented people leaving from Libya in 2005 and 2006.¹⁵

Italy/Libya cooperation has attracted the attention of human rights groups. Human Rights Watch has raised concerns about Libya's record in upholding international human rights standards in border management. Libyan authorities have been accused of arbitrary arrests, physical abuse, lengthy and arbitrary detention in poor conditions, and forced deportations without the opportunity to seek asylum, all of which violate Libyan and international law (Human Rights Watch, 2006). More recently, Human Rights Watch has warned that Italy may be guilty of violating the fundamental principles of international refugee law, because would-be asylum seekers detained at sea by joint coastal patrols have been subsequently deported from Libya (Human Rights Watch 2008). The Council of Europe Commissioner for Human Rights has raised questions about the return of some 1600 aliens who landed on the Italian island of Lampedusa in 2004 and 2005, describing these removals as intransparent as they were not independently monitored. 'Although I heard no allegations of official violence in connection with expulsions,' wrote the Commissioner, 'I did suggest to the Minister of the Interior that the presence of an impartial outside observer might help to ensure full respect for human dignity - and protect Italy's good name in this area' (Council of Europe 2005).

¹⁵ 'Incontro a Sirte (Libia) tra il Ministro dell'Interno Giuseppe Pisanu e il leader della Rivoluzione Muhammad Gheddafi,' Italian Ministry of the Interior press release, 17 January 2006.

The Italy/Libya relationship is not the only case for concern. Similar incidents of human rights violations have been noted in other bilateral partnerships and unilateral efforts. Questions have been raised regarding the adherence of the Spanish and Moroccan border management authorities to international human rights principles.¹⁶ Greek migrant reception centres were harshly criticised by the UN Human Rights Commissioner, and Italy's and Germany's proposal to set up migration and refugee detention camps in southern Mediterranean countries has been criticised as incompatible with international human rights conventions (Weinzierl, 2007; Assembly of Western European Union, 2006). On the southern side of the Mediterranean, NGOs and human rights organisations continue to condemn existing legal provisions and practices, arguing that they give rise to serious humanitarian problems and tend to marginalise and repress illegal migrants (Fargues 2005, p. 28).

5. Existing EU oversight measures

The potential for bilateral agreements to breach European human rights law has been recognised in Brussels. The Assembly of the Western European Union has noted that on many occasions cooperation between EU member governments and their Mediterranean counterparts has been conducted at lower levels of accountability and human rights compliance, and the WEU has warned that relying on Mediterranean partner countries to serve as protective barriers against migratory flows could lead to increased incidences of major human rights violations (WEU, 2006, pp. 30 – 31).

The EU has begun to address oversight issues by creating working groups, regulations and funds designed to monitor compliance with international human rights regulations. In 1998 the Commission established a High Level Working Group on Migration and Asylum (HLWG), a group consisting mainly of Justice and Home Affairs officials in cooperation with individual member state institutions. The HLWG was tasked with drafting guidelines on a coherent framework approach on the issue of visa facilitation, which covers migration, security and external relations. Specifically, it reviewed multilateral, European and bilateral agreements and existing policies in the field of asylum and immigration in order to allow for harmonisation of EU policies. Similarly, the ARGO program, operational from January 2002 until December 2006, was intended to encourage migration policy harmonisation and the uniform application of community law. The program was targeted not only at European member states, but also at third countries, as funding was provided only for projects involving

¹⁶ 'Morocco: Investigate Migrant Deaths at Sea,' *Human Rights News*, Human Rights Watch, 9 May 2008, available at www.hrw.org.

at least one foreign state. Through ARGO, the EU endeavoured to encourage transparency in the actions of national authorities, especially in relation to the member states activities in third countries. Bilateral partnerships were thus monitored and evaluated by the EU in order to ensure their compliance with the relevant human rights laws. These efforts were aimed both at overseeing member states' compliance with international human rights principles and harmonising EU policies to minimise the potential overburdening of certain states.

Establishing a standard legal framework for member states' illegal migration management has only recently become a priority area for the European Commission as the member states themselves have come to accept that community-level oversight has certain advantages. In September 2005 the Commission adopted a proposal for a directive on common standards and procedures for member states returning people staying illegally in the EU to their 'country of origin, transit or another third country, whether voluntary or enforced' (EC 2005, p. 13). In July 2006 the Commission adopted a Communication on illegal migration policy priorities in an effort to strike a balance between European security and the basic rights of individuals. This document reaffirmed the importance of cooperation between EU member states and third country governments. It also called for 'a common understanding of integrated border management to cover the full spectrum of border management activities,' including 'the identification of best practices for an integrated border management model' (EC 2006). In June 2008 the European Parliament adopted the directive on the return of illegal immigrants after a compromise was struck with the European Council. The directive approves deportation but sets down minimum standards, including voluntary departure periods, a maximum detention period of six months, and access to legal aid for poor migrants.¹⁷

The EU has also partly addressed human rights concerns arising from the increasingly militarised bilateral relations between EU member governments and their south Mediterranean counterparts by proposing policy to incorporate human rights protection into everyday operations. The European Commission's Regulation establishing a Community Code on the rules governing the movement of persons across borders is intended to provide a legal framework, taking into account relevant human rights principles, for member states' cooperation with third countries.¹⁸ Articles of the Regulation deal directly with border surveillance, refusal of entry and implementation of controls, outlining in detail the

¹⁷ See European Parliament 'Immigration: MEPs and the 'return' directive in depth', available at www.europarl.europa.eu, accessed 15/8/2008.

¹⁸ Regulation (EC) No 562/2006.

procedures that should be, or may be, taken by member states with regard to migration issues. Of particular importance and difficulty is the task of legally supervising Member states' surveillance activities of maritime borders. In this area, the need for a common, comprehensive European regulation becomes ever more immediate, as operations at sea, especially those taking place in the extra-territorial waters – the high seas and territorial waters of third states – tend to be governed by international legal instruments, rather than by purely national ones.¹⁹

While these EU-level initiatives are undoubtedly a step towards a more efficient and transparent management of illegal migration under the rule of law, they nonetheless still fail to fully incorporate and supervise all of the existing national-level anti-illegal migration policies in the Mediterranean region. There is a clear requirement for more structured, permanent and institutionalised oversight of bilateral partnerships.

Nevertheless, it is unlikely that south and east Mediterranean partner governments will unquestioningly accept Europe's lead in these matters. The situation becomes more delicate regarding the oversight of readmission agreements and other forms of bilateral cooperation between EU member governments and their Mediterranean counterparts. These agreements bypass EU institutions, and Brussels is effectively sidelined because it has no jurisdiction over the governments or security services of Mediterranean partner countries. If oversight is to be improved, these bilateral agreements will need to be incorporated into a framework specifying acceptable policies and best practices. This kind of framework cannot simply be imposed by the EU, but would require the agreement and active cooperation of Mediterranean partner governments. The proposed Union for the Mediterranean may provide an appropriate institutional setting for this kind of framework.

6. Improving oversight of illegal migration policy and operations: A 'Union for the Mediterranean project'?

The 'Barcelona Process – Union for the Mediterranean', first proposed by French President Nicholas Sarkozy during his election campaign, hotly debated by the French and German governments and launched with great fanfare in Paris on 13 July 2008, may provide an appropriate institutional setting for an illegal migration oversight body. In theory, the Union

¹⁹ House of Lords European Union Committee, 9th Report of Session 2007-08, Frontex: the EU external borders agency, Report with Evidence, 5 March 2008.

for the Mediterranean (UPM) addresses two of what some analysts consider the EMP's greatest weakness: first, the lack of south Mediterranean 'ownership' of the EMP; and second, the tendency of political deadlocks in certain issue-areas to overshadow progress on issues where common interests exist. The UPM provides for greater non-EU influence over decision-making, and a project-based focus on discrete issues of common interest. Like most European agreements, the UPM has the characteristics of a negotiated framework that can be expanded into more sensitive issue areas over time. Initially, the UPM will focus on relatively uncontroversial projects including motorway building and de-pollution.²⁰ However, President Sarkozy's original Mediterranean Union proposal called for a multilateral council, similar to that of the EU itself, to deal with all of the major Euro-Mediterranean issues: energy, security, counter-terrorism, migration and trade.²¹ Although these ambitions were refined during intra-EU negotiations before the Paris Summit, there is no reason to believe that the UPM's mandate will not extend into more sensitive areas should the framework prove successful.

By introducing biennial Euro-Mediterranean summits, annual foreign affairs ministers' meetings, a co-presidency, a joint permanent committee and a joint secretariat, the proposed UPM proposal provides non-EU countries with a greater say in decision-making regarding projects carried out under its mandate. Mediterranean partner governments may be able to use this as an opportunity to negotiate a common position on any given project, thus strengthening their weight in negotiations with the EU. A common Mediterranean partner country position towards Europe also reduces the need for the EU and its members to deal with ten or more neighbouring countries, each with different interests and demands. This promises to improve the efficiency of Euro-Mediterranean negotiations by enabling the EU to negotiate the terms of a project with one partner, instead of trying to satisfy a wide spectrum of third country interests. The requirement that the UPM secretariat arrange funding for projects also reduces the influence of the European Commission in major strategic decisions as well as their day-to-day implementation. The UPM is – at least on paper – a less EU and more Mediterranean bargaining framework.

The UPM could be utilised to facilitate transparent oversight of migration policies and operations by incorporating them into a committee comprised of law enforcement, judicial, parliamentary and NGO representatives from both EU and Mediterranean partner countries. As an adjunct to the joint permanent committee or the Euro-Mediterranean Parliamentary

²⁰ See 'Joint Declaration of the Paris Summit for the Mediterranean,' Paris, 13 July 2008.

²¹ Speech by Mr. Nicolas Sarkozy, Tangiers, 23 October 2007, available at www.diplomatie.gouv.fr

Assembly, this body would be able to define best practices for European and Mediterranean border control agencies and monitor adherence to these standards. Its day-to-day operations could be coordinated through the UPM Secretariat. Such a body would not have any legal jurisdiction – its role would be to provide independent, public oversight and to improve the transparency of unilateral and joint actions, with the possibility of case referral to the European Court of Human Rights. This institutional framework would enable a co-ownership of oversight, committing Mediterranean partner governments to participate in the formulation and implementation of policies and practices in accordance with internationally recognised human rights principles. As an official body, a UPM illegal migration oversight committee would have the potential to improve the efficiency of oversight, which is currently conducted by NGOs.

The UPM is designed to be a Euro-Mediterranean rather than an EU organisation, resting on the principles of multilateral cooperation, regional integration and cohesion (European Commission 2008 c). Including illegal migration in its remit would be a clear acknowledgement by Europeans that the phenomenon is a Mediterranean, rather than purely European, problem. While this change may seem merely rhetorical, it would take the wind out of claims that the EU protects its borders unilaterally, without regard for the interests of neighbouring countries. This removes a potential reason for non-cooperation on the part of Mediterranean partner governments. Effective management of illegal migration depends heavily on the ability of southern Mediterranean countries to adopt legal provisions and actions to counter regional irregular migration movements. Therefore, deeper integration of Mediterranean partner countries in the formulation, implementation and oversight phases of the policy and project development processes would increase the likelihood of cooperation, promote regional cohesion and foster the overall stability of the Euro-Mediterranean partnership.

7. Conclusions

Illegal migration is a long-term issue, with economic and social causes and consequences. These ‘root causes’ cannot be addressed in a time frame that is acceptable to most European voters. The push/pull factors that convince people to risk their lives to cross the Mediterranean and attempt to enter Europe illegally will still be prevalent for at least the next decade, if not beyond. It will be many years before the measures that the EU has put in place

to encourage economic growth and to reduce incidences of socio-political persecution in sub-Saharan and Mediterranean partner countries start to make a difference to migration, assuming political elites in these countries implement the reforms the EU is calling for. People will keep trying to enter the EU, and as border security measures tighten and 'easier' routes are made more difficult, people will risk longer and more dangerous entry routes and will be more prepared to put their lives in the hands of people traffickers (Spijkerboer, 2007). The illegal migration problem will not go away, because there will be more people wanting to live in Europe than Europeans are prepared to allow for many years to come. Border security, therefore, will remain an unpleasant necessity, and debates over how best to implement management strategies that uphold European and member state law at the same time as protecting vulnerable migrants will remain current for the foreseeable future.

The EU's role in illegal migration management is based on three spheres of action: providing an institutional framework for discussion, debate and declarations at the policy level; facilitating operations when multilateral coordination is necessary at the operational level; and most importantly, supervising the member states' policies and operational standards with regard to illegal immigrants and undocumented residents at the oversight level. The EU's primary role is to act as a policy 'clearing house', improving policy efficiency in the EU by providing member states with an institutional environment in which to coordinate their policy responses. At the next level, the EU aims to improve border management by facilitating operational cooperation among member states and third countries through agencies such as FRONTEX and EUROSUR. At the third level, the EU oversees member states' adherence to the relevant European and international human rights conventions, especially with regard to their bilateral relations with third countries and their activities in enforcing border control policies. The EU does not endeavour to supersede the existing efforts of member states, but rather seeks to establish communal instruments to synergise and coordinate actions taken by national administrations through the addition of the European dimension (European Commission, 2001a) While member states maintain their responsibilities in border policing and bilateral cooperation partnerships, the EU provides coordinating assistance and oversees existing practices.

While the existing system has led to an increase in the apprehensions of illegal migrants attempting to cross the Mediterranean, it has also raised concerns regarding the transparency of practices and the legitimacy of oversight. Considering that effective management of the

problem rests on deep, sustained cooperation between origin and destination countries, an institutional framework is required to facilitate such cooperation. This involves taking account of the expectations and interests of the neighbouring countries in the policy formulation process, as well as the establishment of a permanent oversight body to define best practices and monitor adherence to them. The bilateral relationships established within the current system clearly lack a coherent institutional and legal framework, which increases the potential for unsavoury incidents, and the difficulty of dealing with them when they occur.

Establishing, implementing and overseeing a common framework for bilateral management of illegal migration represents an opportunity for the European Union and its Mediterranean partners. Facilitating partnerships may be best undertaken in the proposed Union for the Mediterranean, which offers a framework within which efficient and durable project-based cooperation could be incorporated. This framework, based on co-ownership between northern and southern members, has the potential to improve the consistency and structure of bi- and multilateral partnerships. The establishment of a permanent committee to supervise the implementation of existing agreements will in turn greatly increase the coherence and transparency of migration management policies within a joint, legitimate framework.

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