ASSEMBLING CONTAINMENT AT EUROPEAN UNION BORDERS: BETWEEN INCLUSION AND EXCLUSION

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Abstract: The European Union migration governance is characterised by non-linearity and complexity. Such governance represents the competition of a multitude of actors that compete for power and visibility. The policies designed by its member states - based on the decisions of the European Court of Human Rights - oscillate between an inclusive and an exclusive migration governance approach. A concept that can offer a comprehensive understanding of the social and normative dynamics that transformed the Mediterranean Sea as a space of inclusion and exclusion is assemblage. The article suggests that the EU and its member states design migration governance policies on an instrumental assemblage of borders, territory and human rights. From the discussion of these assemblages, it emerges how the compromise developed by the European Court of Human Rights contributed to further exclusion and human rights violations in the Mediterranean Sea. Thus, assemblage offers a critical perspective on the normative limits of the migration management policies unfolding at EU borders.

Keywords: European Union, Migration governance, European Court of Human Rights, Assemblage, Human Rights.

INTRODUCTION

In the past years, the European Union (EU) faced a migration governance dilemma (Geiger & Pécoud, 2010). The policies developed so far by its member states oscillate between an inclusive and an exclusive migration governance approach. These opposing approaches are based on different normative outlooks that recognise a universal understanding of human rights and a statist one that recognises the state as the ultimate authority to initiate human rights protection.

To understand what are the theoretical before than the practical premises that shaped the Mediterranean Sea as a space of both inclusion and exclusion it is essential to identify the theoretical components from a legal philosophical perspective. The article suggests that in the development of this compromise there has been an instrumental assemblage (Sassen, 2008) of three concepts or components: (I) Borders; (II) Territory; (III) Human Rights. Each of these components has diverse interpretations in legal and social theory that can be instrumental for diverse purposes as in the case of migration governance. The assemblage of these concepts has been used instrumentally to transform the Mediterranean Sea into a space of both inclusion and exclusion depending on the political objectives of EU migration governance.

Assemblage thinking has been explored theoretically and methodologically by scholars in different disciplines to generate new knowledge in different social realities. As

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Savage (2020) suggests in the literature scholars have explored the concept of assemblage in a vast array of social phenomena, from international relations (Acuto & Curtis, 2014), various "global assemblages" (Ong & Collier, 2005) and the formation of cities (McCann & Ward, 2011), to particular policy formations such as pig farming practices in the European Union (Dunn, 2005), forest management practices in Indonesia (Li, 2007), and industries policies in New Zealand (Prince, 2010). In the migration studies literature, the concept of assemblage has been under-explored. Yet recently some articles with different elaborations on the concept of assemblage emerged. These studies range from the remittances in post-socialist countries (Rubinov, 2014), the assemblage of migrants' temporalities (Collins, 2018) to migration policy assemblages in Turkey (Düvell, 2019) and the biopolitics of migration assemblages (Wiertz, 2020). However, most of these works use the concept of assemblage without a solid elaboration of the many and at times contrasting characteristics of the concept itself.

By adopting an assemblage approach, scholars of migration can move beyond simplistic and linear models of migration and explore the complexity, contingency, and interconnectedness of migration processes. This can lead to a more nuanced understanding of the factors shaping migration and the diverse experiences of migrants and host communities. The article explores how assemblage can be used to explain heterogeneous elements that form contemporary EU migration governance. In doing so, the article has a twofold aim first it applies the concept of assemblage to EU migration governance that in the literature is still underexplored; second, it shows how the concepts of borders, territory and human rights are socially constructions that can be used instrumental to pursue an exclusive or inclusive migration policy. The article aims to shed light on some specific dynamics of EU migration governance by identifying how the assemblage represents a "political" decision that transforms the sea in a space of containment.

The assemblage has to be understood as a broad conceptual descriptor appropriate to explore heterogeneous systems characterized by non-linearity and complexity. Yet it is important to stress that these assemblages - that the EU and its member states design from the decisions of European courts – cannot be considered causal. A causal analysis demands significant empirical data to account for the real efficacy of, first, human rights courts' decisions on truly affecting states' migration policy; second border management to control migration in practice. Thus, the paper suggests that some dynamics indicate that states design policies that are a logical answer to the compromise that the courts worked out.

The article is organised as follows. Section 1 introduces and the concept of assemblage in the EU migration governance. Section 2 discusses how borders changed over time and how those are conceptualised in the assemblage. Section 3 explores territory as a critical concept for the EU migration governance showing how those are assembled in migration governance. Then, Section 4 offers a theoretical perspective on human rights to identify the different and times contrasting elaborations emerging in the assemblage. To do so, the article investigates different disciplines following an interdisciplinary perspective drawing from border studies, law, and social theory. Finally, Section 5 concludes by suggesting how the assemblage of borders, territory and human rights can offer new insights in the emerging field of assemblage thinking.

1. THE CONCEPT OF ASSEMBLAGE IN MIGRATION GOVERNANCE

The first conceptualization of assemblage can be traced to the work of French theorists Gilles Deleuze and Félix Guattari (1988). Starting from this first conceptualization, in the social sciences in recent years there have been more elaborations on the concept of assemblage (Marcus & Saka, 2006; Phillips, 2006; Sohn, 2016). Assemblage can be employed in three ways: first, as a broad descriptor able to combine heterogenous elements; second, as an ethos committed to explaining the world; and third, as a concept related specifically to the conceptualizations of Deleuze and Guattari (Anderson & McFarlane, 2011, p. 125). Another point is that in an assemblage "heterogeneous elements can hold together without actually forming a coherent whole" (Allen, 2011, p. 155). Others propose to frame assemblage theory "[..] as a conceptual toolbox that is well suited to explore complex systems characterized by non-linearity and far-from-equilibrium operating trajectories" (Sohn, 2016, p. 186). Indeed, there are many elaborations of the concept of assemblage in different disciplines (Delanda, 2016). Yet here the point is not to present a comprehensive account of the concept of assemblage. Instead, in the article the concept of assemblage is intended in its most descriptive sense without any kind of theoretical conceptualization based on Deleuze and Guattari works. The article follows the approach developed by Sassen (2008) that uses the concept as a descriptor able to explore complex structures by combining heterogeneous elements aimed at explaining social processes (Sassen, 2008, p. 5). Moreover, the concept of assemblage should be used as a tool not as a simple result (Aneesh, 2017, p. 129). In doing so, it may be possible to identify the different dynamics that come to form the assemblage of borders, territory, and human rights in EU migration governance.

The migration assemblage discussed in the next sections is an important instance in which the concept of assemblage can be used to identify non-linear dynamics that characterize EU migration governance. It is important to stress that the components assembled (1) are interdependent but maintain a level of specificity; and (2) have variable levels of performance. To fully grasp the concept of assemblage it needs to be elaborated as a descriptor for phenomena characterized by complexity and heterogeneity. The article suggests that the concept of assemblage can be fruitful for migration studies only if intended as a container for complex social and political phenomena such as the control of the European borders. Thus, the concept of assemblage provides a valuable framework for understanding the complexity of migration governance in the European context, where diverse elements come together to shape policies and practices that can have significant implications for migrants and human rights.

The migration governance developed by the EU and by the member states overlooking the Mediterranean Sea from a legal perspective has been often designed on the cases decided by human rights courts and quasi-judicial bodies that decide between two competing traditions of political philosophy. The first is a universal/inclusive framework that considers human rights as integral to the individual independently from the compliance with formal conditions set by immigration management policies. The second tradition is a statist/exclusive one that sees the state as the sole authority able to give access to its territory and to set the legal conditions for access to human rights protection (Thomas, 2013, p. 412; Paz, 2016, p. 6).

The transformation of the Mediterranean Sea into a space of both inclusion and exclusion it's the representation of the jurisprudence developed by the European Court of Human Rights (Paz, 2016, p. 7). The Court adopted the territoriality-based compromise between inclusion and exclusion. In doing so, it reinforces the idea that human rights protection is dependent on the physical presence of the migrant on the territory. On the one hand, the Court has articulated an inclusive and universal principle of human rights protection. On the other hand, it has produced a new concept of territoriality by adopting the territoriality-based compromise as furthered exclusion (Paz, 2016).

To construct an inclusive governance policy, it is necessary to adopt a Universalist understanding of human rights protection. By inclusive policy, it is meant one that gives direct access to the territory of the destination state and that considers the borders as a point of entrance to human rights protection. In doing so, the migrant shall be protected from the moment he or she is in proximity to the borders of the destination country. Inclusion here means temporary protection while awaiting the outcome of the protection formal processes set out by the destination state. This indeed does not prefigure any kind of inclusion within the polity of the state. Migrants are saved because found in distress at sea and are provided with temporary shelter and human rights protection. A Universalist reading of human rights protection presupposes that the lives of the migrants in distress shall always be saved and given access to protection.

The exclusive or statist governance initiates protection of migrants if they comply with the formal conditions set out by the state which require the individual to be present in the territory of the state. In doing so, it reinforces the idea of territoriality because "the state has the sole authority to decide who may enter its domain, under what conditions and with what legal consequence" (Paz, 2016, p. 1). In this second approach, the state has absolute dominion over the border and can permit entrance only to those individuals who comply with the formal conditions of its migration governance regime. Merely getting in the proximity of the border does not by itself represent a condition to activate protection by the state. Moreover, jurisdiction initiates only upon entering the territory, thus proximity does not entail any legal obligation for the state. The state utilizes defined physical boundaries to stop migrants from getting in, either by land or by sea, so that their entry does not activate the state´s obligations to protect migrants.

Borders, territory and human rights are contested concepts that if assembled as in the case of the cases decided by the ECHR illustrate a coherent assemblage that contributes to transforming the Mediterranean Sea as a space of both inclusion and exclusion. The article explores different disciplines following an interdisciplinary perspective drawing from geography to law and social theory. In particular, the three concepts have not received enough attention in migration scholarship from a legal perspective. Moreover, these concepts must be theoretically and historically grounded to show their transformations over time. In doing so, it is possible to identify the latest developments and explain how these changes have contributed to inclusionary and exclusionary policy assemblages.

The next sections offer an investigation of the three components of the assemblage to show how these are assembled in different ways to pursue exclusive or inclusive

migration governance. The three components can be conceptualised as different and at times contrasting ways to achieve the overall political objective: curtailing the arrivals of migrants at EU borders.

2. Borders

We live in a time in which borders in certain contexts disintegrate due to the forces of neoliberal globalization (de Sousa Santos, 2002; Novak, 2019). Yet in other contexts, in relation to human movements, new borders emerge as obstacles to human circulation and movement (Leòn & Overbeek, 2015; Ramji-Nogales, 2016). In this scenario, for some we assist at a continuous process of border reconfiguration along lines of political and military power (Cuttitta, 2007, p. 7). Yet for others, the military and economic functions of borders are declining but are expanding in the control of irregular migrants (Andreas, 2003). In the last forty years, we made incredible steps in abolishing the national borders that impeded the movement of capital nevertheless we made no progress with the free circulation of human beings (Popescu, 2011). We are going towards the development of an idea of "fortresses" not only in Europe but also around the world (Albrecht, 2002).

When we study borders, we should look at them as spaces not just as lines of division (Zanini, 1997, p. xvii). It is in this space that different discourses produce the border in processes of "constant encounter, tension, conflict and contestation" (De Genova et al, 2015, p. 69). In doing so, borders emerge as spaces in which a multitude of actors participate in the process of border configuration. (Vaughan-Williams, 2009; Geiger & Pécoud, 2017). Yet it is important to stress that these processes of bordering do see the participation of migrants that influence and shape the space of the border (Mainwaring, 2016). Thus, it is necessary to understand that border configuration does not represent a simple and linear binary logic of structure/agency but as a representation of a more complex environment in which a crucial and active role is played by migration (De Genova et al, 2015). This articulation of bordering signals that in many cases the incentive for border configuration is given by migrants' movements and struggles (De Genova, 2017). To comprehend the struggles and opposite discourses at the border it is important to realize that the border is the creation of two antagonist forces with different power balances that struggle either to open or to close the border (Chetail, 2016; Abizadeh, 2008).

According to Balibar (2012) trying to define what a border is runs the risk of "going around in circles, as the very representation of the border is the precondition for any definition" (Balibar, 2012, p. 74). Balibar continues suggesting that borders possess an "equivocal character". (Ibid, p. 76). The precondition for any attempt to define a border is to recognize that the border is the representation of the social and that any representation of the social is based on a conceptualization of the border (Novak, 2017, p. 851). In the constructivist approach, borders are spatial categories that change with social changes and are characterized by fluidity in the daily manifestation of borders (Popescu, 2011). Moreover, in the design of borders pursued by social agencies, we do see a strategic use of borders as a resource to satisfy specific policy objectives as the EU migration governance

shows (Sohn, 2016). Other conceptualization close to the Marxist tradition stresses that borders are functional to accumulation because are the production, or the reproduction of different capitalist geographies (Anderson, 2012; De Genova, 2016).

It can be suggested that borders represent the result of the competition of different social and economic forces to design a space that is dynamic, fluid, and can be used as a resource for political reasons. In this spectacle, borders underwent significant transformations in relation to the number (proliferation) and the diversity (heterogenization) of borders (Mezzadra & Neilson, 2013, p. 3). Thus, borders are not merely geographical lines but complex social institutions that see the participation of several actors that create, manage, and shape borders (Hampshire, 2016, p. 549). Borders are not static nor neutral but historically contingent political dynamics of space division (Vaughan-Wiliams, 2009, p. 48.) As Nail (2016) suggests "[…] contemporary borders are largely hybrid structures composed of a mixture of different historical bordering techniques" (Nail, 2016, p. 17). These "bordering techniques" are particularly visible in the EU migration governance unfolding in the last years of the so-called "Migration Crisis". In fact, in designing these management policies these actors attribute to the border a performative function (Balibar, 2012, p. 79; Johnson et al, 2011): the border can include or can exclude (Agnew, 2008, p. 180). Indeed, the capacity to either include or exclude should be regarded as a significantly flexible instrument. In fact, inclusion and exclusion should not be considered in opposition but in continuity with each other (Mezzadra & Neilson, 2013, p. 7).

The elaborations of the concept of border presented above can be evaluated with the EU migration governance. Over the last 20 years, the EU has designed a complex multilateral border regime (Hampshire, 2016, p. 541; Campesi, 2018, p. 198) that aimed at creating a "securitized" and "humanitarian" European border (Pallister-Wilkins, 2022; Cuttitta, 2018). On the one hand, the EU has developed a legal and quasi-legal framework that encompasses directives, regulations, and bilateral and multilateral agreements with third countries. On the other hand, the policy framework was based on the concept of "integrated border management" (IBM) that aims at redefining the "political geography of border control" by the participation of different national and supranational actors and agencies (Campesi, 2018, p. 199).

The significance of the EU approach became evident in light of the so-called "Migration Crisis" during which it appeared evident to the EU the need to reinforce external border controls. The EU inaugurated this kind of border management policy during the Valletta summit in 2015.[2] Nonetheless, the main aim of the EU was to boost cooperation with third countries by designing bilateral or multilateral agreements, often in the form of soft law, to reinforce European border management. Examples of the externalizing migration management policies instigated by the EU are the Turkey-EU statement (2016), the Libya-Italy memorandum of understanding (2017), and the Morocco-Spain (2019) agreement (Moreno-Lax & Lemberg-Petersen, 2019, p. 12). What the EU has developed is

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[2] See the priorities of the Action Plan adopted during the Valletta Summit in 2015. Available from: https://www.consilium.europa.eu/media/21839/action_plan_en.pdf

a complex system of national and international actors motivated by the aim of reinforcing the control of European borders to diminish the arrival of migrants and the death at sea (Cuttitta & Last, 2019; Steinhilper & Gruijters, 2018).

The border is transformed into a space, determined "from distance" by EU governance structures, in which legal obligations and international responsibilities are blurring. These processes are part of a wider transformation, particularly evident in the European contest of "remote control" (Guiraudon & Lahav, 2000, p. 178) or "control from distance" (Bialasiewicz, 2012, p. 852) or more generally of "shifting borders" (Shachar, 2020). It follows that the actors involved in migration governance aim to move the control activities to third countries through a series of legal and quasi-legal instruments that are part of externalization policies (Moreno-Lax & Lemberg-Petersen, 2019). A securitized border displays two characteristics: first, it renders the containment of migration flows; second, it enables an externalization of search and rescue activities to third countries.

It follows from the above analysis that borders are contested concepts that can be assembled in different settings to obtain a specific policy outcome. In the assemblage - based on the decisions of European Courts – borders can include or exclude. The humanitarian or inclusive narrative considers saving lives at sea and addressing the root causes of global migration as the priorities for a human and decent migration governance policy (Cuttitta, 2018). To do so, borders are regarded as points of access to the protection of human rights (Paz, 2017). In fact, for migrants to trigger the protection is sufficient to be in proximity of the border thus jurisdiction is aligned with physicality and grounded in proximity (Paz, 2016, p. 26).

By contrast, borders can be conceptualized as an exclusive migration governance strategy by following a deterrence narrative (Gammeltoft-Hansen & Hathaway, 2014). It follows that borders permit entrance only to those individuals who comply with the formal conditions set out by the state. However, in some cases countries put in place instruments to make r more difficult to reach the border as shown in the externalizing policies pursued by Spain and Italy (Ghezelbash et al., 2018). They do so by avoiding any direct international responsibilities. In other words, in the exclusive strategy borders are regarded as an obstacle to access and thus to the protection of human rights (Paz, 2017). For migrants to trigger the protection is not sufficient to be in proximity of the border but they must access the border to initiate state protection (Paz, 2016, p. 26).

Thus, the article highlights the dynamic and multifaceted nature of borders in contemporary society, emphasizing their role in shaping migration governance and human mobility. It underscores the importance of considering borders as complex spaces where various forces and actors interact and compete, leading to different outcomes and policy objectives. The dichotomy between inclusive and exclusive border strategies is particularly relevant in the context of migration governance, where the balance between security and human rights remains a significant challenge.Inizio moduloFine modulo The next section explores the concept of territory in its specificity to show how this concept can be instrumental in the exclusion of migrants from accessing physically the territory of

the destination state. Moreover, territory represents a contested concept that has different and at times contrasting elaborations depending on which discipline is studied.

3. TERRITORY

Territory is an indefinite term or concept that usually refers to a section of space occupied by individuals, social groups, or institutions (Gregory et al, 2011, pp. 746-747). Other elements that emerge in the process of space occupation according to Hassner (1997) are material elements such as land, functional elements such as the control of space, and symbolic dimensions like social identity (Hassner, 1997, p. 57). Indeed, these elements do represent what for political geographers has always been territory: the concurrent expression of the connections between space, power, and knowledge (Agnew, 1994; Paasi, 2003). Nonetheless, in other elaborations of the concept, there is a significant link with the concept of sovereignty as the last authority that institutionalizes and maintains territory (Flint & Taylor, 2018, p. 156). These processes of territory formations are part of what Paasi (2003) calls "the institutionalization of territories" meaning "the process during which territorial units emerge as part of the socio-spatial system and become established and identified in social action and social consciousness" (Paasi, 2003, p. 113).

The concept of territory has been under investigated due to its volatile nature (Elden, 2013, p. 3.; Banai et al, 2014, p. 99). Gottman (1975) presents one of the first investigations in the concept of territory and its relationship with state authority, he argues that "The concept of territory, with its material and psychological components, is a psychosomatic expedient necessary to preserve freedom and the variety of separated communities in an interdependent and accessible space" (Gottmann, 1975, p. 45). Indeed, the construction and in particular the control of a territory needs a constant process of exchange as Sack (1986) puts it "they are the results of strategies to affect, influence, and control people, phenomena, and relationship" (Sack, 1986, p. 19). It follows that territory as a component is used strategically to influence but more importantly to control people. Brought to its conclusion such elaboration of territory prefigures an inside/outside dichotomy that can trigger exclusion and closed border policies (Vaughan-Williams, 2008, p. 336; Basaran, 2008).

The dynamics that shape territory in geographical and political dimensions should not be understood as a-historical because in doing so there is a risk of missing its complexities (Elden, 2013, p. 6). Moreover, as argued by Foucault (2007) "territory is no doubt a geographical notion, but it's first a juridico-political one: the area controlled by a certain kind of power" (Foucault, 2007, p. 176). The only institutional actor with the power to design territory as a juridic-political category is the nation state. Yet it is crucial to recognize the complexity of territory as a concept otherwise as Sassen (2013) points out, "In much scholarly writing, territory has largely ceased to work analytically because it has been reduced to a singular meaning - nation state territory" (Sassen, 2013, p. 22). Thus, to overcome what Agnew (1994) called the "territorial trap" (Agnew, 1994), it is necessary to go beyond the linear correlation nation-state/ territory to shed light on the multitude of actors and forces that do shape territory as a dynamic and performative concept.

For some scholars, it appears evident that in the last decades, we moved beyond the Westphalia system based on state territoriality (Banai et al, 2014). In this movement away from such a system it became popular the idea of "the end of territories" (Badie, 1996). Yet for others, Westphalia's territoriality is still present nowadays (Khan, 2012). Nonetheless, what we are witnessing is not exactly an "end of territories" but a constant process of territorial reconfiguration along lines of economic and political space that can shape the construction of territoriality (Brenner & Elden, 2009, p. 374). The construction of territoriality from a legal perspective is still conceptualized at the national level and successively is projected at an international level. It follows that the nation states despite being supported by other multilateral institutions maintain the legal capacity to project an idea of territory and successively to construct territoriality.

Instances of these dynamics can be recognized in the territoriality law-making of different nation states (Mickelson, 2014). Examples following from migration management show the use of executive soft law agreements to securitize border control like in the Libya-Italy memorandum of understanding. Further, at EU level territoriality is designed with soft law instruments like in the EU-Turkey statement. Following Sassen (2013), these instances show that territoriality, as a legal construct, is not directly related to territory because it can go beyond the territory itself. In so doing, the meaning of territory transcends its meaning by encapsulating the capacity to design "territorial informal jurisdiction" (Sassen, 2013, p. 23). Here the theoretical point emphasized by Sassen (2013) that opens new theoretical perspectives is the idea that these complex spaces emerge as "distinct territories inside national-state territory itself" (Ibid).

Territory has a critical relation with jurisdiction at the border. Territory in fact should be regarded as a geographical domain in which people, through institutions, exercise jurisdiction over a group of people (Moore, 2015, pp. 26-27). For the policies exercised by a state at the border, the relation between a specific conceptualization of territory and jurisdiction is visible in the application of migration governance policies. Moreover, this conceptualization is based on the compromise developed by the courts and quasi-judicial institutions that transformed the human rights application to what Paz (2017) calls "access" means the ability to establish territorial presence (open territoriality), or to enter the territory (strong territoriality) or to come within the control of the state or its agents (neo-territoriality) (Paz, 2017, pp. 602-603). Therefore, affluent states were able to design a system of governance that is significantly linked to the concept of territory and its conceptualization can achieve an inclusive or exclusive governance policy (Cuttitta, 2018).

While designing inclusive migration governance strategy states conceptualize territory in relation to access, jurisdiction, and proximity in the following ways. First, human rights protection is not dependent on the "access" to the territory of migrants but on the simple proximity to the territory. In doing so, states reinforce the concept developed by the ECtHR in Jamaa vs. Italy that maintains that human rights jurisdiction is "essentially territorial" and is aligned with physicality and proximity (Paz, 2016, p. 26). In this case, the territory is conceptualized as an open point of access for migrants. Territory represents

a space not only dominated by the law of the state but also as a space of humanitarianism in which the "right of escape" is defended independently from the compliance of the rule of the state (Di Cesare, 2017, p. 18). In so doing, territory becomes an inclusive concept that reinforces the idea that the simple territorial presence (open territoriality) triggers human rights protection going beyond the statist vision of the concept of territory. Human rights protection applies extraterritorially meaning independently from migrants' access to state territory. It follows that states assume an extended view of human rights that if brought to the extreme can become an open borders policy that sees no territorial limitation to human rights protection (Ibid, p. 28).

By contrast, designing an exclusive migration governance strategy brought to the extreme can become a closed borders policy. To do so, it is first necessary to recognize human rights jurisdiction as linked to access to the territory because migrants must enter the territory (strong territoriality) and come under direct control of the state (neo-territoriality) (Paz, 2017, p. 603). In this approach jurisdiction is rooted in strong territoriality meaning that human rights obligations are strictly territorial (Paz, 2016, p. 31). Second, state jurisdiction and thus state responsibilities will manifest themselves only if there is direct access to the territory of the destination state. Yet this means that migrants must get close enough to the border to be considered for state protection. In conceptualizing territory, some states pursue policies that make it more difficult for migrants to reach the territory of the state. For instance, states externalize search and rescue operations to third states to avoid international responsibilities.

The interplay between territory, jurisdiction, and human rights in migration governance is a critical aspect of understanding how policies are designed and enforced. The conceptualization of territory can have profound implications for the inclusion or exclusion of migrants and the protection of their rights. It illustrates the complex and dynamic nature of border control strategies in an evolving global context. The last concept of human rights is explored in the next section to show how the assemblage comes together to explain policy processes characterized by non-linearity and far-from-equilibrium operating trajectories. It further emerges how human rights can be conceptualised following a specific ideological understanding that transforms human rights as instruments of both inclusion and exclusion thus contributing to a migration governance assemblage.

4.   HUMAN RIGHTS

The human rights movements in the last decades have provided the globe with "emancipatory vocabulary and institutional machineries for people across the globe" able to design an international legal system that promotes a specific idea of justice. (Kennedy, 2002). In other words, as Macklem (2015) suggests, "Human rights are the vocabulary of justice for our globalized world" (Macklem, 2015, p. 1). Nonetheless, these elaborations of human rights as promoters of justice worldwide cannot be regarded solely as a positive and dynamic force. While human rights in theory were instruments to promote justice, they also possess some critical features that make them problematic to accept tout court (Frankenberg, 2014). First, human rights have not always complied with the aspiration of justice in part due to the dominance of a moral understanding of human rights (Macklem,

2015, p. 185). Second, to design a system in which the search for justice is the primary objective, it is necessary to conceptualize human rights as an international legal entitlement able in theory to mitigate injustice across the world (Ibid., p. 186).

From a strictly legal point of view, human rights are international law norms. It appears from Macklem's argument that human rights have a relation with the international legal order in at least three ways. First, human rights monitor the structural dynamics of the international legal order (Lorca, 2017, p. 472). Second, they mitigate the negative consequences of how the international legal order is designed. And third, the human rights framework, by controlling and mitigating, confers legitimacy to the international order. Indeed, these arguments unfold in the language of human rights (Lorca, 2017, p. 473). To unveil some of the dynamics that characterize the human rights discourse it is crucial to identify what the ideological premises of such an enterprise are.

The pervasive relationship between human rights and the history of capitalism is acknowledged by Badiou (2010) who argues that human rights involve a "cult of freedom (including, of course, freedom of enterprise, the freedom to own property and to grow rich that is the material guarantee of all other freedoms)" (Badiou, 2010, p. 2). Another criticism of the human rights enterprise is suggested by Agamben (1998) who argues that human rights are used, "for the sake of the supposed representation and protection of a bare life that is more and more driven to the margins of nation-states, ultimately to be recodified into a new national identity" (Agamben, 1998, p. 133). Yet how it is possible to radically change human rights politics? Marks (2009) offers an important point, she warns that "rather, there exist some "necessary factors", in the shape of limits and pressures which orient change without actually predetermining it" (Marks, 2009, p. 17). In other words, a project of mobilising human rights for radical democratic purposes now faces some very significant challenges and restrictions following from recent history of neoliberal capitalism (McLoughlin, 2016, p. 17).

Many scholars seem to agree that the human rights project was developed in the 1970s. Yet some like Klein (2007) suggest that the human rights movement developed in relation to the neoliberal project, and thus to understand human rights ideology we should concentrate on its relationship with the history of capitalism (Klein, 2007; O'Connell, 2007). Others like Moyn do accept the proposition that human rights emerged in the 1970s; however, they do not recognize the direct causal relation between the human rights project and neoliberalism (Moyn, 2014). Moyn (2014) argues that human rights and neoliberalism were developed in the same years and share some characteristics. Nonetheless, they remain two parallel but separate projects (Moyn, 2014). Thus, indeed there is a critical relationship between neoliberalism and the human rights enterprise. Nevertheless, it is rather difficult to argue about a direct causal relation.

Another important element of the human rights projects as pointed out by Marks (2012) is the idea developed by some scholars such as Raz (2010) and Moyn (2014) of the "myth of presumptive universality" of human rights (Marks, 2012). While the universality of human rights can be challenged, it is important to consider the difficulties posed by the human rights application. According to Raz (2010), the human rights

project faces two problems: first, only limited practices exist to monitor and enforce the international protection of human rights; second, some claims of human rights are culturally biased and imposed by the West across the world (Raz, 2010). Hence, for some, the human rights movement can be regarded as a-political and a-ideological language aimed at enhancing global justice. However, the implementation of such a project is problematic, as Koskenniemi (2010) points out "Because there are no authoritative lists of prelegislative rights, political actors are always able to dress their claims in rights language" (Koskenniemi, 2010, p. 49). In other words, human rights projects to maintain their ideological and political "independence" should not be committed to a specific theory of economic development, security, or any other "ideological" constraint (Ibid, p. 54).

Perugini and Gordon (2015) suggest that the being the human rights language unfolds in "the ethical, legal and practical construction of practices of domination around the world" (Perugini & Gordon, 2015, p. 11). Perugini and Gordon's book *The Human Right to Dominate* offers some interesting and critical reflections that merit some attention. First, human rights and violence are not antithetical but coexist in the unfolding of human rights enterprises. Second, they present historical instances that show the relationship between human rights and domination. Third, they identify human rights as a language that frames events on legal and moral grounds to secure political legitimacy (Ibid). Thus, according to the authors, human rights "constitute a highly flexible political discourse with the capacity to be constantly appropriated, translated, performed, and retooled in different political arenas" (Ibid. p. 12). In so doing, it is important to recognize the flexibility and performativity of human rights discourses and to make a further effort to detect the invisible relations between governments, international organizations, and NGOs in pursuing global justice or domination.

It is indeed difficult to agree with one of the two positions, but a useful exercise can be to present some features of the human rights language that are common to both streams. First, the power of human rights lies in the capacity to articulate moral or ethical convictions in legal international terms and successively support them by naming and shaming (Murdie & Davis, 2012). Many actors participate in this complex exercise: governments, diplomacies, international organizations, and NGOs, among others. Second, these articulations are presented to the public opinion as neutral and a-political. In doing so, a "joint project" is enabled between different actors to engage in the effort of bringing global justice or domination around the world. Third, human rights tend to be presented as universal legal entitlement to reinforce their moral and political legitimacy. Fourth, a crucial role in promoting human rights narratives is played by activists (Klein, 2007).

Human rights narratives cannot avoid the ontological construction developed from the end of the Cold War (Baxi, 2007; Falk, 2008). On the one hand, a modern understanding of human rights considers human rights an instrument of exclusion. On the other hand, a contemporary understanding of human rights contemplates human rights as an instrument of inclusion (Baxi, 2006). The article suggests that this dichotomy is displayed in EU migration governance. In the application of inclusive border management policies, a specific elaboration of the concept of human rights materialises. First, human rights are considered inherent to the individual independently from the individual compliance with

formal conditions set by migration management policies (Thomas, 2013). In doing so, human rights protection is initiated by the simple encounter between the state agents and migrants (Mann, 2017). Second, by following such a reading of human rights, state agents consider human rights as universal independently from the physical presence inside the territory of the destination country (Paz, 2016). Therefore, in the application of inclusive strategies, human rights jurisdiction is grounded in proximity to the border without any formal restriction of access to the territory.

In the exclusionary strategy, human rights are grounded in physicality thus establishing territorial presence in the destination state or coming under the jurisdiction control of the state agents (Paz, 2017). Moreover, proximity does not entail any legal obligation for the state because jurisdiction is aligned with territory (Paz, 2016). The legal protection depends on the establishment of a direct presence inside a state (Paz, 2017). The main outcome of such an understanding of human rights is that states externalize interdiction thereby avoiding any direct fingerprint that would activate jurisdiction and human rights obligations (Moreno-Lax & Lemberg-Petersen, 2019). These externalization practices aim to reinforce the notion of contactless control by promoting contactless responsibility and contactless jurisdiction raising significant concerns for the ones in need of international protection (Giuffré & Moreno-Lax, 2019). Moreover, from several examples of multi-actors' contactless migration management, there emerges a tension between international responsibilities and jurisdiction (Moreno-Lax, 2020).

The relationship between human rights, justice, and global governance is multifaceted and subject to various critiques and challenges. While human rights have the potential to be powerful tools for promoting justice and protecting human dignity, they can also be co-opted, selectively applied, and used to justify domination. The ideological premises of human rights, their connection to capitalism and neoliberalism, and their cultural implications all contribute to the complexities of their implementation and impact on global justice. In the context of migration governance, the application of human rights can vary significantly, leading to different outcomes for migrants and challenges related to jurisdiction and international responsibilities.

Thus, the theoretical concepts that compose what has been known as EU migration governance are often based on simplistic dichotomies. On the one hand, we see a statist, excluding, and closed category of human rights. On the other hand, we see a universalist, inclusive, and open category of human rights. Yet the core argument here is that human rights as framed so far can dominate and exclude migrants. Indeed, the positive power of human rights here is recognized. However, in a world dominated by affluent states, the positive discourse around human rights is strong and visible. Yet it is important to shed light on the negative impact of human rights: exclusion of human beings based on ideological grounds that are persecuted through highly specialized infrastructure of knowledge and power.

5.   Conclusion

Assemblage is used as a descriptor able to explore complex structures by combining heterogeneous elements aimed at explaining social processes. The strength of the concept

of assemblage is the ability to encompass the several concepts that compose migration governance policies by describing the intersection of these concepts. In doing so, the assemblage offers a critical lens that can be useful to identify some trajectories that in some instances may collide yet in other instances may not. Nonetheless, independently from the level of performance, the assemblage is a fertile concept able to explore systems characterized by complexity, non-linearity, and dynamicity as EU migration governance.

The EU migration governance is characterized by non-linearity and complexity. A multitude of actors compete for power and visibility and thus influence the design of migration governance policies. In particular, the EU and some of its member states have designed policies based on the compromise developed by the ECHR that transformed the Mediterranean Sea into a space of inclusion and exclusion. The article suggested that this transformation is based on an instrumental assemblage of borders, territory, and human rights. On the one hand, it indicates that the three concepts can be assembled in migration governance to design inclusive and exclusive policies. On the other hand, it is important to stress that these assemblages are interdependent but maintain a level of specificity.

The article shows how assemblage can be a fruitful concept able to explore heterogeneous elements emerging in contemporary social processes. By assembling these concepts within an assemblage theory framework, researchers and analysts can provide a more comprehensive understanding of the complex dynamics that underlie the exclusion of migrants. This approach emphasizes the fluidity and contingency of these concepts and how they interact to shape migration policies and practices. It also highlights the potential for change and transformation in the assemblage through advocacy, policy reform, and shifts in public attitudes.

The article contributes to the literature on migration and borders by offering an interdisciplinary outlook on how the concepts of borders, territory, and human rights can be assembled in inclusionary and exclusionary migration policies. By designing these policies states build upon the compromise between inclusion and exclusion developed by European courts. This system of "pragmatic" governance is followed to externalize and securitise the EU borders. In this scenario, it is important to reflect on how such concepts can be manipulated through legal language to exclude migrants from human rights protection as established by international law. Thus, assemblage emerges as a prism to explain the intersection between different institutions that develop the EU migration governance.

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