EXTERNALIZING MIGRATION MANAGEMENT: THE EU PROPOSAL FOR THE ESTABLISHMENT OF REGIONAL DISEMBARKATION PLATFORMS♦

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ABSTRACT: Contemporary threats and push-factors have blurred the once clear-cut difference between asylum-seekers, in search for temporary protection, and migrants, in search for a life-long better future. Temporary status associated with legal regimes of international protection is no longer fit for irregular flows in a globalized world because behind each asylum-seeker there is a potential citizen of the country that protects him. Under the migratory pressure of recent years Europe has reached a crossroad where a new question must be answered once and for all before resuming the journey: should the EU integrate the "others" within its social fabric or isolate itself from them? The concept of regional disembarkation platforms, currently being explored by the EU Institutions, suggests that isolationism will be the likely answer of European policies for the coming years.

KEY WORDS: Regional Disembarkation Platforms; European Way of Life; EU Global Strategy; Migration and Asylum; Dublin Regulation Reform.

1. For many years now, Europe has been under a migratory pressure that, at certain times, was huge and characterized by a mass influx of undocumented persons. The steady flow of persons illegally entering in Europe – most of them arriving on the Italian southern coast or being rescued in the Mediterranean Sea while sailing from Africa – triggered political and social reactions across the EU Member States. Most third-country nationals are not asylum-seekers in search of protection but migrants looking for a better life. A part

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of the European public therefore fears negative economic consequences for their own welfare and future job. The ancestral and irrational fear of the diversity, of the “other” is another key-element for mapping reactions to illegal flows into European countries. Several political parties have put the call for a non-inclusive Europe at the top of their agenda. Their call for stopping the flows at any cost and returning all irregular individuals gains attraction and electoral support and the political landscape in some EU countries has changed to some extent. Another element is that, at the beginning (2010-2016), irregular flows were described as exceptional and short-lived because mainly due to the war in Libya and the Arab Springs. As time goes by, however, the permanent and structural character of the flows has clearly been shown. Migration is nowadays more linked to long-term global processes (globalization, climate change, etc.) than to situations of armed conflict and unrest in some regions or countries. If this is true, European politics and societies have come at a landmark crossroad where they must stop and answer a new question once and for all before resuming the journey. In a long-term perspective, should the EU integrate the “others” within its social fabric or isolate itself from them?

2. The assessment of international and EU legal regimes on asylum and migration provides useful insights on which should be the most proper answer to the question. As a matter of law and fact (at least from an abstract point of view), migration is quite different from international protection. Migrants are “simply” looking for a better life while asylum-seekers are in search of protection from individual persecutions, indiscriminate violence in situations of international and internal armed conflicts or serious threats to their human rights. As a result, relevant legal regimes are different from each other as well as circumstances and preconditions for their application. For instance, States reserve the right not to admit migrants to their territories (and return them home) while they have the duty to let asylum-seekers enter and grant them protection. The most important difference between these legal regimes lies in the fact that international protection is, in its essence

and with some exceptions, a temporary status because asylum-seekers are supposed to return home once the push-factor which forced them to flee have ceased to exist (or have changed to such a degree that protection is no longer required) while the status of migrant tends to be permanent. International and national rules concerning long-term permits of residence and work and naturalization for migrants confirm the tendential permanent nature of migratory phenomenon.

Yet, the «law in books» is different from the «law in action» (1) as well as the reality of migratory and humanitarian flows is far from the one depicted and regulated by legal regimes.

Pragmatic difficulties seriously hamper the enforcement of the Common European Asylum System, including the rules on return and readmission. Accurate identification of irregular third-country nationals is the critical step for applying to each of them proper rules and appropriate assistance. The fear of being identified as migrants and being returned back makes most third-country nationals lie about their status and history and inflates the number of applications for international protection. The process of identification often becomes complex, uncertain and time-consuming. The process of return is even more random. Since 2010 EU common rules on return have been entered into force. Each year between 400.000 and 500.000 foreign nationals become eligible for the application of the Return Directive (2) but only the 40% of them are effectively returned. Reasons for this low rate are many to begin with the lack of cooperation from some third countries in identifying and readmitting their own nationals.

3. There is another reason that helps understanding the overall failure of EU policies in the field of international protection and return/readmission. Every asylum-seeker is indeed an aspirational migrant. Behind each of them, in fact, there is a potential long-term resident or future citizen of the country which grants him international protection. If one flees from Syria, Eritrea or Boko Haram and is forced to stay abroad for several years

waiting for something to happen in his homeland, can he really come back to his torn-apart country once the threat or the armed conflict is over and after that over the years he and his family have become an integral part of the hosting society?

The reality of contemporary threats and push-factors (protracted armed conflicts, organized armed groups, terrorism, transnational organized crime, etc.) has blurred the clear-cut theoretical difference between who needs temporary protection and who searches for a life-long better future. This is one of the main reasons why the EU response to migration and asylum has been substantially ineffective in the last years. Legal regimes fail because temporary status is no longer fit for irregular flows in a globalized world. The logic and the legal framework of international protection is increasingly unsuitable for the needs of third-country nationals. The law in books has been surpassed by the reality "out there" that it is now very different from the old one that was regulated by international and EU rules on asylum and migration. These legal regimes have proven ineffective because they could not reconcile two opposite feelings of those illegally arriving in Europe: the fear of the push-factor they leave behind (armed conflicts, persecutions, human rights violations, violence, social and economic hardship, poverty) and the hope for the life to come, for a better future elsewhere. And most of the time living a better future is at odds with coming back home sooner or later.

Once the legal dichotomy was between being temporary protected (if an asylum-seeker) or being returned home (if a migrant). In a globalized world where everyone illegally arriving in Europe is at the same time both an asylum-seeker and a migrant, that clear-cut dichotomy is no longer identifiable. Europe is therefore faced with a new, different dilemma: should we host foreign nationals forever and integrate them in our society or should we close our borders and isolate ourselves from the wider world? Whatever the answer, the EU will be called upon to thoroughly revise its policies and the overall legal framework on asylum and migration.

4. Some clues suggest how the EU might answer to the question. In the last years the EU legal landscape has changed. The Dublin Regulation have not stood the pressure of unprecedent and extraordinary humanitarian and migratory flows [(3)]. Its country-of-first-entry criterion turned into a discriminatory measure placing excessive burden on front line States like Italy and Greece. Further, the Dublin Regulation lacks appropriate solidarity measures to cope with situations of huge migratory pressure because it was thought and drafted for a different and vanishing world with hard and watertight borders. Solidarity among the EU Member States – a central issue in present European policy debate – was not (again) a landmark issue at the time. The lack of solidarity explains the novelty of the temporary relocation mechanism set up in the 2015-2017 biennium which derogated the Dublin Regulation in the name of stronger solidarity for tackling the migrant crisis [(4)] [(5)]. Yet, even the relocation approach failed as a matter of politics and real solidarity among the EU Member States was poor. The proposal for establishing a permanent relocation mechanism was shelved by the Commission due to strong opposition by many States [(6)]. The pending proposal for reforming the Dublin Regulation is not a real game-changer in terms of improved solidarity among States. Basically, the draft proposed by the Commission and welcomed by the majority of States leaves untouched the previous framework and its benchmark, i.e. the country-of-first-entry criterion [(7)]. The European Parliament turned upside down the Commission’s draft: the amendments delete the country-of-first-entry criterion and uphold the principle of permanent relocation of asylum-seekers among all States and in any situation [(8)]. Yet, at least for the time being, the only consequence of the European Parliament’s amendments has been the stalling of negotiations with the Council. To date, there is no light at the end of the tunnel and EU Institutions and Member States are sailing in unchartered waters. Waiting for the reform of the Dublin system and with no relocation mechanism in place, last year has been characterized by Italy’s ‘closed ports’ policy which has *de facto* waived the country-of-first-entry or, however, has made its application scant or erratic. The result has been a

case-by-case approach to SAR events with NGO's rescue vessels often stuck for days and days in international waters off the Italian or Maltese coast while waiting for *ad hoc* agreements among the European governments regarding both the assignment of a safe port and the relocation on a voluntary basis and for a limited number of asylum seekers. Intense and tough diplomatic rows with accusations and finger-pointing being exchanged between some Governments and EU Institutions showed once again the lack of solidarity and mutual commitment in the field of asylum and migration. Therefore, it is no surprise that the only legal mechanism that has worked in the last years was resettlement with its "pick-and-choice" logic on voluntary basis. This kind of approach is however far from the principles of solidarity and equal burden-sharing and paves the way for a sort of "meritocratic" application of migration and asylum rules.

5. Incapable of finding a political solution for reforming the Common European Asylum System and better dealing with migratory and humanitarian flows, the EU Member States and Institutions started searching the solution for their problems across the European borders by increasing the EU external action. The strategy is clear: in the short-term, cooperation with third countries to enhance returns and offshore the management of irregular flows should be strengthened; in the long-term, the promotion of the "European way of life" (9) – i.e. democracy, human rights and neoliberalism – in the wider world to stabilize foreign countries and eradicate the push-factors for migration and asylum should be improved (10). The 2016 EU Global Strategy is the litmus test of the long-term strategy (11) as well as the 2016 EU-Turkey Statement, the 2017 Protocol between Italy and Libya and the 2018 Commission's "non-paper" on regional disembarkation arrangements clearly reveal the short-term strategy.

The Commission's "non-paper" (12) and the European Council conclusions of 28 June 2018 (13) are telling of the new approach to asylum and migration. Solutions adopted with Turkey and Libya become the starting point for elaborating a wider and more

comprehensive strategy of regional externalization of irregular flows. More support and cooperation with non-EU actors and regions (Sahel region, the Libyan Coastguard, coastal and Southern communities, etc.) is expressly laid down by the political guidelines of the European Council. The preventive approach (to prevent irregular crossings and entries and bring the flows to a halt) is another key aspect of the latest EU policies while the concept of regional disembarkation platforms becomes the preferred solution and means.

For more than one year the Commission is carefully exploring this concept in close cooperation with relevant third countries, the UNHCR and the IOM. Even if «such proposals [disembarkation platforms and controlled centres] have failed to reach consensus due to their lack of political and legal feasibility» (14), we argue that the option is still on the table of EU Institutions and Member States. Should the political climate among Member States improve and should the EU overcome resistance and reluctance of those third countries expected to host places of safety and post-disembarkation processes, the establishment of a disembarkation area along the Southern coastline of the Mediterranean Sea would be probably placed high again on the European political agenda.

6. To this end the 'non-paper' released by the Commission remains the main reference together with a joint proposal from the UNHCR and the IOM (15). For our analysis the most interesting scenario involves the conclusion of arrangements with third countries (like Algeria, Tunisia and Egypt) for disembarkation of migrants and asylum seekers. Arrangements would apply to individuals rescued both in the territorial sea of third countries by national and foreign vessels and in international waters by EU States/Agencies and third countries' flag vessels. Third countries should be identified only if they are safe and respect the non-refoulement principle: as a result, Libya would not be eligible as a regional platform.

Once disembarkation has taken place, a pivotal role should be played by the UNHCR and the IOM. Under the auspices of the IOM, migrants would be returned and reintegrated

to their countries of origin. Instead, asylum-seekers would be channelled to existing EU resettlement schemes and legally admitted in Europe on a voluntary basis and with the cooperation of the UNHCR. In any event, asylum seekers «would not acquire the right to access the asylum procedure in an EU Member State» because the EU law does not apply extraterritorially and there is no right for a third-country national to claim asylum outside the EU. The only way «would be by establishing [new] EU asylum system and EU courts to process [abroad] claims» for international protection. This option is unfeasible, at least for the time being, due to institutional transformations and financial resources that its implementation would require (16).

The whole system would be funded and supported by the EU and its Member States while the disembarkation centres would be set up under the auspices of the UNHCR and would be managed in full compliance with international maritime law, international human rights law and international refugee law. The 'red line' for all the stakeholders would be safeguarding human rights of all individuals involved in SAR events, disembarkation and post-disembarkation processes. In their joint proposal, in fact, the UNHCR and the IOM stated their endorsement «to implement a predictable and responsible disembarkation mechanism that prioritizes human rights and safety first [and shares] responsibility across the Mediterranean Basin» among all countries (15).

7. Regional disembarkation platforms bring new problems into the legal discourse and «have spurred a wide range of criticism and concerns» (14). As underlined by the UN Special Procedures, for instance, «outsourcing responsibility of disembarkation to third countries, in particular those with weak protection systems, only increases the risk of refoulement and other human rights violations» like arbitrary or indefinite detention, torture and ill treatment (17). The unpredictable political situation, the legal gaps and operational obstacles in North African countries associated with their «reluctance to accept disembarkation of migrants rescued at sea on their territory» – to the extent that the

African Union called [18] on «African states to refuse to cooperate with the EU in the implementation of those plans» [14] – are issues which put in jeopardy the feasibility of the EU strategy or, however, its future implementation in full compliance with legal obligations under international and EU law.

In fact, it's a long way to go to have a safe and reliable partner for regional disembarkation arrangements, also taking into account that the European supranational courts' case-law upholds the highest standards of human rights protection, applies them extraterritorially and prohibits any balancing test between human rights and security. As a result, human rights violations of individuals disembarked in third countries with the technical, operative and/or financial support and coordination of the EU and/or its Member States might be also attributable to the EU and/or its Member States according to the principle of "contactless responsibility" already invoked for «funds, training, and other capacity-building activities delivered by EU Member States to Libya [...] for the explicit purpose of 'significantly reducing migratory flows' [...] and 'preventing departures'» [19]. The EU political support and funding of Libyan Coastguard (for SAR activities) and Libyan centres (where those rescued at sea are returned and held) has been heavily criticized and the EU has been accused of turning a blind eye to human rights violations in order to halt irregular flows at any cost. The European Council's call to «all vessels operating in the Mediterranean [to] not obstruct operations of the Libyan Coastguard» [13] also met with harsh criticism.

8. The main problem is that the time-consuming process for making reliable and safe the third countries that should partner with the EU in the implementation of the regional disembarkation platforms is at odds with present and pressing needs of European politics, including the quest for more security and the growing securitization of European policies in the field of asylum and migration.

Securitization implies a new and different balance between security and human rights and it is pursued also through a formalistic interpretation and application of EU legal rules. Further to the regional disembarkation concept, other hints are telling of the European quest for security at any cost: *a*) some basic principles have been amended or suppressed (i.e., EU citizens no longer undergo minimum checks when crossing EU external borders); *b*) the EU return policy will be revised to allow wider use of swifter and simplified procedures and detention for the purpose of preventing and combating irregular migration [(20)] [(21)]; *c*) the European Council and the Commission tried to deny before the ECJ any binding value to the EU-Turkey Statement - criticized as «a blueprint for human rights violations» [(22)] [(23)] - so as to keep on returning all irregular migrants to Turkey regardless of their subsequent treatment and the generic human rights assurances provided by Turkey; *d*) the Commission urged Italy to develop «a national list of 'safe countries of origin' [to fast-track the processing of applications for international protection and allow faster returns if refused], prioritizing the inclusion of the most common countries-of-origin of migrants arriving in Italy» [(24)]: in other words, the Commission reversed the logic behind safe countries lists that should only include those non-EU States whose human rights record has been thoroughly and carefully assessed in terms of their being really "safe". Summing up, it seems «as if States and the Commission are nowadays ready to trade some political idealism and legal functionalism in the field of migration and human rights for more political pragmatism and legal formalism in the field of security», at least to some extent [(25)]. Yet, as anticipated, the highest standards on human rights protection developed for decades by the European supranational courts are imperative for EU Member States and Institutions and apply outside the EU territory. All of this might therefore set the process of securitization on a collision course with supranational Courts' case-law.

9. A major implication of this state of affairs is that the present gap in terms of legal protection between the EU long-term global strategy for a future international order made of stable, prosperous and democratic third countries and the full and prompt protection of the human rights of migrants and asylum-seekers in third countries partnering with the regional disembarkation strategy cannot be bridged in a few weeks, months or – perhaps – years. The progressive implementation of the regional disembarkation platforms would not circumvent the obstacle as well. For a long time, every day in between the launch of the regional strategy and its future operation in full compliance with all applicable international and EU rules would be marked by human rights violations. If the policy goal of the EU States and Institution is the full respect of human rights whatever and wherever, the way ahead is clearly marked out: the EU should temporarily shelve the regional disembarkation platforms' strategy, then it should stabilize the neighbouring countries in every way and only at the end of this process it could relaunch that strategy.

In the light of the hints previously set out, however, we argue that the EU States and the Commission might not support this three-step process as the way forward because, right or wrong, irregular flows have become a security issue for European policy and need a quick fix. Should they find a common political approach on regional disembarkation platforms, the strategy would be probably launched as soon as practicable and even if full protection of human rights could not be always and however safeguarded. If our reasoning is correct, then the answer to the question asked at the end of §§ 1 and 3 would probably be in favour of isolating ourselves from the wider world rather than hosting the "others" and integrating them in our society.

The proposed new portfolio for "Protecting our European Way of Life" (a new portfolio but by no means a new concept for the EU policies) [(10)] in the EU incoming Commission – harshly criticised by several MEP because «this name, which makes a link between immigration and protecting a European way of life, is the direct validation of the words of the far-right for whom immigrants are barbarians who threaten our way of life»

[26] - seems to be another hint of the increasing isolationism of EU policies in the field of migration and asylum.

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