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“Revolutions and their immigrants: EU’s response”

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Abstract

This paper describes EU’s response to the crises in North Africa from the perspective of migration and border control. The HERMES border control Joint Operation of EU’s Border Agency (Frontex) is taken as a case study of EU’s initial response. This paper argues that the influx was not unmanageable by Italy and the EU and represented only a minor part of the migration flows resulting from the unrest in North Africa. Against that background it argues that the HERMES operation represents a restrictive and security-driven response; this in contrast to constitutional values the EU is supposed to uphold and promote, such as solidarity, fundamental rights and the rule of law. Furthermore it discusses the way ahead for EU-North Africa cooperation on these matters.

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1. Introduction

What was triggered by the tragic suicide of a street vendor in Tunisia – the popular uprisings in North African States – has had an unprecedented impact on EU’s border policy towards North Africa. Even more, it evolved from a matter of external border control into a debate on *internal* borders, as evidenced by the Franco-Italian Schengen affair. The EU was faced with an extremely dynamic and uncertain situation; a swift response was needed. One of the main and most tangible initial responses has been the Frontex (EU Border Agency) Joint Operation (JO) HERMES. This response is scrutinised in this paper from the perspectives of solidarity, the rule of law and fundamental rights.

The structure of this paper is as follows. The next section briefly describes the migratory consequences of the uprisings in North Africa. Section 3 then subsequently sets out the different short, medium and long-term policy responses by the EU to these migratory movements. That section provides some elementary background information on EU border policy towards North Africa. It also further analyses the Frontex HERMES operation and poses the question whether this was indeed a sign of solidarity amongst EU Member States, amongst the EU and North Africa and whether it addressed the rule of law and fundamental rights. The paper is rounded off by a set of conclusions.

2. Revolutions in North Africa and their migratory effects

This section does not aim to give a comprehensive account of the popular uprisings in North Africa. Instead it focuses on the consequences this had in terms of migratory flows; both towards Europe as well as in North Africa itself. These flows were and are quite extensive as a result from the insecure and tense situations in almost all countries in the region.

The popular uprisings started in mid-December 2010 in Tunisia, with the so-called ‘Jasmine revolution’ seeing Ben Ali fleeing the country after street protests. Egypt soon followed suit with Mr Mubarak’s departure from power. The situation in Libya is also completely volatile at the moment with a recent intensification of the NATO bombardments. It is no surprise that hard police action by dictatorial regimes, sectarian violence and foreign military intervention produces serious displacements of people.

Although exact up-to-date numbers are difficult to gather, by mid-June at least 1 million people have left their country of residence in North Africa. Obviously, Libya, because of military battle taking place there, is the most important ‘source’ country.¹ A substantial proportion of these people are foreign workers with different nationalities, previously employed in Libya. It is also reported that groups of individuals from different (mostly sub-Saharan) African countries, for which Libya was merely the transit country on their way to Europe, are trying to flee the country. Due to the general suspicion of sub-Saharan Africans by

¹ International Organisation for Migration (IOM), *IOM Response to the Libyan crisis – External situation report*, 14 June 2011.

Libyans, further aggravated by the fact that some of Kaddafi's mercenary forces were also of sub-Saharan origin, they form an extremely vulnerable group of individuals threatened with persecution in Libya.²

Europe also was confronted with a migratory influx from North Africa. Italian officials have described this influx with terms such as a *'human tsunami'* and *'invasion'*; warnings have been issued mentioning numbers of up to 1.5 million individuals potentially coming to Europe.³ In Italy by now some 41,000 individuals have arrived. Around 24,000 of those individuals are of Tunisian nationality.⁴ The main entry point is the island of Lampedusa; at least 31,000 arrivals have been recorded there.⁵ Furthermore, around 1,500 individuals made it to Malta from Libya, with most of the arrivals originating from Somalia or Eritrea.⁶ In April, the arrival by then of around 25,000 individuals prompted an internal EU affair between Italy and France. Italy, constantly stressing the point of lacking solidarity in the EU on this issue, offered temporary residence permits with an automatic of free movement within the Schengen zone. France, in response, temporarily introduced border checks to stop those migrants from entering its territory.⁷

Against the background of this political turmoil, we should however put the migratory influx into some perspective. Although it is true that the arrival of 31,000 people is impossible to handle for an island of just 5,000 inhabitants (Lampedusa), it is not for Italy, with its 60 million citizens, let alone for the EU with over 500 million citizens. A more relevant perspective however is that in 2010 there were 235,000 asylum claims in the EU, of which Italy processed 8,200 claims. For Italy this was a significant drop from 2008 levels when it received over 30,000 applications.⁸ So, surely for Italy there was a significant influx, but it was not *dramatically beyond* what it received in the past. If we look at it from a European perspective, the size of this particular group of individuals is not very significant, representing only some 17.5% of the EU 2010 asylum claims. Even more, from an international perspective, the EU received only around 4% of all people who fled their country of residence in North Africa.⁹ The other 96% of the migratory flow thus descended upon neighbouring countries. Furthermore, if put in historical perspective, the EU-15 received almost 700,000 asylum claims in 1992 and well above 400,000 annual claims in the years 2000-2002, as a result of turmoil on the Balkan region.¹⁰

² IOM, *'Migrants continue to be vulnerable in Libyan conflict'*, 7 June 2011.

³ Italian Prime Minister Silvio Berlusconi spoke of a 'human tsunami': Deutsche Welle, *'Germany tells Italy to solve its own problems' in Tunisian refugee row*, 10 April 2011. Interior Minister Roberto Maroni spoke of 'an invasion' that would bring Italy 'to its knees' and came up with the anticipated numbers: The Telegraph, *'Italy fears up to 1.5 million North African migrants'*, 24 February 2011.

⁴ UNHCR, *'Update No. 28 – Humanitarian situation in Libya and the neighbouring countries'*, 10 June 2011.

⁵ See: Novinite Insider, *'Interview with Frontex spokesperson Michal Parzyszek'*, 27 May 2011.

⁶ UNHCR, *'Update No. 28 – Humanitarian situation in Libya and the neighbouring countries'*, 10 June 2011. See also: DI-VE, *'1,451 migrants land in Malta since March'*, 15 June 2011.

⁷ See in detail and for a critical analysis: S. Carrera, E. Guild, M. Merlino and J. Parkin, *'A race against solidarity – the Schengen regime and the Franco-Italian affair'*, CEPS Liberty and Security in Europe, April 2011.

⁸ UNHCR, *'Asylum levels and trends in industrialised countries 2010'*, 28 March 2011, Annex Table I.

⁹ 41,000 of 235,000 represents 17.5%; 41,000 of 1 million represents 4.1%.

¹⁰ Eurostat, *'Asylum Statistics'* (retrieved from Eurostat online database).

So, all in all the migratory influx into the EU following the revolutions in North Africa was higher than usual but did not go beyond numbers experienced by the EU before, was well below the influx in the 90s following the Balkan wars and represented a very minor share of the overall refugee flows from North Africa.

3. EU's response

This section sets out the reaction at the EU level to these developments. By now, this reaction has evolved, also touching upon the more long-term approach taken to immigration stemming from North Africa. This section does not deal with all the policy initiatives in detail, but describes the main issues, and looks specifically at one of EU's initial responses: the Frontex HERMES JO. To understand better the new policy initiatives, a description of the background of EU-Africa cooperation on border control and migration is given here.

3.1. Background: EU-Africa cooperation on border control and migration

Evidently, already before the recent crisis in North Africa, cooperation with Africa on matters of border control and migration received high priority by the EU. As the North African States are sending and transit countries, the EU has tried to engage them over the past with the aim of 'managing' migration.¹¹ Roughly, this engagement knows two branches, namely measures attempting to attract African States to this cooperation – incentives – and measures meant to contribute to EU's migration policy.

First of all, on the incentive side, the EU's Global Approach to Migration links different aspects of the EU's foreign policy towards Africa with the issue of migration.¹² As a result, migration is now 'streamlined' in cooperation with African States, also in the overall approach of the European Neighbourhood Policy (ENP).¹³ The Global Approach eyes migration also as an opportunity for African development. To that effect a policy focus, at least on the statement level, has been on legal migration and concepts such as circular migration and remittances facilitation.¹⁴ This has also led to the disbursement of specific EU development cooperation funds for capacity-building in African States on migration matters.¹⁵

¹¹ This started already from the Tampere European Council: European Council, Presidency Conclusions, Tampere, 15-16 October 1999, pt. 22.

¹² European Council, Presidency Conclusions, *the Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean*, 15-16 December 2005.

¹³ Commission, Communication, *Integrating migration issues in the EU's relations with third countries*, COM (2002) 703 final; EU Commissioner Ferrero-Waldner, *Migration, External Relations and the European Neighbourhood Policy*, Brussels, 24 January 2006.

¹⁴ See: Commission, Communication, *Migration and development: some concrete orientations*, COM (2005) 390 final

¹⁵ See the EuropeAid administered 2004-2006 ANEAS fund as established by Regulation (EC) 491/2004, 10 March 2004.

However, secondly, the EU has also attempted to engage these countries to contribute to EU's migration policy. The most prominent attempt has been to negotiate readmission agreements with these States, obliging them to take back their own nationals or third country nationals who passed through their territory.¹⁶ That effort has not been successful as far as North African countries are concerned.¹⁷ In the same vein, since its inception in 2004, Frontex has tried to negotiate working arrangements with North African States to obtain cooperation with the Agency's activities.¹⁸

3.2. Short term responses: money and Frontex

The EU started to respond publicly to the influx of immigrants by mid-February 2011. According to the Commission '*the EU response to the emergency situation has been swift, comprehensive and effective*'.¹⁹ Consistent throughout all communications is the appreciation of the move towards democracy and fundamental rights in the countries of origin.²⁰

Firstly, the Commission has proposed to make funds available from the European Refugee Fund (ERF) and the European Border Fund (EBF). This would aid Italy in covering costs accompanied with this influx, such as for medical care for the arrivals.²¹ So far, the Commission has earmarked € 25 million from these funds, but it is not altogether clear how much has really been paid to those Member States 'under pressure'.²² The Commission encourages the Member States to draw from these funds (also the Return Fund) and plans to provide additional resources from them to Member States.²³

Secondly, targeting the countries of origin, another € 40 million has been allocated to assist the work of humanitarian assistance, evacuation and repatriation of third country nationals as carried out by the Internal Organisation for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC).²⁴

¹⁶ See for an overview of EU readmission agreements:

http://ec.europa.eu/home-affairs/doc_centre/immigration/immigration_relations_en.htm

¹⁷ *Ibid.*; only with Libya the EU had concluded an agreement that covered issues of return, but it was not a fully-fledged readmission agreement.

¹⁸ See section 3.3.2.

¹⁹ Commission, Communication, *A dialogue for migration, mobility and security with the southern Mediterranean countries*, COM(2011) 292 final, p. 3.

²⁰ *Ibid.*, p. 2; See also Home Affairs Commissioner Malmström EP Speech, *Immigration flows – Tunisia situation*, 15 February, SPEECH 11/106.

²¹ *Ibid.*

²² COM(2011) 292 final, *supra*, p. 3.

²³ *Ibid.*, p. 5.

²⁴ *Ibid.*, p. 3.

Thirdly, Frontex has launched the HERMES JO ‘aimed at assisting Italy in controlling vessels carrying immigrants and refugees’.²⁵ This will be discussed in detail in the following section.

3.3. Case Study: Frontex’s HERMES Joint Operation

3.3.1. Relevance

This section describes in more detail the Frontex HERMES JO and scrutinises it from the perspective of solidarity, the rule of law and fundamental rights. One could question why the Frontex HERMES JO should deserve extra attention when looking at EU’s response to the recent migratory influx from North Africa. It is perhaps the most tangible initial response: an EU agency coordinating an operation at sea. Furthermore, the role of the Agency cannot be underestimated in EU’s border policy; it increasingly develops into an independent actor. But above all, focusing on the Frontex JO shows also the general approach taken to the ‘crisis’ by the EU and the Member States: a restrictive and security-driven approach to migration flows.

3.3.2. Frontex

To understand better the JO and its role in the wider response, it is necessary to briefly outline the main characteristics and developments of the EU Border Agency Frontex. The Agency was founded only in 2005 but has since then seen a truly remarkable expansion of its activities. Deducing from the ‘explosion’ of its budget and personnel, the Agency has become an absolute priority for the EU.²⁶ The official name of Frontex (derived from the French *frontières extérieures*) reveals much of its limited original mandate: ‘European Agency for the management of operational cooperation at the external borders of the Member States of the European Union’.²⁷ It was therefore not meant to constitute a real European Border Guard,

²⁵ *Ibid.*

²⁶ Over the time frame 2005 - 2010 the number of staff employed by Frontex has risen from 43 to 298 in and its budget from €6 to €88.3 million. For 2005 numbers see COWI Report, *Frontex, External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Final Report, Document no. P-69209-A, 2009, pp. 24-25. For 2010 numbers see the Frontex Programme of Work 2011, p. 7.

²⁷ Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, L349/1. See on the origins of Frontex: A.W. Neal, ‘Securitisation and Risk at the EU Border: The Origins of Frontex’, 2 *Journal of Common Market Studies* (2009) pp. 333-356. Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007, L199/30.

and depends for the deployment of border guards and equipment (e.g. boats or helicopters) on Member States' contributions.²⁸

Firstly, as the basis for its work, the Agency relies on its own risk analysis; it has therefore a strong intelligence dimension. To feed into that activity, the Agency has sought to access various information sources from the Member States, other EU agencies (most notably Europol) and third States.²⁹

Secondly, the Agency has organised a large amount of JOs. Apart from its expanding role in Joint Return Operations (JROs), most operations deal with border surveillance and have diverging aims: they *inter alia* include 'tackling illegal immigration', 'to detect hidden persons in vehicles', 'detection of fake seamen and forged seamen documents', 'to exchange information on illegal immigration' or to 'stop migrants from leaving the shores on the long sea journey'.³⁰ Arguably, the primary objective of these joint operations is thus a reduction of irregular immigration. Typically, it involves border guards and equipment from a number of Member States, with an important role for the Host Member State. The usual activities in maritime JOs include the surveillance by boats, helicopters, airplanes and radar equipment within the territorial waters of the Member States, the high seas and sometimes even in the waters of third States.³¹ If migrants' vessels are detected, they are in principle intercepted and diverted to either the country of origin or to an EU Member State, depending on where the detection takes place.³² Apart from a 'regular' JO, the Agency has since 2007 also the possibility to deploy 'RABITs' (Rapid Border Intervention Teams) if there is an '*urgent and exceptional pressure*'; the only instance so far has been the operation at the Greek-Turkish land border in 2010.³³

²⁸ S. Carrera, 'Towards a Common European Border Service?', 331 *CEPS Working Document*, (2010); S. Carrera, 'The EU Border Management Strategy, Frontex and the Challenges of Irregular Immigration in the Canary Islands', 261 *CEPS Working Document* (2007), p. 10.

²⁹ See for example Frontex's connection to ICONet, a network for the exchange of information on migration: Commission, Communication, *policy priorities in the fight against illegal immigration of third-country nationals*, COM(2006) 402 final, pt. 50; Commission, Communication, *Reinforcing the management of the European Union's southern maritime borders*, COM(2006) 733 final, pt. 15.

³⁰ The aims of *some* joint operations are listed (one sentence generally) on the Frontex website (http://www.frontex.europa.eu/examples_of_accomplished_operations/go:flt/): the quotes are the objectives of respectively the EPN-HERA 2009, JUPITER 2009, ZEUS 2009 and GOOD WILL 2009 joint operations. See for the last quote on HERA: Frontex News Release, *A Sequel of Operation HERA just starting*, 15 February 2007.

³¹ For example in the HERA JO.

³² See Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2010, L111/20. The Decision is however challenged before the CJEU by the EP on grounds of exceeding the implementing powers under Art. 12(5) SBC, see: Action brought on 14 July – European Parliament v Council of the European Union, Case C-355/10, OJ 2010, C246/58. The case is pending.

³³ Art. 1, Regulation (EC) 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ 2007, L199/30; Frontex Press Release, *Frontex deploys rapid border teams to Greece*, 25 October 2010.

Thirdly, this means that the Agency has also attempted to build a network of relations with third States' authorities. Frontex currently has 14 agreements in place with third States' authorities, the latest being with Cape Verde, and with international organisations such as the UNHCR.³⁴ Negotiations with eight more third countries are underway, with Tunisia probably added to this list in the foreseeable future.³⁵ The operational aspects of cooperation with third States cover '*the areas of information exchange, risk analysis, training, research & development, joint operations and pilot projects*'.³⁶ Frontex presents the HERA JO as a very successful instance where the involvement of the Mauritanian and Senegalese authorities in the JO has led to '*reducing the numbers of migrants*'.³⁷ This instance does however also show that Frontex depends on Member States' bilateral agreements for this involvement: in the HERA JO it was based upon Spanish agreements with the two African States.³⁸

3.3.3. *The HERMES JO*

The HERMES JO was launched on the 20th of February 2011, upon an official request made to that effect by the Italian authorities 5 days before and upon tailored risk analysis. The HERMES JO was not a new idea; it was already planned by Frontex to commence in June 2011. Confronted with the sudden influx however, it was decided to start the JO earlier. Initially, the operation was supposed to last until the end of March.³⁹ It has now been extended to last until the end of August 2011.⁴⁰ It was thus not launched as a RABIT but as a 'regular' JO with Italy being the Host Member State.

The HERMES JO is envisaged to have five basic dimensions: 1) surveillance and interception, 2) screening of arrived migrants, 3) risk analysis, 4) assisting in return and 5) involvement of Europol.

The first activity aims at '*detecting and preventing illegitimate border crossings to the Pelagic Islands, Sicily and the Italian mainland*'.⁴¹ It is not clear where exactly this surveillance takes place; whether it is deep into international waters, or mainly at the edges of Italian territorial waters. The extent to which Member States contribute to the JO is not altogether clear either. The JO works solely with Italian vessels and crew; two patrol vessels are employed. Italy also participates with an aircraft, potentially supported by six additional aircraft from other Member States.⁴² The extent to which all committed resources are

³⁴ Frontex press release, *Frontex signs Working Arrangement with Cape Verde*, 17 January 2011.

³⁵ These eight countries are Turkey, Libya, Morocco, Senegal, Mauritania, Egypt, Brazil, and Nigeria. An interviewed Commission official indicated that a negotiating mandate for Tunisia will soon be given to the Frontex Executive Director.

³⁶ Frontex, *External Relations*, http://frontex.europa.eu/external_relations/.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Frontex Press Release, *HERMES 2011 starts tomorrow in Lampedusa*, 19 February 2011.

⁴⁰ Frontex Press Release, *HERMES operation extended*, 24 March 2011.

⁴¹ Frontex Press Release, *HERMES 2011 running*, 21 February 2011, p. 2.

⁴² *Ibid.*: these Member States are: France (1), Germany (2), the Netherlands (1), Portugal (1) and Spain (1).

really *deployed* is however not clear.⁴³ Furthermore, the exact activities and arrangements of the operation are unclear. For example, the action taken by the Italian authorities upon detection are not altogether clear. According to the Commissioner for Home Affairs, Ms Malmström, speaking in the context of the HERMES JO, push-back practices are prohibited by European norms.⁴⁴ That would mean that if vessels are detected in the high seas, they would have to be escorted to Italy and not be pushed back to Tunisia. However, it is reported that on the basis of the bilateral agreement between Italy and Tunisia, boats have been blocked by Tunisian authorities from leaving its territory.⁴⁵ It is not clear whether the HERMES JO follows the guidelines for search and rescue and disembarkation as laid down in the contested Council Decision of 2010.⁴⁶

The task of the officers in the second activity *'will be to gather information necessary needed for analysis, to make assumptions concerning migrants' nationalities, and to enable early detection and prevention of possible criminal activities at the EU external borders'*.⁴⁷ This task is carried out by 20 Frontex guest officers as well as by experts sent by the Member States (around 45) in the HERMES context. Again, the exact amount of deployed personnel is unknown.⁴⁸ What is furthermore not clear is the way in which exactly they operate. What exactly does it mean that the experts make 'assumptions' and what status does these assumptions have in the remainder of a possible asylum procedure? According to Frontex, *'these interviewing activities have confirmed that the vast majority of irregular migrants that have arrived to date have been Tunisian, mostly young adult males. Approximately 20% of them have indicated an intention to apply for international protection.'*⁴⁹ This clearly indicates that the interviews deal with issues of international protection; the relation to the Italian asylum procedure – the proper place to establish the need for international protection – is not clear.

The third activity consists of a constant gathering of information on the expected flows of migrants into the operational area of HERMES. As this process is secret, it is not clear what the sources are and what the employed methodology is.

⁴³ The Frontex Press Releases do not match on this point. Frontex Press Release, *Frontex guest officers sent to work in Italy*, 25 February 2011 lists 13 contributing EU Member States including their precise *available* contributions. Frontex Press Release, *Update to Joint Operation HERMES 2011*, 11 March 2011, however mentions that 14 EU Member States and Schengen Associated Countries (namely Switzerland) have committed resources, with only eight of those 14 being active. Thus, it is not clear which country is deploying; the only countries for which this is sure are Italy, Portugal, the Netherlands and Malta. See for confirmation of Dutch contribution: Frontex Press Release, *HERMES operation extended*, 24 March 2011.

⁴⁴ Interview with Ms Malmström published by Italian press agency 'il Velino' on the 19 February 2011, see: <http://www.ilvelino.it/articolo.php?Id=1300482>. For the English translation of the concerned excerpt: *Migrants at Sea, Frontex Operation Hermes to Begin on Sunday, 20 Feb.–Push-Back Practice Prohibited*, <http://migrantsatsea.wordpress.com/2011/02/19/frontex-operation-hermes-to-begin-on-sunday-20-feb-%E2%80%93push-back-practice-prohibited/>

⁴⁵ <http://www.timesofmalta.com/articles/view/20110507/world/tunisia-blocks-first-migrant-boat-under-new-deal-italy.364097>

⁴⁶ Council Decision 2010/252/EU, *supra*.

⁴⁷ Frontex Press Release, 19 February 2011, *supra*, p. 1.

⁴⁸ Frontex Press Release, 25 February 2011, *supra* mentions the amount of available experts but it is not altogether clear to what extent they are deployed for this activity.

⁴⁹ Frontex Press Release, 11 March 2011, *supra*, p. 2.

The extent to which the fourth activity is actually handled by the HERMES JO is also unclear. For two reasons it seems increasingly unlikely that Frontex will play a major role in the return of migrants to their country of origin. The first reason is that Italy has concluded bilateral readmission agreements with the regimes in North Africa after the revolutions. This leads to the situation that Italy itself returns migrants to Tunisia (those arrived after April 5th) and potentially also to Libya after signing an agreement with the Libyan Transitional Council.⁵⁰ Reportedly, the Frontex HERMES JO does not participate in return in this bilateral context.⁵¹ Secondly, Italy has ‘solved’ some of the situation – at least for itself – by giving out the residence permits on humanitarian grounds to many of the immigrants; hence only a limited amount of people remain to be returned from Italy.⁵²

Lastly, Europol is also involved in the HERMES JO. Its main activities are to deal with criminal intelligence, but again, the exact extent of their activity is unclear.⁵³

3.3.4. Solidarity questioned; a response of restriction and security

One of the official principles underlying EU’s migration policy is solidarity.⁵⁴ Frontex is also seen as a central tool for solidarity for those Member States at the external borders.⁵⁵ This section assesses to what extent the HERMES JO was a sign of solidarity, both internally (between Member States) and externally (with third States).

Although the HERMES JO was promoted widely as a significant way of helping Italy deal with the ‘crisis’ at its borders, the impact of the operation can be questioned. First of all, at sea the operation remained a completely Italian affair; only Italian vessels participated. Although, as mentioned above, the Member States did make available certain aircraft, it is not sure to what extent they were actually used. Also, the deployment of roughly 20 Frontex officials and less than 45 Member States’ experts doing interviews at reception facilities cannot have a major impact if more than 40,000 migrants arrive. Therefore, in the media, Italy has continuously demanded more solidarity from other Member States. Italy’s Interior Minister publicly described his unhappiness with Frontex’ limited way of working and even went as far to question the value of Italy’s EU membership.⁵⁶ However, looking underneath the

⁵⁰ See: <http://www.eubusiness.com/news-eu/immigration-tunisia.9ja/> and <http://migrantsatsea.wordpress.com/2011/06/17/italy-and-libyan-national-transitional-council-sign-migration-agreement/>

⁵¹ Confirmed by a Commission interview.

⁵² See section 2.

⁵³ Frontex Press Release, 21 February 2011, *supra*, p. 2.

⁵⁴ Commission, Communication, *the global approach to migration one year on: towards a comprehensive European migration policy*, COM(2006) 735 final, p. 4.

⁵⁵ Commission, Staff Working Document, *Impact Assessment accompanying the proposal for Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing Frontex*, SEC(2010) 149, 24 February 2010, p. 11.

⁵⁶ <http://www.timesofmalta.com/articles/view/20110512/local/maroni-slams-frontex-inaction.365026> and

political rhetoric, it seemed that the capacity of the HERMES JO was exactly that what Italy had requested.⁵⁷ So, it can therefore be doubted whether real solidarity was desired by the Italian government.

On the issue of international solidarity, I believe that the EU has failed to act in the spirit of the EU Treaty. Where it refers to the constitutional principles underlying EU external action, such as democracy, it must be concluded that this sort of policy reactions – an EU push against the arrival of migrants – does not send the right message abroad of solidarity with people fighting for those EU values.⁵⁸ Even more, when a war zone – like Libya – is concerned, it is against those values to attempt to keep people in that war zone by patrolling the seas. Therefore, at a time when it was in the vital interest of the EU to show solidarity with the democracy movement in North Africa, it was more concerned with its border security. Even though the EU did make available funding for the relevant third States, this money was intended to cater for a local reception of refugees. As showed in section 2, the amount of individuals taken in by the EU was only a small proportion of total migrant flow. In that light it is even more surprising that Europe centred its response so much on restrictive measures for border security.

3.3.5. Rule of law and fundamental rights: legality and accountability

The EU Treaties leave no doubt about the constitutional status of the rule of law. It is a ‘*universal value*’ on which the ‘*Union is founded*’ and which to which the Member States are ‘*confirming their attachment*’.⁵⁹ This internal and identity-linked value is however not bound to remain within the EU solely. It is also an overarching value to export in EU external action: ‘*the Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: (...) the rule of law*’.⁶⁰ The CJEU’s case law on the rule of law includes formal principles such as judicial scrutiny, legal certainty, legitimate expectation and proportionality but links this clearly to the protection of fundamental rights.⁶¹ Against the background of fundamental rights protection, two aspects of the rule of law should specifically be addressed: legality and accountability. The latter contains scrutiny of action, including judicial and parliamentary scrutiny, whereas the former embodies the basic requirement that such action should be in accordance with law.

<http://www.timesofmalta.com/articles/view/20110411/local/italy-has-been-left-on-its-own-angry-maroni-complains.359394/comments:2>

⁵⁷ Frontex News Release, 23 March 2011, *supra*; this was also confirmed during an interview with a Commission official.

⁵⁸ The principle of solidarity is explicitly referred to in relation to external action; see Art. 3(5) and 21(1) TEU.

⁵⁹ Preamble to the TEU and Art. 2 TEU.

⁶⁰ Art. 21 TEU.

⁶¹ ECJ Case 294/83, *Les Verts v Parliament* [1986] ECR 1339, paras. 38-39. See also: Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008], para. 316. See: L. Pech, ‘the Rule of Law as a Constitutional Principle of the European Union’, *Jean Monnet Working Paper 04/09*, 2009.

As a preliminary point it should be noted that the unclear and undisclosed ways of working in the HERMES JO prevent any full accountability of its actions, or the precise establishment of the legality of those actions. To illustrate, since the deployment of the HERMES JO, Frontex has not disclosed details on *where exactly* the involved border guards and equipment operate (e.g.: in which jurisdiction?), in which *specific activities* they engage (e.g.: return in the context of the Italian-Tunisian readmission agreement?), which *detailed procedures* have been followed in the reception of the immigrants (e.g.: where they all informed of the possibility to obtain international protection?) and what the effect is of the work of the Frontex debriefing and screening officers for immigrants' asylum applications.⁶²

If we look at the legality of the HERMES JO, it should be clear to what extent the practices of the operation find a basis in European or international law. As the Schengen Border Code currently stands, there is no possibility under EU law to carry out *extra-territorial* border control.⁶³ An adequate legal basis for such action is also needed in international law. For activities on the high seas, the law of the sea applies, with its principles of freedom of the high seas and right of navigation for the flag State.⁶⁴ This is not the place to discuss in detail the different justifications under maritime law to stop, search and divert boats in international waters, but those options are limited. 'Search and rescue' or 'absence of nationality', sometimes invoked by Frontex,⁶⁵ are indeed relevant grounds but cannot serve, in my opinion, *a priori* to justify a general and proactive policy of intercepting vessels even if they themselves do not indicate a state of distress.⁶⁶ Neither can they serve to justify push-back practices.⁶⁷ These activities target *inter alia* vulnerable groups which are protected under international and European law; obligations of *inter alia non-refoulement* and the right to asylum should thus be safeguarded, also in an extra-territorial setting.⁶⁸ Especially case law by the European Court of Human Rights (ECtHR) has affirmed

⁶² Frontex has issued a number of press releases on the HERMES JO, but left these issued unaddressed. See: http://frontex.europa.eu/hermes_2011_extended/news_releases/page1.html.

⁶³ An amendment to that effect has however been proposed: Art. 1.1.4.3 of amended Annex VI, Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement, COM(2011) 118 final.

⁶⁴ See Arts. 87 and 90, UNCLOS (United Nations Convention on the Law of the Sea).

⁶⁵ Frontex Press Kit, *Background on operations*, p. 1: 'Joint operations coordinated by Frontex represent Europe's biggest search and rescue operation.' Search and rescue is an obligation under international law; see mostly the SAR (Search and Rescue), UNCLOS (United Nations Convention on the Law of the Sea) and the SOLAS (Safety of Life at Sea) Conventions.

⁶⁶ Art. 110(1.d), UNCLOS authorizes the visiting of a ship on the basis of suspicion that the ship is without nationality. Art. 98 UNCLOS, and the abovementioned additional conventions, lay down a 'search and rescue' obligation. These Articles can indeed be legal bases for intercepting a vessel. However, these legal bases must not become a justification to stop any boat for which there is a 'suspicion' that migrants are on board. Boarding without any of these legal bases available is thus problematic, although apparently vessels have been boarded without any clear distress situation, see: E. Papastavridis, "Fortress Europe" and Frontex: within or without international law?, *Nordic Journal of International Law* 79 (2010), pp. 75-111, p. 86, fn. 56.

⁶⁷ In the UNCLOS there is no legal basis for the coercive push-back of vessels to third States.

⁶⁸ The *non-refoulement* obligation is derived from Art. 33(1), Geneva Refugee Convention, but also from a number of additional human rights conventions such as Art. 3(1), UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), Arts. 6, 7, International Covenant on Civil and Political Rights (ICCPR). See also on maritime, refugee and human rights law in extra-territorial operations: M. den Heijer, 'Europe beyond its borders:

the importance of *non-refoulement*.⁶⁹ After the Lisbon Treaty, the *non-refoulement* norm is now also firmly rooted in EU primary law.⁷⁰ Also, the right to leave one's country is relevant in extra-territorial border control.⁷¹

In principle, accountability in its basic forms should contain judicial and parliamentary scrutiny. As far as judicial redress for those targeted individuals is concerned, there are two additional challenges *beyond* the regular difficulties of bringing a case before a court in a Member State or before an EU court. Firstly, the most telling example would be if people would be pushed back or returned in the HERMES JO. If their fundamental rights are infringed upon during those operations, and they want to challenge this action before a European court, they are back in the country of origin or transit. From there, also considering their disadvantaged financial position, it is complicated, if not impossible, to start legal proceedings before European courts. Secondly, it is exactly due to the unclear way of working and the fuzzy sharing of responsibility between Frontex and the participating Member States, that it is hard to bring evidence and establish liability. From the viewpoint of parliamentary scrutiny the activities are hardly controllable by the EP due to the lack of transparency in these areas.⁷² Moreover, the EP has currently limited avenues to scrutinise Frontex; its budgetary power is crucial in this respect.

3.4. *The medium-term response: engaging the third States.*

From April onwards, the Commission proposed an additional set of measures for the further medium term. In the JHA Council of 11-12 April, these proposals were followed.⁷³

Firstly, the Commission highlights the resettlement of individuals from Libyan territory, such as Somali nationals who are potentially in grave danger of persecution.⁷⁴ However, as it depends on Member States

refugee and human rights protection in extraterritorial immigration control', in: B. Ryan, V. Mitsilegas, *Extraterritorial immigration control* (Leiden, Martinus Nijhoff 2010), pp. 169-198; R. Weinzierl, U. Lisson, *Border Management and Human Rights, A Study of EU Law and the Law of the Sea* (Berlin, German Institute for Human Rights 2007); A. Fischer-Lescano, T. Löhr, T. Tohidipur, 'Border controls at sea: requirements under international human rights and refugee law', *International Journal of Refugee Law* (2009); M. Cremona, J.J. Rijpma, 'The Extra-territorialisation of EU Migration Policies and the Rule of Law', 1 *EUI Working Paper Law* (2007).

⁶⁹ See e.g.: ECtHR 11 July 2000, Application No. 40035/98, *Jabari v Turkey*, para. 38.

⁷⁰ See Art. 78(1), TFEU, Art. 19(2), Charter of Fundamental Rights of the European Union, OJ 2000 C 364/20. In secondary law this was already acknowledged, see Art. 3(b), Regulation (EC) No 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Border Code), OJ 2006 L 105/01; Art. 21, Council Directive 2004/83/EC of 29 April 2004 on 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 (Qualification Directive), OJ 2004 L304/12.

⁷¹ Art. 12(2) ICCPR. This 'right to leave' is also laid down in Art. 2, Protocol 4, ECHR and can be derived from Art. 5, Convention on the Elimination of Racial Discrimination. See furthermore on the right to leave: G. Cornelisse, 'European vessels, African territorial waters and 'illegal emigrants': the right to leave and the principle of (il)legality in a global regime of mobility', *Challenge Working Paper*, December 2008.

⁷² See Carrera (2010), *supra*, pp. 26-27.

⁷³ Council, *Conclusions on the management of migration from the Southern Neighbourhood*, 11-12 April 2011.

to accept individuals, the Commission has little more to offer than financial assistance. Following pledging conferences, the EU countries and Schengen associated countries combined have offered around 700 places for immigrants from North Africa and around 300 for those currently in Malta.⁷⁵

Secondly, and more on the medium term, the launching of a ‘joint EU-Tunisia operational project’ is foreseen, which aims at

*‘aimed at strengthening the capacity of the Tunisian authorities to control their borders, to fight against the smuggling of migrants and trafficking in human beings, to facilitate the return and social and professional reintegration of returnees, to support access to legal migration channels and to treat migrants entering their territory in accordance with international standards, including by offering asylum to those in need of international protection. In parallel to this project, to also assist the local authorities of the EU Member States most concerned by this issue to address the immediate repercussions of the migratory flows originating from Tunisia on the local economy and infrastructure’*⁷⁶

In line with this project specifically aimed at Tunisia, the Commission also foresees a wider RPP (Regional Protection Programme) with the aim of capacity-building in refugee assistance and resettlement. This programme is meant to include Egypt, Libya and Tunisia.⁷⁷

3.5. *The long-term response: towards a new partnership with North Africa?*

Apart from these short and medium term measures, the Commission also recently came forward with a set of measures aimed at finding a more structural answer. The European Council will deal with this approach in its 24th of June meeting. This section gives only a short overview of the proposed measures.

The broader push of the EU plan is aimed at fighting the ‘*root causes of migration at a structural level*’ and is therefore very much centred on economic growth and employment possibilities in North African countries. This has obviously strong external action aspects; the High Representative (HR) and her External Action Service (EAS) are thus also closely aligned.⁷⁸ Another important aspect of the long-term approach is that migration and mobility should take place ‘*through regular processes and (...) in an orderly and efficient manner*’.⁷⁹ This also entails opportunities for legal labour migration on the basis of Member States’ needs, in light of the demographic change in the EU.⁸⁰ An important tool to achieve such goals is, according to the Commission, the Mobility Partnership. The overall framework of this renewed

⁷⁴ Commission, *the European Commission’s response to the migratory flows from North Africa*, 8 April 2011.

⁷⁵ Commission, *Statement by Cecilia Malmström, EU Commissioner in charge of Home Affairs, on the results of the Ministerial Pledging Conference 12 May*, 13 May 2011.

⁷⁶ COM(2011) 292 final, *supra*, p. 5.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p. 7; See also: Commission, HR, Joint Communication, 8 March 2011.

⁷⁹ *Ibid.*, p. 7.

⁸⁰ *Ibid.*

EU-North African cooperation is coined '*the dialogue for migration, mobility and security with the southern Mediterranean countries*'.⁸¹

More in detail the picture gets fuzzier, again also because the idea is in its infant stage. First of all, there seems to be a strong *incentive-based conditionality regime* in place. It is only on a country-by-country approach that mobility will be offered *after* those third States have showed '*their willingness and capability to make progress especially in those areas that are of importance to the EU*'.⁸² These 'areas' would *inter alia* consist of the conclusion of readmission agreements, working arrangements with Frontex and the participation in joint surveillance in the Mediterranean Sea, including within the EUROSUR context.⁸³ Within the dialogue, the main incentive for the North African States is mobility; and more specifically labour, study and research opportunities in the EU. According to the Commission, it could eventually lead to visa facilitation and even to visa liberalisation.⁸⁴ This give-and-take policy should further be flanked with capacity-building measures in the third States.⁸⁵

Certainly, these first contours of EU's new strategy try to deal structurally with the question of migration from North Africa. However, firstly, the extent to which the EU can obtain what it wants – greater third State cooperation with its border and immigration policy – depends heavily on its credibility. This is closely linked to whether it can credibly offer real labour mobility for North Africa's unemployed youth. As it is fully dependent on the Member States for such commitments,⁸⁶ this remains to be seen. If the dialogue would be further embedded in the overall EU's external action towards North Africa, including trade aspects with access to EU markets, the leverage for the EU would be much larger. Secondly, this policy of further *extra-territorialising* its immigration policy – by putting emphasis on pre-border surveillance and pre-travel approval – is sensitive to fundamental rights challenges. In light of the legally binding obligations on the EU to ensure access to asylum and *non-refoulement*, it should guarantee opportunities for those in need of international protection to travel the EU. Hence, the possible easing of travel restrictions for North Africans should go beyond the purpose of labour migration.

4. Conclusions

This paper shows the evolution of EU's response to the migratory consequences of the North African popular uprisings and conflicts. From a constitutional perspective it is fully legitimate to ask to what extent this response is in line with the EU's core values, as worded in the TEU. These are values on which the EU is built and which it is called upon to promote in the wider world.⁸⁷ The legitimacy of this scrutiny

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 8.

⁸³ *Ibid.*, p. 11.

⁸⁴ *Ibid.*, pp. 10, 12.

⁸⁵ *Ibid.*, pp. 9-10.

⁸⁶ First of all, such labour mobility will be based upon Member States' need in their labour markets. Secondly, for visa facilitation or liberalization the Member States have to approve this in the Council.

⁸⁷ See Arts. 2, 3(1, 5) and 21 TEU.

is furthermore emboldened since exactly those values of fundamental rights, the rule of law and solidarity are the proclaimed ideals of various democracy movements in North African countries.

In light of that scrutiny it is disappointing to see that one of the EU's initial responses was marked by restrictive and security-driven border control. Especially in light of the fact that it was not a immigrant flow of extraordinary proportion, the reflex of the EU to fall back on a Frontex JO as first response is exemplary for a Europe increasingly 'securitising' and 'criminalising' human mobility.⁸⁸ This is even more so if seen in light of international solidarity; the EU has offered refuge to only a minor portion of all individuals on the move to flee violence and conflict. It is in the politicised European debate on migration and borders that the EU chose for a practice which sits uncomfortably with requirements stemming from the rule of law and fundamental rights. The unclear operation of the HERMES JO renders difficult the allocation of liability for potential fundamental rights breaches and impedes a strong scrutiny by the EP. Furthermore, the legality of the interception practices at sea can be seriously questioned both from European and international law.

In the long-term response the EU seems to intend to use a strong *incentive-based conditionality regime* to obtain cooperation from North African States with its further agenda of pre-border surveillance and pre-travel authorisation. The success of this approach, from an EU perspective, depends highly on the extent to which it can offer credible incentives. In that approach, Frontex is also envisaged to play an important role. It is interesting that the EU wants to grant opportunities to North Africans to study, work and research in Europe. This could indeed – in line with the 'migration for development' thesis – generate the much needed economic growth in North Africa.⁸⁹ The employment thereby generated could indeed kick-start employment opportunities at home. However, there should not be a mere utilitarian motive behind this move; it should also remain possible for those in need of international protection to travel to the EU and access an asylum procedure.

A last point is the impact of EU's response on its wider credibility as an external actor. If it can prove that it is truly pursuing solidarity across the Mediterranean with respect for fundamental rights and the rule of law, it can gain a lot of credits amongst the local population on the southern side. In the opposite case the EU could lose much of its credibility of being an actor promoting its values abroad.⁹⁰

⁸⁸ See Carrera (2010), *supra*, p. 10; D. Bigo, "Frontier Controls in the European Union: Who is in Control?", in D. Bigo and E. Guild (eds), *Controlling Frontiers: Free Movement into and within Europe* (Farnham, Ashgate Publishing 2005) pp. 49-99; J. Huysmans, *The politics of insecurity: security, migration and asylum in the EU* (London, Routledge 2006); T. Faist, 'The migration-security nexus: international migration and security before and after 9/11', Malmö University/IMER, *Willy Brandt working papers in international migration and ethnic relations*, 4(3), 2004.

⁸⁹ N.N. Sørensen et al., 'The migration-development nexus: evidence and policy options', *International Migration*, 40(5), 2002, pp. 49-71; R. Kunz & S. Lavenex, 'The Migration-Development Nexus in EU External Relations', *Journal of European Integration*, 30(3), 2008, pp. 439-457; M. Chou, *EU and the migration-development nexus: what prospects for EU-wide policies?*, University of Oxford COMPAS Working Paper 37, 2006.

⁹⁰ See: I. Manners, 'Normative power Europe: a contradiction in terms?', 40 *Journal of Common Market Studies*, Vol. 2, pp. 235-258.

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