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Thomas Demmelhuber

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The European Union and illegal migration in the southern Mediterranean: the trap of competing policy concepts

Thomas Demmelhuber*

Department of Political Science, University of Erlangen-Nuremberg, Germany

Starting with the European Security Strategy (ESS) in 2003 the European Union reiterated that security, stability, and good governance in its near neighbourhood are key foreign policy priorities. In consideration of new kinds of security threats, such as illegal migration and various forms of terrorist acts in the southern Mediterranean, we have been witnessing an on-going externalisation of security cooperation in the field of Justice and Home Affairs (JHA) with third countries in the region and beyond. In terms of illegal migration, FRONTEX acts as the main instrument in the management of Europe's border. This border control agency aims at curbing illegal migration in cooperation with third countries. However, the question remains whether it is a further step in deepening the chronic deficit of coherence in EU foreign policy. By externalising security cooperation the EU contradicts its policies in the fields of democracy promotion, rule of law, and human rights which are based on the EU's self-perception as a normative power. Thus, the following paper stresses three substantial contradictions of EU policy on illegal migration: *first*, EU policy contradicts its own efforts in democracy promotion, *second*, EU policy is in breach of European and international law, and *third*, the EU seems to prefer a short-term approach to a long-term effort that tackles the root causes of illegal migration in the southern Mediterranean.

Keywords: illegal migration; externalisation of EU policies; FRONTEX; international law

Despite crucial differences in geographic, economic, and social specifics, the countries of the southern and eastern Mediterranean, from Morocco in the West to Lebanon and Syria in the East, share a common denominator regarding their setting of state and power.¹ To a different extent, with the exception of Israel as a parliamentary democracy (within the 1967 borders), we are witnessing a resilience of authoritarian governance. This is also valid from the perspective of early 2011 and the popular upheavals which are reverberating in the Middle East. The breakdown of authoritarian rule as seen in Tunisia or Egypt marks the beginning of a long and uncertain journey considering that consolidated democracy is only one of several possible outcomes following collapsing authoritarian regimes. After the early 1990s in which some observers saw the end of history or the final victory of democracy come, there is a tangible consensus now that Huntington's 'third wave of democratization' has not reached the authoritarian strip in the Middle East in general.² It must rather be seen as a process in which authoritarianism

*Email: thomas.demmelhuber@polwiss.phil.uni-erlangen.de

gets an upgrading or, in other words, authoritarian elites try to adapt this model of governance to new domestic and international challenges in order to stay in power. Consequently, an extensive debate rallies, in academia, around the issue of how to grasp the diverse forms of authoritarian rule, that all share striking similarities in the region.³ Besides, much work is done in policy-oriented research on how to design an agenda that is conducive to political change in the sense of democratic theory.⁴

In practice, foreign policy actors such as the European Union (EU) have genuine policy interests in a region that is of decisive geopolitical and economic importance. With regard to energy security – just to name one prominent security interest – the EU as an evolving foreign policy actor first and foremost follows a realistic approach (in terms of international relations (IR) theory) in its relations to the countries of the Middle East in general and the southern Mediterranean in particular. In principle it also pretends to uphold a normative approach based on the EU's self-perception as a normative power (comprising the principles of rule of law, democratic governance, and human rights), although it is regularly challenged by a more dominant security and stability discourse plus an 'economic realism' on behalf of the involved EU policymakers.⁵ Hereby, the thinking that comprehensive liberalisation might lead, for instance, to short-term instability or unwanted election results with volatile economic repercussions enjoys strong support in practical policy making.⁶ In this subsequent 'zig-zag-pattern' of two competing foreign policy approaches the EU is still searching for a workable, coherent, and credible policy concept.⁷ By the same token, energy security is not the only issue the EU is concerned about in its relations towards the southern Mediterranean and in which the EU forgets about its normative implications. The 60-year-old Arab-Israeli conflict, inter-faith cleavages between Europe (predominantly Christian) and the Arab World (predominantly Muslim), and security risks emanating from Islamic radicalism determine the agenda of EU foreign policy in the region. For the last few years, another pressing problem has almost eclipsed the latter security concerns: the southern coastlines of the EU face a tremendous influx of migrants that try to enter EU territory illegally⁸ by sea via four main routes: *first*, from West Africa to the Canary Islands, *second* via the Strait of Gibraltar (including the Spanish enclaves Ceuta and Melilla), *third* from Libya to Malta or Sicily (via Lampedusa), and *fourth* from Turkey to Greece. In close cooperation with third countries, that primarily act as transit countries for sub-Saharan migrants and those from central Asia, the EU has been gradually establishing a common migration and border policy since the Tampere summit of the European Council in 1999 (based on the Treaty of Amsterdam) and has been gradually undermining its very normative principles as security, stability, and close cooperation with third countries' authoritarian elites became the leading policy priorities or the lesser of two evils for the management of the external border region and beyond.

Thus, the following paper aims at analysing the EU policy in the field of illegal migration and its implications for state and power in the respective third countries. As one main argument the author of this paper concludes that the EU's reaction to the increase in illegal migration is not only short-sighted and lacks a long-term perspective but is also in breach of international law, in particular regarding the United Nations Convention and Protocol Relating to the Status of Refugees (Geneva Refugee Convention, 1951) and European law. Furthermore, as will be shown in this paper, the subsequent close cooperation with the governing authoritarian elites in third countries, that is mandatory for joint border controls or resettlement agreements, has fostered those elites' grip on power and has perpetuated the mechanisms of authoritarian rule. Hence, the EU policy contradicts its own efforts in democracy promotion, that is to say its normative agenda to promote political reform in its immediate neighbourhood. By externalising the fight of illegal migrants the

cooperation in migration issues acts as a bargaining power of authoritarian elites like the Libyan regime in order to avoid any substantial liberalization of state and power.

Illegal migration and Europe

Migration in itself is not new. Moving from one place to another due to war, famines, or persecution based on ethnic or religious reasons has been part of mankind's history, but the attitude towards migration has changed. It was the modern national state with its territorial focus and territorially-based laws and norms (Westphalian system of states, 1648) that laid the ground for the emergence of the term 'irregular migration', 'undocumented migration', or later 'illegal migration' (the EU refers to 'illegal migration'). Subsequently the respective states have created their own legal setting to declare illegal migration as a criminal offence, as Italy's parliament has voted for in 2009. Prior to that legal act, illegal migration was an administrative offence, now it is punishable by a fine of up to €10,000.⁹

The socioeconomic divide between Africa and Europe is striking and one of the obvious reasons for moving towards the North. But the triggers of illegal migration are much more complex. Illegal migration can hardly be understood in a proper way unless one looks at the whole spectrum of state, power, and politics in North and sub-Saharan Africa. Failing states, authoritarian regimes, and war-torn regions are one side of the coin, Europe the other, since it shares a certain amount of responsibility for the current structural, political, and economic asymmetry (for example unbalanced foreign trade regimes like multilateral fishery agreements). Both mentioned reasons are further enhanced by vivid legends of the 'European dream', which create a distorted image of life in Europe for migrant workers leading to an unbroken incentive to move.

Hereby the countries of origin are to be found particularly in Africa south of the Sahara, with the bulk coming from central and western Africa. After having managed the hazardous crossing of the Sahara, most of the time migrants make transit countries in North Africa their temporary homes for two or three years. Within this span of time the migrants try to make enough money with jobs in the informal economy in order to pay for the final crossing of the Mediterranean.¹⁰ An estimated minimum of 100,000 people from sub-Saharan Africa embark on that trip to Europe annually – further supplemented by native migrants from the transit countries in the Middle East and North Africa, although they only account for not more than one fifth of the overall estimated number.¹¹ At the same time, with state structures falling apart and the 'piracy business' in the coastal waters of Somalia thriving, the Gulf of Aden becomes another hot spot of illegal migration that serves as an additional feeder for the eastern migration route (see route four in the introduction) that has been dominated by central Asian migrants. Along this route Turkey acts as a secondary transit country for African migrants coming from the Arab peninsula, which was their temporary home or workplace. Alone during the second quarter of 2008, Saudi authorities were arresting tens of thousands of illegal migrants at the Saudi-Yemeni border. Saudi officials have recently signed a US\$3.5 billion contract with the European consortium EADS to build an 8,500 km long state-of-the-art security fence along the Saudi border in order to curb illegal migration more efficiently.¹²

As shown above, the countries of the southern and eastern Mediterranean face a two-fold challenge: First, they are themselves the source of illegal migration and consequently face a brain drain despite the reciprocal benefit from remittances. Secondly, they become the temporary home in particular for sub-Saharan transit migrants who work in the informal sector in those countries in order to make money for their final stage to Europe. Latest figures show that Libya, for example, prior to the uprising, hosted up to 1.5 million

illegal migrants (under Libyan law), which equated to 10 per cent of the Libyan populace.¹³ Illegal migrants are not a homogenous group with transit migrants, labour migrants, and refugees being the most relevant sub-groups. Indeed, the latter sub-groups have specific profiles although they share a common objective to search for safe shelter and work. Fargues is definitely right when arguing: '[b]eyond differences, however, they share many of the same socioeconomic conditions explained by irregularity. Being in irregular situations implies that migrants have to hide from the authorities, that they enjoy... little or no legal protection...'¹⁴

Turnaround of EU policy on migration

Since the early 1990s, with the fall of the iron curtain in Europe, new security risks have emerged in the Mediterranean, with illegal migration being one of the most pressing soft security risks for the Mediterranean EU members. Due to the implementation of the Schengen Area (end of national border controls between participating European countries) in the mid-1990s and subsequent agreements on the responsibilities and rules for asylum procedures (Dublin II)¹⁵ it soon became a topic of hot debate for the whole EU.¹⁶ Questions on migration and visa matters played a central role in Euro-Mediterranean affairs although it initially produced little results due to a lack of will for joint action on behalf of the EU members that all tried to pursue their individual 'on-and-off-policy' on migration. For years, the socioeconomic divide on both sides of the Mediterranean was seen as the decisive variable in tackling the migration pressure. Thus, support of economic opening, stability, and the generation of wealth was one side of joint EU approaches. The other side was the strong belief in a 'normative one-way street' in which economic opening would automatically lead to political opening and finally to a democratic breakthrough.¹⁷ But the latter fell short of prior hopes. Authoritarian rule is still the order of the day and keeps on challenging EU foreign policy in terms of its default normative agenda that, in theory, aims at supporting political (democratic) reform in its immediate neighbourhood and beyond. The normative approach is overshadowed by an increasing stability and security discourse in EU foreign policy-making that was further enhanced through the post-September 11 security debate culminating in the European Security Strategy (ESS) in 2003, saying:

Even in an era of globalisation, geography is still important. It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe.¹⁸

Within this strengthened security discourse the normative foreign policy approach was not abrogated, nevertheless the on-going references to the EU's value-based self-image produced a 'zig-zag-pattern' of EU foreign policy that was harmful to its credibility as a (global) foreign policy actor. The cooperation in Justice and Home Affairs – parallel to its Europeanisation on EU level – soon became a common ground for action as well. By externalising parts of its security cooperation the EU thought to have found a successful policy instrument to implement its security strategies, for example the mentioned ESS in 2003 and subsequent policy initiatives such as the European Neighbourhood Policy (ENP) or the Union for the Mediterranean as the latest policy initiative in 2008. In fact the aggregation of security and JHA cooperation in EU foreign policy aimed at creating a 'semiperiphery' or in other words a buffer zone between the centre and the periphery that begins in our case in sub-Saharan Africa and central Asia respectively.¹⁹

In the wider framework of an emerging EU foreign and security policy in its immediate neighbourhood, the EU policy on migration and asylum took shape (based on the Treaty of Amsterdam),²⁰ starting with the European Council of Tampere in 1999, in which the EU agreed on a future space of freedom, security, and justice, that shall define the principles of common immigration and asylum policies, comprise a partnership with countries of origin, and constitute a fair treatment of third country nationals. Hereby EU policy on migration and asylum centres on five different policy categories: (1) asylum and refugees; (2) illegal migration; (3) cooperation with third countries (external dimension); (4) legal migration; and last but not least (5) the respective domestic dimension of integration.²¹ Regarding the second aspect the Tampere programme already laid the ground for an enhanced border management strategy. The then 15 heads of EU member states concluded: 'The European Council calls for closer co-operation and mutual technical assistance between the Member States' border control services... especially on maritime borders, and for the rapid inclusion of the applicant states in this co-operation.'²² Subsequent EU policy on migration tried to further coordinate and institutionalise a common European asylum and migration policy, with the Hague Programme (European Council 2004) clearly recognising the need for a more comprehensive EU strategy that not only tackles illegal migration but also recognises the need of legal migration and the necessity to strengthen the foreign policy dimension of asylum and migration policies.²³ Hand in hand with the expanding external dimension of illegal migration, cooperation with third countries in the field of Justice and Home Affairs (JHA) was pushed forward and followed a two-fold agenda that was again symptomatic for EU's 'zig-zag-pattern' in foreign policy. On the one side, cooperation in JHA provided a more stable ground for cooperation in Euro-Mediterranean affairs, in particular in the EU's quest for extending its governance beyond its own borders and to establish a 'policy space that encompasses the actors, rules and practices that relate to the EU's efforts to protect its citizens from a wide range of internal and external threats'.²⁴ On the other side, it acted as a perfect tool to lay the ground for an extraterritorial border management strategy in order to tackle illegal migration in the countries of origin or transit right away – no matter whether the respective third countries share a common understanding of freedom, liberty, and security or whether these 'non-arrival measures' are in line with international and European law.

Europe's answer: FRONTEX

In order to make those 'non-arrival measures' operational, Europe reacted by establishing a 'European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU' (FRONTEX²⁵). Established in 2004 by a Council decision and based in the Polish capital Warsaw, FRONTEX is the European attempt to implement the EU's 'integrated border management system' (IBM) in terms of its external dimension.²⁶ The EU agreed on a very broad and multilayered understanding of IBM, comprising not only border control on the national level, but also efforts in cooperation with third countries, strengthened inter-agency cooperation (including involved EU and national actors such as Europol and, for example, national customs authorities), and the stipulation of the EU Schengen Borders Code.²⁷ Based on the principles of liberty, security, and justice, the *de jure* independent community body but *de facto* intergovernmental agency FRONTEX aims at strengthening the coordination of cooperation between member states in their border management, common action in training national border guards and joint return operations, and carrying out intelligence services with regard to new migration routes and human traffickers' networks.²⁸ In article 14 of the regulation and paragraph 12 of

the Council Regulation's preamble the EU set the stage for the externalisation of the EU's policy on illegal migration that followed soon after FRONTEX had been founded: '... the Agency shall facilitate the operational cooperation between Member States and third countries, in the framework of the external relations policy of the European Union'.²⁹

From an analytical point of view the establishment of FRONTEX has to be seen in the wider context of the genesis of EU foreign and security policy. This has been including a gradual externalisation of Justice and Home Affairs as FRONTEX aims at avoiding illegal migrants reaching EU territory ('non-arrival measures'). In close cooperation with third countries in North and West Africa the EU tries to establish an extraterritorial border line which FRONTEX is determined to guard. In practice, FRONTEX has embarked on numerous joint sea-bound and land-bound operations³⁰ in the southern and eastern Mediterranean (plus the coastal waters of the Atlantic) since it had become operative in 2005 (see various FRONTEX annual reports).³¹ By way of example the Spanish coastguard with the support of FRONTEX border patrols reached a significant decrease of boat arrivals to the Canary Islands by more than 70% from 2006 to 2008. This sea-bound 'non-arrival measure' also includes FRONTEX delegations in various third countries' ports and airports in order to crack down on potential illegal migrants. This presumed success in absolute numbers, as the case of HERA shows, hides the fact that it is a result of a change in interregional migration routes with a substantial increase in migrants who try to reach EU territory via the central Mediterranean and of practices that are in breach of international law.

EU border management and international law

The lack of transparency on behalf of FRONTEX is objectionable with statistics of various missions on intercepted boats and people saying nothing about where the interception took place and how the FRONTEX staff managed to check if there were people falling under the 'non-refoulement rule' of the United Nations Convention and Protocol Relating to the Status of Refugees (1951; Protocol 1967).³² The lack of transparency is further enhanced by the stipulation that both the pre-operational risk analysis plus the evaluation reports on various missions, are not made accessible to the public. There are numerous reports proving that interceptions by border patrols took place in international waters (beyond the 24 nautical miles zone of territorial waters),³³ where the boats are intercepted and escorted back to the state where they set off for the crossing of the Mediterranean or the Atlantic (see introduction). This happens prior to any screening to see whether some of them would fall under the 'non-refoulement rule'. Migrants are then deported to countries which are considered as de facto safe third countries although, like in the case of Libya, have not ratified the United Nations Convention Relating to the Status of Refugees or have a working asylum system in place.³⁴ This procedure is in breach of international and European law unless the respective authorities checked if each single migrant was in need of international protection, that is to say eligible to seek asylum.³⁵ Deported migrants are then brought into detention camps where they wait for further resettlement to their countries of origin. The conditions in those detention camps are reported to be inhumane including arbitrary abuses and 'final dumping in the desert'. A report on behalf of Human Rights Watch concludes:

Libyan authorities in the coastal area put migrants (particularly from the Horn of Africa) in trucks and send them to Kufra [one of the largest Libyan detention camps, T.D.] purportedly to deport them across the land border with Sudan, but often they are not actually deported, rather simply left in the Libyan desert.³⁶

The report continues:

Being ‘deported’ to Kufra often follows the traumatic experiences of a failed boat attempt, arrest, and detention in northern jails. Although the authorities transport migrants to Kufra for the supposed purpose of expelling them overland to Egypt or Sudan, in fact the Kufra authorities sometimes do not actually take them to the border but rather leave them in the desert outside Kufra or make deals with smugglers who pick them up to start the process again.³⁷

The United Nations high commissioner for refugees (UNHCR) concludes in this respect that all intercepted persons ought to be treated in a humane manner respectful of their human rights.³⁸ It further states that authorities and agents that act on behalf of the intercepting state must take all appropriate steps in the implementation of interception measures to protect the right to life and the right not to be subjected to torture or other degrading treatment or punishment of persons intercepted.³⁹ This demand on behalf of the UNHCR stands in stark contrast to the practical output of various FRONTEX missions in the central (Libyan coast) and eastern (Greece, Turkey) Mediterranean plus near the coastline

On the EU level, the institutional control of FRONTEX missions is minimal. The European Parliament is the only actor enjoying principal impact by approving the annual budget of FRONTEX.⁴⁰ As the management board is primarily constituted by member states’ delegates and only two Commission delegates,⁴¹ FRONTEX follows first and foremost the agenda of the affected countries in southern Europe, although the role of the Commission, that is to say its impact, is difficult to define.⁴² FRONTEX activities need prior initiative on behalf of the management board that represents the member states, as given in article three of the FRONTEX regulation, saying ‘[t]he Agency shall evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States.’⁴³ The right of initiative for FRONTEX is minimal, as ‘[t]he Agency may itself, and in agreement with the Member State(s) concerned, launch initiatives for joint operations and pilot projects in cooperation with Member States’.⁴⁴ Therefore the most affected EU Mediterranean countries are the management board’s protagonists in the planning of border patrol missions. This intergovernmental approach is not surprising despite supranational shifts following the Schengen Agreement or later on with the integration of JHA affairs in the first pillar of the EU treaty in 1997. As vividly seen in the nomenclature of FRONTEX it does not speak of the *EU external border*, but rather of the *external border of the EU member states*. In few words, FRONTEX relies on the solidarity among the EU member states and is the natural consequence of the fact that member states – no matter whether part of the Schengen Area or not – still show some kind of resistance when it comes to questions of supranational shifts in the field of their respective territorial integrity. These disputable internal and legal deficits are further enhanced by a deficit in the operational output of EU migration policy in the southern Mediterranean. Hereby, the mandatory cooperation with authoritarian elites, in order to embark on ‘non-arrival measures’, has become a win-win-situation for the incumbent regimes to increase their grip on power.

EU cooperation with third countries

EU cooperation in migration issues with third countries has acted as a new ‘fig leaf’ for authoritarian regimes in North Africa to avoid any substantial liberalisation of state and power. Authoritarian regimes were seen as the lesser of two evils from the perspective of EU decision makers. Cooperation in security issues involved an increased bargaining power on behalf of authoritarian states with Libya being the conspicuous frontrunner.

Technical aid and trade agreements ‘have thus been exchanged against an African state’s readiness to accept the repatriation of citizens who had entered Europe illegally’.⁴⁵ Hereby, Italy and Spain are the protagonists in formulating EU policy *vis-à-vis* those third countries. Bilateral agreements are further supplemented by EU agreements in order to establish an efficient border control together with the affected third countries.

Libya had long been regarded by the EU as a pariah state due to its involvement in terrorist acts and domestic efforts to acquire WMD devices (for example ‘Lockerbie Pan Am 101 bombing’ in 1988; Berlin ‘La Belle bombing’ in 1986), leading to economic sanctions (lifted in 1999) and an arms embargo to the country between 1986 and 2004. After the turnaround in Libyan foreign policy in order to end the country’s international isolation and the declaration by revolutionary leader Gaddafi to stop Libya’s secret nuclear bomb project in late 2003 – under the scrutiny of the International Atomic Energy Agency (IAEA) – the EU decided to lift the arms embargo. Shortly after, the Council of the European Union agreed to accelerate the cooperation with Libya in migration matters, which was further enhanced in the years after.⁴⁶ Remarks of EU commissioner Ferrero-Waldner are self-telling: ‘The flocks of migrants reaching Libya and the European Union are of course a cause of common concern... I have offered today to the Libyan government... a financial package of €20 million on strengthening border control.’ She continued by saying ‘additional funds may be available from 2011’.⁴⁷ At the time of writing, prior to revolutionary year 2011, the negotiations for an EU–Libyan framework agreement that were launched in 2008 have not yet been concluded. The framework agreement aims at strengthened cooperation in areas of common interest such as migration, energy, transport, education, environment, and culture. The cooperation of Libya in terms of illegal migration has hereby become the bargaining power of the Gaddafi regime to claim even more EU financial assistance for the upgrading of the Libyan coastguard, reported to be worth around €700 million.⁴⁸ In other words, the Gaddafi regime has successfully begun to use the problem of illegal migration as a lever to extract concessions from Europe and to dissuade the latter from putting pressure on it regarding its domestic policies – namely, the lack of democracy, bad governance and the violation of human rights.⁴⁹

Evolving EU relations with Libya and third countries are further complemented by bilateral agreements between Mediterranean EU littoral states and potential countries of origin. The most recent one is the ‘Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People’s Libyan Arab Jamahiriya’ that was signed in 2008 and entered into force in March 2009. Both parties – after closing the chapter of Italy’s colonial past in North Africa – agreed on joint border control missions in the field of terrorism, organised crime, drug trafficking, and foremost illegal migration. Thus the first joint Italian–Libyan border control mission was launched on 15 May 2008. In return for joint border controls and cooperation in the resettlement of migrants who set off for Europe from Libyan territory, Italy agreed on a generous funding of the border control system (land- and sea-based) and on delivery of high-tech equipment for the Libyan coastguard at no charge.⁵⁰ Prior to the Italian initiative, Spain had already been busy signing bilateral agreements with states in West Africa in order to lay the ground for joint border controls within the territorial waters of the respective countries. Guinea-Bissau, the tiny West African country, offers a good example: Spain signed an agreement with Guinea-Bissau, accepting the repatriation of its citizens who enter Spain and allowing Spanish ships or helicopters – also under the mandate of FRONTEX – to enter its territorial waters. The trade-off for Guinea-Bissau includes a generous funding of some stimulus measures for the local job market and a more generous handling of the visa quota for Guinean season workers in Spain.⁵¹ Guinea-Bissau is only one example for this broader

Spanish initiative to reach a cooperative border management with West African countries including the establishment of six Spanish embassies in West Africa and estimated €700 million in development aid to the region.⁵²

Conclusion: EU foreign policy and authoritarian rule

As shown above, EU policy on illegal migration is shaped by a three-fold cleavage: *first*, EU policy contradicts its own efforts in democracy promotion, *secondly*, EU policy is in breach of European and international law, and *thirdly*, the EU seems to prefer a short-term approach to a long-term effort that tackles the root causes of illegal migration in the southern Mediterranean.

Cooperation with authoritarian elites

In 2004, the conceptual overhaul of EU foreign policy in the Mediterranean with the European Neighbourhood Policy (ENP) was the outcome of a new geopolitical reality ('enlargement' in eastern Europe) but also the result of a critical assessment of EU policy in the Mediterranean within the scope of the Barcelona Process since 1995. The principle of 'differentiated bilateralism'⁵³ and 'positive conditionality' (the strategy of making aid dependent on policy) took into account the heterogeneity of the southern Mediterranean and offered clear incentives, that is to say closer cooperation and more financial assistance in exchange for political and economic reforms. As shown in this paper, the enhanced cooperation in the policy field of JHA, in general, and the cooperation in terms of illegal migration, in particular, questions the very essence of the principle of 'positive conditionality'. Concerning illegal migration, enhanced political, economic, or legal reforms are not the precondition for enhanced relations. Moreover, cooperation in joint border controls and the acceptance of resettlement programmes become adequate indicators for an enhanced EU cooperation and development aid, no matter whether those third countries ratified fundamental treaties of international law or guarantee fair and humane treatment of illegal migrants.

European and international law

The partial externalisation of EU migration policy through 'non-arrival measures' enjoys strong support among EU decision makers over concerns of conformity with international law. It speaks volumes that it had taken several years and in the end needed more pressure on behalf of the Commission (foremost former Vice-President of the Commission Jacques Barrot) until EU decision-makers admitted incremental discrepancies in the operational output of FRONTEX.⁵⁴ Stricter guidelines for FRONTEX missions were approved by the Commission, the Council, and the Parliament in 2009 and 2010. Prior to the approval, some EU member states had already made clear that they would keep aloof from future FRONTEX missions in light of stricter regulations, but eventually this was nothing more than political calculus to thwart decision-making.⁵⁵

It is unquestionable that the EU has the right to embark on controls of its external borders. But the EU is obliged to conduct border controls without threatening fundamental elements of international law and European law (such as the Charter of Fundamental Rights of the European Union).⁵⁶ International waters are not a lawless area. Intercepted boats in international waters are to be escorted into the next port of the EU, where each single illegal migrant has its indivisible right to claim asylum. Intercepting boats with potential illegal

migrants in international waters does not turn them into illegal migrants due to circumstantial evidence. These legal loopholes show that the EU is still in need of a legal framework that takes into account the legal uncertainty of this new form of border management. Prior to any further institutionalisation of its border management strategy there is a dire need to create a legal basis which offers protection for the rule of law, the adherence to international law and EU law ('non-refoulement rule'), as well as more transparency on the EU side in general. This accounts particularly for more transparency in the multilayered relations network of the EU with third countries and bilateral agreements between EU member states with transit countries and countries of origin.

Short-sighted EU approach

The EU's approach on illegal migration along its southern coastlines – despite much rhetoric on the need of a holistic approach – is short-sighted and more repressive than progressive *vis-à-vis* the involved third countries. It does not incorporate the domestic setting of state, power, and politics in the various third countries and ignores the need of a long-term perspective of political and socioeconomic reform in the respective countries. It ignores that the very setting of state and power in various countries is in itself an essential motive for migrants to leave their home.

The acknowledgment that a large majority of migrants from sub-Saharan Africa do not continue their journey and stay in the Mediterranean transit countries as labourers in the respective informal economies makes the latter into a distinct category that has to be considered as such in the external dimension of EU policy on migration and asylum. The EU should rather focus on this issue than solely fight the symptoms of illegal migration. Due to legal deficits in the concerned countries (for example Morocco has no national integration programme for foreign residents and Libya does not offer political asylum⁵⁷) fundamental rights for illegal migrants are not given. This pictures EU policy as a pragmatic cost-benefit ratio that is in breach of international law and further enhances the impression of the EU's 'zig-zag-pattern' in foreign policy-making.

Even in the years prior to the enhanced cooperation with third countries on migration an inconsistent EU approach had already weakened the EU's role as a normative actor as the EU had been too timid in its demand for more substantial political reform. After 2001 and the strengthened security discourse in EU foreign policy-making, the normative objective to support political and economic reform in the authoritarian strip from Morocco to Lebanon has been even more diluted as the cooperation with authoritarian regimes has seemed mandatory on first hand. In a different context, Pace states, 'if the EU is to continue with its democracy promotion efforts, it needs to change the model and change the players it works with in the Middle East and North Africa'.⁵⁸ So far the EU has failed to extend the spectrum of players on the partner side all across the authoritarian strip in the southern Mediterranean and beyond. The enhanced cooperation in the field of illegal migration makes it even more unrealistic that this policy proposal becomes operational, that is to say it makes it even more unrealistic that the EU's rhetoric will be matched by deeds. Hence, in the foreseeable future it seems that the phenomenon of illegal migration remains a classic win-win situation for the incumbent regimes in the southern Mediterranean as their commitment is going to remain honoured by Europe in exchange for a more long-term policy approach which not only tackles the symptoms of illegal migration but its root causes. This approach might promise to be more sufficient in the long run than an approach that only aims at upgrading third countries' border police equipment or includes the delivery of 1000 body bags, as Italy has done in the Libyan case.⁵⁹

The revolutionary year 2011 has shown so far that the EU has to make a strategic decision on how to manage the political, economic, and social implications of the upheavals in its immediate neighbourhood. After a year-long vague and unclear strategy that already derogated the EU's credibility, the current challenge is also a window of opportunity for Europe in order to adjust its policy agenda in the southern Mediterranean to the new circumstances. If the result of this strategic debate of European policy-makers was a Europe that does what it says, it would be a good year for EU foreign policy in the southern Mediterranean and also for the people on both shores of the Mediterranean.

Notes

1. Though strictly speaking Mauritania is not a Mediterranean country, the EU incorporates the West African country in its Mediterranean cooperation networks and policy initiatives due to policy fields such as illegal migration or anti-terrorism cooperation. Thus Mauritania is also included in the following analysis.
2. Samuel P. Huntington, *The Third Wave. Democratisation in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1993); Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).
3. Steven Levitsky and Lucan A. Way, 'Elections without Democracy', *Journal of Democracy* 13, no. 2 (2002): 51–65; Daniel Brumberg, 'Democratization in the Arab World? The Trap of Liberalized Autocracy', *Journal of Democracy* 13, no. 4 (2002): 56–68; Marina Ottaway, *Democracy Challenged: The Rise of Semi-Authoritarianism* (Washington, DC: Carnegie Endowment for International Peace, 2003).
4. Dietrich Jung, ed., *Democratization and Development. New Political Strategies for the Middle East* (Basingstoke, UK: Palgrave Macmillan, 2006); Thomas Carothers, *Critical Mission: Essays on Democracy Promotion* (Washington, DC: Carnegie Endowment for International Peace, 2004); Thomas Carothers and Marina Ottaway, eds, *Uncharted Journey. Promoting Democracy in the Middle East* (Washington, DC: Carnegie Endowment for International Peace, 2005).
5. Yahira H. Zoubir, 'Libya and Europe: Economic Realism at the Rescue of the Qaddafi Authoritarian Regime', *Journal of Contemporary European Studies* 17, no. 1 (2009): 401–15.
6. For more on this topic, see also: Edward D. Mansfield and Jack L. Snyder, *Electing to Fight: Why Emerging Democracies Go to War* (Cambridge, MA: MIT Press, 2005).
7. Michelle Pace, 'Norm Shifting from EMP to ENP: The EU as a Norm Entrepreneur in the South?', *Cambridge Review of International Affairs* 20, no. 4 (2007): 659–75; Thomas Demmelhuber, *EU-Mittelmeerpoltik und der Reformprozess in Ägypten. Von der Partnerschaft zur Nachbarschaft* (Baden-Baden: Nomos Publishing House, 2009), 91–4.
8. The options of legal immigration have been diminishing since the establishment of the Schengen Area and subsequent joint EU and national regulations.
9. Associated Press, 'Italian MPs Back Crackdown on Illegal Migrants', *The Guardian*, May 13, 2009.
10. Estimated costs for the Mediterranean passage amount to approximately €2,000.
11. Philippe Fargues, ed., *CARIM Mediterranean Migration 2008–2009 Report* (San Domenico di Fiesole: European University Institute, 2009), 472–504.
12. Klaus Heymach and Susanne Sporrer, 'From Somalia to Europe via Yemen', *Qantara.de – Dialogue with the Islamic World*, November 11, 2005, http://www.qantara.de/webcom/show_article.php/_c-478/_nr-349/i.html/ (accessed 2 October 2009); Yosuf al-Hamadi, 'Saudi Authorities Arrest over 65,000 Illegal Migrants in Three Months', *Asharq al-awsat* (English edition), 20 July 2009, <http://www.aawsat.com/english/news.asp?section=1&id=17481/> (accessed 10 August 2009).
13. Philippe Fargues, 'Irregularity as Normality among Immigrants South and East of the Mediterranean', *Irregular Migration Series Background Paper*, CARIM-AS no. 2 (2009): 3.
14. *Ibid.*, 14.
15. The Dublin Regulation (also known as Dublin II) was adopted in 2003 and replaced the Dublin Convention, signed in 1990. It determines the EU member state responsible to examine an application for asylum seekers. In brief, the Dublin II aims to set 'the criteria and mechanisms

- for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national'. (Official Journal of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-country National* (Luxembourg, L 50 2003), 1.)
16. Gemma Aubarell and Xavier Aragall, 'Immigration and the Euro-Mediterranean Area: Keys to Policy and Trends', *EuroMeSCo Papers*, no. 47 (Lisbon: EuroMeSCo Secretariat at the IEEI, 2005).
 17. Following the concept of modernisation theory saying that through economic liberalism and subsequent shifts in society a middle class emerges that pushes forward with claims for full political participation. The teleological bias in this theory is obvious and matter of heated debate.
 18. The Council of the European Union, *A Secure Europe in a Better World – The European Security Strategy* (Brussels: The Council of the European Union, 2003).
 19. For the term 'semiperiphery', see Andreas Marchetti, 'The European Neighbourhood Policy: Foreign Policy at the EU's Periphery', *ZEI Discussion Paper*, no. C158 (Bonn: Center for European Integration Studies, 2006), 27.
 20. The Treaty of Amsterdam prepared the setting for the transfer of third pillar asylum and immigration policies (Justice and Home Affairs) to the first Europeanised pillar.
 21. Each single subcategory of migration would be worth a single study, although in this paper illegal migration plus its external dimension are the main topics of concern. Other aspects of migration are only considered if directly related to EU policy on illegal migration.
 22. European Council, *Presidency Conclusions, Tampere European Council 15 and 16 October 1999*, <http://presidency.finland.fi/> (accessed 2 October 2009).
 23. Aubarell and Aragall, 'Immigration and the Euro-Mediterranean Area', 47.
 24. Sarah Wolff, Nicole Wichmann and Gregory Mounier, 'The External Dimension of Justice and Home Affairs: A Different Security Strategy for the EU?', *Journal of European Integration* 31, no. 1 (2009): 11.
 25. Acronym for the French term 'frontières extérieures'.
 26. Peter Hobbing, 'Integrated Border Management at the EU Level', *CEPS Working Documents*, no. 227 (Brussels: CEPS, 2005).
 27. Sergio Carrera, 'The EU Border Management Strategy. FRONTEX and the Challenges of Irregular Immigration in the Canary Islands', *CEPS Working Documents*, no. 261 (Brussels: CEPS, 2007), 2–8; Official Journal of the European Union, *Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons across Borders – Schengen Borders Code* (Luxembourg, L 105 2006).
 28. Official Journal of the European Union, *Council Regulation (EC) No 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* (Luxembourg L 349 2004). As shown by Wolff, the years prior to the FRONTEX regulation have already seen sporadic ad hoc missions of some member states (for example Operation Ulysses in the Strait of Gibraltar and around the Canary Islands (January 2003) with France, the United Kingdom, Italy, Portugal, and Spain actively participating plus further countries as observers) in order to tackle massive migration pressures (Sarah Wolff, 'Border Management in the Mediterranean: Internal, External and Ethical Challenges', *Cambridge Review of International Affairs* 21, no. 2 (2008): 257–8).
 29. Official Journal of the European Union (L 105 2004), 2.
 30. As an example, the border patrol mission under the code name HERA (phases I–III) since its launching in 2006 – the largest FRONTEX mission so far – aims at combating illegal migration across the external maritime borders of the EU from West African countries to the Canary Islands (FRONTEX, *FRONTEX Annual Report 2006* (Warsaw: FRONTEX, 2007), 27).
 31. Established in 2004 FRONTEX became operational for land-bound missions in 2005 and launched its first sea-bound mission in 2006 (code name Poseidon; in Greek territorial waters) after conducting risk analysis in 2005 as put forward in Council regulation 2007/2004 (FRONTEX, *FRONTEX Annual Report 2006*, 11).
 32. Also known as 'Geneva Refugee Convention'. The 'non-refoulement rule' is a principle in international law (as well as European law) that forbids returning refugees to places where they face inhumane and degrading treatment or where they fear persecution on account of

- their race, religion, nationality, membership of a particular social group or political opinion (as given in article 33 of the mentioned convention).
33. The 24 nautical miles zone consists of 12 miles in territorial waters with another contiguous zone of up to 12 miles within which a state can exert limited control for the purpose of preventing 'infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea' (article 33 in United Nations Convention on the Law of the Sea, UNCLOS).
 34. Ruth Weinzierl and Urszula Lisson, *Grenzschutz und Menschenrechte. Eine europarechtliche und seerechtliche Studie* (Berlin: Deutsches Institut für Menschenrechte, 2007), 14.
 35. Carrera, 'EU Border Management Strategy', 25–7.
 36. Human Rights Watch, 'Pushed Back, Pushed Around', September 21, 2009, <http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0/> (accessed 2 October 2009).
 37. Ibid.
 38. United Nations High Commissioner for Refugees, 'Conclusion on Protection Safeguards in Interception Measures, 10 October 2003, no. 97 (LIV)', <http://www.unhcr.org/refworld/docid/3f93b2894.html/> (accessed 2 October 2009).
 39. Ibid.
 40. The budget of FRONTEX is the fastest growing budget line in the EU. It started with €6 million Euro in 2005 and increased to over €80 million in 2009 – each year approved by the European Parliament (FRONTEX, *FRONTEX Annual Report 2008* (Warsaw: FRONTEX, 2009), 21–6).
 41. See article 21 of FRONTEX regulation: '... the Management Board shall be composed of one representative of each Member State and two representatives of the Commission'. (Official Journal of the European Union (L 349 2004), 7.)
 42. Carrera, 'EU Border Management Strategy', 13–4.
 43. Official Journal of the European Union (L 349 2004), 4.
 44. Ibid.
 45. Marie V. Gibert, 'The Securitization of the EU's Development Agenda in Africa: Insights from Guinea-Bissau', *Perspectives on European Politics and Society* 10, no. 4 (2009): 621–37.
 46. Council of the European Union, *Press Release, 2609th Council Meeting, General Affairs and External Relations* (Luxembourg, 12770/04 [Presse 276] 2004).
 47. European Commission, *Commissioner Ferrero-Waldner Visits Libya to Reinforce EU-Libya Relations* (Brussels, IP/09/227, 2009); 'Libya Gets EU Funds to Combat Illegal Migration', *The New York Times*, February 10, 2009.
 48. Ivan Camilleri, 'Libya Asks EU for \$1 bn to Combat Immigration', *Times of Malta*, May 31, 2009.
 49. Zoubir, 'Libya and Europe', 411.
 50. Jointly financed by Italy and the EU (Natalino Ronzitti, 'The Treaty of Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean', *Documenti IAI*, no. 9 (Rome: Istituto Affari Internazionali, 2009), 6. See also: Zoubir, 'Libya and Europe', 410–2).
 51. Ricard Zapata-Barrero and Nynke de Witte, 'The Spanish Governance of EU Borders: Normative Questions', *Mediterranean Politics* 12, no. 1 (2007): 85–90.
 52. United Nations High Commissioner for Refugees, *Refugee Protection and International Migration: A Review of UNHCR's Role in the Canary Islands* (Genf: United Nations High Commissioner for Refugees, 2009), 7. Under EU law those bilateral agreements are then sufficient for Spanish border patrols to seek assistance from FRONTEX resources.
 53. First termed as such by Raffaella A. del Sarto and Tobias Schumacher, 'From EMP to ENP: What's at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?', *European Foreign Affairs Review* 10, no. 1 (2005): 17–38.
 54. Council of the European Union, *Press Release, 2962th Council Meeting, Justice and Home Affairs* (Brussels, 13467/09 [Press 271] 2009).
 55. According to the rules, illegal immigrants and asylum seekers rescued on the high seas during future FRONTEX missions will be taken to the member state hosting the mission and not to the closest safe port, as was the practice until 2010. Council of the European Union, *Council Conclusions on 29 Measures for Reinforcing the Protection of the External Borders and Combating Illegal Immigration, 2998th Justice and Home Affairs Council Meeting* (Brussels, 25 and 26 February 2010); Commission of the European Communities, *Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external*

borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders (Brussels, Com. 658 final, 2009).

56. Official Journal of the European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007* (Brussels, C 306 2007), 13.
57. In the words of a Libyan Brigadier General (interviewed by Human Rights Watch): 'There are no refugees in Libya. They are people who sneak into the country illegally and they cannot be described as refugees. Anyone who enters the country without formal documents and permission is arrested' (Human Rights Watch, 'Pushed Back, Pushed Around', 47–9).
58. Michelle Pace, *Liberal and Social Democracy? Aspects of the EU's Democracy Promotion Agenda in the Middle East* (Stockholm: International Institute for Democracy and Electoral Assistance, 2009), 14.
59. Paolo Cuttitta, 'Das Mittelmeer als Wohlstandsgrenze', in *Grenzsoziologie. Die politische Strukturierung des Raumes*, ed. Georg Vobruba and Monika Eigmüller (Wiesbaden: VS Publishing House, 2006), 256.

Notes on contributor

Thomas Demmelhuber is lecturer of Middle East politics at the University of Erlangen-Nuremberg. His PhD on Egypt and the European Union was awarded the German Middle East Studies Association's Dissertation Prize for best PhD in Middle Eastern studies in 2008. In his current research he is working on political and social change in the Gulf monarchies.