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# Migration, Human Rights and Security in Europe

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MRU Student  
Conference  
Proceedings

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2012

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Edited by Siril Berglund,  
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## ***Table of Contents***

### **Introduction**

Siril Berglund, Helen McCarthy and Agata Patyna.....4

### **‘Brava Gente’ v. Immigrazione: Immigration Approaches in Italy**

Elif Çetin..... 10

### **The Externalisation of Migration Control: An Assessment of the European Union’s Policy in the Light of the Charter of Fundamental Rights**

Vito Todeschini..... 18

### **Playing Their Cards Early: Lessons for Schengen from the ‘Arab Spring’**

Maia Rotman.....26

### **Protection for Who? The Protection of Trafficked Persons**

Jean-Pierre Gauci.....35

### **Lying Low and not Giving up’: Undocumented Migrants’ Account of Their Situations**

Natasha Posner and Oonagh Skrine.....43

### **An Interpretative Analysis of the Health Rights of Undocumented Migrants in Italy – a Case Study of Naga in Milan**

Roberta Bova.....51

**Abstracts of All Other Papers**.....58

*This conference was organised by MSc students of Global Migration in the Migration Research Unit in the UCL Department of Geography, University College . We would like to thank the UCL Department of Geography, the International Human Rights Programme at UCL and Thirty Nine Essex Street Chambers for their generous support in sponsoring this conference.*

## **Introduction: “Migration, Human Rights and Security in Europe”**

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‘Migration’, ‘human rights’ and ‘security’ are three concepts that perhaps at first glance do not seem to have much to do with one another. However, in recent years, the global human rights discourse and the securitization discourse have been countervailing forces acting on initiatives by the European Union to develop a coherent policy on migration into the Union. As freedom of movement within the Union has been granted to all citizens and become symbolic of the success of the initiative, concomitantly we have seen the securing of external borders and the increasing difficulty in obtaining asylum or residence in EU Member States (Boccardi 2007; Guild 2006; Roig and Huddleston 2007). The designation ‘Fortress Europe’ has aptly described this phenomenon. These processes reflect and respond to fears developed within Member States. In the 21<sup>st</sup> century, associations have increasingly been drawn between ‘illegal’ immigrants and criminals or terrorists (Matthew 2008). The rhetoric justifies practices that many consider to be in violation of migrants’ basic human rights: the extension of detention for immigration purposes, which spreads from Member State to Member State, is just one example. The harmonisation processes of asylum and migration, whilst supposedly improving the system and protecting basic rights, have in some cases led to a race to the bottom (Handoll 2007). Externalisation policies of the EU which seek to push border control questions outside of the Union are also deeply problematic (Baldaccini 2007; Spijkerboer 2007). Frontex border patrols which send people back without examining individual asylum claims (Migreurop 2011) and re-admission agreements with ‘safe third countries’ which have lamentably poor human rights records (Klepp 2010; Roig and Huddleston 2007) are examples of policies which have caused concern to human rights activists, lawyers and academics.

Given the importance and complexity of the issues described above and their multidisciplinary character, in June 2012 a small group of postgraduate students from the MSc in Global Migration at University College London in collaboration with the Migration Research Unit, the Department of Geography and the Institute for Human Rights organised a conference on the topic of ‘Migration, Human Rights and Security in Europe’. We aimed to bring together postgraduates working on these issues from a number of different disciplines. An inter-disciplinary focus was a key part of the objective of the conference as we felt that scholars working in different fields related to migration often had very little contact with the valuable work going on outside their area. We invited papers from students of law, anthropology, sociology, geography, migration and refugee studies, politics and public health. The result was a day of intense debate and discussion with 22 postgraduate papers on seven different interdisciplinary panels, spanning topics from irregular migration, to terrorism and

security to immigration detention (for a full breakdown of the sessions and abstracts of all papers please see page 58).

In what follows, we present a selection of papers from the day which reflect the broad range of topics and disciplines discussed. The selection provides a flavour of the key issues raised during the conference: How does political rhetoric relate to the reality of migrants' access to human rights protection? How does the security discourse affect compliance with human rights and refugee law in European countries and the EU as a whole? Does the current system of regional cooperation in the EU protect or restrict the fulfilment of migrants' human rights? How do the existing laws protect those who are most vulnerable, and how are these migrants affected by the actions of state institutions and public discourse? The breadth of academic disciplines represented during the conference made it possible to examine these issues both at the wider levels of European Union and national policy, as well as on the individual level of every-day migrant experience. The different styles of the papers included in these proceedings, and a combination of theoretical analysis and empirical data presented here, is a reflection of the different angles from which the conference participants analysed the current state of protection of migrants' human rights in Europe.

An issue which came up frequently during the conference was the relationship between discourse and reality, and questions surrounding the relationship between the two in the process of immigration policy-making in liberal states. Many of our presenters provided examples of immigration being used as political currency by parties on the Left and Right of the political spectrum throughout the EU. The proceedings begin with a paper by Elif Cetin from the University of Cambridge, which explores the gap between immigration 'talk' and 'action' by analysing the language of immigration debates and immigration policy in Italy between 1996-2010. On one hand, Cetin's analysis offers some positive commentary on the extent to which lobby groups and sections of society sympathetic to migrants can limit the extent of restrictive policies introduced by parties in power. On the other, she recognises the danger of adding the security and crime rhetoric to migration debates.

Cetin's paper also discusses how the control-oriented policy tools in Italy developed under the impact of international commitments, especially the securitisation of migration within the EU. Her observations reflect the concerns of academics and human rights activists (see, for example, Matthew 2008; Noll 2006; Pirjola 2009) about how the security dimension of EU migration policy affected migrants' human rights. In sessions about terrorism and security and EU border management, our presenters discussed the relationship between migration management and human rights and refugee law.

Issues surrounding the management of the EU's external borders are essential here as they touch upon the right not to be returned (*refouler*) – a fundamental right which is potentially violated by practices like interception at high seas and third-country agreements (Wouters and Den Heijer 2010). The

question of who should be held responsible for human rights abuses in an age of supra-national border control governed by the EU, but often carried out by states individually or by states in co-operation with EU agencies, is at the heart of this discussion. The EU claims to be built on a respect for fundamental human rights, but whether this means that EU agencies such as Frontex can be held accountable and legally responsible for ensuring its actions comply with basic human rights standards is still open to debate.

This question is picked up in the paper by Vito Todeschini from the European Master's Programme in Human Rights and Democratisation. Todeschini analyses whether EU externalisation policies are compliant with The Charter of Fundamental Rights. The EU externalisation programme seeks to manage migration outside the Union through a number of initiatives. Key among these are readmission agreements, the designation of 'safe third countries' and capacity building within so-called buffer zones. Todeschini argues that the EU externalisation programme does not seem to comply with EU's own human rights standards. The various facets that put the programme at risk of breaching these standards include: internally inconsistent definitions of 'safe third countries'; the shift from burden-sharing to burden-shifting in which the 'safe third countries' will find a significant incentive to introduce their own rules in order to prevent access; and the fact that many 'safe third countries' are unable to provide an asylum system with adequate substantial and procedural guarantees. All of these could potentially result in a breach of the Charter, particularly if asylum seekers are returned without proper examination of their individual case, or where they are sent back to countries with poor human rights records where they may face degrading or inhuman treatment.

Fortunately, the courts have not been completely silent on this issue of EU border management. The recent ruling in *Hirsi Jamaa v. Italy* by the European Court of Human Rights challenged the lawfulness of interception and processing at high seas and described push-back by Italian military vessels as a clear violation of the *non-refoulement* principle. Nevertheless, political pressure to reduce the burden on states is strong and the recent uprisings in North Africa demonstrated that the EU was not willing to step forward as a safe haven offering protection to those fleeing violence. Maia Rotman comments on the lessons for Schengen from the Arab Spring. Her paper lies at the intersection of security and human rights, and examines the implications of cooperating with countries such as Libya, with an appalling human rights record, in the area of migration management. Using Duffield's (2008) concept of containment, Rotman correlates the 'panic' associated with the boats of North African migrants with a larger fear of 'losing' Libya as a buffer for incoming 'undesirable' migrants. Rotman sees the events of the Arab Spring as a good opportunity for rethinking the Schengen Agreement.

Rotman's framework of containment and treatment of migrants as 'undesirables' was reflected in other sessions throughout the day. As our presenters demonstrated, simply arriving in the territory of the EU does not guarantee protection of one's rights either. Our speakers commented on the erosion

of the right not to be arbitrarily detained, the right not to be subjected to inhuman or degrading treatment, the right to effective remedies and the right to health services around the continent. They especially emphasised the double vulnerability of those who are already vulnerable by virtue of their legal status of personal histories of abuse and trauma.

A group that highlights this issue of double vulnerability, but one that often gets forgotten in debates on migration is individuals who have been the victims of human trafficking. Jean-Pierre Gauci from King's College London addresses the framework which has been used to protect these individuals. He argues that under the current counter-trafficking framework, much emphasis has been placed on trafficking as a criminal activity, essentially a security issue, with little attention paid to the protection of the victims of trafficking. Few legal guarantees are offered to these victims, as often protection is conditional on their co-operation with law enforcement, and then still rather restricted in scope. Instead, Gauci suggests that the legal framework for refugees can provide protection for this group. He argues that there are a number of ways in which trafficking could fit the definition of persecution, whether this is fear of being re-trafficked, or fear of retaliation on family members. Re-defining a 'particular social group' to include victims of trafficking as has been done in Norway, would guarantee that victims of trafficking are able to access the rights and protection that they deserve.

Following on from these more legal-theoretical discussions, several papers discussed the every-day reality of accessing rights in European Member States. Roberta Bova's, and Natasha Posner and Oonagh Skrine's papers both examine the plight of undocumented migrants once they have arrived in European countries and offer empirical examples of what "accessing rights" actually means in migrants' every-day lives. Whether access to legal resources to help them win asylum claims, or access to healthcare both papers show how undocumented migrants' options are severely constrained.

Posner and Skrine from London's School of Advanced Studies present the results of their interviews with migrants who use the services of Praxis, an East London support charity. They recount stories of people living in legal limbo for years, without access to jobs and struggling to find quality legal assistance. They also comment on the role that quality legal advice from solicitors or NGOs can play in securing migrant's fulfilment of their legal rights. Bova, from the University of Bergamo, describes the problems faced by irregular migrants in Italy when trying to access health care, and the implications that state policies and the conduct of authorities, including the police, have on migrant subjectivity and dignity. She also argues that realising the right to health can be a fulfilment of migrant agency in a precarious and uncertain environment. Both papers show the difference between rights "on paper" and actual, realisable rights. Focusing on the agency of migrants which is often forgotten in considerations of human rights protection they remind us about the important relationship between rights and dignity.

Overall, the conclusions of the conference were those of concern for migrants' rights in Europe. The conference heard how the wider discourse of securitization has permeated public life and impacted on immigration policies at both national and EU levels. We heard how this creates the precarious situations in which many migrants live, and makes it a daily struggle for them to access rights. At the same time, some hope was offered by reference to existing law and recent court rulings, the power of political lobbying and public scrutiny, and finally, the agency, resilience and resourcefulness of migrants themselves. This conference was an opportunity for young researchers from a variety of disciplines to raise issues, and bring different discussions into contact with one another, something which we hope becomes continued exchange. It is vital that we engage in a critical dialogue with our political and legal institutions on both the national and the EU level. We must demand that the courts, state authorities and the wider public stand up for the protection of human rights and that these do not get sold short in this age of austerity.

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## **‘Brava Gente’ v. Immigrazione: Immigration Approaches in Italy**

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### **Abstract**

*Immigration has become an issue often framed with reference to the protection of external borders, the welfare state, cultural and ethnic identity and an increased risk of terrorism in most of the major migrant-receiving countries in Europe. Yet, despite restrictive immigration controls and exclusionary rhetoric in these countries, population inflows continue. Building on the literature which points out that migration policies often ‘fail’ to achieve restrictive objectives due to various institutional constraints preventing governments to realise their electoral promises (Boswell 2003; Calavita 2004; Castles 2004; Freeman 1995; Geddes 2008), this paper analyses the relation between policy debates and policy-making in the migration domain. The processes through which immigration debates and policies evolved in Italy, a late country of immigration which was quick to develop a highly politicised immigration approach, are investigated by drawing on qualitative data for the period covering 1996-2010. The paper examines how, faced with the so-called immigration pressures, different discursive categories of immigrants and immigration are created through elite political debates in Italy and to what extent “nodal points” of immigration debates are reflected in the design of immigration control tools. Consequently, examines what the link between rhetoric and practice reveals about the processes shaping the politics of immigration control.*

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### **Introduction**

This paper explores the gap between immigration ‘talk’ and ‘action’ with a particular emphasis on debates and policies developed in Italy during the years 1996-2010. The main argument is that in Western Europe, while national political elites are the key drivers of domestic-level immigration policies, they are not immune to pressures exerted by organised interest groups such as business lobbies and trade unions. In addition, they are constrained by mechanisms emanating from ‘liberal democratic institutions’, ‘international commitments’, bi-lateral relations with sending countries, and ‘the EU harmonisation process’ all of which limit the extent of restrictive immigration measures that could be introduced (Boswell 2003:3). In the presence of these constraining factors, immigration rhetoric and practices sometimes contradict each other.

While the rhetoric-action gap is not peculiar to the Italian political context, immigration issues tend to generate a remarkably high level of public concern in this country. Moreover, Italy is viewed as a critical case study in migration studies to test whether the relatively new immigration countries in southern Europe would adopt an ‘expansive’ and ‘inclusive’ immigration policy strategy by replicating the liberal paradox (Freeman 1995:881). According to the liberal paradox argument, as those who are benefitting from immigration (e.g. employers and business elites) are better organised than those who are bearing its “costs” (i.e. public) in reflecting their demands upon decision-makers the process leads to liberal immigration policy outcomes despite the existence of restrictive patterns.

The paper is developed in three stages. The first part presents the research frame adopted in this study. The second examines the electoral positioning of the key political parties on migration during the concerned time frame through an analysis of their general election manifestos. The third part places the electoral promises on immigration against the design of the key pieces of immigration legislation. The paper concludes with an assessment of the extent to which core electoral positions on migration were captured in the pieces of legislation passed.

### **Research frame**

The key political parties’ and election coalitions’ positioning on migration during national parliamentary elections is examined through content analysis of their general election manifestos. The recording units are sentences containing references to ‘immigration’ and ‘immigrants’, whereas paragraphs, within which these relevant sentences are located, serve as the context units.<sup>1</sup> The analysed election campaigns are those that took place in 1996, 2001, 2006 and 2008.

### ***Content categories***

The following categories are identified as the pre-dominantly used discourse frames for immigration: (I) Immigrants’ human rights and civil liberties; (II) Economic effects of immigration/immigrants; (III) Immigration as a tool of political blame and/or glorification; (IV) Protection of national borders/homeland/security in the face of immigration; (V) Functioning of immigration and asylum systems; (VI) Protection of the welfare system; (VII) The effect of immigration on national culture/identity/racial composition; (VIII) Immigration and illegality/crime/terrorist threat; (IX) Number of entries/size of immigration; (X) Immigrant integration; (XI) Immigration as an issue to be tackled within the EU framework/through multi-level governance approach; (XII) Extra-EU versus intra-EU migration (*extracomunitari*); (XIII) Peculiarity of Italy’s immigration experience; (XIV) Other (immigration and health risks, environmental degradation, foreign aid).

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<sup>1</sup>Berelson (1952:135) defines the recording unit as ‘the smallest body of content in which the appearance of a reference is counted’, where a reference is a single occurrence of a content element, and context unit as ‘the largest body of content that may be examined in characterizing a recording unit’.

In addition to these main categories, the following sub-categories are also identified: (IIa) Economic costs of immigration; (IIb) Economic benefits of immigration; (IIIa) Immigration as a tool for attacking the political opponent; (IIIb) Immigration as a tool for praising the party position; (Va) Promising liberal immigration measures; (Vb) Promising stricter immigration measures; (Vc) Promising neither liberal or stricter immigration measures (this category covers, for example, proposals for speeding up the processing of asylum applications and realisable forms of assisted repatriation); (VIIa) Immigration's positive effects on domestic culture, identity, and racial composition; (VIIb) Immigration's negative effects on domestic culture, identity, and racial composition or conditionally positive effects that come after strict controls; (VIIc) Immigrants' presence in Italian society acknowledged only as a fact without attaching any positive or negative values on it; (IXa) Current volume of immigrant entries having positive effects for Italy; (IXb) Current volume of immigrant entries having negative effects for Italy; (Xa) Integration as immigrants' duty; (Xb) Integration as a two-way project involving active participation of both immigrants and Italian society; (XIa) Immigration management at the EU-level/through multi-level governance as a preferable option; (XIb) Immigration management at the EU-level/through multi-level governance not as a preferable option; (XIIa) Both extra and intra-EU migration approached neutrally/one is not valued over the other; (XIIb) Extra-EU migration as a beneficial phenomenon; (XIIc) Extra-EU migration as a problematic phenomenon.

The quantified data in these categories reflect the number of references made to the general categories; not the number of relevant sentences. The section on electoral references to immigration provides a more detailed discussion of the content categories.

### **Election rhetoric on immigration in Italy, 1996-2008**

Parties from both sides of the political spectrum adopt a politicised rhetoric on immigration. They refer to immigration issues as a tool of political blame and/or glorification (Category III). Furthermore, independent from their political orientations, all the analysed parties frequently reflect discontent about the functioning of the migration management system in Italy (Category V).

Another category which predominantly appears in the election manifestos of both the right- and the left-wing parties is Immigration management at the EU-level/through multi-level governance (Category XI), and both sides are positive about making Italy part of supra-national and/or bilateral arrangements for controlling refugee and migrant arrivals to the country. In addition to the EU framework, establishing co-operation networks with the major sending countries is also seen as a valuable asset.

Yet, there are certain categories which are adopted either mainly by the Left or the Right. While Category (I) - Human rights and civil liberties of immigrants - is mostly adopted by the parties of the

Left, right-wing parties and coalitions have a greater tendency of approaching immigration from a public order and security lens (Category VIII), and also linking immigration with some other issues (Category XIV), such as increased health risks and environmental degradation caused by the newcomers, and the potential role that foreign aid can play in terms of keeping people in their home countries.

Parties and coalitions from different sides of the political spectrum are polarised on immigration and project different priorities in their election manifestos. For the Left, the top three categories involve migrants' human rights and civil liberties (84 references), criticism of past governments' policies (74 references), especially those of the right-wing governments, and proposals of relatively more liberal migration management tools (65 references).

For the Right, out of a total number of 124 immigration references, 39 of them were about restrictive measures. The second most common way for the right-wing parties to refer to immigration is in relation to security by establishing links between immigration on the one hand, and crime and illegality in the country, on the other (17 references to immigration are made along these lines). In the third place, there are two equally significant categories for the right-wing parties. These are 'approaching immigration and the presence of immigrants in Italy as a factor negatively influencing the cultural and ideational composition of the Italian society', and 'putting immigration forward as an issue which has to be tackled by referring to the EU framework and sources to develop a multi-level governance setting which would involve sending and receiving countries as well as supra-national/international authorities'. Each category involves 10 references.

The general examination of electoral manifestos does not offer a regular pattern of either gradual increase or decrease concerning any of the identified dominant categories over the years. Likewise, no consistent dominance of any single category is detected in the analysis.

The next section builds on manifesto analyses and investigates whether and how the political actors integrate their electoral promises on migration in the policies they tailor after being elected to government.

### **Comparing electoral claims on immigration with political outcomes**

#### ***1996- 2001: Efforts to Tailor an All-Encompassing Immigration Policy:***

The period of 1996-2001 was marked by short-lived centre-left governments established by the *Ulivo* (Olive Tree) coalition which suffered from intra-coalition conflicts and confrontations.

Despite its heterogeneity, the *Ulivo* government developed Immigration Act 40/1998, also known as the 'Turco-Napolitano' law, under the pressure of public and political concerns about increased rates of immigration and the EU's worries that Italy was not able to secure its borders (thus it was not

considered ready to join the Schengen border regime). The law was the product of a compromise reached among different parties, and consequently involved both restrictive and more liberal elements. As an extension of Italy's commitments for becoming part of the Schengen zone, the centre-left government aimed to reinforce measures concerning entry quotas, expulsions of those who came to Italy through illegal routes, and residence permits.

Entries on the basis of annual quotas were facilitated through the introduction of 'sponsorship' provisions according to which foreigners who wanted to seek jobs in Italy could get temporary residence permits provided that they were sponsored by Italian citizens, legally resident foreigners, regional or local authorities, trade unions or recognised voluntary associations (Zincone and Caponio 2005:4). The inclusion of such a clause to the legislation was actually in keeping with the emphasis of the *Ulivo* on the potential economic benefits that immigration can bring to Italy (Category II(b)).

Another novelty introduced by the law at the time was the establishment of favourable quota limits for countries which signed bi-lateral agreements with Italy with an aim to control immigration and facilitate the re-admission of irregular immigrants. While clearly indicating the use of immigration control tools as an extension of foreign policy, this policy innovation matches the left-wing's electoral promises to manage immigration in Italy with further reference to the EU-level framework and multi-level governance (Category XI(a)).

The strict elements of the law mainly involved expulsion practices and the construction of detention centres (*Centri di permanenza temporaneo*). Neither the introduction of expulsion nor the setting up of detention centres was part of the electoral rhetoric of the left-wing coalition. The control-oriented policy tools were developed under the influence of international commitments and parliamentary dynamics.

Yet, the mismatch between electoral promises and the legislative process was not solely created by the introduction of tight immigration control tools. The law also sought to set up an institutional mechanism that would promote immigrants' integration even though integration was not referred to at all in the election manifestos of the left-wing parties. Hence, the gap between electoral campaigning promises and the actual policy-making was due to a liberal policy initiative.

### **2001-06: Casa delle Liberta' Government, the Bossi-Fini Law and Its Aftermath**

After a long and expensive political campaign, the *Casa delle Liberta'* (House of Liberties; CdL) coalition marked a significant victory over the *Ulivo* (Olive Tree) in the 13 May 2001 elections. As reflected in the CdL's manifesto, one of the key commitments made by the right-wing coalition during the 2001 election campaign was to tighten immigration policy. The Bossi-Fini law was the outcome of such efforts and it modified the 1998 law. As Zincone and Caponio (2005) highlight, the Bossi-Fini law's repressive measures were mainly concentrated in two areas: conditions regulating the granting of residence permits and confronting undocumented migration.

Yet, the coalition partners were not in complete harmony in terms of their immigration approaches. The Christian Democrats (CCD-CDU/UDC) were against any policy proposal which would radically restrict immigration to Italy and put pressure on the far-right LN (Lega Nord) and the AN (Alleanza Nazionale) by referring to its close links with pro-immigrant groups, and also Church organisations. In addition to the Catholic Church, the pressure of business and employers' associations, which had concerns that strict immigration regulations would jeopardise their business, also played an important role. As a result of the pressures coming from both within and outside the coalition, the exclusionary and restrictive political discourse adopted by some of the CdL partners (the LN and the repressive elements of the AN), could not be realised in the policy-making arena. The mass regularisation in 2002 covering irregular migrants from all of the economic sectors (Geddes 2008:361) and the gradual expansion of foreign worker quotas between 2003 and 2006, from 79,500 in 2003 to 340,000 in 2006, a policy change which was partially developed under the influence of the EU enlargement (Einaudi 2007: 385), were the two striking examples to the discourse-practice dichotomy.

Thus, in clear contrast with the CdL partners' political campaign promises, 2001-06 became a period during which Italy experienced the highest increase in the number of legal immigrants living in its territories as the numbers raised from 1.3 million (October 2001) to 2.67 million (1 January 2006) (Einaudi 2007:306-307).

#### ***2008-2010: The (First) Security Package (Pacchetto Sicurezza)***

Similarly to the 2001-2006 period, shortly after winning the 2008 general elections, the right-wing government presented new immigration legislation, the so-called "Security Package" (*Pacchetto Sicurezza*). One of the most significant and controversial aspects of this legislative package was 'the configuration of clandestine immigration as a crime punishable with up to four years' detention and a major increase in the maximum detention period prior to removal' (Pastore 2008:6). Furthermore, following the subsequent changes it became 'possible to deport a foreigner or remove an EU-citizen in the event of him/her being found guilty of a crime carrying a sentence of more than two years imprisonment' (Finotelli and Sciortino 2009:2). Moreover, according to the new decree, those who let any sort of property to irregular citizens, no matter whether they were Italian or foreign, could face prison sentences (Finotelli and Sciortino 2009).

Unlike during the 2001-2006 period, this time the heavy dominance of the right-wing parties, with their preference for tighter immigration controls, in the Italian Parliament offered suitable ground to the PdL-LN government to introduce such controversially restrictive immigration control policies without facing with any considerable political challenges. The legislative package revealed that the main determination criteria of the 'desirable' migrant in Italy gained clearer economic nature, and social marginality was seen as a component of unwanted migrant; no matter whether they originated from Europe or not.

While the design of the Security Package was in line with the control-oriented immigration rhetoric of the *Popolo della Liberta'-Lega Nord* coalition, the EU acted as an agent calling a halt to its full-implementation. Treating irregular migration as a crime was challenged at the European Court of Justice (ECJ) and on 28 April 2011, the ECJ (First Chamber) issued a decision that Italy cannot punish irregular migrants by classifying irregular migration as a breach of its criminal law.

### **Conclusion: What do immigration rhetoric and policy-making reveal?**

Despite being a late country of immigration with initially relaxed immigration policies, Italy was quick in terms of how it developed a politicised and securitised stance on immigration and tightened its immigration legislation; the dominant trend which exists among most of the main immigrant-receiving European states. Immigration is a politicised topic because political parties from all sides of the political spectrum use it to distinguish themselves from the 'other' ideological camp and this process usually involves criticising the political opponents for their immigration approaches while presenting the self-party image as the one having the highest competency in immigration matters. While it is not surprising that during election times the competition to enlarge electoral support base involves such a mechanism, the extent to which political parties have started to use the immigration card to carve a special niche for themselves with an expectation to increase their favourability in their electorates' eyes turned immigration into an electoral tool used strategically to manipulate public concerns and worries.

Likewise, the changing tone of political debates on immigration establishing alleged links with immigrants on the one hand and crime/illegality/security on the other indicates that immigration has become a securitised issue as well as a politicised one.

The examination of the relevant key pieces of immigration legislation provides evidence that rhetoric and policy-making in this area do not quite follow each other. The contradictory outcomes and mismatches between rhetoric and policy result mainly from the involvement of various actors with different interests and priorities in immigration policy-making. The coalitions of political parties are composed of a variety of individual parties which do not always necessarily have the same vision on immigration. In addition to such national-level dynamics, the international arena influences the domestic immigration policy-making context. Nevertheless, the development of both immigration rhetoric and policy-making in Italy remain, to a great extent, under the discretion of national political parties.

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# **The Externalisation of Migration Control: An Assessment of the European Union's Policy in the Light of the Charter of Fundamental Rights**

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## **Abstract**

*Since the adoption of the Tampere Programme in 1999, the European Union has pursued the aim of moving the control of migration flows from its territory to third countries. Such a process is known as 'externalisation' and basically consists of the involvement of countries of origin and transit in the management of both legal and illegal flows.*

*The aim of the present paper is to assess whether the policy of externalising migration control mechanisms complies with human rights obligations, by which the EU is bound. After the entry into force of the Lisbon Treaty, the EU's human rights framework acquired a new legal value, in particular with regard to the Charter of Fundamental Rights. Subsequently, the compliance of the EU's acts with human rights enshrined therein can be judicially reviewed.*

*The first part of the paper provides an overview of the development of the EU's migration. This paper shows how the approach to migration has changed so far, and what the main characteristics of such a policy framework are. The second part illustrates several concerns about the respect for migrants' human rights related to the implementation of externalisation. The last part deals with the EU's human rights framework. Externalisation is analysed in light of binding human rights obligations, in order to assess whether and to what extent it violates those fundamental rights, upon which the Union is founded.*

## **Introduction**

'Externalisation' consists of moving migration control from the European Union (EU) to third states. Such states include countries of origin and transit of migration involved in the management of both legal and illegal flows. This process encompasses a wide range of actions, such as the creation of detention camps, the repatriation of migrants and the promotion of capacity building and development programmes in third countries (Aubarell, Zapata-Barrero and Aragall 2009:12).

The aim of this paper is to assess whether the policy of externalising migration control mechanisms complies with the EU's human rights obligations, which have been significantly enhanced by the

entry into force of the Lisbon Treaty. To be precise, the externalisation process and its implementation will be analysed against the Charter of Fundamental Rights.

### **The EU's policy framework on migration**

In 1999, the European Council presented its Conclusions on the area of freedom, security and justice, the so-called Tampere Agenda. *Inter alia*, this document outlined the Union's policy on migration. Remarkably, the Tampere Agenda presents a certain openness towards third country nationals. On the European level, it focused on two issues: the development of a common asylum system and the enhancement of controls at the external borders (see European Council 1999: para 3).

The European Council highlighted the need for the EU to adopt a comprehensive approach to migration aimed at "addressing political, human rights and development issues in countries and regions of origin and transit" (European Council 1999: para 11). This approach hinged on the establishment of partnerships with third countries, with a view to sharing the burdens related to the management of migration flows. In this regard, the Tampere Agenda singled out four core issues related to capacity building in third countries: effectively tackling illegal immigration; creating proper asylum systems; readmitting irregular migrants; and improving development programmes in order to address the root-causes of migration (European Council 1999: paras 13-27). These may be considered the four dimensions of externalisation.

The Hague Programme, adopted in 2004, changed the Union's attitude towards migration, putting much emphasis on security issues (European Council 2004:12). It paid major consideration to the link between the internal and external dimensions of security, developing the concept of 'external dimension of asylum and migration' (European Council 2004:20). In this regard, the Hague Programme focused on furthering capacity- building in third countries with regard to borders controls and asylum processing and on mainstreaming readmission agreements in any of the EU's external partnerships. Lastly, the Programme called for the creation of a European integrated border management system and of a specialised agency (European Council 2004:23-25). The latter was created in 2004. Since then, the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) has played a key role in the coordination of border management, both among member states and between the EU and third countries. The Stockholm Programme, adopted in 2009, focused on the enhancement of the integrated border management (European Council 2010:26), calling for further improvement of FRONTEX resources, capabilities and mandate (European Council 2010:26).

In November 2011, the European Commission adopted the ‘Global Approach to Migration and Mobility’ (GAMM),<sup>1</sup> a strategy built around four pillars: organisation and facilitation of legal migration and mobility; prevention and reduction of irregular migration and trafficking in human beings; promotion of international protection and enhancement of the external dimension of asylum; maximisation of the development impact of migration and mobility. According to the Commission, the GAMM is designed to be migrant-centred.<sup>2</sup> Moreover, the respect for migrants’ human rights is a cross-cutting issue underpinning the four pillars (European Council 2011).

To summarise, it can be said that the Union has developed a two-faceted migration policy. On the one hand, the EU strengthened its own capabilities to control the external borders. On the other hand, it pursued the externalisation of migration management, establishing partnerships aimed to improve third countries’ capabilities to effectively cope with migration flows.

### **The implementation of externalisation**

The EU adopted a wide range of measures with the purposes of preventing unwanted economic migrants from reaching Europe and shifting the responsibility for refugee protection onto neighbouring states. Yet, since the third countries involved almost always do not comply with international human rights standards, this process causes concern about the respect for migrants’ rights.

A first critical aspect regards the ‘safe third country’ concept, envisaged by the Directive 2005/85/EC on minimum standards on procedures concerning refugee status.<sup>3</sup> On the basis of this notion, European states can transfer asylum seekers to ‘safe’ third countries considered the appropriate place where applicants should make their claim. However, the Directive does not provide for a harmonisation of this concept among Member States, which have a certain margin of appreciation as to deciding when a third country is ‘safe’. That is to say, “[a]sylum seekers do not have the same possibility of remaining on EU territory in all European Union countries, because of the differences concerning the *safe third country concept*” (Morgades 2010:15-16; see also Trauner and Kruse 2008:26).<sup>4</sup> This, in turn, may result in a violation of asylum seekers’ rights.

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<sup>1</sup> The GAMM is a renewal of the 2005 Global Approach to Migration (GAM), which was based on three dimensions: the organisation of legal migration; the link between development and migration; the prevention and combat of illegal immigration; see European Council, 2005. The GAMM “[...] should be [...] the overarching framework of EU external migration policy [...]” see European Commission (2011:4).

<sup>2</sup> “[A]ll action must be empowered to gain access to safe mobility” (European Commission 2011:7).

<sup>3</sup> See arts. 27ff. of Directive 2005/85/EC.

<sup>4</sup> According to art. 35 of the Directive, furthermore, member states are allowed to derogate to some procedural guarantees set forth therein. This derogation may lead to a lowering of human rights standards (Weinzierl and Lisson 2007:75).

The creation of Regional Protection Programmes is part of the externalisation process. Their purpose is to improve asylum systems in neighbouring countries. Basically, they “replac[e] the asylum procedure in Europe with similar procedures somewhere else” (Gammeltoft-Hansen 2008:455). However, they could bring about negative results: “it is clear that as long as [third] countries are afraid of being left alone with the protection responsibility, they will have a significant incentive to introduce their own rules to prevent access to asylum” (Gammeltoft-Hansen 2008:457). In this way, the very right to seek asylum could be at risk.

With regard to border controls, Human Rights Watch (2010) reported that FRONTEX was involved in human rights violations. Specifically, the agency exposed migrants to the risk of suffering from degrading and inhuman treatment (HRW 2010:48-50):

Frontex consistently and repeatedly took action during RABIT 2010 that exposed migrants and refugees to inhuman and degrading treatment in the detention facilities in Evros. Most notably, this occurred when border guards participating in Frontex patrols apprehended migrants that they knew would be held in facilities where the conditions were inhuman and degrading. [T]he agency directly or indirectly had a hand in their apprehension and transfer to detention centres and, thus, in their subsequent detention in inhuman and degrading conditions. [...] Frontex’s activities that facilitated the detention of migrants in Greek detention centres during the RABIT deployment violated the prohibition on inhuman and degrading treatment.

Also, the EU contributed to the creation of detention centres in third countries, formally under the jurisdiction of the latter but managed in collaboration with European member states (Morgades 2010:28). Independent organisations reported that human rights are constantly violated in such centres (Morgades 2010:30).

Moreover, since 2001, readmission clauses have been inserted in any type of negotiation or agreement between the EU and third countries (see European Council 2012:11). These states commit themselves to readmit both their own nationals and third country nationals, who passed through their territory. However, these agreements cause several concerns. First, they stop remittances flows, hence bringing families into poverty. Furthermore, they contribute to increasing urbanisation in readmitting countries (Trauner and Kruse 2008:25). Second, people readmitted to transit countries are likely to suffer violations of basic human rights, since such states often present shortcomings regarding organisational and technical means to repatriate third country nationals (Trauner and Kruse 2008:25-26; Weinzierl and Lisson 2007:30). Third, readmission agreements violate asylum seekers’ rights, since third

countries' asylum systems almost always present a lack of substantial and procedural guarantees.<sup>5</sup> Lastly, these agreements are likely to be ineffective.

Overall, the externalisation process does not seem to comply with human rights standards. The next section will analyse it against EU's human rights framework.

### **Assessing externalisation in the light of the EU's human rights obligations**

Human rights are one of the cornerstones of the EU. Since 1992, the Treaty of Maastricht recognised human rights as a fundamental principle of the Union.<sup>6</sup> The Lisbon Treaty made further significant changes. The new art. 2 of the Treaty on the European Union (TEU) state that “[t]he Union is founded on [...] human rights [...]”. Additionally, art. 3(5) provides for the promotion of human rights on the international level. Compliance with human rights standards is a condition to accede to the EU, and, on the other hand, the TEU envisages a special procedure to react to any breaches by member states.

The new art. 6 constitutes the most relevant innovation. First, the Charter of Fundamental Rights of the European Union (Charter) has acquired the same legal value as the TEU and the Treaty on the Functioning of the European Union (TFEU), namely it became a primary source of EU law. Second, art. 6 provides for the accession of the Union to the European Convention on Human Rights (ECHR). Third, fundamental rights are recognised as general principles of European law. As a matter of fact, the Lisbon Treaty established once and for all the EU's commitment to respect and protect human rights. Particularly relevant are the obligations arising from the Charter. According to art. 51(1), “[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union”. Subsequently, any act of the Union's bodies must comply with binding human rights provisions, which are enshrined therein.

As mentioned above, the externalisation process was developed within the area of freedom, security and justice. Any activity carried out in this field must respect fundamental rights (art. 67(1)). According to arts. 263 and 265 of the TFEU, the Court of Justice of the European Union (CJEU) has jurisdiction over any act adopted or omission committed by the EU's institutions, bodies and agencies in the area of freedom, security and justice. Given the new binding value of the Charter, the CJEU can review the compliance of any measure with the provisions set forth therein. That is to say, “[m]easures could [...] be struck down not merely where they violate a fundamental right but also

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<sup>5</sup> “If one assumes that most of the transit countries are not ‘safe third countries’ of asylum according to UNHCR criteria, we can conclude that the return of rejected asylum seekers might imply a lowering of asylum standards below internationally accepted standards. The rights of asylum seekers – to have a minimum quality of living conditions during the procedure, to obtain necessary information, to have a transparent and fair procedure and to have access to an independent appeal process – might be violated on the part of EU member states” (Trauner and Kruse 2008:27).

<sup>6</sup> See art. 6 of the original version of the Treaty on the European Union (TEU).

where the EU institutions have failed to give due consideration to whether a measure potentially violates a fundamental right” (Chalmers 2010:252; HRW 2011:46; Weinzierl and Lisson 2007:56).

The Charter recognises the right to asylum. Art. 18 explicitly recalls the Geneva Convention on the status of refugees and its Protocol. Hence, the principle of *non-refoulement*,<sup>7</sup> which constitutes the cornerstone of the international protection, must be respected. It follows that neither the EU while cooperating with third countries, nor member states while carrying out patrolling operations may act in breach of such a principle.

Moreover, the rights of migrants, who cannot claim to be asylum seekers, are protected within the Union’s human rights framework. The Charter guarantees human dignity (art. 1), right to life (art. 2) and the integrity of the person (art. 3) and prohibits any act resulting in degrading and inhuman treatment (art. 4). The last provision is extremely relevant. Indeed, the prohibition of inhuman and degrading treatment is not only envisaged in the Charter. Also, attention must be paid to relevant judgements of the European Court of Human Rights (ECtHR). Art. 52(3) of the Charter provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by said Convention [...]”. The ECtHR recognised the prohibition of inhuman and degrading treatment, enshrined in art. 3 of the ECHR, as a provision subject to no derogations. It pointed out that poor conditions of detention amount to degrading treatment (HRW 2010:47). Thus, by means of the above mentioned art. 52(3), the interpretation of the ECtHR gives enhanced legal strength to the prohibition set forth in art. 4 of the Charter. It follows that the EU is under a binding obligation to ensure that detention centres for migrants comply with human rights standards.

It can be concluded that any policy or act of the Union on migration must comply with and respect the right to asylum and, in general, with the protection of people’s fundamental rights. Whenever the EU acts in a way inconsistent with such obligations, it acts in breach of the Charter and of its very founding principles. Although the Union officially states its respect for human rights,<sup>8</sup> the implementation of externalisation appears to violate human rights.

The move of asylum procedure to third countries, which are unlikely to comply with international standards, may result in an annihilation of the right to asylum. As noted above, such countries could in turn put in place measures aimed at preventing asylum seekers from reaching their territory, as the EU is presently doing. Further infringements of the right to asylum arise from the 2005/85/EC

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<sup>7</sup> Art. 33(1) of the Geneva Convention of 28 July 1951 states that: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

<sup>8</sup> See Hague Programme (p. 14); Stockholm Programme (p. 8); GAMM (pp. 6-7).

Directive, in particular from the ambiguous concept of ‘safe third countries’ and from the derogations to procedural guarantees allowed at the borders. Considering the foregoing, externalisation seems to be in breach of art. 18 of the Charter.

As mentioned, border controls carried out by member states and coordinated by FRONTEX may bring about infringements of human rights. On the one hand, stopping shipwrecked people and taking them back to third countries, without proper examination of the individual cases, could result in refoulement of asylum seekers. On the other hand, sending people back to third countries, which do not comply with human rights standards, is likely to mean exposing them to degrading and inhuman treatment. Readmission agreements, additionally, lead to the same results. Hence their compliance with the Union’s human rights obligations may be questioned. Moreover, the funding and building of detention centres in third countries, in which human rights are not considered at all, is a further breach of such obligations.

Therefore, externalisation seems to be in violation of art. 4 of the Charter which prohibits degrading and inhuman treatment, as well as of right to life (art. 2) and respect for human dignity (art. 1).

Finally, it is worth mentioning that certain states, such as Senegal and the Maghreb countries, started to enact laws against illegal emigration (Des Frontières et des Hommes 2009). Such measures are completely illegitimate under international human rights law, particularly under art. 13(2) of the Universal Declaration of Human Rights (UDHR) and art. 12 of the International Covenant on Civil and Political Rights (ICCPR). Moreover, with regard to joint patrol operations undertaken by member states and third countries, “collaboration in emigration controls can [...] represent a violation of the human right to leave and the right to seek asylum”(Weinzierl and Lisson 2007:70).

## **Conclusion**

The foregoing analysis showed that the current process of externalisation of migration control is at odds with the EU’s human rights obligations, which are part of its founding principles. The contradiction is evident: the Union pretends to be grounded on the respect for human rights but, at the same time, it pursues policies that violate human rights.

Of course, the EU needs to find its way to organise migration to its territory. However, externalisation is not the right way. Trying to keep people out of Europe’s boundaries is not only unrealistic but also ineffective, since migrants and human traffickers always find new routes to Europe, which are even more dangerous. All in all, the policy of externalising migration control is likely to contribute to increasing death tolls at Europe’s doors.

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## Playing Their Cards Early: Lessons for Schengen from the ‘Arab Spring’

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### Abstract

*From the end of 2010 through to the fall of 2011, overcrowded boats of North African migrants braved the Mediterranean Sea in the hope of reaching European soil. While such migration flows are commonplace and the numbers of migrants who landed in Europe were barely out of the ordinary, the fact that these migrations occurred in tandem with Arab Spring revolutions throughout North Africa led to a panicked response from the European Union. Italy declared a State of Emergency and France responded to the ‘threat’ of irregular migrants by closing its borders with Italy. Such a manoeuvre broke the Schengen Agreement which eliminates internal border controls within the European Union. Although the disaccord did not last long and the heads of EU states have since articulated their renewed support for Schengen, the event remains significant for it symbolises larger issues with the Schengen agreement and the EU’s relationship with North African ‘buffer zone’ countries.*

*In this paper, I will examine Libya’s role as ‘buffer zone’ for the EU within the larger context of extra-territorialisation and securitisation of European borders. I will correlate the panic associated with the boats of North African migrants with a larger fear of ‘losing’ Libya as a buffer for incoming ‘undesirable’ migrants. I will argue that the existence of the Schengen agreement and the willingness of European Union states to abide by the accord is in fact entirely dependent on these extra-territorial ‘buffer zones’. Finally, I will conclude with thoughts about the future of the Schengen Agreement and Libya’s role as a third-country buffer zone.*

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### Introduction

From the end of 2010 through to the fall of 2011, overcrowded boats of North African migrants braved the Mediterranean Sea in the hope of reaching European soil. While such migration flows are commonplace and the numbers of migrants who landed in Europe were barely out of the ordinary, the fact that these migrations occurred in tandem with Arab Spring revolutions throughout North Africa led to a panicked response from the European Union. Italy declared a State of Emergency and France responded to the ‘threat’ of irregular migrants by closing its borders with Italy. Such a manoeuvre

broke the Schengen Agreement, which eliminates internal border controls within the European Union. Although the disaccord did not last long and the heads of EU states have since articulated their renewed support for Schengen, the event remains significant for it symbolises larger problems with the Schengen agreement and the EU's dependence on North African countries such as Libya to act as migration 'buffer-zones', halting irregular migrants before they reach EU soil.

In this paper I will examine Schengen's underlying extra-territorial component and its dependence on migration buffer zones, first theoretically and then through the lens of the 'Arab Spring' as a case-study. I will begin this discussion with a theoretical analysis of extra-territorialisation using Mark Duffield's (2008) theory of containment to historically locate and explain the growing importance of extra-territorialisation. Secondly, I will briefly survey the relevant EU mobility agreements, focusing specifically on Schengen and its main tenants. Finally, I will look at the events of the 'Arab Spring' and the reactions of the EU states to the associated population movements. I will examine what the reactions imply about Schengen as well as what implications they have for refugees and asylum seekers.<sup>1</sup> It is my contention that Schengen's inherent dependence on extra-territorialisation of migration management, such as the 'buffer-zone' erected in Libya, infringes on the rights of asylum seekers and refugees and results in the disintegration of the international refugee protection regime.

### **Defining Extra-territorialisation**

Before undertaking an analysis of the relevant EU migration policies, it is first necessary to define and contextualise extra-territorialisation. Extra-territorial policies are government 'push-back' measures used to ensure that irregular migrants do not enter destination countries (Nicholson 2011). Essentially, these measures are border controls exercised outside the state's territory, or 'policing at a distance' (Bigo 2003). Methods include offshoring visa controls, detention centres or areas for asylum processing and also can include maritime controls, anti-smuggling operations, and diplomatic agreements with third-states or buffer-zones (Nicholson 2011).

Such extra-territorial measures became relevant in the context of a post-Cold War tightening of immigration policies co-existing with a legal commitment to the 1951 Convention Relating to the Status of Refugees (henceforth the 1951 Refugee Convention). During the Cold War, Western<sup>2</sup> states were largely open to asylum claimants, as refugees from the Eastern bloc were considered as prizes of the geo-political spectrum. Refugees at the time, generally political escapees from the Soviet Union, were seen to highlight the superiority of the Western world and also played an important

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<sup>1</sup> While most of the following discussion will apply equally to other categories of migrants, in the interest of time and simplicity I will be focusing exclusively on the implications of extra-territorial policies for refugees and asylum seekers.

<sup>2</sup> I will be using the term 'Western' here broadly to mean asylum destination countries that are liberal democratic states, also synonymous with 'Northern' or 'Global North'.

economic role in post-War Western European reconstruction. However, as the Cold War came to an end, refugees simultaneously lost their "political and ideological value" (Chimni 1998:356). The changing economic and political situation in the Western world and an increasingly securitized rhetoric resulted in a severe decline in Western states' willingness for accepting asylum seekers (Chimni 1998).

Extra-territorial policies have become a method of circumventing the commitment to the 1951 Refugee Convention, especially the right to protection from persecution and *refoulement*.<sup>3</sup> Such is the paradox of liberalism: liberal democratic states are accountable to civil society and their constituencies and therefore have to comply with international norms (Gammelthoft-Hansen 2007; Nicholson 2011) which can conflict with their concerns about security. Extra-territorial policies can be seen as one of the ways in which states attempt to manage this conflict.

### **Theoretical Dimensions: Mark Duffield's Planetary Architecture of Containment**

Within this context, it is illuminating to consider Mark Duffield's theory of containment. Duffield, whose work largely focuses on the migration-security nexus, is helpful for conceptualising the growing Western dependence on extra-territorial measures to curb and contain international migration. He defines containment as "those various interventions and technologies that seek to restrict or manage the circulation of incomplete and hence potentially threatening life, or return it from whence it came" (Duffield 2008:146).

Duffield's theory is premised on the conception of the migrant as the iconic figure of 'threatener' to the developed world, for the migrant is the "embodiment of cultural differences in motion" (Duffield, 2006:71). To arrive at this conclusion, Duffield traces an evolution of state racism, that is, the racism used by the state to exclude others in order to remain legitimate. He traces this evolution from the Foucauldian tradition of biological racism to what Etienne Balibar (1991) calls 'racism without races', or 'socio-cultural' racism. This new socio-cultural racism is one that defines itself as politically legitimate through seeming to bring community cohesion by excluding non-citizens and those socio-culturally different (Balibar 1991; Duffield 2006).

Duffield posits that the change of course from biological racism to sociocultural racism occurred with decolonization. Prior to decolonization, global population movement was largely controlled by the colonial powers. However, with nascent independent states came a world of newly mobile people. These people potentially represent a "non-insured population" (Duffield 2008): socio-culturally

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<sup>3</sup> Non-refoulement is the cornerstone of international refugee protection. Article 33(1) of the 1951 Convention says: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion." (UNHCR, [1951] 2010).

different because of their lack of the many safety nets and infrastructure afforded to those from Western states. Duffield outlines a planetary architecture of containment that places the socio-cultural ‘Other’, the non-insured, as a threat to the legitimacy and capacity of the Western state, in particular community and cultural cohesion and public infrastructure. Consequently, the welfare state and the communities that depend on it are best protected by containment (Duffield 2006).

This framework of containment, in which the bounds of the national and international are indistinct, connects the fields of migration, development and security through the common goal of safeguarding the culture and order of the developed world (Duffield 2006). In terms of migration, potential undesirable migrants are pushed-back or contained through strict border controls and extra-territorial policies. In terms of development, aid and assistance is used to encourage those non-insured populations to become self-reliant in their countries of origin. In terms of security, developed nations promote domestic cohesion in the non-insured world and intervene under humanitarian auspices when internal war breaks out in order to pre-empt the associated migration streams and asylum claims stemming from conflict (Duffield 2006).

### **Practical Dimensions: Applying the architecture of containment to EU policies**

We have just seen how a socio-cultural racism of containing and pushing back non-insured populations through extra-territorial measures serves to legitimatise and securitize developed countries. It is my contention that this theoretical analysis can be applied to the Schengen Agreement. The agreement was signed in June 1985 between Belgium, France, Germany, Luxembourg and the Netherlands. It was agreed that controls at common borders would be gradually removed and freedom of movement would be legislated for all nationals of the signatory states. This agreement was supplemented by the Schengen Convention in 1990 and incorporated into EU law with the Treaty of Amsterdam in 1999. Currently, it includes 26 EU Member States. Candidates for Union membership must also accept the Schengen provisions (Boswell and Geddes 2011). Schengen institutionalises common visa policies, cross-border police and judicial cooperation. Central to the Schengen system is the security apparatus, the Schengen Information System (SIS). The SIS, operational since 1995, is a shared EU database for border control, security and law enforcement. It is designed and intended to compensate for lack of land and air border controls (Europa 2009).<sup>4</sup>

Following the Amsterdam Treaty, the EU undertook consecutive five-year plans to further the initial objectives of the Treaty and provide more specifics on the common area of “freedom, security and justice in the European Union” (European Parliament 1999: Introduction). The Stockholm Programme is the roadmap currently in place (until 2014), following the initial Tampere Agreement (1999-2004)

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<sup>4</sup> SIS II, an updated version of SIS, is currently under development.

and the Hague Programme (2005-2009) (Boswell and Geddes 2011). While these programmes deal with all manner of issues regarding the shared space in the EU by building on the “formal competencies outlined in various treaties” (Boswell and Geddes 2011:52), asylum and migration policies are inevitably central pillars of the discussions. Among the relevant treaties on which the programmes base their roadmaps, of particular note is the Lisbon Treaty. Signed in 2007 and ratified in 2009 it seeks to articulate a common EU migration and asylum policy by “normalising” migration issues, identifying a hierarchy of decision makers (including roles for the European Council, the European Parliament and the European Court of Justice) and, notably, laying the groundwork for partnership with third countries to manage incoming asylum claims (Boswell and Geddes, 2011).

While an in-depth examination of EU treaties is unfortunately beyond the scope of this essay, it is important to note that the chronology and character of the relevant EU agreements indicate a growing concern about the strength of external borders as internal borders are broken down. This anxiety is manifested by the introduction of Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States. Established in 2005 as an external border security agency which “promotes, coordinates and develops European border management”, its budget has grown from 6 million Euros in its inception in 2005 to 90 million Euros in 2010 (Frontex 2012; Nicholson 2011).

### **Case-Study: Libya as Extra-territorial Buffer Zone**

Libya presents an intriguing example of an extra-territorial buffer zone because of its unique dual role of a migrant transit country and migrant destination country. As an oil-rich state, Libya attracts labourers from the region. In addition, because of the UN embargo from 1992 to 2000, which affected the oil industry, Libya focused its foreign policy on sub-Saharan Africa, opening its borders for migrant workers from the continent. It is for this reason that a snapshot of Libya in January 2011 would show that roughly 11% of the population were foreign documented workers with an approximate additional one million undocumented migrants (GDP 2009; Nicholson 2011).

In addition to it being a destination country, Libya also serves as a transit country due to its geographical proximity to Europe. As a result of this the EU and Italy in particular have signed numerous bilateral mobility agreements with Libya. While most of these agreements are confidential or undocumented, the 2008 Treaty of Friendship stands out as a landmark mobility agreement between Italy and Libya. The Treaty of Friendship was officially signed to compensate for past abuses incurred during Italy’s colonial rule over Libya (from 1911 to 1943), but in reality it is a migration management treaty (HRW 2009).

Libya is not a signatory to the 1951 Refugee Convention or the 1967 Protocol and has no procedures in place or law guiding asylum provision for those seeking protection there. In fact, the director of the

Office of Immigration at the General' People's Committee for Public Security, Brigadier General Mohamed Bashir Al Shabbani was quoted telling Human Rights Watch that in Libya there are no distinctions made between refugees, asylum seekers and other types of migrants: "There are no refugees in Libya, they are people who sneak into the country illegally... anyone who enters the country without formal documents and permission is arrested" (HRW 2009:10). Libya's former leader Mu'ammar Gaddafi, supported this view, adding that the idea of asylum seekers coming to Libya was a "widespread lie" (HRW 2009:10).

For asylum seekers and refugees in Libya or seeking to transit through Libya for protection elsewhere, the implications of the Libyan government's statements are severe. As a result, any category of undocumented migrant in Libya is treated as 'illegal' and susceptible to arbitrary and indefinite detention in one of Libya's approximately 27 detention sites (GDP 2009). Western human rights observers have widely noted that conditions at these sites are abhorrent and there is limited option for redress<sup>5</sup>. There have been numerous documented cases of Libyan authorities transporting migrants to the desert and abandoning them (HRW 2009).<sup>6</sup> Moreover, as a result of their presumed illegality and because of increased EU push-back measures, asylum seekers and refugees seeking to transit through Libya to Europe are forced to make increasingly covert and unsafe journeys. Frequently travelling by sea on ill equipped and crowded rafts, migrants are vulnerable to innumerable risks. Despite the fact that the Mediterranean Sea is one of the most policed waterways in the world, these rafts of overcrowded migrants are often ignored and left to fend for themselves. There have also been numerous instances of boats being intercepted by Italian or Libyan vessels and forced to return to Libyan soil, where irregular migrants are then detained. The interception and push-back by Italian military vessels, occurring without any asylum interviews, is in clear violation of the *non-refoulement* principle, as recently seen in the ruling of *Hirsi Jamaa and Others v. Italy* in February 2012 (HRW 2009; UNHCR 2012).<sup>7</sup>

### **The 'Arab Spring' and the Libyan revolution**

The 'Arab Spring' refers to the events beginning at the end of 2010 in Tunisia with demonstrations following Mohamed Bouazizi's self-immolation in protest of government ill-treatment and corruption.

<sup>5</sup> See, for example, Amnesty International (2003), 'Unlawful and Unworkable: Extra-territorial Processing of Asylum Claims'; Human Rights Watch (2009), 'Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers'; Global Detention Project (2010), 'Libya Detention Profile'.

<sup>6</sup> For more information on the human rights abuses faced by undocumented migrants in Libya, including information about detention centres funded by Italy and the EU, see: Fortress Europe (2007), GDP (2009) and HRW (2009).

<sup>7</sup> On February 23, 2012, the European Court of Human Rights ruled that Italy violated the European Convention of Human Rights when it intercepted and returned a group of Somalis and Eritreans to Libya without first conducting an asylum interview to see if they were in danger of persecution (UNHCR 2012).

Significant political uprisings occurred through the region with major political protests beginning in Libya in February 2011, turning into an all-out civil war including a NATO intervention which started in March 2011 and continued until Gaddafi's capture in October 2011. During this time, approximately 27,000 migrants fled to Europe from Libya. Though the reaction was significant, the numbers was actually quite small relative to the number of people who crossed the border to Tunisia (350,000) or Egypt (263,554) during the same period (IOM 2011), not to mention the undoubtedly large, though largely undocumented, number of forced migrants who were internally displaced within Libya as a result of the conflict (Koser 2011).

Despite the relatively small number of actual arrivals to Europe from Libya, the reaction of the European media and politicians was one of panic. Italy declared a State of Emergency in response to fears of overcrowding on its island of Lampedusa where most of the migrants landed. In order to make more room, and perhaps also force greater EU burden-sharing Italy granted temporary visas to some 22,000 of the arrivals. This set off a domino effect, in which France and Denmark promptly suspended the Schengen agreement by reinstating border checks at their internal borders and the Netherlands ordered any Tunisian who had arrived under the 'Berlusconi Arrangement' to leave the country (Pallister-Wilkens 2011). Frontex, meanwhile, stepped up its monitoring role in the Mediterranean.<sup>8</sup>

As a result of the increased and panicked push-back measures from the EU and Italy, those attempting to flee the conflict in Libya and who were not able to return to their country of origin were forced to seek refuge in one of the camps along the land borders of Libya or remain in the war-torn country. Because of scant resources and the difficulties intrinsic to conflict situations, protection and assistance for asylum seekers and refugees in situ was minimal. This was additionally exacerbated by the political realities on the ground in Libya where individuals of sub-Saharan African origin were targeted by rebels as government mercenaries, and were therefore physically persecuted (Wheeler and Oghanna 2011). While protection from persecution based on nationality and race are pillars of international refugee law, the victims of the persecution were not given the opportunity to seek such protection.

## **Conclusion**

In their reactions to 'Arab Spring' migrations, EU leaders played their cards early. The panic and hasty reversal of the Schengen agreement in the days following the Libyan uprising indicated the level

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<sup>8</sup> In April, the leaders of France and Italy met and publicly renewed their commitment to Schengen. By June, Italy signed a Memorandum of Understanding with the Libyan Transitional National Council, essentially reestablishing the migration management agreement established under Gaddafi (Africa News, June 2011).

to which EU states are dependent on Libya as a buffer zone for irregular migrants. The EU uses Libya to contain irregular migration by intercepting and detaining irregular migrants in return for development aid. This containment, aside from being essentially racist, also illuminates Schengen's inherent fragility. It is dependent on a system that is deeply flawed: these buffer zones are unstable and have high potential for internal strife, as seen in Libya. Moreover, because Libya is not a signatory to international human rights law conventions, such as the 1951 Refugee Convention, there is no accountability for its abuses against asylum seekers and refugees transiting through the country. The EU, in handing over accountability and responsibility for the welfare of those seeking protection to buffer zone states where such protection will not be afforded, blatantly violates the core principles of the international protection regime.

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## Protection for Who? The Protection of Trafficked Persons

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### Abstract

*This paper seeks to discuss two facets of how trafficked persons, as a particular subset of forced migrants in Europe, are addressed through European and national legal frameworks. It starts with a discussion of a rights based approach to trafficking and how this has failed to permeate into the counter-trafficking legal framework. This failure is discussed with reference to the stated purpose of the instruments, the nature of the provisions, the content of the protection afforded to trafficked persons and the time limitations thereon as well as the question of accessibility of such rights. The paper then discusses a further option available to trafficked persons in seeking protection and that is through the use of the refugee law framework. It therefore discusses whether, and the under what conditions, trafficked persons may be protected under the provisions of the Qualification Directive. This includes an analysis of whether the various components of the definition of refugee as enshrined in the Geneva Convention and elaborated in the Qualification Directive can be considered met with regards to trafficked persons. This analysis builds on theories by various authorities in the field, case law as developed over the past years in various European countries as well as the preliminary findings of fieldwork.*

### Introduction

Most movies and books around the issue of human trafficking highlight the plight of trafficked persons. They provide a glimpse into the vulnerability to traffickers and what happens within the context of the brothel, sweatshop or farm. Many organisations working on these issues engage with awareness-raising focusing on the gross human rights violations inherent in this treatment. However, these movies tend to end around the time when ICE (Immigrations and Customs Enforcement), NYPD (New York Police Department) or others enter the venue and ‘rescue’<sup>9</sup> the trafficked persons, or when the individual escapes and reaches a place of immediate safety. They ignore a critical part of the experiences of trafficked persons – the part where they have to face the prospect and risks associated with return, overcome the trauma associated with their past experiences and deal with a legal, policy and institutional framework that is often largely sceptical of their claims. This is the

<sup>9</sup> The ‘inverted commas’ aim to reflect an acknowledgement of the controversial nature of the use of this term in this context, despite the fact that a discussion thereof is beyond the scope of the present paper.

focus of this research. It assesses the post-trafficking scenario and in particular the search for long-term protection.

For many trafficked persons, the prospect of return ‘home’ to their country of origin comes with a series of risks and concerns. Speaking about the UK, Chandran and Finch (2011) describe how ‘in many cases, victims of human trafficking (...) fear that they will be re-trafficked by the same individuals or criminal gangs or face retribution and punishment if they are returned to their countries of origin. In other cases, they believe that if they are returned home to the same socio-economic or cultural conditions which rendered them vulnerable to trafficking in the first place,<sup>10</sup> they will be re-exposed to the same or increased risks of trafficking and exploitation (...)’. There are also some victims who simply cannot face the prospect of return, either because they might have lost all links and bonds with their home countries on account of having been trafficked abroad many years previously and have no idea what might await them there or, owing to illness, they are highly reliant on support structures and medical assistance in the UK for their ongoing ability to survive and function and, in the cases of some extremely vulnerable cases, removing them from the UK may raise a real risk of suicide.’ (Chandran and Finch: 2011). It is therefore pertinent to assess the long-term protection regime available to trafficked persons. This research addresses this question from the perspective of international refugee law – in particular it assesses whether, and the conditions under which trafficked persons can be considered as refugees and the implications of such protection.

This paper starts by discussing some of the overlaps between trafficking and asylum. It then critically evaluates the protection provisions within counter-trafficking instruments<sup>11</sup> and then outlines some of the advantages of refugee law in this context. It ends with a general overview of some of the substantive and procedural requirements of successfully claiming asylum.

### **Trafficking and Asylum Overlaps**

The lines of demarcation between migration, smuggling, trafficking and asylum are often blurred. Despite distinctive legal definitions, the phenomena intersect and intertwine as one overlaps with the next creating the mix that is often over-simplistically termed international migration. The multiple

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<sup>10</sup> Such factors include: poverty, age, gender or family circumstances and may be considered relevant when one is assessing the subjective component of the ‘well founded fear’ element of the refugee definition.

<sup>11</sup> For the purpose of this paper this is taken to include the instruments which provide substantive provisions namely: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the Protocol), supplementing the United Nations Convention against Transnational Organized Crime (hereinafter UNCTOC); the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter the CoE Convention); the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (hereinafter the SAARC Convention); Directive 2011/36/EU of The European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (hereinafter the EU Trafficking Directive) and Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (hereinafter the Residence Permit Directive).

points and levels of overlap are a reflection of the fact that both asylum and trafficking are complex, multi-faceted phenomena that involve multiple stakeholders. The phenomena cross both in the practical realisation of the various acts and in the legal, policy and institutional frameworks that have been put in place to address them.

There are a series of ways in which trafficking and asylum overlap. Some of the most apparent of these include the sharing of means of transport, the use of asylum to legitimise irregular entry, the potential of refugee status determination proceedings to identify trafficked persons, the vulnerability of beneficiaries of international protection to trafficking as well as trafficked persons being refugees.<sup>12</sup> The focus here, however, is on the potential of refugee law as a channel for the long-term protection of trafficked persons.

The potential existence of asylum claims by trafficked persons is acknowledged in the anti-trafficking framework including: article 14 of the Trafficking Protocol and similar provisions in other regional counter-trafficking instruments, the duty to inform of the right to seek international protection as found in the 2011 EU Trafficking Directive, guidance on trafficking-based-asylum claims by UNHCR (2006) and on the national level, other efforts by UNHCR in recent years, as well as a limited yet growing body of case law in various jurisdictions.

### **Protection Provisions within the Counter-Trafficking Framework**

An assessment of the protection provisions in counter-trafficking instruments reveals that the law enforcement approach to counter-trafficking has been prioritised over a ‘rights based approach’<sup>13</sup> thereby leaving trafficked persons unprotected in the long term. For instance, Srikantiah (2007:168) argues that the Protocol is based on a law enforcement perspective on fighting trafficking and addresses the concerns of developed countries about increased migration. On a similar note, Bruch (2004) illustrates that the Protocol comes as part of an explicit law enforcement regime. Fitzpatrick (2003) highlights that the focus remains on crime control and deterrence of unlawful migration. Jayasinghe and Baglay (2011:493) note how the Protocol is ‘set against a background of border control and transnational crime, its focus is on the prevention and the prosecution of human trafficking rather than the protection of victims’.

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<sup>12</sup> With claims independent of their trafficking experiences, having been duped into the trafficking circles potentially through promises of access to a place of safety.

<sup>13</sup> An overview of the rights based approach to trafficking can be found in the judgments of the European Court of Human Rights in cases like *Rantsev vs. Cyprus* and *Russia and Siliadin vs. France* as well as in the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the High Commissioner for Human Rights. See: UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 20 May 2002, E/2002/68/Add.1

An in-depth evaluation of the provisions within the relevant instruments identifies a number of critical concerns. First, whilst the protection of trafficked persons is a stated purpose of most instruments at both the international and regional level, this is not adequately reflected in the main substantive provisions of the instruments. In some cases, the protection provisions are optional<sup>14</sup> whilst in others they are conditional on the collaboration of the trafficked person with the criminal justice system whether as an informant or as a witness. Hathaway (2008) describes the Protocol as being ‘content to recommend, rather than require, remedies for victims’. Pietrowicz (2008:244) notes that ‘from a victim’s perspective, the Protocol offers only limited assistance with rather nebulous, aspirational obligations that leave much to the State’s discretion’. The EU framework, on the other hand, is mandatory in nature but makes continued residence in a Member State conditional on the collaboration of the trafficked persons with the criminal justice process.<sup>15</sup> The COE Convention also indirectly allows for such conditionality. Another concern is the dichotomy between short-term assistance and support and long-term protection with the second being largely sidelined. A final indicator refers to the potential human rights externalities of the particular instruments, namely the likelihood that the instrument will justify other human rights violations, under the pretext of counter-trafficking efforts. These include the focus on a particular subset of ‘slaves’, the imposition of restrictions on specific migrants (most notably women), as well as the risk of violations to the right to seek asylum linked to increased border controls justified as prevention measures in the context of human trafficking.

### **Benefits of International Protection**

Asylum broadens the scope of protection in terms of who may be protected, where that protection may be sought and when such protection can be made available. It protects not only individuals who have been trafficked but may also, at least in theory, be used preventively, to protect an individual who is at a real risk of being trafficked. It can also be used to protect family members and other known associates facing risks as a result of their link to the trafficked person. This is relevant when one notes that often threats meted out against trafficked person include threats to family members which are often credible due, at least in part, to the traffickers’ criminal reach within the country of origin. Individuals who are targeted due to their actions to combat the crime, such as police officers, NGO workers and prosecutors may also fall within the scope of protection.

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<sup>14</sup> This issue of nature of provisions is of particular concern with regard to the Protocol.<sup>14</sup> Part I addresses the criminal law dimension of trafficking and is couched in direct mandatory terms. The provisions in part II (which deals with the protection of trafficked persons) on the other hand are drafted in discretionary, non-obligatory terms. The Protocol speaks of ‘shall consider implementing’ and ‘shall endeavor to provide’ rather than ‘shall implement’ or ‘shall provide’. Other instruments have sought to provide more mandatory provisions. Whilst some discretion might still be applied (including definitional issues<sup>14</sup> and context specific determinations) States are obliged to take measures.

<sup>15</sup> It is interesting to note that whilst the 2011 Directive expressly States that the provision of assistance and support shall not be conditional on collaboration it makes this provision subject to the 2004 Directive that is the epitome of such conditionality. In practice therefore, assistance and support, at least when it comes to Third Country Nationals.

Moreover, it broadens the scope as to which countries are obliged to provide protection. Whilst the protection provisions of the counter-trafficking instruments apply to states of origin, transit and destination, international protection obligations apply also to third countries irrespective of being completely outside the trafficking route and experience. An individual might have been trafficked from Moldova to the UK via France but seeks asylum in Germany. In this context Germany is under an obligation to carefully consider the international protection needs of such individuals whilst the protection provisions of the trafficking instruments would apparently only bind the UK and France as well as Moldova.

Another advantage is the shift of conditionality. Whilst anti-trafficking conditions protection on participation in the prosecution of traffickers, the fundamental condition in international protection is the needs of and risks faced by the individual applicant. Moreover, asylum offers better protection in terms of the content and duration of the protection granted, not least by having a clearly illustrated list of rights and obligations including the right to employment and education as well as to access healthcare. The practical access to such rights is however often problematic.

### **Refugee Status for Trafficked Persons?**

Article 1 A of the 1951 Refugee Convention<sup>16</sup> defines a refugee as someone who is outside of his country of origin because of a well-founded fear of being persecuted for one of the convention grounds, and by reason of such fear is unable or unwilling to return. Each of these criteria merits in-depth analysis however in this paper a brief snapshot of some of the most pertinent issues as they relate to trafficked persons will be highlighted.

Whilst the notion of **fear** is clear a subjective consideration, affected by various personal characteristics of the applicant including age, gender, psychological state, the family context (whether the family is involved in the trafficking and/or whether the trafficked person has children) as well as the circumstances surrounding the past experiences of trafficking, the requirement of such fear being ‘**well founded**’ adds objective considerations into the equation. The fear must be corroborated or justified by objective conditions including the situation in the country of origin often measured by reference to general assessments of the country, the legal and policy framework as well as the ranking of the specific country in the US Department of State’s Trafficking in Persons report.

The term ‘persecution’, it is claimed, has been purposefully left undefined despite being the exclusive benchmark for international refugee status. A number of legal developments have gone some way into providing at least a description of what such persecution might entail. Article 9 of the EU Qualification Directive, for instance describes acts amounting to persecution as being sufficiently

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<sup>16</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

serious by their nature or repetition to constitute a severe violation of basic human rights. This has a number of important qualifications which are in part remedied by the second part of the provision which states that persecution can also be an accumulation of various measures, including (but not limited to) violations of human rights that are sufficiently severe as to affect an individual in a similar manner. Moreover, it goes on to provide some specific examples of persecutory acts some of which are of direct relevance to trafficked persons. These include acts of physical or mental violence, acts of sexual violence, disproportionate or discriminatory punishment as well as acts of gender-specific or child specific nature. The Australian Migration Act<sup>17</sup> speaks of a threat to a person's life or liberty, significant physical harassment, significant physical ill treatment, and denial of access to basic services. Swiss law refers to the term 'serious disadvantage' rather than persecution, which it defines as including a threat to life, physical integrity or freedom as well as measures that exert intolerable psychological pressure. It adds that motives for seeking asylum specific to women must be taken into account.<sup>18</sup>

In the context of trafficking-based asylum claims persecution can take various forms. These include: re-trafficking by the same or other traffickers (maybe as a result of returning to the same conditions that led to the trafficking in the first place), retaliation by traffickers or traffickers' associates (for instance for not getting paid, or for contributing to the prosecution) and social exclusion/ostracism, discrimination and punishment by family and/or society. The latter can result in destitution as well as in so called 'honour crimes'. The agents of persecution can include: traffickers, traffickers' associates, new traffickers, criminal gangs, family members, society at large as well as State authorities in a limited number of cases.

Typically trafficked persons have 'membership of a particular social group' in seeking to establish a **convention ground nexus**.<sup>19</sup> There are two tests in establishing such membership, namely the 'immutable characteristic test' and the 'social perception test'. Some courts have argued that both tests must be satisfied, whilst other have gone for an either or approach, the latter being the practice recommended by the UNHCR (2002). A key issue remains that the persecution faced cannot be the only factor that links the group together. This notwithstanding, past experience of trafficking is an immutable characteristic. A number of relevant 'groups' have been tried and tested in cases linked to trafficking. These include inter alia: 'former victims of trafficking for sexual exploitation', 'Women from Ukraine forced into prostitution against their will', Girls trafficked from West Africa, 'Impoverished women from the former Soviet Union recruited for exploitation in the international sex trade', 'Abused, unwanted children sold into labour by their parents', 'Hindu women born into a low

<sup>17</sup> *Migration Act 1958 (as amended up to Act No. 91 of 2009) - Volume 1* [Australia], Act No. 62 of 1958 as amended, 8 October 1958.

<sup>18</sup> See in this regard: [http://www.admin.ch/ch/e/rs/142\\_31/a3.html](http://www.admin.ch/ch/e/rs/142_31/a3.html).

<sup>19</sup> The Convention mentions the following possible grounds for persecution: race, religion, nationality, membership of a particular social group or political opinion. The Convention Ground nexus is a fundamental requirement of the refugee definition.

caste that would have forced them into a life of prostitution’, ‘young women in Albania threatened with abduction and being forced into Prostitution.’ It is noteworthy that in Norway the definition of particular social group now explicitly includes former victims of human trafficking.<sup>20</sup>

### **Procedural Issues**

Besides the substantive arguments relating to trafficking-based asylum claims, one can note that a number of procedural issues also play a part in the framework. Key amongst these is that of evidence and guidance available to courts and tribunals. When one looks at the 29 sets of the UK’s Operational Country Guideline Notes (OCGN), used by courts in deciding claims for asylum, one can notice that only three have a specific section on trafficking. Another four make only a reference, whilst 22 make no reference at all to trafficking. When one takes the list of top 10 source countries of trafficked people (based on SOCA (Serious Organized Crime Agency) information) one notes that out of the 10 Countries, 3 are EU Countries and therefore no OCGNs exist since technically asylum is not possible, 3 of the OCGNs make no reference at all to trafficking, 1 has a reference and 3 have a specific section dedicated to trafficking.

### **Conclusion**

This paper has sought to provide an overview of some of the issues around the long-term protection of trafficked persons. It started with a discussion of some overlaps between trafficking and international protection. It then critically evaluated the protection provisions within counter-trafficking instruments moving on to argue that refugee law offers a number of advantages in this context, in particular with regards to the broadened scope of protection. It then provided a very general overview of some of the requirements of the ‘refugee’ definition and how these can and have been met by trafficked persons. It is argued that the plight of trafficked persons provides refugee lawyers the opportunity to re-affirm the human rights credentials of the international refugee law system. It is argued that the system of international refugee law has moved too far down the line of State interest and away from the notion of refugee law as an instrument for guaranteeing human rights to those whose State of origin has proven unable or unwilling to protect. Such a re-conceptualisation or a ‘going back to basics’ would re-affirm the humanitarian notion of refugee law.

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<sup>20</sup> Section 30(d) of the Norwegian Immigration Act; Act of 15 May 2008 On the entry of foreign nationals into the kingdom of Norway and their stay in the realm (Immigration Act).

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## **Lying Low and not Giving up’: Undocumented Migrants’ Account of Their Situations**

### **Findings of research carried out among users of Praxis in East London**

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#### **Abstract**

*Lying low and not giving up was one strategy adopted by some of the undocumented migrants and failed asylum seekers interviewed in our research carried out as interns with Praxis – an organisation in East London providing help and support to people who find themselves displaced and unwelcome. The focus was on the experiences of our 27 interviewees (15 men and 12 women) in seeking legal help and advice to negotiate their immigration status. We documented their difficulties with finding and paying for a solicitor and their mixed views of the treatment they received. If the solicitor appeared knowledgeable, motivated to help, and communicated with them regularly, they were happy. Too often, however, the opposite was the case.*

*In their accounts of complex trajectories towards leave to remain, there were several common themes. It was clear that both they, and sometimes their solicitors, had insufficient knowledge of current law and procedures. Exploitation and abuse, particularly of women from befrienders and partners, was not uncommon. The apparent inhumanity of the immigration processing system became evident in judgments and very difficult processes that our interviewees experienced. In some cases, people were denied the opportunity to access the immigration system due to the paucity of high quality representation available. Instead, their desperation led them into the hands of unscrupulous solicitors. In this context, a solicitor who can provide realistic and supportive help to a client with their immigration status can make a very valuable contribution to a life that is otherwise in limbo.*

*Most of our interviewees remain undocumented and/or waiting for decisions – unable to go backwards or forwards in life with any confidence. Were they wrong to seek refuge in a developed democracy, party to a full complement of international human rights law?*

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## **Introduction**

Praxis is an organization in Bethnal Green, London, committed to the fundamental human rights of all migrants and their families, working on a daily basis to support and accompany them through the process of settlement. This research project was conducted in 2011, while the authors were interns at PRAXIS, at the organisation's request. The main aim of the project was to investigate and record clients' experiences of legal help with their migration status. This paper presents the findings of the research by highlighting the main themes which arose out of our conversations with migrants. Through presenting the different stories we heard, the paper comments on the importance of access to good quality and trustworthy legal advice as well as the need for a "human" attitude of legal practitioners towards migrants, many of whom are especially vulnerable given the difficulties in negotiating the system faced by those with uncertain or irregular immigration status.

## **Research methods**

The objectives and methods of the research were discussed and agreed with Praxis staff, and a semi-structured interview schedule designed. The interviews were guided by 23 questions designed to obtain personal data about the clients, investigate a range of aspects about the process of getting legal help, document the outcomes from the client's viewpoint and identify sources of help accessed. The format of the interview schedule, which included a number of key open-ended questions, enabled the interviewers to be responsive to the way in which the participants were most comfortable disclosing what could be emotionally sensitive information.

Initially we contacted people from a list of suitable clients. Thereafter we examined the client database for people likely to have sought legal help, and telephoned clients to invite them to take part in a face to face interview. Others were recommended by Praxis advisors or contacted at a workshop taking place at Praxis. Contact was made with around 80 individuals in total, of which 27 went on to complete interviews. The interviews were carried out in a private room in Praxis after clients had signed a consent form. Participants were assured of confidentiality and no identifying details were recorded on the interview records. The interviews tended to last around 30 to 60 minutes and were conducted in English, except for two in French. Responses to questions were noted on the interview schedules, with some verbatim quotations being recorded. To enable processing of the data collected, the shorter answers to closed questions were entered into a response grid, providing a profile of the individual participants, and then tabulated; and open-ended (longer) answers were compiled by question, aiding thematic analysis of the responses.

## Results

### *Participant characteristics*

The interview sample included 15 males and 12 females, across a range of ages (Table 1) with most (20) in the age groups 26-35 years and 36-45 years.

**Table 1: Participants in different age groups (n=27)**

Age group (years)	18-25	26-35	36-45	46-55	56-65
Number of participants	1	8	12	5	1

Our research participants mostly came to the UK from African countries, particularly Nigeria (5), Uganda (4), Democratic Republic of Congo (2) Mauritius (2), and one from each of eight other African countries; as well as two participants originating from Iran, and one each from Iraq, Malaysia, Pakistan and Guyana.

Participants were living in or near London in various situations (Table 2).

**Table 2: Current living situation (n=27)**

Living situation	On own	With partner	With children	With family	With friends	In bed & breakfast	In shelter/refuge
Number of participants	5	7	9	3	8	2	2

Some of the participants who lived ‘with friends’ were co-habiting with groups of asylum seekers. The numbers of children in a family ranged from one to four. Quite often parents and children were living in one room.

### *Accessing legal advice and help*

Participants were asked why they came to Praxis the first time. The most common reasons were to seek legal advice and help with their immigration status (11), and to seek medical help and access to a GP (10). Two participants came initially for help with accommodation, two for financial help and three for general support. Often clients received help in a range of areas when their needs had been assessed. In answering this question, participants frequently mentioned the person or organisation referring them to Praxis and these were recorded.

Participants were also asked whether it was easy or difficult to find a person to give them legal advice and help. Ten interviewees replied that they had had no particular difficulty finding a solicitor, several mentioning help from Praxis with this. Two interviewees had not yet consulted a solicitor.

Fourteen interviewees said that they had found it difficult for one reason or another. In the first place, they might not know how to find one, or ‘which ones were good’, especially in relation to

immigration issues. Secondly, unless they could get legal aid, the payment required for legal help became very problematic without financial resources or work. If they managed to find a solicitor to consult then the solicitor might not agree to take the case, and this was particularly so if a previous application had failed or s/he might say that they could not help that time.

One participant who said that he had found it difficult to get legal help, thought that the first solicitor he consulted was taking advantage of the situation by charging up to £3000, which he could not afford. A friend recommended the solicitor he was using at the time of interview who has only charged £250. Another participant replied to this question:

‘Yeah, very, very difficult...If you don’t know anything or have any friends to help you, you’re just stuck between solicitors and the Home Office. Some just get money and don’t do anything’.

Two participants reported their experience that it was easier to get legal help in London than Manchester.

Details of the costs of legal help proved difficult to record accurately because many participants had seen several solicitors. Eleven participants received free legal aid at one point (usually the initial asylum claim). Nine participants said they received no help, three that they received help from family, friends or charities. The amounts paid to solicitors ranged from £250 to around £2000, with one participant paying £6000 altogether.

### ***Evaluating the service provided by solicitors***

At the end of the interview, participants were asked whether they were happy with the way their solicitor helped them. Thirteen participants said that they were; in four cases, they were happy with their present solicitor, though not with the previous solicitor(s). Two participants had not seen a solicitor, and two were non-committal in answer to this question, one of these saying that he was at least pleased to have a solicitor who was recommended. Ten participants were clearly not happy with their solicitor’s services.

An important reason for satisfaction with a solicitor’s services was that s/he let the client know what was being done and what replies had been received, by mailing copies of letters sent on behalf of the client, or making contact with the client. For instance, one participant reported that the firm was easy to contact and that he trusted they would tell him straight away if anything happened.

Another important reason for contentment with solicitors’ services was a feeling that they had the necessary expertise - ‘only they know how to do it’. One participant explained that his solicitor was very professional, knowledgeable, helpful and ‘a very strong man’. In another case, the fact that the solicitor’s firm had a big office and employed lots of solicitors allowed the participant to feel

confident. A third participant said ‘I feel safe in their hands’ and that her solicitor had encouraged her not to panic and would let her know as soon as the Home Office replied.

The reasons participants gave for not being happy with their solicitor were, in large part, the opposite of the reasons for being happy with the service provided. One participant explained that her solicitor did not answer phone calls from her and failed to let her know that the Home Office had refused her asylum claim for a month. Another participant contrasted the ease of communication with his current solicitors to previous ones whom he had called many times and was always told they were busy or were away.

Several participants questioned the expertise of their solicitors and the way they had presented their case. Two female participants thought that their cases had been undermined by the absence of evidence about the physical violence they had experienced. A male participant replied that ‘there are a lot of solicitors not qualified to be immigration lawyers’ and suggested that the quality of solicitors’ work needed to be evaluated.

Another participant felt that the solicitor he had when in a dispersal centre was ‘very bad’ because he appeared not to take his case seriously and lost his file. It was recognised by another interviewee that even when a solicitor has the ability to help, she or he needs to have the motivation to do so: ‘Some people can help you but don’t want to... They want to go home early or don’t feel like working’.

There were a few complaints among those participants who were not happy with their solicitor that s/he was ‘rude’ or ‘arrogant’. There were also complaints about delays for initial appointments, or because of lack of progress: one interviewee complained of the solicitor ‘delaying and delaying and not being honest’; another was also frustrated by his solicitor taking a long time to come back to him and then sending his papers back.

Apart from complaints about individual solicitors our research participants had experienced, some made comments about the work of solicitors in general, which reflected their thoughts and feelings about the whole process of needing the help of legal experts who might or might not care about them as people. In particular, the suspicion was expressed that solicitors are doing very little work just for the money - for instance, taking the legal aid money but ‘not doing proper work’ for asylum seekers. As one participant complained:

‘Solicitors are charging extra, collecting the money and not doing anything... It’s very painful if someone rips you off of your money... Sixty percent of solicitors are only going for money, using a big car, expensive life, making people cry without doing anything...’

Not everyone thought that this was the case. A participant who had experienced a reassuring and communicative solicitor, said:

‘The ones you don’t pay money for, pay attention... they feel for us... they try their best to bring that peace we want’.

Beyond the feeling of being financially exploited, the suspicion was voiced that solicitors were not motivated to work on their cases:

‘I do not appreciate the treatment I’ve had from solicitors... back home we call them lawyers. A lawyer builds a case to help you. Here they don’t try to build a case or contribute to you winning... They don’t want you to get stay. When you have stay, they don’t have a job’.

### **The process of negotiating immigration status**

Each participant’s account of their entry into the country and quest for legitimate immigration status was different, but there were important common themes in their stories. Mostly these themes related to ways in which the process had been made more complex and difficult, causing disruption and great distress in the lives of people entering the country hoping to make a new life. An account of these themes is provided below.

#### ***Insufficient knowledge of current law and procedures***

It was clear from a number of accounts that participants might have managed to negotiate the system better and been saved distress had they known the current rules before they came. For instance, a female participant expected to be able to enter the country as the spouse of a British man in 2003, and did not realise this was would be at the discretion of the border official. On entry, she was only given a tourist visa. When she was in the country, her husband completed a form for her to stay in the country as his spouse, but according to this participant, it was the wrong form and submitted too early. Her request to remain was refused. Subsequently, a series of solicitors failed to help until she eventually applied for asylum in 2010 and was granted discretionary leave to remain in 2011.

#### ***Exploitation and abuse***

Another common theme in our participants’ stories was that they had suffered from exploitation of their situation because of the way they came to the country with people who had befriended them, or from their partners once they were in the UK.

We heard the stories of three women who had been brought to the UK after being misled about the situation they would be in. One told of a ‘friend’ who helped her get into the country, but then would not help with her asylum claim and kept her in an exploitative situation until she escaped. Another told how the person who brought her into the UK, told her that she had to work looking after the children, and could not go out because she was at risk of the police picking her up. At the time she did not know how to apply for asylum. The third woman was an experienced nurse in her country of

origin, and led to believe that she could work in the UK. The man who brought her into the UK left her on the outskirts of London and disappeared. Two other female participants had been in abusive relationships with their partners, their vulnerability made worse by their lack of legal status in the UK.

### ***Lying low and not giving up***

In the face of the complexities of the immigration system, and the difficulty, sometimes impossibility, of getting expert help with negotiating it, some participants had responded by getting on with life as best they could with their undocumented status, and ‘lying low’. An African man whose partner was a Muslim while he was not, has remained undocumented for many years since he entered the UK. He was caring for their two year old child, since his partner under pressure from her parents, apparently because he was not a Muslim, had returned to their country of origin.

Typical of participants who made repeated attempts to regularise their situation, was an interviewee who had arrived in the UK in 2001, had been through a dispersal centre, at least five solicitors and three applications, eventually appealing in 2010 under Article 8 of the European Convention on Human Rights (the right to respect for private and family life). As with many of our research participants, he was still waiting to have his immigration status resolved when we met him. Twelve participants were undocumented, nine were waiting for a decision, and six had leave to remain, two of whom had received asylum.

### ***Lack of humanity in the system***

A fourth evident theme in these accounts was the apparent inhumanity of the immigration processing system. We spoke to one young single man whose whole family are now UK residents, but whose conditions of leave to remain after two appeals on his asylum application mean that he cannot take paid work. If he returns to his country of origin, he will be without any family. We heard the story of a mother who was educated and has worked in the UK and wants leave to remain because her only daughter is ill and badly needs her support.

Sometimes the process the asylum seeker is expected to go through is simply too difficult for them, given their language skills, level of comprehension of the system and confidence in presenting their own case to an unwelcoming system.

Participants told us about the complex trajectories of their cases –several of which had cruel twists and turns. One of them was a case that went to judicial review after the Home Office allowed no right to appeal so that an expert witness and more evidence was heard. The appeal was heard and the man was granted asylum, only to have the Home Office appeal against the judge’s verdict so that there was to be another hearing.

## Conclusion

Without ‘leave to remain’ in the country, life is difficult and precarious, physically and emotionally, not least because of the need to work legitimately to earn money, but also because of the need to go on with one’s life. As one participant said ‘Waiting is difficult – I’m stuck’. Another said he was ‘in limbo - if I think about it I go mad’. “In limbo” or “stuck”, one is unable to go back or forwards. Da Lomba (2010) has explained how UK government policies relating to ‘earned citizenship’ have made the process of refugee integration one-sided rather than two-sided, and called for a reassessment of the linkage between legal status and integration (unclear?).

A participant who told us she ‘felt like a product’ that people were making money out of, suggested that solicitors ‘do it by the book and forget that who they’re doing it for is human’. This is the crux of the situation - that solicitors must do it by the (law) book, but the problem they are addressing involves a difficult human dilemma. If they can help their clients realistically and supportively, they make a valuable contribution, not just to the resolution of their cases, but to their clients’ ability to get through the difficult and complex process of resolving their immigration status.

Webber (2012:92) has reminded us that ‘most of those who come to our shores without official permission are refugees from globalization...’ and that ‘the entire system of immigration controls...is built...on the most massive global injustice’. The cut-backs to legal aid, to the support of local refugee community organisations and other NGOs, and the ‘enforced destitution policies’ (Webber 2012:96) for those not able to seek asylum, add to this injustice. Organizations such as Praxis provide invaluable help and support to people who find themselves displaced and unwelcome, offering humanitarian aid and some community integration.

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## Acknowledgements

We would like to thank Praxis for inviting and enabling us to conduct this research, and the participants for their willingness to come to Bethnal Green to be interviewed and for sharing their experiences with us.

## **An Interpretative Analysis of the Health Rights of Undocumented Migrants in Italy – a Case Study of Naga in Milan**

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### **Abstract**

*This paper discusses the existing Italian policies officially designed to protect undocumented migrants' health rights. It argues that the Italian governance of migration aims to monitor and exclude migrants from the political sphere (Castles 2000; Davidson 2000), and that those strategies of exclusion are performed on migrants' health and bodies (Farmer 2004; Fassin 2009; Willen 2011). Moreover, this governance has a direct influence on the development of migrants' subjectivity and agency. This fact is evident from the interpretative analysis of the rhetoric adopted by migrant patients during the interviews I conducted at Naga, a charity providing health services to undocumented migrants in Milan.*

*This paper is composed of two parts. The first is a sociological and anthropological analysis of the Italian laws regarding undocumented migrants' health rights (Scevi 2010). The second is an exposition of the main findings of the fieldwork I conducted in Milan, during which I observed the management of migrants' every-day health needs and conducted interviews with users of the service. Finally, the two parts of the paper converge in an analysis of the embodiment process of the new forms of control of undocumented migrants', and their marginalisation in Italian society.*

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### **Introduction**

This paper draws on field research conducted as part of my PhD. I am focusing on the Italian policies' influence on undocumented migrants' embodiment process (Csorsas 1998; Fassin 2009). By "embodiment" I refer to the process which begins with discourses, laws, popular beliefs which all affect social relations and consequently leads to actions, feelings, sensations and physical symptoms of the individuals affected by those discourses, laws and popular beliefs. I examine these interrelated phenomena through observing and interviewing migrants using healthcare services and people involved in the protection and realisation of undocumented migrants' health rights. In this paper, I

argue that the Italian governance of migration aims to monitor and exclude migrants from the political sphere (Castles 2000, Davidson 2000). By looking at health rights in particular I show how these monitoring and exclusion strategies are performed on the migrants' health and bodies. I further contend that this governance has a direct influence on the development of migrants' subjectivity and agency. While exclusion from the political process can lead to an erosion of migrant agency and self-worth, realising the right to health, albeit in a narrow sense, can also act as a mechanism for expressing and reinforcing one's agency.

### **Research background and methodology**

I did my fieldwork at Naga, a consulting room for irregular migrants in Milan during a period of six months between May and October 2011. Naga is an organisation which has been involved in the protection and the promotion of irregular migrants and asylum seekers' rights for many years. The clinic which served as my case-study is spacious and composed of many rooms assigned to a gynaecologist, general medical care practitioners, a psychologist and a dermatologist. A few other rooms are dedicated to the helpdesk, the advocacy point and the secretary. In general, this environment is perceived by the migrants as a place of security and solidarity. Everyone who works there is a volunteer and in this way shows his/hers political engagement in the migrants' cause and sympathy towards them.

For the first three months of my fieldwork I worked as volunteer at Naga which made it possible for me establish a more personal relationship with the other volunteers as well as to carry out observation working at the help desk and attending medical consultations. Having got to know the environment I started doing conducting interviews with the patients. All the interviews were composed of open-ended questions and each lasted about one hour. The interviewees were allowed to keep their anonymity. During the interviews I asked the patients to describe themselves, their migration history and their experiences with accessing help at emergency wards provided by the public healthcare system. I also asked how they perceived their health and what they thought about Naga's consulting room and the doctors who worked there. In this way, I focused my attention on two topics. Firstly, I examined undocumented migrants' ability to interact with the legal and the institutional system where they lived. Following Genova (2002), I was especially interested in their perceptions of the limitations to accessing their rights imposed by the law and the kind of effects the police and some media campaigns are producing on migrant behaviours. Secondly, I looked at how the migrants described their identity, their relationship with their body and medical treatment (Sontag 1988). The aim of these questions was to understand how the context affects the personal subjectivity (Csordas 1998).

### Italian Policies relating to Migrants' Right to Health

In this section, I provide a brief overview of Italian migration policy in general as it has profound consequences for migrants' ability to realise their right to health. Since 2009 law Number 94, called *Decreto sicurezza* ("Security decree")<sup>21</sup> makes it a crime to enter or to stay in the Italian territory without proper documents. Consequently, undocumented migrants are considered criminals by the law. If they are apprehended, they could be deported or locked up in detention centres for at least three months. Moreover, they are forbidden from accessing public services such as registry offices, state schools and a host of other services. As shall be demonstrated later, this situation has great influence on migrants' everyday lives as well as their psychological well-being.

In terms of Italian law that relates to the right to health, it is possible to identify at least three political levels affecting migrants (Scevi 2010). The first one consists of the national and international legal conventions that protect health rights. The second level is that of practical enforcement of the law which in Italy is managed by local governments (*enti locali*). Finally, the third level consists of the symbolic messages and behaviours of the police and the media that aim to prevent migrants from claiming their rights (De Genova 2002).

Starting with the first level, the international stage, the right to health is based on the Article 25 of the Universal Declaration of Human Rights and its further codification in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966). In Italy, it is enshrined in Article 32 of the Italian Constitution as well as Article 35 of the National Law on Migration (*Testo Unico sull'Immigrazione*, Law No. 286, 1998). All these sources identify health as a personal and fundamental right. Consequently, the State has the duty to preserve the health rights of every person present in the Italian territory, notwithstanding the legal status of the person in question. As a consequence, everyone has the right to emergency medications as well as access to treatment of chronic diseases and other essential procedures (such as prenatal care). The law certainly covers basic medical needs, but its interpretation is more problematic when it comes to secondary care. In the Italian health system, access to secondary care is provided through a GP (*medico di base*). Everyone should have a GP based on their legal domicile. However, as we have seen before, undocumented migrants are unable to use public offices, such as the registry office, and for this reason they are not assigned legal residence that would enable them to register with a GP. In order to get around this problem, the national law provides for the creation of local GP registers and for the use of an "anonymous code" STP (*Straniero Temporaneamente Presente*) in hospitals for undocumented

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<sup>21</sup> The popular name of the law, used by the media was "Pacchetto Sicurezza", while the name "Decreto Sicurezza" is the proper legal name. "Decreto" normally refers to laws which become effective without the Italian Parliament's vote and are often exceptional measure justified by a situation of emergency which was not the case for this law.

migrant patients, referred to as “Temporarily Present Strangers”. In this way, it is possible to protect undocumented migrants’ rights despite the fact that they are illegally present in the territory.

In addition, however, national law places the practical management of health services in the hands of local governments, adding another level of politics which affects migrants’ health rights. The local management system leads to some important differences within the Italian territory in relation to the efficiency of health service provision. In practice, in some parts of Italy the national law is not fully respected. In some regions, there is no GP register for undocumented migrants and hospitals do not issue the anonymous code set out by the law. This way, the enforcement of the right to health set out by the constitutional law depends on arbitrary decisions of the local governments (Scevi 2010).

Finally, enforcement of the law can sometimes be prevented by the behaviour of the police. As an example, the Italian police often park close to emergency wards and, in this way, send a message to undocumented migrants going to the emergency ward is dangerous for them and comes with a risk of being reported as criminals. The other public institution that has played a crucial role in affecting migrants’ right to health is the media. During the public discussion of the “Decreto sicurezza” law, certain sections of the media disseminated incorrect information such as how it was possible for an undocumented migrant to be caught by the police at the emergency ward or that doctors had the possibility of denouncing their patients. Even if the national law protects the undocumented migrants’ health rights, the symbolic messages that the police and the media spread in the public sphere have produced some migrants’ behaviours that are in opposition to their legal entitlements (De Genova 2002). In this sense the police’s, and the state’s, strategy of marginalisation has led to actions by migrants which restrict their access to the right to health.

The result is simply that many undocumented migrants suffer from a lack of health care frequently getting sick due to the poor conditions in which they live and work in Italy. Moreover, many face serious problems in terms of finding the medical treatment they need. In this way, a population that is on average young and healthy upon arrival in Italy becomes more and more unhealthy the longer it remains in the country. Furthermore, as a result of the actions of the police and certain sections of the media undocumented migrants experience an atmosphere of danger and exclusion from the public sphere. This atmosphere directly affects their developing subjectivity and their capacity to interact with the wider society (Agamben 1995; Ticktin 2006).

Often, the sense of danger comes from what people have read in the papers or heard from their friends. In other cases, however, this feeling is based on dramatic personal experiences. For example, I remember the story of a young man who was at the emergency ward for an incident which took place whilst he was working in an irregular job. While he was waiting for the doctor, the police came to the emergency ward, asked him for his documents and then decided to denounce him. The police behaviour was completely illegitimate as according to the law they cannot come to the emergency

ward asking for documents. Most importantly, they cannot denounce a person while s/he is being treated. The person interviewed decided to stay in Italy illegally and to get the medication he needed from a friend from his country who is also undocumented. In this way, the action of the police has led the young man to refrain from using the health services he was entitled to.

### **Migrants' Subjectivity and Sickness as Agency**

I collected many similar stories from the interviews I conducted and then tried to investigate the effects produced by policies and actions of the state through narrative analysis. I examined the development of the migrants' subjectivity by interpreting the metaphors and images that patients employed to describe themselves.

The people interviewed often portrayed themselves as animals, placed in a position of inferiority, passive in the face of an inescapable destiny. These feelings were reinforced when they become sick because sickness often compromised their ability to work and to make a living, the main reason why most had migrated in the first place (Sayad 1999). At the same time, being treated required them to face the barriers to normal life enforced by the law and by the behaviour of the police.

I am convinced that these feelings of passivity and inferiority are related to the political and institutional context in which undocumented migrants live. The undocumented migrants who live in Italy have to face a paradox: in theory they are entitled to a great number of rights, including the right to health, but in their everyday experiences these rights are practically violated by many of the institutions. The migrants are unable to ameliorate their condition or claim a violation of their rights since they cannot interact with any type of public institutions, such as the police, legal services or trade unions. This leads to a great sense of disempowerment. I see this situation as an example of what the philosopher Giorgio Agamben (1995) calls the 'state of exception'. In the state of exception, undocumented migrants are completely outside the political sphere while at the same time being entirely subjected to it (Agamben 1995). They live every day in a state of insecurity and chaos, a sort of permanent state of liminality based on the fact of being alienated from their rights and their political agency, whilst simultaneously contributing to Italian economy and civil society.

Victor Turner (1974) describes liminality as a passage during which personal characteristics change. For this reason, it is a moment of danger where a person is constantly at risk of losing himself or herself, of losing his or her personality. The situation of the undocumented migrants in Italy can be seen in a similar way. However, it differs from Turner's liminality in the way that it is not a passage, but it is permanent: it could last for many years or even the migrants' entire life (Ticktin 2006). I believe this explains why dignity was a recurring theme in the undocumented migrants' narratives. Furthermore, I think that their perception that their dignity was damaged has a direct influence on the expectations they have of receiving medical treatment or seeing a doctor.

The high expectations migrants have of medical treatment exist for two different reasons. In some cases, migrants express the idea that their body is a device dedicated entirely to work. In these cases, migrants are looking for quick fixes to be provided by medicines. For this group of patients, who have a mechanical notion of their body, the treatment is a process of medicalisation (Illich 1976). In fact, all the problems related to their work or living conditions are expressed as physical problems that could only be treated with medical technology and medicines. In this way, the political aspects of migration are completely forgotten and covered by medical science (Fassin 2009). This process of medicalisation is a strategy operated, consciously or not, by doctors, nurses, others working in the field of medical science. The final result of this strategy is to translate everything into medical language. However, in the case of undocumented migrants, important meaning is lost in this process of “translation”. For many migrants, the symptoms they express to a doctor are directly linked to their experiences of flight or movement from their country, of actual poverty, of work exploitation or of poor living conditions. These are not directly physical or medical issues, but after the process of medical translation they are understood as such. Poverty becomes “malnutrition”, the experience of exploitation becomes “post traumatic stress disorder”, work exploitation becomes “backache” or “stress”. This has profound consequences: since poverty, exploitation, flight and living conditions are produced by political governance and it is in this process we should look for the causes and the individuals responsible. This is not possible for purely medical symptoms. In this way, political management of migration disappears out of the picture and escapes scrutiny.

However, there is also another group of patients who perceive the doctor not only as a medical professional, but also as someone who could re-establish their damaged dignity. In this case, what a patient asks of the doctor is not only medical treatment but also care, attention and a listening ear (Good 1994). For this reason, most of the migrants who come to the consulting room are there not because they suffer from a serious disease, to spend time in a safe, warm place. They ask to spend a lot of time with the doctor in order to talk with him/her and to be treated as a person, with respect and dignity. This second group of patients are therefore expressing a kind of existential need not satisfied by usual doctor-patient interactions. For this reason, when the doctor decides to be quick and superficial and prescribes some general medicines like aspirin this behaviour is perceived by the patient as a scandal.

Whether a patient wants a mechanical treatment or is looking for a more complex type of care, the sickness becomes a resort for realising the migrant’s agency (Fassin 2009). In fact, being sick could represent the only occasion to interact with a professional environment, or could be a chance to find solidarity and finally to re-establish their dignity as an individual.

## Conclusion

The experience of patients using emergency services at Nada provides an example of Foucault's (1976) 'biopolitics', the impact that political power can have on different aspects of life, including those related to health and their bodies. This 'biopolitics' has a profound effect on migrants' health rights in practice. In this paper, we have seen how the politics of criminalisation and marginalisation, led by a significant section of Italian public institutions, from legislators, to the police and local authority, are affecting the way a group of people cope with their body and health, and realise their right to health. At the same time, the stories of migrants at Nada show that the search for the realisation of the right to health can be a powerful tool of expressing the migrants' identity agency. Access to health is a central component of their humanity.

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## **Abstracts of All Other Papers**

### **Where we are: key issues**

#### ***Immigration Control in the United Kingdom and the Liberal democratic paradox***

**Cosmas Ukachukwu Ikegwuruka**, PhD candidate in International Human Rights Law, University of Newcastle (Email: c.u.ikegwuruka@newcastle.ac.uk)

A liberal democracy such as the United Kingdom believes in certain values and actively promotes them. This paper will evaluate the salient features of those liberal values such as the rule of law in the amphitheatre of immigration control. It will use the United Kingdom's practices in immigration control to measure its compliance to liberal democratic ideologies and thus explore the dilemma -if any - faced by the UK in what is referred to as the 'liberal democratic paradox'. The emerging question then is how will the UK respect these values and at the same time marry them with immigration control? If there are conflicts between these values, what will be the remedy?

By way of analysis, this paper will conceptualize the rights of migrants in their precarious, irregular or stranded immigration status otherwise called 'the precarious migrants dilemma' and in doing so will address the issues as to whether the rights of these precarious migrants in the UK are merely theoretical and illusory or whether they are real and practical? By engaging in this investigation, the paper will draw a distinction between the enforcement of immigration control on the one hand and the protection of basic human rights of migrants on the other hand in the sense of 'bifurcation or firewall argument'.

The methodology is purely documentary analysis, as the study will draw immensely from existing literature, case laws, soft laws and the applicable international legal instruments.

#### ***'Brava Gente' v. Immigrazione: Immigration Approaches in Italy***

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*Full paper included in these proceedings.*

### ***The erosion of refugee status in law***

**Anne Neylon**, PhD Candidate Faculty of Law, University College Cork (Email: 107221664@umail.ucc.ie)

The rights of the refugee living in the state extend beyond the right that she should not be returned to her country of origin. There are clearly rights accruing to the refugee on the basis of her physical presence in the state. There is an intention laid out in the content of the Refugee Convention which suggests that the refugee's legal status in the state must at least be such as to allow her to gain access to the rights which are set out in the Convention. Therefore, the legal status that the refugee is entitled to in the state must be a meaningful one and not merely a representation of the state's inability to return her to her country of origin. There is an ever increasing division in treatment in states between those with temporary and those with a permanent residence status. Where refugees are only provided with a temporary status, the refugee is treated as temporary on the basis of her status as a refugee, but she is also affected by a general trend where fewer rights are afforded to immigrants with a temporary status in the state. While the concept of the "disaggregation of citizenship" is supported through the idea that there has been a proliferation of human rights, there is nonetheless a tendency for states to be quite minimalist in terms of the rights that they in fact will make available to those present on the basis of a temporary residence permit. This paper interrogates the concept of temporariness of refugee status, taking account of the increased likelihood of states to grant a temporary status to refugees. While taking account of recent practises of the UK and the EU, the paper also reflects on the recent move by Turkey to grant refugees from Syria a status below that of refugee in order to ensure their non-permanence in the state.

### ***Looking Ahead: Evaluating the Prospects for Reinforced Solidarity and Responsibility Sharing in the Common European Asylum System***

**Carolyn Armstrong**, PhD Candidate in the Department of Government, London School of Economics and Political Science (Email: C.Armstrong@lse.ac.uk); Co-authored with Eiko Thielemann

In December 2011 the European Commission issued a communication on enhanced intra-EU solidarity in the field of asylum that seeks to create 'an EU agenda for better responsibility sharing and more mutual trust'. In this communication, the Commission proposes that the strengthening of intra-EU solidarity and responsibility sharing should be reinforced around four axes: practical cooperation and technical assistance, financial solidarity, allocation of responsibilities, and the improvement of tools for governance of the asylum system. They also advocate for an increase in the use of internal relocation of asylum applicants among Member States and for the possibility of a move

towards the joint processing of asylum applications in EU territory. While the focus on solidarity as an essential component of the CEAS is not new and instead builds on previous efforts by the Commission to improve responsibility sharing among Member States, recent events have highlighted the difficulties and the shortcomings still facing the operation of the system, and are indicative, at least in part, of the lack of progress made in this policy area in recent years. This has arguably led to a renewed impetus to improve the system and to ensure that those states that are facing higher levels of responsibility are receiving adequate support in order to ensure that they are able to uphold their commitments under both EU and international law. This paper will examine and analyse this most recent articulation of the Commission's plan for improving and enhancing solidarity and responsibility sharing while simultaneously ensuring that the fundamental rights of asylum seekers are upheld. While many of the recommendations made by the Commission should be encouraged, it will be argued that the proposed action points attempt to address the repercussions of the uneven distribution of costs and responsibilities but fail to address the structural, institutional features of the system that are perpetuating these inequalities.

### **Whose rights? Vulnerable and particular social groups**

#### ***Knockin' on Europe's door: women, war and gender-based persecution.***

**Olga Jurasz**, PhD Candidate, Aberystwyth University (Email: onj09@aber.ac.uk)

Recent experience of armed conflicts has exposed significant flaws, from the humanitarian and human rights perspective, in how International Refugee Law (IRL) addresses the status of women escaping conflict and post-conflict zones. In its current form and application, the international system of refugee protection remains largely gender-blind. In particular, the current mechanism heavily disadvantages women who are persecuted due to their gender, especially when it takes place during armed conflict. Although the gender-specific impact of war on women has become increasingly recognized in international law, the precarious position of women in the aftermath of armed conflict and practical implications it has on their lives, is yet to be adequately addressed. Conflict-related displacement and search for asylum (in mostly gender-blind IRL system) remain key practical consequences of war on women.

In 2004, the European Union issued its Qualification Directive , which forms part of the Common European Asylum System. The Directive sets “minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted”. As such, it brings together the classical refugee status (1951 Convention) and subsidiary, or complementary, protection status. Furthermore, it attempts to give effect to rights contained in the ECHR in conjunction with humanitarian practices

adopted by EU states with regard to persons, who may not qualify for right to asylum under 1951 Convention.

This paper discusses from a legal and gender perspective the extent to which the Qualification Directive may be viewed as a mechanism assisting women persecuted because of their gender, who seek asylum from conflict-affected zones. This particular example will be used to illustrate and further discuss the overall legal challenge of ensuring gender equality of women in post-conflict situations.

### ***Protection for Who? The Protection of Trafficked Persons***

**Jean-Pierre Gauci**, PhD candidate in Law, Kings College London (Email: [gaucijp@gmail.com](mailto:gaucijp@gmail.com))

*Full paper included in these proceedings.*

### ***Challenging the borders of intimacy and legality: The cultural construction and transnational implications of Danish marriage migration policy***

**Tess Hellgren**, MSc in Migration Studies, Oxford University (Email: [tess.hellgren@jesus.ox.ac.uk](mailto:tess.hellgren@jesus.ox.ac.uk))

Based on my dissertation work, my presentation will explore the formation and consequences of the Danish ‘24-year rule’ limiting transnational marriage migration, using this case study to consider the national evolution and regional resonance of immigration policies in the modern Danish state. My presentation will contextualise recent Danish policy in theories of integration and belonging, examine its intentions and outcomes, and investigate the relevant interaction (and conflict) of state and supranational authority in dictating marriage migration policy. Over the past ten years, immigration discourses have been increasingly politicized in Denmark, tied to the enhanced influence of the right-wing Danish People’s Party over mainstream political leadership. Amidst the societal normalization of anti-immigration sentiments, the 2002 legislation on marriage migration places strict requirements of age, income, and ‘national attachment’ upon any third-country national (TCN) wishing to marry a Dane. Justified under gender equality discourses seeking to prevent forced marriages, the legislation has created culturally normative judgments on ‘divergent’ marital practices, declaring that arranged and kinship partnerships are unacceptable in Danish society. Marriage restrictions have simultaneously been a pragmatic immigration control, considerably restricting the eligibility of potential applicants for family migration. My presentation examines how the law has impacted the decisions, identities, and livelihoods of Danish migrant couples, particularly drawing attention to their agentive responses shown in new migration flows to southern Sweden. By relocating across the Danish border, impacted couples are strategically navigating intersecting levels of Danish, Nordic, and EU law in their determination to form a partnership. This provocative outcome raises important

questions about present and future interactions of national and supranational legal structures in the realm of EU family migration and beyond.

## **Security and Counter-Terrorism**

### ***“Whose security? Swiss Politics of Asylum and the “Securitization” of Migration”***

**Robin Stünzi**, PhD Candidate, University of Neuchâtel/Centre de Droit des Migrations (CDM)  
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Since the end of the 20th century, the nexus between security issues and migration has become more prominent in major countries of immigration, both among policy-makers and among researchers in social sciences, law and international relations, where it is referred to as the “securitization” of migration. This complex relationship is particularly at stake within the domain of asylum, where the tension between human and national security is a contentious issue. This paper aims at exploring this relationship and its evolution within the development of asylum policy in Switzerland since the 1970s. After describing some characteristics of the contested meaning of security and the way it has been conceived as inherently linked to political and state practice, this paper focuses on legal, political and administrative discourse and practices to examine how specific understandings of the concept of security are constructed and transformed within the field of asylum policy in Switzerland. Using the theoretical contributions of both the “human security” and the “securitization” frameworks, I analyse data produced during the legislative process (federal legal bases, reports, records of parliamentary debates), especially the creation and the successive development of the Swiss Asylum Act (AsylA). The paper draws attention to the fact that security rhetoric has been used to talk about asylum and refugees since the creation of the first Asylum Act in 1979 and that its meaning has experienced significant transformations, as regards the kind of threat that has been perceived to endanger various referent objects, and the measures that have been taken afterwards. In the concluding part, I turn to some political and philosophical implications of using security rhetoric within the politics of asylum and refugees.

### ***Exclusion from Refugee Status: asylum seekers and terrorism in the UK***

**Sarah Singer**, PhD Candidate in Law, Queen Mary, University of London (Email: s.r.singer@qmul.ac.uk)

Recent legal and political discourse on terrorism within the United Nations (UN) has presented refugee status as a means by which terrorists can seek entry to a country to perpetrate terrorist acts, or evade prosecution for their crimes. For example, UN Security Council Resolution 1373 of 2001 urges states to ‘ensure ... that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts’. The drive to deny the benefits of refugee status to suspected terrorists has led to a

radical reinterpretation of the exclusion clause of the 1951 UN Refugee Convention, both at national and international levels, so as to bring terrorism within the ambit of this provision. An asylum-seeker will now be excluded from refugee status if he or she has committed or prepared for an act of 'terrorism', or has encouraged or induced someone else to do so. However, 'terrorism' is not a legal label, but an undefined political term: there is at present no internationally agreed definition of 'terrorism', nor an internationally agreed list of 'terrorist organisations'. The discretion inherent in the undefined nature of the term 'terrorism' therefore leaves the Refugee Convention's exclusion clause open to abuse by Member States seeking to exclude genuine asylum seekers from refugee status. In this paper it will be argued that, in light of the serious consequences of exclusion from refugee status, there is a need for a principled approach to the application of the Refugee Convention's exclusion clause which is not served by the undefined political term 'terrorism'. Furthermore, since fleeing persecution for political opinion is an archetypal reason for seeking asylum, injecting subjective political notions of 'terrorism' into refugee exclusion has the potential to undermine the very foundations of the international refugee protection framework.

***Are securitisation and human security compatible? A comparative analysis of Italian migratory policies and humanitarian intervention in Libya in terms of securitisation and human security.***

**Silvia Eugenia Carmen Devecchi**, Masters in International Relations & Modern History (2008-2012), University of St. Andrews (Email: silviaec.devecchi@gmail.com)

This paper will analyse the often overlooked interaction between human security and securitization, attempting to evaluate whether they can coexist. Starting by outlining the Critical Security framework of this essay, a definition of legal securitisation will be advanced. In order to be legal, securitisation has to (1) respond to objective existential threat (2) have referent object which is not primarily threatened by the state (3) be initiated and carried out following international legal directions on matters of proportionality. This paper will use the 2011 humanitarian intervention in Libya and compare it with the handling of migrants which fled North Africa, maintaining a specific focus on Italy. In this way, the extent to which the two processes have been made incompatible on this specific occasion will be shown, while highlighting how the two aspects can coexist when the criteria for legal securitisation are met. Italy was chosen in light of its long standing relationship with Libya, its dependency in natural resources and the particularly visible process of securitization of migration which has occurred in the country for years. The period between May 2009 and September 2011 will be looked at closely, focusing particularly on the months preceding the March 2011 humanitarian operation. A revised conduct on the behalf of the Italian government towards Libya and migrant will be pointed out as a demonstration of the feasibility of the theoretical claims advanced by this essay.

## **Irregular migrants: rights and strategies**

### ***Irregular migration: Are the Scandinavian countries really exceptional?***

**Stine Laursen**, DPhil Candidate in the Department of Politics and the School of Global Studies, University of Sussex (Email: S.Laursen@sussex.ac.uk)

Irregular migration has become a major topic worldwide in the past 10-15 years, but little is known theoretically and empirically about irregular migration in a Scandinavian context. Therefore, this thesis investigates the extent of irregular migration to Scandinavia, i.e. to Denmark, Sweden and Norway and focus in particular on two theoretical issues. First, it is often argued in the current literature on irregular migration, that state policies are ineffective in curbing irregular migration, and that irregular migration therefore affects all developed countries (Chiswick, 1988; Cornelius et al., 1994; Albrecht, 2002; Bhagwati, 2003). However, at the same time, it is also argued by several authors, for example Duvell as part of the Clandestine project (Clandestino, 2009), that the Scandinavian countries are an exception from this general rule, since there appear to be very few irregular migrants in Scandinavian. Second, another assumption in the literature is about Scandinavian homogeneity in relation to irregular migration in terms of both policies and outcomes (Clandestino, 2009), this is slowly being challenged (Thomsen et al., 2010) but overall there is still a lack of comparative and empirical research on irregular migration in Scandinavia which could challenge these assumptions about Scandinavian exceptionality and homogeneity. In my thesis I will empirically investigate the claim that the Scandinavian countries have low levels and similar types of irregular migration using a mixed methods research design, and I will then examine the discourses, attitudes, and policies which have shaped irregular migration to the three Scandinavian countries; Denmark, Sweden and Norway to uncover if they are indeed as homogenous as is often assumed and whether they really constitute a special case compared to other countries – or in other words, whether they are indeed exceptional?

### ***‘Lying Low and not Giving up’: Undocumented Migrants’ Account of their Situations***

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*Full paper included in these proceedings.*

***Risk-Taking in Transit: The Case of Afghan Migrants in Turkey***

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This paper is concerned with how migrants and asylum seeker perceive and negotiate insecurities created by the increased “securitization” of state policy through the case study of Afghan migrants and asylum seekers in Turkey.

Pursuant to the institution of restrictive policies towards Afghan migrants and refugees in Pakistan and Iran, as well as continuing insecurity in Afghanistan, Turkey has become a significant country of transit and the closest country asylum in the region. When in Turkey, however, Afghans are subject to policies designed to legally marginalize and prevent integration. Furthermore, anti-smuggling measures and tighter controls on the EU border appear to have increased the financial cost of irregular travel and possibility of apprehension. This paper seeks to explain how recent Afghan arrivals view and negotiate insecurities associated with their migratory options whilst in Turkey within framework of social and cultural theory of risk perception and acceptability.

The migratory options for Afghans in Turkey, such as irregular travel or asylum, expose migrants to uncertainties and vulnerabilities. Typically Afghans pursue a combination of these options. Current migration theory on decision making fails to capture the diversity of intra-group variation as witnessed among Afghans in Turkey, because of its focus on macroeconomic and political factors. Based on ethnographic research since December 2010, including 55 in-depth interviews with Afghans across several cities in Turkey, it is argued that the heterogeneity of Afghani migratory trajectories arises from their subjective evaluation of risks in the broader cultural and social context of their decision making. This paper goes towards challenging the common perception of migrants as “risk-averse actors” while demonstrating the discrepancy between the impact of “migration controls” as viewed by states versus individual migrants.

**EU Borders and human rights**

***The Externalisation of Migration Control: An Assessment of the European Union’s Policy in the Light of the Charter of Fundamental Rights***

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*Full paper included in these proceedings.*

***Expanding European Borders: Extraterritorial Immigration Control and the case of Hirsi Jamaa v. Italy***

**Ruth Clinch**, Masters in Human Rights, Sussex University (Email: R.Clinch@sussex.ac.uk)

Following the recent case of *Hirsi Jamaa v Italy* this paper will explore interdiction, push backs and the plight of ‘boat people’ through the lens of ECHR law. Tracing the history of these migrants from Vietnamese refugees to those fleeing Haiti in the early nineties and the current situation in the Mediterranean brings into focus the nexus of maritime law, obligations under international and refugee law, and attempts by states to secure and control their borders. The ruling of the European Court of Human Rights in *Hirsi Jamaa v Italy* marks the first time the extraterritorial measures of member states for migration control have been decisively condemned in international law. The case is indicative of a new phase of such controls as practiced at the borders of Europe, often in partnership with non-member third party states such as Libya and Mauritania as well as with the EU agency Frontex. If subsequently followed the case could help establish greater accountability for such relationships and measures. As such it is a crucial first response to this emerging phenomenon which should remind states that while developing practices to regulate and control the entry of aliens - as is their well established right - they are obliged to keep in mind the object and purpose of the ECHR by whose rules they are bound.

***Playing their Cards Early: Lessons for Schengen from the ‘Arab Spring’***

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*Full paper included in these proceedings.*

**Migrants’ (Right to?) Health**

***Asylum-seekers, violence and health: A systematic review of research in highincome host countries***

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Populations displaced by conflict and persecution are thought to experience high rates violence with significant public health implications. Yet, scarce data exist to identify the prevalence and nature of violence and inform policies and health services for the approximately 367,000 asylum-seekers in high-income host-countries. The objective of this study was to systematically review evidence on prevalence and health effects of violence among adult asylum-seekers in high-income countries. The data was selected from a pool of 5454 articles identified through Medline, Pubmed, Embase, Web of Science and the Cochrane Library published in peer-reviewed journals January 1, 2000- August

30, 2011. Studies were selected that employed experimental or observational designs reporting physical or sexual violence prevalence (risks, rates, proportions, mean scores on validated instruments) and/or health associations among asylum-seekers 15 years or older in high-income host-countries. Data were extracted according to PRISMA guidelines on study population, design, sampling method, instruments, violence prevalence, and violence/health associations. Data quality and suitability were assessed using a peer-reviewed appraisal tool.

23 studies met inclusion criteria. Prevalence of torture was above 30% across studies, though convenience sampling posed risk of bias. Reported torture and suicide were more prevalent among men and reported sexual violence was more prevalent among women. 78% of studies did not disaggregate findings by sex. No studies examined intimate-partner, family or post-migration community violence. Only two studies reported significant adjusted health effects of violence. Torture history in clinic populations was significantly associated with hunger (OR=10.44, p=0.032)<sup>3</sup> and PTSD (OR=4.93, p=0.03).<sup>4</sup> One study observed significant interaction between past violence and length of immigration detention on depression ( $F(1,86) = 5.97, p = 0.017$ ).

In conclusion, the studies suggest asylum-seekers experience high levels of abuse, but representative findings on violence and health are scarce, with current evidence drawn primarily from convenience samples, based on irregular definitions and not sex disaggregated. Fair and humane asylum responses are needed and should rely on high quality research.

### ***The Human Right to Health of Migrants: Perspectives from the Council of Europe***

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Human Rights Law is being shaken by rising debates on the justiciability of social rights: how rights such as education, housing or health can be legally enforced. However, very little is said on how these rights apply to migrants and through the lens of this research, on how the human right to health applies to migrants in Europe.

Different aspects of the human right to health have been examined in the existing literature but no attempt to clarify its legal content in Europe has been made, even less in the context of non-nationals. It is however fundamental to analyse what rights and obligations the right to health entails in order to improve its realization among these individuals. The Council of Europe offers unique perspectives in this respect, thanks to the interpretation made by the European Court of Human Rights and the European Committee of Social Rights.

I intend to discuss this by first, providing a brief account of international human rights law on the right to health recognized to non-nationals. Second, I wish to examine the contradicting jurisprudence of the European Court of Human Rights in respect to states' obligation to provide healthcare to illegal migrants. Third, I will assess the restrictive definition of the right to health of non-nationals in the

European Social Charter. And fourth, I will analyse the extensive interpretation of this definition made by the European Committee of Social Rights (in its procedures of states' reporting and collective complaints).

***An Interpretive Analysis of the Health Rights of Undocumented Migrants in Italy – a Case Study of Naga in Milan***

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*Full paper included in these proceedings.*

**Immigration detention and temporary accommodation**

***From Blankenburg to Fliegerhorst: An Exploration into Strategies of Social Control***

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This paper attempts to analyze the common European Asylum policy with a specific lens on human rights of the asylum seeker through the prism of 'social control'. The authors attempt to elucidate if and how strategies of social control are enacted on the body of the asylum seeker taking the social housing centres at Blankenburg and Fliegerhorst, in Germany, as case studies. The official function of these pre-admission 'communal housing centres' is ostensibly to provide for 'safe' accommodation and basic needs of asylum seekers who are presumably unfamiliar with Germany. On the contrary, this paper argues that although a non-punitive measure, the banal bureaucratic logic underlining these institutions enables the enactment of border control by ensuring that 'unwanted' migrants can be located and identified and cannot abscond while their application, and potential expulsion, is prepared. Through a series of semi structured interviews- with social workers, government representatives, activists and NGOs themselves- as well as regular field visits combined with media and discourse analysis, conducted over a period of 6 weeks in November- December 2011, this paper seeks to analyze the strategies of social control enacted over the personal and political figure of the asylum seeker. This is explored through the prism of space, management of daily life and discourse of protection, and through representation in media. Simultaneously, the paper explores strategies of resistance to this hegemonic discourse, by investigating how alternate representations beyond a narrative of victimhood are realized. The theme of immigration detention and human rights is thus explored through systems of surveillance as well as resistance.

### ***Immigration detention, security and human rights***

**Mairead De Faoite**, LLM in Human Rights Law, Nottingham University (Email: llxmd12@nottingham.ac.uk)

The attacks of September 11 led many states to introduce new administrative detention powers. Under international law such legislation is permitted but is subject to certain safeguards. Essentially, administrative detention exists as a supposed solution to a problem Governments have in relation to international terrorism. It is forbidden under international law to return an individual to a country where they might be tortured. However, States are also unwilling to allow an individual, which they believe to be a risk to National Security, to remain free within the Country.

The first part of this presentation will briefly outline the development of national legislation surrounding administrative detention since 9/11. The second section will analyse whether there is a need for administrative detention. The third part will examine two case-studies the UK and the US. The UK is examined as its legislation has evolved from physical detention to a system whereby the individual is submitted to restrictions and surveillance. The US is examined because it provides an example of a system without the influence of the ECHR and because there is a certain confusion as to which system of law to apply. (The Government have given mixed signals as to whether the detainees are considered “enemy combatants” or not.) Thus, the American system can provide a contrast to European countries. Lastly, this article will examine what approach International and Regional Treaty Bodies should take in relation to detention.

### ***Immigration detention in Switzerland: Toward a new management of ‘unwanted’ foreigners?***

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The administrative detention of irregular migrants aiming at enforcing removal orders has been introduced within the Swiss Federal Act on Foreign Nationals (FNA) in 1986. At that time, detention was allowed for a maximal period of 30 days for foreigners when a final decision regarding their removal had been made by the authorities. In 1995 and 2008, the so-called coercive measures were introduced and further developed in the FNA. The measures extended the maximal length of detention to 12 and subsequently 24 months, and the scope of foreigners which may be detained – including foreigners whose removal had not yet been ordered. While the debate regarding the introduction of coercive measure departed from public concerns regarding the criminality of asylum seekers, the measures were finally legitimated by the Parliament and in front of the Swiss population as means to protect ‘real refugees’ and the Swiss ‘humanitarian tradition of asylum’. Despite such positive justifications, the evolution of the legislation regarding the administrative detention of foreigners in Switzerland demonstrates a clear mix between criminal and immigration law, which has been

documented in the case of other countries as the emergence of a ‘cimmigration law’ system (Stumpf 2006). This paper will be divided in three sections. Section I presents a detailed analysis of the evolution of the administrative detention of foreigners in Switzerland. Section II analyses the arguments used by the Swiss Parliament to justify the implementation of such measures. Section III highlights convergences between criminal and immigration law in the Swiss context. To conclude, I will argue that the evolution described in the case of Switzerland should be understood as a more general trend of implementation of new ‘techniques of control of unwanted foreigners’ within liberal democracies.

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