

The Instrumentalization of Migration in the Euro-Mediterranean Area: Between Past and Present

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More than fifteen years ago, I published an article in the 2005 IEMed Mediterranean Yearbook¹ in which I examined the ways in which the EU and its Member States were cooperating with non-EU countries in the Mediterranean region to control migration and the EU's external borders. The paper aimed to show that unprecedented patterns of interdependence were emerging, with implications for future cooperation on migration governance in the Euro-Mediterranean area. At that time, externalization was a recurrent analytical framework in academia to describe the EU's attempt "to engage sending and transit countries in strengthening border controls, combating illegal entry, migrant smuggling and trafficking, or readmitting migrants who have crossed into the EU illegally."² Indeed, externalization was deeply rooted in the EU's external action, especially since the EU's ambitious commitment to strengthening the Common European Asylum System and mobilizing non-EU countries in the "fight against irregular migration," readmission, and reinforced border controls, and, more intensely, after the adoption of the European Neighbourhood Policy (ENP) in 2004. However, when analysing the

perceptible empowerment of some non-EU countries in their interactions with the EU and its Member States, the reference to externalization and its analytical framework showed its own limits. Various bilateral and multilateral dialogues supported by regional consultations³ on migration matters were regularly organized with a view to laying the groundwork for common principles to deal with "migration management." Their rationale was guided by the need to reach a consensus which, beyond the asymmetries that typically characterize states' preferences and contingencies, would reduce uncertainties, while ensuring a modicum of cooperation (be it effective or not) on migration and border management with non-EU countries.

Preparedness to Talk vs Consensus

In European policy circles, the predominant vision was that formal commitments expressed in ENP action plans would gradually consolidate patterns of cooperation at bilateral and supranational levels. Recurrence of informal consultations played a key role in the diffusion of practices, norms and policies from the EU to its neighbourhood. Repetition was also a core ingredient to instil in the minds of stakeholders a sense of meaningfulness to their engagement in

¹ CASSARINO, Jean-Pierre, "Migration and Border Management in the Euro-Mediterranean Area: Heading towards New Forms of Interconnectedness." *IEMed Mediterranean Yearbook*, Barcelona, 2005, p. 227-231.

² BOSWELL C., "The 'External Dimension' of EU Immigration and Asylum Policy," *International Affairs* 79 (3), 2003, p. 619-620. See also, LAVENEX, S. and SCHIMMELFENNIG, F. "EU Rules beyond EU Borders: Theorizing External Governance in European Politics," *Journal of European Public Policy* 16 (6), 2009, p. 791-812. For a critical stance on the root-causes approach see CASTLES, Stephen and VAN HEAR, Nicholas, "Root Causes." In BETTS, Alexander, ed., *Global Migration Governance*. Oxford: Oxford University Press, 2011, p. 287-306.

³ THOUÉZ, Colleen and CHANNAC, Frédérique "Shaping international migration policy: The role of regional consultative processes," *West European Politics*, 29(2), 2006, p. 370-387. HANSEN, R., *An Assessment of Principle Regional Consultative Processes on Migration*. IOM Migration Research Series on Migration 38. Geneva: International Organisation for Migration, 2010. See also COLLYER, Michael, "Geopolitics as a migration governance strategy: European Union bilateral relations with Southern Mediterranean countries," *Journal of Ethnic and Migration Studies* 42(4), p. 606-624.

the “joint management of international migration.” Also, informality and the reinforced centrality of the state and its law-enforcement agencies in migration talks were critical to all actors involved, be they European or non-European. Various third countries in the southern Mediterranean were proactively involved in such informal consultations, showing their willingness, if not preparedness, to open informal talks on migration governance.

However, despite the manifest preparedness of various non-EU countries, such regular and informal talks found their own limits. First, it quickly turned out that the EU and its Member States were pushing their own views and vested interests while jeopardizing any *genuine* discursive interaction aimed at achieving a “reasoned consensus.”⁴ The latter, as defined by Thomas Risse, is contingent on three preconditions: 1. the ability to understand and factor the contingencies and subjectivities of the partners involved; 2. the legitimation of a common system of norms and rules; and 3. the fact that actors involved in the consultations are recognized as equals. To be sure, none of these preconditions were met. Moreover, non-EU countries are not necessarily passive recipients vis-à-vis the diffusion of norms, practices and policies imported from abroad. Non-EU countries may be prone to dialogue through consultations on migration governance with their European counterparts without, however, reaching a “reasoned consensus,” let alone building trust, especially when southern Mediterranean countries were looking suspiciously at the EU’s eastern enlargement process, while expressing their concerns over its potential consequences for development aid and foreign direct investments in North African industrial sectors.

Empowerment and Disclosed Representation

Additionally, non-EU countries started to (re-)construct their own national interests.⁵ Firstly, they became aware of their empowered position vis-à-vis the EU and its Member States in the “fight against irregular migration.” Secondly, they started to dis-

close and defend their own representation of what cooperation on migration governance would entail. It is through this double articulation (empowerment and disclosed representation) that regional consultations on migration governance in the Euro-Mediterranean area have unfolded since the mid-2000s. In other words, not only did southern Mediterranean countries open communicative channels with their European counterparts, they also expressed their own visions as applied to migration governance, while capitalizing on their empowered position. True, their empowerment resulted from the emergence of unprecedented patterns of interdependence in the field of migration and border controls. True also, their empowerment resulted in the skilful ability to defend their own preferences and contingencies, be they connected with migration matters or not.

The Drive for Informalization

Invariably, this empowerment generated additional uncertainties to which the EU and its Member States have been obliged to respond. To do so, their responses converged towards the gradual flexibilization of their patterns of cooperation on migration governance with non-EU countries. Heightened uncertainties in their bilateral cooperation on migration governance certainly explained the drive for informalization, given its lower costs and also because it allowed “adjustment in the face of international uncertainty without dismantling cooperation.”⁶ A modicum of cooperation, be it effective or not, had to be preserved at all costs.

At a bilateral level, some Mediterranean EU Member States (e.g. France, Greece, Italy and Spain) already excelled in this flexible *modus operandi*, with a view to addressing non-EU countries’ empowered agency and exigencies. Long before the EU, various Member States had realized that migration governance was (and still is) inextricably based on asymmetric patterns of cooperation, as well as unequal costs and benefits, that codified their interactions with non-EU countries in the Mediterranean and in Africa.⁷ They learned that

⁴ RISSE, Th., “‘Let’s Argue!’: Communicative Action in World Politics.” *International Organization* 54 (1), 2000, p. 10.

⁵ WELDES, Jutta “Constructing National Interests.” *European Journal of International Relations* 2 (3), 1996, p. 275-318.

⁶ KOREMENOS, Barbara “Contracting Around International Uncertainty.” *American Political Science Review* 99 (4), 2005, p. 561.

⁷ CASSARINO, Jean-Pierre “Informalising Readmission in the EU Neighbourhood.” *The International Spectator*, 42 (2), 2007, p. 179-196.

migration governance is inseparable from the articulation of an array of interests and incentives, both material (military assistance, technical equipment, financial support) and immaterial (regime legitimacy, strategic alliances, territorial integrity), which may motivate the engagement of non-EU countries.

Not only did southern Mediterranean countries open communicative channels with their European counterparts, they also expressed their own visions as applied to migration governance, while capitalizing on their empowered position

At a supranational level, before the EU's drive for informalization, it was initially stuck on its normative approach to migration governance. Indeed, its action was mainly oriented towards repeated calls on non-EU countries to comply with their commitments and international obligations under public international law, especially with regard to readmission and the fight against human-trafficking.⁸ For example, when the area of justice, freedom and security was established following the 1999 Treaty of Amsterdam, the European Commission adopted a strictly legalistic

approach to readmission based on the oft-cited reference to states' obligation "under customary international law" to accept the readmission of their own nationals. This obligation, skilfully constructed during the late 1990s, has had, since then, a decisive epistemic impact on the scholarship, especially among lawyers.⁹ This constructed normative framework¹⁰ coincided with the intensification of cooperation on justice and home Affairs and migration management with third countries. Readmission became a pivotal element of the joint management of migration flows, especially with reference to the "fight against irregular migration," as well as a major cross-over issue in various internal and external policy domains. Their detailed analysis would go beyond the scope of this study. It is, however, important to stress that such developments, driven by an extraordinary sense of normative and bureaucratic rationality, contributed to the growing visibility of readmission in migration talks, especially in the external relations of the EU and its Member States.

These developments were also conducive to strong expectations on the part of some EU Member States who, on various occasions, criticized the slow progress in the negotiations initiated by the European Commission in the field of readmission. The European Commission was called to deliver promptly. In an attempt to respond to such domestic challenges and to safeguard its credibility in dealing with irregular migration, the Commission expressed its intention to "broker a deal"¹¹ in the framework of the Global Approach to Migration (GAM), with a view to

⁸ CASSARINO, Jean-Pierre, "Informalizing EU Readmission Policy." In Ariadna RIPOLL SERVENT and Florian TRAUNER (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, London, Routledge, 2018, p. 83-98.

⁹ I refer to the well-known study of Kay HAILBRONNER, "Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, No. 57, 1997, p. 1-49. Kay Hailbronner's study strongly contributed to diffusing a dogmatic and legalistic interpretation of this "obligation" among scholars and in the world of practice. For a radically different vision, see Guy Goodwin-Gill, "The Limits of the Power of Expulsion in Public International Law." *British Yearbook of International Law*, 47(1), 1975, p. 55-156.

¹⁰ It has to be underlined that various migration lawyers have interrogated and criticized this (constructed) obligation. For example, Sergio Carrera notes that there is no "wide consensus as regards the actual scope of that obligation, and the extent to which it relates to the right to leave and return by individuals of these same states as enshrined in international human rights instruments." Sergio CARRERA, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, London, SpringerOpen, 2016, p. 48. See also Mariagiulia GIUFFRÉ, "Obligation to Readmit? The Relationship between Interstate and EU Readmission Agreements." In Francesca IPPOLITO and Seline TREVISANUT (eds.), *Migration in the Mediterranean: Mechanisms of International Cooperation*, Cambridge, Cambridge University Press, 2015, p. 263-287. Also, Mariagiulia GIUFFRÉ, *The Readmission of Asylum Seekers under International Law*, Oxford, Hart, 2020, pp. 133-140. See also Vincent CHETAIL, "Is There Any Blood on My Hands? Deportation as a Crime of International Law." *Leiden Journal of International Law* 29(3), 2016, p. 917-943.

¹¹ "Experiences have demonstrated that to broker a deal the EU needs to offer something in return. In their bilateral readmission negotiations Member States are also increasingly offering other forms of support and assistance to third countries to facilitate the conclusion of such agreements, and the possibilities of applying this wider approach at EU level should be explored." see EUROPEAN COMMISSION, *The Global Approach to Migration One Year On: Towards a Comprehensive European Migration Policy*, COM(2006) 735 final, p. 9.

facilitating the conclusion of EU readmission agreements with third countries, while learning from the bilateral experiences of EU Member States. This statement did mark a watershed in the EU approach to negotiations on readmission, for it revealed the growing awareness on the part of the European Commission that its role as leader in the EU-wide readmission policy could be jeopardized should no new compromise be found.

Various Member States learned that migration governance is inseparable from the articulation of an array of interests and incentives, both material and immaterial, which may motivate the engagement of non-EU countries

However, despite its official claim to draw on bilateral experiences, the EU continued to rely on conditionality¹² in its cooperation on readmission, whereas most EU Member States had a different approach to it. Actually, as mentioned earlier, EU Member States have often used material and non-material incentives, not conditionalities, in order to ensure the cooperation of third countries on migration management issues, including reinforced border controls and readmission. Material incentives include the conclusion of financial protocols to support foreign direct investments and job-creating activities in third countries' labour markets. Also, technical equipment and capacity-building programmes aimed at upgrading their law-enforcement bodies are part of the incentives. Non-material incentives refer to strategic alliances aimed at reinforcing the international recognition of the political leadership of a cooperative

third country or at defending its voice in the international community.

At a bilateral level, the use of incentives (not coercive conditionalities) has been motivated by the perceptible empowerment of some third countries as a result of their proactive involvement in the reinforced control of the EU's external borders. For example, some Member States have experienced in their bilateral interactions with third countries located in the Mediterranean that the latter were prone to capitalize on crucial issue areas (the fight against international terrorism, intelligence cooperation, energy security, border controls, to name but a few) to defend their own interests and priorities. In other words, not only did some Mediterranean third countries become empowered, but their capacity to use their own leverage on their European counterparts was already a common practice, though subtly performed. The instrumentalization of migration for political and diplomatic purposes is not uncommon in the history of international relations. The matter is well-documented in the academic literature.¹³

Empowerment and Instrumentalization

To give a recent illustration of this instrumentalization, the mobility partnership (MP) that Morocco signed in June 2013 is inseparable from the attempt to legitimize its *de facto* presence in Western Sahara. Morocco skilfully linked the negotiations of its MP with the prior conclusion in March 2012 of an exchange of letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products (henceforth Fisheries Partnership Agreement – FPA). The FPA raised a lot of controversies in the EU owing to its geographical scope covering the territory and waters off the coasts of Western Sa-

¹² On how conditionalities have been ambiguously framed in the external relations of the EU, see Nora EL QADIM, "Lutte contre l'immigration irrégulière et conditionnalité de l'aide au développement." *Migrations Société* 2018/1, n° 171, p. 109-125.

¹³ Emanuela PAOLETTI, *The Migration of Power and North-South Inequalities: The Case of Italy and Libya*, New York, Palgrave Macmillan, 2011; Paolo CUTTITTA, "Non-governmental/Civil Society Organisations and the European Union-Externalisation of Migration Management in Tunisia and Egypt." *Population, Space and Place*, vol. 26, n° 7, October 2020; LEMBERG-PEDERSEN, Martin, "Manufacturing displacement. Externalization and postcoloniality in European migration control." *Global Affairs* 5(3), 2019, p. 247-271. Ahmet İÇDUYGU et Damla B. AKSEL, "Two-to-Tango in Migration Diplomacy: Negotiating Readmission Agreement between the EU and Turkey." *European Journal of Migration and Law*, vol. 16, n° 3, October 2014; Sarah WOLFF, "The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey." *European Journal of Migration and Law*, vol. 16, n° 1, 2014; Nora EL QADIM, *Le gouvernement asymétrique des migrations: Maroc/Union européenne*, Paris, Dalloz, 2015.

hara. The Popular Front for the Liberation of Saguia-el-Hamra and Río de Oro (henceforth Polisario Front) brought a legal action before the Court of Justice of the European Union (CJEU), in November 2012, against the Council of the European Union for “breaching the right to self-determination of the Sahrawi people and [for] encouraging the policy of annexation followed by the Kingdom of Morocco.”¹⁴ It is important to highlight that the signing of the MP with Morocco preceded the final judgement of the CJEU regarding the FPA and its compliance with international law. These chronological developments speak volumes about the guarantees that were offered at that time to Morocco regarding the seamless implementation of the FPA, despite the legal action taken by the Polisario Front. In February 2019, after years of legal disputes at the CJEU, the FPA entered into force¹⁵ with the full support of the European External Action Service, the European Commission and the approval of the European Parliament. Moreover, bilateral relations between Spain and Morocco were quickly reinvigorated following the official visits of King Felipe VI and King Mohammed VI to Rabat and Madrid, respectively, and the conclusion of 11 cross-sectoral bilateral agreements.¹⁶ It is worth noting that years of legal disputes between the Council of the European Union and the Polisario Front have not only “shed light on the European Union’s paradoxical position on the conflict in Western Sahara [where] economic and geopolitical interests prevail over the application of European and international law.”¹⁷ Such legal and policy developments have also contributed to constructing a sort of community of interests between the Kingdom of Morocco and a number of European actors, including Spain, France, the Council, the Commission and the EEAS. It is against this backdrop that the massive border crossing, dated May 2021, between Morocco and the Spanish enclave of Ceuta has to be understood.

Reportedly facilitated by the Moroccan border police, thousands of migrants crossed the border. Morocco was accused of blackmailing Spain for having accepted the hospitalization of the Polisario Front leader Brahim Ghali on its territory. This form of explicit retaliation against an EU Member State was arguably predictable, if we take into consideration the constructed community of interests detailed above. Moreover, there is a *déjà-vu* in the diplomatic pressures exerted by Morocco on Spain, although such pressures have been more explicit than ever. Perhaps, explicitness is the only new element that today characterizes the ability of non-EU countries to exert their own leverage in migration management matters with a view to shaping the behaviour of their European counterparts. That said, the visible tensions that recently affected the relations between Spain and Morocco cannot be simply dismissed as the result of so-called “blackmail,” as reported by the media.

The instrumentalization of migration for political and diplomatic purposes is not uncommon in the history of international relations

Behind the public coverage of the Ceuta case lies a highly sensitive factor that risks creating additional tensions between Morocco and the EU. Soon the CJEU will have to pronounce itself on another legal action brought by the Polisario Front following the entry into force of the February 2019 FPA. This action¹⁸ was brought against the Council of the European Union on 23 June 2020. Among many other pleas, it is aimed at denouncing the Council’s decision dated 28 January 2019, relating to the entry

¹⁴ Official Journal of the European Union, Action brought on 19th November 2012 – Front Polisario vs. Council. Case T-512/12 (2013/C 55/26), p. C55/14.

¹⁵ This is not the place to delve into the technical and legal details of this controversial ruling by the CJEU. Ángela Suárez-Collado and Davide Contini argue that “the Court used a counterfactual legal analysis that did not take into account the practice of the agreement, but rather the theory on which it was based.” see Ángela Suárez-Collado and Davide Contini (2021) “The European Court of Justice on the EU-Morocco agricultural and fisheries agreements: an analysis of the legal proceedings and consequences for the actors involved.” *The Journal of North African Studies*, doi: 10.1080/13629387.2021.1917122

¹⁶ Miguel González and Francisco Peregil, “Felipe VI pide a Mohamed VI ir ‘más allá’ en el control de la emigración.” *El País*, 13 February 2019.

¹⁷ Suárez-Collado and Davide Contini, op. cit. p. 16.

¹⁸ Action brought on 23 June 2020 – Polisario Front v Council. (Case T-393/20).

into force of the FPA, which, in the opinion of the applicant, “denies the existence of the Sahrawi people by using the expression ‘the people concerned’ [and] organizes, without the consent of the Sahrawi people, the exploitation of its resources.” By all accounts, the FPA-Western Sahara saga is far from being over. In the meantime, there is no question that Morocco is intent on showing its European counterparts that it remains vigilant on this pending case. Moreover, Morocco expects that the community of interests (unimpaired by the recent Ceuta events) will once again bear its fruits.

An Unsettling Sense of Déjà-vu

To date, patterns of interdependence have developed, despite the contrasting vested interests or the asymmetric costs and benefits that have constantly characterized the so-called “joint management of migration” in the Euro-Mediterranean area. The examples mentioned above show that informalization does not necessarily result from the need to make cooperation on migration governance more responsive to uncertainties. Rather, it may also result from the need to accommodate empowered third countries’ preferences and exigencies in a context marked by strong patterns of interdependence between EU and non-EU countries. Over the last twenty years, the EU and its Member States have witnessed the ability of some non-EU countries to buttress their own position in the field of migration governance with a view to defending their preferences and interests, be they connected with migration matters or not.

In other words, both the EU and its Member States have become receptive to forms of reverse diffusion, including the subjectivities and claims of their own Mediterranean neighbours. Ironically, those who claimed (and were expected) to act as socializers in the framework of recurrent regional consultative processes on migration and border controls – namely, those who were supposed to lead the consultations, provide guidelines and transfer norms values and

practices to recipient non-EU countries – have turned out to be constrained by the expectations and reverse conditionalities of the latter. Manifestly, there is no stable point from which to analyse socialization in international systems, for both socializees and socializers may play interchangeable roles.¹⁹ The drive for informalization in dealing with migration governance, in the broadest sense, constitutes a good indicator of how the EU and its Member States have, as it were, accommodated, if not internalized the preferences and subjectivities of some strategic Mediterranean non-EU countries.

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Though not fully studied in academia, reverse diffusion is perhaps as old as the externalization of migration controls. Empowerment of non-EU countries, reinforced interdependence, reciprocal patterns of socialization and reverse conditionalities all intersect to delimit a complex international system where diffusion is far from being unidirectional. What happened in Ceuta, a few months ago, generates more of an unsettling sense of déjà-vu than a surprise. Indeed, third countries’ intentions to exert pressure on their European counterparts by using the migration variable are not uncommon. Rather, as explained in this article, what is unprecedented is the explicitness of their intentions to instrumentalize migration. Today, Pandora’s box is wide open and no one knows how to close it.

¹⁹ For further details on reverse diffusion, see Jean-Pierre CASSARINO, “Beyond the criminalisation of migration: A non-western perspective.” *International Journal of Migration and Border Studies* 4(4), 2018, p. 397-411.