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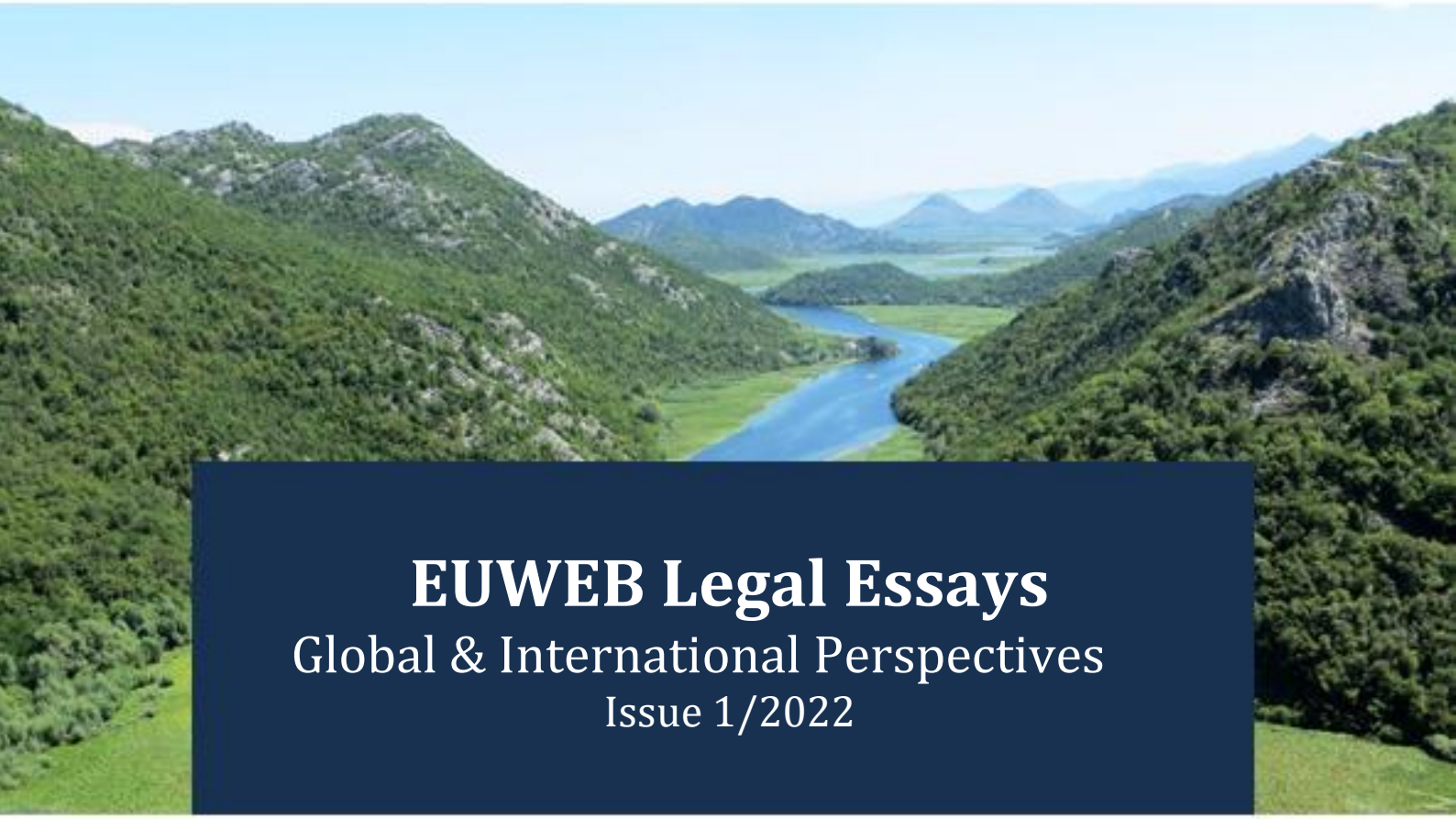

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THE MIGRANT CRISIS ALONG THE BALKAN ROUTES: STILL A LOT TO DO

*di Teresa Russo**

SOMMARIO: 1. Introductory remarks. – 2. The 2015 Migration Crisis and EU Decisions. – 3. The Failure of the Relocation Quota System. – 4. The Unconvincing Solutions of the EU Pact on Migration and Asylum. – 5. The situation of migrants in the transit zones of Tompa and Röszke and the Court of Justice's findings. – 6. Conclusions

1. Introductory Remarks

The connection between security needs in migration management and the implications for migrants' rights is now a field on which there is still much (perhaps too much) to be done. As one of the components of the European area that should be combined with the other two elements of freedom and justice, security ends up being prevalent especially in the context of the Union's immigration and asylum policy. This occurs in attempts of Member States to shirk of their obligations, such as in the case of decisions on the reallocation quotas of migrants, but also in the adoption of national laws and practices contrary to EU law and which have created the so-called transit areas where migrants' rights are limited or cannot be exercised.

Since the Western Balkans are an area of fundamental geo-strategic interest for the security inside and outside Europe[1], because Western Balkan borders are EU borders, the region has always been placed high on the EU agenda, underlining its importance strategically and security-wise. Furthermore, it is a frontier region between Europe, Asia and Africa, as well as a point of origin and a transit area for migration. Therefore, migration management has been a prominent issue in EU-Western Balkans relations since the early 2000s through the EU's use of visa facilitation and readmission[2].

This geostrategic importance was even more evident when, since 2015, the Western Balkans have been crossed by one of the most impressive migratory routes to Europe, the so-called "Balkan routes", showing the political instability of both the region and the EU. On the one hand, the Western Balkans Countries are still experiencing a process of

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[1] See the Presidency Conclusions of Lisbon European Council of 23 and 24 March 2000: "[t]*he European Council reaffirms that the peace, prosperity and stability of South East Europe are a strategic priority for the European Union*".

[2] According to F. TRAUNER, I. KRUSE, *EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood*, in *CEPS Working Documents*, No. 290, April 2008, www.ceps.eu/ceps-publications/ec-visa-facilitation-and-readmission-agreements-implementing-new-eu-security-approach/, these agreements between the EU and Albania, Bosnia and Herzegovina (ByH), Macedonia (FYROM), Montenegro and Serbia entered into force between 2006-2008, "*offering speeded up visa procedures for citizens of those countries in exchange for stepped up migration cooperation, primarily aiming to curb irregular migration to the EU*".

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transition and adaptation to EU standards[3]. On the other hand, the disagreement in respecting the principle of solidarity and fair sharing of responsibility between the same EU Member States, that should inform the EU policies on border checks, asylum and immigration according to article 80 TFEU, showed the political instability of the EU itself. The massive flow of asylum seekers, most of them from third countries such as Syria, Afghanistan, Iraq and Eritrea, led, in fact, the EU institutions to recognize in April 2015 the exceptional nature of the situation, calling unsuccessfully for the adoption of solidarity measures to overcome the catastrophic humanitarian situation in the so-called "frontline Member States", such as the Hellenic Republic and the Italian Republic[4].

In this context, the European Commission's Pact on Migration and Asylum of 23 September 2020 has represented a package of proposals that incorporates previous measures advanced by the Commission after this migration crisis. Despite the expectations and premises of the new Pact, it retains an emergency and state-centered approach that has so far characterized the measures adopted by the Union. Therefore, the crisis is still ongoing and, for certain aspects, unresolved and unsolvable, because it is a deeper crisis that concerns the values of the Union which is intended differently by the EU Member States. This has been even more evident in the latest judgements of the Court of Justice in the case C-808/18, *Commission v Hungary*[5], concerning the restricting access to the international protection procedure, unlawfully detention of applicants for that protection in transit zones and the movement of illegally staying third-country nationals to a border area, without observing the guarantees surrounding in EU return procedure, and in the case C-821/19, *Commission v Hungary*,[6] concerning the criminalisation of assistance to asylum seekers. These two judgements underline that, on the excuse of maintaining public order and preserving internal security, in accordance with Article 72 TFEU, some Member States adopt legislation which authorise derogations in the application of Union law, thus violating migrants' rights. Thanks to the EU institutions, these violations are declared and condemned[7], but the truth is that there is still a lot to do so that the EU migration policy is not handled as an emergency.

[3] For a critical view, see N. KOGOVŠEK ŠALAMON, *Asylum Systems in the Western Balkan Countries: Current Issues*, in *International Migration*, Vol. 54, No. 6, 2016, pp. 151-163. Furthermore, the EU enlargement to the Western Balkans is marked by continued roadblocks and unjustified delays.

[4] As is known, the Court of Justice (CJEU) stated that the Republic of Poland, Hungary and the Czech Republic failed to fulfil their obligations under art. 5, para. 2 of Decision (EU) 2015/1523 and art. 5, para. 2 of Decision (EU) 2015/1601, and have consequently failed to fulfil the subsequent relocation obligations under art. 5, paras. 4 to 11 of each of those two decisions. These decisions were adopted to establish provisional measures in the area of international protection for the benefit of Italy and Greece on the basis of art. 78, para. 3 TFEU and according to art. 80 TFEU. See CJEU (Third Chamber), judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17 *European Commission v Republic of Poland and Others*.

[5] CJEU (Grand Chamber), judgment of 17 December 2020, Case C-808/18, *European Commission v Hungary*.

[6] CJEU (Grand Chamber), judgment of 16 November 2021, C-821/19, *European Commission v Hungary*.

[7] See European Commission's Press Release, *Migration: Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment*, Brussels, 12 November 2021.

2. The 2015 Migration Crisis and EU Decisions

By Decisions nos. (EU) 2015/1523 and 2015/1601[8], adopted on the basis of articles 78, paragraph 3[9], and 80 TFEU, the Council established, through temporary measures for the period 2015-2017, a compulsory system of migrants' relocation for the benefit of Italy and Greece[10], according to which neither the Member State of relocation nor the asylum seeker would have had a choice about the procedure. The other States could escape this mechanism only in the presence of "*well-founded reasons of danger to national security or public order, or in the presence of serious reasons to apply the provisions on exclusion*" from international protection (article 5, paragraph 7), or if the relocation State found itself in an emergency situation (article 9). According to the relocation procedure provided for by article 5, Italy and Greece had to identify the applicants to be relocated, giving priority to vulnerable subjects and, following the approval of the relocation state to take "a *decision as soon as possible for each identified applicant*". Then, Member States were required, at regular intervals and at least every three months, to indicate the number of applicants they were able to swiftly relocate to their territory and any other relevant information (article 5, paragraph 2).

Despite these Decisions, such measures were contested by the Slovak Republic and Hungary, that brought two appeals to the Court of Justice, asking for the annulment of Decision (EU) 2015/1601, and Poland intervened in support of the two states with observations that confirmed a strong political tension[11]. With a variety of grounds for appeal, the two States complained, in fact, defects deriving from the choice of an inappropriate legal basis, errors in the adoption procedure[12], as well as substantive defects consisting in the inability of the decision to respond to the migratory crisis. In particular, they argued the violation of the principle of proportionality (article 5, paragraph 4, TEU)

[8] These are Council Decision (EU) 2015/1523, *establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, of 14 September 2015, in OJ L 239 of 15 September 2015, pp. 146-156; Council Decision (EU) 2015/1601, *establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, of 22 September 2015, in OJ L 248 of 24 September 2015, pp. 80-94. See A. DI PASCALE, *Il ricollocamento: appena nato è già finito?*, in *Eurojus*, 12 February 2016; M. BORRACCETTI, *"To Quota" or "Not to Quota"? The EU Facing Effective Solidarity in Its Asylum Policy*, in *Eurojus*, 31 July 2015; M. DI FILIPPO, *Le misure sulla ricollocazione dei richiedenti asilo adottate dall'Unione europea nel 2015: considerazioni critiche e prospettive*, in *Diritto, Immigrazione e Cittadinanza*, No. 2, 2015, pp. 33-60; P. MORI, *La decisione sulla ricollocazione delle persone bisognose di protezione internazionale: un irrituale ricorso al metodo intergovernativo?*, in *Il Diritto dell'Unione europea, Osservatorio europeo*, September 2015.

[9] Art. 78 TFEU, para. 3, states: "[i]*n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament*".

[10] Only Decision (EU) 2015/1601 laid down, in Annexes I and II, entitled respectively "*Allocations from Italy*" and "*Allocations from Greece*", pre-established reallocation quotas in the Member States which will then be challenged by Slovakia and Hungary. On the contrary, Decision (EU) 2015/1523 implemented the political agreement reached by the Member States in the Council Resolution of 20 July 2015.

[11] See CJEU (Grand Chamber), judgement of 6 September 2017, joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*, in particular paras. 302-305.

[12] See A. CIRCOLO, O. HAMUĽÁK, P. LYSINA, *The Principle of Solidarity between Voluntary Commitment and Legal Constraint: Comments on the Judgment of the CJEU Union in C-643/15 and C-647/15*, in *Czech Yearbook of International Law*, No. 9, 2018, pp. 155-173. On the contrary, in a critical perspective, see H. LABAYLE, *Solidarity Is Not a Value: Provisional Relocation of Asylum-Seekers Confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council)*, in *EU Immigration and Asylum Law and Policy*, 11 September 2017.

because, in their opinion, the objective of the decision could be achieved "by other measures which could have been taken in the context of existing instruments and *would have been less restrictive for Member States and impinged less on the 'sovereign' right of each Member State to decide freely upon the admission of nationals of third countries to its territory and on the right of Member States*" (paragraph 225).

With a judgement of the Grand Chamber of 6 September 2017[13], the Court of Justice rejected the appeals, recalling that: the Council was effectively required to implement the principle of solidarity (and fair sharing of responsibility, paragraph 252); pursuant to article 78, para. 3, TFEU, the burdens deriving from the measures adopted had to be shared, in accordance with the principle of solidarity, among all the other Member States (paragraph 291); the very determination of the State of relocation had to be based on criteria connected with solidarity between the Member States (paragraph 329). Although the Court repeatedly recalls the principle of solidarity[14], in its reasoning it is perceived as instrumental to the adoption of necessary and temporary measures aimed at compensating the management of migratory flows in a moment of contingent crisis, and of an operational nature such as to legitimize the decision-making of the Council. In other words, it does not concern the entire construction of the EU, although, as rightly pointed out, the hostile attitude of EU Member States ended up questioning the European project itself[15].

[13] See, CJEU, *Slovak Republic and Hungary v Council of the European Union*, cit. *supra* nt. 8; A. CIRCOLO, *Il principio di solidarietà tra impegno volontario e obbligo giuridico. La pronuncia della Corte di giustizia (GS) nel caso Slovacchia e Ungheria c. Consiglio*, in *Diritto Pubblico Comparato ed Europeo*, No. 1, 2018, pp. 197-210; L. TSOURDI, *Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers Within the European Union: Slovak Republic and Hungary v. Council*, in *Common Market Law Review*, Vol. 55, No. 5, 2018, pp. 1457-1494F; F. CHERUBINI, *La Corte di giustizia in merito alla decisione del Consiglio sulla ricollocazione: riflessioni sulla politica di asilo dell'UE*, in *Quaderni costituzionali*, No. 4, 2017, pp. 923-926; C. FASONE, *La Corte di giustizia in merito alla decisione del Consiglio sulla ricollocazione: gli effetti sui legislatori e sulle procedure (non) legislative dell'Unione*, in *Quaderni costituzionali*, No. 4, 2017, pp. 927-930; M. MESSINA, *La Corte di Giustizia afferma la validità giuridica del meccanismo provvisorio di ricollocazione obbligatoria dei richiedenti protezione internazionale. A quando la volontà di alcuni Stati membri UE di ottemperarvi?*, in *Ordine internazionale e diritti umani*, No. 4, 2017, pp. 603-607; S. PENASA, *La "relocation" delle persone richiedenti asilo: un sistema legittimo, giustificato e... inattuato? Brevi riflessioni sulla sentenza Slovacchia e Ungheria c. Consiglio*, in *Diritto Pubblico Comparato ed Europeo*, No. 3, 2017, p. 29.

[14] In this sense, see U. VILLANI, *Immigrazione e principio di solidarietà*, in *Freedom, Security & Justice: European Legal Studies*, No. 3, 2017, pp. 1-4.

[15] As is known, the Advocate General Bot delivered a different opinion. After pointing out that solidarity is surprisingly absent from the list of the first sentence of art. 2 TEU of the values on which the Union is founded, he stresses that the Union promotes not only solidarity between generations but also solidarity between Member States (para. 19). Therefore, Decision (EU) 2015/1601 constitutes an expression of the solidarity that the Treaty envisages between Member States. This solidarity "*has a specific content and a binding nature*" which legitimizes the contested decision, that has a strong political nature aimed at stirring the opposition on the part of Member States supporting freely consented solidarity based solely on voluntary commitments (para. 23). In his view, these appeals offered an opportunity to remember that solidarity is one of the basic values of the Union: "[t]*he present actions provide me with the opportunity to recall that solidarity is among the cardinal values of the Union and is even among the foundations of the Union. How would it be possible to deepen the solidarity between the peoples of Europe and to envisage ever-closer union between those peoples, as advocated in the Preamble to the EU Treaty, without solidarity between the Member States when one of them is faced with an emergency situation? I am referring here to the quintessence of what is both the raison d'être and the objective of the European project*" (para. 17). See also the reflections of M. OVÁDEK, *Legal Basis and Solidarity of Provisional Measures in Slovakia & Hungary v Council*, in *European Database of Asylum Law*, 4 December 2017.

3. The Failure of the Relocation Quota System

Therefore, these solidarity measures were not or only partially enforced, highlighting the limits of the existing regulatory framework, which was unable to offer an adequate response to such a situation. The reallocation system of 2015 Decisions had not worked out, and was perceived as an attempt to derogate to the Dublin Regulation[16], or to correct a flawed system that the Court had ended up endorsing[17].

The crisis had, in fact, simply exacerbated the failure of the relocation quota system and the limits of the Dublin III system, which did not provide (and still does not foresee) any mechanism to deal with situations of massive influx of potential beneficiaries of international protection[18]: it was not conceived to carry out this function[19], despite the express reference to solidarity (recitals 22 and 25)[20].

Even the subsequent proposals to amend the Dublin Regulation[21] disappointed expectations. In the first proposal, the Commission did not introduce any revolutionary

[16] The Court recalls, among the pleas advanced by the Slovak Republic and Hungary, in para. 49 of the judgment of 6 September 2017, that: "[a]*lthough the contested decision classifies these amendments as mere 'derogations', the distinction between a derogation and an amendment is, in the applicants' view, artificial, since, in both cases, the effect is to exclude the application of a normative provision and, by the same token, to undermine its effectiveness*".

[17] In a critical view, H. LABAYLE, *Solidarity Is Not a Value,* cit., who considered that, by confirming the validity of the contested Decisions, the Court of Justice has ended up defending the Dublin system, without stimulating a structural reform.

[18] Regulation (EU) 604/2013 of the European Parliament and of the Council, *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person,* of 26 June 2013, in OJ L 180 of 29 June 2013, pp. 31-59. See the reflections of M. DI FILIPPO, *The Dublin Saga and the Need to Rethink the Criteria for the Allocation of Competence in Asylum Procedures*, in V. MITSILEGAS, V. MORENO-LAX, N. VAVOULA (eds.), *Securitising Asylum Flows. Deflection, Criminalisation and Challenges for Human Rights,* Leiden, 2020, pp. 196-235.

[19] According to J. BAST, *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, in *European Public Law*, Vol. 22, No. 2, 2016, pp. 289-304, "*it is already evident from this outline of the Dublin System that it was not conceived as a system of solidarity. Quite the contrary: it was established as a 'delimitation of responsibilities without a sharing of burdens between the States. The principle of the country of first asylum is ill-suited to operate as a rule establishing solidarity within the Common European Asylum System because it cannot compensate for the uneven burdens caused by the different geographic locations and established migration patterns. Indeed, this principle intensifies these effects by making further migration within Europe more difficult*".

[20] According to E. KÜÇÜK, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, in *European Law Journal*, Vol. 22, No. 4, 2016, pp. 448-469, the Dublin system would give rise to a constitutional violation.

[21] In general on the amendments of Dublin Regulation, see, among others, M. DI FILIPPO, *The Allocation of Competence in Asylum Procedures under EU Law: The Need to Take the Dublin Bull by the Horns*, in *Revista de Derecho Comunitario Europeo*, No. 59, 2018, pp. 41-95; T.M. MOSCHETTA, *I criteri di attribuzione delle competenze a esaminare le domande d'asilo nei recenti sviluppi dell'iter di riforma del regime di Dublino*, in *Federalismi.it*, No. 5, 2018; D. VITIELLO, *The Dublin System and Beyond: Which Way Out of the Stalemate?*, in *Diritti umani e diritto internazionale*, Vol. 12, No. 3, 2018, pp. 463-480; C. DI STASIO, *La crisi del "Sistema Europeo Comune di Asilo" (SECA) fra inefficienze del sistema Dublino e vacuità del principio di solidarietà*, in *Il Diritto dell'Unione europea*, No. 2, 2017, pp. 209-249; C. FAVILLI, *La crisi del sistema Dublino: quali prospettive?*, in M. SAVINO (a cura di), *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive*, Naples, 2017, pp. 279-302; E. BROUWER, R. SEVERIJNS, *Sharing responsibility: A Proposal for a European Asylum System Based on Solidarity*, in *EU Immigration and Asylum Law and Policy*, 17 February 2016; F. MAIANI, *The Dublin III Regulation: A New Legal Framework for a More Humane System?*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden-Boston, 2016, pp. 99-142; P. MORI, *La proposta di riforma del sistema europeo comune d'asilo: verso Dublino IV?*, in *Eurojus,* 7 September

changes, essentially reproducing the mechanism for relocating quotas for asylum seekers put in place in 2015 and which proved to be inadequate and ineffective. In the second amendment proposal, the Commission confirmed the criteria of competence already in force and introduced a corrective relocation mechanism to be activated when necessary[22]. Then, amendments put forward by the European Parliament's Commission on Civil Liberties, Justice and Home Affairs (LIBE)[23], highlighted the very different approaches of the EU institutions[24], determining the paralysis of the reform. Therefore, once again, there was need to intervene through emergency relocation measures on a voluntary basis, through an "experimental" joint declaration of intent between France, Germany, Italy and Malta in September 2019[25] which, however, fails to be successful by Member States equally affected by migratory flows, at the meeting of the Justice and Home Affairs Council on 7 and 8 October 2019[26].

Therefore, the system of relocation quotas confirmed a state-centric approach[27] and a conflicting perception of the principle of solidarity by the EU Member States. Solidarity in sharing responsibilities should be a constant in the Union's migration policy. Even if it needs to materialize in appropriate measures, any act that ends up disavowing its application should be totally rethought because it is in conflict with article 67 TFEU (the Union "*develops a common policy on asylum, immigration and external border control,*

2016; F. MUNARI, *The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime*, in *Diritti umani e diritto internazionale*, No. 3, 2016, pp. 517-547; S. FRATZKE, *Not Adding Up. The Fading Promise of Europe's Dublin System*, March 2015.

[22] See the Proposal for a Regulation of the European Parliament and of the Council *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast),* COM/2016/0270 final - 2016/0133 (COD), no longer in force, where the Commission confirmed: "[t]*he objectives of the Dublin Regulation – to ensure quick access of asylum applicants to an asylum procedure and the examination of an application in substance by a single, clearly determined, Member State – remain valid. It is clear, however, that the Dublin system must be reformed, both to simplify it and enhance its effectiveness in practice, and to be equal to the task of dealing with situations when Member States' asylum systems are faced with disproportionate pressure*". In a critical view, see F. MAIANI, *Responsibility, Allocation and Solidarity*, in P. DE BRUYCKER, M. DE SOMER, J.L. DE BROUWER (eds.), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration*, Brussels, 2019, p. 103 ff.

[23] See the Report of Cecilia Wikström, 6 November 2017, (A8-0345/2017) and F. MAIANI, C. HRUSCHKA, *The Report of the European Parliament on the Reform of the Dublin System: Certainly Bold, but Pragmatic?*, in *EU Immigration and Asylum Law and Policy*, 20 December 2017.

[24] In particular, the European Parliament wanted the establishment of a permanent system of allocation of quotas based on a list of preferences of the applicant (so-called bottom four). On the contrary, *"(…) neither the Dublin III Regulation nor the reform proposals take into account the preferences of the asylum seekers when it comes to the host state*". So, E. KÜÇÜK, *The Principle of Solidarity*, cit., p. 462.

[25] See *Joint Declaration of Intent on a Controlled Emergency Procedure - Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism*, 23 September 2019.

[26] See G. MORGESE, *Dublin System, «Scrooge-Like» Solidarity and the EU Law: Are There Viable Options to the Never-Ending Reform of the Dublin III Regulation?*, in *Diritto, Immigrazione e Cittadinanza*, No. 3, 2019, pp. 85-101 and, in part. p. 93.

[27] Although with reference to the resettlement measures adopted by the Union in the external migration policy, see the critical considerations of S. POLI, *"Flexible" Cooperation Between the European Union and Third Countries to Contain Migration Flows and the Uncertainties of "Compensation Measures": The Case of the Resettlement of Refugees in EU Member States*, in *Diritto Pubblico Comparato ed Europeo online*, No. 4, 2020, pp. 5272-5299, who underlines: "*logic, which is State-centred, fails to appreciate what the needs of the EU as a whole are and shows little awareness and sensitivity with respect to the degree of instability and concerns coming from the Southern neighbours. Furthermore, this approach is not in line with the principle of loyal cooperation that Member States have with the EU institutions in the context of EU external relations*". See, also, N. ZAUN, *States as Gatekeepers in EU Asylum Politics: Explaining the Non-Adoption of a Refugee Quota System*, in *Journal of Common Market Studies. Special Issue: EU Refugee Policies and Politics in Times of Crisis*, Vol. 56, No. 1, 2017, pp. 44-56.

based on solidarity between member states"). This is not the approach followed so far and it does not seem that the EU Pact on Migration and Asylum significantly changes this approach.

4. The Unconvincing Solutions of the EU Pact on Migration and Asylum

In this framework, the Pact adopted by the European Commission on 23 September 2020[28] is a package of proposals and measures that are still to be approved by the Union[29]. Presented by the Commission as a rupture with respect to the past, on the contrary it confirms the criteria of the country of first entry[30] and the need to identify acceptable solutions for the most recalcitrant Member States[31], without leaving room for an approach effectively based on a sense of solidarity and the protection of migrants' rights. In particular, through two proposals for Regulations, respectively on the management of asylum and migration[32], and on situations of crisis and force *majeure*[33], the Commission distinguishes the different situations that can or must lead to a solidarity intervention. The aim would be to ensure a fair sharing of responsibilities and an effective management of

[28] In general, references concerning the Pact can include: G M. MOUZOURAKIS, *More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status*, in *European Law Journal*, 7 May 2021; D. ARCHIBUGI, M. CELLINI, M. VITIELLO, *Refugees in the European Union: From Emergency Alarmism to Common Management*, in *Journal of Contemporary European Studies*, 10 April 2021; G. CORNELISSE, M. RENEMAN, *Border Procedures in the Commission's New Pact on Migration and Asylum: A Case of Politics Outplaying Rationality?*, in *European Law Journal*, 23 March 2021; F. SPINELLI, *United against the Pact: The Fatal Flaws in the EU's Plans to Reform its Asylum System*, in *Green European Journal*, 17 March 2021; G. CAMPESI, *The EU Pact on Migration and Asylum and the Dangerous Multiplication of 'Anomalous Zones' for Migration Management*, in *ASILE Forum Contributions on the new EU Pact on Migration and Asylum*, 27 November 2020; J.P. CASSARINO, L. MARIN, *The New Pact on Migration and Asylum: Turning European Union Territory into a Non-Territory*, in *EU Law Analysis*, 30 November 2020; E. KARAGEORGIOU, *The New Pact on Migration and Asylum: Why Pragmatism Cannot Engender Solidarity*, in *Nordic Journal of European Law*, No. 2, 2020, pp. III-VIII; S. MANSERVISI, *The EU's Pact on Migration and Asylum: A Tsunami of Papers but Little Waves of Change*, in *IAI Commentaries*, No. 88, 2020, pp. 1-8; S. PENASA, *Il Nuovo Patto e l'idea di solidarietà: principio fondativo del sistema europeo di asilo o metodo di allocazione delle responsabilità tra Stati membri?*, in *ADiM Blog, Analisi & Opinioni*, 30 November 2020; F. MAIANI, *A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact*, in *EU Immigration and Asylum Law and Policy*, 20 October 2020; P. DE PASQUALE, *Dal Nuovo Patto per la migrazione e l'asilo a un diritto dell'emergenza dell'Unione europea: a che punto è la notte?*, in *Diritto Pubblico Comparato ed Europeo*, No. 3, 2020, pp. V-XVI; M. FUNK, *New Pact, Old Problems*, in *International Politics and Society*, 25 September 2020; A.H. NEIDHARDT, O. SUNDBERG DIEZ, *The Upcoming New Pact on Migration and Asylum: Will It Be Up to the Challenge? Discussion Paper*, 29 April 2020.

[29] E. CODINI, M. D'ODORICO, *Towards More Solidarity? Preliminary Remarks on the New Pact on Migration and Asylum*, 8 October 2020, consider the Pact timid document that will likely be subject to Member States' restrictive negotiations in the upcoming months.

[30] According to C. FAVILLI, *Il patto europeo sulla migrazione e l'asilo: "c'è qualcosa di nuovo, anzi d'antico"*, in *Questione Giustizia*, 2 October 2020, the Dublin Regulation disappears formally, but its shadow, the Dublin system, remains in substance.

[31] P. VAN WOLLEGHEM, *Riformare Dublino e attivare la solidarietà: gli obiettivi del Nuovo Patto UE sulla migrazione e l'asilo*, in *Osservatorio sulla democrazia. Fondazione Feltrinelli*, 6 October 2020, considers that the approach of the Commission aimed at gathering the consensus of the member states on the New Pact through maximum flexibility in the choice between instruments. Flexibility and equivalence between measures are essential for the success of this text.

[32] Proposal for a Regulation *on asylum and migration management*, COM(2020) 610, of 23 September 2020

[33] Proposal for a Regulation *addressing situations of crisis and force majeure in the field of migration and asylum*, COM(2020) 613, of 23 September 2020.

irregular arrivals of migrants and asylum seekers not handled by individual Member States alone, but by the EU as a whole.

In this context, the Commission[34] enjoys wide discretion in deciding whether a situation of a State requires the adoption of solidarity measures. In consideration of the different situations and migratory pressures, it can propose a system of flexible contributions on a voluntary basis: only in situations of pressure would it become compulsory[35]. In fact, the development of solidarity response plans is foreseen following an assessment of the migratory pressure by the Commission which will indicate the necessary measures, to which all other Member States will be required to contribute through relocations or sponsored returns or a combination of the same (articles 50 and 51).

For their part, the Member States will be called upon to provide solidarity contributions (pursuant to article 45)[36], but without necessarily being obliged (in particular in ordinary situations) and being able, in any case, to choose whether to resort to the form of relocation, sponsored repatriations, or can assist countries in strengthening capacities for border management, including by reinforcing their search and rescue capacities at sea or on land, through well-functioning asylum and reception systems, or by facilitating voluntary returns to third countries or the integration of migrants. The proposal takes up, from the previous experience of the 2015 Decisions, the financial incentives for each person relocated or whose repatriation has not been successful (article 61). Furthermore, a distribution key based on the size of the population (50 percent) and on the economy of the Member States (50 percent of GDP) should be applied to all solidarity measures for determining the total contribution of each State (article 54).

Some of the most critical issues arise if the Commission concludes that a Member State is confronted with a "crisis". In this case, the rules of the Proposal for a Migration and Asylum Crisis Regulation (article 2) are applicable. These cover exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State, being of such a scale and nature that it would render a Member State's asylum, reception or return system non-functional and which risk having serious consequences for the functioning of, or result in the impossibility of applying, the Common European Asylum System and the migration management system of the Union. This proposal also addresses situations of force majeure in the field of asylum and migration management within the Union, providing the necessary adaptation to the EU rules on the asylum and return procedures as well as to the solidarity mechanisms. Despite the fact that these hypotheses are only a proposal, it is too obvious that the Member States could abuse its application, as Hungary has already done by adopting a national law which in fact legitimizes exceptions to EU law in the event of a migrants' crisis.

[34] The Commission would be a solidarity promoter especially in situations of migratory pressure, although with a margin of discretion that could lead it to adopt too "*accommodating*" solutions, in order not to upset some states. In this sense, see G. MORGESE, *La "nuova" solidarietà europea in materia di asilo e immigrazione,* cit., in part. p. 35. According to A. DI PASCALE, *Il nuovo patto per l'immigrazione e l'asilo: scontentare tutti per accontentare tutti*, in *Eurojus*, October 2020, the Pact would generally adopted a compromise approach.

[35] So P. DE PASQUALE, *Il Patto per la migrazione e l'asilo: più ombre che luci*, in *I Post di AISDUE*, II (2020), Focus "*La proposta di Patto su immigrazione e asilo*", No. 1, 5 October 2020.

[36] Member States shall have to specify the type of contributions of their solidarity response plan sent to the Commission.

5. The situation of migrants in the transit zones of Tompa and Röszke and the Court of Justice's findings

In response to the high influx of asylum seekers into the EU, Hungary had already amended its laws on asylum and return, introducing the concept of a "crisis situation caused by mass immigration" which, declared by the Government, made it possible to apply a derogatory regime, repealing certain guarantees. This law also allowed the creation of special transit zones areas of Tompa and Röszke, situated on the border with Serbia, where there are detention centers for migrants and barriers with barbed wire to curb migratory flows from the Balkan routes[37]. Since 2020, four judgments of the Court of Justice have contested the non-compliance of Hungarian legislation and practice with Union law, although the Hungarian Government continues to appeal to the needs of protection of national public order and the inadequacy of the provisions of EU law in the field.

In the first judgment of 19 March 2020[38], the Court notes that the Hungarian law on the right of asylum adds a further ground for the inadmissibility of the application for international protection, not provided for by Article 33(2) of Directive 2013/32, i.e., the ground that the application must be rejected when the person arrived on the territory of the Member State concerned via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed. In the second judgment of 14 May 2020[39], the Court also considers the Hungarian law on entry and residence by third-country nationals in relation to a request for a preliminary ruling concerning two cases of reject of asylum application issued by Hungarian administrative authority against a married couple of Afghan nationals and an Iranian father with his minor son. In these joined cases, the Court affirms that Article 13 of Directive 2008/115 (i.e., the return directive), read in the light of Article 47 of the EU Fundamental Charter, must be interpreted as precluding the legislation of a Member State under which the amendment by an administrative authority of the country of destination stated in an earlier return decision can be contested by the third-country national concerned only by means of an action brought before an administrative authority, without a subsequent judicial review of the decision of that authority being guaranteed. In the reasoning of the Court, contrary to what the Hungarian Government contended, the existence, in national law, of a general power to review the legality of return decisions, recognised to the Public Prosecutor's Office and authorising only the latter to challenge such a decision is not a remedy that satisfies the requirements of Article 13(1) of Directive 2008/115. The Court considers also that the placement of the applicants in the main proceedings in the Röszke transit area is not to be distinguished from a detention regime, devoid of any guarantee arising from the return Directive.

Finally, in the latest two judgements concerning two actions for failure, the Court declared that Hungary has failed to fulfil its obligations under EU law. In the first case[40], the Court accepts the Commission's complaints by ascertaining that there is a consistent and

[37] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017, CPT/Inf (2018) 42, available at https://rm.coe.int/16808d6f12

[38] CJEU (First Chamber), judgment of 19 March 2020, C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*.

[39] CJEU (Grand Chamber), judgment of 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*.

[40] See *supra* note 5.

generalised administrative practice of the Hungarian authorities aimed at limiting access to the transit zones of Röszke and Tompa so systematically and drastically that third-country nationals or stateless persons who, arriving from Serbia, wished to access, in Hungary, the international protection procedure, in practice were confronted with the virtual impossibility of making an application for international protection. Similarly, the Court finds that the establishment of a system of systematic detention of applicants for international protection in the same transit zones does not observe the conditions and guarantees arising under Directive 2013/32, as well as that, contrary to what Hungary contends, the forced deportation of an illegally staying third-country national beyond the border fence erected in its territory must be treated in the same way as a removal from that territory. While in the second judgement[41], the Court adds that the Hungarian legislature's inclusion of further grounds of inadmissibility of an application for international protection, the criminalisation by that legislature of organising activities facilitating the lodging of asylum applications by persons who are not entitled to asylum under Hungarian law and the restrictions on freedom of movement imposed on persons to which that criminal offence refers infringed EU law.

In particular, the Court does not agree with Hungary exception of the maintenance of law and order or national security that cannot be determined unilaterally by each Member State, without any oversight by the institutions of the European Union[42], as well as the contested inadequacy of the provisions of EU law in addressing abusive practices of asylum applications. Furthermore, according to the Court, the criminalisation of organising activities facilitating the lodging of asylum applications, also restricts the effectiveness of the right of asylum seekers under Article 22(1), and discourages such persons from providing these services. The provision of Hungarian Criminal Code goes beyond what may be regarded as necessary to attain the objective of preventing fraudulent or abusive practices. On the contrary, it is capable of preventing lawyers from effectively defending the interests of applicants who consult them by discouraging them from advising such applicants to make or lodge an application for asylum in Hungary for the purpose of subsequently challenging the relevant national provisions which appear to them to be contrary to EU law.

6. Conclusions

In the light of the considerations made so far, the emergence of the Balkan route as one of the main migratory routes to Europe has shown the vulnerability of the Western Balkans' legal systems, shaking the enlargement process that still struggles to take off today. However, according to other authors[43], it has, at the same time, exposed the EU to a crisis of values, revealing a latent lack of "*idem sentire*" of the Member States. The common front of the Visegrad Group has not only gone against the migration policy of the Union, but has clearly contested the limitations of sovereignty resulting from the application of the solidarity's principle. This rigid entrenchment on positions of claiming sovereignty seemed to undermine the process of over fifty years of European integration.

This danger is evident from the pleas put forward by Poland, that, on the basis of Hungary's 10th plea, alleged that the imposition of binding quotas on it had

[41] See *supra* note 6.

[42] SARAH PROGIN-THEUERKAUF, *Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary*, in *European Papers*, Vol. 6, 2021, No 1, European Forum, Insight of 29 March 2021, pp. 7-15

[43] E. M. GOŹDZIAK, I. MAIN, I. B. SUTER (eds.), *Europe and the Refugee Response: A Crisis of Values?*, London, 2020.

disproportionate effects in its regard, as well as on a number of host Member States which, in order to meet their relocation obligations, have to make far greater efforts and bear far heavier burdens than other host Member States. This, particularly, in the case of Member States which are "*virtually ethnically homogeneous, like Poland*" and whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory (paragraph 302). The Court, while declaring the argument inadmissible because it was put forward in a statement in intervention and far beyond the argument made by Hungary, which is strictly limited to Hungary's own situation (paragraph 303), took the opportunity to clarify that: "[i]*f relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, consequently, the adoption of a binding relocation mechanism would be impossible*" (paragraph 304). In addition, the Court pointed out that: "*considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union*" (paragraph 305).

Hence the question of whether it is a crisis that can be resolved through the solidarity mechanisms of the Pact, or whether it is a crisis that overwhelms the idea of a *solidarité de fait* invoked by Robert Schuman in 1951. After more than fifty years and on the basis of a series of treaties that have evolved over time, the EU is a legal system with its own identity pursuant to the values set out in article 2 TEU. It distinguishes between fundamental values (human dignity, equality, democracy, rule of law, etc.) and other values of human society, such as pluralism, non-discrimination, tolerance, justice and solidarity which should be common to the Member States. This common substratum[44] seems absent or, in any case, it does not seem adequately protected. Although on 4 March 2022, the Council of the European Union unanimously approved for the first time the activation of the Temporary Protection Directive (2001/55 /CE) and the application of such an instrument to people fleeing Ukraine[45], much still needs to be done in terms of effective solidarity between Member States in the various crises they are called to face. This even more so when one considers the different interpretations given by the European Court of Human Rights in virtually identical cases which legitimize conflicting political and legislative choices by States[46]. The brief analyzed judgements of the Court of Justice concerning Hungary confirms a deeper crisis of identity that is struggling to balance the coexisting interests that characterise EU legal system[47].

ABSTRACT

[44] On the idea of a social values' "background", see T. RUSSO, *Articolo 2 TUE*, in C. CURTI GIALDINO (dir.), *Codice dell'Unione europea operativo. TUE e TFUE commentati articolo per articolo*, Naples, 2012, p. 60.

[45] Council Implementing Decision (EU) 2022/382 of 4 March 2022 *establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection*, ST/6846/2022/INIT, in OJ L 71 of 4 March 2022.

[46] ECtHR, judgment of 21 November 2019, Application No. 47287/15, *Ilias and Ahmed v. Hungary*.

[47] According to art. 13, para. 1, TEU: "[t]*he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions*".

This article aims to underline how the Western Balkans are an area of fundamental geo-strategic interest for the security inside and outside Europe. Its geostrategic importance was even more evident when, since 2015, the Western Balkans have been crossed by one of the most impressive migratory routes to Europe, the so-called "Balkan route", showing the political instability of both the region and the EU. The massive flow of asylum seekers led the EU institutions to recognize in April 2015 the exceptional nature of the situation, calling unsuccessfully for the adoption of solidarity measures to overcome the catastrophic humanitarian situation in the so-called "frontline Member States". In this framework, the article intends to briefly investigate the limits of the existing regulatory framework, which was unable to offer an adequate response to such a situation, as well as of the proposals of the EU Pact on migration of asylum and migration in order to find a solution to a crisis that is not only a migration crisis, but a deeper crisis of identity that, with specific reference to some Member States, belonging to the so-called Visegrad Group, is struggling to balance the coexisting interests of the EU legal system.

KEYWORDS

Migration Crisis, New Pact, Relocation Quota System, Solidarity, Transit Zones of Tompa and Röszke, Western Balkans.