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TITLE:

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Publisher citation:

OpenAIR citation:

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THE EU MIGRATION CRISIS

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*Things fall apart.... The centre cannot hold*¹

A. Introduction

On 9 September 2010, the body of a man who had fallen from a BA flight to Heathrow was discovered in a wealthy, west London suburb.² It is hard to pinpoint any one precise origin of the migration crisis currently unfolding in Europe, but the migrant who fell from the sky, in his extreme efforts to enter a Europe otherwise closed to him, was to foreshadow something on a much larger scale which has shaken European integration to its very core. The mass movement of more than a million refugees and migrants (many fleeing conflicts in Syria, Afghanistan and Iraq) into European countries during 2015³ (the migration crisis so called), has generated an extreme level of disruption and disunity in the EU and its Member States as they strive to deal with the arrivals.⁴ But the crisis is, first and foremost, a humanitarian catastrophe of a sort unseen in Europe since the 1930s and 40s. Images from Lesbos and Lampedusa, among others, bear witness to the magnitude of the human cost of the crisis, which is still growing at an alarming rate at the time of writing.⁵ This note argues that the humanitarian crisis points to more deep-seated and long standing problems in the governance of the European Union. As the EU and its Member States struggle with the pressures of mass movement of displaced people, the treatment of those people exposes what can only be described as a crisis of European values. It is, in many ways, a stark exposé of shortcomings in the application of European fundamental rights, humanitarian law, and neighbourhood policy.

B. The Road to Crisis

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¹ WB Yeats, "The Second Coming" in *The Collected Poems of W.B. Yeats* (Macmillan, London, 1933) 210.

² P Peachey, "From Mozambique to Mortlake: The man who fell out of the sky", *The Independent*, 21 December 2012, available at <http://www.independent.co.uk/news/uk/home-news/from-mozambique-to-mortlake-the-man-who-fell-out-of-the-sky-8429552.html>

³ EUROSTAT, Asylum Quarterly Report (December 2015), http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report

⁴ See further, European Commission, COM (2015) 240 *A European Agenda on Migration* (13 May 2015).

⁵ UNHCR statistics: <http://data.unhcr.org/mediterranean/country.php?id=83>

What was seen as, and conveniently categorised as, a “peripheral glitch”⁶, a merely local issue confined to the Mediterranean extremes of fortress Europe has been evolving slowly over the last five years before it reached an unavoidable crescendo during 2015. In 2014, Daniela Caruso spoke of the “lost generation” of those who had literally been lost, drowned in the waters of southern Europe.⁷ Before the origins of the current crisis began to influence the shaping of Member State and EU migration strategy, in about 2009/2010, EU level migration policy had begun to gradually move from being the precious preserve of Member State sovereignty into being a commonly shaped policy. The original Schengen Agreement of 1985⁸ which provided for the gradual abolition of internal borders in the then EEC was largely influenced by the demands of a free moving trading community within parts of the EEC; trade, for now, trumped tight territorial control. The 1992 Maastricht Treaty and its Third Pillar can be seen as the starting point of the evolution of a common EU migration and border control programme.⁹ In tandem, the pre-Maastricht 1990 Dublin Convention¹⁰ led to a 2003 Community-wide agreement on the handling of asylum claims (the Dublin Regulation).¹¹ To complement the procedural agreements on borders, Frontex was established for the control of the Union’s external borders in 2004.¹² In 2013, Eurosur was created, also with the aim of deflecting illegal migrants from EU external borders. The whole package for “managing” Third Country Nationals coming to and within the EU was, or certainly seemed to be, a sleek, polished system, a modern bureaucratic success with its organisational efficiency, keeping others, non-Europeans, at bay so as to further success and progress within.

Individual Member States have played significant and contrasting roles in the EU migration narrative. Germany’s perspective has been fundamental in shaping communal positions on immigration and asylum in Europe; it is, therefore, not surprising to see that state’s

⁶ D Caruso, “Lost at Sea” (2014) 15 German Law Journal 1197.

⁷ Caruso (n 6) 1199.

⁸ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, 2000 O.J. (L 239) 19.

⁹ Regulation 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 (Schengen Borders Code), 2006 O.J. (L 105/1).

¹⁰ Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 1997 O.J. (C254/1).

¹¹ Regulation 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member State by a Third Country National, 2003 O.J. (L 50/1).

¹² Council Regulation 2007/2004, Establishing the European Agency for the Management of Operational Cooperation at the External Borders of the European Union, 2004 O.J. (L 349/1).

role in such a pronounced way in the current crisis. As Caruso points out, “It was in German political circles that the idea of Europeanizing immigration policies was born.”¹³ She characterises the original development of EU level migration policy as based on the need to externalise a German problem (dealing with a high levels of non-EU migrants in the 1980s) and redirect migrants away to other states.¹⁴ In contrast to those evolutionary stages, it might be said that the 2015/16 crisis has seen the externalisation of a German *solution*, as many other Member States were required to respond to the migrants flowing into Germany after the Merkel announcement of “all Syrians welcome”.¹⁵

One of the states most affected specifically by the “Syrians welcome” announcement, and by the Mediterranean crisis in general, has been Greece. The handling of asylum seekers and migrants within Greece was problematic even before the situation reached crisis level in the spring and summer of 2015. The European Court of Human Rights (ECtHR) found Greece to have breached the ECHR in its treatment of an Afghan migrant in 2011.¹⁶ Malta¹⁷ and Italy¹⁸ too have both been judged wanting by the ECtHR in terms of the human rights accorded to incoming migrants and the *refoulement* practices operated in both states. The existence of this jurisprudence, dating from the last 4-5 years, testifies to the fact that the values failure at European level has been incremental. The signs of both practical and legal breakdowns at Europe’s periphery were all visible but not recognised or acted upon sufficiently rapidly. Economic (Euro Crisis) and political (Arab spring) events both colluded to increase the problems in the vulnerable southern borders of the EU.

The Schengen rules, which exist to prohibit border controls as between Member States, have equally been breached. In 2013, controversial rules were introduced in response to the upheaval resulting from the Arab spring.¹⁹ By way of exception to the general rule, the new legislation allows Member States to reinstate internal border controls in the event of a failure to control the outer borders of the Schengen area.²⁰ This has allowed Member States to erect

¹³ Caruso (n 6) 1201.

¹⁴ *ibid.*

¹⁵ A Hall and J Lichfield, “Germany opens its gates: Berlin says all Syrian asylum-seekers are welcome to remain, as Britain is urged to make a ‘similar statement’”, *The Independent*, 24 August 2015, available at <http://www.independent.co.uk/news/world/europe/germany-opens-its-gates-berlin-says-all-syrian-asylum-seekers-are-welcome-to-remain-as-britain-is-10470062.html>

¹⁶ *M.S.S. v Belgium and Greece*, ECHR App. No 30696/09 (21 January 2011).

¹⁷ *Aden Ahmed v. Malta*, ECHR App. No. 55352/12 (23 July 2013); *Suso Muso v. Malta*, ECHR App. No. 42337/12 (23 July 2013); *Louled Massoud v Malta*, ECHR App. No. 24340/08 (27 July 2010).

¹⁸ *Hirsi Jamaa v Italy*, ECHR App. No 27765/09 (23 February 2012); *Khlaifia and Others v. Italy* (no. 16483/12) 1 September 2015.

¹⁹ S Peers, ‘Immigration and Asylum’ in C Barnard and S Peers (eds.) *European Union Law* (OUP 2014) 781.

²⁰ Regulation of the European Parliament and of the Council 1051/2013 OJ 2013 295/1; Council Regulation 1051/2013 OJ 2013 295/27.

razor fences to impede the flow of migrants from one state to another, thereby localising and exacerbating a suite of problems that might better be shared and resolved in common.²¹ The introduction of the legislation was accompanied by a decision to reduce the powers of the European Parliament by adopting regulations under the intergovernmental Justice and Home Affairs procedure.²² Effectively, therefore, the response to the needs of refugees was to reinstate the powers of the Member States, to negate the principle of solidarity as between the Member States and to lead to a migration *laissez-faire* approach in which whoever builds the highest fence or stops the most asylum claims is the short term winner. All of the apparently carefully crafted, vital loadbearing structures of EU migration and border policy, Schengen, Dublin, Frontex, have now come crumbling down in spectacular fashion over the course of 2015/16 in the face of the crisis which is still ongoing.²³

C. A Constitutional Crisis

The failures in the treatment of asylum seekers appear to stem, in part, from a perception that migration is, first and foremost, a negative externality to be mitigated, rather than an exercise in the fulfilment of constitutional obligations. Far from embracing the European principles of solidarity and the rule of law, several Member States appear, paradoxically, to reject those European principles in the face of a perceived threat to their own construction of European identity. Indeed, not only have the Member States failed to fulfil their human rights obligations stemming from European instruments, but the Union has collectively failed in its obligation to share burdens internally and externally as required by the spirit, if not necessarily the letter, of the 1951 Geneva Convention.²⁴

The refusal to adopt meaningful burden sharing,²⁵ accompanied by the reversion to physical impediments to movement within the Union, suggests that the horizontal relationship between the Member States has reverted to traditional notions of absolute territorial sovereignty. Of

²¹ See for example ‘Hungary defends border fences blocking migrants’, France 24, 10 June 2015, available at <http://www.france24.com/en/20150930-hungary-defends-border-fences-blocking-migrants>

²² Peers (n 19) 782.

²³ “Editorial comments: From eurocrisis to asylum and migration crisis: Some legal and institutional considerations about the EU’s current struggles” (2015) 52 CMLRev 1437-1450.

²⁴ See S Peers, ‘The Refugee Crisis: What should the EU do next?’ (2015), available at <http://eulawanalysis.blogspot.co.uk/2015/09/the-refugee-crisis-what-should-eu-do.html>

²⁵ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece OJ L 239/146. For academic commentary, see Peers 2015 (n 25).

course, this is by no means a uniform trend. There are instances in which the Union has demonstrated a stronger commitment to constitutional safeguards for asylum seekers. The judgment in *NS* in particular goes a long way to reordering the relationship between Member States by permitting them to refuse to recognise as sufficient the standards of fundamental rights protection in other parts of the Union.²⁶ This marks a significant change of direction for a union whose record in fundamental rights protection is open to criticism. Indeed, states with higher standards of fundamental rights protection have, on occasion in the past, been required to sacrifice those higher standards at the altar of mutual recognition.²⁷ That this will no longer be the case in respect of asylum seekers is to be commended.

Yet this does not result in common and higher standards of fundamental rights protection for the EU as a whole. Rather than an agreement to adopt higher standards in all Member States and a robust system to assist and enforce those standards, the judgment merely allows recalcitrant states to transfer the burden of values that are purportedly held in common.

Indeed, EU law lacks enforcement mechanisms in the event that the member states do not fulfil their obligations towards one another and towards citizens of third countries. There is therefore a conflict between fundamental constitutional principles. On the one hand, the Member States are notionally bound by the principle of solidarity. On the other, the law-making processes allow the Union to act only insofar as powers have been conferred by sovereign states; those states also retain control over the substance of legislation, particularly as regards areas that remain closely associated with the residual sovereignty of nations. It follows that, despite its lofty ideals, the Union is often only as principled as the lowest common denominator among its constituent states.

D. Prospects

At time of writing, after over six months of facing up to the reality of the migration crisis, the EU's long term commitment to fostering the bonding of its citizens,²⁸ by entrenching external frontiers at the same time as removing internal border obstacles, is collapsing.²⁹ Building up the privileged club for insiders for decades has generated an increasingly harder external border, and an increasingly harsher face towards outsiders.

²⁶ Case C-411/10 *N. S. v Secretary of State for the Home Department* [2011] ECR I-13905

²⁷ Case 438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779.

²⁸ Caruso (n 6) 1197.

²⁹ Schengen and External Borders were the subject of the Justice and Home Affairs Council on 25 February 2016 (Outcome of the Council Meeting, 6462/16 (Provisional)) against the background of growing tension between EU Member States on the issue of migration control: BBC News, Migrant crisis: Greece recalls ambassador from Austria amid EU rifts, <http://www.bbc.co.uk/news/world-europe-35658776>

It is apt also to recall that this is not the first time that European states have failed to respond justly and humanely to desperate people fleeing to their territories. Echoes of the Évian Conference of 1938 abound in the responses of states whose establishment of the European Union was intended to prevent a repeat of Europe's catastrophic failings in the 1930s and 40s.³⁰ The migrants crisis highlights a Europe which has, arguably, made little real progress in terms of how "outsiders" are treated by and within Europe. The EU is based on the upholding of values such as human dignity and human rights, all of which have been found seriously wanting during the unfolding of this worsening situation.³¹ At the 18/19 February 2016 European Council,³² there was a noticeable lack of focus on issue of rights and values. The discourse was again, just as at the December European Council,³³ one of stemming 'flows' (not actual people), securing borders and safeguarding Schengen. Article 1 of the Charter of Fundamental Rights of the EU, and Article 6 TEU, as well as EU Member States' international human rights obligations, appear to have been forgotten in the race to defend the Union from the migrant threat. The question is, what is being defended now? An integrated Europe without a clear commitment to rights and values is a Europe which has lost its very *raison d'être*.

³⁰ For an account of the Évian Conference in its broader context, see WI Brustein and RD King, 'Anti-Semitism in Europe before the Holocaust' (2004) 25 International Political Science Review 35 at 35.

³¹ Comparisons with the evolution of asylum policy in Australia, where there has been "a distinct trajectory of deterrence and punishment" is apt; C Tazreiter, "'Stop the Boats'! Externalising the borders of Australia and imaginary pathologies of contagion' (2015) 29(2) JIANL 142-158.

³² European Council Conclusions, 18-19 February 2016, EUCO 1/16

³³ European Council Conclusions, 18 December 2015, EUCO 28/15