

Creating a European market for refugees?

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Abstract: *Creare un mercato europeo dei rifugiati?* – The idea to establish a European market of refugee quotas, although promising for the flexibility that it would introduce into the European asylum system, raises doubts about its feasibility and adequacy to the current regional context. Firstly, however iniquitous and obsolete, a distribution of the refugee burden already exists at EU level: negotiating in the shadow of the non-cooperative legal framework designed by the Dublin III regulation constitutes a significant constraint. Secondly, for the EU and its Member States, externalizing the burden of refugee protection (burden-shifting) is a much less divisive strategy than internalizing it (burden-sharing). Thirdly, the ‘commodification’ of refugee protection might produce an unintended consequence: to the extent that it legalizes the ‘welcome-or-pay’ alternative, it could paradoxically ‘crystallize’ the existing uneven distribution of the refugee burden both inside and outside the EU.

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1. How feasible? Negotiating asylum reform in the shadow of the Dublin non-cooperative framework

Reforms do not take place in a legal and political void. Policies are path dependent. When extraordinary and dramatic events – such as the movement of millions of refugees towards Europe – challenge the *status quo*, the legal setting that harbors it may curb the need for change and constrain the search for the best possible solution. This is also the case with the Common European Asylum System (CEAS). Its cornerstone – the Dublin regulation – is the elephant in the room: it hardly helps to level the political battlefield and to counter the free-riding approach of reluctant Member States. This, in turn, inevitably narrows the debate on alternative solution.

The Dublin system, in fact, places the primary responsibility for examining applications for international protection on the Member State of first entry, where the applicant irregularly crossed the border from a third country.¹ The aim of that provision is both to encourage the Member States to control the external EU border, and to discourage secondary movements and forum shopping by applicants. In principle, if applicants would arrive in Europe by air in an orderly way, the system might work.

¹ Art. 3, § 1, Regulation no 604/2013 of the European Parliament and the Council of 26 June 2013 (Dublin III Regulation).

However, in a context where most applicants for international protection arrive by boat, such a system determines an evident asymmetry in the distribution of the burden among EU partners, at the expenses of the most exposed Mediterranean Member States, namely Greece and Italy. If the fear of becoming first-asylum state is the main incentive for burden-sharing,² the current system further reduces that incentive and paves the way to the non-cooperative strategy of most Northern and Eastern Member States.

Any attempt to radically reform the CEAS should come to terms with this reality. To many reluctant EU partners (so far, a solid majority in the Council), the main political concern pertains to security and translates into the following question: how to limit the secondary movement of asylum-seekers and how to prevent the “wave through” policy that the most affected (Southern) Member States might be tempted to enact. This overarching non-cooperative framework is nourished both by the terrorist threat and by the imbalances that the Dublin system perpetuates. For many national leaders, the most convenient option is to reintroduce border controls in the Schengen area, rather than to accept a costly burden-sharing mechanism.

The endurance of the Dublin regime explains several key features of the current refugee crisis:

- the manifestly disproportionate burden that Greece (especially until the closure of the “West Balkan route” in March 2016) and Italy have carried so far in managing – on behalf of the EU and its area of freedom, security and justice – the large-scale influx of refugees from the Middle East and the Sub-Saharan Africa;
- Merkel’s humanitarian decision, during the late summer 2015, to unilaterally “exempt” Syrian nationals from the Dublin system, in order to allow hundreds of thousands of refugees to lodge their asylum requests directly in Germany rather than in the Member States of first entry;³
- the establishment, in September 2015 (with Council decisions 2015/1523 and 2015/1601), of an emergency mechanism which involves a temporary suspension of the Dublin rules and is aimed at “relocating” within two years 160 000 third-country nationals who lodged applications for asylum in Italy and Greece:⁴ a largely missed target, due to the reluctance of many EU partners;⁵

² P.H. Schuck, *Refugee Burden-Sharing: A modest Proposal*, in *Yale Journal of International Law*, 1997, vol. 22, 243 ss., spec. 275.

³ This “exemption”, adopted on 21 August 2015, was repealed in November 2015.

⁴ Decision 2015/1601 also introduced a distribution key and it was adopted by qualified majority, with the contrary vote of Czech Republic, Hungary, Slovakia and Romania. Hungary and Slovakia, supported by Poland, have challenged its legality before the Court of Justice (a first hearing took place on 10 May 2017).

⁵ Until May 2017, 6 896 applicants from Italy and 13 973 from Greece have been relocated to other EU Member States, for a total of less than 21 000 implemented transfers. The target of 160 000 relocations by September 2017 set by the mentioned Council Decisions is patently unreachable. While most EU partners reluctantly cooperate, three EU countries (Hungary, Poland and the Czech Republic) are not relocating from Greece and Italy, thus breaching their legal obligations. Yet, no infringement procedures against those countries has been brought so far. See European Commission, *Thirteenth report on relocation and resettlement*, COM(2017) 330 final, 13 June 2017.

- the recent claim of Advocate General Sharpston that the current Dublin system cannot reasonably be expected to work, and its criteria correctly applied, in conditions of mass inflow of people.⁶

Despite all its structural weaknesses and shortcomings,⁷ the Dublin system resists and feeds a non-cooperative game at EU level. The European Commission has tried to tame the elephant instead of throwing him out of the room. It has proposed to supplement the Dublin rules with a corrective allocation mechanism, which would be triggered automatically when a Member State faces a disproportionate number of asylum-seekers, i.e. when that number exceeds 150% of each State's 'hidden' quota (based on the size of the population and the GDP). If a Member State decides not to accept the allocation of asylum-seekers from a Member State under pressure, a 'solidarity contribution' of 250 000 € per applicant should be paid.⁸ At the same time, however, the Commission has acknowledged that, although "the current Dublin system was not designed to ensure a sustainable sharing of responsibility for applicants across the Union", that system "should be preserved" in the absence of a politically viable alternative.⁹

The proposal advanced by the Commission has met strong resistance, especially from the Eastern European bloc, which does not accept to pay for a right (to exclude migrants) that they regard as 'sovereign' and unfettered.

The European Parliament, however, has proposed amendments not only to make the corrective mechanism less exceptional,¹⁰ but also to replace the optional formula proposed by the Commission ('welcome-or-pay') with a mandatory participation to the relocation scheme, and the exclusion of non-cooperative Member States from access to EU solidarity funds (i.e. EU structural and investment funds).¹¹

The position of the European Parliament has been clarified by the rapporteur in the following terms: "Allowing other Member States to buy themselves out from the system would not be fair to frontline Member States and for such a system to work the cost of the opt out would have to be so dissuasively high that it would become fundamentally unfair also to less economically strong Member States."¹²

This argument aptly captures the problem that the creation of a market for refugees would entail. The 'commodification' of refugee protection – which would

⁶ Opinion of Advocate General Sharpston, delivered on 8 June 2017, Case C-490/16, *A.S. v Republic of Slovenia*, and Case C-646/16, *Jafari*, §§ 236-237.

⁷ This reality has been widely acknowledged both by the European Council (EUCO 19.02.2016, SN 16/16) and the European Parliament (see resolutions of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration: 2015/2095(INI), and resolution of 10 September 2015 on migration and refugees in Europe: 2015/2833(RSP)).

⁸ Art. 37 of the Proposal: see European Commission, COM(2016) 270 final, p. 19 and 68.

⁹ European Commission, Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, 4 May 2016, p. 3-4.

¹⁰ Transfers of asylum-seekers to other EU countries should be automatically triggered when the first country has reached 100% of its allocated share (not 150%, as proposed by the European Commission): see Article 34(2) of the Proposal, as amended by the Rapporteur Cecilia Wikström (see Draft Report to the LIBE Committee, 24 February 2017, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-599.751+02+DOC+PDF+V0//EN&language=EN).

¹¹ See amendment to Article 43 b in Wikström's Draft Report to the LIBE Committee.

¹² Wikström's Draft Report to the LIBE Committee, p. 74.

result from the trading scheme proposed, *inter alia*, by Professor Schuck – might produce, in the present context, an unintended consequence: to the extent that it legalizes the ‘welcome-or-pay’ alternative, it could paradoxically ‘crystallize’ the current uneven distribution of the refugee burden both inside and outside the EU.

Inside the EU, whereas the relatively poorer countries of the Eastern European bloc would simply refuse to pay, richer Northern States might accept to pay the bill in order to keep asylum seekers at safety distance, thus leaving the burden of reception again to the Southern EU countries of first landing. Similarly, *outside the EU*, third-countries like Turkey, (what remains of) the Libyan State and the Sub-Saharan countries would continue to receive EU funding in exchange for their more or less credible commitment to protect asylum seekers in their territory and avoid their arrival on European shores. The promised market revolution might paradoxically uphold the *status quo*.

2. How satisfactory? The external dimension and the temptation of burden-shifting

The European refugee crisis is part of a broader migration crisis. Its triggering factor is the current absence of proxy control previously exercised by the Southern and Eastern Mediterranean States on behalf of European countries. The ‘Arab Spring’, the Syrian conflict, the spread of ISIS and the failure of the stabilization process in Libya have resulted in the ‘fading’ of institutions in key third countries. Taking advantage of this power vacuum, criminal organizations have strengthened human trafficking and earned high profits.

The restriction or complete closure of regular access channels to the European labor market has paradoxically exacerbated the loss of control over migration flows across the Mediterranean. In the last three years, 1,6 million migrants have reached the European shores irregularly. In the lack of an alternative legal path, after landing, most migrants have applied for international protection, although not qualifying for it; and many of them have seen their applications rejected. In 2016, out of 181 436 migrants arrived by sea on the Italian shores (mainly from Sub-Saharan Africa), almost 70 % (123 482) asked for international protection and 62 % of the processed requests have been rejected¹³.

Moreover, only a tiny share of those unauthorized migrants can be repatriated, due to the limited effectiveness of European return policy. All the other migrants remain on the European soil without permission. This reality inevitably affects the free movement in the Schengen area, fuels a circuit of illegality that stretches from the countries of origin to the countries of destination, and ultimately nourishes the anxieties of European citizens about their security.

This evolution of the migration crisis has contributed to a partial reversal of political priorities at EU level. In 2015, the influx of almost 1 million Syrian refugees and the German decision to welcome them emphasized the shortcomings of the EU asylum policy and the lack of an adequate burden-sharing mechanism. However, the closure of the Western Balkan Route in March 2016 has imposed the cooperation

¹³ M. Savino, *La risposta italiana alla crisi: Un bilancio*, in Id. (a cura di), *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive*, Napoli, Editoriale Scientifica, 2017, p. 13-32, at 23.

with key third countries as the privileged means to achieve the paramount end: ‘stemming the flow’ and keeping displaced individuals away from European shores.

This silent shift of the political focus from internal burden-sharing to external burden-shifting has much to do with the difficulties that the EU is facing in defeating the protectionist attitude of Member States. Challenged with questions on how they intend to share the refugee burden that only few Member States hold, free-riding national governments point to ‘containment’ as a common strategy to regain control over migration flows, cut down the arrivals of asylum seekers, prevent the abuse of European asylum law and, ultimately, shift the burden of reception on third states.

The ongoing crisis has therefore convinced European leaders of the need to invest, wherever possible, their political and financial assets to obtain the cooperation of key third countries of transit. The EU-Turkey ‘statement’ of 18 March 2016 is the most evident outcome of this strategy. Far from promoting an effective burden-sharing, the check of 6 billion euros used to buy the cooperation of the Turkish government has allowed the EU to enforce its strategy of burden-shifting.¹⁴ Another evidence is the agreement on migration control that the Italian government has concluded in February 2017 with the precarious Libyan State, under the auspices of the European partners.¹⁵ How would a European market of refugee quotas fit into this expanded picture, where any chance to openly discuss and assess the EU ‘absorption capacity’ seems to be ruled out by the deceptive ‘stemming the flow’ mantra?

If one shares Professor Schuck’s optimistic assumption that, “[j]ust as cap-and-trade schemes enhance environmental protection, this market would maximize the number of refugees protected by exploiting differences in states’ resources, politics, geography and attitudes toward newcomers”,¹⁶ a promising answer can be foreseen: if the proposed trading scheme would succeed in expanding the capacity of the European refugee quotas beyond the needs of internal relocation (essentially from Italy and Greece), the same scheme could also pave the way to a (more) credible EU resettlement program from those third countries that host millions of refugees at the gates of Europe.¹⁷ Internal solidarity would go hand in hand with external solidarity and the European refugee market would translate into a Mediterranean market where the EU accepts to bear a burden that is proportional to its wealth.

However, two antagonist dynamics suggest a more realist view.

On the one hand, Western States traditionally tend to avoid the creation of a truly “globalization” of asylum regimes because of the “pull factor” that it may enact.¹⁸ It is far more likely that EU Member States will continue to favor a combination of limited internal burden-sharing and extensive external burden-

¹⁴ As of 9 June 2017, under the ‘1:1 scheme’ thereby provided, the total number of Syrians resettled from Turkey to the EU is 6,254: a drop in the ocean of almost 3 million refugees currently hosted in Turkey: see European Commission, *Sixth Report on the Progress made in the implementation of the EU-Turkey Statement*, COM(2017) 323 final, 13 June 2017, p. 9.

¹⁵ Malta *Declaration* by the Members of the *European Council* on the *external aspects of migration: addressing the Central Mediterranean route*, La Valletta, 3 February 2017.

¹⁶ Peter H. Schuck, *Creating a Market for Refugees in Europe*, in *New York Times*, 9 June 2015.

¹⁷ The top six refugee-hosting countries in the world currently are Turkey (2.9 millions), Pakistan (1.4 million), Lebanon (1 million), Iran (980 000), Uganda (941 000) and Ethiopia (792 000): see UNHCR, *Figures at a glance* (<http://www.unhcr.org/figures-at-a-glance.html>).

¹⁸ M.J. Gibney, *Forced Migration*, cit., p. 59.

shifting, with the perpetuation of thin resettlement schemes, used as fig leaf to keep refugees away.¹⁹

On the other hand, only a serious commitment to resettle (a significant share of) refugees in the Mediterranean area could make the European policy of externalization of border controls sustainable in the long run. By receiving 1 million refugees in 2015–2016, Europe gave an important yet minor contribution, both in relation to its demographic and economic dimension (the EU has an ageing population of 500 million people – less than 7 percent of the world population – and a GDP that represents 26 percent of the world economy) and in relation to the latitude of the current humanitarian crisis: in the Mediterranean area, there are more than 10 million refugees.

This situation entails very high costs, difficult to sustain in the long run for the various actors involved. There are social and political costs for the third countries of transit that accept to cooperate with the EU and that, as a consequence, inevitably become top refugee-hosting countries. There are humanitarian costs for asylum-seekers and migrants in general, who remain ‘trapped’ for months or years in countries where the level of protection of human rights is significantly lower than in Europe. And there are costs for the EU and its Members States as well: leaving aside the funding that is necessary to buy the reluctant cooperation of third countries, there are non-negligible political costs resulting from “a dynamic in which the European project is no longer seen as an expression of Europe’s liberal universalism but as a sour expression of its defensive exceptionalism”.²⁰

In the proposal advanced by Professor Schuck, a clarification on this crucial point – if and how to resettle displaced persons from overburdened third countries – is missing. Is the creation of a regional market of refugee quotas consistent with (or somewhat related to) the introduction of a credible program of resettlement? Would that trading-scheme selectively include key third countries of transit or refuge, like Turkey, Libya or Lebanon? Wouldn’t such an enlarged trading-scheme ironically perpetuate the post-colonial idea that European States contribute only financially, while Middle-Eastern and African countries bear the social, administrative and political costs of the refugee crisis? And what about the standards of human rights protection that asylum seekers and refugees are entitled to? Can Libya and other poor or unstable third countries satisfactorily guarantee them? Should a refugee trading scheme involve only States with acceptable human rights records?²¹ Shouldn’t this concern be part of a more sustainable European asylum policy?

These pressing questions confirm the complexity of the issue: no magic formula can square the circle. Any attempt to reform the European asylum regime should come to terms with the fact that there is only a very narrow passage between the Scylla of the internal Dublin rules and the Charybdis of the external burden-shifting practice. Both these uneven distributive strategies have deep roots in the EU

¹⁹ The current European resettlement scheme, approved by the EU Council on 20 July 2015, provides for the resettlement of 22,504 refugees within 2 years. Beyond the limited implementation of this measure, there is an evident problem of magnitude of such schemes.

²⁰ Cfr. I. Krastev, *After Europe*, Penn Press, 2017, p. 7.

²¹ See, e.g., M.J. Gibney, *Forced Migration, Engineered Regionalism and Justice between States*, in S. Kneebone and F. Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead*, Oxford, Berghahn Books, 2007, p. 57 ss., spec.

legal and political setting. And both of them have the strength to bend the market logic to the preservation of the *status quo*.

3. Any alternative?

In his seminal article on refugee burden-sharing (1997), Peter Schuck observed: “Precisely because the altruistic motives for burden-sharing are so weak, [liberal] powerful states have strong reasons to induce others to cooperate by manipulating the formidable carrots and sticks that the powerful states control”²². This observation suits well to the European context, where the prospects of a more adequate burden-sharing system crucially depend on the commitment of “big” States like Germany and France. Nonetheless, the creation of a European market of refugee quotas would raise at least two problems.

The first one is internal to the EU: however iniquitous and obsolete, a distribution of the refugee burden already exists and is set by the Dublin III regulation. Negotiating in the shadow of the non-cooperative legal framework designed by the Dublin rules constitutes a significant constraint, which makes two scenarios more likely and, perhaps, promising.

In a first ‘stick-oriented’ scenario, powerful states may impose (by qualified majority) a quota system on the reluctant Visegrad countries, under the threat of excluding them from access to the EU structural funds (of which those countries are net beneficiaries).²³ In this case, the correction offered by the proposed trading system would hardly be beneficial, since Eastern European States would not accept to pay any (high) price to avoid a burden that they find incompatible with their nationalist vision of State sovereignty.

In the alternative “carrot-oriented” scenario, Germany and France may launch an ‘enhanced cooperation’ between the EU partners who acknowledge that a proportionate refugee burden-sharing is necessary for the survival of the Schengen area. In this scenario, a permanent mechanism of relocation, built upon a combination of criteria (GDP, population and land mass, past protection efforts, unemployment rate and/or else), may be preferable – in terms of reciprocal trust between partners and reliability of their commitment to solidarity – to the provision of a market-like mechanism of quota adjustment, as it may be(come) a potentially divisive escape for richer states. Other Member States will join that avant-garde if and when they perceive the convenience to be part of that more exclusive and cohesive club.

The second problem relates to the external dimension of the European asylum policy: a policy that is increasingly oriented towards externalizing EU border control. Instead of accepting credible resettlement schemes which would imply an effective burden-sharing, the EU and its Member States will probably continue to use their financial leverage to keep refugees and other categories of unauthorized migrants at distance, in the territory of third cooperating countries. After all, for the European Union, externalizing the burden of refugee protection is a much less divisive strategy than internalizing it.

²² P.H. Schuck, *Refugee Burden-Sharing*, cit., spec. 275.

²³ As proposed by the EP rapporteur Cecilia Wikström (*supra*, § 1).

Assessed against this backdrop, the proposal to create a regional refugee market looks even more problematic. First, it is by no means clear whether that market would be exclusively European or inclusively Mediterranean. Secondly, due to the marked financial disproportion between EU and non-EU countries, any trading scheme would make the alternative ‘welcome-or-pay’ illusory: the former countries would (more or less gladly) pay for the reception services carried out by the latter ones. The risk is there that a trading-scheme serves to legally sanction the existing unfair distribution of the refugee burden between the EU and its neighboring countries.

Perhaps it is time to treat this seemingly intractable issue with the elaboration of a more comprehensive therapy, which links the asylum reform to the development of a common policy on economic migration. The rise in the number of both asylum requests and their rejection in Europe shows that the current immigration system incentivizes abuses of the European refugee protection system. This is mainly due to the lack of legal paths to the European job market. When migrants reach the Italian or Greek shores, they are left with no alternative: the only legal way to be temporarily admitted is to apply for international protection even when the requirements are missing. These mixed economic/humanitarian flows not only fuel the illegal traffic of migrants in the Mediterranean. They also exacerbate the problem of reception and selection of migrants and, thus, they strengthen the non-cooperative position of those Member States that do not accept to share the burden until those flows stay out of control.

It would be difficult to create a balanced relocation system within the EU and/or a credible resettlement program from third countries, unless a significant number of Members States accept to open legal channels of access to their job market.²⁴ This opening would help to select the migrant workers that the ageing old continent needs, to separate economic and humanitarian flows, and, as a result, to lighten the refugee burden that European countries would be required to share. At that point, the issue of burden-sharing might become a more tractable one.

²⁴ This reform would not entail any indiscriminate access to the European job market. It would rather involve a more comprehensive and coordinated European approach, based on “entry quotas for workers, information on job opportunities in Europe for third countries nationals, pre-departure measures (including language and vocational training) in collaboration with European companies ready to employ manpower from third countries, matching of demand and supply of jobs, professional and social integration in the host Member States, Erasmus Plus programmes for students and researchers”, as well as “initiatives on circular migration”, as proposed by the Italian government in its *Migration Compact. Contribution to an EU Strategy for External Action on Migration*, 15 April 2016, § 3.1.