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EU asylum (mis)management: Fortress or House of Cards?

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Abstract

The goal of this paper is to investigate the *EU asylum (mis)management*, by tackling this policy area and focusing on the underlying paradigms and political choices. The paper wants to critically investigate the “*original sins*” of the EU responses towards incoming migrations. Moving from the tenets of the *Fortress Europe* discourse, the paper proposes an alternative metaphor, showing that the EU migration management can be better represented as a “*house of cards*”, i.e. an unstable and weak construction that can easily fall, undermined by its own myopic response to a transnational structural phenomenon wrongly framed as an emergency.

Keywords: asylum, crisis, EU, responsibility to protect

1. Introduction

This paper seeks to understand why the 2013 Lampedusa migrant shipwreck¹ represents a turning point of the European Union asylum regime showing the image of the *EU asylum (mis)management*, by tackling this policy area and focusing on the underlying paradigms and political choices.

The paper wants to critically investigate the “*original sins*” of the EU responses towards incoming migrations, showing the limits of its approach and its evolutionary path from the 1970s onward, facing in the last years, mainly after the *Arab uprisings*, massive *mixed-fluxes* of migrants and refugees willing to reach the wealthier and safer European countries. The choice of closing the borders, without viable legal accesses, made *irregularity* the intrinsic feature of Mediterranean migration regimes (Wolff & Hadj-Abdou, 2017), following the *myth of securitization* (Waever, 2006) and *fencing Europe* (Attinà, 2016).

This securitarian obsession and the externalization of migration control was depicted by Geddes (2009) with the lucky expression *Fortress Europe*. It will be proposed here an alternative metaphor, showing that the EU migration management can be better represented as a “*house of cards*”, an unstable and weak construction that can easily fall, undermined by its own myopic response to a transnational, multifaceted, structural phenomenon, constantly and wrongly framed as an emergency, shifting the burden and delocalizing the responsibilities.

¹ 366 migrants died few kilometres before the Italian island of Lampedusa. This was not unfortunately the first and only hecatomb in the Mediterranean Sea, but the effect on the international community was devastating. The largest maritime disaster after WWII will be on the 19 April 2015, when over 750 migrants died near Libyan coasts in just a shipwreck and in the month casualties amounted to 1240 (“the black April”, Panebianco, 2016: 85).

See UNHCR site for further data: <https://data2.unhcr.org/en/documents/download/53632>.

The focus will then move on the opposite paradigm, the *human security*, paying attention on the responsibility-duty to protect as a tool to counter-frame the crisis and change the response, affronting also the *solidarity* and *sharing* principles in the Common European Asylum System, hindered by the *Visegrad* bloc and the centre-eastern opposition to the burden/responsibility sharing mechanisms of *relocation* and *resettlement*.

Finally, there will be space to discuss the latest evolutions, as the European Commission's Communication on the implementation of the European Agenda on Migration and the attempt to reform the *Dublin principle of the first country*, showing the need for a necessary and urgent change of response, towards a new comprehensive and global approach on migrations.

2. The “original sins” of the EU asylum regime

The mainstream *crisis narrative* established especially from the 2013 in the public debate about migrants and refugees has surely distorted the nature and the vision on people movements in the Mediterranean region. The Europeans are pretty used to the almost unlimited right of (intra-EU) mobility, granted to all the EU citizens and the regularly settled third nationals in the Schengen Area. However, we forget or ignore that movements have never been so restricted for the people of the southern rim of the Mediterranean, explaining partially the origin of the irregularity.

If we go back to the post-WWII, *guest workers* from the MENA countries were allowed to enter in the European labour market as temporary labour force intended to return to their countries of origin (de Haas, 2007). In the 1970s, with the 1973 oil crisis and the economic stagnation, the decreased demand of

job led to restrictive European immigration control policies. Even the destination of migrants changed, with the southern European countries as Italy, Spain and Portugal experiencing positive migration balance for their first time. To sustain their demand and the economic growth, southern European economies relied on the irregular cheap foreign labour, triggering this new kind of emigration and setting *irregularity as an intrinsic feature*. From the 1990s to the 2000s, European countries' approach on migrations changed furtherly for diverse reasons, as the rising global terrorism, the 2008 great economic recession and the 2011 Arab uprisings, closing completely the doors and securitizing immigration. With this process of securitization, the issue is framed (and faced) as a security issue (Geddes, 2009; 2017). The consequent increased border militarization drove to the deployment of military (member states' navies and EU operations) and semi-military police forces (member states' coast guards and FRONTEX operations), extending the range of action and setting bilateral agreements with non-EU third countries of origin/transit of migrants to block the flows (EU-Turkey² and Italy-Libya³). As we can see, this response contains original imbalances and ambiguities, with the resulting mismanagement of the so-called mixed-flows: "coexistence of asylum seekers, vulnerable categories as unaccompanied minors and trafficked women and economic migrants in the irregular inflows" (Pastore & Henry, 2016: 46). The imbalances concerns not only the different statuses and the responses, but also the responsibility of the different EU member states, with the north/south

² 2016 EU-Turkey deal to stop irregular arrivals from the Eastern route, returning the migrants to Turkey in change of Syrian refugees with the criteria of 1 per 1.

³ 2017 Italy – Al-Sarraj's Libya Memorandum of Understanding to contrast illegal immigration.

In 2008 there was already a precedent, the Treaty of Friendship signed by Italian PM Berlusconi and the former Libyan Rais Gaddafi.

divide and the Dublin principle affecting the frontline states⁴ (Italy, Greece, Hungary, Spain).

Considering the process that led to the establishment of the Common European Asylum System (CEAS), set with the European Council of Tampere in 1999, the realist approach on the international regimes theory focuses on power relations among states as the cause of the *burden shifting* on southern and peripheral states, fostering asymmetrical efforts from the different member states (Pastore & Henry, 2016). The Dublin principle, born to avoid the “asylum shopping” and the *refugees in orbit*, and the European migration regime thus reflect the strategic priorities of some member states, unequally distributing functioning and reception costs among EU countries. This inevitably affects the quality of the overloaded countries’ asylum systems, implying significant differences among the protections acknowledged by the member states and hampering the effectiveness and the real uniformity of the CEAS.

3. EU facing the crisis: “fencing Europe”

On 13 October 2013, after the above mentioned shipwreck, the Italian Prime Minister Enrico Letta launched the Italian unilateral operation *Mare Nostrum* (MN) in the central Mediterranean to stop the massacres and save human lives with the *Search & Rescue Operations*. Several and strong internal and external oppositions blamed Italy to have thus contributed to the arrival of illegal migrants, considering MN as a *pull factor* (Panebianco, 2016). Before analysing this turning point and the aftermath, it is important to know the events and the

⁴ The Dublin regime was established by the Dublin Convention of 1990, adopted as regulation in 2003 and modified in 2013. It introduced “the principle of the first country of entry”, the only one responsible for the applications of asylum.

international pressure behind this paradigm shift. In the pre-2013 context, the EU-accepted and common response to the irregular migration was the *refoulement*, a practice consisting in rejecting the ships or boats irregularly entering territorial waters, denying the potential refugees the possibility to ask for protection.

The European Court of Human Rights condemned Italy in 2012⁵ in a famous sentence, remembering and enforcing the international duty of *non-refoulement*. After MN the Italian government led by the new Prime Minister Matteo Renzi pressed to put the migratory issue on the European Agenda. The Frontex Operation Triton and the EU Navfor MED⁶ Operation Sophia replaced MN, reducing the range of action and the resources of MN, with a less comprehensive approach focused more on the control of the borders and the fight against smugglers rather than addressing the original causes of the crisis⁷. In 2014, about 170.000 people reached Italy (UNHCR data), while the 2015 has seen the explosion of the Eastern route, with more than 800.000 people reaching Greece (about 1 million in all the EU). Thousands of people died and still die trying to reach Europe, with the central Mediterranean route as the most lethal in the world⁸.

From the 2015 onward, the EU response can be named *Fencing Europe*, with the closure of the Eastern route (2016 EU-Turkey agreement and the famous fence between Hungary and Serbia), the closure of the central route (2017 Italy-Libya Memorandum) and the externalization of the border control, with the critical

⁵ Hirsi Jamaa and others vs. Italy, 2012, European Court of Human Rights, concerning Somali people rejected from Italian territorial waters before having the chance to ask for international protection.

⁶ European Union Naval Force Mediterranean, a military operation with the aim of contrasting the migrant smugglers.

⁷ Since 01/02/2018, FRONTEX Operation Themis has been launched following the same path.

⁸ About 4.000 migrants died in 2015, more than 2.900 in the central route (Panebianco, 2016: 76).

human rights abuses in the detention centres for migrants in Libya, a state that did not subscribe the Geneva Convention on refugees of 1951.

Focusing on the underlying paradigm behind migration management and the *humanitarianism/security clash*, there has been a tendency of framing “humanitarianism as an act of grace” rather than acknowledging the enforcement of human rights (Cuttitta, 2017). This is understandable by the process of victimization of migrants, saved with paternalistic gestures, and the prevailing form of humanitarianism materializing in policies and practices increasing the asymmetry between those giving a helping hand and the beneficiaries, preventing the latter to enjoy their rights, forcing them to remain in Africa, with the dominant concern on the right to life, non-recognizing the others. This strongly critical view see “Mare Nostrum as an instrumental role in the (re)appropriation of the task of saving lives by state authorities (SAR operations), confirming the sovereign power” (Cuttitta, 2017: 15), framed and aimed at cooperating to delocalize (rather than to eliminate) inhumanity. Humanitarianism and securitization, usually considered as alternatives, in this framework are rather overlapped, supporting each other in enforcing and delocalizing the borders.

4. The challenges to the principles of solidarity

Since the creation of the Area of Freedom, Security and Justice (AFSJ) with the Treaty of Amsterdam, EU policies on asylum have emphasized cooperation and responsibility sharing as a means to achieve the objectives in that policy domain, developing a CEAS based on solidarity among states (Karageourgiu, 2016). The principle of solidarity and fair distribution of responsibilities is stated in the Article 80 of the Treaty on the Functioning of the European Union and CEAS

policies are dictated by the need of building an asylum system based on common standards of protection (Tampere Conclusions, 1999). This comprehends practices of sharing norms, practices, financial resources, expertise and reallocating people.

Solidarity has two dimensions: *the interstate dimension*, related to the allocation of responsibility between member states and *the state-refugee dimension*, related to the protection acknowledged to individuals in need based on the international and European refugee regime. Interstate solidarity can be expressed as the assistance covering financial costs (*burden sharing*) or assistance on a procedural and administrative level (*responsibility sharing*). Despite the existence of the CEAS and its directives concerning the qualifications, the procedures and the reception, the lack of harmonisation did not lead to standardized asylum systems of the member states, and, in addition to the mentioned Dublin principle, a refugee cannot choose its country of destination to seek protection, so the uneven distribution of responsibilities over member states hinders the sharing of a common policy concerning asylum (interstate solidarity), with critical consequences on individuals (state-refugee solidarity).

The only effective and tangible forms of interstate assistance in the EU have been the financial burden sharing, through the European Refugee Fund (ERF), then replaced by the Asylum and Migration Fund (AMIF), and the expertise sharing through the enhancement of EASO capacities and resources. EASO has been designed to improve the quality of member states' asylum systems, cooperating with other EU agencies and bodies, providing scientific and technical assistance to member states facing particular refugees' pressures. In the field of external border management, FRONTEX operations are equally important and cooperation-based (Karageorgiu, 2016).

If financial burden sharing proved to be legitimate and supported by the member states, the *responsibility sharing* (sharing asylum seekers) has been strongly opposed by the major part, refusing the compulsory requests of *relocation* and defending the voluntary nature of this free and sovereign decision. The protagonists of this oppositional bloc are the *Visegrad Group countries*, the Czech Republic, Hungary, Poland and Slovakia, far from being always homogeneous but uniformly against the idea of compulsory relocation within EU of persons applying for international protection (Nagy, 2017).

The 2015 was the year with the biggest number of arrivals, due to the explosion of the Eastern route, the EU thereby replied with *ad hoc* measures to lighten the pressure on Greece and Italy. The summer and autumn of 2015 led to rapid changes in the asylum landscape. The European Agenda on Migration essentially dealt with irregular arrivals, border management and strengthening the common asylum system, devoting minimal attention to regular migration. It heralded “a temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all member states” and also promised “a lasting solution” in the form of a “legislative proposal by the end of 2015 to provide for a mandatory and automatically-triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges” (European Commission, 2015).

Two decisions on relocation and a proposal for the amendment of the Dublin regulation (from the European Commission) emerged, fostering a fair responsibility-sharing. The Council Decision (EU) 2015/1523 of 14 September 2015 envisaged the voluntary relocation of 40.000 persons, 24.000 from Italy and 16.000 from Greece and the Council Decision (EU) 2015/1601 of 22

September 2015 envisaged the relocation of 120.000 persons in clear need of protection, 15.600 from Italy and 50.400 from Greece in the first year, 54.000 in the second year. Despite the formally binding decision, at 17 May 2017, only 5,758 asylum seekers from Italy and 13.107 from Greece had been relocated (Nagy, 2017). Latest European Commission data indicate 12,329 asylum seekers relocated from Italy and 21,994 asylum seekers relocated from Greece (updated on 26 March 2018)⁹. The poor performance of the *Visegrad* countries, almost non-existent, notwithstanding the “soft pressure” of the Commission and the European Court of Justice, has not yet been replaced by compliant behaviours. In addition to the relocation quota-based mechanism, the EU has initiated several resettlement schemes to resettle directly in EU member states people from third countries in clear need of international protection. According to the Commission a total of 16.163 people have been resettled into the EU as of 12 May 2017.

The main arguments submitted by the *Visegrad* countries, mainly Hungary, to justify this non-compliant behaviour were of legal nature, defending the explicit requirements of the treaties regardless of the principles of loyal cooperation and solidarity with the EU institutions and member states. Nevertheless, the infringement procedure against Poland, Hungary and Czech Republic launched by the European Commission in June 2017 for failing to fulfil their obligations under the Council Relocation Decision goes on. On 6 September 2017, the Court of Justice of the EU dismissed in its entirety the challenges brought by Hungary and Slovakia against the provisional mechanism of mandatory relocation¹⁰.

⁹ Member States' Support to Emergency Relocation Mechanism (As of 26 March 2018), European Commission https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf

¹⁰ European Commission – December infringements package: key decision.

5. Security *versus* the responsibility to protect

The massive arrival in Europe of asylum seekers and migrants in the last years, especially in the summer 2015, with the dramatic death toll witnessed in the Mediterranean, have been met with two opposite claims (Weinblum, 2016). On the one hand, there is the alleged impression that more protection for migrants and asylum seekers would necessarily lead to less security, sovereignty and safety for the European countries. On the other, there is the narrative of the inalienability of the safety and rights of these people. EU policies and practices, guided by the containment approach, are explicitly visible in the areas of border and migration management that we have already mentioned: sea border management, land border management and the externalisation of border management. However, this military and security approach has proved to be ineffective (Breen, 2016).

As underlined by several scholars and experts, containment measures do not succeed in blocking migration flows, but rather tend to divert them. By doing so, they push migrants towards more perilous routes and to the crossing of borders clandestinely, in some cases after resorting to smugglers and traffickers, which the EU and other European institutions are seeking to combat” (Weinblum, 2016: 6). Moreover, just like border securitisation, the externalisation of border management to the third countries of origin and/or transit has failed to fully reconcile the defence of European borders, the protection of migrants’ rights and the duty to enable asylum seekers to demand protection in Europe. NGOs have detected and reported frequent (and

http://europa.eu/rapid/press-release_MEMO-17-4767_en.htm

unacceptable) human rights abuses of returned or blocked migrants¹¹, including poor conditions of reception, physical abuses and arbitrary detention (*ibidem*). In addition to the consequent violations of international and EU obligations, the border securitisation and externalisation has thus proved to be counterproductive, fostering the rise and the specialization of smugglers and criminal networks organizing the journeys, financing countries that are themselves refugee-producing, with these undemocratic regimes as a push factor that can use the *refugees as a foreign policy tool* (Memisoglu & Ilgit, 2017) to seek legitimacy and threatening to “open the doors” without sufficient financial aid (see the 2016 EU-Turkey deal). This has been, is and probably will remain the chosen and incontrovertible EU response to the migratory issue; the aim to control the *holy soil of the nation* seemed to prevail on the will and need to establish a comprehensive approach to this transnational issue, reframing what is not clearly an emergency but a structural problem of our globalized world.

Nevertheless, a rising group of scholars is interestingly trying to reframe two apparently different international obligations, the Responsibility to Protect (R2P) and Humanitarianism, to better implement R2P and manage the worst humanitarian crisis of recent times. There would be so a missing link between R2P and refugee protection that could improve EU management of the current crisis and disentangle the international community’s stalemate (Panebianco & Fontana, 2017).

The R2P is a global political commitment launched by the UN in 2005 and subscribed by its member states to prevent genocide, war crimes, ethnic cleansing and crimes against humanity. It can be based on military interventions,

¹¹ *The EU’s complicity in migrants abuse in Libya*, Amnesty International, 18/12/2017
<https://www.amnesty.org.au/migrant-abuse-libya/>

but also on non-violent and non-coercive human protection. There is an intrinsic struggle between the state sovereignty and the humanitarian intervention, ideally shifting from the security of the state to the security of the individuals. This explains the difficulties and the recurrent states' opposition against R2P that led to an inconsistent implementation. Although several cases demonstrated how military interventions can be ineffective, the duty to protect those in need remains a priority and “reacting to the argument that R2P contains no requirements to grant asylum - also acknowledging that R2P per se cannot guarantee refugee protection, there is an increasing scholar attention to the need to reform and adapt the refugee protection regime to the requirements of populations vulnerable to atrocity crimes” (Panebianco & Fontana, 2017: 2).

R2P has three pillars. The first one affirms that states carry the primary responsibility for the protection of populations from the four mentioned specific “atrocity crimes”, hence any state's failure implies a corresponding diminution of its rights to non-interference by outside forces. The second pillar states that the international community has the responsibility to assist states in fulfilling their responsibility to protect, remembering them what they ought to do or helping them; the third one affirms that if a state fails to protect its population, or it is the perpetrator of crimes, the international community should appropriately intervene, either peacefully or non-peacefully. Transferring the R2P requirements to the EU refugee crisis and focusing on the first two non-military interventions, the member states have to protect the citizens of third countries fleeing from atrocity crimes, granting them asylum (state-refugee dimension); they have also to help themselves one another to share the burden, rather than shifting it (interstate dimension).

The first pillar's measures imply the international principle of non-refoulement and is fulfilled by the Search & Rescue (SAR) operations; the second pillar's measures are the resettlement, the relocation and the temporary protection, giving humanitarian aid to support countries with high arrivals (frontline states). The result is the asylum as an alternative peaceful mean to military intervention, since the direct state (of arrival)-refugee nexus would save more human lives, without obliging the fleeing people to risk a lethal journey financing the smugglers.

As we know the EU has only partially undertaken this path and the R2P is still considered mostly as a foreign policy issue, i.e. something the states do outside their borders, not inside (*ibidem*). Thus refugee protection remains uneven among EU member states, “the variable geometries of protection” (Panebianco & Fontana, 2017: 9), and financial burden-sharing is preferred to the solidarity-sharing measures.

6. The path-dependency syndrome

The so-called refugee crisis characterized the European Commission mandate 2014-2019. It was, and still is, more a crisis of the European management of migration, due to the lack of solidarity between the Member States (Borraccetti, 2017: 1). The Juncker Commission inconstantly succeeded in mediating the internal cleavages on the migration/asylum issue and it generally did not overcome the ontological division between states in framing and facing the crisis.

On 27 September 2017, the Commission released a communication suggesting on how to develop and implement new measures to better manage similar

future situations in order to guarantee a better management of the Schengen Area¹². These proposals focus on four main aspects: solidarity between the member states, legal routes to the EU, strengthening of the return policy, better development of the external dimension; with also a proposal on new rules and procedure about border controls in the Schengen Area. This intermediate assessment on the European Agenda on Migration by the Commission, starting with the approval of the reduced number of arrivals towards the EU territory, wants to achieve more stable and structural solutions, upholding the unity of the member states and the responsiveness of the Union against future similar threats. Avoiding the rhetoric and the partial assessments, the failure of the interstate solidarity in the CEAS is clear and the Commission did not pressed the opposing countries to comply to the compulsory mechanism of relocation.

Another failure is the attempt to reform the Dublin principle, due to the strong resistance of centre-eastern states in the Council of the EU. These states continue to defend the voluntary-based mechanism and seek to contrast the *secondary movements* from the frontline countries. The proposed new legal routes (migratory quotas for regular workers and resettlements for refugees) are reduced and not much ambitious, focusing on *private sponsors* interested in hiring workers from third countries (*ibidem*). Great attention is paid to the return policy, a constant concern of both EU institutions and MS, fostering the return of those citizens of third countries not in need of protection to better help those in clear need. This can only happen through further agreements with the countries of origin of the migrants, normally unwilling to take them back without financial aid. The last domain of proposal regards the EU external

¹² Communication of the European Commission on the implementation of the European Agenda on Migration, 27/09/2017, COM (2017) 558 final.

dimension and the development of plans of action to manage the migratory phenomenon. The cooperation with third countries of origin and transit is crucial and often stressed, rising the financial support for the economic development with the *EU Trust Fund for Africa*. To counter-balance the critical effects of the externalisation of the border control, there is the will to intensify the collaboration with OIM and UNHCR. Finally, there is the proposal to modify the Schengen regime, better regulating the temporary suspensions of the internal free mobility, following the claims of the member states and showing non-significant innovations.

Conclusions

Controlling migrants and borders has become the main objective of states, also at a regional and global level, as a result of growing insecurity and uncertainty deriving from globalization. In the Mediterranean region too, a vicious circle of “stricter migration controls and a lack of legal avenues, together with the persistence of economic needs, caused an increase in irregular migration, which in turn generated the need for more control” (Wolff & Hadj-Abdou, 2017: 391), engendering *the paradox of open markets and closed political communities* (Hollifield, 1992).

The consequent unsustainable situation that refugees, migrants and EU frontline states are experiencing cannot last for ever, continuing to be intended as a pure and state-solvable emergence. There is the evident lack of a comprehensive approach, with an effective and rights oriented *transregional governance*. With an alternative framework and a paradigm shift, legal accesses through pre-determined quotas and visas to EU would be opened to regularize the entry of people willing to improve their life conditions; a serious and bigger

plan of resettlement would better protect the refugees without risking their lives; the principle of solidarity between EU member states would re-gain its centrality in the EU politics; the Dublin principle would be deeply changed with a more fair and equal burden/responsibility-sharing.

The EU would finally come back to its original *normative power*, being again a champion of rights' promotion and protection, rather than externalizing responsibilities to undemocratic and uncontrollable third partners. Otherwise, the risk is that the ideal *fortress* we erected would surely collapse as a *house of cards*, undermined by EU and member states' myopic response to transnational and transregional issues of the contemporary globalized world we live in. The Mediterranean region would re-discover its lost intrinsic union, tearing down the walls and building up bridges made of common rights, sustainable prosperity and shared inclusive identity.

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