European Union

Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees

Introduction

Irregular migration into the European Union (EU) poses clear challenges for European governments. Few would question the urgent need for policies to address these challenges. However, the common EU policy in this area is primarily focussed on keeping migrants and asylum seekers out of and away from Europe. The rights of migrants and refugee protection are marginalized.

This briefing paper summarizes recent trends in the EU's approach. Through case studies of conditions in, and EU policies toward, Ukraine and Libya, it critiques current EU "externalization" practices. After noting some hopeful signs toward enhanced protection for asylum seekers and migrants, it concludes with recommendations to the EU and its member states.

I. Current EU Policy

The "Internal Dimension"

Within the borders of the EU the emphasis is on managing migration and securing the EU's borders with the rest of the world. This "internal dimension" of the EU's approach blurs immigration and asylum policies with cooperation among member states on counterterrorism, crime, and border security issues. It is unsurprising that it results in measures that are incompatible with the obligations of EU member states under the 1951 Refugee Convention[1] or the European Convention for the Protection of Human Rights (ECHR).[2] Efforts to develop common minimum standards for the treatment of asylum seekers have often undermined rather than enhanced protection.

A telling illustration of the direction EU policy is taking is the Asylum Procedures Directive. In September 2005, the European Parliament expressed "severe reservations" about the draft directive and called for over 100 amendments to the document. In a reaffirmation of the principle that an asylum seeker should have his

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[1] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, adopted July 28, 1951, entered into force April 22, 1954.

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), European Treaty System No. 005, Rome, November 4, 1950.

or her claim individually assessed, the Parliament argued that any applicant should have the right to "rebut the presumption of safety" associated with the proposal for "safe third country" lists.[3] Human Rights Watch and others had called in March 2004 for withdrawal of the draft directive on grounds that the "most contentious provisions are all intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU."[4]

Yet the EU Justice and Home Affairs Council passed the Asylum Procedures Directive on December 1, 2005, without significantly responding to the reservations expressed about the draft by the Parliament or others. The United Nations High Commissioner for Refugees (UNHCR) stated the following day that the agency was "worried that the implementation of the directive may lead to breaches of international refugee law if no additional safeguards are introduced, and make it harder for refugees to have their asylum claims properly heard in Europe."

In addition to the Asylum Procedures Directive, individual member states such as Italy, Spain, the Netherlands, and the UK have introduced increasingly restrictive measures. These measures at the national level variously include increased use of immigration detention, falling recognition rates for refugees, the withdrawal of social benefits from asylum seekers, and the lack of effective opportunities to challenge detention and deportation, resulting in increased risk of refoulement (the return of persons in need of human rights or refugee protection to places where they are at risk of being persecuted, or subjected to torture and ill-treatment).[5]

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[3] The European Parliament's proposed amendments to the Asylum Procedures Directive were not binding on the Council.
[4] Letter from Human Rights Watch and others to Antonio Vitorino, Member of the European Commission, "Call for withdrawal of the Asylum Procedures Directive," March 22, 2004, http://hrw.org/english/docs/2004/03/22/eu-letter032204.pdf#search=%22Vitorino%22..
[5] See Human Rights Watch, *Spain, Discretion Without Bounds: The Arbitrary Application of Spanish Immigration Law,*, vol. 14, no. 6(D), July 2002, http://www.hrw.org/reports/2002/spain2/; *Spain, The Other Face Of The Canary Islands: Rights Violations Against Migrants and Asylum Seekers*, vol. 14, no. 1(D), February 2002, http://hrw.org/reports/2002/spain/; *Nowhere To Turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco*, vol. 14, no. 4(D), May 2002, http://www.hrw.org/reports/2002/spain-morocco/; *The Netherlands, Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, vol. 14, no. 3(D), April 2003, http://www.hrw.org/reports/2003/netherlands0403/.

"Externalizing" migration and asylum policy

A second dimension of EU policy seeks to "externalize" migration and asylum policy by focusing on regions of origin and transit countries as more appropriate places to host, detain, and process refugees, migrants, and asylum seekers.[6]

Since the mid-1980s, policy makers in Europe have been intrigued by the idea of "externalizing" or "internationalizing" the hosting of asylum seekers and migrants attempting to reach, or already on, the territory of the EU. The external dimension of EU asylum and migration policy currently has a number of components, including:

- o refusal of entry to EU territory of persons coming from countries designated as "safe countries of origin" or transiting through countries deemed to be "safe third countries";
- o interdiction at sea of persons attempting to reach EU territory;
- o the conclusion of "readmission agreements" with countries outside the EU, by which the countries agree to accept the return from EU territory of migrants and asylum seekers who transited through the countries en route to the EU; and
- o support to border enforcement and detention capacity in transit countries that border the EU.

The external dimension emphasizes development as a mechanism for increasing the ability of regions of origin to secure their borders against irregular migration, but also to host refugees from the region—termed "capacity building"—and utilizes political and aid conditionality as a means of securing the cooperation of countries outside the EU.

Some elements, such as the proposal that common EU policy should include a refugee resettlement program to admit UNHCR-recognized refugees to the EU from their regions of origin, are relatively uncontroversial.[7]

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[6] These dimensions are set out fully in the Hague Programme, a comprehensive EU plan addressing cooperation among EU states on a range of internal matters including migration, counterterrorism, criminal and judicial cooperation, and human rights. "The Hague Programme: Strengthening Freedom, Security And Justice In The European Union," Annex I to The Presidency Conclusions of the Brussels European Council (4/5 November 2004), Council of the European Union, Concl 3, 14292/04, Brussels, November 5, 2004, p. 21.

[7] Communication from the Commission to the Council and the European Parliament, "Towards more accessible, equitable and managed asylum systems," COM(2003) 315, Brussels, June 3, 2003."

Others are less clear cut. The Justice and Home Affairs Council in October 2005 hailed the EU's first step in "improving access to protection needs and durable solutions for those in need of international protection, as quickly and as close to their home as possible." The object of this praise was the European Commission's September communication on Regional Protection Programmes (RPPs).[8] In and of itself the RPP idea appears to have a number of positive elements; the RPPs' goals of strengthening the protection capacity and improving access to durable solutions in the target countries are laudable.

The RPPs concept raises concerns, however, that the EU will use the existence of such programs as a pretext to declare the target countries "safe third countries." The EU could then return asylum seekers and migrants who transited through these countries even though effective protection could not be guaranteed.

It is critical that the mere existence of RPPs is not used to justify the return of migrants and asylum seekers to countries like Ukraine in the absence of adequate capacity to process and host those groups, or to undermine the right to seek asylum in the European Union. UNHCR, in welcoming the RPP proposal, stressed the need for guarantees that RPPs would be complementary to existing asylum provisions in EU states.[9]

Scepticism regarding the RPP concept can be traced to its forebear, the Regional Protection Area, or RPA, concept, touted in a February 2003 UK Cabinet Office and Home Office policy paper, called "A New Vision for Refugees."[10] Under the New Vision proposal, RPAs were to be established both to achieve improved protection in regions close to the origin of refugee flows, but also to contain those flows by returning spontaneous arrivals from the EU to the RPAs and by establishing managed

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[8] Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes (doc. 11989/05 ASILE 14 RELEX 438), September 1, 2005, and Draft Council Conclusions on the Communication from the Commission on regional protection programmes (doc 12593/05 ASILE 18 RELEX 471), September 26, 2005. See also European Commission website, dedicated page on Regional Protection Programmes, at http://europa.eu.int/scadplus/leg/en/lvb/l33222.htm. The communication stated that RPPs are to be piloted in the "Western New Independent States" (Ukraine, Moldova and Belarus) and Tanzania.

[9] UNHCR has welcomed the RPP proposal but emphasized "It is important that these measures do not prevent asylum seekers from entering the EU, and still provide full access for them," Stefania Bianchi, "EU Plans to keep asylum seekers at bay," IPS, September 29, 2005, http://www.ipsterraviva.net/Europe/article.aspx?id=2395 (accessed October 14, 2005).

[10] Gregor Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones," *European Journal of Migration and Law 5*: 303-341 (2003).

refugee resettlement programs from the RPAs to the EU as an alternative to irregular movement by asylum seekers to the EU. Following vigorous protests from civil society and other member states, including Germany and France, the UK withdrew its proposal prior to the June 2003 European Council meeting in Thessaloniki. Nevertheless, it is not difficult to imagine individual states, or the EU as a whole, seeking to rely on the existence of a Regional Protection Programme to justify the establishment of a similar "protection area" in the future.

Human Rights Watch is also concerned about the implications of the EU's goal (as the Commission communication on RPPs states) of addressing asylum needs "as close to home as possible."[11] As discussed below, countries that the EU is cultivating to offer "protection in the region" may not be up to the task, with the result that this aspect of the externalization of EU migration and asylum policy threatens to cut off access to meaningful international protection for many who require it. European Commission plans for "protection in the region" based on improved protection in current countries of transit appear also to be based partly on the proposition that, even before such improvements take place, "intercontinental movements are seldom necessary for protection reasons alone."[12] Human Rights Watch research—in Libya and Ukraine (the two case studies in this paper), and elsewhere—suggests this assumption is false.

The EU has begun to implement elements of almost all of the externalization measures listed above. Meanwhile some individual EU states have already stepped well beyond common EU policy in some of the areas listed. At least two EU states, Italy and Spain, have engaged in exclusionary practices that conflict with international law. These and other EU states have also implemented returns with scant regard for whether the receiving countries could offer effective protection.

By bilateral arrangement with Libya, Italy in late 2004 and again in 2005 expelled— without a proper assessment of their asylum claims or access to fair asylum

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[11] Council conclusions on regional protection programmes, adopted October 12, 2005, Bulletin EU 10-2005, Area of freedom, security and justice (9/24), http://europa.eu/bulletin/en/200510/p104009.htm (accessed August 8, 2006).

[12] "Draft resolution on manifestly unfounded applications for asylum," Ad Hoc Group Migration for the UK Presidency of the Council of the European Communities, Brussels, July 1, 1992, cited in Edward Mortimer, "Behind closed doors – Governments are conspiring to restrict the right to political asylum in the EC," *Financial Times* (London), October 28, 1992.

procedures—people who arrived from North Africa and were being held on the Italian island of Lampedusa under Italy's mandatory detention policy for undocumented migrants and asylum seekers. (The Italian government elected in April 2006 said in May that it will not expel individuals to countries that have not signed the Refugee Convention, including Libya.)

In early October 2005, faced with mass attempts by undocumented migrants to force entry into Spain's North African enclaves of Ceuta and Melilla, the Spanish government expelled back to Morocco at least seventy-three people who had reached the enclaves, including several who had sought to claim asylum. The expulsions were reportedly carried out without an individual assessment that would have enabled presentation of asylum claims. Eleven migrants were killed and scores wounded in and around the enclaves during the crisis. There were reports of excessive use of force by Spanish and Moroccan border guards in and around the enclaves, and allegations that some migrants were abandoned in the desert by the Moroccan authorities.[13]

The European Commission dispatched a fact-finding mission to Spain and Morocco in the wake of the crisis, but its mandate was limited to assessing the scale of "illegal migration" from Africa via Morocco to the EU, immigration channels from Morocco to the EU, and ideas from Moroccan and Spanish authorities about "measures to intensify cooperation between the EU and Morocco in preventing and combating illegal migration." As the Commission's report on its investigation states: "The technical mission did not seek to investigate the recent tragic incidents in Ceuta and Melilla nor did it aim to assess the ways that border management is carried out by Morocco or Spain."[14] While a focus on irregular migration is perfectly legitimate, it must be coupled by consideration of the human rights dimension of migration.

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[13] For further details see "Spain: Deportations to Morocco Put Migrants at Risk - Violence against Migrants in Ceuta and Melilla Requires Independent Investigation," Human Rights Watch news release,
http://hrw.org/english/docs/2005/10/13/spain11866.htm.

[14] European Commission, "Visit to Ceuta and Melilla – Mission Report Technical mission to Morocco on illegal immigration, 7th October– 11th October 2005," October 19, 2006,
http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/380&format=HTML&aged=0&language=EN&guiLanguage=en

II. EU Externalization in Practice

A. Current lack of protection in states bordering the EU

Among the specific flaws in the "externalization" agenda is the EU's choice of countries to target as partners for cooperation and assistance in "migration management."

Countries neighboring the EU in the east or in the south across the Mediterranean are experiencing increasing numbers of migrants and asylum seekers in transit trying to reach EU territory.[15] The EU is pursuing partnerships with countries that have yet to implement systems for handling migrants and asylum seekers that provide necessary protections. Although they are not "safe countries," it is expedient for the EU to characterize them as such. More and more migrants and failed asylum seekers are returned to these countries under "readmission agreements."

Consequently, many of the EU's neighbors carry a heavy responsibility (in logistical, technical, and financial terms) for the identification, apprehension, detention, and eventual return of migrants, as well as responsibility for identifying asylum seekers and providing them with a full and fair asylum determination procedure.

The case of Ukraine

Ukraine demonstrates the difficulties for newly independent or less developed states on the borders of the European Union seeking to balance what is essentially an agenda to prevent irregular migration to the EU with the need to respect the rights of the migrants, refugees, and asylum seekers on its territory.

Ukraine falls substantially short of its international obligations toward migrants and refugees. Notwithstanding recent legislative improvements and a proposal to

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[15] In 2004, 900,000 irregular immigrants were refused entry to the EU, 380,000 were arrested in "unlawful" situations and 200,000 were expelled, according to Justice, Freedom and Security Commissioner Franco Frattini. Inauguration speech of the Frontex Agency, 2nd meeting of the Management Board of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States, SPEECH/05/401, Warsaw, June 30, 2005, http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/401&format=HTML&aged=0&language=EN&guiLanguage=en (accessed July 7, 2005).

develop a new state migration service under the ministry of interior, it has an inadequate system for dealing with asylum seekers, migrants, and refugees. Repeated institutional restructuring has led to periods of complete suspension of asylum procedures, and very strict application deadlines are difficult for many asylum seekers to meet. Problematic institutional policies, such as profiling particular national groups who are automatically refused the possibility to make an asylum claim, further undermine the system. Migrants and asylum seekers at the country's western border with the EU face a significant risk of detention, and once in detention, border guards sometimes refuse to forward applications for asylum in Ukraine from detainees to regional migration services. There is ineffective protection against refoulement both for persons sent back from Poland, Hungary, and Slovakia after attempting to gain access to the EU, and for other asylum seekers in detention in the interior.[16]

Effective protection in Ukraine is limited by a series of factors: lack of prior experience in managing migratory flows, a judicial tradition in which administrative law is not thoroughly developed or functional, institutional structures that are lagging behind, limited resources for social support and integration due to a strained economy, no tradition of asylum, and the lack of a human rights culture.

Migrants and asylum seekers in Ukraine are routinely subjected to substandard conditions of detention, physical abuse, and verbal harassment. Severe overcrowding was a serious problem in most of the detention facilities visited by Human Rights Watch when researching our report about Ukraine, *On the Margins*, in early 2005.[17] Many detainees were deprived of appropriate bedding and clothing, and access to exercise, fresh air, natural light, adequate food, and medical services. Those in detention lacked basic procedural rights, including access to counsel, doctors, and interpreters, the right to challenge effectively the lawfulness of their detention, and the opportunity to communicate with family, friends, and the outside world. Many migrants and asylum seekers we interviewed were not informed of the

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[16] In February 2006, for example, ten Uzbek asylum seekers were returned from Ukraine to Uzbekistan before their protection needs could be determined. See Human Rights Watch, "Ukraine: Uzbek Asylum Seekers Sent Back to Face Abuse HRW Letter to President Yushchenko," February 22, 2006, http://hrw.org/english/docs/2006/02/22/ukrain12737.htm.

[17] Human Rights Watch, *Ukraine - On the Margins: Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union*, vol. 17, no. 8(D), November 2005, http://hrw.org/english/docs/2005/11/30/ukrain12097.htm.

reasons for their detention nor told how long they were likely to remain in detention. Although Ukrainian law provides a limit on the length of immigration detention, those time limits had expired in many of the cases we researched.

The long periods of detention, combined with severely substandard conditions and lack of procedural guarantees, raise serious concerns that detention conditions in Ukraine for migrants amount to cruel, inhuman, or degrading treatment in violation of the European Convention on Human Rights.

In September 2006, a delegation from Human Rights Watch returned to Ukraine to determine what progress had been made with respect to rights protections for migrants and asylum seekers. Representatives from nongovernmental and intergovernmental organizations indicated that the conditions of detention and the problem of refoulement remain serious concerns. Ukraine thus cannot be considered a "safe third country" for the purpose of returns. In light of this, Human Rights Watch and other actors have advocated for a "transition" clause to be inserted into the EU-Ukraine readmission agreement, currently under negotiation and slated for adoption by the end of 2006. A transition or suspension clause would delay any returns of third country nationals from the EU to Ukraine until Ukraine can provide effective protection and guarantee the human rights of asylum seekers and migrants on its territory (see section below on readmission agreements).

The case of Libya

There are many parallels between conditions in Ukraine and Libya, but the latter presents some issues of specific concern. Pressure from the European Union that Libya should stem the flow of migrants transiting its territory has contributed to an all-out retreat from Libya's previous open door policy for foreigners. The Libyan government has toughened its border controls and in recent years has implemented a plan to arrest and forcibly return tens of thousands of migrants, refugees, and asylum seekers. In researching our recent report on Libya, *Stemming the Flow*,[18] we found that the plan has led to arbitrary arrests, physical abuse, lengthy and arbitrary

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[18] Human Rights Watch, *Libya – Stemming the Flow: Abuses against Migrants, Asylum Seekers and Refugees*, vol.. 18, no. 5(E), September 2006, http://hrw.org/reports/2006/libya0906/

detention in poor conditions, and forced deportations without the opportunity to seek asylum, all of which violate Libyan and international law.

Libyan security officials typically arrest migrants, refugees and asylum seekers at or near the borders—entering or departing the country—or during urban sweeps. In both cases, migrants, refugees, and asylum seekers reported physical abuse by Libyan police and prison guards, sometimes allegedly resulting in deaths. They complained of overcrowding in detention facilities, poor sanitation and food, not knowing the reasons for their detention, and not having access to a lawyer or legal review. Some individuals who transited through Libya told Human Rights Watch that they witnessed Libyan security officers sexually abuse women in detention. In many cases, migrants, refugees, and asylum seekers reported that the police or guards let them go after they paid a bribe. Corruption in the form of collusion between authorities and people-smugglers was also alleged by some of the migrants interviewed by Human Rights Watch.

Our report on Libya also examines abuses during the deportation process, concluding that while the majority of people Libya has sent home in recent years were economic migrants, some were refugees who faced the risk of persecution. Libya has given foreigners in the deportation process no opportunity to seek international protection—Libya has no asylum law or procedure, has not signed the 1951 UN Convention relating to the Status of Refugees (although it has signed the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa), and refuses to sign a formal agreement with UNHCR. Officials told Human Rights Watch that the introduction of an asylum law was being contemplated, but as of October 2006 no draft had been made public. Some government officials said that such a law was not necessary because all foreigners in Libya were economic migrants, but other officials were more candid, telling Human Rights Watch that introducing an asylum law would encourage foreigners to "come like locusts."

Consistent with its reasoning that there are no asylum seekers in Libya, the Libyan government claims it is only returning unauthorized economic migrants, so they face no risk of torture. The Libyan government maintains it is incurring great expense to do such migrants a favor by preventing them from embarking on the dangerous sea

route to Italy, on which hundreds of people die every year in overcrowded boats.[19] However, according to some reports, deportees were sometimes left stranded and died along the way during deportations by the Libyan government back to their countries of origin. On April 14, 2005, the European Parliament passed a resolution that called on the Italian government to cease the collective expulsions of migrants and refugees to Libya due to that country's "recent massive repatriations of foreigners in conditions guaranteeing neither their dignity nor their survival." The resolution cited "Libyan sources" as reporting "106 alleged deaths resulting from these expulsions."

The Libyan and Eritrean governments apparently have an agreement for the return of Eritrean nationals, which puts Eritrean refugees in Libya at particular risk. Since 2002, Libya has deported hundreds of Eritreans, and some of them have faced serious abuse upon their return. A well publicized mass deportation took place on July 21, 2004, when Libya forcibly returned 109 Eritrean nationals on an Italian-funded Air Libia Tibesti chartered flight. According to human rights groups, the Eritrean government detained the deportees upon arrival and held them incommunicado in a secret prison. On August 27, 2004, the Libyan government attempted to forcibly return another group of seventy-five Eritreans, among them six children. Afraid of returning home, some of the Eritreans hijacked the plane and forced the pilot to land in Sudan, where sixty passengers sought asylum and were recognized as refugees by UNHCR.

B. Impact of EU migration policy toward neighboring states

In pursuit of good relations with the EU, neighboring states may not only seek to comply with EU "external" policy initiatives on migration and asylum, but also to emulate the worst of EU internal approaches to these issues, particularly with regard to detention and expulsion.

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[19] Libyan officials told Human Rights Watch that between August 2004 and February 2005 the government spent $16 million on returns.

Ukraine illustrates this concern. The EU is Ukraine's biggest donor, and has had a significant influence on its democratization and reform processes.[20] Since 1998, relations between the EU and Ukraine have been based on a Partnership and Cooperation Agreement.[21] The EU has not encouraged Ukraine to make a membership application, offering it instead a place in its European Neighbourhood Policy (ENP) framework. Given the strategic, political, and economic importance to Ukraine of its relationship with the EU, the government in Kyiv has a clear interest in cooperating with the EU on the management of migration and asylum flows on the EU's terms. The same could be said of many countries with which the EU is implementing or developing cooperation on migration and asylum. Ukrainian officials have stated, however, that cooperation on migration matters must benefit both the EU and Ukraine, and consequently have raised concerns over the EU-Ukraine proposed readmission agreement's provisions for the return to Ukraine of third country nationals.[22]

Libyan officials who spoke to Human Rights Watch were critical of the levels of support their country receives from the EU on migration, and utterly rejected the idea of hosting "offshore processing" on behalf of the EU. Nevertheless, Libya appears eager to please and emulate its key bilateral European partners in migration matters. A January 17, 2006 press release by the Italian Ministry of Interior, concerning a meeting between Libyan leader Mu'ammar al-Qadhafi and Italy's then-Interior Minister Giuseppe Pisanu, stated that in just over one year Italian-Libyan cooperation had prevented 40,000 undocumented people from leaving Libya.[23] Libyan officials told a delegation from the European Parliament visiting Libya the previous month that Libya's "goal is to repatriate all illegal immigrants we receive

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[20] Total EU funding for Ukraine from 1991 to 2004 amounted to €1 billion. This amount is supplemented by contributions from Member States which reached €157 million in the period 1996-1999. "Commission Staff Working Paper, European Neighbourhood Policy, Country Report," Brussels, 12.5.2004, SEC(2004) 566, (COM(2004)373 final).

[21] "Council and Commission Decision of 26 January 1998 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part," 98/149/EC, ECSC, *Official Journal L 049, 19/02/1998* pp. 0001-0002, http://europa.eu.int/servlet/portail/RenderServlet?search=RefPub&lg=en&nb_docs=25&domain=&in_force=NO&year=1998&month=2&day=&coll=JOL&nu_jo=49&page (accessed September 12, 2005).

[22] Andrew Rettman, "EU-Ukraine Relations Hit Visa Bump," *EU Observer*, October 2, 2006.

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

from Italy."[24] This summer, negotiations between the EU and Libya continued on joint naval patrols in the Mediterranean to interdict irregular boat migrants. In mid-September, Italy announced an agreement to deploy Italian police on Libyan territory to work with Libyan law enforcement in preventing people from leaving Libya's northern coast by boat.

The EU member states that receive the bulk of the transit migrants, refugees, and asylum seekers who pass through Libya—notably Italy—present the bad example of their own mandatory detention and unlawful expulsion practices. In bilateral cooperation to bolster Libya's interception capacities[25] they have been unwilling to advocate for refugee and human rights protection including safeguards against arbitrary detention and risky expulsions from Libya. Such safeguards would impede the speedy removal (and hence disappearance from visible accountability) of persons whom they themselves have forcibly returned to Libya, or whom Libya has intercepted with their encouragement and assistance.

Readmission Agreements

The EU is placing increasing emphasis on the use of readmission agreements as a mechanism to facilitate the return of migrants and asylum seekers to countries outside the borders of the EU.[26] A readmission agreement is usually a bilateral arrangement that enables the return of undocumented persons from one state to another. Readmission agreements between the EU and a state function in exactly the same way.[27]

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[24] "EP delegation to Libya: 'Our goal is to repatriate all illegal immigrants we receive from Italy', say Libyan authorities," European Parliament press release, Brussels, December 7, 2005.

[25] Libyan-Italian cooperation on irregular migration dates from incorporation of the issue in a December 2000 general bilateral agreement, and includes training and equipment for Libyan officials, Italian funding of charter flights from Libya to repatriate undocumented migrants, and the building of a reception centre for undocumented migrants in Libya and planning for two more.

[26] See, Justice and Home Affairs Council Action Plan to Combat Illegal Migration and Trafficking in Human Beings in the European Union, OJ C 142, June 14, .2002, http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52002XG0614(02):EN:HTML (accessed July 16, 2005), and, Justice, Freedom and Security Commissioner Franco Frattini, Speech before the Bundestag, "The Commission's policy priorities in the area of Freedom, Security and Justice," SPEECH/05/93, Berlin, February 14, 2005.

[27] In 1994, the Council adopted an EU specimen bilateral readmission agreement and a Recommendation concerning the adoption of a standard travel document for the expulsion of third country nationals. See Council Recommendation concerning a specimen bilateral readmission agreement between a Member State and a third country (OJ C 274, 19 September 1996); Council Recommendation concerning the adoption of a standard travel document for the expulsion of third country nationals (OJ C 274, September 19, 1996). Since 2000 European Community readmission agreements (applicable to all EU member states except

In theory, readmission agreements are not designed to interfere with the right to seek asylum. In practice, those subject to return under such agreements include not only irregular migrants and failed asylum seekers but also asylum seekers whose claims for asylum and protection needs have yet to be adequately determined. The agreements are also used to refuse admission at the border to asylum seekers without determining their protection needs.[28] This approach undermines the right to seek asylum and conflicts with Article 31 of the 1951 Refugee Convention, which prohibits penalties against refugees for unauthorized entry.

UNHCR has expressed concern about the impact of readmission agreements on the right to seek asylum.[29] In particular, UNHCR has questioned whether persons subject to return under such agreements will have access to effective and durable protection in the country of return, and has expressed concern about the use of such agreements to return third country nationals, emphasizing that "transfers of responsibility for considering asylum applications should only be explored in cases where the applicant has a connection or close link with another State." [30]

Negotiations on an EU-Ukraine readmission agreement began under the framework of the Partnership and Cooperation Agreement and the EU Justice and Home Affairs Action Plan.[31] Ukraine already has long-standing bilateral readmission agreements with Hungary, Poland, and Slovakia. The three bilateral agreements cover not only Ukrainian nationals, but also citizens of third countries and stateless persons. The older agreements lack an express obligation to ensure that the returnees will have their asylum claims processed in a fair and effective manner upon readmission, do

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Denmark, where an abstention applies) have been concluded with Hong Kong, Macau, Sri Lanka, Albania and Russia, and are presently being negotiated with four other countries: Pakistan, Morocco, Turkey and Ukraine.

[28] Executive Committee of the UNHCR, Conclusion on the return of persons found not to be in need of international protection, No. 96 (LIV) – 2003. See also UNHCR position on the EC readmission agreements with third countries, UNHCR Brussels, April 2003.

[29] UNHCR Position on the EC Readmission Agreements with Third Countries, UNHCR Brussels, April 2003. See also Executive Committee of the UNHCR, Conclusion on the return of persons found not to be in need of international protection, No. 96 (LIV) – 2003.

[30] UNHCR Background Paper Number 3, "Inter-state Agreements for the Readmission of Third Country Nationals, Including Asylum Seekers, and for the Determination of the State Responsible for Examining the Substance of an Asylum Claim," UNHCR, May 2001. UNHCR further clarified its position by stating that "a meaningful link or connection… would make it reasonable for an applicant to seek asylum in that State… Mere transit through a third country does not generally constitute such a meaningful link." "UNHCR Urges Caution as EU Negotiates "Safe Country" Concepts," *UNHCR News*, October 1, 2003.

[31] The EU-Ukraine Action Plan was jointly adopted at a special Cooperation Council, February 21, 2005, http://europa.eu.int/comm/external_relations/ukraine/intro/index.htm (accessed July 1, 2005).

not include a prohibition on the return of asylum seekers, and do not require receiving states to put into place adequate procedural safeguards to protect against refoulement, including return to risk of torture. Nor are protection mechanisms provided for vulnerable groups or for victims of trafficking.

In light of the problematic impact of current readmission agreements, the agreement being negotiated between the EU and Ukraine raises concerns regarding the content of its guarantees, as well as its likely operation. It remains unclear whether the agreement will contain an effective mechanism to ensure that returnees will have their asylum claims processed in a fair and effective manner upon readmission. The fairness and effectiveness of the accelerated procedures under which the returns would take place remains unclear, including whether those subject to return would have the right to an appeal with suspensive effect against refoulement, including return to risk of torture.

Given that Human Rights Watch research indicates that Ukraine does not provide effective protection or access to asylum, and fails to protect the rights of migrants, any readmission agreement negotiated between the EU and Ukraine must include language that guarantees that persons subject to the agreement will not be readmitted to Ukraine in violation of their basic human rights, including the right of those within the EU to seek and enjoy asylum in the EU state responsible for examining their claim. Such an agreement must take into consideration the necessary resources and the timeframe required to amend Ukrainian migration and asylum legislation and upgrade reception and accommodation conditions in the country.[32] The same concerns must apply to other agreements under negotiation between the EU and third states.[33]

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[32] By way of example, the EU–Albania Bilateral Readmission Agreement includes a suspension clause that creates a buffer period of two years of preparation for Albania before enforcing the agreement. Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation – Declarations, OJ L 124 , May 17, 2005, pp. 0022 – 0040.

[33] According to the European Commission, as of October 5, 2005, "the Council has so far approved the mandate for the Commission to negotiate Community Readmission Agreements with 11 third countries/entities: Morocco, Sri Lanka, Russia, Pakistan (September 2000), Hong Kong, Macao (May 2001), Ukraine (June 2002) and Albania, Algeria, China, Turkey (November 2002). Negotiations have been successfully completed with Hong Kong (November 2001), Macao (October 2002), Sri Lanka (May 2002) and Albania (November 2003)." European Commission, Readmission Agreements, MEMO/05/351, October 5, 2005. http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/351&format=HTML&aged=0&language=EN&guiLanguage=en

The EU admitted Ukraine as a partner in its European Neighbourhood Policy framework as a state sharing a "mutual commitment to common values principally within the fields of the rule of law, good governance [and] the respect for human rights." One of the first priorities identified under the ENP was cooperation in the area of justice and home (internal) affairs. The priorities for cooperation include: "readmission and migration, border management…[and] trafficking in human beings."[34] The EU Action Plan on Justice and Home Affairs with Ukraine further defined the areas for cooperation in this field.

This cooperation may be setting Ukraine up to fail in its human rights obligations toward migrants and asylum seekers. Because it lacks much of the necessary legal and policy framework and the proper accommodation capacity required to provide protection to refugees, process asylum seekers, and respect the rights of migrants, Ukraine runs the risk of becoming a warehouse where asylum seekers and migrants are detained in conditions that flout international law. It remains to be seen whether Ukraine's inclusion in a pilot Regional Protection Programme will address this.

The EU and the Ukrainian authorities expect the readmission agreement to be finalized by the end of 2006. Any agreement brokered in 2006, however, would require a transition or suspension clause, delaying the readmission of third country nationals to Ukraine from EU territory until such time as their protection needs and human rights could be guaranteed on the territory of Ukraine.

The cooperation between the EU and Libya is equally troubling. While it is not at this stage negotiating a readmission agreement, the EU is moving forward on cooperation with Libya without prioritizing protection, including negotiations on joint naval patrols, and with human rights conditionality more rhetorical than real. The EU Justice and Home Affairs Council, at a meeting on June 2-3, 2005, said that any cooperation with Libya on migration will be "limited in scope and take place on a technical ad hoc basis" as long as Libya has not fully integrated into the Barcelona Process. While this statement implies human rights conditionality,[35] at the same

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[34] Commission of the European Communities, "Commission Staff Working Paper, European Neighbourhood Policy, Country Report," Brussels, May 12, 2004, SEC(2004) 566, (COM(2004)373 final), p. 11.

[35] Libya has been mooted since 1999 as a partner in the EU's Barcelona Process, whereby partner states agree to act in accordance with the United Nations Charter and the Universal Declaration of Human Rights, to develop the rule of law and

time the EU Justice and Home Affairs Council indicated a willingness to move ahead on a series of such "ad hoc" measures.[36]

These measures include reinforcing "systematic operational cooperation" between agencies responsible for enforcing sea borders and developing common Mediterranean Sea operations involving the temporary deployment of EU member states' vessels and aircraft;[37] sending EU immigration liaison officers to Libyan seaports and Tripoli airport for interception purposes;[38] and training Libyan officials on immigration controls, as well as on asylum issues, and on "best practices" for removal of irregular immigrants.

The Conclusion endorsed at the June 2005 Justice and Home Affairs Council meeting also calls for launching exploratory discussions between the EU and Libya to develop "concrete cooperation" to "tackle illegal migration in areas such as training, reinforcement of institution building, asylum issues, and public awareness of the dangers of illegal migration."[39] Among the list of suggestions for these discussions in the short term is how to assist in the repatriation of failed asylum seekers "after an independent asylum procedure in accordance with international standards."[40] This is a curious short-term discussion item given that Libya has no asylum procedure. The same list of short-term items for discussion also includes intensified cooperation and capacity building for "migration management and protection of refugees" in cooperation with UNHCR,[41] but the EU does not set as a precondition for cooperation either that Libya should sign and implement the 1951 Refugee

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democratic political systems, and to promote respect for diversity and pluralism and to combat manifestations of intolerance, racism, and xenophobia. To date Libya remains far from meeting the standards of the Barcelona *acquis*.

[36] "Council of the European Union, 2664th Council Meeting, Justice and Home Affairs, Luxembourg, 2-3 June 2005," 8849/05, press release, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/jha/85255.pdf (accessed March 7, 2006).

[37] The EU hopes to define a search and rescue area for Libya, as one does not currently exist. The definition of Italian/International/Libyan territorial waters is also extremely complex in the Sicily Channel.

[38] The EU Justice and Home Affairs Council on February 19, 2004, adopted a regulation on the creation of an immigration liaison officers' network. It refers to the "prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration," but contains no reference to the right to seek asylum. "Council of the European Union, 2561st Council Meeting, Justice and Home Affairs, Brussels, 19 February 2004," 5831/04, press release, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/jha/79117.pdf (accessed March 1, 2006).

[39] "Council of the European Union, 2664th Council Meeting, Justice and Home Affairs, Luxembourg, 2-3 June 2005," 8849/05, press release.

[40] Ibid.

[41] Ibid.

Convention or that it enter into a formal agreement with UNHCR. In the absence of a clearly agreed role for UNHCR, the EU states' interest in offering training on asylum issues and "best practices" for removal of irregular immigrants to Libya does not inspire confidence.

III. Toward Enhanced Protection

In relationships such as those between the EU and Ukraine or the EU and Libya it is the obligation of both parties—the EU and each partner state—to ensure compliance with international standards for respecting the human rights of migrants and asylum seekers. However, the EU should consider itself under a heightened obligation to improve its own policies and practices, as it pursues its agenda of exporting them. It should reaffirm its commitment to its own obligations to protect asylum seekers and migrants inside the EU's borders. The EU should also leverage its relationships with those neighboring countries with whom it is cooperating in "migration management" in order to seek improvements in protection within those countries.

There are some hopeful signs. In tandem with seeking to strengthen Libya's border controls, there are bodies within the EU trying to improve Libya's capacity to protect refugees and respect the rights of migrants. A European Commission Technical Mission to Libya in November-December 2004, for example, was frank in acknowledging problems, including the absence in Libya of an individual status determination prior to deportation of irregular migrants. The mission report noted that a "comprehensive long-term global approach to migration is needed, which should also include… protection of refugees." It concluded that "a full recognition of the UNHCR status by Libya would constitute a first step in this respect."[42]

This conclusion was partly reflected in the Justice and Home Affairs Council Conclusion of June 2005, which called on the Libyan authorities "to demonstrate a genuine commitment to fulfil their obligations under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which recognises that the Geneva Convention on Refugees constitutes the basic and universal instrument relating to the status of refugees and which requires effective cooperation with the UNHCR and

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[42] European Commission, "Technical Mission to Libya on Illegal Immigration, 27 Nov – 6 Dec 2004, Report."

the respect of the principle of 'non-refoulement'" (as noted above, however, this was not set as a precondition for cooperation).[43] It is important to stress that turning Libya into a safe country of first asylum would be a laudable goal in terms of enhancing refugee protection, but not as a nominal goal pursued self-interestedly by EU member states in order to make Libya a less inappropriate destination for readmissions.

There is also room for cautious optimism about the Regional Protection Programme concept. As noted above, Regional Protection Programmes aim to enhance the protection capacity of regions of origin through a coordinated approach, including general development and humanitarian assistance, and to improve access to durable solutions in the target countries. These are laudable goals that have the potential to improve global protection capacity. Whether the mechanisms do so, or serve instead as a pretext for denying access to asylum in the EU, will be a fundamental test of the European Union's commitment to its obligations toward refugees.

IV. Recommendations

To EU Member States

- Ensure that any national measures to prevent unauthorized entry and residence and to facilitate the removal of undocumented residents from the territory of the European Union fully respect human rights and refugee law.
- Refrain from sending asylum seekers and migrants to countries such as Ukraine and Libya until those countries have fair and efficient asylum processes.

To the Justice and Home Affairs Council

- Ensure that EU migration control measures, including the draft directive on common standards for the return of irregular migrants and the regulation establishing a Community Code on the rules governing the

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[43] "Council of the European Union, 2664th Council Meeting, Justice and Home Affairs, Luxembourg, 2-3 June 2005," 8849/05, press release.

movement of persons across borders, include adequate safeguards to ensure effective protection for refugees and respect for the human rights of migrants. In particular, procedural safeguards during deportation should be an essential element of an EU returns policy.

- Ensure that EU returns policy includes accountability for law enforcement and immigration officials who violate any safeguards aimed at preserving returnees' rights, particularly those established under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention against Torture (CAT).
- Ensure that the EU through the European Neighbourhood Policy prioritizes improvement of refugee and human rights protection by helping participating countries, including Ukraine, upgrade their reception and detention conditions and develop effective asylum laws, procedures, and infrastructure.

To the European Commission

- Encourage independent monitoring of the points of entry into the EU (border checkpoints, temporary reception centers, detention facilities for asylum seekers and migrants) in order to guarantee that the right to seek asylum is respected.
- Create an institutional mechanism to review the human rights impact of readmission agreements.
- Ensure that the rights of migrants, asylum seekers, and refugees are consistently prioritized within the context of the European Neighbourhood Policy.
- Create a Plan of Action to ensure respect for human rights prior, during, and after returns as a complement to the proposed readmission agreement with Ukraine, and any similar readmission agreements, which should include implementation of a tracking mechanism for the returns, a complaints mechanism, and a practical guide for the implementation of the returns.
- Include a transition or suspension clause in the proposed readmission agreement with Ukraine that will delay the return of third country nationals from EU territory to Ukraine until such time as legislative improvements

and the upgrading of reception and detention conditions in Ukraine meet international human rights and refugee protection standards.

- Invite representatives of nongovernmental organizations, UNHCR and the Ukrainian Ombudsman's office to participate in the Committee of Experts, when it is established, to monitor the application and interpretation of the proposed readmission agreement with Ukraine. Take a similar approach in any other readmission agreement.
- Ensure that the dialogue on migration between the EU and Ukraine includes all stakeholders (international organizations, refugees, communities representing migrants and asylum seekers, domestic and international nongovernmental organizations).
- Display greater transparency in negotiations with Libya on all matters relating to migration and border controls.
- Consistently emphasize the rights of migrants, asylum seekers and refugees, and access to protection, in all EU relations with Libya on migration matters (including any cooperation on border controls).

To the European Parliament

- Ensure under co-decision procedures that EU immigration control measures, including the draft directive on common standards for the return of irregular migrants and the regulation establishing a Community Code on the rules governing the movement of persons across borders, include safeguards to ensure effective protection for asylum seekers and respect for the human rights of migrants. In particular, procedural safeguards during deportation should be an essential element of an EU returns policy.
- Ensure that the rights of migrants and refugees are consistently prioritized within the context of the European Neighbourhood Policy.
- Denounce any collective expulsions of foreigners from European Union states as breaches of the principle of non-refoulement and in violation of the right to protection from collective expulsion.
- Ensure that the EU consistently emphasizes the rights of migrants, asylum seekers and refugees, and access to protection, in all EU relations with Libya on migration matters (including any cooperation on border controls).

To the External Border Agency

- The European Agency for the Management of Operation Cooperation at External Borders (European Border Agency/FRONTEX) should coordinate common training for national border guards and develop a practical guide for the implementation of returns that spells out the human rights standards applicable to each stage of the returns procedure.