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MIGRATION IN THE MEDITERRANEAN
AREA AND
THE CHALLENGES FOR “HOSTING”
EUROPEAN SOCIETY

Edited by

GIUSEPPE CATALDI – ANNA LIGUORI – MARIANNA PACE

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PREFACE

In the course of the past few years Europe has had to face an unprecedented arrival of migrants and refugees. The EU political agenda, however, has been driven mostly by the priority will to combat irregular migration and protect border controls. The absence of refugees' and transregional migration's governance is the cornerstone of the Mediterranean "crisis" and, accordingly, response provided by current policies are confusing, at odds between the need to protect the human rights of refugees and migrants and security aspects.

Migration flows to Europe in 2015 and 2016 have challenged the principal statements of the so-called 'push' and 'pull' factors that usually drive EU policy. EU responses have failed because of the lack of a fair policy implementation that reflects flawed assumptions regarding the reasons why people move to Europe. Indeed, migration flows have a profound social and economic impact on hosting societies but too often local governments do not guarantee the respect of the rights they are supposed to protect. Therefore, re-focusing on the improvement of access to rights and to socioeconomic opportunities in countries hosting significantly larger numbers of refugees and migrants, becomes increasingly necessary.

In order to provide a rights-oriented view of the situation, the Jean Monnet Centre of Excellence on Migrants Rights in the Mediterranean focused the "*OPEN DOORS*" *Summer School on Migration, Sea Border Control and Human Rights* of 21 June 2017 on these issues.

Essays included in this volume are excerpts from the lectures given, in particular, during the international final Conference. Its Proceedings have been collected in two volumes: the present publication and a subsequent one to be published in the coming;

both will be available in open access on the website (www.jmcmigrants.eu).

The first essays of the volume analyse the push factors, routes and personal motivations of migration in the Mediterranean. Specifically, the contribution of Giovanni Gozzini, University of Siena, highlights two fundamental aspects: the evolution of the perception of international migrations throughout the twentieth century and the relationship between the increasing number of displaced peoples and refugees and current armed conflicts.

In her contribution Maja Savic-Bojanic, of the Sarajevo School of Science and Technology, Department of Political Science and International Relations, assesses Balkan-bound migrants' stories from Afghanistan, Iraq and Syria through in-depth interviews and focuses on the dynamics that determine recent migrants' motivations to remain in Bosnia and Herzegovina, Croatia or Serbia.

The essay by Valeria Saggiomo, University of Naples "L'Orientale", analyses the 'diaspora' processes, addressing three case-studies from Mali, Libya and Afghanistan, which present different characteristics but also common features.

The essay by Sandra Paola Alvarez Tinajero, International Organization for Migration, explores the links between migration governance and development in the current global and European contexts. In particular, the author highlights the need to shift from a 'crisis management' approach to the need to form and develop more inclusive societies.

In her second essay Valeria Saggiomo expands on the subjects dealt with in her first essay and analyses the theoretical nexus between migration and development within the scenario of Italian policy for international development and migration management.

In order to build more inclusive societies, it is essential that the fundamental need to protect the rights of refugees and migrants be recognised. The essay by Elena Santiemma, Amnesty International Italy, gives a picture of the current violations of human rights as a consequence of EU policies, analyzing *inter alia* the risks connected to the widespread externalization of border controls.

Following essays focus on contemporary issues of international law that are closely connected to the previous ones.

In particular, the essay by Elspeth Guild, Queen Mary University of London and Radboud University Nijmegen Netherlands, analyses how the Schengen Member States have exploited the fear of terrorism (and consequently the quest for more security) to re-introduce intra-Schengen state border controls.

With respect to migration by sea, Tullio Scovazzi, University of Milano-Bicocca, focuses his contribution on the rights arising from customary international law and treaties in force, showing how migrants at sea are too often the victims not only of smugglers, but also of States that try to evade their legal and moral duties to meet internal security needs.

As to security issues, the essay by Marco Fantinato, Italian *Guardia di Finanza*, focuses on enforcement powers at sea and explains how the phenomenon of moving borders through military operations is progressively leading to the process of the externalization of border control management.

Finally, Anna Liguori, University of Naples “L’Orientale” and co-editor of this collected volume, analyses a recent case of externalisation, i.e. the Memorandum of Understanding between Italy and Libya of 2 February 2017, and explores the basis for Italy’s responsibility for the violation of the fundamental rights of migrants as a consequence of the MoU.

INTERNATIONAL MIGRATIONS: HISTORICAL FACTS AND WESTERN PERCEPTIONS

Giovanni Gozzini*

INDEX: 1. Introduction. – 2. The assimilation paradigm. – 3. The multicultural paradigm. – 4. The transnational paradigm. – 5. Human mobility and multiple identities. – 6. What the long-run data show. – 7. Refugees and new wars.

1. Introduction

This article focuses on two main questions. The first concerns the way our perception of international migrations has been changing over the twentieth century. The second relates to the nature of contemporary armed conflicts and its connection with the increasing number of refugees and displaced peoples.

2. The assimilation paradigm

During the last hundred years, the Western mind on migrations was shaped by the succession of three scientific and practical paradigms: assimilationism, multiculturalism, transnationalism. The assimilationist paradigm was especially elaborated in the United States, even though it inspired the policies of several colonial empires, notably the French one.

* University of Siena.



On the face of the dime (the coin by ten cents of dollar) you can find the Latin motto which could be assumed as one of the basic foundations of assimilationism: *e pluribus unum* that means “from many one”. It conceives the American nation as the final destination of peoples who are requested to cancel their original identities in order to be “assimilated” and become the citizens of a totally new World, which coincides with the “Land of opportunities”. Needless to say, that such theoretical foundation corresponds to the imprinting of the American identity, as an equalitarian society which has overcome the aristocratic belongings of the Old European World.

Famously, the most popular image concerning the paradigm of assimilation was the “melting pot”.



It was the title of a theater drama that was performed for the first time in 1909 at Broadway, New York. The author was Israel Zangwill, a Russian Jewish immigrant, who transplanted the classic and Shakespearean story of Romeo and Juliet into the context of Tsarist Russia. The father of one of the young lovers was an official of the Ochrana, the Tsarist secret police, and actively prosecuted the relatives of the other family until the forced exile to the United States. Afterwards, even the former family choose to migrate toward the United States and the lovers could meet again, but they have to face the reciprocal hatred of the two families. Eventually, this time the end was different and it was a typically American happy end. In the final scene of the drama, the young lovers are sitting down in Battery Park, at the extreme end of Manhattan in front of the Atlantic Ocean. They reciprocally tell themselves that the ancient conflicts were part of

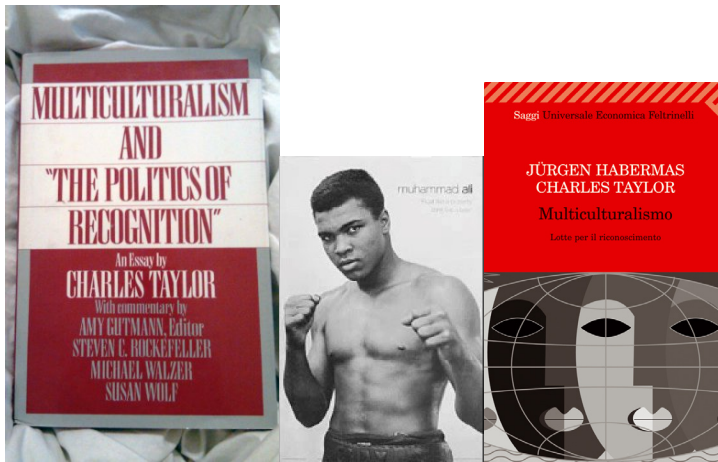
the Old World and they had the right and the duty to jointly conquer a new shared life in the New World at the condition of cancelling their past. Accordingly, the melting pot became the symbol of the assimilationist paradigm and, at the same time, the shared and grateful common life experience of millions of immigrants entering America.¹

3. *The multicultural paradigm*

For a long time the United States Immigration Office did not register regular statistics of departing aliens because they were regarded as a discarded nonsense, conflicting against the happiness that was solemnly inscribed as a basic right in the Constitution of the United States. The assimilationist paradigm became the cultural foundation of the best experiment, ever attempted in the whole history of the mankind, concerning the integration of several subsequent waves of immigrants coming from the most remote corners of the world. Such was the story until 1968, when the student revolt of the baby boom generation broke the common consensus about many matters, assimilation not excluded.² Different minorities living in the United States (natives, Afro-American, latinos) inaugurated a new and proud path toward the rediscovery of their ancient collective identities.

¹ M. M. Gordon, *Assimilation in American Life: The Role of Race, Religion, and National Origins*, Oxford University Press, New York, 1964. For a more recent and critical view see P. Spickard, *Almost All Aliens: Immigration, Race, and Colonialism in American History and Identity*, Routledge, New York 2007.

² T. Gitlin, *Sixties: Years of Hope, Days of Rage*, Bantam, New York, 1987.



One of the key testimonials of such process was Cassius Clay, the boxer who refused to serve the U.S. Army in Vietnam, was jailed, and then decided to change his name into Mohammad Ali, in order to appropriate his original African and Muslim identity.³ Accordingly, one of the most distinguished scholars connected with this cultural and political movement was Charles Taylor and his concept of “politics of recognition”, that was considered the base of the multiculturalist paradigm.⁴ The “melting pot” was replaced by the “salad bowl”, whereby each component remains wholly divided from the others, without any mix. Aim of democracy is to recognize and safeguard the individual right to his/her cultural difference, avoiding to impose an official state religion, language, set of values.

The way of multiculturalism was paved by an historical constant of the international movements of population, that is the

³ G. de Groot, *The 60s Unplugged: A Kaleidoscopic History of a Disorderly Decade*, Pan MacMillan, London, 2008, p. 125; T. Hauser, *Muhammad Ali: His Life and Times*, Simond and Schuster, New York, 1991.

⁴ C. M. Taylor, *Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, Princeton NJ, 1994.

settlement by clusters in receiving countries.⁵ Now and then the choice to migrate was originated by migration chains which are and were established between a first moving individual or group and the remainder of the «transplanted community» that over time was able to follow it. Little Italy and Chinatown are born in such a way and even today the largely prevailing tendency is to look for the protection (that sometimes implies illegal or criminal organization) of the network of compatriots who are already successfully living in the country of destination.

What is commonly ignored by media is that multiculturalism was a short-lived paradigm. Its symbolic death can be dated back to 1992 and the riots which devastated Los Angeles. The killing of a Black man by the policemen was the starting point of a three-days upheaval, whereby Black and Hispanic minorities attacked the shops and minimarkets owned by the Asian minority (at that time largely composed by South Korean immigrants) that, according to the data of 2000 population census, had an average income corresponding to 124 percent of the US gross domestic product per capita. By comparison, Black and Hispanic households had 80 and 60 percent, respectively.⁶

⁵ For one of the first analyses, see C. Tilly, “Transplanted Networks”, in V. Yans-McLaughlin (ed.), *Immigration Reconsidered: History, Sociology, and Politics*, Oxford University Press, New York, 1990, pp. 25-42.

⁶ D. Schmidley, *Profile of the Foreign-Born in the United States: 2000*, US Census Bureau, Current Population Reports, 2001, available at: www.census.gov.



Like many others, even Arthur Schlesinger, one of the most authoritative American historians and former adviser of President John Kennedy (in the photograph at the top of slide 4 he is the second from left, among vice-President Lyndon Johnson and the Kennedys), was shocked by the events and wrote an instant-book whose significant title was “The Disuniting of America”.⁷ The main argument was that the multiculturalist paradigm had demonstrated to be efficient in reproducing distinct and separated ethno-cultural *enclave*, but even to be unable to build a common civic culture. Eventually, indifference had been replaced by violent hostility leaving no space to solidarity and compassion. Indeed, multiculturalism was a failure; a modern, democratic

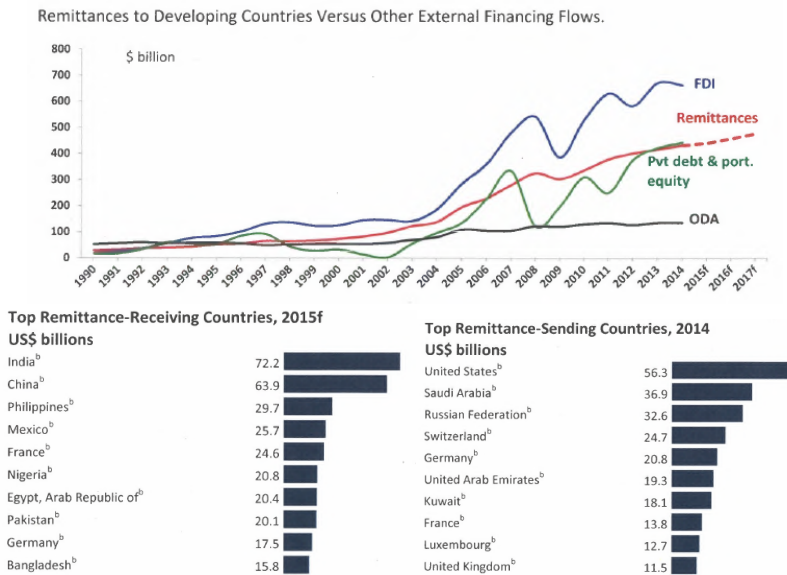
⁷ A. M. Schlesinger Jr., *The Disuniting of America: Reflections on a Multicultural Society*, Norton, New York, 1992.

society needed a “light” constitutional patriotism, according to the concept coined by the German philosopher Jürgen Habermas, that fixed the rules of the citizens’ pacific coexistence and, in the meanwhile, avoided to have an official culture, lifestyle, religion.⁸

4. *The transnational paradigm*

What Schlesinger has to do with global migrations?

A possible answer lies in two dynamics of the current situation. First, the remittances to developing countries have been constantly increasing over the last twenty years.⁹



As compared to other financial flows, the remittances have two unequivocal advantages, that are a greater resilience against

⁸ D. A. Hollinger, *Postethnic America, Beyond Multiculturalism*, Basic Books, New York, 1995.

⁹ World Bank, *Migration and Remittances Factbook 2016*, World Bank Group, Washington DC, 2016.

global and local conjunctures such as the 2008 Great Recession, and the ability to reach directly the needing situations, overcoming the institutional corruption and bribery often suffered by aid extended through the Official Development Assistance (ODA). Of course, the remittances are much better relief-oriented than the profit-oriented FDI (Foreign Direct Investment) led by multinational companies. Further, it is estimated some 40 percent of remittance flows that are not registered by the official channels, because they prefer informal long-distance transfer systems, such as individual travels or local phone centers. The problem is, however, the use of remittances. A working nexus between the increase of remittances and poverty reduction in developing countries is documented. From a development economics point of view, however, the multiplier effect of remittances is limited to the purchase of goods and services, especially medical and education. On average, only about one tenth of the remittances is used for small business investments, which increase the multiplier effect. In contrast, the largest share corresponds to conspicuous consumption, like for instance for marriages or purchase of houses.¹⁰ As it happens in many other variables concerning low income countries, the positive difference is often provided by women. For example, whenever women are the home recipients of the remittances, the use of remittances is more likely oriented towards the education of children. This attitude becomes particularly relevant for long-term human development as professional prospects of the next generation improve and

¹⁰ R. H. Adams, J. Page, “Do International migration and remittances reduce poverty in developing countries?”, in *World Development*, 33, 2005, 10, pp. 1645-69; I. Sirkeci, et al. (a cura di), *Migration and Remittances during the Global Financial Crisis and Beyond*, World Bank, Washington DC, 2012; R. P. C. Brown, E. Jimenez Soto, *Migration and Remittances*, in B. Chiswick-P. W. Miller (eds.), *Handbook of the Economics of International Migration*, v. 1B, North-Holland Elsevier, Amsterdam-New York, 2015, pp.1077-1140.

generate less dependency on remittances in the future. Remittances represent a further historical constant;

- media 84 PVS 1970-2004 = più di un terzo del valore delle esportazioni totali **esattamente uguale** rimesse da Usa in Italia 1880-1914 (= 2-3% GDP)
- (Rimesse degli italiani dall'Argentina 1880-1914 = quasi zero)
- **No investimenti-moltiplicatori**, oggi come ieri: in Italia e in Europa orientale
- i biglietti di viaggio dei nuovi migranti
- l'acquisto di case (le cosiddette «case degli americani» lungo le vie d'accesso ai centri abitati di molte zone in Veneto, Calabria, Sicilia, Abruzzi)
- miglioramento dei regimi di vita contadini (carne, vestiti, mobilia)
- acquisto di terra (Italia, Svezia, Ungheria, Polonia)

one century ago, they corresponded to similar magnitude, meaning 2-3 percent of gross domestic product, in the case of Italy before World War 1, and mode of employment, such as land purchase.¹¹

The second dynamics relates to return migration, which is almost always obscured by media.¹²

¹¹ R. Esteves, D. Khoudour Casteras, “Remittances, capital flows and financial development during the mass migration period 1870-1913”, in *European Review of Economic History*, 15, 2011, 3, pp. 443-74; G. Massullo, “Economia delle rimesse”, in P. Bevilacqua, A. De Clementi, E. Franzina (ed.), *Storia dell'emigrazione italiana. Partenze*, Donzelli, Roma, 2001, pp.161-83; M. Hörner, “Immigration into Latin America, Especially Argentina and Chile”, in P. C. Emmer, M. Hörner (ed.), *European Expansion and Migration. Essays on the Intercontinental Migration from Asia, Africa, and Europe*, Berg, New York-Oxford, 1992, p. 238; M. Wyman, *Round-Trip to America. The Immigrants return to Europe 1880-1930*, Cornell University Press, Ithaca-London, 1993, pp. 60-1.

¹² Sopemi (Système d'observation permanente des migrations), *International Migration Outlook 2008*, OECD, Paris, 2008, pp.171 and 214.

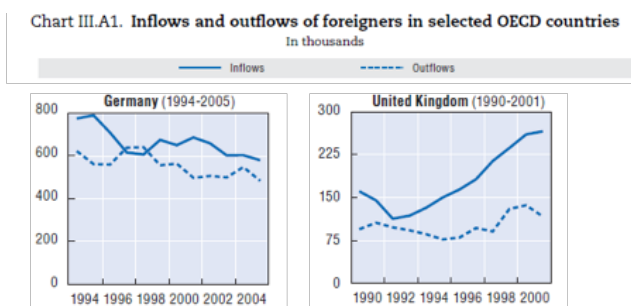


Table III.1. Estimates of re-emigration rates in selected European countries and the United States after 5 years of residence

Population aged 15 and older

	Entry period	Average re-emigration rate after 5 years (%)
Ireland	1993-1998	60.4
Belgium	1993-1999	50.4
United Kingdom	1992-1998	39.9
Norway	1996-1999	39.6
Netherlands	1994-1998	28.2
United States	1999	19.1

Significant minorities of immigrants choose to go back home after a period of stay, on average, no longer than five years. Even this is an historical constant; in the past, the Asian migration system of indentured laborers (5 years of work contract abroad, such as the Indian miners in South Africa) was working in the same way, with even higher, about 80 percent, of migrants.¹³

¹³ A. McKeown, “Les migrations internationales à l’ère de la mondialisation industrielle 1840-1940”, in *Mouvement Social*, 2012, 241, p. 38.

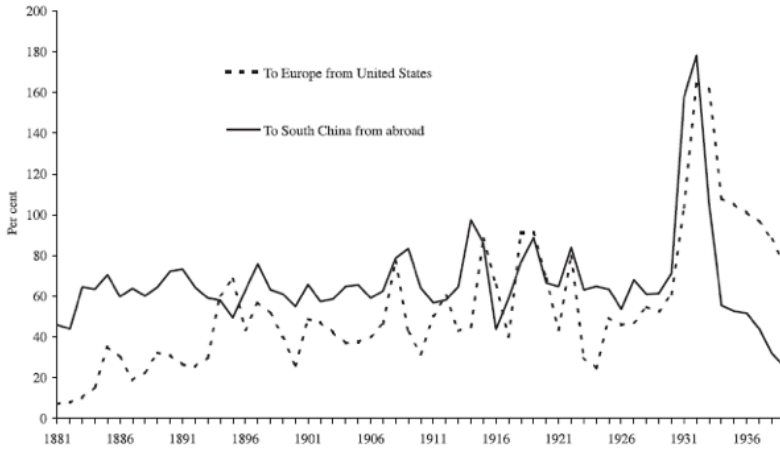
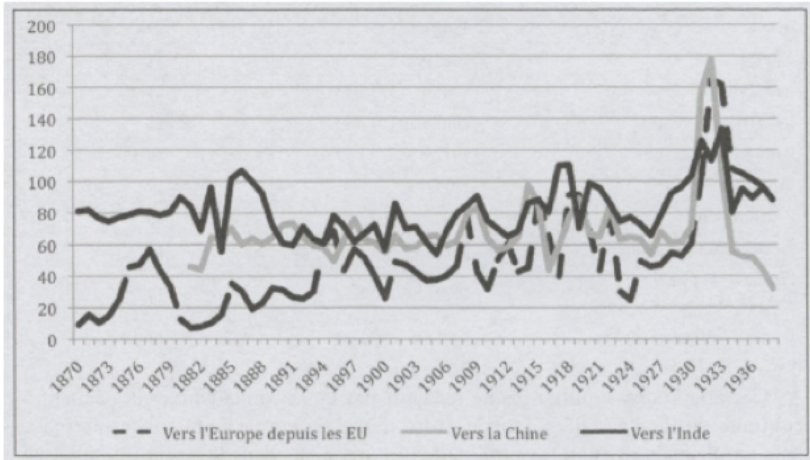


Figure 4. Proportion of return migration, US and south China, 1881–1939.

≠ coolies

Figure 2. Taux de retour des principaux flux migratoires, 1870-1938



The reasons of return could and can be quite opposite, deriving from the success or failure in the receiving country. Still, what is important is the symptom of an enduring transnational identity of the migrants. They neither cancel their original roots, as the assimilationist paradigm imagined, nor make them revive in the

destination country, as the multiculturalist paradigm maintained. The historical and current migrants are moving people, virtually by remittances as well as physically by their home journeys. Here is the third paradigm, the transnational one, and the answer to the question about Schlesinger.¹⁴ One of the most important scientific reviews concerning migrations is the Franco-Canadian Journal *Diasporas*.¹⁵



dissemi-nation

circular exchange/mobility

cultural hybridity

≠ global civil society

women = 50% migrants

The key concepts its articles elaborate are extracted from the very peculiar historical experience of the Jewish people (such as

¹⁴ D. Hoerder, *Cultures in Contact. World Migrations in the Second Millennium*, Duke University Press, Durham-London, 2002.

¹⁵ D. Schnapper, “De l’État-nation au monde transnational. Du sens et de l’utilité du concept de diaspora”, in *Revue Européenne de Migrations Internationales*, 17, 2001, 2, pp. 9-36.

a double identity and loyalty to Sion and other national belongings) in order to make them universal interpretative categories of the migration choice. The hyphenated term “dissemi-nation”, for instance, means the coexistence within the same person of multiple identities referring to different homelands, such as the original sending country and the receiving country where he or she is spending a part of his/her life.

5. *Human mobility and multiple identities*

According to the assimilation paradigm, human nature can be host only for one identity and belonging. But recent historical research is finding that mobility, even international mobility, was a common feature of everyday life in early modern Europe.¹⁶ Seasonal laborers moving between countryside and cities, sailors, soldiers, merchants corresponded to significant minorities of pre-industrial European societies, up to one third of the whole population, experiencing circular cross-border movements. Such experience was also common at the dawn of mankind. Over the last thirty years historical genetics elaborated a well-established hypothesis, which maintains that the human species evolved to its modern form in East Africa some 150,000 years ago, and thereafter embarked on populating the entire globe in a stepwise migration process beginning about 90,000 B.C.¹⁷ Using archeological data combined with mitochondrial and Y-chromosomal DNA analysis, geneticists are able to offer evidence that every human being has only one common ancestor and the same root of DNA was moving over millennia all over the Earth. The first human groups were composed by hunters and gatherers

¹⁶ J. Lucassen, “From mobility transition to comparative global migration history”, in *Journal of Global History*, 6, 2011, 4, pp. 299-307.

¹⁷ L. L. Cavalli Sforza, P. Menozzi, A. Piazza, *History and Geography of Human Genes*, Princeton University Press, Princeton NJ, 1994.

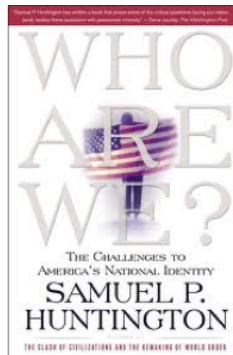
ignoring agriculture; they predated the natural resources, flora and fauna, of a micro-local environment and then they moved. Migration was the foundational experience of the mankind.

The essays published on *Diasporas* do not refer to the theoretical (and, in some measure, abstract) construction of a global civil society without borders. Rather, they investigate human networks whereby the migrants can activate flows of information and resources. Within the constraints of push and pull factors, such as the escape from depriving situations or life emergencies as well as the attraction toward more prosperous situations, the migrants try to improve their lives according to rational strategies of survival and improvement. Their identities are continuously changing, according to their movement across nations and cultures. A significant case study is embodied by Turkish women, who migrated to Germany during the 1990s, and then repatriated to their homeland, in the rural villages of the inland Turkey. They do not repudiate their Muslim identity, but they very often generate cultural conflicts within their original communities because they acquired some characters of German culture they do not want to renounce, namely about the women's power in the household and their role in public life.¹⁸

Social sciences are not accustomed to work according to the transnational paradigm and their operative framework remains statically national. A case in point is the last study by Samuel Huntington, that depicts the "Reconquista" of the United States by the Mexicans via immigration.¹⁹

¹⁸ L. H. Day, A. Icduygu, "The Consequences of International Migration for the Status of Women: A Turkish Study", in *International Migration*, 35, 1997, 3, pp. 337-61.

¹⁹ S. P. Huntington, *Who Are We? The Challenges to America's National Identity*, Simon and Schuster, New York, 2005 (Italian translation, Milan 2005).



Wasp = 10% pop. Usa

2005

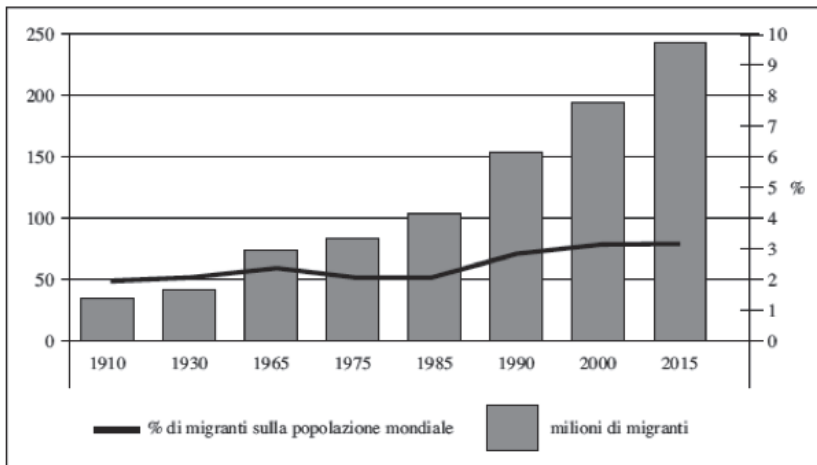
R.D.Alba-V.Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration*, Harvard University Press, Cambridge MA 2003: alte percentuali (95%) di immigrati messicani delle ultime generazioni (compresi tra i venticinque e i quarant'anni di età) che parlano l'inglese come prima lingua e che sposano (il 28% nel 1990) persone di altre origini etniche.

A real situation (the White Anglo-Saxon Protestant component is currently reduced to a mere 10 percent of the whole US population) which could be alarming if viewed with the lens of the assimilationist paradigm, is actually reversed by the dynamic changes occurring in the immigrant communities. In fact, second and third generation immigrants increasingly interact with the receiving society and deeply modify basic features of their identity. They speak English as first language and consistent minorities of them marry partners belonging to different communities.²⁰ But these data are largely unknown. Huntington embodies the educated side of the xenophobic movements which gain consensus all over the world exploiting the ancestral fear of the barbarians. Thus, it is important to remember that we are not facing an invasion.

²⁰ R. D. Alba, V. Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration*, Harvard University Press, Cambridge MA 2003.

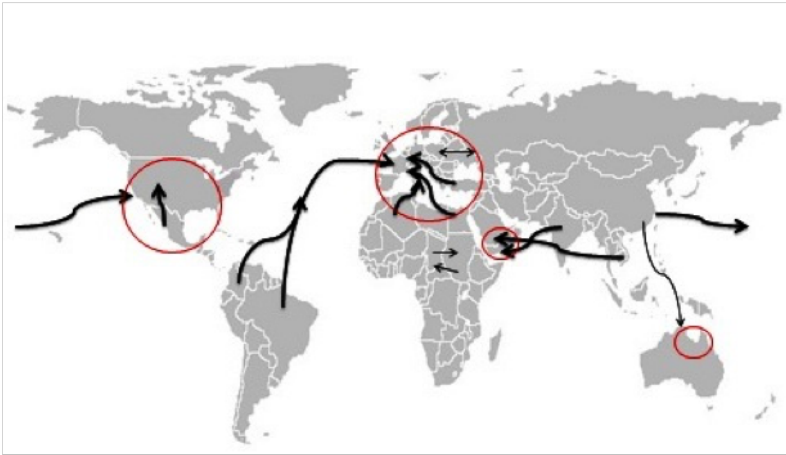
6. *What the long-run data show*

Over the last century the percentage of foreign born population (according to the official definition of the United Nations, everyone who lives in a country different from the country where she/he is born) has been constant, close to 3 percent.



The 1990s increase (roughly 27 million), in fact, was wholly related to the administrative dissolution of the Soviet Union; especially Russians in Ukraine or Georgia were abruptly considered immigrants even though they never moved. The stable percentage of migrants is particularly significant if considering the current global inequality and higher people density.

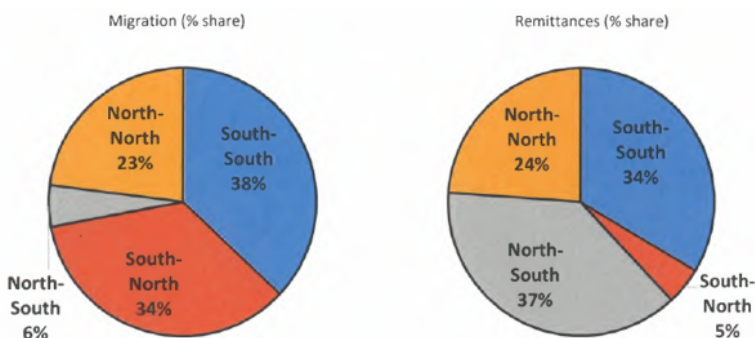
Migrazioni internazionali, 1970-2010



FB population = 3% stabile, con differenze GDP p.c. 3 vv. + grandi rispetto al 1900
Usa e Germania = + immigrati, - disoccupazione
Italia: 5,7 milioni = 9,4% popolazione (UE 9,8%) = 7% Pil = 2% entrate fiscali ← 3D

In 1970, the world population was almost one fifth of the current one and the greater gross domestic product per capita differential (between United Kingdom and regional average of Africa) was 7:1 while in 1998 (between United States and Africa) was 20:1.²¹ Further, an increasing share of migrants is moving along South-South directions, especially from South-East Asia to Persian Gulf, and the corridor South-North recently lost the position of relative majority.

²¹ A. Maddison, *The World Economy: A Millennial Perspective*, Oecd, Paris, 2001, tab. B-10 p. 241, tab. B-21 p. 264.



Sources: World Bank staff calculations based on Migration and Remittance Factbook 2016, UN Population Division, and national censuses. Definition of the “North” and the “South” in this chart follows UN classification. The data on migration are for 2013, the latest year for which data are available. The data on remittances are forecasts for 2015. According to the UN, the term “North” refers to countries or regions traditionally classified for statistical purposes as “developed,” while the term “South” refers to those classified as “developing.” The developed regions include Europe and Northern America plus Australia, New Zealand and Japan. Using World Bank classification of Developing Countries as “South” and High Income Countries as “North” implies that South-South and South-North migrants constitute 56.4 mil (23%) and 128.6 mil (52%) of total international migrants, respectively.

Today, the largest attractors of immigrants (US and Germany) have low and stable unemployment rates, as compared to other advanced economies. The main reason is the dual structure of the labour market; accordingly, the immigrants are employed in secondary occupations, which are commonly renamed as “3D” (Dirty, Dangerous, Demanding) and are not particularly requested by native population (notably, domestic service to aged people, undocumented jobs in construction industry, retail, and restoration).²² It ought to be added a demographic factor such as the sharp fall of fertility rates in a large majority of European countries, which implies a decline in working age population and a subsequent rise of the dependency ratio, i.e., the increasing share of unproductive population at the expenses of national welfare systems. At least temporarily immigration is able to provide a valid counterbalance because over time immigrants

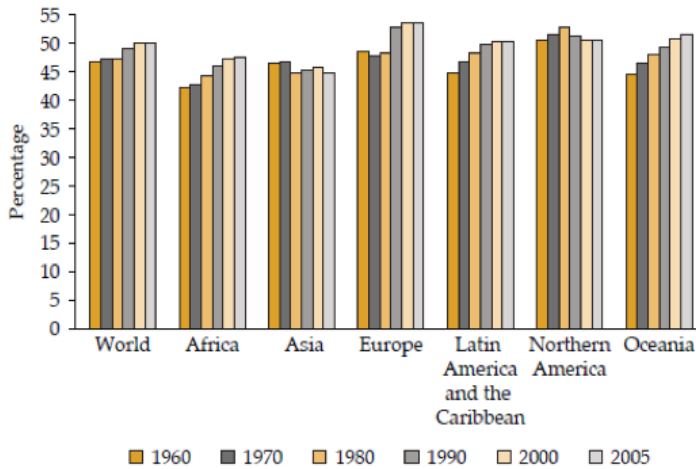
²² For an early exhibit of the situation see Sopemi, *Trends in International Migration. Annual Report 2002*, OECD, Paris 2002, chart I.14. For an update see S. Castles, “Guestworkers in Europe: A Resurrection?”, in *International Migration Review*, 40, 2006, 4, pp. 741-66.

tend to imitate native population's behaviour, even in the reproductive domain.

From each of those points of view, high income countries have not to face an invasion or a "Reconquista". Rather, a well-regulated immigration could represent a driver of economic progress for both sending and receiving countries.

Two are the main historical differences with the great migration at the end of the nineteenth century. First, an increasing presence of women, who cover today half of the international flows of population.²³

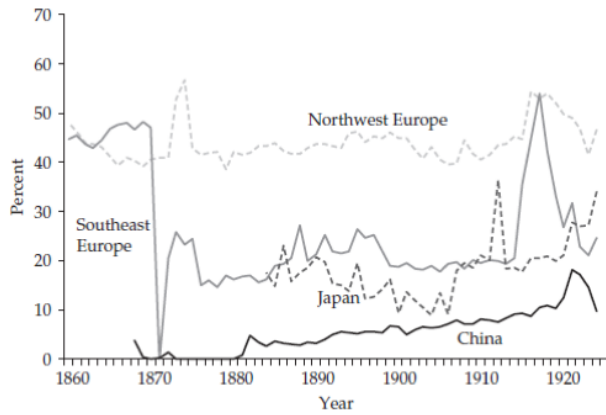
Figure I.1 Trends in Female Migration, 1960–2005



Source: Alcalá 2006.

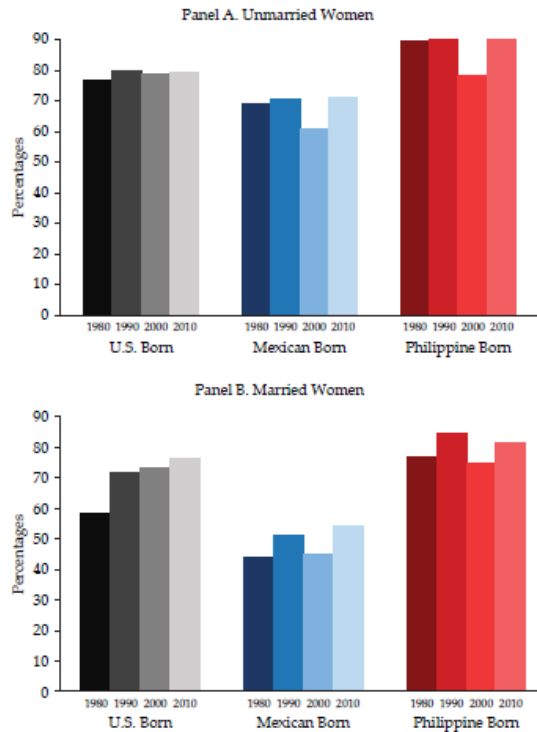
²³ K. M. Donato, D. Gabaccia, *Gender and International Migration: From the Slavery Era to the Global Age*, Russell Sage, New York, 2016.

Figure 4.4 Percentage Female Emigrants, 1860–1924



Source: Authors' compilation based on Willcox and Ferenczi 1929 and on unpublished port data for Chinese travelers made available to us by Adam McKeown and compiled by Elizabeth Sinn.

Figure 7.3 Labor Force Participation of Women, 1980–2010



Migrant women are the result of contrasting processes, such as women emancipation in some countries like Turkey, Peru, Philippines and trafficking in human beings in other ones (Nigeria). In fact, the second difference with the past concerns the active role played by criminal organizations, which exploit the illegal immigration.



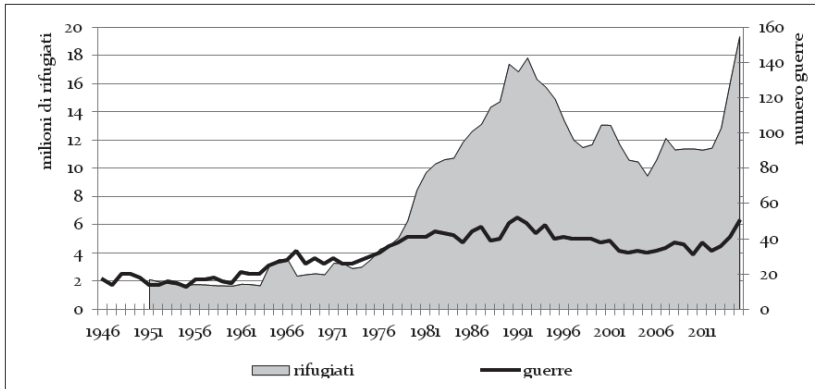
Revenues criminal organizations on migrants = \$ 3-6 bn. Revenues on drugs \$ 320 bn.
3.000-6.000 \$ p.c. for 1 million migrants. 40.000 employed in 32 countries



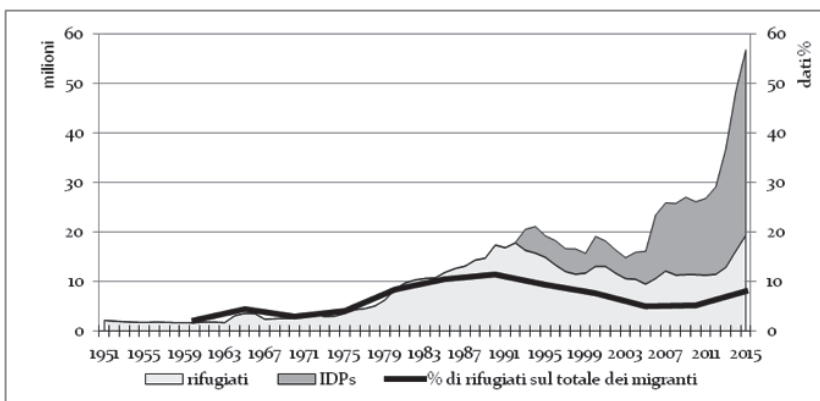
Their business is increasing, even though it remains minimal as compared to the drugs traffic. Admittedly, criminal organizations are the worst enemy for both immigrants and receiving countries; they are responsible for thousands of deaths and constrain immigrant inflows within an illegal mood which provokes the overreaction by native populations. The elimination of criminal organizations could make the global migration much more manageable and useful for all.

7. Refugees and new wars

Unfortunately, there is a section of migrant population that is much more vulnerable and prone to the criminals' violence: the refugees.



Fonti: UNHCR, *Population Statistics*, http://popstats.unhcr.org/en/time_series per i dati sui rifugiati, che non coincidono con quelli di UNDESA e sono più dettagliati; Uppsala Conflict Data Program, Peace Research Institute Oslo, *Armed Conflict Dataset version 4-2016*, <http://ucdp.uu.se/downloads/ucdpprio/ucdp-prio-acd-4-2016.xlsx> per le guerre in atto ogni anno.

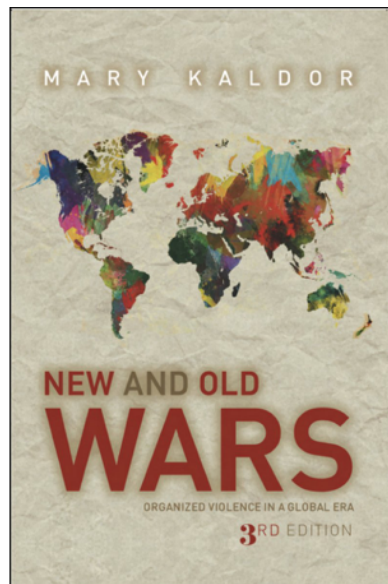


Their number peaked at the end of the Cold War, declined thereafter, and peaked again during the civil wars (Syria, Libya)

which arose from the failure of the so-called “Arab Springs”. The United Nations High Commissioner for the Refugees early adopted a policy aimed at containing the refugees within the boundaries of their nation (IDP, Internally Displaced Persons) but recently the percentage of refugees over the whole migrant population is again rising. It cannot be considered a transitory condition; in fact, the armed conflicts’ typology has been changing in the last decades.²⁴ The 1992 Balkans War, which was the actual conflict observed by Mary Kaldor, cannot be considered the first “new war” of the history because many post-colonial civil wars, such as Biafra or East Timor, had the same characters. But it was fought in the core of the Old World and apparently portrayed the changing nature of the armed conflict, by comparison with traditional wars such as Vietnam War.

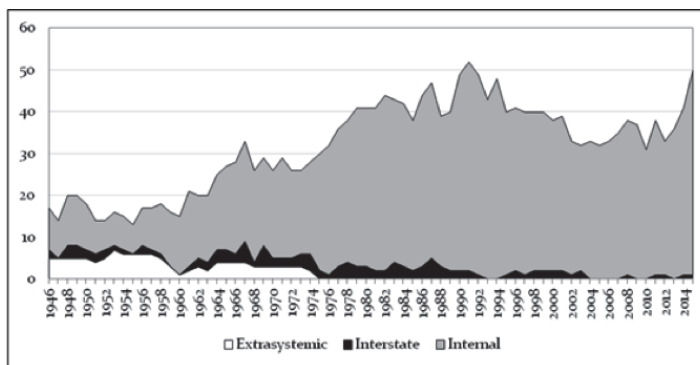
ex Jugoslavia: 83 bande paramilitari
(56 serbi 13 croati 14 bosniaci)

1. collapse of a state
2. privatization of violence
3. terror on civilian population
4. no interest in peace
5. Endemic / low intensity armed conflicts



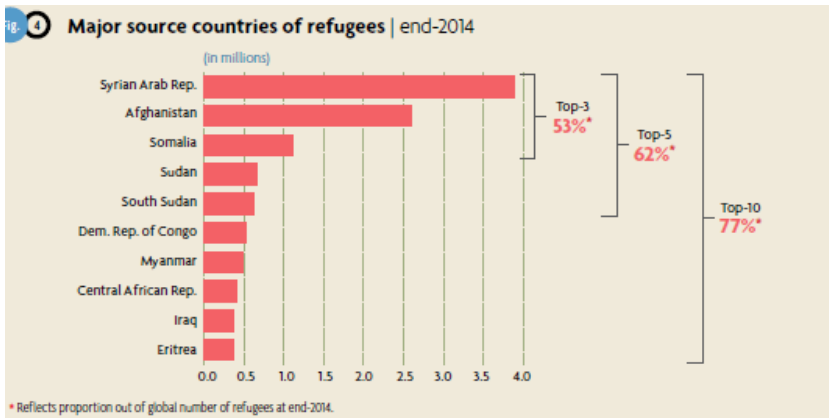
²⁴ M. Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Stanford University Press, Stanford CA, 1999 (Italian translation, Rome 1999).

All the basic features of the “new wars” are tightly connected with the creation of refugees. First, the collapse of the central state means the end of both monopoly of violence and protection of civilians by the rule of law. Second, the privatization of violence implies the proliferation of paramilitary bands whose main occupation is to extract the resources to survive such as food, heating, shelter, from the civilian population; in the Balkans they were numbered in more than eighty. Hence, third, the terror on the civilians and the subsequent escape of refugees are the main aspect of the new wars. Fourth, just because the criminal bands can survive only exploiting the civilians, they are not at all interested to be involved in pacification processes that could throw light into their crimes. On the contrary, they are only aimed at controlling a restricted portion of territory, terrorizing and draining resources from the local population. Fifth, as a consequence, armed conflicts tend to transform into endemic and “low intensity” (according to the international conventions, with less than one thousand of yearly victims) wars. The current typology of armed conflicts overwhelmingly corresponds to internal, civil, “new wars”.

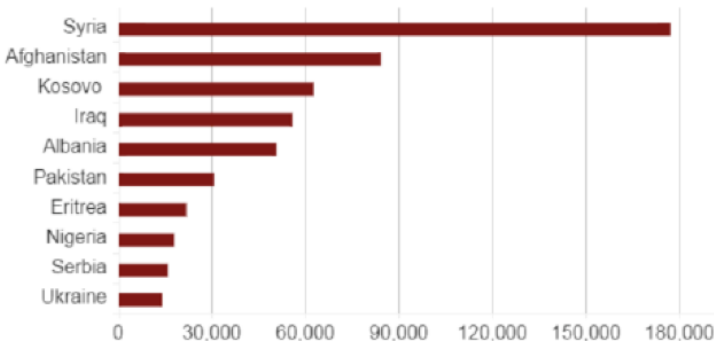


Fonte: Uppsala Conflict Data Program, Peace Research Institute Oslo, *Armed Conflict Dataset Version 4-2016*, <http://ucdp.uu.se/downloads/ucdprio/ucdp-prio-acd-4-2016.xlsx>.

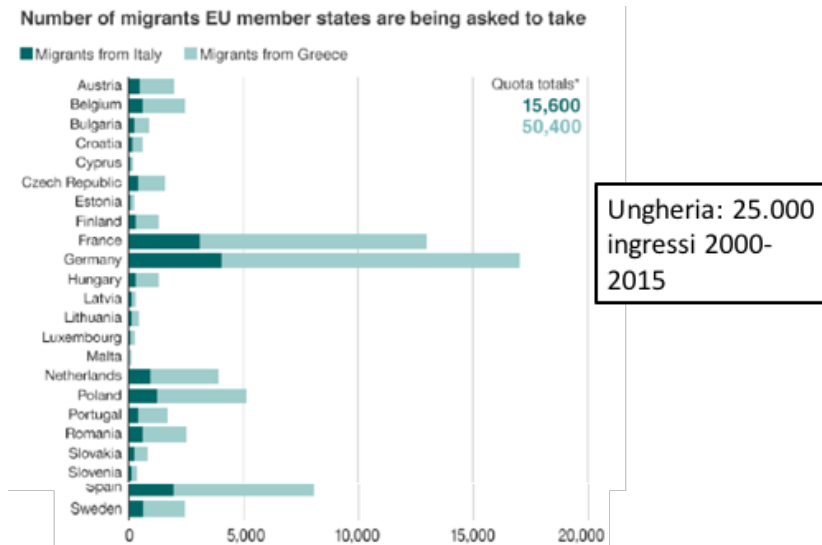
The almost unavoidable result is an increasing global flow of refugees, who cannot hope in a prompt return to the homeland and have a coerced propensity to overlap with the economic migrants. In fact, it is unbearable for everyone to spend years in a refugee camp, without education for the children, without any prospect of a regular job; summing up, without any future. At that moment, the opportunity provided by criminal organization can be seemingly better than the present, even though the refugees are conscious of the dangers it involves. The list of the contemporary armed conflicts strictly resumes the typology of the refugees-producing new wars.



Top 10 origins of people applying for asylum in the EU
January - October 2015, first-time applications



My last final point concerns the European Union.



The program of resettlement of the asylum seekers is founded upon a shared management of the immigrant flows by the proactive collaboration of the member states. Famously, it was contrasted by some eastern countries, by totally false arguments. Hungary, for example, over the last 15 years has regularly accepted a yearly average of 20-25 thousands of immigrants; but it refused the resettlement of 1,300 refugees landed in Greece and Italy. Hungary does not deserve to be part of Europe.

MIGRATION AT THE OTHER SIDE OF THE MEDITERRANEAN: LOCATION CHOICES OF BALKAN-BOUND MIGRANTS

Maja Savic-Bojanic *

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1. Summary

This descriptive qualitative study examines the stories of Balkan-bound migrants from Afghanistan, Iraq and Syria. In particular, it focuses on the location choices and analyzes the factors that determine recent migrants’ motivations to remain in Bosnia and Herzegovina, Croatia or Serbia. Using in-depth interviews to learn about the determinants of their location choices and the motivations that bind them to these three countries, much is learned about these individuals that now live and work in cities and towns across the former Balkan Route. The life histories used as empirical cases for this research present just a portion within a wide range of experiences, but I have used them to argue that, contrary to immigrant population trend of geographically concentrating, recent middle-Eastern migrants in their late teens to early thirties choose to divert from the main transition route and remain in the countries of

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the Balkans. Divergent to typical location choices of the majority of immigrants who left their homes in the wake of the immigration crisis and whose primary destination was the European Union (EU), the patterns that emerge among these young cohorts of middle-Eastern migrants are characterized by absence of their own families, but close familiar ties in the countries of the Balkans – such as presence of relatives and friends. Alternatively, a second finding demonstrates a high interest in religious similarities with the population of the host states, a factor that demonstrates easier transition and integration process. These push factors are the main motivators for Balkan-bound migrants from the middle-East. They help in contextualizing the recent immigration challenges faced by migrants in the Mediterranean area passing along the Balkan Route.

2. Introduction

In 2015, Frontex, the European Border and Coast Guard Agency assessed that around 764.000 migrants, mainly from Syria, Afghanistan and Iraq, sought to enter the European Union via the Former Yugoslav Republic of Macedonia (FYROM), Serbia and Croatia and onto Hungary or further into other union states. This number presented a 16-fold rise from 2014, although this route, commonly termed the “Balkan Route” served as a popular passageway from 2012, when visa requirements for Albania, Bosnia and Herzegovina, Montenegro, Serbia and FYROM became less stringent. But, in the period from 2014 until 2016, the Balkan Route represented one of the rare channels for re-entry into the EU – once that migrants left Greece, their pathway continued through FYROM, Serbia and Croatia. According to the United Nations High Commission for Refugees (UNHCR), some 600.000 migrants were

registered at Preševo Centre in Serbia and although these Western Balkan states are considered to be “bridge countries” and not destination countries (such as Austria or Germany), during my ethnographic field research in Serbia, Croatia and Bosnia and Herzegovina, I encountered a considerable number of young migrants – those in their late teens and into their early thirties - who stated that they wanted to remain in their current Balkan host. Quite clearly, different factors have influenced their location choices. Scores of articles that have been published up until today in the fields ranging from anthropology and sociology, to economics and migration studies explore the determinants of location choices in detail (Zavodny, 1997; Zavodny, 1999; Owusu, 1999; Borjas, 2001; Malheiros, 2002; Arbaci, 2004; Åslund, 2005; Bauer et al., 2002, 2005). One question that arises from the available literature and that connects to this research is what are the predominant push factors for young migrants coming from the Middle East that bind them to the Balkans, an unpopular destination in the last European refugee crisis.

In his research on residential patterns in North European and Mediterranean metropolis centres, Malheiros (2002) concludes that spatial distribution in the cities of the European South differs from that in the North due to different migration processes and significantly dissimilar socio-urban contexts. Arbaci (2004) explains this latter phenomenon by bringing into context the social factors which determine the differences in spatial locations of migrants finding refuge in the North or South of Europe. Yet, reflecting the direction of this work which deals with recent young migrants from the Middle East in the Balkans and the determinants of their location choices, previous works which discuss economic and social factors show that it is not the economic benefits that represent the main push force; rather the presence of one’s own ethnic community in the host

state determines the choice of location for many migrants (O'Loughlin, 1995; Clark 1996). Borjas (2001) and Zavodny (1999) go on further to explain this phenomenon by differentiating between location patterns that are observable among immigrants who arrive to the host country without initially joining their own ethnic community. Zavodny (1999) describes the making of new communities by arguing that “immigrants ... are likely to be attracted to states with large total populations and large foreign born populations” (1999, p. 1019). She also raises questions about the effect of the “location of other foreign-born persons”¹ (Ibid, p. 1019) which is deemed a significant push factor in determining the location of newly arriving immigrants. Alternatively, in his work on migrants residing outside of ethnically concentrated communities, Owusu (1999) raises similar questions of personal and cultural preferences, spatial proximity to other ethnic groups and social identity. These ties, according to Bauer et al. (2002, 2005), are also revealed by the fact that immigrant clustering is characterized by “network externalities” which “arise when previous immigrants provide shelter and work, assistance in obtaining credit, and/or generally reduce the stress of relocation to a foreign culture. Network externalities imply ‘I will go to where my people are, since it will help me.’” (2002, p. 2). Hence, migrants joining their ethnic communities abroad hope to benefit in the transition process once they arrive to a particular foreign location.

These bodies of research on migrants add to the recent debates of location choices of recent migrants in the wake of the immigration

¹ “Other foreign-born” persons refer to groups that do not belong to the same ethnic or national category as the newly arrived migrant, but similarities in socio-economic conditions between two different migrant communities, largely influence the determination of location choices.

flow crisis in Europe to the extent that they provide the basis for testing rather the same conclusions hold true for young cohorts of migrants who escape home due to wars, lack of religious freedom or political motivations. On the one hand, these everyday challenges of a refugee and a foreigner in a distant land, deepen socio-economic burdens of integration with the hosts, assert belonging to a larger ethnic community and determine the choice of location. On the other hand, however, the motivations for staying in a given place are created and re-created throughout the journey and influence the paths that young migrants choose not to ignore on their way for a better life. Understood in such a broad sense, the social, personal and religious ties amongst young migrants from the Middle East altogether, determine the location choices that influence their decisions to remain in the Balkans.

In what follows, I examine whether the above conclusions hold entirely true for the young migrant population who arrived to the Balkans in the recent immigration flow from Arab countries. Thus, the purpose of this work is to push forward the discussion of determinants of location choices of migrants by examining the specificities of several social factors that influenced the settlement of Middle-Eastern young migrants in Bosnia and Herzegovina, Croatia and Serbia.² In the wake of recent European migrant crisis, a need to discuss beyond different policy responses across the impacted states along the Balkan Route is especially relevant in the context of young migrants who left their home without families in hope to escape war, but also join friends and relatives who have inhabited these Balkan states prior to 2012. The young cohort of migrants that this study

² These three countries were chosen because the largest number of young migrants that I talked to choose to remain there, mainly in capital cities or other large urban areas.

examines is, in essence, drastically different from migrants with families and children who moved along the Balkan Route in what concerns their location choices – that is a place they choose to settle in. The former, I have found, emerges out of three different factors, all of which stem from the social identity environment in their homeland: the importance of a close circle of family and/or friends, urbanity and religious freedom in identity formation. The background against which I observe these push factors and their levels of influence on location choices concerns the time and space (context) variables or better the period in which these young migrants arrived to the countries of former Yugoslavia and previous links they had with these locations.

Hence, this work will focus on these three factors which have had an impact on the lives of current young migrants living in Bosnia and Herzegovina, Croatia or Serbia in their struggle to socially (re) integrate and practice their religious habits. More importantly, this study divulges which of these factors contribute the most to individual choices of settling along the Balkan Route. While aware that these questions are not limited only to this group of migrants, I opt to look at, on the one hand, at young migrants who choose the locality based on the “network externalities” that Bauer et al. describe, and on the other, those who perceive religious similarity with the host state as the most important push factor and put second the presence of families and friends. Both groups of young migrants have exerted different types of efforts in order to “belong” to their host society, which is especially relevant among participants who have started their families in the meantime.

The present study draws from an ethnographic study of young migrants who have settled in former Yugoslav countries along the Balkan Route and close by it (Bosnia and Herzegovina) conducted

from May 2015 until January 2017. A portion of what I present henceforth is data gathered during in-depth interviews with twenty young migrants in Subotica (Serbia), Belgrade (Serbia), Zagreb (Croatia) and Sarajevo (Bosnia and Herzegovina). The more general conclusions are drawn from the combination of qualitative field research and a wider literature review on determinants of location choices among migrants. At this point, I also feel the need to briefly comment on the epistemology and bias as researcher. To investigate young migrants in the context of location choices and reasons for opting to stay along the Balkan Route in the wake of a major migration crisis in Europe, I have not only consulted written works, but also undertook fieldwork. These involved two trips of different length (between two and three days) to Belgrade and Subotica and Zagreb. Other interviews took place in Sarajevo. I conducted all interviews myself in English or French. I am aware of my biases as I have spent the entire time working with young migrants who have purposefully chosen to remain in these cities, thus forming networks within urban settings. I have discriminated the participants on the basis of the time during which they have arrived to these former Yugoslav states (spring 2015 - winter 2016/2017), the push factors they cited for influencing their location choices and the relationships they have previously had in these countries. While I do know the national and ethnic background of my participants, I did not consider nationality and ethnicity as variables which might relate to their choice of settlement. I did, however, consider religion as an important pattern which emerged during our numerous conversations. Lastly, I wish to state that this work should not be taken as an archetype of young migrants' experience in the Balkans, but rather that various life histories – a particular form of in-depth interview that focuses on individual agency – have been used to

highlight a plethora of realities which determine migrants' location choices when settling in a particular place.

3. *How Familiar Ties Influence the Location Choices? "Network Externalities", Solidarity and Urbanity as Determinants of Settlement Choices among Young Migrants from the Middle East*

Qasim (a pseudonym), a 19 year old former medical student from Holmes arrived to Belgrade in summer of 2015. He first crossed the border between Syria and Turkey, where his mother's older sister lived since the late 1980s and then continued along the well known route to reach first Greece and then northwards into Macedonia. He moved alone, a story hardly typical of Syrian refugees, where youngsters usually try to escape with their parents.

I had my route planned – Turkey first, to reach my aunt Rana. I thought that even if I do not make it, if it becomes hard, I can always return back to her. Many families don't have anybody in Turkey, but I am lucky that I do. The next stop for me was Serbia. I knew there were camps there, but I communicated with a close relative who settled in Belgrade in the 1980s, when Yugoslavia still existed. He is a doctor there now, so he promised to take me in with his family, so I thought it would be much easier to, at least, go back to school. I am a medical student, so a friend with a medical background would have helped with my schooling since I want to continue my education in that direction

These opinions show the general spirit among young Syrian refugees, apart from the location they chose to settle in, which, they state “*was never on the list of friends they have spoken to*”. Although, the majority of their compatriots that moved along with them continued on to Germany or Austria, they never had any doubts about their chosen location: “*We were offered help in terms of housing and food. We had friends who helped us situate and make a much easier transition. There are many Syrians in Serbia who studied there during Tito’s times, so we have our diaspora there*” notes a twenty-four year old Karim (a pseudonym). Karim and the other two Syrians that I encountered in Belgrade, Salem and Wadud (pseudonyms) were also close friends or relatives of Samad (a pseudonym), the doctor who worked in Belgrade for the past 30 years. All four of them have moved on to finding jobs in local cafés and have started to learn Serbian language. The prospects of living in a new country are now much more attractive to them than returning to the damaged homes and “*embracing life without future*” as they say, in Holmes where they all come from.

Despite the fact that for many young migrants that I met during my research, former Yugoslav countries did not seem initially attractive, all of the twenty interviewees who arrived to Sarajevo, Zagreb, Belgrade and Subotica now choose to remain. Their stories expose the importance of network externalities (Bauer, 2002), which, all of them say, have resulted in a decision to stay. Today, more than a year after, they are managing well on their own and some are even starting their own families as they find other Arab-speaking nationals around them and mix into marriages or close friendships. Consequently, what matters are “ties of kinship, friendship, and village, link migrants, former migrants, and non-migrants in the home and host country. In an uncertain environment, migration

networks ... decrease uncertainty ...” (Ibid, p. 5). This reflection of low insecurity, dependent solely on migrant’s external networks with his/her ethnic group is captured by Saadia (a pseudonym), a twenty-two year old student of chemistry from Kabul.

I really care about settling in a place where I can speak my own language and where I know somebody. I do not care too much about whether that would be a co-national, but being able to hear my language, speak it, have somebody to share my fears and my hopes, having somebody to help me out, is more important to me. It eliminates the doubts of uncertainty that we have as we cross the long road to a better world.

Another interesting aspect that emerged from the interview data was a shared perception that the presence of co-nationals and not other foreign-born migrants was more important for young individuals who settled along the Balkan Route.

This country [Bosnia] is not a typical migration choice. Economy is poor; life is not the greatest, but I came here because back home I had several friends who married Bosnian women. When the war started most of them traveled to Bosnia, so it was easier for me to go to a place where I had my fellow countrymen. There is a significant Syrian diaspora in Sarajevo now, so life is much easier

says Farooq, an eighteen year old baker from Damascus.

When I arrived to Sarajevo, I immediately had a roof over my head. My friend and his wife found a place for me in an

apartment that they pay for me. I now attend Bosnian language classes with his wife and attend a local mosque where I also meet other Syrians who are married to Bosnian women. I have also managed to find a job - he says adding that - my people have helped me in every aspect of my new life in Bosnia.

The overwhelming feeling of transitioning to a drastically different culture experienced by these individuals mirrors Bauer's (2002) explanation of beneficial network externalities³, which explain for immigrant clustering.

Sumaya (a pseudonym) is a twenty-year old NGO volunteer and a future culinary student currently living in Zagreb. Her experience as an orphan from Iraq, however, challenges the concept of the importance of network externalities:

When I arrived to Zagreb I accidentally met an older lady from Senegal. She was a cook, we started speaking, she brought food for many of us...This is how I learned about 'Okus Doma'⁴, a project which helps asylum seekers from across the world adopt to their new life in Croatia. It gave me a chance to share the tastes of my home, to remember them for myself, to tell others about life back home, how it was...but also, it helps me connect to other people with similar stories and to locals who come and talk to us, from whom we learn and with whom we work. It helps me feel more 'at home'

³ These externalities arise when previous immigrants provide shelter and work, assistance in obtaining credit, and/or generally reduce the stress of relocation to a foreign culture (Bauer, 2002, p. 2).

⁴ Eng. – “The Taste of Home”.

For Sumaya, the presence of other foreign-born individuals is equally important as the presence of her own nationals: *“I am an orphan, I adjust easily and I prefer people with similar experiences no matter where they are from. It is easier to relate to them because of shared stories. What can I talk about with my co-national if we do not have anything in common apart from our homeland?”* Saadia’s and Sumaya’s stories portray the label of “neighbors solidarity” that Damm (2007) attaches to immigrants in the host country that choose to settle close to other migrants regardless of the country of origin. What attaches these individuals to places with large concentration of other migrants is not merely a relationship with their country, but the remembered stories and life practices that they have in common with other individuals like them. These feelings translate into temporary nostalgia whereby sharing of one’s own rituals, tastes and habits become important in the process of settling and transitioning within a new outside society. Consequently, a large number of young migrants begin to view their temporary place of residence as a permanent home.

Evidently, network externalities do not represent the sole factor that determines location choices of recent migrant settlers along the Balkan Route. Contrary to young migrants who settle in places with significant portions of different immigrant communities regardless of the size of the location, I have also met young individuals, all of them in their late twenties, who prefer to settle in large cities.

I have a degree in dental medicine from Iraq and I wish to continue working here. I like this city, but more than anything, I like being in a large city. Living here makes it easier for me to learn the language, compete in the job market and take care of immigration documentation more easily. This is why I would

not live in a small town, let alone village, although I do know my co-nationals who are doing well in smaller places. However, most of them are in Austria, Sweden, Denmark ... I think those countries are much better organized when it comes to immigrants and what is available to them than Serbia. So, as long as I am here I will remain in a city. It's much easier

says Basri (a pseudonym), a single twenty-nine year old from Iraq. For Basri, a decision to settle along the Balkan Route was a “*natural inclination*”, since in Belgrade he joined a group of medical volunteers who helped during the largest surge of immigrants, many of whom lived in parks or bus stations. He offered invaluable medical help, connected to locals and learned about the opportunities he would get in Belgrade.

Thanks to my education and some practice I had back in Baghdad, I was able to help many refugees who, by the time they reached Belgrade, were barely alive and still had a long way to go. Many were severely ill, so together with local and foreign volunteers I traveled across Vojvodina and close to Hungarian border to help out. This is how I learned about Serbia, about the life and opportunities in villages and small towns, and realized I wanted to remain here. However, if I hadn't managed to stay in Belgrade I would have probably tried to cross the border to the EU.

Similar to Basri is Fahmi (a pseudonym), a thirty year old Afghani who settled in Sarajevo after he was turned away from the EU border over twenty times.

I moved to Sarajevo last year. I could not get papers in Croatia. There they offered me a place in a refugee centre where I stayed until I decided to cross over to Bosnia. My arrival story to here is long, but Sarajevo is now, I hope, my new home. I work here, occasionally, but what is important to me is ... maybe you will think this is funny ... but is the fact that during summer I get to work for many Arabs who come to visit Sarajevo. I take them around, you know. Also, there are many low-cost airlines that fly out from here to the Middle East, so it is much easier for me to reach my family who is now in Egypt. These are the opportunities of a big urban city, so this is why I think most migrants who live in Bosnia live in Sarajevo.

Damm (2007) claims that immigrants choose large cities for variety of reasons, most of which translate to “more job opportunities and general economic activity, easy access to airports that facilitate contact with old networks abroad, access to large variety of goods and services ...” (p. 161). The factors outlined by Damm, namely neighbor solidarity and urbanity, do emerge as important for recent young migrants from the Middle East who settle in former Yugoslav countries. For them, “network externalities” are less important than for those who settled in the same countries and cities due to familiar ties. The time and space of arrival of young middle-Eastern migrants cut across these drastically diverse push factors that determine their location choices and impose the perceived differences between them. The obvious desire to join the company of established family and friends was the first most observable trait among young migrants. Their young age and the fact that they have left their parents behind emerge as clear grounds for wanting “to feel secure” and “settle in a safe-haven”. In fact, the younger the participants were the more likely

they were to attach significant importance to network externalities. What is obvious is that the actual time and place of arrival, the period of the largest refugee wave in Europe and locations where they knew somebody, represent the push factors that determined their ultimate decision to settle in a given place. Conversely, those individuals with weak family ties in their homeland or with a desire to settle for a better life abroad tend to abandon the link with external networks and focus more on individual motivations – shared life histories and economic opportunities. Both motives indicate different desires and feelings about the life in their host states and denote newly emerging push factors that are easily observable among younger population of recent migrants who find their new home along the Balkan Route or elsewhere on the European continent.

As previously shown, both the time and space variables create symbolic and interesting characteristics of young middle-Eastern migrants across the Balkans, notably when used in a discourse of determinants of migrants' location choices, which are strongly intertwined with the discussion on network externalities. The “clinginess” to perceived ethnic identity and cultural habit that is a product of a shared recent past among the younger generations of migrants originating from the Middle East is easily observable among these individuals. Those who settled in the Balkans precisely because of strong positive externalities are linked to their new homes because of a solid community support that they enjoy. They have a clear picture of “belonging” to a larger community away from home, a feeling which eases the transition process. In that sense, the importance of “home” remains and seems to be a product of nostalgia, rather than a real desire to return. Contrary to this is the feeling of those young who do not have a strong sense of “homeland” embedded in the transition process within their host states. For them,

solidarity and urbanity carry much weight in the integration process, despite the fact that they have arrived to the Balkans in the midst of their personal life tragedies. These push factors, although not as strong as network externalities, are translated into individual and not group-oriented interests. Thus, despite the fact that both categories of young migrants currently living in the Balkans do not share typical migrant characteristics induced by shared lived stories⁵, they both value the existence of other immigrant communities at the place of arrival. The rate at which this occurs, however, is different for these two groups, since it is highly contingent upon other push factors, such as religious similarities with their hosts.

*4. Religious Similarity as a Determinant of Location Choices:
New Push Factors for Young Migrants?*

In the previous section I introduced network externalities, neighbor solidarity and urbanity which, as I have demonstrated, largely discriminate among young migrants from the Middle East settling along the Balkan Route. Now I ask how these factors extend to encompass the importance of religious similarity and availability or better whether this motive, in its present form and practiced activities, contributes to the emergence of different types of migrants among the observed group. Further, I unravel whether this factor, no matter how strong or weak it is, contributes to the effort of studying specific identity-related determinants of location choices among recent immigrants from the Middle East.

In the literature on migrant location choices, various factors point

⁵ Individual vs. group oriented interests (e.g. urbanity vs. presence of relatives in a given spatial context).

out to ways in which migrants choose their new homes and what motivates them to remain. Previous research (Bartel, 1989; Dunlevy, 1991; Buckley 1996) that the most important determinant of immigrants' location choices is the presence of earlier immigrants, while other factors include the presence of other foreign-born persons, economic factors (Bartel, 1989) and welfare payments (Zimmerman & Fix, 1994). While there is very limited research on the impact of religious similarities of the host state on migrants' location choices, Chiswick and Miller (2005) describe ethnic migrant networks which provide the newly arrived members with ethnic goods (food, clothing), but also facilitate social organization, particularly religious services. The provision of these services is expected, they conclude, to increase the stock of migrants with similar ethnic background. The empirical research carried for the purposes of this work has identified that an important premise on which young migrants from the Middle East choose to settle in Serbia and Bosnia and Herzegovina⁶ is embedded in the cultural reproduction, or better preservice of traditional everyday routinized religious activities and practices, which depict the importance of religious habits and assert belonging to an ethnic and religious community.

Fatima (a pseudonym) declares herself as a Syrian, accentuating also that she is a Muslim. She sees herself as a wartime migrant who decided to settle in Sarajevo due to, as she puts it "many Muslim sisters and brothers" who have helped her get situated, organized for

⁶ Although this study did take Croatia as a destination country of young migrants from the Middle East, religious similarity did not play a role of individuals who settled there. The reason for this is that the majority of interviewees who settled in Zagreb were more interested in education and/or employment opportunities.

immediate food and shelter and ease the transition process. She says:

The only place where I truly enjoy myself is the mosque I attend. I go there to pray, to talk to other people who speak Arabic and pray for Allah's mercy. I spend an entire day almost alone, so I feel at home there. I met other women, Bosnian, but also Arabic, two of them also from Syria. They are older and they came here not with the recent wave, but earlier with their Bosnian husbands. Although I do not have a family here, I feel at home. They have welcomed me here... - She readily continues to show that the mosque she attends is not only a place for worship - I learn Bosnian language here; I cook together with other women, so that poor can have food. I was shy in the beginning, but it is now getting better. This place is my safe haven.

The Muslim community to which Fatima belongs is very much attached to the local religious community, of which many individuals from the Middle East are a part. Abid (a pseudonym), twenty-three year old student from Iraq also speaks of religious belonging.

I am Irqi and I came to Serbia in 2015, when I managed to finally enter the country and get all the necessary documentation upon an invite from my friend. I choose Serbia because of friends, but in all honesty, because I found a large Muslim population here, although the majority of Serbs themselves are orthodox. There is a beautiful mosque here in Belgrade, a nice site for a Muslim from a foreign land. However, I go to a mosque we organized in a house of a friend. There are about 30 of us. We don't do anything illegal, it is a

place of prayer and gather. We are all very young, mostly from Iraq, Syria and Afghanistan.

He goes on about declaring that he sees this “*place of prayer and gather*” as “*a keeper of Islamic tradition in a foreign land that is welcoming of Arabs. We pray, fast, sit silently, drink tea and eat food from back home. We feel secure and we don’t bother anybody.*” His friend, Abdul from Syria, who is twenty five and is a former security guard, continues:

We have all chosen Belgrade based on connections, but ultimately what was important was that we, as Muslims, were accepted here, that we had a place of worship and that we were not disturbed in our practices. Historically, during Tito’s time, Serbia has had good relations with Syrian people. I did go to the mosque here in Belgrade and I was most welcomed.

All of the twelve respondents, who arrived to Belgrade in the period from 2015 until 2017, speak about the importance of religious similarities as an important determinant of locational decisions. Freedom of religious practices and ability to, at least partially, identify with the locals, appear to significantly impact young migrants’ motivation to settle in a certain geographical area. In this constellation, we can observe that cultural reproduction forms the basis for existence of ethnic community groups in a given locality. These young migrants tend to posit their decisions to settle in a particular place against religious tradition of the host state. It turns ethnic community networks into makers and keepers of religious identity in a sense that it does not destroy what was “brought from home” and does not create new, more so “diasporic identities” among

recent migrants. Clearly, if religious networks rely upon only one premise of network externalities, and a weak one such as religious similarity, than we cannot fully count for the observation that migrants settle where other migrants from the same country of origin concentrate. What is important in this regard, however, is the ability to fit in a religious sense, that is to say – religious individuals search other religious persons of preferably the same or similar ethnic background, rather than settle in places with co-nationals that are not religious. Hence, religion, as an unexplored determinant of migrants' locational decisions, challenges the concept of network externalities in the case of young migrants from the Middle East.

This severance between religious and irreligious groups was very obvious among young middle-Eastern migrants who now live in Bosnia and Herzegovina. What is more, the overreliance on religious similarities is a distinct feature of all migrants whom I interviewed in this city; it is so much pronounced that six out of seven interviewees cited it as the primary determinant of the location choice. In fact, the separations that existed between religious and non-religious youth in their homeland are also clear in a foreign land:

During our journey, religious practice was something that kept us strong and alive. Naturally, when you move in large groups across foreign lands you socialize with others that share the same beliefs, those that trust that Allah would save us. And he did. We are here, all together, and it is much easier since Sarajevo is a place which welcomes other Muslims, it is mostly a Muslim city. It is easy for us to talk to local imams and they help us a lot too, since they are also Muslim and they understand our troubles.

Despite a strong presence of network externalities, the internal divisions between recent young migrants who settle in Bosnia and Herzegovina are more obvious than in Serbia and Croatia. In this context, we can then focus on the capabilities of migrant groups to participate in various “local” activities – religious, in this case. However, they also include, but are not limited to capabilities that “also centre upon the internal organization of migrant or exile communities, and the level of motivation to maintain group solidarity. A specific area of interest is the extent to which communities in different host countries collaborate and mobilize for a common purpose, or even identify with that purpose.” (Al-Ali et al., 2001, p. 581). Arguably, the decision to be viewed as “separate” among a large ethnic community (hereby I refer to all Arabs who settled along the Balkan Route) is making this religious community the one that can be viewed as a separate, yet positively linked determinant of migrants’ locational choices within a broader discourse on network externalities.

In contrast to evidence which presents that young migrants who settle along the Balkan Route pursue typical migration patterns – that is they settle in areas where they have previous contacts following the principle of network externalities – highly religious young migrants do not list network externalities as the primary factor which determined their location choice. Although important, network externalities were seen as less determinant of locational decisions among migrants who listed religious similarities with the local population as their primary reason for choosing a certain settlement area. Adil (a pseudonym), an eighteen year old Syrian boy, arrived to Sarajevo in January 2017 after spending a few months in Serbia. Stating that he does not have good memories of his home after the onset of the conflict he states: “*I do not want to return. I have a new*

life here. I am learning Bosnian and want to integrate socially, into the school system and study to become an imam.” This young boy goes to mosque each Friday with his friend Tariq from Afghanistan. Tariq is only a year older, so they attend other activities together, but always stay close to the mosque. Tariq explains:

I feel this local mosque as my home. I met a nice Bosnian guy who brought me here. I have been attending every Friday and I attend many other activities to which he invites me to. There are many different things here when it comes to the practice of Islam in Bosnia, but I do not mind. Muslims are Muslims everywhere. They are all good Muslims here - he adds as he points to the importance of feeling welcome first as a Muslim and then as a foreigner -This is not the experience I would have in Germany or Sweden or Canada. I would fit in my own ethnic community, but I don't think I would ever be able to find my place among the locals... and I really want to integrate locally. My people matter to me, but I don't mind if there is nobody here from Afghanistan. I have a few Arab friends, but most of my friends are Bosnian and my girlfriend is too.

The same is true for Salim, a twenty-eight year old father of twin boys who are now six. He is young and, unlike all other interviewees, has arrived to Bosnia with a family. A few months ago his sons started attending a local mosque's *maktab*⁷:

⁷ School (in Arabic). In Bosnian language maktab or mekteb denotes a primary Islamic school.

They have a good time in maktab; it is all interesting to them. Other children have heard about Syria, so they were well accepted from the very beginning. They have made a very good friend there, a little boy named Muhamed. Muhamed is Bosnian and he is helping them learn Bosnian language. My hope is that they will be able to start school next fall, even though they will probably go to 1st grade again because of their language skills.

Zaim (a pseudonym) also agrees with the fact that religious networks are, especially for young Middle Eastern migrants who settle in Bosnia and Herzegovina, a beckon of religious identity inherited from home who allow the very young to use the opportunities of religious settings to which they are accustomed as places where they can experience gradual integration through something that is familiar to them. This feeling of being locally accepted is especially relevant for the young as the majority of them traveled alone and settled alone in these areas.

Maktabs, mosques, local homes of good Muslims – for us, they are all places where we feel a little bit at home. We pray together, we speak the same language of prayer and hence integration and resocialization becomes much easier. Once you have this, once you have local friends, it is much easier to search for a job and become a part of a local society

says Zaim, a twenty-seven-year-old English professor from Iraq. None of the respondents who view religious similarities with the local hosts seem to annunciate national differences when talking about migrants from the Middle East. In fact, although they do come

from more or less single-nationality families, they focus on religious uniformity and put aside national differences: “*We are Muslim and that is what matters. It was God’s will for us to settle here, but at least we found a place where we can be Muslims again.*” These young cohorts of middle-Eastern migrants who settled along the Balkan Route in the period from 2015-2017 maintain strong religious links with other religious individuals of same faith, but also links to different religious institutions. These patterns were especially obvious in Bosnia and Herzegovina and less so in Serbia, while in Croatia none of the interviewed individuals considered religion and religiosity a determinant of locational choice. Strong religious individuality, important connections with religious institutions in their host states, weak or inexistent links to other foreign-born communities despite their strong presence in the three host states and no focus on national differences characterize the emerging new middle-Eastern diaspora in the Balkan states. Unlike migrants who rely on network externalities and who establish very weak cultural links with their host state, individuals who claim to be religious encourage strong links with locals in spite of their foreign origin. Thus, this group of migrants can be termed to be the bearer of an emerging, but still relatively weak diaspora, a pattern which is still difficult to observe and study in many European states.

5. *Conclusion*

In this paper, I have explored the location choices and analyzed the factors that determine recent migrants’ motivations to remain in Bosnia and Herzegovina, Croatia or Serbia within the framework of network externalities and existence of strong religious associative links with the host state. Aware that life histories outlined below

present just a portion within a wide range of experiences, I have argued that contrary to immigrant population trend of geographically concentrating, recent middle-Eastern migrants in their late teens and up to their early thirties choose to divert from main transition route and settle along the Balkan Route due to the strong presence of ethnic and/or national networks and host-nation's similarities with social identity traits that can also be observed among this cohort of migrants – namely religion. Those I have interviewed, center instead on what they believe are the most valuable elements for migrants escaping political or social issues in their homelands – the presence of their own ethnic group which must be willing to help, but also the presence of religious associative networks. Although many of those interviewed also, somewhat, challenge the concept of network externalities by focusing more on neighbor solidarity, they do not abandon the concept in its entirety.

In terms of strong religious associative networks, young cohorts of migrants from the Middle East exhibit rather strong connections and even reliance on religious institutions in their host state as long as they are hospitable and similar to their own religious practice. Alternatively, findings show that religious similarity, as a determinant of locational decision, is a strong binding factor to the host state as all respondents who are highly religious and who cite this reason as the primary one for choosing their location, also wish to remain here. Hence, what will be observable in the future is the creation of new diasporic networks in the Balkans and forms in which they will emerge. This group can be seen as the carrier of emerging, but still fairly weak diasporic activity persuaded by those who do not wish to return due to socio-political ills in their homeland and less religious support in other destination countries.

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BECOMING DIASPORA. HOW THE HOST AND ORIGIN COUNTRIES INFLUENCE MIGRANTS' ACTIVISM IN AID AND DEVELOPMENT: A COMPARATIVE PERSPECTIVE

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INDEX: 1. Introduction. – 2. The Political Opportunity, still a useful theoretical framework. – 3. Malian Diaspora in France. – 4. Lybian diaspora in the UK. – 5. Afghan Diaspora in Europe. – 6. Conclusions. – 7. Bibliography.

1. Introduction

The title of this article “becoming diaspora” is evocative of a process that, in the view of the author, does not receive enough attention by policy makers. This process describes the trajectory of civic engagement of migrants in aid and development of their origin countries. The recent emphasis on supporting diaspora engagement in aid and development that arises from the efforts of some policy makers and UN organizations active in the migration field risks to homogenize the category of migrants and assimilate them to the notion of diaspora. By definition, the world diaspora refers to migrant communities that nurture a dual sense of belonging to both home and host country. Diasporas maintain strong ties with their origin countries that they aspire to through a commitment to contribute to their restoration, development and maintenance. Diasporas often nurture thoughts of an eventual return, in what can be conceived as a dual citizenship, the one of the heart and the one of the mind. Understandably, not all migrants feel the moral duty to engage in solidarity towards their

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fellow nationals, their origin country and their beloved land. Not all migrants have the capacity to do so, even if they are willing to. Not all migrants engage successfully in aid and development, even if their intention is positive and passionate. The one many migrants experience at a certain stage of their migration history is a process of ideal return to their homeland that may be exercised through engaging in aid and development activities, in a collective form.

The article aims to address the question of when migrants become diasporas? What trigger their activism towards social work of transnational solidarity?

This article supports the idea that there are factors that stimulate the transition from the status of migrants to the one of diaspora. These factors are responsible for triggering a process that, time after time, leads migrants to become diasporas and engage in the origin countries to bring change through aid and development projects. What are these factors? This article suggests to consider the convergence of two distinct dimensions that positively affect the transition from migrants to diasporas. These are: the attitudes of host countries vis-à-vis the migration phenomenon, including the recognition of migrants as potential development actors, institutional structures and opportunities to support diaspora activism (contextual factors); secondly, the sudden eruption of a crises that, in the origin country, solicit diaspora engagement in helping fellow nationals (situational factors).

Using a comparative analysis, this article argues that the convergence of contextual factors in the host societies and situational factors in the migrants' origin countries at a certain time in history deeply influence the attitude to activism in aid and development by migrants as individuals and as groups. The article brings narratives from three cases: the Malian diaspora in France, where both factors occur, generating a high level of constant

diaspora engagement in Mali; the Lybian diaspora in the UK, where the support of institutional structures to Libyans exists, though at a slower pace, and the fall of the Gaddafi's regime in 2011 prompted the reaction of Libyan diaspora, apparently limited to the initial phase of the humanitarian crises; the Afghan diaspora in Europe whose engagement in aid and development is hindered by the absence of a specific institutional support in the host countries and by the lack of a specific triggering situational factor in Afghanistan.¹

The three cases from Mali, Libya and Afghanistan present different characteristics for the historical roots of the diaspora, for the profile of people migrating to Europe, for the different hosting societies that are considered in this article. Despite differences, the three groups share a common feature that make them suitable for the proposed analysis, that is a good propensity to remit money back home, calculated comparing data on annual remittances flowing in the country, the total number of nationals living outside the country and the national GDP. The article assumes that this propensity is indicative of the willingness of migrants to maintain ties with the origin country, and of the sensitiveness towards engaging further in aid and development, if external conditions are conducive.

¹ Initial research on these three diaspora groups was conducted with Giulia Spagna in the framework of a scoping study commissioned by the Danish Refugee Council to me as leading consultant. The scoping study was aimed at identifying potentials to promote diaspora related programming in DRC countries of operation, within the overall Diaspora Program promoted by its leader Mingo Heiduk in Copenhagen. The scoping study was conducted between December 2015 and January 2016 and explored potentials from a total of 22 origin countries, namely Iraq, Jordan, Lebanon, Syria, Turkey in the Middle East and North Africa region (MENA); Ethiopia, Kenya, Somalia, Uganda, Yemen, Djibouti in the Horn of Africa and Yemen region (HoAY); Nigeria, Burkina Faso, Mali, Ivory Coast, Liberia, Guinea in the West Africa region (WA), Afghanistan, and stand-alone countries in Africa such as Sudan, South Sudan, DR Congo and the Central Africa Republic.

2. *The Political Opportunity, still a useful theoretical framework*

Since the early 1990s, many comparative migration studies have adopted a political opportunity structure (POS) approach to explain variations in forms of migrants' grassroots organising, mobilisation, participation and engagement.

The approach of the political opportunity structure developed within the theoretical framework of social movement theory (Tilly 1978; Tarrow 1994; Kriesi et al. 1995). Tarrow (1994, 85) defines the political opportunity structure notion as 'consistent dimensions of the political environment -not necessarily formal or permanent- that provide incentives for people to undertake collective action by affecting their expectations for success or failure'. The political opportunity framework explains motives for people to act for reaching a certain objective and ascribe personal or collective motives to external contextual opportunities that favour processes and indirectly solicit people's activism.

Taking this perspective means recognizing that people, including migrants, tend to form organizations and act collectively to reach an objective when there are favourable external conditions that raise migrants' positive expectations towards what they can achieve through collective actions. In other words, when a given political context is favourable in a given historical timeframe, for instance through a new legislation or through incentives to certain categories, people take the opportunity to organize themselves and achieve an objective.

During the 1990s, the notion of political opportunity structure was further specified by authors like Kriesi, Koopmans, Duyvendak and Giugni (Kriesi et al 1995). In a famous book discussing the notion of POS in the context of the Social Movement Theory these authors added various components that,

complementing the political opportunity structure, affect diaspora engagement in the social sphere, such as national cleavage structures, institutional structures, prevailing strategies and alliance structures. All these aspects, according to the authors, frame what they call the “interaction context” that links macrostructural level of the political opportunity structures to the collective actions of movement actors. The major contribution of these authors has been to look for a connection between external opportunities and migrants’ agency that is exactly the perspective that this article works on.

Scholars’ attention to migrants’ agency in the POS framework emerged towards the 2000, when the notion evidenced some shortfalls in supporting the analysis of ethnic and migration research (Bousetta 2000, 232) particularly concerning the lack of mechanisms of the POS approach to add insight to its general framework.

In particular, the critique of Bousetta (Bousetta, 2000, 235) pointed towards an overemphasis of the POS approach to institutional factors that seemed to be the primary triggering factor in migrants’ activism. In other words, dedicated institutions such as Ministries of Diasporas in migrants’ origin countries, or offices in charge of diaspora involvement in home politics would act as catalyst of diaspora engagement in aid and development, as the case of some western African countries demonstrates. This focus on the institutional framework of the origin countries however, Bousetta noticed, seem to undermine the agency and strategies used by migrants in engaging with their origin countries. The POS framework, according to Bousetta, seems to forget immigrant organisations’ internal and identity construction processes, thus misinterpreting immigrants role and portraying them as passive agents whose actions are determined by institutional structures alone.

The critique of Koopmans (Koopmans et al. 2005, 19-20) suggests that in addition to the general institutional structures of the state, specific dimensions of the opportunity structures, such as integration policy, should be taken into account when analysing the factors that trigger migrants' activism. This critique highlights the importance of hosting societies in shaping and modelling the role of migrants in the host country. Koopmans suggests that explicit integration measures promoted by host governments enhance the ability of migrants to engage in the socio-political sphere.

Caponio and Garbaye (Garbaye 2005; Caponio 2005) seem to build on this critique when they point towards the importance to encompass the local besides the national level in the analysis of migrants' activism in the host countries. In studying migrants' organizations in three different local contexts in Italy, namely Milan, Naples and Bologna, Caponio evidenced how different local opportunities given by the different local/municipal governments influence levels of immigrant organization, suggesting the importance to look at the local context for understanding patterns of migrants' activism.

In the same vein, stressing the importance of local contexts to diaspora engagement in aid and development, this article looks at "opportunities" arising from migrants' origin countries. The article conceives local contexts in terms of institutional structures, recognizing the importance of a political will in migrants' origin countries to deal with the global diaspora and seek for its contribution to the country's growth. More importantly however, local contexts are here framed as *situational factors*, meaning those calamities that occur in a given local political contexts and that spur diaspora activism and solidarity. Both institutional structure and situational factors fall under the category of external conditions (external to migrants' agency) that are determinants

for triggering migrants' activism in line with the political opportunity approach.

At the same time, the article embraces the perspective that Boussetta suggested in early 2000s that is to look at migrants' agency in determining their future and their role in host societies. As such, migrants are conceived as potential agents of development in the host and origin societies, in line with the Migration and Development approach. In such a perspective, the article recognizes the importance of migrants' relations in supporting their activism at both national and transnational level, to response to the critique that has been posed to the POS theory as being too rigid and static in offering explanations to mobilisation patterns, ignoring for example aspects related to networks and social capital. As argued by Koopmans et al. (2005, 21) 'collective actors never mobilise in a vacuum. They are always confronted with established actors who already occupy certain positions in the playing field with whom they enter into relations of competition, alliance or opposition'.

In doing so, this work agrees with Marco Giugni (Giugni 2011) interpretation of the political opportunity approach in its post-critique period, maintaining that the POS still represents a useful concept to understand current features of diaspora engagement. At the same time, the article builds a conceptual framework that draws from the most recent evolutions in the approach and applies them to the analysis of diaspora activism in aid and development to explain how situational factors in the origin countries, coupled with political opportunities in host countries influences migrants' activism in aid and development.

3. Malian Diaspora in France

The case of Malian diaspora shows how institutional structures in the host societies are determinant to enhance diaspora

engagement in aid and development. Historical legacy and the level of bilateral cooperation between France and Mali on diaspora engagement in development, make the case of Malian diaspora in France extremely interesting for this study².

The relationship between France and Malian immigrants is old and solid. French colonisation prompted Malian belonging to the Soninke ethnic group to migrate into France already at the beginning of the 20th Century. During the 1960s and 1980s, droughts in Mali and labour needs in France attracted several Malians to migrate there. Most of them (an estimated 80%) originated from the Senegal River Valley that includes the region of Kayes where the majority of Malians in the diaspora belong to.

Starting from the 1960s, Malians in France have been setting up associations to assist their fellow migrants in integration into the French society, and to pool funds to help their communities in Mali. In the 1970s, Malian diaspora's Home Town Associations became a popular way to do so; The first development projects were supported by the Group de Recherche pour le Development Rurale (GRDR), which focussed on communal development projects entirely funded by the diaspora and implemented through a network of migrants in France and villages in Mali.

During the 1980s, and after France officially recognised Diaspora associations in its territory, the number of diaspora associations in France started growing exponentially, totalling about 400. Their recognition boosted the activism of migrants far beyond remittances and rural development; Diaspora's engagements encompassed infrastructural development projects, including the creation of wells, water tanks, schools, health centres and supporting the economic sector through the establishment of cooperatives, cereal stocks and enterprises.

² Today, 125.300 Malian are part of the national diaspora, representing about 0,8% of the country's total population (15,3 million). About half of global Malian diaspora reside in France.

During the 1990s, projects oriented towards education activities, professional training and teachers' training (Galatowitsch 2009). Between 2000 and 2004, it is estimated that more than 5.5 million Euros have been channelled to Mali by Malian diaspora residing in France (FSP 2005).

Nowadays, Malian Diaspora communities in France are still organised through Home Town Associations, which promote projects such as the building of schools, mosques, hospitals and act as mediators for exchange experiences between different towns in Mali and in France. Typically, Home Town Associations channel funds in the area of origin of the diaspora, through an established network of local counterparts. Among their recent activities, worth to mention are the provision of soft loan facilities to people in need of aid or support for business start-ups. This system, called tontine, is traditionally used in areas where the access to official credit is difficult.

The relationships between Malian Diaspora and the population left home has always been very strong. Traditional leaders and griots in Mali ensured that a good reputation was maintained as the gifts of the migrants benefitted the entire community (Azam and Gubert 2004). Migrants maintain a high status in Mali, and Malian youth are encouraged to migrate in search of wealth, prestige and as an income diversification strategy for the family (Traoré 2009).

At the same time, since the early 2000s France invested into diaspora strengthening as development actors. In 2002, France launched the Fond de Solidarité Prioritaire - Codevelopment Mali with a budget of 2.6 Million Euros over three years (first phase). The FSP is a branch of the French Ministry of immigration aimed at boosting socio-economic development in Mali through dedicated diaspora projects. The FSP co-funded diaspora organisations' and local counterparts' projects aiming at promoting local development, provided technical assistance to

diaspora organisations, and coached them through an office in France and an office in Mali (Gauvrit 2004). The second phase of the FSP (2006-2009) was implemented in collaboration with the Agence National de l'Accueil des Etrangers et des Migrations (ANAEM) and funded over 180 projects of diaspora organisations.³

In 2013, France integrated diaspora support into its international cooperation policy. In fact, harnessing Mali's diaspora for Development is one of the four pillars in France's strategy for reconstruction and development of the country, alongside the external action of local governments (French Ministry of Foreign Affairs, 2013). In 2013, France and Mali launched the Mobility and Migration for Development Programme. The program aims at enhancing the economic impact of Malian diaspora by promoting job-creating entrepreneurship initiatives and supporting local governance. It addresses three areas: a) Building the capacities to effectively include migration in Malian public policies, for example by funding local capacity building operations through the qualified diaspora; b) Co-financing and supporting local development projects; c) Supporting productive investments and migrant entrepreneurship.

On the Malian side, Mali has established and pursued strategies to attract the involvement of their diaspora in the homeland's development projects (ADPC, 2011 p. 5). To this end, in 2000 the Ministry for Malian Nationals Abroad and African Integration has been created and devoted to enhancing the role of Malian Diaspora for peace and development in Mali.

In addition, the Haut Conseil des Maliens de l'exterieur (HCME) was created in 1991 to manage the relationship between Malian diaspora and the population in country. In 2003, the

³ <http://www.panapress.com/Plus-de-180-projets-finances-par-le-FSP-et-l-OMi-au-Mali--13-662274-18-lang1-index.html> (accessed on 23 February 2016).

HCME was re-structured as a non-political and non-profit organisation, with offices in 62 countries and the head quarter in Bamako. The aim of the HCME is to support Malians residing abroad, to channel migrants' remittances towards investments in Mali, to promote cultural events and sport competitions, and to sustain decentralised cooperation. The HCME represents the an established Malian non-governmental institution, both for development purposes and during emergency situations, such as the case of the 2002 political crises in Ivory Coast, when in few days the HCME was able to mobilise diaspora to remit sufficient funds to repatriate Malians living in the Ivory Coast. (IOM 2009).

4. Lybian diaspora in the UK

The case of Libyan diaspora shows how situational factors in the origin country, such as the eruption of the civil war after the fall of Gaddafi's regime in 2011, contribute to solicit diaspora engagement in aid and development. The case of Libyans in the United Kingdom also shows how institutional support from the host government, in the form of available funds to Libyan diaspora organizations, also triggers engagement of diaspora organizations. In line with the critique of Koopmans to the POS approach, this section on Libya looks at the hosting societies as a pivotal parameter to understanding Libyan migrants' attitude to engage in humanitarian aid and development activities in Libya.

Libyan diaspora originated between 1995 and 1998 when many young Libyans, mostly university graduates, students or working professionals, escaped Libya to avoid arrest, after clandestine Islamic organisations belonging to the Muslim Brotherhood and 'Islamic Grouping' were discovered by the Libyan authorities. A great part of them sought political asylum status in Italy, UK, Switzerland, Germany and other EU countries (Gamaty, 2012). Looking at the United Kingdom as one of the

preferred destinations of the Libyan diaspora, relations between the United Kingdom and Libya were tense from the mid-1980s, following the shooting of a British police officer in Central London apparently from a diplomatic office of the Libyan government. The subsequent Lockerbie case, when a bomb placed by two Libyan terrorists on a flight crossing Scotland caused the death of more than two hundred fifty persons, disrupted diplomatic contacts completely and led the UN Security Council to impose sanctions on Gaddafi's government who refused to collaborate and hand over the suspects. Sanctions lay heavily on Libya for almost a decade and were suspended in 1998 after Gaddafi recognized his responsibilities and promised to pay compensation to British families. That admission of fault reopened diplomatic relations between Libya and the United Kingdom from 2001. UN sanctions were lifted soon after and Libya started close cooperation with the UK in the war against terrorism and in the oil business. According to Blitz, Libya geo-strategic importance to the UK has become evident in 2004, when Libya accepted to dismantle its nuclear weapon programme, opening commercial opportunities and collaboration in the war on terror (Blitz, 2008). Accordingly, since 2004, the UK government has enhanced cooperation on asylum and migration management with Libya, and the number of Libyan asylum seekers in the UK has increased. The number of Libyan charities registered in the UK expanded rapidly, taking advantage of the British Department for International Development (DfID) dedicated funding initiatives for development and humanitarian aid programmes led by diaspora organizations, particularly those open to Libyan diaspora organisations such as the Disability Rights Fund; Girls'

education Challenge; Collaborative Challenge Fund; Global Innovation Fund; Common Ground initiative.⁴

Who are Libyans in the UK? What is their potential in aid and development? The answer is anchored to the opportunity structure offered to refugees and migrants in the UK that seems to shape diaspora engagement in collective actions. Data from OECD show that 58% of Libyan nationals who reside in the UK are in possess of a University degree. This data is reinforced by qualitative studies on the profiles of Libyan Diaspora in the UK that report that students and business people represent the vast majority of Libyans in the UK (Blitz 2008, p 115). Higher education level and a relatively well-off status, probably constituted a fertile ground on which Libyan nationals in the UK were ready to build on, as soon as an external opportunity in their origin country arose. In fact, during the 2011 crises that determined the fall of long-term leader Muḥammad Gaddafi, a vivid activism of Libyan organizations became visible in the UK and in the USA.

Within this activism, the organization Volunteer Libya⁵ was set up by eight diaspora individuals in 2011 and started as fundraising association in the USA and increasingly focussed on youth empowerment and social cohesion programmes in Libya. Moved by the lack of opportunities in Libya that pushes more and more youngsters to join armed militia, the association organised trainings, volunteering and renovations projects, donations of school materials, scholarships for Libyan and Tunisian youth and distribution of non-food items in camps in Libya. The

⁴ For more information on the British Government support to Libyan organizations see <https://www.gov.uk/world/organisations/dfid-middle-east-and-north-africa> (accessed 21/11/2017).

⁵ Interview to Volunteer Libya by Giulia Spagna and Valeria Saggiomo, within the framework of a Scoping Study on Diaspora Engagement commissioned by the Danish Refugee Council from December 2015 to January 2016.

humanitarian crisis that followed the fall of Gaddafi's regime pushed around 2.4 million Libyan nationals in need of urgent assistance and prompted the activism of Libyan diaspora in the UK. Interviews with Libyan diaspora reported by media⁶ described the way Libyans mobilised their resources and activated networks of Libyans in Europe and in the United States to collect funds and address humanitarian needs in their home country. Libyan diaspora's activism involved the creation of charities and organisations to gather resources and organise a response in a structured way. For example, the "World Medical Camp for Libya" (WMCL), was set up in London in a few days immediately after the fall of Gaddafi's regime in 2011. Through appeals aired by Facebook, the organisation quickly activated a network of supporters able to raise 100.000 euros in two weeks to arrange a convoy with medical supplies by road, via Egypt. The convoy successfully reached the hospitals in Benghazi, as well as to other Eastern towns including Derna, Bayda and Tobruk.⁷ Despite the successes achieved, the organisation permanently closed in May 2013.

The narrative on the World Medical Camp for Libya is evocative of the ways many Libyan Diaspora organisations in the UK seem to work. An overview of the annual budget of Libyan Diaspora organisations in the UK suggests that their activism is often strictly linked to a quick-response to a particular aspect of the humanitarian crises in Libya. This is also probably due to the lack of sustained core funding, as their budgets - considerable at the onset of the 2011 crises - sharply diminished in the following two or three years.

⁶ New America Now "Libyan Diaspora Helps the Homeland" Interview to Sarah Ibrahim, press officer of the World Medical Camp for Libya. <http://newamericamedia.org/2011/03/libyan-expats-pitch-in-to-help-give-aid.php> accessed on January 2016.

⁷ <http://www.tnpp.org/2011/02/world-medical-camp-for-libya-charity-to.html> (accessed on 23 February 2016).

According to a UK Governmental source,⁸ in 2015 six active Libyan Diaspora organizations were officially registered in the country. These are: Lawyers for Justice in Libya that operates in Libya, Egypt and Tunisia, promoting human rights, justice and the rule of law, with an annual budget of about 230.000 pounds; Libya Aid Relief Efforts that operates in Libya and Tunisia, targeting civilians and conflict-affected population with health projects, with an annual budget below 10.000 pounds; Libya Human Aid that operates in Libya and Syria, delivering humanitarian aid, with an annual budget of 424.000 pounds in 2012, and 52.000 in 2013; Libyan Medical Relief LTD that operates in Libya only, providing medical and humanitarian relief, with an annual budget of 80.000 pounds in 2013, and below 10.000 pounds in 2014; The Society for Libyan Studies, an established cultural association active in England and Wales to promote the study of Libyan history, culture, languages, literature, art and customs. It organises cultural missions to Libya, exhibitions, meetings and lectures pertaining to the Libyan cultural sphere. It has a constant annual budget of about 90.000 pounds; World for Libya that operates in Libya and Tunisia, providing medical support, training to Libyan doctors, education projects and financial assistance to refugees and displaced Libyans. The charity managed a budget of 765.000 pounds in 2012, 53.000 in 2013, less than 2.000 in 2014.

Data presented above demonstrates a vivid activism of charities immediately after the fall of the Gaddafi's regime in 2011, with a massive amount of money spent on humanitarian interventions that sharply declined in the subsequent years, until closure or minimal operations in 2014 and 2015. This indicates that Libyan diaspora activism in aid was clearly triggered by the 2011 historical event and faded away soon after in the following

⁸ www.charitycommission.gov.uk (accessed on 23 February 2016).

years. Worth to note that because of the severe political fragmentation prevailing in Libya, neither a government body nor a national engagement strategy or policy dedicated wholly or partly to diaspora engagement in Libya exists. Ministries such as those of Foreign Affairs and International Cooperation, Justice, Defence and Interior may all have roles relevant for a diaspora's engagement in the country, but none appears to have an active strategy relating to this at the present time, according to research (Taylor, 2014).

5. Afghan Diaspora in Europe

The case of the Afghan diaspora describes how the lack of an institutional structure that recognizes its role in the host society, and the lack of specific situational factors in Afghanistan are detrimental to the Afghan diaspora engagement in aid and development, despite the good propensity of Afghans to remit money back home.

Looking at historical milestones that generated Afghan diaspora, three distinct waves of migrations fluxes from Afghanistan can be identified. The first followed the Coup d'Etat in 1978 that established a Marxist regime; political opponents, officials from the former government, university professors and members of the elites fled the country to escape persecution. In 1992, a second wave saw the massive exodus of the Marxist regime authorities and their supporters, who left power to a radical Islamist group, the Mujaheddeen. The third wave began in 1996, when the Taliban took over Kabul, defeating the NATO force and its allies (Danstrom, Kleist, Soresen 2015).

The preferred destinations were the United States and Europe (OECD 2015). Germany and the United Kingdom host the vast majority of the Afghan diaspora residing in Europe (respectively 23,6% and 13,6%) but there are also considerable communities in

the Netherlands, in Denmark and in Norway. Recent research (Danstroem, Kleist, Soeresen 2015) confirm that the narrative on Afghan diaspora's involvement in development and humanitarian aid in their origin country is scarce. Available data account for high remittances levels, estimated at 30% of the GDP, totalling more than five hundred million USD in 2013. While Afghan diaspora involvement in numerous investments in the sectors like telecommunications, banking, civil aviation, real estate, is known and documented, little research on diaspora organisations commitment to humanitarian activities or development projects exists.

In the UK, Afghan Diaspora organisations are formally registered at the Charity Commission website, managed by governmental offices. The website accounts for 62 registered Afghan diaspora organisations in the UK, working in various domains such as relief, development, cultural activities, religious activities and human rights. Worth to mention is the existence of an umbrella organization, the Federation of Afghan Refugee Organisations in Europe (FAROE), that at the European level brings together 53 organisations of Afghan Diaspora in different European countries. As stated in its website, FAROE is the biggest and the most important coordinating body Afghans have ever had in Europe.⁹ The organization was founded in 1999, when Afghanistan suffered the theocratic dictatorship of the Taliban. Among others, FAROE's aim is to stimulate Afghan organisations' involvement in the promotion of human rights, good governance, democratisation and peace-building in Afghanistan. In addition, FAROE acts as advocacy forum to solicit the attention of Europe and European countries in contributing to the political stabilization of the country.

⁹ http://www.afghandiaspora.org/index.php?option=com_content&view=article&id=197&Itemid=93 (accessed on 21/11/2017).

Looking at the local institutional setting, Diaspora's engagement does not appear to be under the remit of a single institution, nor does it appear to be coordinated by a leading body in Afghanistan. According to research (Taylor et al. 2014, p.192) multiple agencies are involved in aspects of diaspora engagement, including the Ministry of Foreign Affairs, the Ministry of Borders and Tribal Affairs, and the Ministry of Refugees and Repatriation. While there is no government ministry in the lead for diaspora-related issues, the Afghanistan National Development Strategy (ANDS) includes the Afghan diaspora in its National Consultation Process, which aims to oversee the strategic direction of the ANDS by high-level stakeholders. The government ministries who oversee these broad thematic areas of the ANDS, which would ostensibly involve the Afghan diaspora, are the Ministry of Finance, the Ministry of Justice, and the Ministry of the Economy (Islamic Republic of Afghanistan, 2008).

The majority of Afghan diaspora organizations in Europe under the FAROE umbrella do not promote aid nor development projects in Afghanistan, despite the estimated above 8 million people who are in need of humanitarian assistance, after decades of civil war. According to human rights organizations' reports, civilians in Afghanistan are recurrently exposed to targeted killings and forced recruitment by armed groups, while victims of mines have reached a world's record. Stability and development are hampered by a high level of poverty, which remains entrenched especially in urban contexts and IDP camps, leading to increased food insecurity and low level of resilience. All these situational factors, however, are not sufficient to catalyse significant contribution of Afghan diaspora for aid and development, especially in the absence of a local dedicated institutional support system for channelling the Diaspora engagement in the country. Afghan diaspora engagement in aid

and development is low and tend to focus on advocacy at the European level to intervene in the country and bring political change.

6. Conclusions

This article concludes that migrants who become diaspora undergo a long process of integration into the host societies and of re-working of their identities so to be able to contribute to the development of both the host and the origin country. In this long and sometimes painful process, hosting societies play a key role in either supporting or hindering migrants' transition from passive beneficiaries of social welfare in the host countries to active actors of development in the origin countries. As the Malian diaspora case demonstrates, the presence in host societies of institutional structures that facilitate diaspora engagement in aid and development, a positive attitude of institutions towards the recognition of migrants as development actors, and a constructive relationship between migrants' host and origin countries act as catalysts of diaspora activism. In such a context, his activism is strengthened, empowered and channelled into strategic development paths that potentially generate positive change in both the origin and the host countries.

Conversely, as the case of the UK with Libyan migrants during the Lockerbie case seems to suggest, where a conducive framework is feeble, where host governments are less prone to enact social policies explicitly targeting migrants as potential aid and development actors, the engagement of migrants in the home affairs of the origin countries is much slower, less prominent and short-term. Equally, the lack of bilateral agreements and operational programs between the host and origin countries on how to maximise the contribution of diaspora groups or organizations in aid and development seems to affect diaspora

engagement negatively. Situational factors, instead, trigger diaspora activism in humanitarian aid, as the 2011 surge of Libyan diaspora organizations in the UK demonstrates. This trend however seems to follow emotional rather than intentional motives, as diaspora engagement gradually fades away after the onset of the crises.

Finally, the case of Afghan diaspora organizations supports the argument that institutional structures conducive to diaspora engagement in hosting societies are pivotal in facilitating the transition from “migrants to diasporas”. In fact, the low number of Afghan diaspora organizations in Europe and the low profile they keep with regard to aid and development activities in Afghanistan sadly correspond to a vague cooperation framework between Afghan authorities and host governments on diaspora matters, despite the high level of remittances that flow in Afghanistan annually.

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THE CHALLENGE OF FUTURE MIGRATION GOVERNANCE: CONCEIVING OF MIGRATION AS AN INHERENT ASPECT OF DEVELOPMENT

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1. Introduction

This paper explores the links between migration governance and migration and development discourse in the current global and European contexts. Firstly, it briefly discusses the construction of migration as a matter of international policy and how the ‘root cause’ approach has inspired most of migration and development discourse, policies and practices. Secondly, the paper explores in more detail the embeddedness of the root cause approach in European migration and development cooperation policy, and identifies some of the shortcomings of this approach. Thirdly, the paper reviews some of the opportunities and challenges that the ‘mainstreaming of migration’ approach presents to embrace more decidedly the

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The responsibility for the content, the views, interpretations and conditions expressed herein rests solely with the author, and can in no way be taken to reflect the views of the International Organization for Migration or its Member States and partners. The author is grateful to Valeria Saggiomo for her review of the draft version of this paper.

reciprocal relationship between migration and all sectors of governance. Finally, the paper suggests that the new chapter in migration governance and international cooperation on this matter that is opening up with the forthcoming adoption of a *Global compact for safe orderly and regular migration* (GCM) represents an opportunity to ‘internalize’ the ‘root causes’ of migration, and understand them as embedded in the choices that we make, translated into sectoral policies. In this new chapter of international cooperation, we have the opportunity to review these choices and ensure that social policies create an enabling environment for people to achieve their full potential. As such, it is argued that the challenge for future migration governance lies in fully embracing the reciprocal relationship between migration and all sectors of governance, thus shifting the focus from ‘crisis management’ to building more truly inclusive societies in the long run.

2. The construction of migration as a matter of international and European policy: A brief overview

Since the 1990s, there has been a growing internationalization and regionalization of migration policy issues. Migration has been increasingly, and more strongly since the turn of the millennium, constructed or problematized as a matter of international policy. This trend reflects, on the one hand, a renewed optimism among the international community on the potential of migration to contribute to ‘development’ (mostly of the ‘developing world’, without fully embracing migration’s contributions to the welfare of affluent societies). It also reflects the rising interest in the diversification of development financing, including through private funds, such as

migrant remittances.¹ On the other hand, it is telling of growing concerns associated with the ‘crisis (or reduction) of the state’, the perception of migration as a destabilizing factor for states and societies, and the perceived need for enhanced governance of international migration ever since the end of the Cold war, in a context marked by the collapse of communism and the expansion of neoliberal capitalism. (Geiger and Pécoud, 2014 and 2010).

Different, even contradictory, understandings of migration coexist and shape interstate cooperation around migration. For example, the perception of migration as a threat has coexisted with perceptions of migration (and especially remittances) as an asset in international and regional policy discourses on migration and migration and development. Certain understandings may, nevertheless, prevail at specific points in time, and in different arenas in which migration governance actors operate and interact, owing to power imbalances between such actors.

In this framework, policy coherence, greater capacity to enhance international migration governance, and enhanced multilateral cooperation (both to manage migration and to make migration work for development) have been high in the international agenda. In Europe, this trend has translated into the gradual elaboration of European migration and development cooperation regimes, and increased cooperation with neighboring countries (Geiger and Pécoud, 2014). Recently (in the past three years or so), predominant perceptions of migration as a ‘risk’ or a ‘threat’, in an increasingly fragmented migration

¹ This especially since data on ‘migrant’ remittances have become more widely disseminated, mainly by financial institutions such as the World Bank, making remittances an object of interstate cooperation; from ‘regulation’ at the national level (e.g. adoption of anti-money laundering regulations) to international declarations on ‘financing for development’ (e.g. Addis Ababa Action Agenda).

governance context, have led to new forms of interstate cooperation outside of conventional aid, bilateral or multilateral frameworks. Many of these instances conflate elements of development-related cooperation and migration management. These new forms of cooperation have indeed revealed the truly ‘pluricentric’ nature of migration governance.² And, however unconventional these forms of cooperation may be, they entail formal implications in terms of resource allocation (e.g. creation of specific funding mechanisms) and the associated expected operationalization of the commitments embraced.³

Similarly, data on migration (international and internal migration and forced displacement) have been key in the process of internationalization of migration policy issues. Data are often

² Conference on “The Dynamics of Regional Migration Governance” organized by the European University Institute (EUI) under the MIGPROSP Project – Prospects for International Migration Governance”, (25-26 May 2017, EUI, Florence). Visit: www.migrationgovernance.org (accessed 10.10.2017).

³ Some examples include the ‘EU-Turkey Statement’ of 18 March 2016; the proliferation of migration ‘compacts’ (e.g. EC COM(2016) 385 final); the Joint Communication on the Central Mediterranean route (EC JOIN(2017) 4 final); the Malta Summit hosted by Maltese Prime Minister Muscat and chaired by European Council President Tusk ‘Taking action on the Central Mediterranean route Managing flows, saving lives’ held on 3 February 2017 to address the external dimension of migration, focusing on the Central Mediterranean Route and on stabilization in Libya and its outcome, the ‘Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route’ (visit: https://ec.europa.eu/commission/sites/beta-political/files/malta-migration-summit_feb2017.pdf); the recent bilateral cooperation initiatives and dialogue with transit countries, such as Libya and Niger, promoted by some countries such as Italy (e.g. Italy-Libya Memorandum of Understanding; Italy-Niger cooperation the fight against trafficking and smuggling of migrants; the Ministerial Meeting convened by Italian Minister of Interior, Marco Minniti, with Ministers of Niger, Chad and Libya, held on 20 21 May 2017); the code of conduct for NGOs engaged in search and rescue operations at sea also promoted by Italy; or the so-called Euro-African ‘mini summit’ of Heads of State and Government held in Paris on 28 September 2017 and the resulting ‘Joint Declaration’ and call for ‘protection missions’.

treated as an inherent element of capacity building in relation to migration governance. There seems to be a strong consensus and conviction among institutional actors that migration ‘evidence’ is currently lacking, insufficient or inadequate, and that better data (e.g. in terms of availability, quality and comparability) will lead to better policy making. A myriad of initiatives and institutions aim at producing, harmonizing and disseminating better migration data⁴. However, the availability of more, and ‘better’ data, *per se*, does not necessarily translate into ‘better’ or ‘more effective’ international or regional migration policies.

The number of international migrants in 2015,⁵ was estimated at 244 million, which make up around three per cent of the world’s population; this share has been stable for decades (UN DESA, 2016).⁶ The total number of refugees worldwide, is currently estimated at 22.5million, which together with the number of internally displaced persons (estimated at 40.3 million) and asylum seekers (2.8 million) make up 65.6 million forcibly displaced worldwide. Nine of the top ten refugee-hosting countries are in developing regions, three of which are classified as least developed countries (the Democratic Republic

⁴ For example, the establishment of the International Organization for Migration’s Global Migration Data Analysis Centre (GMDAC) <https://gmdac.iom.int/>, and the expansion of its Displacement Tracking Matrix (DTM) <http://www.globaldtm.info/>; the launch of the European Commission Joint Research Center, which includes migration among its thematic priorities, with the aim of producing knowledge to implement the New EU Migration Partnership Framework (June 2016) https://ec.europa.eu/info/departments/joint-research-centre_en; the United Nations Department of Economic and Social Affairs (UN DESA) Population Division estimates <http://www.un.org/en/development/desa/population/migration/index.shtml>; among others.

⁵ This refers to the *migrant stock*, or people living outside their country of birth.

⁶ Most (67 per cent) international migrants are living in about twenty countries, mainly in the United States of America (47 million), Germany and the Russian Federation (12 million each), and Saudi Arabia (10 million) (UN DESA, 2016).

of the Congo, Ethiopia, and Uganda; UNHCR, 2017).⁷ Despite revealing a longstanding stability in the international migrant stock, the fact that most migration (especially to Europe) is regular (de Haas, 2017), and that the majority of those forcibly displaced are in the Global South, data have nurtured the dominant narrative of migration in the Global North, constructed in terms of ‘mass’ (im)migration, ‘large movements’ and ‘migration crises’.

In Europe, data have had a prominent role in the construction of migration as a regional (and interregional) policy matter too, especially in terms of a ‘migration crisis’. Data on arrivals to Europe by sea, and on dead and missing migrants along the Central Mediterranean migration route and elsewhere,⁸ have become both more available, widely disseminated and visible. Italy is the country where most arrivals to Europe by sea, through the Central Mediterranean route, have been recorded in the past few years. Arrivals in Italy by sea were estimated at 170,100 in 2014, 153,842 in 2015, 181,436 in 2016, and 108,402 so far in 2017 (IOM, Italian Ministry of Interior, 2017). This year there has been significant decline of inflows in the past months, compared to the same period in previous years.⁹ It is worth noting that the 387,739 arrivals to Europe in 2016 represented 0.07 per cent of the total number of European

⁷ Visit: UNHCR Figures at a Glance <http://www.unhcr.org/figures-at-a-glance.html> (accessed 13.10.2017).

⁸ See for example IOM GMDAC Missing Migrants Project. IOM’s Missing Migrants Project began following two shipwrecks off the coast of Lampedusa in October 2013, in which nearly 400 migrants lost their lives. The Missing Migrants Project hosts the only existing global database on migrant deaths. Today, the Central Mediterranean migration route is considered the deadliest route <https://gmdac.iom.int/missing-migrants-project>.

⁹ Most arrivals by sea to Italy depart from Libya. The main countries of origin include Nigeria, Guinea, Bangladesh, Côte d’Ivoire, Mali, Eritrea, Gambia, Senegal, Sudan, Morocco and Ghana (Italian Ministry of Interior, IOM, as of 11 October).

residents that year (510,284,450 in the EU28; IOM; Eurostat).¹⁰ Yet, data, combined with media and policy discourse of the ‘European migration crisis’ and powerful images, have further enabled the construction of migration as a matter of international and regional policy.

On 19 September 2016, for the first time, Heads of State and Government, and High Representatives gathered to discuss, at the global level, issues related to ‘large movements of refugees and migrants’ at a dedicated high-level summit during the United Nations General Assembly.¹¹ The *New York Declaration for Refugees and Migrants* (hereafter ‘New York Declaration’), adopted on this occasion, launched a state-led process of intergovernmental consultation towards the adoption of a *Global compact for safe, orderly and regular migration* in 2018. The summit materialized political consensus among states about the importance of addressing international migration by further fostering multilateral cooperation, and committing to addressing the so-called ‘root causes’ of migration and forced displacement.

The *root cause* approach is deeply engrained in migration management and ‘migration and development’ discourse, policy and practice, especially since the 1990s.¹² This approach is

¹⁰ This does not mean that foreign residents are equally distributed across countries or cities. There are cities where foreign (both European and non-European) residents may make up to 20%.

¹¹ Visit UN Summit for Refugees and Migrants 2016 <https://refugeesmigrants.un.org/summit>.

¹² Migration management and migration governance are closely related and sometimes used interchangeably, perhaps wrongly. The definition of these terms is beyond the scope of this paper. Nevertheless, international migration management is here understood as “a wide range of initiatives that aim at renewing policies pertaining to the cross-border movements of people”. It comprises a set of *actors* who “conceptualize and justify their increasing interventions in the migration field” (e.g. intergovernmental organizations); *practices* “that are now part of migration policies, and that are often performed by the institutions that promote the notion”; and *discourses*

based on the highly contested, and yet largely influential assumption, that more development leads to less (South-North) migration.¹³ The next section explores how the root cause underlies European both migration and development cooperation policy and practice.

3. Migration and development in the EU perspective

The root cause approach is firmly embedded in European policy and practice on migration and development. Root causes, generally depicted in economic (e.g. poverty), political (e.g. persecution), or environmental (e.g. climate change) terms, are often assumed to be geographically and politically situated outside of the European Union (hereafter EU).

The EU migration management approaches have consistently integrated migration and development as a key pillar, focusing

about “what migration is and how it should be addressed” (see Geiger and Pécoud, 2010: 1-2).

¹³ For example, the Programme of Action of the 1994 International Conference on Population and Development cites explicitly, among its objectives “To address the root causes of migration, especially ... poverty”, and “To encourage more cooperation and dialogue between countries of origin and countries of destination in order to maximize the benefits of migration...”. (UNFPA, 1995, Chapter X, Section A, paragraph 10.2, pp. 67–68). The Berne Initiative (2004) also aimed at defining common understandings on migration and included migration and development as a key element. Likewise, the Global Commission on International Migration (GCIM), convened in 2003 by the United Nations (UN) Secretary General, recommended to strengthen the governance of international migration in its report released in 2005 (GCIM, 2005). The recommendations of the GCIM led to the first United Nations General Assembly’s High-level Dialogue (HLD) on International Migration and Development in 2006, which featured ‘addressing the root causes of migration’ and ‘strengthening bilateral, regional and multilateral cooperation on international migration and development’ in the agenda. A second HLD was held in 2013. In 2015 migration was explicitly included in the 2030 Agenda, in which the international community committed to achieving 17 Sustainable Development Goals by 2030.

the mobilization of migrants' financial or human resources for the (economic) development of countries or communities of origin. The main lines of action have revolved around the productive use of (private) migrant remittances, diaspora investment and skills transfers from (qualified) migrants to countries of origin (see for example, EC COM(2005) 390; COM(2011) 637; COM(2011) 743; COM(2013) 292). A closer look at relevant EU Communications, reveals a progressive acknowledgement of the mutual effects of migration on development and *vice versa*. It also discloses a shift of focus from addressing migration to Europe, to addressing also South-South migration, including its social costs.

The EU's Global Approach to Migration and Mobility (GAMM), which is one of fundamental instruments for EU cooperation with third countries on migration; further recognizes the importance of the links between migration and sectoral policies (e.g. employment, trade, agriculture, education, health) for third countries and, to some extent, for the EU through attention to such issues as labour market planning, and the labour market integration of regular migrants. Furthermore, a rights-based approach was clearly permeating migration management policy, as revealed by the emphasis put on human rights in the GAMM.

The EU Agenda for Change (COM(2011) 637), the EU's development cooperation policy framework, espoused an even more far-reaching approach to development cooperation. It recognized not only the fact that EU sectoral policies (e.g. on security, trade, agriculture and fisheries, environment, climate, energy and migration) have strong impacts on developing countries; but also that sustainable economic growth is as much about growth rates, as it is about the way in which such growth is achieved.

The year 2015, however, marks a turning point in the EU's migration and development policy and practice. Since the adoption of the European Agenda on Migration (EAM), a short-term 'emergency response' standpoint¹⁴ that revolves mainly around four pillars,¹⁵ seems to have outshined the more comprehensive approaches to international cooperation at large, and development cooperation in particular outlined in the Agenda for Change.

The EAM sets key priorities around saving lives through (laudable) search and rescue efforts, border management, dismantling 'criminal' smuggling networks, return, relocation and resettlement schemes, and partnerships with countries of origin and transit 'to tackle migration upstream'. The EU migration and development policy and practice also appear to be even more firmly grounded in the *root cause* approach: "To try to halt the human misery created by those who exploit migrants, we need to use the EU's global role and wide range of tools to address the root causes of migration. Some of these are deep-seated but must be addressed." (EC COM(2015) 240: 2).

The EAM includes references to migration's contributions to the development of countries of origin and the EU's commitment to support the achievement of migration-related targets of the Sustainable Development Goals (e.g. through facilitated remittances). Nonetheless, it identifies the root causes

¹⁴ For example, the EC *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration* is introduced as follows: "Despite increased efforts by the EU, deaths in the Mediterranean Sea occur on a daily basis. Europe is currently experiencing unprecedented migratory flows, driven by geopolitical and economic factors that will continue, and maybe intensify, over the coming years and indeed it is a global challenge with more than 60 million displaced persons worldwide" (EC COM(2016) 385 final).

¹⁵ The fight against irregular migration, traffickers and smugglers; securing Europe's external borders; a strong common asylum policy; and a new European policy on legal migration (EC COM(2015) 240).

(civil war, persecution, poverty, and climate change) and *externalizes* them as pertaining to third countries, suggesting thus to address these issues through the EU external policy. More specifically, the focus is placed on partnership with countries of origin and transit,¹⁶ mainly on the fight against irregular migration and border management; and to some extent on mainstreaming migration issues into development cooperation.¹⁷

Placing the ‘root causes’ of migration in a different geographical, economic, historical, social and political sphere than that in which we live, hinders our understanding and capacity address more comprehensively the reciprocal relationship between migration and all sectors of governance. The next section discusses the challenges and opportunities that the ‘mainstreaming approach’ presents to redefine the ‘root causes’ and review sectoral policy to seize the opportunities for policy change to achieve policy coherence.

4. Mainstreaming migration into policy planning: challenges and opportunities

In 2005, the Global Commission on International Migration suggested that the ‘mainstreaming of migration into development planning’ was key to enhancing international migration governance. As such, the ‘mainstreaming migration’ approach initially targeted ‘developing countries’, often

¹⁶ Some of these key countries include Algeria, Afghanistan, Bangladesh, Egypt, Ethiopia, Eritrea, Ghana, Ivory Coast, Libya, Mali, Morocco, Niger, Nigeria, Pakistan, Senegal, Somalia, Sudan, Tunisia (see for example: EC COM(2016) 385 final).

¹⁷ The mainstreaming of migration into development cooperation had since the end of 2014 gained track in the EU development cooperation, as suggested by the 2014 Council Conclusions on Migration in EU Development Cooperation.

conceived of as countries of origin or transit in migration management discourse.

The Global Migration Group (GMG), for example, defined ‘mainstreaming’ as “... the process of assessing the implications of migration on any action (or goals) planned in a development and poverty reduction strategy” (GMG 2010: 16). This approach gained track since 2011. More precisely, following the Fifth Meeting of the Global Forum on Migration and Development (GFMD, 2011), its operationalization in some ‘pilot countries’ was strongly supported by a few key donors.¹⁸ Practice has generally focused on building evidence of the effects of migration on ‘development’ (rarely *vice versa*), on enhancing intra-governmental coordination and capacities at central and local levels of government to design, implement, monitor and evaluate migration and development policies and initiatives, and on seizing migration’s potential for development through the identification, prioritization and implementation of migration and development strategic objectives, mostly leveraging on migrant remittances, migrants’ or ‘diaspora’ investment and skills transfers to professed homelands (GFMD, 2015). The ultimate goal is to facilitate ‘whole-of-government’ and ‘whole-of-society’ approaches to migration governance with a view to attaining greater policy coherence in the fields of migration and development.

Migration has thus been conventionally ‘mainstreamed’ in a few sectoral policies perceived as having a direct, or more

¹⁸ For example, the IOM-UNDP joint *Global Project on Mainstreaming migration into national development strategies* supported the piloting of this approach starting since 2011, starting in four countries (Bangladesh, Jamaica, Republic of Moldova, and Tunisia), subsequently expanding its operationalization in four more countries in 2014 (Ecuador, Kirghizstan, Morocco, and Serbia). Visit: Mainstreaming Migration into National Development Strategies <https://www.iom.int/mainstreaming-migration-national-development-strategies> (accessed 15.10.2017).

tangible impact on human mobility. For example, migration has been integrated in labour migration policies, and human and labour rights frameworks. Regarding finance, the focus has been placed on facilitating remittances to developing countries, improving remittance data, increasing the volume of remittances transferred through formal channels; encouraging remittances' productive use and lowering their transfer costs. With regards to education, policies have looked at promoting student international mobility, migrants' access to vocational training and skills development opportunities, and the recognition of qualifications and validation of foreign diplomas, among others. In the field of health, the accent has traditionally been put on countering 'brain drain', through the 'ethical' recruitment of health professionals from developing countries, but also by capitalizing on diasporas' skills transfers. As to urban development and environment, the focus has been on migration's contributions to adaptation and climate change resilience, and disaster risk reduction and preparedness.

Interpreted solely as an issue of domestic policy for 'countries of origin', and of external policy for donor or developed receiving countries, the mainstreaming approach falls short of proving means to overcome deeply rooted dichotomies inherent to the migration and development debate, which divide 'rich and poor', 'developed and under developed', 'destination and origin countries'. It also risks hindering the achievement of policy coherence within countries and beyond (e.g. between domestic policies and development cooperation policy).

These shortcomings, are not unsurmountable. The mainstreaming approach has the potential to embrace the reciprocity between migration and sectoral policy planning, thereby contributing to fostering greater policy coherence. In particular, the sectoral approach to mainstreaming migration has the potential to internalize the 'root causes' of migration as

issues in which we all participate and have the capacity to change. Rather than externalizing the root causes of migration, it offers an opportunity to think of the latter as embedded in the policy choices we make, thus as elements intrinsic to sectoral policy, some of which hinder people's full participation in the societies they belong to. As such, it encourages reflection about the reciprocal effects of sectoral policies on migration decisions, conditions and outcomes (i.e. the extent to which sectoral policy goals and means of implementation determine, facilitate, compel or constrain people's mobility), and of the effects of migration in the achievement of sectoral policy goals. In short, it opens space for making migration policies more sensitive to sectoral policy goals. For example, it offers an opportunity to review how certain patterns of production, consumption and lifestyles enshrined in sectoral policy create the conditions that compel people to migrate in search of new opportunities to cope with exclusion, marginalization and lack of prospects. In sum, it carries the potential for reflecting on the interdependencies between societies, and for *internalizing* the so-called 'root causes' as embedded in sectoral policy objectives promoted at home and abroad, irrespective of the countries' level of income or geopolitical classification. This is further explored in the following section.

5. *The real challenge: addressing reciprocity between migration and all sectors of governance*

The relationship between migration and sustainable development is now firmly embedded in the 2030 Agenda for Sustainable Development, which evokes how migrants contribute to development, and how better governance of migration can reduce global inequalities. While the effects of migration on 'development' in so-called countries of origin have

been widely discussed and promoted, the effects of sectoral policies on migration decisions, conditions and outcomes remain poorly understood and often overlooked in migration and development discourse, policy and practice. Embracing the reciprocal relationship between migration and all sectors of governance is fundamental, if states are to seriously commit to the achievement of the Sustainable Development Goals (SGDs) outlined in the 2030 Agenda.

Migration is now largely acknowledged as a cross-cutting issue, affecting and being affected by a variety of sectoral policies. Yet, it continues to be rarely understood and addressed as an inherent element of larger processes of social transformation, such as ‘development’. This may be partially owing to a certain resistance to understanding the relationship between migration and development as complex and non-linear, especially in the pursuit of ‘quick’ migration management solutions. Perhaps two noticeable exceptions worth mentioning are the far-reaching understanding of the links between EU sectoral policies and their impacts on developing countries outlined in the EU Agenda for Change, and the recognition, by the Global Commission on International Migration, of the importance of the effects of sectoral policies on the lives of people and on migration decisions.¹⁹

Migration, can be all at once the driver, result and consequence of ‘development’.²⁰ For example, migration, or the

¹⁹ For example, in 2005 the GCIM report recognized that agricultural subsidies and depressing world prices of agricultural commodities have an impact on the livelihoods of small farmers from developing countries, resulting, among others, in internal and international (temporary and seasonal) migration (GCIM 2005: 21).

²⁰ There are recent and well-founded attempts at theorizing migration as an inherent element of development and social transformation processes. In a recent paper, scholar Hein de Haas, for example, conceptualizes migration “as a function of aspirations and capabilities to migrate within a given set of opportunity structures. Drawing on Sen’s capabilities approach, this paper

ability to move across borders and to choose one's places of residence, could be conceived of as an integral aspect of development, if we admit that the latter entails the expansion of people's freedoms and capabilities to lead the lives they have reason to value (see Flahaux and de Haas, 2014). Displacement can also be the result of development projects (e.g. infrastructure works) that compel people to move. Migration could be further be seen as a 'driver' of development when people are able to participate of the welfare and to actively contribute to the social, economic, civic and political life of the societies they belong to.

The process towards the adoption of the *Global compact for safe, orderly and regular migration* (GCM) in 2018 is grounded, among others, in the ambition of the international community to achieve sustainable development, in line with the 2030 Agenda. The GCM is expected to set out a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions; contribute to global governance and enhanced coordination on international migration; present a framework for comprehensive international cooperation on migration; and address all aspects of international migration (humanitarian, developmental, human rights-related, etc.).

As such, the GCM brings an opportunity to truly address migration as an inherent aspect of development, making migration policies more sensitive to sectoral policy objectives, and the later more sensitive to their effects on migration decisions, conditions and outcomes. It opens up an opportunity to discuss and address the root causes of migration embedded in employment policies to guarantee decent work conditions for all; in trade policies to address unequal terms of exchange, in agricultural and rural development policies to reverse the

defines human mobility as people's capability (freedom) to choose where to live, including the option to stay" (de Haas, 2014).

damage to biodiversity and traditional livelihoods and knowledge; in health policies to ensure that every one has the right to and can access quality healthcare; in welfare policies to guarantee equal access to social benefits, etc. In sum, it is about guaranteeing the full participation of each and every one of us, including migrants, in the social, cultural, political, civic and economic life of the societies in which we live and that some are able to bridge. The GCM could therefore allow embedding the ‘root causes of migration’ in a more general understanding of the choices we make, the lifestyles we embrace, the patterns of consumption, production and resource utilization we promote and, which ultimately translate into the objectives of sectoral policies and affect human mobility, irrespective of where we live. The GCM also represents an opportunity to redefine migrants’ contributions to societies beyond narrow economic factors (e.g. remittances and investment), and to recognize and address the difficulties they face (e.g. with regards to living conditions, racism, xenophobia, intolerance and stigmatization). The GCM represents an opportunity to tackle these obstacles in a more decisive way, not in a utilitarian perspective, but simply because it is right to do so.

The real challenge for this new chapter of international migration governance and international cooperation on migration, is thus to fully embrace the reciprocal relationship between migration and all sectors of governance. Indeed, the most serious commitment that states can make is to review and reform sectoral policies to address the real ‘root factors’ that constrain the realization of people’s full potential; not *for* migrants, but *to leave no one* behind.

6. Conclusion

Migration has been constructed in the past decades as an issue of international policy. In this context, migration management and migration and development discourses, policies and practices have been closely associated with one another, and firmly grounded in the ‘root cause’ approach. This approach tends to disregard the interdependencies between countries, and the mutual effects that sectoral policies, pursued at home and abroad, have on international migration at the micro-, meso- and macro-level. As such, it falls short of means to address more comprehensively the reciprocal relationship between migration and all sectors of governance.

The mainstreaming of migration into sectoral policy planning offers an alternative to embrace such reciprocity and to contribute to greater policy coherence, so long as it is grounded in a and broad understanding of “human mobility”, and in the acknowledgment that the links between migration and development are complex and nonlinear.

The new chapter in international migration governance and international cooperation on migration leading to the adoption of the GCM, represents an opportunity to overcome deeply rooted divisions between countries of ‘origin, transit and destination’, and to stimulate a joint reflection on how best recognize and address ‘root causes’ of migration that are embedded in sectoral policies which hinder the achievement of people’s full potential. As such, GCM could overcome some of the deeply rooted dichotomies in migration management and migration and development discourses, and help shifting the focus of migration governance from a short-term crisis management perspective, to building more inclusive societies in the long run.

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FRAMING THE MIGRATION AND DEVELOPMENT NEXUS IN THE ITALIAN CONTEXT

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1. Summary

This article describes the theory of the migration and development nexus and the ways diaspora engage in aid and development in their origin countries. The article discusses the migration and development approach within the scenario of the Italian policy for international development and migration management. Finally, the article suggests policy makers to manage migrations in the perspective of supporting the potential enshrined in the migration fluxes to boost participatory development, with migrants as key development actors.

2. Introduction

Migrations have characterised the history of human being since the very beginning. In the past, as today, small groups of people used to cross oceans, using makeshift boats, often risking

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their lives in the rough sea. These movements however were not in the spotlight as they are nowadays. Since 2015, in fact, migrations get attention and interest from the public and from institutions who are called to avoid another tragic shipwreck as the one occurred on 18 April 2015 off Libyan coasts when an estimates 900 migrants, including women and children, lost their lives in the sea for lack of appropriate rescue operations at sea.¹

On the wave of that tragic event, and at a moment of raising distress by the Italian public opinion for the risk of terrorist attacks in the EU, the emerging national discourse in Italy revolved around two main pillars: on the one hand, boundaries around States entail surveillance to protect European citizens from external threats. On the other hand, there is a moral obligation to provide humanitarian aid to people in need, obligation enshrined in many constitutions of the EU countries, including Italy, in international treaties as well as in the codes of conducts of personnel dedicated to rescue operations and humanitarian aid.

Despite the fact that often the multitude of people “threatening” European boundaries are the result of forced migrations, despite that they are prevalently escaping violence and conflicts, poverty and deprivation, migrations are discussed in the framework of security policies, as if they were a physical aggression to the States that are supposed to provide assistance, protection and support.

The more migrations towards the EU increase in numbers, the more supposedly “host” States react moving behind the lines of the security discourse.

¹ Operation Mare Nostrum was a year-long naval and air operation commenced by the Italian government on October 18, 2013 to tackle the migratory ship wreckages off Lampedusa. The operation was funded by the European Commission and saved at least 150,000 migrants, mainly from Africa and the Middle East. Mare Nostrum ended on 31 October 2014 and was not re-funded on the plea of representing a migrant pull factor to Europe.

Italy is no exception to this trend. Anti-European sentiments fuelled by anti-establishment forces (Five Star Movement), coupled with anti-immigrant parties (Northern League) and the risk of terrorist attacks resulted in ordinary citizens being increasingly scared of migrants and sceptic about a common EU migration policy that is able to accommodate refugees, give home to economic migrants and gain benefits from the migration phenomenon.

The government's action to manage migrations seems to reflect the ambivalence of the Italian public opinion, divided over national egoism and benevolent humanitarianism.

For instance, the recently approved Zampa Law² on protection measures for unaccompanied child migrants enhances the protection of migrant children, affirming the prohibition by authorities from turning migrant children away at the borders or returning them to countries if that could cause them harm. The law also sets minimum standards of care for migrant children in Italy, including the reduction of time they spend in reception centres, a 10-day deadline to confirm their identities, guaranteed access to healthcare and expansion of the use of guardians and cultural mediators to ensure their needs are met.

This positive model to support protection of migrant children in Italy contrasts with the restrictions of rights contained in the so-called Minniti Law³ on immigration and asylum. According to the Association for Juridical Studies on Immigration (ASGI),⁴ with the new law, for instance, in the name of simplifying judicial procedures and lightening the burden of the reception system, those seeking international protection will no longer have the

² Law n. 47 approved by the Italian Parliament on 7 April 2017.

³ Law n. 46 approved by the Italian Parliament on 13 April 2017.

⁴ Why the new Italian law on immigration and asylum is not good news at all. April 28, 2017 - OPEN MIGRATION, available at: <https://openmigration.org/en/analyses/why-the-new-italian-law-on-immigration-and-asylum-is-not-good-news-at-all/> (09/2017 accessed).

chance to appeal the rejection of their asylum claims. Also, the law focuses on repatriation of irregular migrants, significantly expanding the number of Centres for Identification and Expulsion (CIE); it envisages the deportation of irregular migrants to their countries of origin or transit, also through bilateral agreements signed with Libya and Soudan, countries that do not qualify as “safe third countries”, as international law requires.

If humanity is fading away from European and Italian policies and norms to manage the migration phenomenon, part of the blame lays on the paucity of positive narratives of migrants and the positive contribution they give to the development and to the economic and social growth of both countries of origin and countries of destination.

This article aims to contributing to filling this gap, describing the theory of the migration and development nexus and the ways diaspora engage in aid and development in their origin countries. The article then discusses the migration and development approach within the scenario of the Italian policy for international development and migration management.

The article suggests policy makers to manage migrations in the perspective of supporting the potential enshrined in the migration fluxes to boost development processes, particularly in the origin countries. In doing this, policy makers from host countries would adopt hosting policies respectful of migrants’ rights and needs and at the same time promote a new participatory development paradigm with migrants as key development actors.

3. What is the Migration – Development Nexus?

The migration-development (M&D) nexus is a paradigm that takes into consideration the potential development outcomes of the migration phenomenon. This policy perspective emerges in Europe between the end of the 1990s, when heads of state firstly

met to discuss migration policies in Tampere,⁵ and the beginning of the new millennium, when the World Bank reveals the huge amount of transnational flux of money generated by migrants around the world.⁶

In the late 1990s, the migration phenomenon was framed as the consequence of conflicts, political persecutions, natural disasters (forced migration) or as the ambition of few to improve their economic situation and look for better opportunities in the wealthier world (economic migration). Given these root causes and given the necessity to contain and possibly restrain migration flux to European countries, development cooperation measures were seen as a way to counter excessive population fluxes towards northern countries.⁷

What was called the “root causes approach”, or using the words of a pragmatic observer “more development for less migration” policy,⁸ later evolved towards a perspective that sees the positive impact of migrations on the economies of the host countries and the countries of origin. When in 2003, the World Bank pointed out that globally migrants’ remittances to developing countries surpassed the level of all official development assistance, a growing interest towards the financial capacity of migrants emerged and research dedicated to quantifying the extent of the remittances phenomenon and

⁵ Tampere European Council 15 and 16 October 1999. Presidency Conclusions. http://www.europarl.europa.eu/summits/tam_en.htm (10/2017 accessed).

⁶ J. Page, S. Plaza, *Migration Remittances and Development: a review of global evidence*, The World Bank, 2005. Draft presented at the Plenary Session of the African Economic Research Consortium, May 29, 2005.

⁷ F. Pastore, “‘More development for less migration’ or ‘better migration for more development’? Shifting priorities in the European debate, in *MigraCtion* – Periodical analysis bulletin on migration policies in Europe, Centro Studi di Politica Internazionale, December 2003, <http://www.cespi.it/bollMigraction/MigSpecial3.PDF>.

⁸ F. Pastore, ‘*More development for less migration*’ or ‘*better migration for more development*’, cit.

relating it to the national economies of the receiving countries. The increasingly accurate data on international remittances published by the World Bank unveiled a huge financial flux potentially directed to development purposes.⁹

For the first time, ever the world acknowledges the economic power of migrants. A new perception of migrants as agents of development started winning the hearts and minds of many policy makers. In 2003, the UN set up the Global Commission on International Migration for promoting a comprehensive debate about international migrations and its management by governments. In 2005, the European Union issued a communication on the migration and development nexus¹⁰, formally recognizing the potential of diaspora organizations to become actors of development for their countries of origin. The communication had relevant policy implications: international cooperation was not intended to restraining migratory fluxes but to maximizing the positive impact of migration on host and origin countries.

Since then, though not always explicitly, a number of other European Member States reviewed their policies on migration management and development promotion so to include the role of diasporas (the so-called co-development approach). After France and Spain, the Netherlands acknowledged the contribution of diasporas in development, in complementarity with other non-

⁹ To give an idea of the size of this phenomenon, in 2013 the global volume of migrants' remittances to developing countries reached \$404 billion, almost four times in excess of the International Community Investment in Overseas Development Assistance (World Bank 2014). Worth to note, that these figures may be underestimates because migrants also use unofficial channels to send money home, and these sums are not necessarily recorded (Newland 2007).

¹⁰ European Commission, *Migrazione e sviluppo: orientamenti concreti*, COM(2005) 390 def., 1 September 2005, http://europa.eu.int/eur-lex/lex/LexUriServ/site/it/com/2005/com2005_0390it01.doc.

governmental organizations.¹¹ In Norway, the white paper on foreign policy recognized the benefits deriving from a policy that utilizes the positive effects of migration on foreign policy and development cooperation.¹² In 2006 the UN Secretary General Kofi Annan, talking to the General Assembly highlighted how the migration is a triple-win phenomenon that benefits the migrant, the host country and the countries of origin.¹³ In the same year, the High Level Dialogue on International Migration and Development was the first event at global level dealing exclusively with this subject. Since 2007, the Global Forum on Migrations and Development provides the platform to advance the theory linking Migrations and Development and supports practical action-oriented outcomes of theoretical discussions. Numerous studies and policy guidance books were issued since then to accompany governments and institutions willing to embrace a co-development approach in managing migrations in their countries.¹⁴

This interest at international level produced a sort of shift in paradigm on the migration development nexus, at least at the level of rhetoric. The discourse changed from a view that looked at

¹¹ Joint policy memorandum by the Minister for Development Cooperation and the State Secretary for Justice, *Dutch Policy Memorandum on Migration and Development*, 2008.

¹² G. Sinatti, C. Horst, "Migrants as Agents of Development: Diaspora engagement discourse and practice in Europe", in *Ethnicities*, 2014.

¹³ High-Level Dialogue of the General Assembly on International Migrations and Development, New York, 15-16 September 2006.

¹⁴ Among the most important see C. Horst, et al., *Participation of Diasporas in Peacebuilding and Development. A Handbook for Practitioners and Policymakers*, PRIO Oslo, 2010. G. Sinatti, S. P. Alvarez Tinajero, *Migration and Development: a Bottom-Up Approach. A Handbook for Practitioners and Policymakers*, EC-UN Joint Migration and Development Initiative (JMDI) 2011. MPI/IOM, *Developing a road Map for Engaging Diasporas in Development. A Handbook for Policymakers and Practitioners in Home and Host Countries*, IOM, 2012. International Organization for Migration, *Migration and Development. Migrant Stories*, IOM, 2010.

ways to reduce pressures of migration on receiving countries to a view in which migrants can be a resource for poverty reduction and sustainable development in their home countries.¹⁵ Research increasingly focused on remittances as a major indicator to measure the capacity of migrants to produce funding potentially useful for local economic growth. Little by little, the idea that migrants are not necessarily only victims of conflicts or poverty but can turn into “agents of change” or agents of development crept into the mind of policy makers.¹⁶

4. *Co-Development: an inclusive development approach*

In development studies, co-development is an approach that strategically recognizes migrants as potential development actors. Co-development is grounded on the recognition that refugees as well as people migrating for economic reasons often help their communities in the origin countries by sending money (financial remittances) for family consumption or for the construction of community facilities like schools and hospitals. In the last ten years, research is exploring the impact of the so-called social remittances¹⁷ that are the ideas, behaviours, identities and social capital¹⁸ that migrants acquire during the migration experience and export to their home communities with whom they maintain

¹⁵ N. Piper, “The “Migration-Development Nexus” Revisited from a Rights Perspective”, in *Journal of Human Rights*, issue 7, n.3, pp. 282-298.

¹⁶ Secretary-General of the United Nations, *International Migration and Development—Report of the Secretary-General*, A/60/871, 18 May 2006, New York, United Nations.

¹⁷ The notion of “social remittances” has been described by P. Levitt, N. Nyberg-Sorensen, “The Transnational Turn in Migration Studies”, in *Global Migration Perspectives*, 2004, n. 6.

¹⁸ Social capital is “the sum of resources, actual or virtual, that accrue to the individual or a group by virtue of possessing a durable network of more or less institutionalised relationships of mutual acquaintance and recognition.” Bourdieu (1992).

contacts. For instance, the use of modern technology in education, the use of virtual reality in social relationships, gender sensitive costumes are all examples of behaviours that migrants easily transfer in their origin communities when they go back home, temporarily, virtually or physically. Social remittances have demonstrated to contribute to development purposes as well as financial remittances, although in a longer-term perspective. At the same time, migrants earning their income in the host countries contribute, with taxes and new income generating activities, to its social and economic development.

Starting from these bases, the notion of co-development theorizes the link between the migration phenomenon and a process of positive development of host and origin countries. The French scholar Sami Nair¹⁹ coined the term co-development in the late 1990s, with reference to a development policy that reversed the tendency to consider migration fluxes from the former French colonies as a loss for the origin countries. According to Nair, migrations could benefit both the country of departure and the country of arrival if supported by a mutual co-operation strategy. Legal presence and integration in the host country, France in that case, was a pre-condition for fostering the mutual benefits of co-development. From 2001, Spain echoed Nair's approach and successfully implemented numerous co-development actions both at State level and at regional level for about a decade.²⁰

¹⁹ S. Nair, *Rapport de bilan et d'orientation sur la politique de codeveloppement liee aux flux migratoires*, 1997.

²⁰ The GRECO plan (Programa Global de Regulación y Coordinación de la Extranjería y la Inmigración 2000-2004) was launched by the Spanish Ministry of Interior in 2001 on the wave of the enthusiasm surrounding the 1999 Tampere Forum and the policies launched by France on Migration. The Plan mentioned co-development as a strategy to manage the migrations, combined with measures to channel migrants' remittances to development purposes and the cooperation with governments of the migrants' origin countries.

Because of the co-development programs promoted in Spain,²¹ research documented numerous evidences on the link between migration and development in relations to migrants coming from countries like Equator, Colombia and Morocco. This research constituted a solid body of literature on co-development that expanded also to other European countries with significant migrant population, marking the beginning of the Diaspora Studies.

5. Diaspora Studies and Related Policies

The term ‘diaspora’ often refers to migrant communities that nurture a dual sense of belonging to both home and host country. Diaspora communities mainly result from forced migrations from their countries of origin, to which they maintain strong ties. They share a commitment to contribute to the restoration, development and maintenance, of their country of origin, and often nurture thoughts of an eventual return, while at the same time seeking to establish and maintain a sustainable livelihood in their country of destination. This dual citizenship, with the diaspora constituting a link between home and host country, has been the subject of research in the last decade, with a focus on the professional, social, cultural and monetary contributions that diasporas are able to send back home, and on their potential to generate development processes.

In the last decade, diaspora studies tend to focus on specific dimensions of diaspora engagement in their origin countries, notably transnationalism and social remittances.

²¹ For example the constitution, in 2010, of a strong network of migrant organizations in Valencia, the FEDACOD (Federation of Associations for Codevelopment), see: www.fedacod.com.

Transnationalism means the capacity of diaspora to act both within the boundaries of the host country and outside,²² reaching the country of origin along the “here” and “there” pattern discussed by Riccio.²³ There is a large debate whether this capacity implies physical presence of diaspora people in multiple places, including the origin country, as Portes argued,²⁴ or not considering how virtual communication channels and modern technology support social networking despite physical presence. In any case, transnational activities promoted by diasporas are designed in a way that links different territories, involves actors living in various countries and has the ability to produce effects in multiple places. To conceptualise diaspora activities under the lens of transnational theory leads to evidence the strict relation between transnationalism and the notion of social remittances. In fact, as noted by Al-Ali, Black and Koser²⁵ in their work on refugees in Europe, it is “not only people who travel between

²² Transnational theory has been debated by N. Glick Schiller, L. Basch, C. Blanc-Szanton, “Transnationalism: A New Analytic Framework for Understanding Migration”, in S. Vertovec, R. Cohen (eds.), *Migration, Diasporas and Transnationalism*, Cheltenham: Edward Elgar, 1999, pp. 26-50. A. Portes, L. E. Guanzino, P. Landolt, “The Study of Transnationalism: Pitfalls and Promise of an Emergent Research Field”, in *Ethnic and Racial Studies*, Issue 22, n. 2, 1999, pp. 217-237. A. Portes, “Introduction: The Debates and Significance of Immigrant Transnationalism”, in *Global Networks: A Journal of Transnational Affairs*, Issue 1, n. 3, 2001, pp. 181-193. A. Portes, “Conclusion: Towards a New World - the Origins and Effects of Transnational Activities”, in *Ethnic and Racial Studies*, Issue 22, n. 2, 1999, pp. 463-477. B. Riccio, “From ‘ethnic group’ to ‘transnational community’? Senegalese Migrants’ Ambivalent Experiences and Multiple Trajectories”, in *Journal of Ethnic and Migration Studies*, Issue 27, n. 4, 2001, pp. 583-599.

²³ B. Riccio, “From ‘ethnic group’ to ‘transnational community’?”, cit., p. 597 ff.

²⁴ A. Portes, L. E. Guanzino, P. Landolt, “The Study of Transnationalism”, cit., p. 219 ff.

²⁵ N. Al-Ali, R. Black, K. Koser, “Refugees and Transnationalism: The Experience of Bosnians and Eritreans in Europe”, in *Journal of Ethnic and Migration Studies*, Issue 27, n. 4, 2001, pp. 615-634.

countries, but also ideas, values and cultural artefacts”.²⁶ Research demonstrates that often, diaspora activism privileges social, before financial, capital as the resources diaspora mobilise in promoting development or humanitarian activities in the countries of origin rely on the transfer of social capital acquired by migrants in the host country. For instance, skills and competences, habits, ideas and visions, relationships with other actors (networks), acquired by migrants in the host country are the kind of resources that are shared and built upon in diaspora transnational activism.

6. *Diaspora Activism in Aid and Development*

What kind of activism?

Literature generally differentiate diaspora engagement in development from humanitarian activism.²⁷ This is mainly because the international community²⁸ for development, and the main aid agencies, including UN agencies and NGOs normally frame their intervention within either the long-term development domain or the short-term humanitarian field. The two interventions differ very much in terms of objectives, strategies and modalities to achieve results.

²⁶ N. Al-Ali, R. Black, K. Koser, “Refugees and Transnationalism”, cit., p. 624 ff.

²⁷ Z. Sezgin, D. Dijkzeul, “Migrant Organizations in Humanitarian Action”, in *Journal of International Migration and Integration*, Issue 15, n. 2, 2013, pp. 159–177.

²⁸ By International Community we mean the group of DAC countries (Development Assistance Committee) of the OECD that is involved in development cooperation, with all its Non-Governmental Organizations for aid and development and those intergovernmental and international organizations aimed at promoting global and local development.

Apparently, however, this distinction is not common in diaspora organizations' engagement in aid and development.²⁹ Diaspora in fact seem to envisage their transnational action more as a manifestation of their sensitiveness towards their origin country through social works and charity (no matter whether short or long termed), rather than a professional commitment to global development and peace. While more research is needed to provide evidence for that, this work suggests conceiving diaspora engagement in aid and development of the origin countries as a synonymous of "diaspora solidarity". In other words, diaspora engagement describes that part of activism that is directed to aid and benevolent actions for the benefit of the communities in the host and origin country, regardless of whether solidarity projects consist of humanitarian or development oriented activities.

Why diaspora activism is important?

There is little systematic research on the results of diaspora aid programs in their origin countries. What has been documented so far refers to diaspora organisations' capacity to enjoy easier access to conflict areas in their countries of origin, because of shared language, cultural proximity and personal links with the beneficiaries³⁰. In countries like Somalia, for instance, despite diaspora is exposed to insecurity threats the same as all people, including locals, their capacity to activate local networks and find ways to operate is higher than the capacity of international NGOs. This is proved by the recent IOM diaspora project MIDA Youth that was successful to involve Somali diaspora organizations

²⁹ This is an observational finding of the author drawn upon different works with diaspora organizations, from 2010 to 2017. The observation regards about 80 diaspora organizations met by in Denmark, in Somalia and in Italy, within the framework of projects led by the Danish Refugee Council and by the International Organization for Migration, Rome office.

³⁰ E. Svoboda, S. Pantuliano, *International and local/diaspora actors in the Syria response. A diverging set of systems?*, Humanitarian Policy Group Working Paper, March 2015.

based in Italy to conduct projects aimed at fighting youth unemployment in Kisimayo and Baidoa, two places hardly accessible to internationals.³¹

Additionally, the diaspora's commitment to their country of origin does not fade out at the end of the emergency response, possibly making the link between Relief, Recovery and Development a reality.³² Long-termed commitment of diaspora organizations to their communities of origin has been observed especially in the case of home-town associations where members share the same geographical origin and group together with the aim to support their (extended) family.³³

Literature generally agree that diaspora groups are able to mobilise own networks and resources to support development programs and humanitarian responses,³⁴ thus complementing international aid resources. The case study of the Mandaye mental health hospital in Somalia is explicatory of diaspora ability to activate transnational networks. The hospital in fact was built after the initiative of a Somali doctor living in Germany who was able to connect Somali psychologists in Norway, Sweden and Denmark with patients in Burao for distance therapy.³⁵

Experience with Somali and Afghan diaspora organisations has shown that their deep and personal engagement with

³¹ V. Saggiomo, *Engaging, Enabling and Empowering the Somali diaspora in Italy: The MIDA Youth Experience*, IOM, 2017, forthcoming.

³² C. Horst, et al., *Participation of Diasporas in Peacebuilding and Development. A Handbook for Practitioners and Policymakers*, PRIO Oslo, 2010.

³³ V. Saggiomo, "Cooperazione in equilibrio tra due mondi. La diaspora somala e le sue controparti locali nei progetti di sviluppo", in L. Ciabbari, E. Vitturini, *Dopo la Guerra: Democrazia, Sviluppo e Migrazioni in Somalia*, Edizioni Mimesis, 2016, pp. 137-162.

³⁴ S. Vertovec, *Transnational Networks and Skilled Labour Migration*, Paper given at the conference: Ladenburger Diskurs "Migration" Gottlieb Daimler- und Karl Benz-Stiftung, Ladenburg, 14-15 February 2002.

³⁵ V. Saggiomo, "Cooperazione in equilibrio tra due mondi", cit.

beneficiary communities fosters strong local ownership of projects and thus high probability of sustainability.³⁶

7. *Factors triggering diaspora activism*

Notoriously, not all groups of migrants dedicate to development or humanitarian activities. As evidenced by various scholars,³⁷ diaspora engagement is highly specific to individual diaspora communities and their interests, aspirations, institutions and sources of identities. Most importantly however, contextual aspects play a role in shaping forms of diaspora engagement.

These contextual aspects may relate to both the host and the origin countries, as well as to a wider international consensus to engage migrant/diaspora organizations as non-traditional partners of the international community for aid and development. For instance, natural disasters or conflicts may stimulate diaspora solidarity and activism, as documented by the research on the role of diaspora communities during the Arab Spring revolts and during the war in Syria in support to national fellows in need of humanitarian assistance.³⁸ Also, opportunities in the host countries that support diaspora activism, such as new legal frameworks that recognise migrant organizations as agents of development, national and international policies in support of migrant activism, funding opportunities specifically dedicated to trigger diaspora activism in their origin countries, all have the

³⁶ V. Saggiomo, M. Heiduk, *Diaspora as Development Actors. Lessons Learned on How to best design programmes in support of diaspora-led development initiatives*, DRC Evaluation Learning/Brief n. 05, available at: http://drc.dk/fileadmin/uploads/pdf/IA_PDF/Diaspora/links_and_resources/E_L_BRIEF_05.pdf (09/2017 accessed).

³⁷ See K. Marchand, S. Langley, M. Siegel, *Diaspora Engagement in Development. An Analysis of the Engagement of the Nigerian Diaspora in Germany and the Potentials for Cooperation*, UNU-Merit., 2015.

³⁸ E. Svoboda, S. Pantuliano, *International and local/diaspora actors in the Syria response*, cit.

effect to prompt the engagement of diaspora communities in their origin countries.³⁹ Similarly, in the attempt to cover a wider scope of needs, in a greater number of crises, diaspora organizations have been involved as non-traditional partners by the international community for aid and development. During the 2016 World Humanitarian Summit, donor countries and aid agencies manifested their willingness to engage with non-traditional partners to complement efforts and widen the modalities to deliver aid in those places where access is limited to humanitarian actors.⁴⁰

Institutional support remains among those external opportunities triggering diaspora engagement. For this reason, for a host country, embracing a co-development perspective means not only considering migrants as a source of potential development initiatives both in the receiving and in the origin countries but also acquiring a political consciousness about the contribution that migrants can bring to the economic and social upgrade of the host society. In this sense, adopting a co-development perspective is a political choice by both the host and origin country that facilitates and supports diaspora's activism towards aid and development and seeks modalities to promote cooperation and partnership between the traditional development and humanitarian world and potential non-traditional partners, such as diaspora organizations and groups. For instance, some diaspora host countries enshrine diaspora contribution to development in the Development Master Plans, and in some cases in the institutional arena by providing official interaction

³⁹ See for instance the effect of the "Diaspora programs" promoted in Denmark by the Danish Refugee Council with Somali and Afghan communities, or similar programs promoted by the International Organization for Migration in Italy, namely through the MIDA Youth, MIDA Women, MIDA Somalia.

⁴⁰ C. Lattimer, *Think Piece: Humanitarian Financing*, Paper drafted for the World Humanitarian Summit in 2016, Development Initiatives.

modalities between institutional actors and diaspora organizations.⁴¹ On the side of diaspora origin States, in a view to boost a co-development approach, some endowed their administrative structure with specific offices dedicated to migration issues such as Ministries of Diaspora, or institutions in charge of the relationship with the nationals living abroad.

The concomitance of these two external opportunities, namely local humanitarian needs and external institutional support to diaspora engagement is gradually favouring the transnational activism of many diaspora groups, particularly from those Countries where humanitarian access is at stake for insecurity or for political reasons such as Libya, Syria, Afghanistan, Somalia.

8. Factors limiting diaspora activism

Despite the attempt by many institutional actors in the humanitarian and development fields to involve diaspora organizations as partners in operation, a number of reasons have halted engagement in genuine partnerships so far.

Initial research⁴² aimed at exploring possible modalities of a collaboration between diaspora and conventional actors⁴³ point towards two main concerns/challenges: the aid sector's mechanisms and jargon, and discording agendas.

⁴¹ P. Mezzetti, V. Saggiomo, P. Pirkkalainen, "Interaction between the Somali organizations and Italian and Finnish development actors", in L. Laakso, P. Hautaniemi, "Diasporas, Conflict and Peace in the Horn of Africa", in *Zed Africa New Series*, 2014.

⁴² The reasons limiting genuine partnerships between traditional aid agencies and diaspora organizations have been analysed within a scoping study on Diaspora Engagement commissioned to the author by the Danish Refugee Council in 2015-2016. The scoping study was conducted in collaboration with Giulia Spagna.

⁴³ Such as the Danish Refugee Council Diaspora Programme's DEMAC project.

With reference to the first concern, aid workers complain that diaspora organizations are often not familiar with current humanitarian mechanisms, actors and their jargon, including the Humanitarian law, the Inter-Agency Standing Committee, the core Humanitarian Standards. In addition to this, different interpretations of concepts like “protection”, and scarce knowledge by diaspora actors of the ways the humanitarian system is structured and organised represent an additional barrier to collaboration with the international community, according to practitioners.

Experience in this field suggests that diaspora organisations can adapt and eventually adopt principles and conduct of the prevailing humanitarian system.⁴⁴ It is however important to be conscious that this kind of assimilation does not necessarily serve the purpose of improving the overall humanitarian response. In fact, diaspora organizations have their own operational modalities that the international community for aid and development should understand and recognize as complementary to mainstreaming humanitarian practices. Research has not yet discovered if one can truly speak of a “diaspora approach” in aid and development, but according to lessons learnt from practice⁴⁵ it is collaboration rather than co-option that yield the best results for a fruitful engagement with diaspora actors.

The second challenge, discording agendas, refers to the observation that contrarily to most traditional humanitarian actors, many diaspora organisations are indeed based on ethnicity, tribal connections, political affiliation or religion. Diasporas mainly originate from forced migration related to

⁴⁴ E. Svoboda, S. Pantuliano, *International and local/diaspora actors in the Syria response*, cit.

⁴⁵ V. Saggiomo, A. Ferro, *Mid-Term Evaluation DIASPORA PROGRAM: Diaspora driven relief, rehabilitation and development*, Copenhagen: Danish Refugee Council, 2014.

violence and political conflict, and may thus represent certain political factions and opinions. All these aspects, sometimes enshrined in the identity of diaspora networks, potentially contrast with the adherence to the core humanitarian principles, with special reference to neutrality, impartiality and operational independence.

9. Practices of Co-development in Italy

The Italian Ministry of Foreign Affairs and International Cooperation (MAECI) supports co-development projects promoted by the International Organization for Migrations in Rome since 2002, within the general MIDA framework. MIDA is a capacity building approach adopted by the International Organization for Migrations in 2001, aimed at identifying diaspora professionals and favouring their temporary employment within public and private institutions in the origin countries so to promote forms of circular migration and engage migrants in their home countries' development goals. Over time, the MIDA structure broadened to include actions targeting organizations of diaspora individuals, as an expression of a collective voice and desire by diaspora communities to engage in their origin countries' development. The capacity building approach of MIDA re-oriented its focus on the empowerment of diaspora organizations, through training and financial support for specific diaspora-led activities. In this framework, the Italian section of MIDA program supported migrant communities from Senegal, Ethiopia and Ghana to establish both collective and individual initiatives such as transnational businesses between Italy and the origin countries, social projects, as well as research activities to inform policy on how to channel migrants' remittances for triggering development. From 2008, the

geographical coverage of MIDA interventions in Italy included Somalia, Latin America and the Middle East.⁴⁶

Despite not being formally part of a general development strategy of the Italian Cooperation,⁴⁷ the linkage between migration and development and the co-development approach did represent a continuum in the Italian cooperation practice since 2002. In addition to supporting co-development projects promoted by the IOM, in 2008 the Italian Ministry of Foreign Affairs funded the PLASEPRI program (Plateforme d'appui au secteur privé) to the Senegalese Government with the considerable amount of twenty-four million euro. The Program ended in 2015 and aimed at supporting the establishment of small and medium enterprises in the agricultural sector in the regions where the majority of Senegalese people in Italy come from. The program provided technical and financial support to the Senegalese community in Italy for promoting co-development projects in Senegal, also through decentralized cooperation.

In the last decade, parallel to co-development projects funded by the Italian Cooperation, a considerable number of co-development practices arise from local level initiatives at municipal and regional level, through the various decentralized cooperation channels. These practices involve civil society actors, banks, migrants, local authorities in what has been called by scholars a *bottom-up approach* to co-development,⁴⁸ as opposed to a top down approach, guided by a national strategy eventually designed for enhancing the role of migration for development.

The municipality of Milan is an example of an Italian Municipality that pointed to co-development as one of the main

⁴⁶ International Organization for Migration, *The MIDA experience and beyond*, IOM Geneva, 2009.

⁴⁷ A. Stocchiero, *Sei Personaggi in cerca di autore. Il Co-Sviluppo in Italia: pratiche senza politica*, CeSPI Working Papers, 60/2009.

⁴⁸ S. Ceschi (ed), *Movimenti migratori e percorsi di cooperazione. L'esperienza di co-sviluppo di Fondazioni4Africa – Senegal*, Carocci, 2012.

strategic policy of international cooperation, in view of the 2015 Expo. Between 2008 and 2009, the Municipality availed about two million euro to diaspora organizations for pursuing their development objectives in the origin countries. The municipality of Milan, through a competitive selection of proposals, intended to enhance the social and human capital of migrant communities in Milan, and build on the municipality past experiences on supporting migrants' engagement in their origin countries' development.

It is important to note that the effort of the Municipalities in the co-development approach complement the one of the civil society that independently gathered in the last ten years to discuss theoretical implications of the co-development. This is the case of Fondazioni4Africa Senegal Project, born after the initiative of four Italian banking foundations, four Italian NGOs, a research centre, and three Senegalese Diaspora organizations based in Italy with the objective to improve the socio-economic conditions of people living in Senegal, activating the decentralized cooperation system in Italy, particularly from the Tuscan region.

10. New trends: From unconnected practices to comprehensive policies

While scholars underline that, until 2009, practices of co-development in Italy existed at local level without a national broader strategy,⁴⁹ today the inclusion of migrants' organizations in the Law 125/2014⁵⁰ hopefully represents a first step towards the elaboration of a national policy dedicated to promote co-development at the national level in Italy. In fact, for the first time ever, the Italian Law on International Cooperation for

⁴⁹ A. Stocchiero, *Sei Personaggi in cerca di autore. Il Co-Sviluppo in Italia: pratiche senza politica*, CeSPI Working Papers, 60/2009.

⁵⁰ Law 125/2014, Article 26 paragraph 2.d.

Development 125/2014 explicitly conceives migrants as agents of local development,⁵¹ with the view to promote the positive impact of migrations for both the origin and destination countries.

This reference in the Italian law is clearly rooted in the co-development approach, in accordance with the recent EU recognition of migrants as agents of development.⁵²

In addition, by providing an institutional framework to decentralized cooperation promoted by local authorities in the pursuit of their international development cooperation relations, the law 125/2014 allows the Italian national level governance to capitalize on the work done by those Provinces and Municipalities in the co-development sector.⁵³

11. Conclusions

The new Italian Law on Cooperation for Development marks a shift in the Italian scenario whereas various practices of co-development existed in isolation, without a comprehensive policy framework and development objective. Differently, today, after the new Italian law on Cooperation and development that recognize migrants as agents of development, the Italian government started to frame co-development potentials within a broader development policy.

⁵¹ Law 125/2014, article 2, paragraph 6: “Italian cooperation policies, by promoting local development also through the role played by communities of immigrants and their relations with their Countries of origin, contributes to developing shared migration policies with Partner Countries, inspired by the safeguard of human rights and compliance with European and international legislation”.

⁵² European Commission, *The Global Approach to Migration and Mobility*, Migration and Development Commission staff working paper accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM 2011 743 final.

⁵³ See article 9 Territorial Partnerships of law 125/2014.

Despite this remarkable progress, it must be noted that the focus on co-development adopted by the Ministry of Foreign Affairs and international cooperation and its implicit reference to the positive contribution of migrants to development seem to clash with the *securitarian* approach that prevails in the measures adopted by the Ministry of Interior, when dealing with the migration phenomenon. The restriction of the rights of migrants enshrined in the 2017 Minniti law, the prolixity of bureaucratic procedures for admission, residence and working permits hamper integration opportunities for migrants upon arrival and in the first years of permanence in Italy. Because integration is key to sustain diaspora engagement, the approach to migration management of the Ministry of Interior contradicts the efforts of the Foreign Affairs and International Cooperation of promoting an active positive role of migrants at national and transnational level.

Italy seems to be caught in a dual approach to the migration phenomenon that risks undermining the effectiveness of the Migration and Development approach and of the co-development practices described above. To promote the convergence of migration management policies by the Ministry of Foreign Affairs and International Cooperation on the side of diaspora work and the Ministry of Interiors on the side of new arrivals, more work is needed on integration measures that, according to research, have the effect to speed and easy diaspora engagement in development. Institutions in Italy should adopt a rights-oriented approach, with operative implications in facilitating the acquisition of rights by migrants, such as, for instance, the right of movement on the European territory, the right to access social services, starting from health, decent houses and education, the right to participate actively in the socio-political life of the host country.

The entitlement to enjoy these rights fully on the Italian territory would facilitate the integration of migrants in our

societies, the development of those skills and attitudes that constitute the so-called social remittances as soon as migrants transfer them back to their origin countries. Ultimately, promoting integration of migrants through a rights-based approach would favour temporarily or permanent return of migrants/diasporas to their origin countries as agents of development, social change and economic progress.

Far from promoting random discontinuous actions, a rights-based approach should be enshrined in a long-term migration management process that entailing coordination between the local, regional and national institutional level, systematic programming and funding, and flexibility in meeting counterpart migrants' needs.

**THE RIGHTS OF MIGRANTS AND REFUGEES
AT STAKE IN THE FAILING MANAGEMENT
OF THE CURRENT REFUGEE CRISIS BY
EUROPEAN STATES AND THE
INTERNATIONAL COMMUNITY, IN THE
LATEST AMNESTY INTERNATIONAL'S
REPORTS**

Elena Santiemma^{*}

INDEX: 1. Global trends in international migrations flows. – 2. States' shared responsibility on refugees. – 3. Safe and legal pathways for refugees and migrants. – 4. Externalisation of migration control: EU cooperation with Turkey and Libya. – 5. An unthinkable bad practice: returns to Afghanistan. – 6. Concluding remarks.

1. Global trends in international migrations flows

When assessing the rights of refugees and migrants that are being systematically violated by States in recent years, it could be useful to start with an overview of global trends regarding migration flows.

First, it is worth noting that there is no single factor or cause for the current crisis of mass displacement of refugees and migrants. On the contrary, while armed conflict and persecution are still one of the main causes of forced displacement in several regions of the world, they are no longer the only determinants of people's movements. Other factors include general violence perpetrated by a range of non-State actors, such as armed gangs and organized crime, discrimination and violence against communities, forced recruitment, as well as sexual and gender

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based violence. Additional factors that are normally debated when recognizing the right to international protection are poverty, inequality and climate change.

Also, economic interests by criminal groups are fueled by a wide use of restrictive migration policies by States, resulting in a serious lack of safe and legal pathways for refugees and migrants, who put their lives at risk undertaking illegal and dangerous routes by land and sea, in an attempt to find refuge. Amnesty International (AI) asserts that, instead of managing these flows in a humane and efficient manner, States prefer to ignore the bigger picture and manage the flows on a security basis. With the result that many of the refugees and migrants who survive the trip must face numerous violations and abuses along the transit routes as some regional contexts are particularly well known for mass violations of human rights. This is the case, for example, in the Central Mediterranean Sea, with its enormous death toll, as well as in North Africa, Southeast Asia, and Mexico¹.

Amnesty International is also seriously concerned about a widespread practice of *refoulement* in all regions of the world, in spite of its prohibition by the Geneva Convention on the Refugee Status². I will focus specifically on the appalling case of *refoulement* from Europe to Afghanistan, in the final paragraph of this essay. With regard to the above-mentioned convention, the reluctance of new States to ratify it weakens the effectiveness of the international protection of refugees in Europe, where we are witnessing an erosion of the relevant existing legal framework. It is true that an attempt to reform the Common European Asylum System is underway – with the European Parliament recently

¹ See Amnesty International – International Secretariat’s website, on Refugees and Migrants: www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/.

² Please find the 1951 Geneva Convention on the Status of Refugee, here: www.unhcr.org/pages/49da0e466.html.

passing an improved version of the European Commission Dublin regulation reform proposal³ –, but the final outcome is still uncertain.

Finally, in terms of global trends, I must draw attention to the rise of xenophobia in the form of racist attacks against refugees in many regions and to the existence of a political rhetoric that equates the movements of refugees to a terrorist threat in several European Countries, the United States and South Africa. This, together with the lack of recognition of rights and integration policies, results in denial of access to appropriate assistance and basic services. Finally, in some cases, States are using anti-terrorist operations as a pretext to crack down on refugees, while instrumentalizing the general migration issue in order to generate fear and gather consensus – something that has become common practice among politicians.

2. States' shared responsibility on refugees

If 2016 was the year in which the international community realized the magnitude of the refugee crisis, 2017 is the year of States burying their heads in the sand and leaving the search for a solution to others. Wealthy States and the international community as a whole failed to equitably share responsibility for managing the ongoing global refugee crisis. Such responsibility

³ During the meeting of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of 19 October 2017, a major reform of the Dublin regulation was passed (41 in favour, 14 against and 0 abstentions), which determines which member state is responsible for processing an asylum request. The aim is to tackle the weaknesses of the current asylum rules and to share responsibility more equally between member States. All asylum seekers should be registered upon arrival in the EU and people needing protection should also be able to get it much faster, while those who do not could be returned more swiftly. Cecilia Wikström (ALDE, SE) was the rapporteur. See: www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%202016%29586639_EN.pdf.

still lies disproportionately with poorer Countries: 86% of the world's 20 million refugees are in developing States⁴.

Unfortunately, in 2016, several international meetings failed to address the global refugee crisis and provide relief to refugees and to the main host Countries: the World Humanitarian Summit, the Annual Tripartite Consultations on Resettlement, the UN General Assembly High-Level Plenary on addressing large movements of refugees and migrants, the US-led Summit on the global refugee crisis. All these meetings led only to a few declarations on resettlement quotas from Syria.

Amnesty International's main objective regarding all the international meetings was for States to use them as opportunities to move from stop gap measures to long-term, proactive and globally coordinated solutions for refugee protection and responsibility-sharing⁵. Although the international community postponed the solution of the problem to 2019, AI continues to ask for a new Global Compact that will: resettle all refugees who are identified by UNHCR to be in need of resettlement, establish or increase alternative pathways for the admission of refugees, and significantly increase their contribution to humanitarian financing (including UN humanitarian appeals). A new Global Compact on refugee responsibility-sharing should also be firmly based on international human rights and refugee law⁶. In

⁴ See UNHCR "Figures at a glance": www.unhcr.org/figures-at-a-glance.html.

⁵ See S. Shetty, *Tackling the global refugee crisis: Sharing, not shirking responsibility*, Amnesty International 04/10/2016, available at: www.amnesty.org/en/latest/campaigns/2016/10/tackling-the-global-refugee-crisis-sharing-responsibility/. See also, Amnesty International, *UN Refugee Summit talks end in abject failure*, 03/08/2016, available at: www.amnesty.org/en/latest/news/2016/08/un-refugee-summit-talks-end-in-abject-failure/.

⁶ See S. Shetty, *Global refugee deal risks being sacrificed on altar of selfish national interests*, available at: www.amnesty.org/en/latest/news/2016/07/global-refugee-deal-risks-being-sacrificed-on-altar-of-selfish-national-interests/.

particular, AI believes that the 1951 Convention Relating to the Status of Refugees and the other international and regional instruments of refugee law remain the main framework for the protection of refugees worldwide. While it is understandable that pre-established principles and mechanisms are needed (including a definition of fair and proportionate contribution by each State), an effective responsibility-sharing framework should also ensure a proactive response to displacement crises. It is worth clarifying that, although a flexible approach to responsibility-sharing may allow States to contribute in different ways to a common response, financial support to Countries hosting large numbers of refugees and asylum-seekers in times of crisis should not be considered as a substitute for contributions to resettlement and relocation, or to the admission of asylum-seekers at the border.

In the Organisation's opinion, the new Global Compact on refugee responsibility sharing should include: a permanent distribution system of resettlement places, based on objective criteria; in cases of large movements of refugees, an additional distribution system to admit refugees through expedited safe and legal routes, also based on objective criteria; guaranteed full, flexible and predictable funding for refugee protection and meaningful financial support to Countries hosting large numbers of refugees (as said, over and above existing development assistance programmes); strengthened refugee status determination systems and increased use of *prima facie* recognition of refugee status; and, last but not least, respect, protection and fulfilment of the rights of refugees in their Country of asylum, including the enjoyment of an adequate standard of living, access to education, healthcare and other services, as well as economic self-reliance⁷.

⁷ See Amnesty International, *The Global Refugee Crisis: Genuine Responsibility Sharing - Amnesty International's Five Proposals*, available at: www.amnesty.org/en/documents/ior40/4380/2016/en/.

3. *Safe and legal pathways for refugees and migrants*

When it comes to the issue of safe and legal routes, the case of the European Union is pivotal. Since there is no safe and regular pathway for migrants and refugees to reach Europe, in past years a large number of individuals have been risking their lives on irregular journeys by land or sea, transiting from Africa and the Middle East through Turkey or through the Mediterranean. Regarding the latter in particular, notwithstanding the major efforts of the Italian Navy and the EU operation Sophia, as well as of many NGO vessels (for the short period they were allowed by the Italian Government to operate freely in the area, in cooperation with the Italian Coast Guard⁸), hundreds of men, women and children died before reaching Italian shores. The Italian Section of Amnesty International is clearly strongly involved and committed to resolving this problem and, at European level, AI has been relentlessly working on the negotiations on legal pathways for humanitarian admission, particularly on the mentioned Dublin Regulation (Dublin III) review process, the international resettlement scheme, and the creation of new legal migration pathways.

With regard to the review of Dublin III, which is universally recognized as a weak system with regard to its design, as well as to its implementation, it is imperative that any reform proposal be based on fairer distribution, an integration perspective, as well as

⁸ See some NGOs reactions: Doctors Without Borders, *MSF committed to saving lives on Mediterranean but will not sign the Italian "Code of Conduct*, available at: www.msf.org/en/article/msf-committed-saving-lives-mediterranean-will-not-sign-italian-code-conduct; ASGI (Associazione Studi Giuridici sull'Immigrazione), *Position Paper on the Proposed Code of Conduct for Ngos Involved in Migrants' Rescue at Sea*, available at: www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf; Human Rights Watch, *EU: Draft Code for Sea Rescues Threatens Live*, available at: www.hrw.org/news/2017/07/12/eu-draft-code-sea-rescues-threatens-lives.

on mutual recognition and mobility. In particular, EU legislators must ensure that the following core principles guide the reform: swift access to international protection; respect for human rights, particularly the right to seek asylum and the principles of family unity and the prohibition of *non-refoulement*; strong procedural rights (in line with EU law and European Court of Human Rights case law), such as provision of information, access to a lawyer, personal interview, and effective remedies; as well as flexibility to accommodate personal and humanitarian circumstances⁹.

As for the international resettlement scheme, even though we have seen greater attention and commitment by many States that have increased their quotas, this has not yet reached UNHCR targets. Also, as long as this scheme remains voluntary, it is of little help in making States accountable. The European Union, for example, is making its policy on resettlement conditional on migration management cooperation. This trend, that first emerged in the case of the political agreement with Turkey, in 2016, is extremely worrying. The notion of one place being made available in Turkey for every Syrian refugee returned from Greece makes every place contingent upon a person taking the life threatening sea route to Greece disregarding the basic principles of the international protection system. It is now clear – with the relentless effort of the Italian Government, which is already paying the Al-Serraji Government in order to stop departures of migrants and facilitate readmissions, and the fund

⁹ See: Amnesty International European Institutions Office, *Amnesty International Recommendations to the Slovak EU Presidency*, pp. 2-4, available at: www.amnesty.eu/content/assets/Presidency/AI_SK_Presidency_calls_FINAL_new.pdf; Amnesty International European Institutions Office, *Amnesty International's contribution to the European Commission's public consultation on the Debate on the future agenda for Home Affairs policies: An open and safe Europe – what next?*, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/public-consultation/2013/pdf/0027/organisations/ai-amnesty-international_en.pdf.

raising effort at international level – that the EU is going to apply the same externalisation scheme to Libya.

Finally, AI is firmly convinced that a lasting solution to the current refugee crisis will not be possible unless States start considering ordinary ways to let migrant workers (the so-called “economic migrants”) into their borders, safely. In with this regard, it is particularly interesting – and troubling – to note that, in its cooperation with “key” Third States, the EU is developing tailor made packages of incentives, asking them to ensure effective returns and readmission of migrants, in exchange for legal migration opportunities for their own nationals. This is of course no solution to refugees’ displacements nor to economic migration.

4. Externalisation of migration control: EU cooperation with Turkey and Libya

One recent and serious concern of AI, observing advanced States increasingly attempting to escape their responsibility towards refugees, is a widespread externalisation of migration policies¹⁰. The right of States to control their territory is clearly not questionable, as it is in their legitimate interest to control migration into their territories, and cooperate with other States in this field. What is questionable though is the regrettable practice by some States of placing increasing emphasis on certain “external migration policies” to define and manage the migration issue in general. These policies can in fact be a multifaceted spectrum of actions implemented outside of the territory of the

¹⁰ See Amnesty International, *The Human Rights risks of External Migration Policies*, available at: www.amnesty.org/en/documents/pol30/6200/2017/en/.

State that people are trying to enter, usually through enhanced cooperation with other Countries¹¹.

Generally, Amnesty International considers that external migration policies are not unlawful *per se* and can include many different measures and activities. First of all, the externalisation of border control, which is to say enlisting other Countries to engage in punitive or preventive policies to stop irregular border crossings by refugees, asylum-seekers and migrants. Secondly, the externalisation of the asylum process, which is to say shifting to other Countries the responsibility for providing protection to those seeking asylum, as well as readmission agreements that facilitate the forcible return (to their Countries of origin) of people with no right to remain, such as irregular migrants or people whose asylum claims were unsuccessful. International assistance can also be used for externalisation purposes. For instance, States use positive incentives that attempt to address the perceived causes of migration and displacement by improving living conditions and access to rights and protection in Countries of origin and transit (including development aid, trade measures and foreign direct investment), as well as negative incentives. Another example of positive external migration policies are safe and regular entry pathways, such as policies enabling regular access to destination Countries for people in need of protection (e.g. resettlement, family reunification, protected entry, community sponsorships, etc.), as well as for migrants (e.g. labour migration schemes, student visas, etc.).

However Amnesty International believes that several types of external migration policies, and particularly the externalisation of border control and asylum-processing, are dangerous to human rights¹². And such policies are found in many regions of the

¹¹ *Idem*, p. 5.

¹² More specifically: Right to Seek and Enjoy Asylum (Art. 14, *Universal Declaration Of Human Rights*), Principle of *Non-Refoulement* (Art. 3,

world. Apart from those initiated by the European Union and its Member States – briefly mentioned above and to which I will return in a moment – we also find that, for instance, Australia has concluded formal externalisation agreements with Cambodia, Nauru and Papua New Guinea (PNG) and the United States has externalized border control mechanisms in place with Mexico, Honduras and Guatemala¹³.

To return to the European continent, the mentioned “EU-Turkey Deal” is a milestone in this field. Under the terms of the agreement, “All new irregular migrants crossing from Turkey into Greek islands as of 20 March 2016 will be returned to Turkey”¹⁴. This means that three categories of people are being returned: people who do not apply for asylum in Greece; those whose asylum applications have been evaluated by the Greek authorities and judged unfounded; and those whose asylum applications were found by the Greek authorities to be inadmissible. In exchange, the EU promised to resettle one Syrian refugee from Turkey to the EU for each Syrian refugee returned from Greece to Turkey (up to a maximum of 72,000 people). It also committed to provide up to 6 billion euros for a “Facility for Refugees in Turkey” (but only the first half has been delivered so far), to grant

Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment), Right to Liberty (Art. 9, *International Covenant On Civil And Political Rights*), Right to a Remedy (Art. 2, *International Covenant On Civil And Political Rights*), Freedom from Torture and Other Ill-Treatment (Art. 2, *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*).

¹³ See B. Frelick, I. M. Kysel, J. Podkul, “The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants”, in *Journal on Migration and Human Security*, Volume 4, Number 4 (2016), pp. 190-220.

¹⁴ Please find the text of the EU-Turkey Deal on the European Council website: www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. See also, a Questions & Answers document, by the European Commission, here: http://europa.eu/rapid/press-release_MEMO-16-963_it.htm.

visa-free travel for Turkish nationals by June 2016, as well as to revive the stalled negotiations for Turkey to accede to the EU. Though following the attempted coup against president Erdogan and his subsequent hideous repression of Turkish society it appears that only the first part of the agreement has been implemented.

The agreement was based on the assumption that Turkey is a safe place to which asylum-seekers and refugees can be returned. But this is clearly not the case. First of all, Amnesty International research has shown that, in late 2015 and early 2016, asylum-seekers and refugees in Turkey were sent back to Afghanistan, Iraq and Syria, in violation of the principle of *non-refoulement*. Second, since Turkey is hardly safe for its own citizens, nowadays; it cannot really ensure asylum-seekers and refugees the full enjoyment of their rights.

In this regard, a 2016 AI briefing (“No Safe Refuge: Asylum-Seekers and Refugees Denied Effective Protection in Turkey”¹⁵) focusing on the treatment received in Turkey, shows that – contrary to what is required under EU and international law – asylum-seekers do not have access to fair and efficient procedures for the determination of their status, since Turkey’s asylum system is still very young and under-developed. Also, asylum-seekers and refugees do not have timely access to so-called “durable solutions” as identified by UNHCR, including repatriation to Countries of origin (when safe), integration in host Countries, and resettlement to Third Countries. Lastly, research shows that asylum-seekers and refugees in Turkey are denied access to means of subsistence sufficient to maintain an adequate

¹⁵ See Amnesty International, *No Safe Refuge: Asylum-Seekers and Refugees Denied Effective Protection in Turkey*, available at: www.amnesty.org/en/documents/eur44/3825/2016/en/.

standard of living, due to the overall difficult situation of the Country and to additional barriers.

As mentioned above, AI is also deeply concerned about EU's plans to cooperate more closely with Libya on migration control, since this risks fueling the ill-treatment and indefinite detention of thousands of refugees and migrants in that Country. Testimonies gathered during AI visits to Sicily and Puglia in 2016 and 2017 reveal shocking abuses by the Libyan coastguard and at immigration detention centers in Libya. Specifically, in a 2016 report, the Organisation collected 90 testimonies regarding shootings and beatings by the Coast Guard, torture and other ill-treatment at detention centers, and a case of a migrants' boat left to sink with some 120 people on board¹⁶. Amnesty International is appalled by the Libyan Coast Guard's practice of intercepting thousands of people at sea and returning them to detention centers where they suffer torture and other horrific abuses. It is therefore critical that any support from the EU and the Italian Government does not fuel the human rights violations to which foreign nationals in Libya are being subjected, such as torture, sexual violence, religious discrimination, exploitation, extortion or being sold to smugglers¹⁷.

In preparation for Italy's periodic review of before the UN Committee Against Torture, in November 2017, Amnesty International submitted its concerns and recommendations on the specific matter of torture and other human rights violations of refugees and migrants pushed-back or blocked in Libya favored by Italian and EU policies¹⁸. With particular regard to complicity

¹⁶ See, Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, available at: www.amnesty.org/en/documents/EUR05/006/2014/en/.

¹⁷ See Amnesty International, *Italy: Submission to the United Nations Committee against Torture, 62nd Session, 6 November - 6 December 2017*, available at: www.amnesty.org/en/documents/eur30/7241/2017/en/.

¹⁸ *Idem*, pp. 12-19.

in torture resulting from cooperation on migration with Libya, AI pointed out that, with the support of the EU and the encouragement of many of its member States, Italy has put in place measures to support Libyan authorities – as well as informal leaders and groups – in their border control activities that are trapping hundreds of thousands of people in a Country where they are constantly exposed to the risk of serious human rights violations, and where they have no access to any form of protection. As a matter of fact, UNHCR operations in Libya are extremely limited due to security concerns and Libya, whose internal political conflict is far from settled, does not have an asylum system. Various NGOs and UN bodies confirm that thousands of refugees and migrants are arbitrarily detained in centers formally managed by the Libyan Ministry of Interior, as well as in informal detention centers run by militias and criminal gangs. In both types of centers, they are systematically exposed to torture and other cruel, inhuman and degrading treatment, including sexual violence, usually to extort a ransom. Many are killed or left to die after being tortured, or are sometimes sold for forced labour. Moreover, these already vulnerable people are exposed to the generalized lawlessness and violence ruling the Country, where racism against sub-Saharan nationals is ordinary and widespread.

Amnesty International documented this situation by interviewing hundreds of people¹⁹ and monitoring several incidents at sea, demonstrating, the reckless conduct of the Libyan Coast Guard that, when it does not resort to firearms and violence, it operates in disregard of basic security protocols and international standards²⁰, as also reported in recent UN

¹⁹ See Amnesty International, *A Perfect Storm: The Failure of European Policies in the central Mediterranean*, available at: www.amnesty.org/en/documents/eur03/6655/2017/en/.

²⁰ Idem, pp. 21-26.

documents²¹. In August 2017, the UN Special Rapporteurs on extrajudicial, summary or arbitrary execution²², as well as the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture²³, expressed their concern about interceptions resulting in disembarkation in Libya. Unfortunately, funding and expanding the programmes of international Agencies, which Italy and the EU are doing, is not sufficient to ensure that cooperation with Libya on migration issues does not violate human rights, including the prohibition of torture.

In its submission to CAT, Amnesty International recalls the steps undertaken by Europe to strengthen the Libyan Coastguard. In June 2016, the mandate of the European naval operation EUNAVFOR MED was amended to include capacity building and training of Libyans²⁴. In May 2017, Italy provided the Al-Serraji Government with four patrolling assets, with a promise of a further six²⁵. In July 2017, a 46.3 million euros project was approved under the EU Trust Fund for Africa, to strengthen Libyan capacity along the sea border (defining a Libyan SAR

²¹ See OHCHR, “*Detained And Dehumanised*” Report on Human Rights Abuses against Migrants in Libya, available at: www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf.

²² See OHCHR, *Italy-EU search and rescue code could increase Mediterranean deaths, UN expert warns*, 15 August 2017, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21971&LangID=E.

²³ See OHCHR, *EU ‘trying to move border to Libya’ using policy that breaches rights – UN experts*, 17 August 2017: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21978&LangID=E.

²⁴ The training covers basic seamanship, more advanced specialist skills, as well as human rights and international law. Amnesty International reports that a new training, involving 87 Libyan personnel, began in Taranto, Italy, on 17 September 2017, see: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/32315/operation-sophia-new-training-modules-libyan-coastguard-and-navy-arranged-italy_en; and www.consilium.europa.eu/en/press/press-releases/2017/07/25-eunavformed-sophia-mandate-extended/.

²⁵ See: www.interno.gov.it/it/notizie/controllo-traffico-dei-migranti-consegnate-prime-motovedette-alla-marina-libica.

region), as well as the southern borders, and to assist the Libyan authorities in establishing two operational coordination centers²⁶. On 2 August 2017, in response to a formal request by Al-Serraji, Italy launched a naval operation in Libyan waters and deployed Navy officials on Libyan soil to support Libyan authorities in their activities against irregular migration and human smuggling²⁷. As a result of these measures, the number of people intercepted at sea by the Libyan Coastguard and disembarked in Libya has increased. In 2017 about 16.500 people were routinely taken to official and informal detention centers and exposed to serious human rights violations and abuses²⁸.

To conclude, Governments often claim that their border control efforts are aimed at saving lives by reducing the incidence of irregular border crossings, or at combating criminal networks of smugglers and traffickers, but, as shown above, this is not always the case. On the contrary and in most cases, their primary goal is to reduce the number of people arriving, in the shortest possible time. Furthermore, while Amnesty International welcomes approaches that employ positive incentives (such as the creation of safe and legal routes to move across borders, as well as international cooperation intended to improve living conditions in refugee camps in developing Countries and establish viable asylum-systems), it recognizes that punitive or preventive measures are often synonymous with human rights abuse. The Organisation therefore notes that the current approach is bound to exacerbate the current unfair distribution of responsibility between developed and developing Countries, and will in fact

²⁶ See: http://europa.eu/rapid/press-release_IP-17-2187_en.htm.

²⁷ See: www.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf.

²⁸ The Libyan Coastguard reportedly intercepted and pulled back to Libya 18,904 refugees and migrants in 2016. See: www.iom.int/news/iom-eu-train-libyan-mediterraneanmigrant-rescuers; and www.iom.int/news/mediterranean-migrant-arrivals-reach-131772-2017-deaths-reach-2556.

force people fleeing conflict, persecution and poverty to put their lives into the hands of smugglers or traffickers. In particular, it considers that any policy seriously aiming to address the irregular arrivals of refugees and migrants should respond to the key problems at the roots of displacement. Those problems are: human rights violations and destitution in Countries of origin; lack of adequate protection and opportunities in Countries of transit or first refuge; near impossibility for refugees, asylum-seekers and migrants to reach destination Countries in a safe and regular way²⁹.

5. An unthinkable bad practice: returns to Afghanistan

Unbelievable as it is to human rights practitioners, thousands of Afghans have been returned from Europe to Afghanistan, in the last two years. These returns are taking place despite evidence that people returned face a real risk of serious human rights violations. Amnesty International recently published a report on this, following research trips to Afghanistan in May 2017³⁰.

It is common knowledge that Afghanistan is currently being torn apart by an internal armed conflict between “Anti-Government Elements” (including over 20 armed groups and the Taliban) and Pro-Government Forces. The United Nations Assistance Mission in Afghanistan (UNAMA) reported that 2016 was the deadliest year on record for civilians (11,418 people killed or injured)³¹, while in 2017 the Humanitarian Aid

²⁹ See Amnesty International, *The Human Rights risks of External Migration Policies*, cit., p.12.

³⁰ See Amnesty International, *Forced Back to Danger: Asylum-Seekers Returned from Europe to Afghanistan*, available at: www.amnesty.org/en/documents/asa11/6866/2017/en/.

³¹ See United Nations Assistance Mission in Afghanistan, *2016 Annual Report on the Protection of Civilians in Armed Conflict in Afghanistan*, 01/02/2017, available at: <https://unama.unmissions.org/protection-of-civilians-reports>.

Operations (ECHO) Stated that the situation had “reverted to an increasingly acute humanitarian crisis”³². Beyond the general conflict-related risks, many people in the Country are also at particular risk of persecution. Amnesty International documented that human rights violations and persecution are widespread in areas under the control of the Government, as well as where Anti-Government Elements are in control. These include extrajudicial executions, torture and ill-treatment, as well as denials of the rights to free movement, freedom of expression, political participation, access to education and the right to health care. Moreover, both sides of the conflict perpetrate human rights violations in areas outside their respective control, in a situation where accountability is almost impossible.

It is clear that Afghans fleeing their Country who reach Europe have the right to lodge an asylum claim – and that they cannot be returned, based on the principle of *non-refoulement*. Unfortunately, though, AI noted a decrease in the recognition rates of Afghans’ applications for international protection in European Countries, in recent years, as well as a specular increase in forced returns or in the so-called “assisted voluntary returns” (which are nonetheless mandatory). The reason for this can only be linked to the refugee crisis in Europe and to the subsequent pressure by EU institutions and member States on Afghanistan to accept large numbers of returns, including through economic means (see development aid). Consequently, in order to be able to return people to that Country, many European States declared some areas of Afghanistan as “safe”, relying on the idea of an “Internal Flight Alternative” (IFA). In other words, the authorities recognise that the person’s province of origin is dangerous, but expect them to live elsewhere in the Country. To Amnesty

³² See European Civil Protection and Humanitarian Aid Operations, *Afghanistan Factsheet*, May 2017, available at: http://ec.europa.eu/echo/files/a/id/Countries/factsheets/afghanistan_en.pdf.

International, the concept of IFA is «both legally questionable and factually unsound»³³. In addition, this practice is particularly aimed at targeting children and young adults who originally reached Europe as unaccompanied children, and who face even greater risks because of the lack of national legislation, or of local or international NGOs that could provide them with support. Since it believes that, given the grave security and human rights situation across the Country, all returns to Afghanistan constitute *refoulement*, Amnesty International is calling on all European Countries to implement a moratorium on such returns until they can take place in safety and dignity.

6. Concluding remarks

The so-called “global refugee crisis” needs to be considered in the wider context of human migration. States, particularly those that share leadership of the international community and have the means to address the problem, need to see and understand the wider picture and start to genuinely cooperate in order to find more equitable, human and durable solutions to refugees and migrants flows. This does not mean “let everybody in”, but rather to make use of legitimate and existing tools to design a system that is respectful of human rights and humanitarian law. For example, States wishing to consider externalisation measures must at least make sure that the human rights of migrants, asylum-seekers and refugees are central to the development and implementation of their external migration policies. This surprisingly would not result in non-cooperation on border control matters with Countries where there are systematic human rights violations, and in not preventing refugees and migrants from leaving such Countries. As in every other area of

³³ See Amnesty International, *Forced Back to Danger: Asylum-Seekers Returned from Europe to Afghanistan*, cit., p. 33.

Government intervention, due diligence, monitoring and accountability mechanisms are crucial to the success of migration control policies, both internally and externally. Possible human rights impacts must be evaluated in advance and adequate funding must be allocated in order to provide effective protection of refugees and effective integration of migrants in hosting societies. Believing that outsourcing international protection and using leverage with poorer Countries will lead to a decrease in people wishing to enter richer and more peaceful States is, in my opinion, simply naïve. States should focus on positive aspects of migration, regulating it in a humane and efficient manner, and favoring positive incentives to other States, as this will foster their own development. These could include: a significant increase in funding for refugee protection and meaningful financial support to Countries hosting large numbers of refugees; a substantial increase in resettlement places for the world's most vulnerable refugees, as identified by UNHCR; the significant expansion of other safe and legal routes for asylum-seekers to reach destination Countries (such as humanitarian visas, family reunification, student visas, and community sponsorship arrangements); and, finally, a review of the mechanisms through which migrants can apply for regular entry and the development of accessible and transparent systems, which can open up real mobility opportunities, according to national labour markets.

SEA ARRIVALS, BORDERS AND ASYLUM IN SCHENGENLAND

Elsbeth Guild*

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1. Introduction

The arrival of about one million people, and the registration of over 1 million asylum applications each year in 2015 and 2016 has caused substantial upheaval regarding border controls in the EU. These arrivals were mainly by sea, through the southern Mediterranean primarily from north Africa to Italy and then from the summer onwards mainly from Turkey to the Greek islands, has galvanized public opinion and policy makers.¹ The first part of what has been called a crisis but is increasingly being transformed into the new normal, has been the numbers.² Mainly Syrian, Iraqi and Afghan asylum seekers have arrived over the year outstripping

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¹ P. Pallister-Wilkins, "Humanitarian Rescue/Sovereign Capture and the Policing of Possible Responses to Violent Borders", in *Global Policy*, 2017, pp. 19-24.

² R. van Reekum, W. Schinkel, "Drawing lines, enacting migration: visual prostheses of bordering Europe", in *Public Culture*, 2017, pp. 27-51.

other nationalities, in particular the Western Balkan nationals who had been a focus of concern.³

The routes of arrival of refugees into the EU and their trajectories across Europe have fixated the EU external border agency, FRONTEX and many media outlets.⁴ The Schengen border control free area, a major success of the EU has been put under strain as refugees have travelled into the Schengen area from Turkey into Greece, out of the Schengen area into Macedonia and other non EU Member States and EU non-Schengen Member States (Bulgaria, Croatia, Cyprus and Romania in the region) and then back into the Schengen area across the borders into Austria and Hungary.⁵ Many refugees make their way north to the more hospitable countries of northern Europe, Germany, Hungary and Sweden. According to the EU statistical agency EUROSTAT “Of the 138 000 Syrians who applied for the first time for asylum in the EU in the third quarter of 2015, more than three quarters were registered in three Member States: Germany (53 100), Hungary (35 800) and Sweden (18 100).”⁶ As refugees move, they run into border controls and various obstacles to the continuation of the journeys such as the cutting of train services. Yet, mainly they end up where they appear to want to be. The so-called Dublin system of allocating responsibility for caring for refugees and determining

³ J. Arsenijević, et al., “A crisis of protection and safe passage: violence experienced by migrants/refugees travelling along the Western Balkan corridor to Northern Europe”, in *Conflict and health*, 2017, p. 6.

⁴ K. Santer, V. Wriedt, “(De-)Constructing Borders. Contestations in and around the Balkan Corridor in 2015/16”, in *Movements. Journal für kritische Migrations-und Grenzregimeforschung*, 2017.

⁵ F. G. Sicurella, “The Language of Walls Along the Balkan Route”, in *Journal of Immigrant & Refugee Studies*, 2017, pp. 1-19.

⁶ EUROSTAT, 9 December 2015 available at: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylumquarterlyreport>.

their claims is supposed to fall on the first EU country through which they arrive.⁷ Obviously it is not realistic that all these refugees should be the responsibility of Greece as the EU policy and legislation requires. But no one seems to have a better plan for the moment. The European Commission and the Council are very keen on the idea of relocation where Member States offer places to refugees in Greece and Italy – in September 2015 it was agreed that 160,000 places would be opened in this relocation scheme. But according to the Commission only 4,582 places have been offered by Member States and only 218 people moved as of 8 February 2016.⁸ So in the meantime refugees continue to ‘self-relocate’ around the EU not always to the satisfaction of the authorities of the Member States.⁹

Throughout the refugee crisis, the issue of security, terrorism and potential terrorism has been present. This concern has fuelled resistance to relocation, calls for more and better registration and investigation of refugees arriving in the EU. Further, the fear of refugees as possible sources of security risks and terrorism has been a concern expressed by a number of Schengen states which have used the exception in the EU border code to reintroduce intra-Schengen border controls on persons when states are faced with a crisis. This contribution examines how the Schengen Member States have used the argument of the risk of terrorism/security

⁷ M. Fullerton, “Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law”, in *Harvard Human Rights Journal*, 2016, p. 57.

⁸ Communication from the Commission to the European Parliament and the Council *on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, Annex 4, COM(2016)85final of 10.2.2016.

⁹ Communication from the Commission to the European Parliament and the Council *on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, COM(2016)85final of 10.2.2016.

threat in the context of the emergency temporary, reintroduction of intra-Schengen state border controls. The discovery of a Syrian passport near the venue of a terror attack in Paris on 13 November 2015 has heighten these worries.¹⁰

Since 13 September 2015 the following Member States have introduced intra-Schengen border controls under emergency measures (in order of appearance) on the basis of the arrival of refugees on their territory (see Annex I below for a short analysis of the 2015 EUROSTAT information of arrivals of refugees in the Member States): Germany, Austria, Slovenia,¹¹ Sweden, Norway and Denmark. Malta and France had already notified the EU authorities that they would reintroduce border controls temporarily for the purposes of the Valletta migration conference and Commonwealth Heads of State meeting (Malta) and COP 21 (France).¹²

At the time of writing the Member States still carrying out intra-Schengen border controls are the following:

Current Temporarily Reintroduced Border Controls

Temporarily reintroduced border controls in the context of *foreseeable events*:

- France (16 July 2017 – 31 October 2017)
Persistent terrorist threat

¹⁰ See for instance <http://www.theguardian.com/world/2015/nov/15/why-syrian-refugee-passport-found-at-paris-attack-scene-must-be-treated-with-caution>.

¹¹ Apparently, Hungary also temporarily introduce intra-Schengen border controls but the relevant notification is not available on the Council registry.

¹² E.R. Brouwer, et al., *Internal border controls in the Schengen area: Is Schengen crisis-proof?*, Policy Department for Citizens' Rights and Constitutional Affairs, 2016.

- Norway (26 August 2017 – 25 September 2017)
UCI Road World Championship in Bergen (Bergen airport)
- Temporarily reintroduced border controls in the *context of Recommendation of the Council of 11 May 2017*:
 - Germany (11 May 2017 – 11 November 2017)
land border with Austria
 - Austria (11 May 2017 – 11 November 2017)
land border with Slovenia and with Hungary
 - Denmark (11 May 2017 – 11 November 2017)
Danish ports with ferry connections to Germany and the Danish-German land border
 - Sweden (11 May 2017 – 11 November 2017)
Swedish harbours in the Police Region South and West and the Öresund bridge
 - Norway (11 May 2017 – 11 November 2017)
Norwegian ports with ferry connections to Denmark, Germany and Sweden.

In practice, some border controls have been very substantially relaxed such as those on the trains between Denmark and Sweden. Yet the fact of continuing intra-Schengen border controls as a result of sea arrivals primarily in the Eastern Mediterranean as been a shock for the EU and its institutions. The convergence of terrorism and border crossing as the motivation for the re-introduction of these border controls is the issue examined here.

2. Background

The Schengen area is made up of the Schengen states, all EU Member States except Bulgaria, Croatia, Cyprus, Ireland, Romania

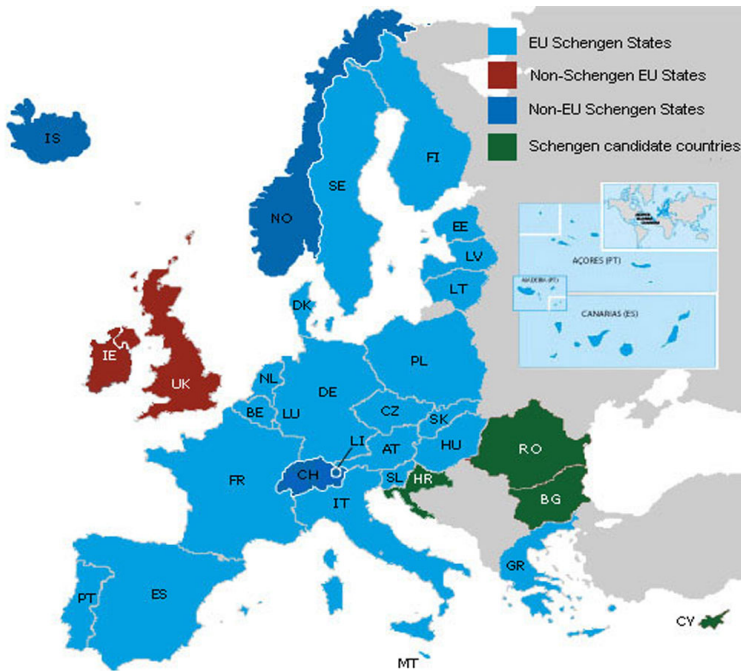
and the UK plus the ETFA states, Iceland, Liechtenstein, Norway and Switzerland.¹³ Since 13 September 2015 when Germany notified the Council, Commission and Member States that it would be reintroducing selective border controls with Austria at specified places, there has been much media speculation that the Schengen area without border controls on the movement of persons moving among them is falling apart. The Anglo-American press has been particularly gleeful in its presentation of the ‘collapse’. Only the existence of the euro is more irritating than the Schengen area to the Anglo-American press thus in one year to have the possibility to herald the demise of both was a real bonanza.

Before we participate in this Schengen bashing, it may be worth looking carefully at what has been happening to the Schengen area as regards the re-introduction of intra-Schengen states border controls and I particular the reasons for this reintroduction of border controls. But first a little history. The Schengen border control free area was first contained in the Schengen Agreement 1985 between the three Benelux countries (Belgium, Luxembourg and the Netherlands – which already had their own free travel area dating from the 1950s) France and Germany. All other Member States and Schengen states joined after 1985 and by 1999 the frame was set. In 1987 the Single European Act contained for the first time the objective of abolition of border controls among the EU Member States but not much happened except a lot of infighting among the Member States about what the abolition of border controls meant, inspired and sustained by the UK (not least by inflaming Spanish authorities over the states of Gibraltar). The Schengen states moved forward and in 1990 adopted the nuts and

¹³ Switzerland has had a number of referenda where the people have voted to leave the free movement of workers area but stay in the Schengen area.

bolts treaty – the Schengen Implementing Agreement (referred to by the CJEU as CISA) which included all the principles of the Dublin Agreement on the allocation of responsibility for asylum seekers. The Dublin Agreement was signed a few weeks after CISA.

The Schengen states first abolished intra state border controls on persons on 25 March 1990. The whole system was incorporated into the EU in 1999 (by the Amsterdam Treaty) with opt outs only for Denmark, Ireland and the UK. All acceding states are required to join Schengen as soon as the Schengen states consider that they are ready. For the 2004 Member States (except Cyprus which remains outside because of its messy Green Border issue) entry took place on 21 December 2007 (in time for everyone to do their Christmas shopping in another Member State). Schengen now looks like this:



There was turbulence in the Schengen area at the commencement of the Arab Spring when a number of Tunisians arrived in Italy in 2011. The President of France accused the Italian authorities of issuing short residence permits to the Tunisians which permitted them to travel lawfully to France (when presumably the French President preferred for them to remain irregularly in Italy). Border controls were introduced briefly between two of the founding Member States of the EU. This was a sufficient shock to the system that the Commission proposed for reaching amendments to the Schengen Borders Code (the regulation covering the crossing of internal and external borders) which require the Member States to notify the Council, Commission and Member States if they seek to reintroduce border controls among themselves and to justify the reintroduction of such

border controls on the basis of limited grounds (which specifically exclude a large number of third country nationals crossing the borders).¹⁴ The grounds for exceptional reintroduction of border controls are now contained in Article 25 SBC. Where there is a serious threat to public policy or internal security which requires immediate action a state may, exceptionally, reintroduce controls for a period of up to ten days. It must notify the other Member States and the Commission (and the Commission the Parliament) and supply the Article 24 justifications and justify the use of the Article 25 emergency procedure. The Commission may consult other states on receipt of the notification. Where the serious threat continues beyond the initial ten days, the state can prolong the border controls for a period of up to 20 days. Again, the state must take into account the Article 23 criteria in an assessment of necessity, proportionality and any new elements. Consultations and opinion are permitted here too. The Article 25 procedure can only be renewed for a total of two months.

The Article 24 justifications set out the procedure for temporary introduction of border controls. The first step is that the state must inform the other Schengen states, the Commission, the European Parliament and the Council – for ‘normal’ foreseen threats the latest four weeks before the introduction of the border controls. A shorter period is permitted where the circumstances become known less than four weeks before the planned reintroduction of controls. The notification must include five elements:

¹⁴ Pursuant to Recital 5 of Regulation No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 *Migration and the crossing of external borders by a large number of third - country nationals should not, per se, be considered to be a threat to public policy or internal security.*

(a) The reason for the proposed introduction including all relevant data detailing the events that constitute a serious threat to public policy or internal security;

(b) The scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced;

(c) The names of the affected crossing points;

(d) The date and duration of the planned reintroduction.

The Commission is entitled to request further information. The state can classify as confidential parts of the information but this cannot deprive the Commission and European Parliament of the totality of the information. When a state makes a notification, the Commission and the Member States are entitled to issue opinions. For the Commission, this means that if it has concerns regarding the necessity or proportionality of the measure or if it considers that consultation is appropriate, it should issue such an opinion. Article 24 also provides for consultation including joint meetings among Member States on reintroduction of controls. These should take place at least 10 days before the reintroduction.

The 'normal' procedure is contained in Article 23. It provides the general framework for the temporary reintroduction of border controls at internal borders (those between Schengen participating states). The first requirement is that there is a serious threat to public policy or internal security in a Member State. Where there is such an emergency, the state may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its extension exceeds 30 days. But the scope and duration of the temporary reintroduction of border controls must not exceed what is strictly necessary to respond to the serious threat. Further, border controls can only be reintroduced as a last

resort and in accordance with the procedure set out in Articles 24, 25 and 26.

If the serious threat to public policy or internal security persists beyond the period provided, it may be prolonged subject to further criteria (see below) but all new elements must be taken into account and the renewal must be for 20 and 30-day periods or the foreseeable duration of the serious threat. The total period of the reintroduction of border controls must not exceed 8 months (two months under Article 25 and six months under Article 23) unless there is a Commission recommendation and Council resolution to reintroduce border controls (Articles 19 and 26). The Article 23(a) criteria require that a Member State decide that the measure is a last resort and that the reintroduction of border controls is temporary. On prolonging the internal border controls, the state must assess whether the measure is likely to adequately remedy the threat and the proportionality of the measure in relation to the specific threat. In doing so the state must take into account the following:

(a) The likely impact of any threats to its public policy or internal security including following terrorist incidents or threats including those posed by organised crime;

(b) The likely impacts of the measure on free movement of persons within the Schengen area.

Article 26 provides for exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious deficiencies relating to external border control. This is not the basis for any of the measures taken by Schengen states since the critical 13 September notification by Germany invoking an Article 25 border control with Austria, however, it is increasingly likely that it may be invoked as the Commission has reported that there are serious deficiencies in

Greek external border controls (contested by Greece).¹⁵ However, it is worth remembering that Schengen states have frequently reintroduced temporary border controls with one another, usually under the normal procedure for the purposes of safeguarding international events taking place in their countries, as a response to serious health scares and similar circumstances. Groenendijk undertook an excellent analysis of these activities in his 2003 publication.¹⁶

3. The ground of security threat in the Schengen States' notifications on emergency reintroduction of border controls

In this section I will examine the use of the ground of terrorism/security threat for the reintroduction of Schengen border controls among those Member States where the principal reason is the refugee crisis.

Germany: notification 13 September 2015 – “Further arrivals [of refugees] would endanger public order and internal security.”¹⁷ 12

¹⁵ Council of the European Union, *Draft Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of management of the external borders by Greece*, No 5877/1/16 REV 1, of 11 February 2016.

¹⁶ K. Groenendijk, “New borders behind old ones: post-Schengen controls behind the internal borders and inside the Netherlands and Germany”, in *Search of Europe's Borders*, Kluwer Law International, The Hague, 2003, p. 113-146.

¹⁷ Council of the European Union, *Temporary reintroduction of border controls at the German internal borders in accordance with Article 25 of Regulation (EC) No 562/2006 establishing a Community Code on the rules*

October (the 22 September notification is not available): “temporary internal security checks will be limited to the level required by actual security needs”; 30 October “This influx seriously affects Germany’s public order and internal security in various ways [unspecified]”.

Austria: notification 15 September 2015 “in view of the security situation caused by the huge migration flows to and via Austria...”¹⁸; 15 October [24 September document not available] “In view of the massive influx of third country nationals, such measure continues to be necessary for maintaining law and order, safeguarding internal security and avoiding continuous overstressing of police force..”. 18 November: “This is the only way to prevent security deficits.” “This further measure is inevitable to prevent a threat to public order and internal security.”

Slovenia: notification 17 September 2015: “uncontrollable migration flows... coupled with the measures adopted by the neighbouring countries... presents a serious threat to Slovenia’s national security.”¹⁹ Extended once then lifted.

Sweden: 12 November 2015 “due to the serious threat to public policy and internal security” posed by the arrival of refugees “now lead to extreme and increasing challenges regarding the functionality of the Swedish society which is one of the three goals of Swedish security.” “challenges for a range of important services

governing the movement of persons across borders (Schengen Borders Code), No 11986/15 of 14 September 2015.

¹⁸ Council of the European Union, *Summary conclusions of the 26th meeting of ERAC, held in Riga (LV) on 16-17 April 2015*, No 1210/15 of 9 July 2015.

¹⁹ Council of the European Union, *Temporary reintroduction of border controls at the Slovenian internal borders in accordance with Article 25 of Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, No 12111/15 of 17 September 2015.

in Swedish society...strictly necessary to respond to the threat to public policy and internal security..”²⁰ Extended 18 December and moved to Article 23 controls.

Norway: Notification 25 November 2015 “due to a serious threat to public policy and internal security posed by the consequences of the unpredictable migratory pressure and ensuing challenges to the functioning of the Norwegian society...”²¹ and on 18 December “Although there has been a significant decrease in the number of migrants applying for asylum in Norway, we fear that the situation may change rapidly again if we abolish the introduced internal border controls.” The exceptional controls were moved to Article 24.

Denmark: On 12 October Denmark notified the Council it would be exercising its right under the Danish Protocol TFEU and TEU to reintroduce temporary border controls. Then it opted into the amendments to the SBC.²² The on 4 January 2016 it introduced emergency border controls under Articles 23 and 25. The notification states “Denmark is of now faced with a serious risk to

²⁰ Council of the European Union, *Temporary reintroduction of border controls at the Swedish internal borders in accordance with Article 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across border (Schengen Borders Code)*, No 14047/15 of 12 November 2015.

²¹ Council of the European Union, *Temporary reintroduction of border controls at the Norwegian internal borders in accordance with Articles 23 and 25 of Regulation (EC) 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, No 14633/15 of 25 November 2015.

²² Council of the European Union, *Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances - Notification by Denmark*, No 13214/15 of 19 October 2015.

public order and internal security because a very large number of illegal immigrants may be stranded in the Copenhagen area within a short period of time.” The reason for this seems to be the wholesale break down of the Nordic Union. The Danish authorities blame the Swedes and Norwegians (and Germans) for the border control introduction. They also complain that the Swedes, Norwegians and Finns (who are applying the rule apparently to Finnline) have all applied carrier sanctions requiring passengers entering to be checked by the transporters that they have passports or IDs and any other necessary documents.

4. The ground of terrorism in the Schengen States' notifications on emergency reintroduction of border controls

Only two Member States specifically use the ground of a terrorism threat for their reintroduction of Schengen border controls on persons – France and Malta.

Malta: The 25 November 2015 notification states “In view of the current situation with regard to the global terrorist threat...” the controls already in place for other purposes would be extended on the basis of Article 23 “in view of the serious threat to public policy and internal security that is currently considered to exist.”

France: The 7 December 2015 notification states “The terrorist attacks that took place in Paris on 13 November 2015 led the government to declare a state of emergency throughout the country...owing to the imminent danger resulting from serious breaches of public order.” The controls are introduced with Belgium, Luxembourg, Germany, Switzerland, Italy and Spain.

5. *The Commission's Assessment*²³

As required under the new SBC provisions, the Commission is required to make assessments of the Member States' use of Article 25. The assessment for Germany, Austria and Slovenia was published on 23 October 2015. On 15 December, the Commission issued its 8th biannual report on the functioning of the Schengen area 1 May – 10 December 2015 which covers some of the same ground as set out above. The Commission has also issued an assessment of the Maltese reintroduction of border controls but this is not public. According to the Commission's assessment of Germany and Austria's use of Article 25, the Commission is very forgiving. On the question of terrorism, it states:

“14...Many of these persons have not been registered and screened in any other European country. While there is no direct evidence so far that jihadist group have exploited the movement of refugees with the specific aim of infiltrating Germany, in view of the large number of people entering the country, it is possible that among these persons there could also be people with links to crime, members of militant groups or lone extremists.”

“30. As to the possibility advanced by the German authorities that also radicalised persons might be hiding among the bona fide asylum seekers entailing risks related to organised crime and terrorist threats, the Commission considers that this would need to be further substantiated to be considered in itself as constituting a serious threat to public policy and internal security e.g. by

²³ European Commission, *Commission opinion on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to Article 24(4) of Regulation No 562/2006 (Schengen Borders Code)*, C(2015)7100 final, of 23.10.2015.

quantifying the warnings on persons who may have had contacts to or fought with militant groups in crisis regions. This possibility does nevertheless underscore the need to register all the persons concerned, something which could not otherwise be achieved in the current, extraordinary situation.”

However, the Commission accepts the necessity of the re-introduction of controls. This seems quite exceptional considering the lack of detailed information regarding the nature of the threat which the Member States produced.

6. A Legal Assessment of the Justifications

At this point it is worth repeating the criteria against which any justification by a Schengen state to reintroduce border controls must be assessed. In Article 25 these are:

- (a) The reason for the proposed introduction including all relevant data detailing the events that constitute a serious threat to public policy or internal security;
- (b) The scope of the proposed reintroduction specifying for which parts of the internal borders controls will be introduced;
- (c) The names of the affected crossing points;
- (d) The date and duration of the planned reintroduction.

To these must be added the Article 23(a) criteria:

- (a) The likely impact of any threats to its public policy or internal security including following terrorist incidents or threats including those posed by organised crime;
- (b) The likely impacts of the measure on free movement of persons within the Schengen area.

On an examination of the notifications made by the Member States under Article 25 (and repeated in their move to Article 23-

24), there seems to be a noticeable shortage of detail on the reasons for the reintroduction of border controls. The German notification seems to be motivated by exasperation with the Italian and Greek authorities' management of their external borders. The references, necessary according to the Article, to public order and internal security are without any specific detail. The same is true for the Austrian notification which seems to have been premised on the German one. The Austrian authorities sought to bolster their public security argument in their 18 November 2015 notification by mentioning security deficits but again there is no detail. However, the overstressing of the police is proposed in the 15 October notification. This is an interesting ground as it suggests that the public security threat is the shortage of Austrian law and order personnel not the nature of the people arriving in Austria. Slovenia was in and out very quickly though it is clear that their authorities did not examine too carefully the requirements as regards the grounds for an Article 25 reintroduction of border controls.

The Nordic Union countries appear to have their own specificities regarding the public security threat. The Swedish notification provides a very interesting argument regarding the functionality of Swedish society as one of three goals of Swedish security. This probably makes sense in a Swedish context but it is difficult to unpick from a distance. Norway is concerned about the unpredictability of arrivals as a security threat. Denmark's public security threat appears to be that people might not move on as quickly as the Danish authorities would like because the neighbours have imposed carrier sanctions requiring travel companies to check ID documents.

Malta suggests that the global terrorist threat is sufficient which if accepted would mean that Malta will never lift intra-Schengen

border controls again as the global terrorist threat is something so nebulous that it is unquantifiable.

France justifies its reintroduction of border controls on the basis of its national state of emergency. As the object of all three substantial terrorist attacks in the EU in 2015 (January, July and November) at least one can understand the perspective of the French authorities that they have a problem. Whether border controls are the solution is another question. However, for the moment the Commission does not appear likely to challenge the French choice of border controls as a counter-terrorism measure.

Turning to the scope of the border controls, here the notifications are more precise. All the Member States (except Malta) provide details of where they plan to carry out the border controls, usually including details about the exact border crossing points at which these will be conducted. This includes for all except Malta the names of the affected crossing points. There is less specificity on the date and duration of the reintroduction of border controls. The need to re-notify the institutions every 20/30 days or for the foreseeable duration means that there are quite a lot of notifications on the Council registry though it would seem that some are missing.

None of the notifications deal with the additional justifications required under Article 23(a). The impact of the reintroduced border controls on the public policy treat is missing. No State seems willing to indicate how border controls at a small number of border crossing points with a few neighbours is going to solve their security deficits. It is also worth remembering that these controls only apply to those border crossing points which the Member States themselves have notified to the Commission under the SBC

as places where the Code applies. So, they do not automatically apply to green field border crossings (a matter of national law).

Further none of the notifications address the issue of the impacts on free movement of persons within the Schengen area though this is something which the Commission addresses in its assessment of the Austrian/German reintroduction of border controls (it notes that no EU citizens have complained to them so apparently the controls are not annoying EU citizens).

7. *The Visegrad States*

The only 2004 Member State to introduce border controls under Article 25 SBC was Slovenia²⁴ and it dropped the controls quickly. On 17 December in the margins of the Council meeting the Visegrad states (Czech R, Hungary, Poland and Slovak R) issued a statement regarding emergency introduction of intra-Schengen border controls. It is something of a warning to those states which have reintroduced border controls: “A common resolute and united action is needed to improve, support and preserve Schengen as one of the cornerstones of the European integration project. We call on all true friends of Schengen to join this effort towards a conclusive debate on the key proposals tabled by the European Commission in this respect.”²⁵ Clearly, among the strongest supporters of border control free Europe are those who arrived last at the table.

²⁴ The situation of Hungary is not available in the Council registry through the Commission states that it reintroduced intra-Schengen controls for a short period but lifted them – Communication from the Commission to the European Parliament and the Council *on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, cit.

²⁵ <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151221-1>.

8. *Conclusions*

The Schengen area of no border controls on the movement of persons has been under substantial strain over 2015-16. A surprising number of Member States have re-introduced border controls on persons among themselves on the grounds of the threat to security and of terrorism. These countries can be classed in two groups – those which claim a general security threat on account of the arrival of refugees – Austria, Germany, Denmark, Norway and Sweden and those which claim a specific threat on the basis of terrorism – France and Malta. One of the noticeable aspects of the use of emergency intra-Schengen border controls is that they are most popular in the Nordic states which have had a passport union dating from 1957 which allowed movement without identity documents across the region. This was subsumed into the Schengen area as all the relevant states joined. That this very long standing free travel area which is, geographically, as far as one can get from the south-eastern EU external borders through which refugees are arriving is astonishing. The two countries through which most refugees are arriving – Greece and Italy – appear to have no interest in the re-introduction of Schengen border controls.

It is also worth noting, as the Commission does in its opinion on Austria and Germany that the recital to the Schengen Borders Code provisions which create the emergency procedures specifically state that “migration and the crossing of external borders by a large number of third-country nationals should not, per se, be considered to be a threat to public policy or internal security.” So, the reasons which all relevant Member States but France and Malta give for the reintroduction of intra-Schengen border controls are directly foreseen as inadmissible reasons by the legislator when they were

adopted in 2013. Only two years later it was exactly these reasons which supposedly had been excluded which were claimed by the Member States.

Security and terrorism have once again become tangled up with refugees and movement of persons. The justification for this on the basis of security and terrorism seems rather slim and not defined. If there are good grounds these are not apparently being published either to the Council, Commission and Parliament or to the public. Instead there are general statements of threat which ring rather hollow. The Schengen area without border controls on persons was supposed to have put an end to this sort of reasoning within the area. Its reappearance is somewhat disappointing for scholars and those who champion the Schengen area free of intra- state border controls. Yet, it is worth remembering that for the moment the damage to the area is fairly limited – involving a restricted number of Member States most of which are applying the controls only at some land and sea borders in practice. The situation may become more dramatic if the Commission and some Member States in the Council seek to use the powers contained in Article 19 and 26 of the Code to find that there are serious deficiencies in the management of Greece's external border such as to justify more severe measures against that one Member State.

Annex I: EUROSTAT 9 December 2015 on the Refugee crisis

On 9 December 2015 Eurostat issued its Asylum quarterly report which covers the third quarter 2015 (July – end of September 2015). This period covers a very active period in the EU crisis of movement of persons – commonly called a Refugee Crisis

or a Migration Crisis or more recently a Schengen border crisis.²⁶ Now we have the official figures and they are surprising in many ways. On 20 September 2017 EUROSTAT issued its quarterly asylum report confirming that the number of first time asylum applicants in the EU-28 decreased by -54 % in the second quarter of 2017 compared with the same quarter of 2016 and by -11 % compared with the first quarter of 2017. Overall, the number of persons seeking asylum from non-EU countries in the EU-28 during the second quarter of 2017 reached 149 000. This was 175 000 less than in the same quarter of 2016.²⁷

First, the total number of first time asylum applications in Q3 2015 was 413,815 compared to 62,780 in Q3 2014. Of the new asylum applications 137,935 were made by Syrian nationals, 56,670 by Afghans and 44,425 by Iraqis. For the 12 month period ending in Q3 2015 the total number of new asylum applications was: 997,125²⁸ for the whole of the EU (population: 508 million).

Most asylum applicants applied for asylum in one of five Member States which account for over 75% of the total number of asylum applications in the preceding 12 months. These are:

²⁶ For an analysis of the Schengen border ‘crisis’ is ILPA European Update, December 2015.

²⁷ http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report accessed 25 September 2017.

²⁸ The figure for all applicants – both first claims and subsequent claims was 1,066,210. This leaves a difference of 69,085 who are second or subsequent applicants – presumably people who applied for asylum in one Member State (eg Hungary) but travelled on to a second Member State (eg Germany) where they wanted their claim determined.

<i>Country</i>	<i>Asylum</i>	<i>% of total</i>	<i>applicants per 1 million population</i>
Germany:	317,670	(26% of total)	1,335
Hungary:	201,495 (26% of total though there is some doubt about whether these applicants stay in Hungary or move on)		10,975
Sweden:	87,595	(10% of total)	4,360
Italy:	79,820	(7% of total)	465
Austria:	65,260	(7% of total)	3,215
UK:	35,045	(@4% of total)	185

At the other end of the spectre, the Member States with the lowest number of first time asylum applications were:

Croatia	175	10
Slovakia	180	5
Estonia	230	55
Slovenia	250	35

There are still large differences in main countries of origin of asylum seekers in different EU Member States. In the UK, at the top of the list are Sudan, Eritrea, Iran, Afghanistan and Pakistan. But for Germany the list is Syria, Albania, Afghanistan, Iraq and Serbia. For Italy, the list is even more different: Nigeria, Pakistan, Bangladesh, Gambia and Senegal (clear the Syrians do not stop in Italy).

As regards outcomes, 75% of Syrians are granted refugee status and a further 23% subsidiary protection. For Iraqis, 80% are recognised as refugees and 7% are granted subsidiary protection. 62% of Eritreans get refugee status and 24% subsidiary protection.²⁹

²⁹ As regards decision making in the UK on Eritreans see the extensive article in the Economist 12 December 2015 on the reversal of refusal decisions in respect of Eritrean asylum seekers before the Tribunal:

However, outcomes continue to vary greatly from Member State to Member State. The EU average of recognition (including refugee status and subsidiary protection) is 48%. But in the UK, the average is 37%. In France recognition is running at 26% but in the Netherlands, it is 71%. Of course, this also reflects the differences in top five nationalities of origin in the different Member States. However, that justification only goes so far.

UNHCR has published its Statistical Yearbook 2014 which includes recognition rates by nationality and country.³⁰ From this source we find that new asylum claims by Afghans made in the UK have a 44% success rate. But in Italy they have a 95% recognition rate. In Germany, the rate is 67% and in neighbouring Austria 98%. If one looks at Syrian asylum claims – a group which is generally accepted as being in need of international protection there are still variations across EU Member States. The recognition rate in the UK for new Syrian asylum applications is 93% but in Romania it is only 77%. In Belgium, the rate is 98% but in Hungary it is 65%. What these figures tell us is that asylum seekers do not have equivalent outcomes to their asylum claims irrespective of the Member State where they make their application.

The whole argument of the justice of the Common European Asylum System is that there are common rules on the definition of a refugee and beneficiary of subsidiary protection, there are common procedural rules and the European Asylum Support Office produces common country of origin information. With so much convergence and harmonisation, the argument goes, it is justified to allow an asylum seeker only one chance to present his or her

<http://www.economist.com/news/britain/21679843-thin-evidence-britain-declare-s-its-biggest-source-refugees-safe-after-all-turned-away>.

³⁰ <http://www.unhcr.org/566584fc9.html>.

asylum application and if it is rejected, no other Member State is required to consider the evidence and claim again. But even with so much convergence and harmonisation, the outcomes are still far too different for asylum seekers from the same countries of origin in different EU Member States for this assumption to be valid.

SOME LEGAL QUESTIONS RELATING TO IRREGULAR MIGRANTS AT SEA

Tullio Scovazzi*

INDEX: 1. The Asymmetrical Right to Emigrate. – 2. The Rights of Irregular Migrants: 2.A. The Right to Be Assisted if in Danger at Sea. 2.B. The Right to Be Humanely Treated and not to Be Prosecuted. 2.C. The Right Not to Be Returned to a State Where There Is a Risk of Being Tortured. 2.D. The Rights of Refugees. – 3. The Past Italian “Pushing Back” Policy. – 4. Conclusive Remarks.

1. The Asymmetrical Right to Emigrate

In the past few years too many people have put their lives at risk in attempts to cross a border. They are driven by the desire to enter a country where they will be safe from persecution, poverty, conflicts, natural disasters or other calamities and where they have a chance for a decent life. They are ready to face social discrimination and vulnerability after arriving in the country of destination and living there irregularly. Migration is the reason why the waters of some seas, such as the Mediterranean, have become the graveyard of thousands of human beings, including children, leaving a number of African or Asian countries to reach Europe.

This is a great human tragedy and it is not possible to put an end to human tragedies by resorting to walls or legal prohibitions. Unfortunately this is not wholly understood by the States of destination of irregular migrants, as proven by the

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persistent lack of an adequate European Union policy on immigration and asylum.¹

In fact, the human right to mobility is not fully protected by international law. Art. 13, para. 2, of the 1948 Universal Declaration of Human Rights states that every individual has the right to leave any country, including his own. The same right is protected by Art. 12, para. 2, of the 1966 International Covenant on Civil and Political Rights.² Nevertheless, this remains an asymmetrical right, one that is not complemented by a corresponding right to immigrate. Under customary international law and unless different provisions are applicable by virtue of specific treaties in force, any State has the sovereign right to allow or not to allow aliens to enter its territory and to adopt legislation limiting immigration flows.

For instance, customary international law of the sea, as also reflected in Art. 19, para. 2 of the United Nations Convention on the Law of the Sea (Montego Bay, 1982),³ affirms that passage by a ship flying a foreign flag through the territorial sea of a coastal State cannot be considered innocent if the ship engages in activities of immigration contrary to the legislation of such State. Under Art. 33 of the UNCLOS,⁴ coastal States can

¹ Cfr. A. Pécoud, P. de Guchteneire (eds.), *Migration without Borders*, Oxford, 2007; L. Westra, S. Juss, T. Scovazzi (eds.), *Towards a Refugee Oriented Right of Asylum*, Farnham, 2015.

² “Everyone shall be free to leave any country, including his own. (...)”.

³ Hereinafter: UNCLOS. According to Art. 19, para. 2, “passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (...) (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (...)”.

⁴ “In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of

establish a contiguous zone whose breadth cannot exceed 24 n.m. from the baseline of the territorial sea, where they can exercise control over certain matters, including immigration.⁵

It appears that, in the present situation of so-called globalization, goods and capitals can move freely or almost freely while human beings cannot. If they want to escape persecution, poverty or conflict, too many people are thus forced to cross borders clandestinely at the cost of great risk and suffering. If we consider this from the point of view of the migrant, one may very well ask what is the meaning of a right to emigrate without a corresponding right to immigrate. Where are migrants entitled to settle if they are rejected by the State of destination? On the high seas? In the unclaimed sector of Antarctica? On the Moon or in outer space?

2. The Rights of Irregular Migrants: 2.A. The Right to Be Assisted if in Danger at Sea

However, despite the state of uncertainty regarding their final destination, illegal migrants at sea do have some rights.⁶

the above laws and regulations committed within its territory or territorial sea”.

⁵ When on the high seas, ships carrying migrants can only be boarded by the authorities of the flag State, except where acts of interference derive from powers conferred by such State (see Art. 110, para. 1, UNCLOS). This rule is basically confirmed by Art. 8 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (Palermo, 2000).

⁶ See, in general, N. Ronzitti, “Coastal State Jurisdiction over Refugees and Migrants at Sea”, in N. Ando, E. McWhinney, R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda*, The Hague, 2002, II, p. 1271; B. Miltner, “Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception”, in *Fordham International Law Journal*, 2006, p. 75; S. Trevisanut, “Search and Rescue Operations in the Mediterranean: Factor of Cooperation or Conflict?”, in *International Journal of Marine and Coastal Law*, 2010, p. 523; L. Salamone, *La disciplina giuridica dell’immigrazione clandestina via mare, nel diritto italiano, europeo e internazionale*, Torino, 2011; S. Trevisanut, *Immigrazione irregolare via mare – Diritto*

First, if illegal migrants are in distress at sea, they have the right to be assisted and rescued. The beneficiaries of the right to be assisted at sea are all persons who are in distress, irrespective of the nationality of the ship and of the legality of the activity in which they are engaged, be they stowaways, migrant smugglers, drug, weapons or slave traffickers, pirates or terrorists. In the case of migration by sea, the right to be assisted is of paramount importance, as migrants are often transported in inhuman conditions by unseaworthy and overcrowded craft and are exposed to the dangers caused by bad weather, starvation, dehydration and illness. In too many cases, the illegal migrant is also a person in distress at sea.

The duty to render assistance to persons in danger has a longstanding tradition in maritime custom and is reflected today in Art. 98, para. 1, of the UNCLOS.⁷ Moreover, coastal States are bound to establish and operate an adequate and effective search and rescue at sea service.⁸ Several treaties adopted within

internazionale e diritto dell'Unione Europea, Napoli, 2012; M. Di Filippo, "Irregular Migration and Safeguard of Life at Sea. International Rules and Recent Developments in the Mediterranean Sea", in A. Del Vecchio (ed.), *International Law of the Sea – Current Trends and Controversial Issues*, The Hague, 2014, p. 1; U. Leanza, F. Graziani, "Poteri di enforcement e di *jurisdiction* in materia di traffico di migranti via mare: aspetti operativi nell'attività di contrasto", in *La Comunità Internazionale*, 2014, p. 163; T. Scovazzi, "Human Rights and Immigration at Sea", in R. Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford, 2014, p. 212.

⁷ "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call".

⁸ "Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of

the framework of the International Maritime Organization (IMO) aim at ensuring safety of life at sea, in particular the 1979 International Convention on Maritime Search and Rescue, which states that any person in distress at sea has the right to be rescued and brought to a place of safety.⁹ Unfortunately, the thorny question left open by the 1979 Convention is how to determine where the place of safety is located and consequently where the rescued persons are to be delivered. This does not help to ensure adequate assistance to rescued people, especially when dealing with large groups of migrants.

2. The Rights of Irregular Migrants: 2.B. The Right to Be Treated Humanely and not to Be Prosecuted

Migrants, in particular the most vulnerable among them, have the right to be treated humanely by immigration officials and to be protected from violence that may be inflicted upon them by others. As clearly stated in the Protocol against the Smuggling of Migrants by Land, Sea and Air (Palermo, 2000),

“States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol” (Art. 14, para. 1).

“Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or

mutual regional arrangements cooperate with neighbouring States for this purpose” (Art. 98, para. 2, of the UNCLOS).

⁹ According to the Annex to the 1979 Convention, “Rescue” means “an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety” (Chap. 1.3.2).

groups, by reason of being the object of conduct set forth in article 6 of this Protocol” (Art. 16, para. 2).

Migrants also have the right not to be criminalized for the attempt to migrate illegally. Irregular migrants who are victims of the crime of smuggling are very different from migrant smugglers who are responsible for this crime.¹⁰ As provided for in the above mentioned Palermo Protocol,

“Migrants shall not be liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol” (Art. 5).

2. The Rights of Irregular Migrants: 2.C. The Right Not to Be Returned to a State Where There Is a Risk of Being Tortured

Irregular migrants enjoy all the human rights granted to any individual and arising from customary international law and treaties in force.

One of most fundamental human rights is the right not to be subjected to torture or inhuman or degrading treatment or punishment, provided for, *inter alia*, in Art. 3 of the European Convention on Human Rights, Art. 7 of the 1969 International Covenant on Civil and Political Rights, Art. 5 of the American Convention on Human Rights, Art. 5 of the 1981 African Charter on Human and Peoples Rights and specifically regulated by the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. All the above-mentioned treaties are consistent in setting forth that no

¹⁰ Art. 3, para. *a*, of the Palermo Protocol, defines “smuggling of migrants” as follows: “(...) the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.

derogation from this human right can be made.¹¹ As stated in Article 2, para. 2, of the above mentioned 1984 Convention,

“no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

The individual is protected against torture also in an indirect way, in so far as international law prevents States from extraditing, expelling or returning a person to a State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. This is clearly stated in Art. 3 of the 1984 Convention¹² and is constantly repeated in several decisions of international human rights courts.

Accordingly, also irregular migrants, like any other human beings, cannot be returned to a State where, given the specific circumstances, they run the risk of being tortured or subjected to cruel, inhuman or degrading treatment, even if the State in question is their own State or the State of their permanent residence. A similar prohibition applies to States parties to treaties that ban the death penalty as regards extradition, expulsion or return to States where the individuals concerned run the risk of being subjected to capital punishment.

¹¹ According to the International Criminal Tribunal for the Former Yugoslavia, *Furundžija* case, judgment of 10 December 1998, para. 144: “the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition applies to situations of armed conflicts). This is linked to the fact (...) that the prohibition of torture is a peremptory norm or *jus cogens*”.

¹² “No State Party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of being subjected to torture”.

2. *The Rights of Irregular Migrants: 2.D. The Rights of Refugees*

Other human rights applicable to migrants by sea are linked to the condition of the refugee, according to the 1951 Convention Relating to the Status of Refugees (amended by the 1967 Protocol).

Refugee status is a matter of fact and does not depend on an official recognition by any authority. A refugee is defined by the 1951 Convention as a person who,

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it”
(Art. 1, para. A.2).

This definition covers people who are persecuted for a number of reasons that are mostly based on political grounds. It does not include people who are attempting to flee conflicts, either international or domestic, poverty or natural disasters (war, economic or environmental refugees). The majority of current illegal migrants belong to these categories.

The Refugee Convention, however, does not provide the refugee with a right to receive asylum in any of its States parties.¹³ In this respect, the 1951 Convention does not comply

¹³ Such a right might be granted by the domestic legislation of the States concerned. For example, under Article 10, para. 3, of the Constitution of Italy, enacted in 1947, “an alien who in his country is prevented from effectively exercising the democratic freedoms guaranteed by the Italian Constitution, has the right of asylum in the territory of the Republic according to the conditions established by the law” (unofficial translation).

with Article 14, para. 1, of the 1948 Universal Declaration of Human Rights (“everyone has the right to seek and to enjoy in other countries asylum from persecution”). Under the Refugee Convention, the refugee is granted only the right not to be returned to a State, including his or her own, where he or she would be threatened for a number of specific reasons (right of *non-refoulement*, according to the commonly used French expression):

“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” (Art. 33, para. 1).

This is another example of asymmetrical rights. A refugee, who has a right not to be returned to a country where he is threatened, has no right of entry into a given State. He could be returned to a State where he is not threatened. But the latter in turn has no obligation to allow the refugee to enter its territory. If States continue to reject the refugee, one after the other, where is he or she entitled to settle? On the high seas? In the unclaimed sector of the Antarctic continent? On the Moon or in outer space?

Regrettably the Refugee Convention is not sufficiently clear regarding this crucial question. However, it seems to be implied in a treaty recognizing “the social and humanitarian nature of the problem of refugees” (preamble) that a refugee who is outside his country and presents himself to an official of a State party is entitled to submit an application for asylum and to have it processed and screened. States cannot play with “asymmetrical rights” beyond a certain extent, reaching the point of denying the true objective of a treaty of humanitarian nature. If the refugee cannot decide whether, where and when to

be admitted, he or she must at least be granted the right to directly submit an application to a State party to the 1951 Convention. This can be considered a right to fair and efficient asylum procedures. The right of the refugee to have access to the territory of a State party to seek asylum is indirectly implied in Art. 31, para. 1, of the 1951 Convention:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

As consistently pointed out by the United Nations High Commissioner for Refugees, who is in charge of supervising the application of the Refugee Convention,

*“as a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures”.*¹⁴

At sea, the identification of asylum-seekers and the processing of their applications are activities that normally cannot be carried out on ships. Consequently, the rescuing or intercepting State is under an obligation to disembark the potential refugees in a place where they can exercise their right to fair and efficient asylum procedures. Regrettably, some States have taken the position that human rights treaties, including the 1951 Convention, do not apply outside the national territory and

¹⁴ UNCHR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 8.

have engaged in policies of “pushing-back” potential refugees at sea. In fact, the theory that human rights treaties apply only within the territory of States parties is not only wrong, it is a mockery of the rule of law. Respect for human rights is due to any individual who is under the power or effective control of any State agent, wherever the latter happens to be, including the high seas.

3. *The Past Italian “Pushing Back” Policy*

In the past Italy also implemented a policy of “pushing back” irregular migrants and was consequently judged to be in violation of the European Convention of Human Rights by the European Court of Human Rights, specifically in the case relating to the pushing-back to Libya of illegal migrants (Judgment of 23 February 2012 in the case *Hirsi Jamaa and others v. Italy*).

This case confirmed that the Italian push-back policy did not comply with the obligations arising from the European Convention on Human Rights. The case was filed by eleven Somalis and thirteen Eritreans who were among a group of about 200 migrants intercepted at sea by Italian authorities and summarily returned to Libya. The applicants claimed violation of a number of provisions of the European Convention on Human Rights, including Art. 3 (Torture) and Art. 4 of Protocol No. 4 (Prohibition of collective expulsion of aliens).

As regards the weight of bilateral agreements relating to the fight against illegal migration, the Court observed that

“Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the

Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States".¹⁵

On the merits, the Court unanimously found that Italy was responsible for violation of Art. 3 of the Convention, since, by returning the applicants to Libya, it had exposed them to the risk of being subjected to torture or inhuman or degrading treatment in Libya or in their countries of origin:

"During the period in question no rule governing the protection of refugees was complied with by Libya. Any person entering the country by illegal means was deemed to be clandestine and no distinction was made between irregular migrants and asylum seekers. Consequently, those persons were systematically arrested and detained in conditions that outside visitors, such as delegations from the UNHCR, Human Rights Watch and Amnesty International, could only describe as inhuman. Many cases of torture, poor hygiene conditions and lack of appropriate medical care were denounced by all the observers. Clandestine migrants were at risk of being returned to their countries of origin at any time and, if they managed to regain their freedom, were subjected to particularly precarious living conditions as a result of their irregular situation. Irregular immigrants, such as the applicants, were destined to occupy a marginal and isolated position in Libyan society, rendering them extremely vulnerable to xenophobic and racist acts".¹⁶

"(...) according to the UNHCR and Human Rights Watch, individuals forcibly repatriated to Eritrea face being tortured and detained in inhuman conditions

¹⁵ *Ibid.*, Para. 129.

¹⁶ *Ibid.*, Para. 125.

*merely for having left the country irregularly. As regards Somalia, in the recent case of Sufi and Elmi (...) the Court noted the serious levels of violence in Mogadishu and the increased risk to persons returned to that country of being forced either to transit through areas affected by the armed conflict or to seek refuge in camps for displaced persons or refugees, where living conditions were appalling”.*¹⁷

The situation in Libya was well-known to the Italian authorities or could be easily verified by them through multiple sources.¹⁸

According to the Court, irrespective of whether an intention to apply for asylum was manifested by the applicants – a circumstance that was disputed by the parties –, Italy was under the obligation of not pushing the migrants back to Libya:

*“In any event, the Court considers that it was for the national authorities, faced with a situation in which human rights were being systematically violated, as described above, to find out about the treatment to which the applicants would be exposed after their return (...) Having regard to the circumstances of the case, the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations under Article 3”.*¹⁹

The Court unanimously found that Italy was also responsible for violation of Art. 4 of Protocol No. 4, which prohibits the collective expulsion of aliens. In particular, the Court rejected the formalistic argument put forward by Italy that an expulsion can take place only if the aliens are inside the national territory.

¹⁷ *Ibid.*, Para. 150.

¹⁸ *Ibid.*, Paras. 131 and 156.

¹⁹ *Ibid.*, Para. 133.

After having remarked that Art. 4²⁰ does not use the word “territory”,²¹ the Court interpreted the Convention and its Protocols in a way “which renders the guarantees practical and effective and not theoretical and illusory”,²² showing a particular consideration for the fate of migrants who risk their lives at sea:

*“The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land”.*²³

²⁰ “Collective expulsion of aliens is prohibited”.

²¹ *Ibid.*, Para. 173.

²² *Ibid.*, Para. 175.

²³ *Ibid.*, Para. 177.

Finally, the Court unanimously found that there had been a violation of Art. 13 of the Convention (Right to an effective remedy), taken in conjunction with Arts. 3 of the Convention and 4 of Protocol No. 4, as the applicants were deprived of any remedy which would have enabled them to lodge their complaints with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.²⁴

Today Italy has radically changed its previous attitude. In October 2013, after 366 migrants drowned in the vicinity of the island of Lampedusa, it initiated a policy of engaging units of the navy and police to deal with the humanitarian emergency occurring in the waters of the South-Central Mediterranean Sea. Illegal migrants and asylum seekers found in unseaworthy boats, where they are often abandoned by smugglers, are rescued and transported to the Italian territory where applications for asylum are processed.

Subsequent migration policies have been established in the Central Mediterranean within the framework of relevant European Union legislation.²⁵ However, a more balanced regime of asylum is still expected at the European Union level to better share among all member States the burdens met by some Mediterranean member States, in particular Greece and Italy.

4. Conclusive Remarks

In conclusion, many of the relevant facts demonstrate that illegal migrants are too often the victims not only of smugglers,

²⁴ *Ibid.*, Para. 205.

²⁵ See I. Tani, “Le forme di contrasto al fenomeno dell’immigrazione irregolare attraverso il Mediterraneo nell’ambito dell’Unione europea”, in A. Antonucci, I. Papanicolopulu, T. Scovazzi (eds.), *L’immigrazione irregolare via mare nella giurisprudenza italiana e nell’esperienza europea*, Torino, 2016, p. 45.

but also of a number of States that try to evade their legal and moral duties by resorting to shows of strength against the weakest of human beings or to barely credible legal technicalities. The treaties so far concluded are not sufficiently clear to deal with all the problems posed by this great human tragedy. The very invention of asymmetrical rights undermines the merits of international law in addressing the basic human needs of irregular migrants and asylum seekers. This is the reason why, where different views are admissible, a clear position should be taken in favour of the weaker subject, that is the illegal migrant, and against the stronger subject, that is the State. If it appears that the international rules in force do not offer sufficient protection for the weaker party, the only conclusion to be drawn is that the present regime should be changed and improved as soon as possible.

LAW ENFORCEMENT POWERS AND MOVING BORDERS AT SEA

Marco Fantinato*

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1. Introduction

The Mediterranean has never before been populated by so many ships, border police, military and NGOs, all scouting the horizon in search of vessels in distress, while their patrolling missions are constantly supported by an intense activity of aircraft and helicopters, satellite surveillance and drone operations. This militarization of the Mediterranean Sea is due in large part to the fact that Europe is facing its greatest maritime refugee crisis, one of the main challenges of this century that will eventually lead to long-lasting implications from a humanitarian, economic and geopolitical standpoint.

However, in the battle against migrant smuggling, what powers can coastal States effectively enforce during operations at sea? In answering this question, this paper first focuses on enforcement powers at sea and then describes how the phenomenon of moving borders through military operations is

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progressively leading to the externalization of border management.

2. Jurisdiction Powers in Maritime Spaces

As a general rule, State jurisdiction is based on the State's territorial dimension. Therefore, when delimiting competences at sea through legislative powers (prescriptive jurisdiction), the measures implemented by border police (enforcement jurisdiction) within the territorial sea are in principle lawful, while actions performed outside territorial waters are regarded with suspicion, and sometimes even considered presumptively unlawful.¹ As a result, when it comes to the prosecution of transnational crimes committed outside the scope of a coastal State's sovereignty, judicial authorities are not usually competent to deal with such cases (adjudicative jurisdiction), save for a few exceptions provided for in international law.

Nonetheless, in terms of the exercise of jurisdiction, the legal regime applicable at sea is unique. It is governed by the principle that the sovereignty of coastal States is inversely proportional to the distance from national coasts. Basically, the jurisdictional power of a coastal State decreases as the distance from the shore increases. Starting from territorial waters where States can exercise their full powers, passing through the contiguous zone where they can claim jurisdiction only in certain areas, and finally reaching international waters where every State enjoys freedom of navigation on the high seas.

In this regard, over the years, disproportionate migratory pressures across the Mediterranean Sea have significantly increased the number of interdiction operations of migrants' boats on the high seas. These events clearly highlighted the need

¹ C. Ryngaert, "The Concept of Jurisdiction in International Law", in *University International Law Journal*, Utrecht, 2015.

for both law enforcement and judicial authorities to take effective measures in order to secure the arrest of smugglers apprehended in international waters. In fact, these maritime spaces are normally subtracted from national jurisdiction and exceptions apply only to specific cases provided for by international conventions and bilateral treaties.

3. *Creeping Jurisdiction in Criminal Law*

Transnational criminal organizations pay close attention to operational activities performed at sea and adjust their tactics and *modi operandi* accordingly. These criminal networks have also been trying to adapt to law enforcement operations in territorial waters and contiguous zones and have changed their criminal behavior by perpetrating transnational crimes in what they believe to be areas of impunity, and thus not subject to national jurisdiction.

However, under the aegis of Frontex Joint Operations, law enforcement authorities reacted to this peculiar phenomenon by extending the scope of their operations in international waters. As a result, in an effort to tackle this new approach taken by transnational criminal organizations, during the last few years, in Italy we have witnessed a trend to claim both enforcement and adjudicative jurisdiction on the high seas.²

Given this operational scenario, since 2010 Italian law enforcement authorities like the *Guardia di Finanza*³ have

² U. Leanza, F. Graziani, “Enforcement and Jurisdiction in Countering the Smuggling of Migrants: Operational Aspects”, in *La Comunità Internazionale*, 2/2014, 2014, pp. 163-209.

³ Following the entry into force of the Legislative Decree 177/2016, from January 2017 the *Guardia di Finanza* is the only Italian authority responsible for maritime security while the Italian Coast Guard retains the coordination of all the activities related to the provision of Search and Rescue services at sea.

exercised their powers to intercept migrants' boats, arrest the smugglers and then seize the ship, regardless of the fact that these events took place outside Italian jurisdiction. Consequent to these early interception techniques on the high seas, judges and prosecutors began to acknowledge this methodology by extending the application of Italian criminal jurisdiction to international waters. This *ad hoc* approach adopted by the Italian magistrates finds its legal basis on the so-called principle of 'creeping jurisdiction' at sea, however, applied to the field of criminal law.

In this domain, the operational scenarios faced by law enforcement and judicial authorities are mainly regulated by the United Nations Convention on the Law of the Sea (hereinafter UNCLOS),⁴ the United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter SUA Convention)⁵ and the United Nations Protocol against the Smuggling of Migrants (hereinafter UNTOC).⁶

Below we submit four case studies in which the interpretation of international law has led to the slow but relentless process of 'moving borders' further away from national coasts, a phenomenon that has recently contributed to the externalization of border management. These cases involve the use of national and international provisions that offer the legal instruments for both enforcement and judicial authorities to interfere with freedom of navigation on the high seas.

⁴ United Nations Convention on the Law of the Sea, with Index and Final Act of the Third United Nations Conference on the Law of the Sea, 1983. Most Mediterranean States are party to the UNCLOS, except Israel, Libya, Syria and Turkey. Italy ratified it with Law no. 684 of 2 December 1994.

⁵ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Italy ratified it with Law 422 of 28 December 1989.

⁶ United Nations Convention against Transnational Organized Crime, Protocol against the Smuggling of Migrants by Land, Sea and Air, Palermo, 2000. Italy ratified it with Law 146 of 16 March 2006.

4. Case Study 1 – Operation “SHERI”

On 24 August 2010, 51 migrants were rescued in the vicinity of Crotona, in Calabria. A few hours after the migrants were rescued, a *Guardia di Finanza* vessel intercepted a suspicious boat which was navigating at about 20 nautical miles from the Italian coastline. The sailboat, named SHERI, was flying a Turkish flag and it was allegedly linked to the migrant smuggling event that had just occurred. After receiving several signals to come to a halt, the sailboat was finally stopped at about 30 nautical miles and the two people on board were apprehended for further investigations. Once on shore, several migrants recognized the two individuals apprehended as being the smugglers who had previously transported them toward Italy. They were consequently arrested on charges of facilitating irregular immigration.

After the arrest, the two smugglers appealed the judge’s decision before the Italian Court of Cassation on two grounds. In particular, they stated that their pursuit commenced outside territorial waters, and therefore their arrest was not legitimate because Italy had never formally declared the existence of a contiguous zone extending up to 24 nautical miles. In addition, they maintained that since they had not been caught in the act of disembarking migrants on Italian territory, they could not be arrested in international waters. However, during the proceedings, the Supreme Court rejected both complaints lodged by the smugglers and confirmed the approach taken by border police officers at sea. Specifically, the Court of Cassation pointed out that article 33 of the UNCLOS provides for the possibility of preventing infringement of immigration laws in the contiguous zone.⁷ Likewise, article 111 of the UNCLOS

⁷ UNCLOS, article 33 - Contiguous Zone: “1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may

contemplates that the right of hot pursuit can be exercised if the chase has commenced in the contiguous zone and the ship has presumably violated the laws and regulations of the coastal State.

Following this line of reasoning, the judge concluded that the pursuit and interception of the SHERI on the high seas, culminating in the arrest of the two smugglers, were indeed legitimate actions since the pursuit continued outside the territorial sea and was not interrupted until the smugglers were finally apprehended in international waters.⁸ In this case, the Court also noted that despite the fact that Italy had yet to declare the existence of a contiguous zone, both at national (article 12, paragraph 9 *bis* D.Lgs. 286/1998)⁹ and international level

exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

⁸ *Ibid*, article 111, paragraph 1 – Right of Hot Pursuit: “1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.”

⁹ *Italian Immigration Law Consolidated Text*, Legislative Decree 286/1998. Article 12, paragraph 9 *bis* - Disposizioni contro le Immigrazioni Clandestine: “La nave italiana in servizio di polizia, che incontri nel mare territoriale o nella zona contigua, una nave, di cui si ha fondato motivo di ritenere che sia adibita o coinvolta nel trasporto illecito di migranti, può fermarla, sottoporla ad ispezione e, se vengono rinvenuti elementi che

(articles 33 and 111 UNCLOS), police and judicial authorities had the legal instruments to exercise enforcement and adjudicative powers beyond territorial sea. This ruling¹⁰ was quite remarkable as it clearly reversed a judgment issued by the same Court of Cassation only the previous year. In fact, in a similar case involving a Turkish vessel, the Court rejected the existence of a contiguous zone in Italy affirming that such a maritime space could not be invoked especially because Turkey had not ratified the UNCLOS.¹¹

5. Case Study 2 – Operation “TUSA”

On 8 August 2012, under the aegis of Frontex Operation AENEAS 2012, an aircraft spotted a suspicious vessel allegedly involved in smuggling migrants, navigating at about 80 nautical miles from the Italian shores. On the following morning, the boat, named TUSA, abruptly halted its course in territorial waters. A SAR operation ensued and 158 migrants were rescued at about 11 nautical miles from the Italian coasts, while the smugglers who had just abandoned the ship were later intercepted by a *Guardia di Finanza* vessel. The smugglers were caught on board a rubber boat about 33 nautical miles from the Italian shores, attempting to flee from the sailboat they had previously left adrift. This time the right of hot pursuit could not be invoked because the interception of the smugglers took place outside the contiguous zone. As a result, both enforcement and judicial authorities required a different legal instrument to claim jurisdiction over the smugglers.

confermino il coinvolgimento della nave in un traffico di migranti, sequestrarla conducendo la stessa in un porto dello Stato.”

¹⁰ See Italian Court of Cassation, Sentence no. 29182/2011.

¹¹ See Italian Court of Cassation, *Kircaoglu and Sanaga vs Italy*, Sentence no. 32960/2010.

Since the smugglers had jeopardized the safety of the boat by damaging the engines, the GPS, life vests and the helm before abandoning the ship, in this specific case the norms of the United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation were applied. Hence, the judge confirmed the operational approach of border police authorities according to the SUA Convention provisions by observing that any damage caused to a ship to endanger its safe navigation can be punished by a State Party (article 3).¹² In addition, he argued that the Convention also applies if the ship is navigating from waters beyond the outer limit of the territorial sea (article 4)¹³ and that a State Party can establish its jurisdiction if the crime is committed in an attempt to compel that State to do or to abstain from doing any act (article 6).¹⁴

As a result, at the end of the legal proceedings, the smugglers were prosecuted both for facilitating illegal immigration and for crimes committed against the safety of maritime navigation. However, pursuant to the provisions of the Italian law that ratified the SUA Convention, the smugglers could be prosecuted only after submitting a request to the Ministry of Justice which granted the possibility to proceed with respect to the foreign

¹² SUA Convention, article 3 paragraph 1, letter c): “Any person commits an offence if that person unlawfully and intentionally ... c) destroys a ship or causes a damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship.”

¹³ *Ibid*, article 4 – “1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the later limits of its territorial sea with adjacent States. 2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.”

¹⁴ *Ibid*, article 6, paragraph 2, letter c): “A State Party may also establish its jurisdiction any such offence when: ... c) it is committed in an attempt to compel that State to do or to abstain from doing any act.”

perpetrators apprehended in international waters (article 4 of the Law no. 422/1989¹⁵ and article 10 of the Italian Penal Code¹⁶).

6. Case Study 3 – Operation “NEVERMORE”

On October 12, 2013, under the aegis of Frontex Operation AENEAS 2013, an aircraft spotted a suspicious vessel allegedly involved in smuggling migrants, navigating at about 250 miles from the coasts of Calabria. In line with a *modus operandi* adopted by transnational criminal organization in those years, the fishing boat was flying no flag nor showed any distinctive mark indicating its nationality. However, the suspicious ship was towing a smaller and empty wooden boat attached with a rope. About 200 nautical miles from the coast of Calabria, the smugglers began to transfer migrants from the fishing vessel used as a mother boat to the smaller vessel. When these operations were terminated, the mother ship started heading

¹⁵ SUA Convention Italian ratification law, article 4 of the Law 422/1989 - I.: “Oltre che nei casi indicati negli articoli da 6 a 11 del codice penale, è punito secondo la legge italiana, a richiesta del Ministro di grazia e giustizia ... d) lo straniero che commette all'estero uno dei reati previsti dall'articolo 3 al fine di costringere un organo dello Stato a compiere qualsiasi atto o ad astenersene.”

¹⁶ Italian Penal Code, article 10, “Delitto comune dello straniero all'estero”: “1. Lo straniero, che, fuori dei casi indicati negli articoli 7 e 8, commette in territorio estero, a danno dello Stato o di un cittadino, un delitto per il quale la legge italiana stabilisce la pena di morte o l'ergastolo, o la reclusione non inferiore nel minimo a un anno, è punito secondo la legge medesima, sempre che si trovi nel territorio dello Stato, e vi sia richiesta del ministro della giustizia, ovvero istanza o querela della persona offesa. 2. Se il delitto è commesso a danno delle Comunità europee, di uno Stato estero o di uno straniero, il colpevole è punito secondo la legge italiana, a richiesta del ministro della giustizia, sempre che: a) si trovi nel territorio dello Stato; b) si tratti di delitto per il quale è stabilita la pena di morte o dell'ergastolo, ovvero della reclusione non inferiore nel minimo a tre anni; c) l'extradizione di lui non sia stata concessuta, ovvero non sia stata accettata dal Governo dello Stato in cui egli ha commesso il delitto, o da quello dello Stato a cui egli appartiene.”

toward North African coasts while the fishing vessel with the migrants on board proceeded toward Italian shores.

A SAR operation was launched and the vessel with migrants was intercepted at 180 nautical miles from the coasts while the mother ship was stopped at about 230 nautical miles by a *Guardia di Finanza* vessel. In light of the evidence collected by the aircraft and considering that the mother boat was without nationality, border police authorities exercised the right of visit on the high seas (article 110 UNCLOS). However, the police officers did not find any documentation proving the nationality, registration nor the name of the vessel, hence the vessel was treated as a stateless ship and the mother boat seized. At the conclusion of the operation, 17 smugglers were arrested on the mother ship while 226 migrants were rescued on board the wooden boat and taken to the nearest place of safety in Italy.

The judge confirmed the operational approach adopted by border police authorities on the high seas by stating that several international law provisions were applicable to this specific case. In fact, both article 110 letter d) of the UNCLOS (right of visit on the high seas in cases of ships without nationality)¹⁷ and article 8 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (measures against the smuggling of migrants by sea) contemplate the possibility of boarding and searching a stateless vessel in international waters. At the end of the legal proceedings, the judge confirmed the arrest of 17 smugglers

¹⁷ UNCLOS, article 110, paragraph 1 - Right of Visit: "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

pursuant to article 8 of Annex III of the UNTOC, with a particular reference to the legal provisions set forth in paragraph 7.¹⁸

This specific approach was further corroborated by the Italian Antimafia Directorate (hereinafter DNA) affirming that the UNTOC provisions effectively confer upon Italian authorities the enforcement and judicial powers needed to exercise their jurisdiction in respect of vessels without nationality. Likewise, the right of visit can be exercised on the high seas also in relation to a ship using a flag of convenience. Such a ship may not claim any nationality and therefore may be assimilated to a ship without nationality.¹⁹

Whereas, if a ship navigating on the high seas is flying a flag of another State Party and this ship is suspected of migrant smuggling, before boarding and searching the vessel the coastal State must request prior authorization from the flag State.²⁰

¹⁸ UNTOC, Annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, article 8, paragraph 7 Measures Against the Smuggling of Migrants by Sea: “A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.”

¹⁹ UNCLOS, article 92, paragraph 2 - Status of Ships: “A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”

²⁰ UNTOC, Annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, article 8, paragraph 2 - Measures Against the Smuggling of Migrants by Sea: “A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with

In accordance with these arguments, the Court held that in the above-mentioned case the principle of territoriality was fully applicable pursuant to national norms, *inter alia* articles 6²¹ and 7²² of the Italian Penal Code and article 12, paragraph 9 *quater*, D.Lgs. 286/1998.²³ In addition, the judge noted that the exercise of enforcement powers on the high seas (e.g. boarding, searching and seizing the ship) are indeed legitimate when executed by those States Parties who have an interest in preventing the infringement of their domestic laws.²⁴

regard to that vessel. The flag State may authorize the requesting State, *inter alia*: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.”

²¹ Italian Penal Code, article 6 - “Reati commessi nel territorio dello Stato”: “Chiunque commette un reato nel territorio dello Stato è punito secondo la legge italiana. Il reato si considera commesso nel territorio dello Stato, quando l’azione o l’omissione, che lo costituisce, è ivi avvenuta in tutto o in parte, ovvero si è ivi verificato l’evento che è la conseguenza dell’azione od omissione.”

²² *Ibid*, article 7 - “Reati commessi all’estero”: “E’ punito secondo la legge italiana il cittadino o lo straniero che commette in territorio estero ... ogni altro reato per il quale speciali disposizioni di legge o convenzioni internazionali stabiliscono l’applicabilità delle legge penale italiana.”

²³ Italian Immigration Law Consolidated Text, Legislative Decree 286/1998. Article 12, paragraph 9 *quater* - Disposizioni contro le Immigrazioni Clandestine: “I poteri di cui al comma 9-bis possono essere esercitati al di fuori delle acque territoriali, oltre che da parte delle navi della Marina militare, anche da parte delle navi in servizio di polizia, nei limiti consentiti dalla legge, dal diritto internazionale o da accordi bilaterali o multilaterali, se la nave batte la bandiera nazionale o anche quella di altro Stato, ovvero si tratti di una nave senza bandiera o con bandiera di convenienza.”

²⁴ A. Antonucci, M. Fantinato, P. Caiazza, “The Evolution of Enforcement Powers on the High Seas through the Air-naval Operations of the Guardia di Finanza against the Smugglers of Migrants in the Mediterranean Sea”, in Cataldi G., et al. (eds.), *A Mediterranean Perspective on Migrants’ Flows in the European Union: Protection of Rights, Intercultural Encounters and Integration Policies*, Editoriale Scientifica Napoli, 2016, p. 295.

7. Case Study 4 – Operation “DEEP SEA”

On April 22, 2015, the Maritime Rescue Coordination Centre (hereinafter MRCC) of the Italian Coast Guard in Rome received two distress calls via satellite phone from two different rubber boats that had departed from Tripoli. These boats were allegedly carrying migrants on board and were heading toward Italian coasts. A SAR operation was then launched under the aegis of Frontex Operation TRITON 2015. Both rubber boats were intercepted by a *Guardia di Finanza* offshore patrol vessel in international waters and 220 migrants were rescued at a distance of about 20 nautical miles from Libyan shores. The migrants were then transferred on board the Italian vessel and escorted to the port of Catania while two smugglers were apprehended for further investigations.

Although the event took place far away from national coasts, the judge acknowledged the operational approach adopted by border police authorities and confirmed the possibility of claiming jurisdiction over the smugglers arrested in international waters. In particular, the Court noted that smugglers systematically use unseaworthy boats on purpose in order to trigger SAR events. These well-known *modi operandi* compel the coastal State to act in accordance with the duty to render

assistance at sea²⁵ and to transport migrants into Italian territory pursuant to the existing provisions on the place of safety.²⁶

In addition, the judge argued that by endangering the lives of migrants, smugglers create a ‘state of necessity’ which is clearly premeditated and whose ultimate goal is to facilitate the entry of migrants into Italian territory under the aegis of a SAR operation. Under such circumstances, the distress call to the Italian authorities can be considered as an essential fragment of this premeditated criminal design, planned by the smugglers from the very beginning. Hence, the satellite phone call placed to the Italian MRCC constitutes a direct link to the State allowing for criminal jurisdiction over ships requesting assistance at sea and that are supposedly involved in migrant smuggling in international waters. Likewise, the Court highlighted that pursuant to provisions set forth in article 12 of D.Lgs. 286/1998,²⁷ preparatory acts aimed at facilitating

²⁵ UNCLOS, article 98, paragraph 1 – Duty to Render Assistance: “1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.”

²⁶ International Convention on Maritime Search and Rescue (chapter 1.3.2) of 1979 and Resolution *Guidelines on the Treatment of Persons Rescued at Sea*, paragraph 2.5, MSC.167(78), adopted in May 2004 by the Maritime Safety Committee together with the SAR and SOLAS amendments.

²⁷ Italian Immigration Law Consolidated Text, Legislative Decree 286/1998, article 12, paragraph 1 - Disposizioni contro le Immigrazioni Clandestine: “Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l’ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina

irregular immigration are also punishable under Italian criminal law. Specifically, this article refers to generic criminal conduct that contributes to irregular entry into Italian territory in any manner whatsoever.

In this regard, the judge argued that despite the fact that preparatory acts to facilitate the illegal entry were committed abroad (both in Libya and in international waters), these preliminary actions were undoubtedly intended to compel the Italian State to intervene and therefore could also be prosecuted according to article 7 of the Italian Penal Code.²⁸ This operational approach was further corroborated by the Court of Cassation and the DNA, both affirming that, along with international law provisions, domestic laws also effectively confer upon Italian authorities the enforcement and judicial powers to exercise their jurisdiction over unseaworthy vessels placing distress calls to the Italian authorities in order to be transported into Italian territory.

8. Moving Borders and Border Externalization

As we can infer from the case studies described in the previous paragraphs, from 2010 to 2015 there has been an increasing tendency to ‘move borders’ through law enforcement operations at sea. However, in 2010, SAR incidents usually took place about 20 nautical miles from the Italian coasts while migrants were transported on wooden boats that could often endure the long voyage across the Mediterranean Sea. After just five years, SAR events started occurring at approximately 20 nautical miles from Libyan shores and migrants were smuggled

o non ha titolo di residenza permanente, è punito con la reclusione da cinque a quindici anni e con la multa di 15.000 euro per ogni persona.”

²⁸ See *supra* note 20.

on board unseaworthy rubber boats with a limited endurance that did not even allow them to reach Italian shores.

This *modus operandi* was adopted by transnational criminal organizations to cope with the shortage of wooden boats in Libya and to trigger SAR events just a few miles outside the Libyan territorial sea, compelling the Italian State to intervene. Since this particular criminal behavior put the Italian SAR services under a considerable strain, several NGOs tried to fill the vacuum by patrolling the areas closer to Libyan waters along with Frontex and EUNAVFOR-Med military ships.

Against this background, both Italian border police and judicial authorities have been trying to extend criminal jurisdiction through the interpretation of the existing national and international legal framework. The Italian magistrates tried to bridge the gap through creeping jurisdiction in order to apprehend smugglers in international waters and disrupt the migrant smuggling business model. This approach was unprecedented and contributed to securing the arrest of several smugglers intercepted on the high seas while acting as a deterrent to transnational criminal organizations.²⁹ In this regard, it is worth mentioning that the phenomenon of creeping jurisdiction in SAR operations ensured both the safety of thousands of migrants rescued at sea, and a high level of sea border security in respect of the number of smugglers apprehended in international waters and then prosecuted in Italy.

On the other hand, following the process of creeping jurisdiction, during the past couple of years, both Frontex and EU military activities in the Mediterranean have progressively fostered the externalization of border management. While

²⁹ I. Papanicolopulu, "Immigrazione Irregolare via Mare ed Esercizio della Giurisdizione", in T. Scovazzi, I. Papanicolopulu, A. Antonucci, et al. (eds.), *L'Immigrazione Irregolare via Mare nella Giurisprudenza Italiana e nell'Esperienza Europea*, Giappichelli Editore, Torino, 2016, p. 20-22.

border externalization strategies are a reoccurring process in the European debate, they still represent a much more comprehensive phenomenon that engulfs all the extraterritorial actions that a State can adopt. These measures may include creeping jurisdiction of coastal States, technical cooperation with third countries and extra-territorialization of asylum processing.

Along the same line of reasoning, the above-mentioned case studies covered a five-year period and highlighted the innovative approach of Italian authorities in interpreting international conventions. However, following the implementation of this ‘creeping jurisdiction’ methodology during 2010-2015, it is noteworthy to remark that in 2016 the EU decided to sign two different technical cooperation agreements with third countries (Turkey and Libya). While the former agreement aimed at stemming the number of irregular border-crossings from Turkey,³⁰ the latter provided for training the Libyan Coast Guard in order to reduce migratory pressures from Libya.³¹ Nevertheless, ongoing SAR and return operations to Libya continue to raise questions related to the unresolved issues of ‘safe third country’.³² In this regard, it is still unclear whether these concerns will soon be addressed in order to make

³⁰ *EU Turkey statement*, signed on the 18th March 2016.

³¹ In the framework of EUNAVFOR-Med Operation Sophia, on the 23 August 2016, Rear Admiral Enrico Credendino and Commodore Abdalh Toumia signed a Memorandum of Understanding for the training of Libyan Coast Guard aimed at tackling migrant smugglers while contributing to prevent further loss of life at sea.

³² UN High Commissioner for Refugees (UNHCR), *UNHCR Position on Returns to Libya - Update I*, October 2015, available at: <http://www.refworld.org/docid/561cd8804.html> (accessed on the 30 June 2017).

these operations compliant with human rights law, with particular reference to the principle of *non-refoulement*.³³

Likewise, in June 2017, as confirmation of this continuous tendency to externalize border management, the Italian Ministry of the Interiors signed a Joint Declaration with Chad, Niger and Libya to create extra-territorial centers for asylum claims processing in their territories.³⁴ However, these programs cast doubts on how to ensure both the protection of human rights and access to legal remedies for refugees in those third countries. In addition, it has yet to be revealed whether these centers will be placed under the coordination of the European Union or under the supervision of any other international organization.

Nonetheless, under the overarching framework of international relations with key third countries, these two measures adopted firstly by the EU through technical cooperation and then by the Italian government through bilateral agreements on extra-territorialization seem to endorse this refined process of border management externalization that has been in place over the past two years.

9. Concluding Remarks

Although this trend to ‘move borders’ through law enforcement and military operations at sea has stepped up the level of cooperation among different partners and stakeholders, this development in operational cooperation has been recently

³³ Charter of Fundamental Rights of the European Union, article 19 - Protection in the event of removal, expulsion or extradition: “1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

³⁴ See: http://www.ansa.it/english/news/world/2017/05/22/migrant-centers-in-chad-niger_cf222ffa-972f-4b89-866f-d8112fb3259b.html (accessed on the 30 June 2017).

replaced by technical cooperation agreements with third countries. While these agreements certainly will contribute to reducing migratory pressure on the Central and Eastern Mediterranean routes, it bears mentioning that these participating States are not bound by the Charter of Fundamental Rights of the European Union nor by the European Convention on Human Rights.

So far, this latest development in border management externalization has not been matched by the introduction of a system to identify possible fundamental rights breaches during Joint Operations. In fact, despite the new Frontex Regulation that introduced a Fundamental Rights Officer³⁵ and a Complaints Mechanism,³⁶ these systems still need to be effectively tested in the operational field. For instance, where shared responsibility is not matched by a shared accountability of all the actors involved in border management, it is very difficult to imagine an incident reporting mechanism that would ultimately recognize a Member State as being responsible and held accountable for possible human rights violations.

In addition, compared to the pioneering ‘creeping jurisdiction’ approach, externalizing border management to third countries comes at a price: both criminal prosecution of smugglers and asylum claims processing of refugees will be dealt with far from the European borders and far away from public scrutiny.³⁷

³⁵ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on *the European Border and Coast Guard*, amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, article 71 - Fundamental Rights Officer

³⁶ *Ibid*, article 72 - Complaints Mechanism.

³⁷ J. Rijpma, M. Cremona, *The Extra-territorialisation of EU Migration Policies and the Rule of Law*, in EUI Working Papers, 2007, p. 20.

In conclusion, while the significant increase in using creeping jurisdiction methodology through ‘moving borders’ and encouraging law enforcement cooperation with third countries can be hailed as positive developments, these border externalization strategies may also encompass some dangers. One of the greatest risks of moving the borders of external frontiers management so far away from Europe is that this entire process could eventually lead to an overall shift of responsibility. As a result, border management could be progressively externalized toward countries with a poor human rights framework and inadequate refugee protection, jeopardizing the rights and security of those genuine refugees seeking to reach Europe.

In this regard, the European Union must accept that border security and international protection are indeed strictly connected.³⁸ Therefore, border management externalization toward third countries should not be used by the EU as an elusive strategy to escape the principle of solidarity, the obligation to provide refugee protection and the safeguard of *non-refoulement* to unsafe countries.³⁹

³⁸ E. Guild, C. Costello, M. Garlick, V. Moreno-Lax, *The 2015 Refugee Crisis in the European Union*, CEPS Policy Brief no. 332, September 2015, p. 6.

³⁹ European Court of Human Rights, *Hirsi Jamaa and others v. Italy [GC]*, judgment of 21 February 2012.

THE 2017 ITALY-LIBYA MEMORANDUM AND ITS CONSEQUENCES

Anna Liguori*

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1. Introduction

The present Paper intends to analyze the recent Memorandum of Understanding between Italy and Libya of 2 February 2017 and explore to what extent Italy might be considered responsible for violating the fundamental rights of migrants rescued by the Libyan coast guard, if they are disembarked in Libya.

As observed, and under the motto “*Out of sight, out of mind*”, Europe’s policies of externalization aim at rendering invisible refugees and migrants, the violation of their rights and the actual causes of escape and displacement”.¹ In fact, as we have learned from Australian² and US border control practices,³ externalizing

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¹ See *Out of sight, out of mind: Externalization of migration and refugee policies*, available at: [www.proasyl.de/en/news/out-of-sight-out-of-mind-externalisation-and-regionalisation-of-migration-and-refugee-policie/\(10/17\)](http://www.proasyl.de/en/news/out-of-sight-out-of-mind-externalisation-and-regionalisation-of-migration-and-refugee-policie/(10/17)).

² Australia has experimented with extraterritorial processing twice, from 2001 to 2008 and again from 2012 onward, outsourcing to Nauru and Papua New Guinea the examination of the asylum claims of individuals, intercepting them before they reach Australia or sending them to offshore centres after initial identity and health screening in Australia. See, *ex multis*, S. Keebone, “The Pacific Plan: The Provision of ‘Effective Protection’”, in *International Journal of Refugee Law*, 2006, p. 696 ff.; the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 28th sess., Agenda item 3, UN Doc.

border controls can lead to infringement of migrants' rights, in particular the prohibition of torture or inhuman treatment; the right to leave any country; the right to liberty (because of arbitrary and prolonged detention); the right to seek asylum; the rights of vulnerable people (children, victims of trafficking etc.); the right to effective remedies. What is usually a risk, becomes a certainty when we talk about Libya, because of the dire situation that migrants and asylum seekers face in this country, as well documented by several UN and NGO Reports, for example the Human Rights Watch World Report 2017, issued on 12 January 2017 (a few weeks before the Italy-Libya MoU), which states that in Libya "Guards and militia members subjected migrants and refugees to beatings, forced labor, and sexual violence" and held them in detention camps in inhuman conditions.⁴ Also

A/HRC/28/68/Add.1, 6 March 2015, 7-9; Amnesty International, *The State of the World's Human Rights 2015*, Report 2014/15, pp. 63-64; the *Communiqué to the Office of the Prosecutor of the International Criminal Court of February 2017 for the Situation in Nauru and Manus Island*, available at [https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/\(10/17\)](https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/(10/17)).

³ US management of migration flows has varied between *refoulement* (endorsed by the Supreme Court in the *Sale* judgment) and pre-screening in the Naval Base of Guantanamo, in Jamaica, and Turks and Caicos, violating human rights for conditions of detention, and giving rise to difficulties in accessing fair procedures and the risk of *refoulement* to unsafe countries. See M. Flynn, "There and Back Again: On the Diffusion of Immigration Detention", in *Journal on Migration and Human Security*, 2014, p. 165 ff.; S. Legomsky, "The USA and the Caribbean Interdiction Program", in *International Journal of Refugee Law*, 2006, p. 680 ff.; and H. Koh, "The 'Haiti Paradigm' in United States Human Rights Policy", in *Yale Law Journal*, 1994, p. 2391 ff. On the *Sale* judgment see in particular Goodwin-Gill, "YLS Sale Symposium: The Globalization of High Seas Interdiction. Sale's Legacy and Beyond", 16 March 2014, available at: <http://opiniojuris.org/2014/03/16/yale-sale-symposium-globalization-high-seas-interdiction-sales-legacy-beyond> (10/17).

⁴ See also, *ex multis*, www.fidh.org/en/issues/migrants-rights/eu-libya-cooperation-serious-risks-of-migrants-rights-violations (10/17); ASGI

noteworthy is the UNHCR-IOM joint statement⁵ on addressing migration and refugee movements along the Central Mediterranean route, delivered on 2 February 2017, the very same day of the signing of the Italy-Libya MoU, whereby both organizations stated in very clear terms that “We believe that, given the current context, it is not appropriate to consider Libya a safe third country nor to establish extraterritorial processing of asylum-seekers in North Africa”. In the same direction, the Final Report of the Panel of Experts on Libya,⁶ transmitted to the UN Security Council on 1 June 2017, which highlights, *inter alia*, serious human rights’ violations (including arbitrary detentions and summary executions) vis-à-vis migrants; links between armed groups, criminal groups, and different coast guard factions and in some cases even the coast guard’s involvement in smuggling, concluding that “[a]fter interception, migrants are often beaten, robbed and taken to detention centres or private houses and farms, where they are subjected to forced labour, rape and other sexual violence”.

2. *The Italy-Libya MoU as a small piece of a larger scenario*

Over the past decades the European Union and European Member States have been implementing different strategies of externalized border controls, such as visa requirements, carrier sanctions, extraterritorial patrolling of borders, “safe third

(Associazione Studi Giuridici sull’Immigrazione): “The EU and Italy de facto violate the principle of non-refoulement”, 6 February 2017, at www.asgi.it/english/libya-eu-italy-asylum-migration (10/17); Amnesty Report “The human cost of European hypocrisy on Libya”, at www.amnesty.org/en/latest/news/2017/03/the-human-cost-of-european-hypocrisy-on-libya/ (10/17).

⁵ www.unhcr.org/news/press/2017/2/58931ffb4/joint-unhcr-iomstatement-addressing-migration-refugee-movements-along.html (10/17).

⁶ <http://undocs.org/S/2017/466> (10/17). The Panel of Experts was established pursuant to UN Security Council resolution 1973 (2011).

country” procedures. The idea of externalizing border controls is not new in the European debate: what is new is the disturbing systematic recourse to this practice by multiple arrangements with third countries (i.e Turkey, but also several African countries), exposing migrants and asylum seekers to serious human rights violations. As noted, a new form of “‘contactless control of cross-border’ has been implemented, with the aim not only to deter, but also to pro-actively restrain the onwards movement of refugees and migrants to European territory”.⁷ The so called Eu-Turkey deal⁸ inaugurated this new approach while the MoU we are going to analyze is a disconcerting “from bad to worse”⁹ evolution, given the well-known situation of migrants and asylum seekers in Libya as documented in the reports mentioned above.

Despite this, the signing of the agreement between Italy and Libya was envisaged and encouraged at the European level. Already in the European Council Conclusions of 28 June 2016 there is a clear endorsement of “the expanded role for Operation Sophia in ... training the Libyan Coast Guard”.¹⁰ In even more unambiguous words the European Commission, in its Joint

⁷ V. Moreno-Lax, M. Giuffré, “The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows”, in S. Juss (ed), *Research Handbook on International Refugee Law*, Cheltenham: Edward Elgar (forthcoming).

⁸ On the nature of this agreement see *Order of the General Court* of 28 February 2017, case T-192/16, *NF v. European Council* and E. Cannizzaro, “Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*”, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu (10/17), p. 251 *et seq.*

⁹ M. Giuffré, “From Turkey to Libya: The EU Migration Partnership from Bad to Worse”, in *Eurojus*, 20 March 2017, <http://rivista.eurojus.it/from-turkey-to-libya-the-eu-migration-partnership-from-bad-to-worse/> (10/17).

¹⁰ European Council, *Conclusions*, European Council meeting (28 June 2016), available at: www.consilium.europa.eu/press-releasespdf/2016/6/47244643506_en.pdf (10/17), para. 19.

Communication of 25 January 2011,¹¹ states that: “To effectively cope with this current situation, part of the answer must lie in the Libyan authorities preventing smugglers from operating, and for the Libyan Coast Guard to have the capacity to better manage maritime border and ensure safe disembarkation on the Libyan coast. Of course, the Libyan authorities’ effort must be supported by the EU and Member States notably through training, providing advice, capacity building and other means of support”.¹² To this end the Commission recommends to “Deploy the full range of EU missions and projects to support the Libyan authorities in border management and migrant protection in Southern Libya”.¹³

At the informal Summit held at La Valletta on 3 February 2017 (the day after the signing of the MoU), the European Council agreed to a Declaration (known as the *Malta Declaration*) concerning the Central-Mediterranean route,¹⁴ which states *inter alia* that “Where possible the EU and Member States will also step up cooperation with and assistance to Libyan regional and local communities and with international organizations active in the country” and that “Priority will be given to ... training, equipment and support to the Libyan national coast guard and other relevant agencies”.¹⁵

¹¹ European Commission, *Migration on the Central Mediterranean route Managing flows, saving lives*, Joint Communication to the European Parliament, the European Council and the Council of 25 January 2017, JOIN(2017) 4 final.

¹² *Ibid.*, p. 6

¹³ *Ibid.*, p. 13.

¹⁴ European Council, *Declaration concerning the Central-Mediterranean route (Malta Declaration)*, adopted on 3 February 2017, available at: [www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/\(10/17\)](http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/(10/17)).

¹⁵ In its recent report, *European Partnership Framework on Migration: Commission reports on results and lessons learnt one year on*, issued on 13 June 2017, the European Commission affirms that: “To respond to the

3. The Italy-Libya MoU of 2 February 2017

On 2 February 2017 Italy signed a Memorandum of Understanding with Libya “on cooperation in the development sector, to combat illegal immigration, human trafficking and contraband and on reinforcing the border security”.¹⁶

The MoU resurrects the *Treaty of Friendship, Partnership and Cooperation* signed in 2008 between then Italian Prime Minister Silvio Berlusconi and Libyan dictator Gaddafi (suspended in 2011 after the fall of Gaddafi and the subsequent civil war), which opened “the way to the highly criticized push-backs of boat - refugees to North Africa”¹⁷ resulting in the famous *Hirsi* judgment of the European Court of Human Rights of 23 February 2012, where Italy was found responsible for violations of Articles 3, 13 and 4 of Protocol 4.¹⁸

It is important to focus first of all on the Preamble, which states: “Reaffirming the resolute determination of cooperating to

ongoing crisis along the Central Mediterranean Route, the EU has deepened its work with North African partners and with Libya in particular”.

¹⁶ Unofficial translation of the *Italy-Libya Memorandum of Understanding* signed on 2 February 2017 is available at: www.statewatch.org/news/2017/feb/it-libya-mem-o-eng.htm (10/17).

¹⁷ M. Giuffrè, *From Turkey to Libya*, cit.

¹⁸ On the *Hirsi* judgment see M. Den Heijer, “Reflections on Refoulement and Collective Expulsion in the *Hirsi* Case”, in *International Journal of Refugee Law*, 2013, p. 265 ff.; A. Liguori, “La Corte europea dei diritti dell’uomo condanna l’Italia per i respingimenti verso la Libia del 2009: il caso *Hirsi*”, in *Rivista di diritto internazionale*, 2012, p. 415 ff.; F. Messineo, “Yet Another Mala Figura: Italy Breached Non-Refoulement Obligations by Intercepting Migrants’ Boats at Sea, Says ECtHR”, in *EJIL: Talk!*, 24 February 2012, www.ejiltalk.org/yet-another-mala-figura-italy-breached-non-refoulement-obligations-by-intercepting-migrants-boats-at-sea-says-ecthr/ (10/17); V. Moreno-Lax, “*Hirsi* v. Italy or the Strasbourg Court v. Extraterritorial Migration Control?”, in *Human Rights Law Review*, 2012, p. 574 ff.; N. Napolitano, “La condanna dei ‘respingimenti’ operati dall’Italia verso la Libia da parte della Corte europea dei diritti umani: molte luci e qualche ombra”, in *Diritti Umani e Diritto Internazionale*, 2012, p. 436 ff.

individuate urgent solutions to the irregular migrants matter which cross Libya to go to Europe by sea, through the provision of temporary hosting camps in Libya, under the exclusive control of the Libyan Interior Ministry, in anticipation of repatriation or voluntary return to the countries of origin". What is really surprising is that the only two possibilities envisaged are expulsion or voluntary return, forgetting that neither of these alternatives is acceptable for people in need of protection.

In the following articles the Memorandum states in very clear words that "The Parties commit to start cooperation initiatives ... *in order to stem the illegal migrants' fluxes*¹⁹ and face the consequences coming from them"²⁰ ... and that "the Italian party commits to provide technical and technologic support to the Libyan institutions"²¹ ... and financing of "the ... hosting centers already active"²².

It is the purpose of this Paper to analyze the consequences of the Memorandum, focusing in particular on an incident occurring on 10 May 2017, when Libyan authorities, in coordination with the Italian Search and Rescue Authority, intercepted 500 migrants in international waters and returned

¹⁹ Italic added. *Italy-Libya Memorandum of Understanding*, cit.

²⁰ *Italy-Libya Memorandum of Understanding*, cit. Art. 1 lett. A).

²¹ *Italy-Libya Memorandum of Understanding*, cit. Art. 1 lett. C).

²² *Italy-Libya Memorandum of Understanding*, cit., art. 2.2. However, as observed, "local authorities in Libya's capital city Tripoli and elsewhere are mounting resistance to EU plans to stem migration flows towards Italy" because Libya cannot manage all migrants who will remain in Libya (see <https://euobserver.com/migration/136837> (10/17)). On 14 February 2017, a complaint was filed to Tripoli Appeal Court claiming the unconstitutionality of the Memorandum, which has been signed by President al-Sarraj in Rome without seeking the approval of the Parliament and the Government (see www.internazionale.it/notizie/annalisa-camilli/2017/02/20/italia-libiamigranti-accordo-illegale (10/17)).

them to Libya. As noted,²³ “[t]he incident represented an extremely worrying departure from the procedures so far applied to search and rescue operations of refugees and migrants in the central Mediterranean”. Up to that time, in fact, SAR operations, coordinated by the Italian Coast Guard Maritime Rescue Coordination Centre in Rome (MRCC Rome) - with the cooperation of EU vessels, Frontex, the EU military operation EUNAVFORMED SOPHIA, as well as merchant vessels and, above all, ONG boats -, were directed to safe disembarkations in Italy.

4. The maritime operation of 10 May 2017

On 10 May 2017 the Italian Coast Guard Maritime Rescue Coordination Centre in Rome (MRCC Rome) was contacted by refugees and migrants in distress on an overcrowded wooden boat in Libyan territorial waters.

MRCC Rome alerted both the Libyan authorities and a vessel of the German NGO Sea-Watch which was in the vicinity. When the Libyan coast guard agreed to coordinate the rescue operation, the Italians informed the German NGO that the Libyan coast guard had “on scene command”. By the time the Sea-Watch vessel detected the boat in distress, the latter was already in international waters.

The Libyan coast guard, ignoring the radio calls sent by Sea-Watch, made a very dangerous high-speed manoeuvre, putting at risk its own crew and that of the German vessel. The scene was filmed:²⁴ as observed by Amnesty International²⁵ on the

²³ See Amnesty Public Statement, *Italy: Refugees and migrants in the central Mediterranean, cutting the lifelines*, available at: www.amnesty.org/en/documents/eur30/6319/2017/en/ (10/17).

²⁴ For a detailed report of the incident, including a video, see: <https://sea-watch.org/en/libyan-navy-is-putting-sea-watch-crew-and-refugees-into-danger-during-an-illegal-return-operation> (10/17).

basis of the available video, the entire interception and rescue operation “was carried out by the Libyan coast guard in a manner which put the refugees and migrants at grave risk of falling into the water and drowning” and was in clear contempt of standard practices. In fact, the Libyan Coast Guard came so close to the overcrowded boat on one side that it risked causing it to sink (“a manoeuvre which has in the past caused boats to capsize as the people on board tend to move all on the side of the vessel approaching to rescue them”²⁶); moreover, the Libyan Coast Guard did not provide the rescued migrants with life-jackets nor did it cast a lifeboat into the water; in addition, they didn’t even try to identify vulnerable people in need of urgent medical care.

Some of the rescued migrants were transferred onto the Libyan vessel, while the majority remained in the wooden one. Both boats were taken back to Tripoli.

5. Italy’s responsibility

Could Italy be held responsible for the fate of those migrants rescued and towed back to Libya? To this end we must verify that the conduct:

- a) is ‘attributable’ to the State
- b) constitutes a breach of an international obligation of the State.

With respect to point b), in light of the revelations in the above mentioned international Reports, there is no doubt that the migrants’ return to Libya violates at the very least²⁷ the

²⁵ See Amnesty Public Statement, *Italy: Refugees and migrants in the central Mediterranean, cutting the lifelines*, cit.

²⁶ *Ibidem*.

²⁷ On the possible violation of “the right to leave” see N. Markard, “The Right to Leave by Sea: Legal Limits on EU Migration Control by Third

prohibition of torture due to the risk of torture and ill-treatment while in Libya and of *refoulement* from Libya to countries of origin (such as Eritrea and Sudan).

With respect to point a), according to general international law, a State is directly responsible for the conduct of its organs and agents (the organ or agent exercising elements of government authority acts for the State, even when it exceeds its authority or acts contrary to instructions): this might entail direct responsibility on the part of Italy both if it adopts a decision to transfer migrants who have already arrived on its territory (*Soering* jurisprudence), or if it intercepts a vessel carrying asylum seekers and diverts it to Libya (*Hirsi* case).

In this particular case (the incident of 10 May 2017), because a State organ (Italy's Maritime Rescue Coordination Centre, MRCC) instructed the Libyan authorities to take "on scene command" (even though it was aware that such instruction would lead to the return of intercepted people back to an unsafe place: i.e. Libya), the outsourcing State is responsible for its own conduct.²⁸

In general: if there are no specific instructions but, as might happen as a consequence of the Italy-Libya MoU of 2 February 2017, the Libyan Coast Guard intervenes with assets provided by Italy (boats, equipment or financial aid), then Italy may incur indirect responsibility for complicity.²⁹

Countries", in *European Journal of Migration and Law*, 2016, p. 591 ff. and V. Moreno-Lax, M. Giuffrè, *The Rise of Consensual Containment*, cit.

²⁸ See J.-P. Gauci, "Back to Old Tricks? Italian Responsibility for Returning People to Libya", in *EJIL: Talk!*, 6 June 2017, www.ejiltalk.org/back-to-old-tricks-italian-responsibility-for-returning-people-to-libya/ (10/17).

²⁹ See also J.-P. Gauci, *Back to Old Tricks?*, cit.; F. De Vittor, *Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione*, Presentation at SIDI Conference which was held in Trento on 9 June 2017, available at: www.youtube.com/watch?v=gCTcTJuWC3I&Index=4&list=PL-auIDviyDFLQIMWQwBnWYZFmUcdySz2j (10/17); V.

According to the International Law Commission, which regulates “Aid and Assistance” at article 16 ASR,³⁰ three conditions must be satisfied: “first, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself”.³¹

Indeed, all three of these requirements can be considered met if migrants are taken back to Libya in compliance with the Italy-Libya MoU³²:

1. Returning migrants back to Libya puts them at risk of torture and ill-treatment in Libya (and chain *refoulement*): both the prohibition of torture and the principle of *non-refoulement* are recognized as customary international law. Italy is well aware of the circumstances making the conduct of Libya internationally wrongful as several reports have clearly demonstrated the existence of risks to migrants once they are returned to Libya and Italy had already been condemned once

Moreno-Lax, M. Giuffrè, *The Rise of Consensual Containment*, cit. On Italy’s responsibility see also F. Vassallo Paleologo, “Elementi per un esposto nei confronti del governo italiano a seguito dell’applicazione del Memorandum d’intesa sottoscritto con il governo di Tripoli il 2 febbraio 2017”, 14 June 2017, available at: www.a-dif.org/2017/06/14/elementi-per-un-esposto-nei-confronti-del-governo-italiano-a-seguito-dellapplicazione-del-memorandum-dintesa-sottoscritto-con-il-governo-di-tripoli-il-2-febbraio-2017/ (10/17).

³⁰ ILC Articles on the Responsibility of States for Internationally Wrongful Acts (‘ASR’), [2001] YILC Vol. II (Part 2), Annex to UNGA Res. 56/83, 12 Dec. 2001 (A/56/49(Vol. I)/Corr.4).

³¹ ILC Commentary to ASR (‘ASR Commentary’), [2001] YILC Vol. II (Part 2), (A/56/10), at 66-67, paras 1 and 10.

³² See also J.-P. Gauci, *Back to Old Tricks?*, cit. and V. Moreno-Lax, M. Giuffrè, *The Rise of Consensual Containment*, cit.

before for the same violation by the ECtHR in the *Hirsi* case. Since then, the risk of abuse of migrants in Libya has become increasingly worse.

2. The substantial financial resources for the ‘hosting camps’, in addition to the provision of boats and equipment to the Libyan Coast Guard in order to “stem the flow of migrants”, is clearly giving assistance to Libya “with a view to facilitating the commission of the wrongful act”, i.e. the returning of migrants to Libya. It would be another matter if aid and assistance were given in good faith - for example, as aid for development -, and was subsequently misused by the receiving country to enforce border controls resulting in *refoulement*.

3. Finally, there is no doubt that such inhuman treatment of migrants would be considered an internationally wrongful act if committed by Italy.

Italy can therefore be held responsible for complicity for the aid given to Libya with the explicit aim of stemming the flow of migrants, irrespective of their protection needs, in addition obviously to Libya’s own responsibilities.

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