

WHY EU MIGRATION LAW MATTERS? LEGAL PERSPECTIVES ON EU MIGRATION LAW.

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ABSTRACT: *In this paper, I will present some interesting points of reflection with regards to illegal immigration, external border controls, Human trafficking and Human smuggling. Smugglers and traffickers are indeed part of criminal organizations that are making money on migrants' damage, and it constitutes a problem for the European Union and the single Member States. I will analyze this challenge and the efforts undertaken by the International and European Community to solve this problem. Also, I wish to clarify some laws of the EU systems regarding the rights of the migrants, proposing alternatives to the migrants' protection.*

KEYWORDS: *Migrants' rights, EU migration law, Human trafficking and Human smuggling, Solidarity.*

JEL CODE: *K34*

1. INTRODUCTION

The European Immigration law is one of the most complicated areas of law and a confusing system for many people. From years to now, Europe Union(EU) is facing big challenges in the Migration field, always trying to find out new solutions and new policies to cope with different problems that characterize the new Era of migration. In the last ten years we had an intensification of the migration flows towards the European Union borders and as a response, a new institutional trend with European rules, present at the supranational level. It is clear that both legal and illegal entries into the territory of EU Member States(MS) explains the perception that immigration is one of the fundamental challenges of the century. Tackling such a challenge implies the development of new tools and frameworks of action. When a Member State fails its work, being too restrictive or lascivious, it is a must for European intervention to put regulatory stakes with its directives and regulations. By examining the issues that immediately connect to the phenomenon, we identify that a civilized society should grant protection to people regardless of nationality, as well as ensure the maintenance of order and public safety. The balance of these two components is the real challenge that the European Union is facing in a consistent and determined manner. When it covers this task, the illegal migration enemy

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and its derivatives must be taken into account. In the moment that it goes beyond the national control, like the case of Lampedusa (Italy), we need a reply from the EU level that despite its limitations, could give an adequate response to such a complex phenomenon. Starting from the legacy of the Treaty of Rome in 1957, the European Economic Community did not have a formal qualification in the field of immigration policies, essentially given the purpose of economic activity in the European integration project with a primary objective of the Single Market. Nevertheless, The community has intervened several times, both directly and indirectly in this area, but Member States have always been reluctant to give space to the EEC in this area. Therefore, nullified the possibility of a Community Immigration Policy, the Member States focused on forms of cooperation at the intergovernmental level, also given the creation of the single market. The conditions started to change with the Single European Act and with the Schengen Agreements, first two steps of the legal puzzle in the way of the Europeanization. Later on, we had the intensification of the Europeanization of the migration policies through the Treaty of the European Union (1993), the Treaty of Amsterdam (1997-1999) the Tampere Summit (1999), the Treaty of Nice (2001), The Hague Program (2004), The European Pact on Immigration and Asylum (2008), The Treaty of Lisbon (2007-2009) and The Stockholm Program (2010-2014).

However, although Europe lacks teeth when it faces Migration issues and does not meet the challenges (as we can see from the last tragedy where a Libyan migrant boat sank with up to 700 lost lives in the south of Italian waters), it is also true that a today's Union Law contains a comprehensive and almost all-encompassing migration law system. It governs both voluntary and forced migration. It controls entry, residence and return. It covers both Union citizens and third-country nationals. In the same way, EU has increased its operational instruments: EUROJUST for justice, EUROPOL for policing, FRONTEX for border management and EUROSUR for surveillance. Although it seems that all the legal problems of migration are covered, the Member States are still far from the solidarity that is required, and the policy inside the EU is still unclear. Moreover, the question should be: what is Europe doing outside its borders? Which are the development policy and the Humanitarian aid law that covers its work with third countries? I truly believe that Cooperation with NonEU countries is the key, even in the fights against those criminal organizations, but we should investigate more in the meaning of the word "engagement" with third countries.

2. QUERY ON MIGRANTS PROTECTION

After this brief introduction, I propose an interesting query considering the migrants protection when they cross the EU borders.

In particular, the system of rules governing the movement of persons across borders (Schengen Borders Code¹) stated at art. 13.3 that "Persons refused to entry shall have the right to appeal and further: "Lodging such an appeal shall not have a suspensive effect on a decision to refuse entry." Firstly, not all the EU countries will decide in the same manner for the migrant's entry, Belgium authorities may take an opposite decision from the Italian authorities. Hence, those rules do not put national sovereignty into question and

¹Regulation (EC) no 562/2006 of the European Parliament and of the Council of 15 March 2006, establishing a community code on the rules governing the movement of persons across borders.

leave primary responsibility for dealing with admission issues to the member states. This will create uncertainty for the migrant protection and will bring him to the decision to stay in an illegal situation inside the EU borders, considering it better than going back to his country of origin which could be in war. Secondly, this art. 13 moves in a conflicting direction with what comes up in Article 33 (1) of the 1951 Convention relating to the Status of Refugees, as well known as the principle of nonrefoulement: which states that: "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Therefore, if we deny the suspensive effect of a decision to refuse entry, in other words, we deny the right to a fair trial. Well connected with this principle is also the Hirsi Judgement (Hirsi Jamaa and Others v. Italy)² an historical decision of ECHR establishing that even when individuals are intercepted in international waters, government authorities are obliged by international human rights law³. Anybody intercepted must have access to an individualized procedure as well as remedies to challenge the decision to return them to their country of departure. This important product of law covered the legal vacuum that could be generated in high seas regarding the discussion of jurisdiction (ECHR art.1), making the Non-refoulement applicable also in international waters". Furthermore, this was the first time that the Court said that a State have breached Article 4 of Protocol 4 ECHR⁴, which prohibits the 'collective expulsion of aliens.

These small examples of legal perspectives for migrants protection confirm some doubts that EU does not have a clear policy that manages the legal migration, and most important collides with other International laws, cornerstone of the International protection of migrants. The legal protection is an important protection that EU could ensure to all the migrants trying to enter the EU zone, because it is a Human right and as such, it is a fundamental right that belongs to every human being. Indeed, most of the migrants are not only smugglers and traffickers, they are also people seeking to escape from wars and poverty aiming for a better life and a better protection. Who can ensure it better than EU, that emphasis Rule of law and democracy in its multilateral relations as a global actor, making it a basis of the "Acquis Communautaire". Unfortunately, it seems that some legal protections were made only for privileged members that are part of a "club", where it is hard to get in and easier being pushed back.

3. IN PARTICULAR: HUMAN TRAFFICKING AND HUMAN SMUGGLING

One of the big challenges of the last decades, is the illegal immigration in EU member States, that came from non-EU countries, where the underdevelopment, poor economy, and the lack of rule of law, bring migrants to choose Europe as a destination for a future

²Echr, Hirsi Jamaa and others v. Italy.(application no. 27765/09) judgment Strasbourg 23 February 2012

³Par. 74 "whenever the state through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under article 1 to secure to that individual the rights and freedoms under section 1 of the convention that are relevant to the situation of that individual.

⁴ Protocol no. 4 to the convention for the protection of human rights and fundamental freedoms securing certain rights and freedoms other than those already included in the convention and in the first protocol thereto Strasbourg, 16.ix.1963

well-being life. Clearly, the difficulty of reaching the European Union put them in the illegal channels of migration. The EU on its side is not well managing these migratory flows, because of the profound differences that are reflected in the perception of national interests, in the related policies of each Member States and because of differences due to the complexity and diversity of reasons and characteristics of migration flows. Therefore, the migrants in a situation of emergence put themselves in the hand of criminal organizations ready to deal with the management of migration flows. This is, with great regret, the phenomenon of trafficking and human smuggling. It is a phenomenon linked to the old slavery, as it is rightly pointed out by Mr. Pino Arlacchi⁵. Migrants as slaves then, because the latter was the stranger par excellence, migrants who fall into the trap of these organizations that primarily affects women and children, subjects that are clearly the weakest. The new slavery, therefore, differs from its past incarnations since its purpose is exclusively economic exploitation. Since the post world war, the phenomenon of slavery was condemned, with the European Convention on Human Rights 1950, art 4: "1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labor. Even with the African Charter of Human and Peoples' Rights 1981, art 5: " Every individual shall have the right to the respect of the dignity inherent in a human being and the recognition of his legal status. All forms of exploitation and degradation of men, particularly slavery, the slave trade, torture, cruel, inhuman or degrading punishment, and treatment shall be prohibited". This was not enough, the problem continued to rise until we reached a Universal recognition, such as the UN Convention of Palermo, which provides harsher penalties and potentiated the action of contrast. It entered into force in December 2003 and involved 159 members. Despite all these efforts, it is still very difficult to fully recognize the essential dimension of the phenomenon that violate the basics human rights. The criminals are smart, they reduce more and more physical violence in the methods of recruitment, allowing more room for manoeuvre and especially participation in the profits, which led the trafficked persons not to perceive themselves as victims. Looking at Europe, these political and economic implications also joined the migration policy adopted by individual countries, a policy that contains a strong penalty, which showed that organized crime is becoming increasingly important in the management of illegal migration. Indeed in Europe, the prohibition of lawful entry after a certain fixed number of foreigners, bring the immediate activation of strategies by individuals and criminal organizations on how to overcome the obstacle set up by this kind of EU legislation. Transnational organized crime is structured as a service company able to ensure the trip to Italy or another country of destination in exchange of adequate compensation. In a paradoxical way, they propose themselves as a repository of hope, allowing people to realize their dream, to achieve a country that in their eyes represents an investment of life for the future. David Mancini⁶ in his book describes the function of the criminal organization as a good travel agency, an efficient "Tour Operator", which ensures the arrival in the place agreed, completely uninterested in the future of the person being transported. (Mancini 2008)

⁵Pino Arlacchi, *Schiavi: il nuovo traffico di esseri umani*, Milano 1999, cit., pag 12-13 e 40. Giuseppe Pino said Arlacchi was a sociologist and Italian politician, considered one of the world's foremost authorities on the subject of human security and current MEP.

One of the biggest response against the phenomenon was the Convention against Transnational Organized Crime, that with its Protocols, it is considered to be “the greatest effort to harmonize legislation and promotion of judicial cooperation never previously promoted by the States.” In the same vein, but in a European context, the EC Treaty Art.(63) is the legal basis against trafficking. Even the Tampere Conclusions(No.42) (2001) with the Framework Decision on the standing of victims in criminal proceedings, stressed the need “for The Member States to approximate their provisions, to achieve “objective of affording victims of crime, regardless of the Member States where they are, a high level of protection”. The next steps were: the European Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), which makes it more like the criminal law of the Member States in this field; Council Directive of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings, or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. This created common European minimum standards, concrete obligations of States and links assistance / protection to cooperation. Furthermore, the Council of Europe continued to engage in the fight against trafficking in human beings, saying that it is a key priority of the European Union, given its serious violation against human rights and determined to fight it with all its forces. In addition, to prevent trafficking in human beings, we had an important Directive 2011/36/EU,⁷ requiring the Member States: to discourage demand through education and training, to lead information and awareness-raising campaigns; to train the officials likely to come into contact with victims of trafficking, to take the necessary measures to establish as a criminal offence the use of services, sexual or other, of a person who is a victim of trafficking. As quoted in the legally binding Directive, Europe is acting as an anti-trafficking coordinator, to ensure a consistent approach to combating this phenomenon. Indeed, over 40 concrete actions to prevent human trafficking and to protect victims and prosecute traffickers were created at the EU level, also with a mechanism to better identify, refer, protect and assist victims⁸.

4. CONSEQUENCES ON MEMBER STATES.

As it is pointed out, the criminal organizations have a lot of power, that is counterbalancing with the loss of power for the Member States. Indeed, the Member States tried to have always the control of the migration issues, even expanding it, with all the measures that are required (*VALSAMIS M. 2014*). But, having said that, it is important to note that they have never had full sovereign control over migration and have lost much of what little they had in the era of globalization with the enhancing of border controls. Employers, smugglers, migrant networks, agents, and individual migrants continue to be big challenges for national policies on admission and employment. Governments have won many battles against unauthorized migration, but they are losing the war for control over who enters, leaves, and remains in their territories⁹. The situation is becoming worse, these unauthorized migrants are not protected, they can be at risk of

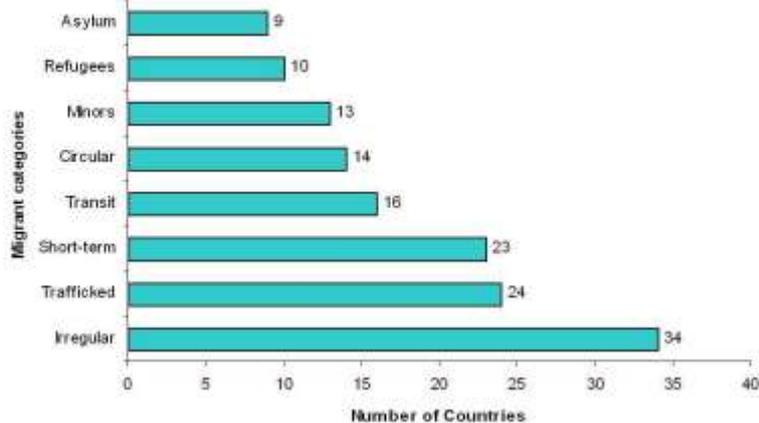
⁷Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101 of 15.4.2011].

⁸Human trafficking and human smuggling, European Commission web site.

⁹ www.iom.int. Cit.

exploitation by employers and landlords, and they do not use public services to which they are entitled (Newland K. 2005). At this point, all this lack of regular migration, it is weakening the state at the expense of those traffickers and smugglers that are growing their power. We do not forget that the benefits of globalization are available also to the latter and the incapacity of the States to impede mobility despite strict legislation is clear. Frontiers are never waterproof, and smuggling networks play an important role in bypassing States controls, giving to migrants the means of avoiding control and legal requirements. (Barbou Des Segolene P. and H. Oger, 2005). What is obvious here, is the little influence of States capacity of elaborating law on the migration reality. This happens because, there are barely legal migration routes¹⁰ into the EU from third countries, so the migrants are forced to use irregular migration channels and put themselves in the hands of smugglers and traffickers and take all the risks to reach the country of destination. This was clear in the tragedy of Lampedusa (Italy) in October 2013, where a shipwreck claimed the lives of more than 360 Migrants, asylum seekers, and refugees in their aim to reach Europe. In front of this events, the single states are very weak, because they continue to face problems in an isolated manner, without prioritizing solidarity and the common tools that will help to face this ugly situation. They must find another way, trying to shift the power (FAIST- ETTE2007) on the migration agenda to a supranational authority that may provide harmonization of the policies and encourage the use of innovative approaches, that reduce the need for refugees to put their lives in the hands of smugglers and human traffickers.

Number of countries reporting on challenges in providing statistical counts/estimates on "difficult-to-measure" international migrant groups
(51 countries filled and returned the questionnaire)



This picture¹¹, confirms the most important challenges that countries faced every day, putting in the first position the important challenge of the irregular migration, which is the

¹⁰ An Open and Safe Europe- What next? ECRE submission to the European Commission, Consultation on the future of the Home Affairs Policies, January 2014

¹¹ Source: United Nations, economic commission for Europe, Statistical database. 29.05.2014

most present category of migrants. The creation of new legal channels for refugees and asylum seekers to access or claim protection on the territory of one of the EU member States is one concrete measure, that would reduce the need for those in search of international protection to resort to unsafe and irregular methods to access the territory of an EU Member State. The path is still long and hard, and the substantial political obstacles to supranational governance of migration are significant, even where the need for greater cooperation and coordination among states is acknowledged, a supranational organization is not seen by many states as the preferred way of international governance. States continue to manage the migration agenda on their own because there are a lot of political conflicts inside this field¹² that impede them from leaving their sovereignty.

5. CONCLUSION

Now, drawing a line, we can see how those measures serve to stimulate a uniform legislative protection against the phenomenon examined, clearly demonstrating, as well as Europe gradually is strongly committed to counter it, because it is directly involved as the main point of destination of migrants. The possible solutions are many: "First we need to flip the experience of the past and ensure that the exploitation of a person, whether for refugees or work purposes, becomes a low-risk asset" Pietro Grasso, the Italian National Anti-Mafia Prosecutor stated that "to attack criminal organizations, we should follow two paths simultaneously: 1) prevention and protection of victims and 2) the prosecution of the traffickers. Each alone is not sufficient. The repressive activity, if ineffective, also has a negative impact on the protection of the victims. This activity should be followed by an identification of assistance and protection of victims that allow the roots of the repression of crime, which, with the absence of this process remained in oblivion. Clearly, the phenomenon has remained on the agenda of the international community, as demonstrated by the actions of the Palermo Convention with the annexed Protocols and by the work at European Level with the directives, in order to demonstrate that the main weapon against traffickers can only be collaboration, both at international and at the European Level. Furthermore, it is necessary to promote at the National and at the European level the " Legal trials " that were launched recently: "who denounces their exploiters is entitled to forms of protection and obtains a temporary residence permit, so coming from the condition of secrecy". Moreover, examining the new Migration Agenda¹³ after the tragedies in the Mediterranean, the EU Commission proposed a new European Agenda on this legal basis: Art.78.3 TFEU: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament." The new European Agenda on Migration defines immediate measures to prevent human tragedies and to reinforce mechanisms to deal with emergencies. This will be done by strengthening the EU presence at sea to save lives, targeting criminal smuggling networks, responding to high volumes of arrivals within the

¹² Immigration may adversely affect political stability if conflict becomes endemic among heterogeneous groups of people living in

close proximity due to the process of migration

¹³ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf

EU with a distribution mechanism for asylum-seekers (relocation), bringing an increased number of refugees from third countries (resettlement) safely and legally to the EU, and using the EU's operational and financial tools to help frontline Member States. Nevertheless, imposing a mandatory quota system may generate wider legal implications on who processes and deals with asylum claims in the first place.¹⁴ What does it mean? This would mean that South Europe states like Italy and Malta would not have to deal with so many asylum-seekers, which would normally be their responsibility under the EU's Dublin rules on this issue. Having regard to that, other MS(France, Hungary) opposed clearly to the quota system and the relocation of asylum seekers, generating a serious period of uncertainty and a big impasse. Therefore where should we focus? First of all, it is important to define which are the legal remedies and grounds with which individuals will be able to appeal against a relocation decision, or the measures to adopt in order to ensure that relocated individuals remain in the designated Member State. We should improve the cooperation with third countries, which has a legal basis in (Art 78(2) 9 TFEU), and the situation in the Mediterranean. We should focus on the roots of the migrants, and the EU cooperation with third countries will aim not only to combat illegal immigration but even to promote the development of the countries involved. Better assistance to these countries will be an asset, and collaboration between MS, must not be limited to the exchange of information concerning voluntary returns only. A common migration policy must include an effective and sustainable return policy, that may exclude problems at the levels of the Member States. Readmission agreements are the major instruments for cooperation with third countries. Unfortunately, ten Member States do not participate in resettlement and are nullifying the return policy, an integrated and crucial part of the fight against illegal immigration. For these reasons, the MS need much faith on co-operation.(*Baldaccini A.Guild E., Toner H. Op.Cit. Pag.356*) Furthermore, I will suggest an interesting work on the economic potential that migrants may bring to the EU. With this regard, we should propose a review of the existing EU law providing a "Blue Card"¹⁵ for the admission of highly-skilled non-EU migrants, trying to find out new solutions to increase the EU's attractiveness to highly-skilled migrants. This directive represent an important cornerstone for the labour migration to the EU and its analysis and its impact assessment for the purpose of the legal migration to the EU is fundamental. This is one of those legal channels that gives to Non- EU citizens, especially those with interesting skills, an alternative to the illegal Immigration, helping them to a better integration without forgetting that mobility will remain a way in which people improve their lives and can contribute to the economic growth of the EU itself.

Last but not least I propose the possibility to create a "*General Statute of foreigners*" that collects all the legislative acts regarding residence, access to employment, civil rights and social rights defining for example: which are the *legal remedies* and grounds with which migrants will be able to *appeal against a relocation decision*, or the measures to adopt in order to ensure that relocated individuals remain in the designated member state. We should adopt a different approach that covers not only the asylum seekers that are protected, but even those who do not fulfill the requirements under the Geneva

¹⁴ <https://euobserver.com/justice/128689>

¹⁵ http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/114573_en.htm

Convention and whose return to the country of origin would result in serious danger. After the asylum seekers, it will have a wider application, which includes all the foreigners and migrants, that are leaving their countries for other purposes. Another similarity like the American system (with the green card) could be a good help in the draft of this General Statute. The aim is to represent a complementary protection to the EU laws on migration and asylum, being the added value to when we encounter different confusing laws. For those reasons, it has the purpose to be an alternative, giving to migrants a “*European Legal Status*” to which the Member States can rely when they face the big fluxes.

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