Foreword

This volume is an outcome of the Project Human Rights of Asylum Seekers in Italy and Hungary – Influence of International and EU Law on Domestic Actions, jointly carried out by the Institute for International Legal Studies (ISGI) of the National Research Council of Italy (CNR) and the Institute for Legal Studies of the Hungarian Academy of Sciences (HAS). Started in 2016, the Project aimed at analyzing, in comparative perspective, the dynamics of migration law and practice that have developed in Italy and Hungary from the 'refugee crisis' of 2015 onwards.

The book reflects contents and methods of the scientific work carried out in coordination by the Hungarian and the Italian teams, under the wise direction of Balázs Majtényi and Gianfranco Tamburelli. It collects 15 essays on selected topics on migration, authored by legal researchers and professionals from within and outside the Project. The common objective is assessing whether the existing legal and institutional framework is appropriate to govern a significant raise in migration flows and in the number of asylum applications, in a manner consistent with the European traditional approach to human rights protection.

All the essays focus on the interaction between different law sources, a phenomenon peculiar to, but not exclusive of migration law. The book analyzes the impact of international and EU law, with their strengths and weaknesses, on the state domestic legal order. As a rule, and despite possible problems of coordination, the fact that a plurality of international and EU instruments exists – many of which with a court or a quasi-judicial body of its own to monitor implementation – is such to reinforce and not weaken human rights protection. With regard to migration law, however, the existing regulations need reform at all normative levels. On one hand, states should rethink some ageing contents of the UN Convention on the Status of Refugees and Protocol. On other hand, attempts of updating the yet obsolete EU 'Dublin system' have proved, until now, unsuccessful. We are far from the effective application of the principle of solidarity between member states, evoked in the book. This, despite the EU legislation on the matter should, expectedly, take into account the EU Charter of Fundamental Rights and the ECHR, and facilitate respect by the EU member states of their obligations under these Treaties.

Concerning national legislation, the book comments recent innovations introduced in Italy, with regard to the procedural rules on ‘international protection’, and in Hungary, as part of a broader constitutional reform. In both cases, redrafting the existing norms seems weakening the protection of asylum seekers.

A distinctive feature of the volume is, among others, making wide recourse to the examination of judicial, administrative and other practice of the states, as a means for assessing whether respect for human rights is effective in Italy and Hungary. The authors have payed particular attention to the principle of migrants’ non-refoulement, which is a critical point in Italy with regard to cooperation agreements with Libya. The right to social inclusion is one further key issue, together with the social rights of migrants in broad sense, as these rights are most at risk in the present phase of world economy (post-globalization), with more and more unfair wealth distribution, to the prejudice of most vulnerable persons.

It should be stressed the importance of approaching migration issues from the human rights perspective. As obvious as it may be for jurists, this particular approach is precious in making non-expert readers, the media and the public opinion aware of a number of scientific arguments against the widespread narrative on migration issues as pertaining, mostly or exclusively, to national security matters.

If supported with appropriate laws and policies, migration is an opportunity of economic growth and social development for all humans living in a country, as the history testifies. Certainly, it cannot be a reason for diminished protection of the rights of aliens and nationals in Europe.

Ornella Ferrajolo
Acting Director – Institute for International Legal Studies –
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Foreword

It is often heard that academic research fails to focus on important social issues. This cannot be said about this volume of studies, edited by two well-known scholars in their field, Balázs Majtényi and Gianfranco Tamburelli. Their book focuses on one of the most topical issues, the human rights of asylum seekers in Italy and Hungary.

The book is about solidarity in the refugee crisis. The deep and careful assessment of how to interpret rules, how to create new ones, how to frame national legislation according to EU law and how to frame EU law according to national law and policy considerations contributes to solutions that might advance the realization of solidarity.

The longstanding cooperation between the Hungarian Academy of Sciences, Centre for Social Sciences Institute for Legal Studies and the Italian National Research Council, Institute for International Legal Studies enables the sharing of experiences and the development of new doctrinal approaches. This book, which is the latest joint project of the two institutions, is a great example that shows the success of cooperation.

The book focuses on national solutions based on the framework of European Union law. The novelty of this book is that it highlights that the position of the EU law is not as unequivocal as it once was. The book focuses on questions of integration and disintegration, on the role of national approaches in shaping EU law.

A core value of the book is that it does not simply provide an overview of national approaches, but it also provides insights into various policy approaches, also taking into account the relevant cultural aspects. Thanks to this approach, the book will help to understand the current Italian and Hungarian legal regime and its policy foundations. Furthermore, it could also contribute to better law making both on the national and the European level.

At times when migration is once again one of the most important challenges facing societies and legislators, the cooperation of the authors of this book shows a sign of solidary and could help us find solutions to difficult humanitarian issues.

Fruzsina Gárdos-Orosz
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Introduction

The Hungarian Academy of Sciences (HAS) and the National Research Council (CNR) of Italy have played a decisive role in the development, and the internationalization of the scientific research of the two countries. In 2015, they stipulated a new *Agreement on Scientific Cooperation*, followed by an *Executive Protocol* for the period 2016-2018. In this framework, the Institute for Legal Studies, Center for Social Sciences of the HAS and the Institute for International Legal Studies of the Department of Social Sciences and Humanities, Cultural Heritage, of the CNR, carried out research on a topical issue of great national and international interest, that of the human rights of asylum seekers.

The principal reason at the base of the Joint Project on the human rights of asylum seekers in the two countries was the awareness of the importance of the Italian and Hungarian experiences in dealing with the migration 'crisis' affecting Europe in 2015; the theme had occupied the stage of legal and political debate at national and European Union levels. Italy and Hungary are, in fact, border countries of the EU, and the main migratory routes passed through their borders. They were in the forefront of the European response to the mass arrival of asylum seekers, and are a key to understanding the incompleteness of the European framework, and the various attempts to rectify some of its shortcomings.

Facing, to a certain extent, similar difficulties, they reacted in totally opposite ways. Hungary affirmed the prevalence of domestic political interests over possible EU orientation and ruling on migration, and emphasising the principle of sovereignty, refused to be a beneficiary country of ad hoc measures, like Italy and Greece, and strongly opposed the relocation mechanism among Member States activated by the Commission. According to Italy, policies on border checks, asylum and immigration should be governed by the principle of solidarity as stated in Article 80 of the Treaty on the Functioning of the EU, and the fair sharing of responsibility, including its financial implications. This policy has been based on the idea that single states cannot manage modern migration flows, and the most appropriate level for their management is that of the EU. Whenever necessary, the Union should establish appropriate measures to give effect to a common asylum policy.

These different national policies can only in part be explained by the fact that refugees were arriving in Hungary via the mainland while they came to Italy by sea, or that Italy had long been a destination for Mediterranean crossings, while Hungary was a relatively new transitory point of arrival for migration through Balkan routes. The Common European Asylum System (CEAS) had never been exposed to such intensive pressure. The international system of human rights, as well as the Dublin Regulation No. 614 of 26th June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection* showed their gaps and ineffectiveness.

Since 2017, migrant and refugee flows have progressively decreased. Issues such as the setting up of sustainable reception systems, the duration of administrative and judicial procedures, the relocation of asylum seekers to other States, and the return of those not qualified for protection, have remained, however, at the core of political and legal discussion (cfr. *State of Democracy, Human Rights and Rule of the Law*. *Report* by the Secretary General, Chapter 5, *Access to Rights and Integration of Migrants and Refugees*, Council of Europe, 2018).

The aim of the Joint Project was therefore to analyse and evaluate the development, following the 'crisis' of 2015, of the Italian and Hungarian legislation and practice on migrants and asylum. The exchange of researchers between Budapest and Rome allowed the members of the joint research team to enrich their knowledge about the differing national legal and administrative praxis. From the first lecture held in Rome by Balázs Majtényi on: *Civil Solidarity with Refugees: The Case of Hungary* (June 2016), to the lectures and work meetings held in Budapest and Rome, to the semi structured interviews with representatives from Italian and Hungarian NGOs active in the field of human rights and refugees, to the international workshops on: *Human Rights of Asylum Seekers* held in Budapest on 18th April 2018 and in Rome on 23rd May 2018, the Italian – Hungarian team developed a fruitful dialogue, also with other research groups, universities, and public institutions. Some University professors and other scholars were involved in the research.

This book is the principal result of these activities, and finally offers a comparative analysis of the Italian and Hungarian experiences in the framework of the international and EU legal systems, retracing – mainly from a normative point of view, but also considering the political, sociological, and historical aspects – the main lines of debate on the handling of the refugee question in Europe. It contains contributions from experts with different scientific backgrounds and theoretical approaches. The research results, expressing the opinion of the respective Authors, confirm the differing perspective of the scholars involved, and perhaps also the influence on Italian and Hungarian researchers and professionals of the respective social environments, as well as of public authorities and public opinion.

My personal starting point was the opinion that "human rights however fundamental are historical rights and therefore arise from specific conditions characterized by the embattled defence of new freedoms against old powers" (Norberto Bobbio, *The Age of Rights*, Turin, October 1990, p. XIII). I proposed to adopt a cautious method of interpreting and evaluating current rules and praxis, including national ones, because, considering the political sensitiveness of the issues at stake, a tentative objective interpretation might facilitate an open debate, and help to identify a common ground for decision-makers. Other Authors started rather from a natural law approach and, with the same aim of contributing to the broadest possible affirmation of human rights of migrants and asylum seekers, proposed the adoption of criteria of extensive interpretation.

But we all shared a vision according to which the existing international legal framework does not really offer solutions to the hottest current issues; the 1951 UN Convention on the Status of Refugees and its 1967 Protocol, outlining the principle of non-refoulement, have a limited scope; the EU Dublin Regulation is rather obsolete, and EU States Members have neither a common standing nor a medium-long term strategy.

With regard to the international legal framework, various were the analyses and the opinions on, among other things, the EU-Turkey Agreement, the specific obligations of the States at the external borders of the EU, EU and Italian obligations towards migrants whose lives are at risk in the Mediterranean. In particular, on the issues raised by migration flows via sea and agreements aimed at the control of borders, of great interest were the contributions given by Giovanni Salvi on the prosecution of migrant trafficking across the Mediterranean (*New Challenges for Prosecution of Migrants Trafficking: from Mare Nostrum to EUNAVFORMED*, *The Experience of an Italian Prosecution Office*), and Antonio Marchesi on the bilateral agreement between Italy and Libya (*Preventing the Exercise of the Right of Asylum. The Human Cost of Italy's Push-back Policy*).

With regard to the EU asylum system, it is worth highlighting the thorough research carried out by Andrea Crescenzi on the principle of solidarity (*Solidarity as a Guiding Principle of the EU Asylum Policy*), and the well-founded theory developed by Tamás Dezső Ziegler on the interaction between the EU legal system and national practices, in particular, the interaction with Hungarian practice (*EU Asylum Law: Disintegration and Reverse Spillovers*). On the whole, points of weakness and strength of the EU asylum legal system, and the interaction between the EU sector regulations and the Italian and Hungarian practice were extensively analysed. It seems that the work for a reform of the CEAS has advanced, and proposals concerning qualification regulation, reception conditions, the EU Agency for asylum, Eurodac (European dactyloscopy), and the Union resettlement framework have gained some consensus;

while other proposals – on the asylum procedure regulation, the reform of the Dublin Regulation, the European border and Coast Guard, the common standards and procedures for returning illegally staying third-country nationals (recast) – still meet serious difficulties.

With regard to Italian legislation on migrants and the right of asylum, Anton Giulio Lana analysed in depth the provisions introduced by the 2017 Decree "Minniti-Orlando" (*The Innovations Introduced in the Italian Legislation by the "Minniti-Orlando" Decree Law Containing Urgent Provisions To Accelerate Proceedings Concerning International Protection*), and Eugenio Zaniboni assessed and evaluated in an extensive article the legal aspects of the implementation of the EU Reception Directive (*Money for Nothing, Push-back 'for Free': the (Missed) Implementation of the CEAS and the Lowered Standards of the Asylum Seekers' Reception in Italy*). Further, Rosita Forastiero carried out with a comparative approach a well-structured piece of research on: *The Role of the Charter of Fundamental Rights in Protecting the Right of Asylum Seekers and Refugees*. Issues concerning the international obligations of Italy, including those arising from the conclusion of new bilateral agreements, and compliance of the domestic law with international and EU law, taking into account administrative practices and jurisprudence, were therefore objects of specific attention.

With regard to the Hungarian legal system, Judit Tóth made an extensive study of the changes to the Refugee Law introduced since 2009 (*From the Minimum of Human Rights to the Maximum of National Defence. Transformation of the Asylum Law in Hungary*), while Balázs Majtényi carried out a rich and stimulating comparative analysis of the evolution after 2015 of the Hungarian and Italian legal systems in the sector (*The Refugee Crisis in 2015 and Its Aftermath: A Comparison of the Hungarian and Italian Responses*). Issues related to rules and actions aimed at checking or 'closing' borders (*e.g.* fences between Hungary and Serbia) were among the focuses of these contributions. Also very useful for the comprehension of the Hungarian experience, were the studies made by Giulia Perri (*The Position of the VISEGRAD Group Countries on the Dublin Regulation*), and Gloria Adoni (*The Council of State of Italy on Hungary's Asylum System*).

The assessment of the Hungarian domestic asylum policy and legislation seems in line with some worries expressed by the European Parliament, according to which in the country there is *a clear risk of a serious breach of the values on which the Union is founded* (cfr. *Resolution on the Situation in Hungary*, 17th May 2017). Not surprisingly, various applications have been submitted to the European Court of Human Rights in the last few years (cfr. *Case of Ilias and Ahmed v. Hungary*, Application No. 47287/15, Judgement 14th March 2017).

On a more theoretical level, Zsolt Körtvélyesi underlined how essential are

the constitutional and administrative changes for interpreting Hungarian legislation and practice in recent years (*Hitting the Wall? Contextualizing Hungary's Response to the Arrival of Asylum-Seekers between 2015 and 2018*). Passing to the Italian constitutional framework, I would like to observe that the right to asylum holds a position of particular importance in the Italian Constitution, being established among the first twelve fundamental principles. Article X states that "a foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law". Even this provision, of undeniable value, which recognizes protection to those who in the country of origin are impeded from participating democratically in decision-making processes, now appears historically dated and not broad enough to face the current nature and dimension of migratory flows.

The comparative analysis of the sector national legislation of each country, and of their relation to European and international law, has highlighted fundamental trends and issues concerning the handling of migration at global level. In this perspective, I would like to recall that the UN has included the 'migration' theme in the *2030 Agenda for Sustainable Development*, where States affirm, among other things, that they will cooperate *to ensure safe, orderly and regular migration, involving full respect for human rights and the humane treatment of migrants regardless of migration status, of refugees and of displaced persons* (*Declaration*, 29).

Finally, on the issue concerning social rights, and refugee inclusion rights, Giuseppe Palmisano offered a magisterial contribution with his article on: *Protecting Social Rights and Social Inclusion of Asylum Seekers in Europe: Shortcomings and Potential of the European Social Charter*. The assessment of the state of the art of integration policies at national level was further enriched by the contributions of Attila Szabó (*Quo Vadis Integration Policy?*) and Francesca Zappacosta (*Refugee Integration Policies: A Comparison of the Hungarian and Italian Case*).

This collection of articles provides a unique analysis on how mass migration flows challenges basic principles and existing regulations; legislation is continuously evolving and recent changes in the political orientation of the Italian government might imply a rapprochement of the sector policies of Italy and Hungary, and their stronger impact on the EU orientation.

Lastly, it is important to acknowledge the full support the joint research team received from the CNR and the HAS. In this regard, on behalf also of my colleague and friend Balázs Majtényi, who acted as responsible of the Hungarian team, I would like to thank Ornella Ferrajolo and Gárdos-Orosz Fruzsina, directors of the two institutes, as well as Giuseppe Palmisano, former director of the ISGI, for their valuable advice and their contributions. I would also like to acknowledge the assiduous support always received from Virginia Coda Nun-

ziante, Daniela Guidarelli and the International Relations Office of CNR that deals with the development and management of scientific cooperation agreements.

The Authors involved in the Joint Project have formulated and discussed several new project ideas, and received various expressions of interest from experts and representatives of other institutions and research centres. One of the themes identified as being of greatest common interest is that of migratory flows towards the EU and its Member States (in particular, Italy and Hungary) from Eastern Europe (in particular from countries linked to the EU by Association Agreements: Georgia, Moldova and Ukraine). It is therefore my hope that this book will further scientific, legal, and institutional cooperation between Italy and Hungary, the CNR and the HAS.

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Solidarity as a Guiding Principle of EU Asylum Policy

Andrea Crescenzi [*]

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1. *Introduction*

In 2015-2016, OECD countries registered more than one million new asylum applications. Of these, almost three-quarters were registered in European Union countries. [1] The unprecedented arrival of this high number of immigrants on European shores has shown that the Dublin system is not adequate for facing this issue. Initially, European institutions took emergency measures to tackle the on-going crisis. Then, an in-depth debate was initiated on an overdue reform of the Common European Asylum System (CEAS).

The new approach to the management of the migration crisis has a strong reference to the principle of solidarity and the sharing of responsibility between Member States, as set out in Article 80 of the Treaty on the Functioning

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[1] OECD, *G20 Global Displacement and Migration Trends*, Report 2017, 2018, p. 13, http://www.oecd.org/eco/growth/G20-Global-Displacements-and-Migration-Trends-Report-2017.pdf; IOM, Mixed Migration Flows in the Mediterranean and Beyond. Flow Monitoring Compilation, Annual report 2015, 2016, http://doe.iom.int/docs/Flows%20Compilation%202015%20Overview.pdf.

of the European Union (TFEU).[2] This principle informs two decisions adopted by the Council in September 2015, combining the criterion of 'country of first entry' (Dublin III) with a mandatory temporary quota mechanism for relocation of migrants from Italy and Greece to all other Member States.[3]

2. *The Principle of Solidarity and the European Union*

While considering that a human rights based approach is not inconceivable when we talk about solidarity we refer, in this paper, to solidarity among the Members States and not to international solidarity, as a right of individuals. Generally speaking, the principle of solidarity is a fundamental pillar of the European integration process.[4] Since the 1970s, the case-law of the European Court of Justice has repeatedly suggested that solidarity is a general principle of the European legal system, accepted by the Member States as a result of their accession.[5] Recently, in the case Slovak Republic and Hungary v Council of the European Union, Advocate General Bot stated, Although surprisingly absent from the list in the first sentence of Article 2 TEU of the values on which the Union is founded, solidarity is, on the other hand, mentioned in the Preamble to the Charter of Fundamental Rights of the European Union as forming part of the 'indivisible, universal values' on which the Union is founded".[6] It should not be forgotten, in fact, that the principle of solidarity is referred to in the EU Charter of Fundamental Rights among

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[2] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 13 December 2007, Art. 80 "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle"; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[3] Council Decision (EU) 2015/1523 of 14 September 2015 and Council Decision (EU) 2015/1601 of 22 September 2015 *Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece*.

[4] The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (Art. 2). Cfr. U. VILLANI, Immigrazione e principio di solidarietà, in *Freedom, Security & Justice: European Legal Studies*, No. 3, 2017, pp. 1-4.

[5] CJEU, Case 128/78, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, 7 February 1979, para. 12.

[6] CJEU, Joined Cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council of the European Union*, *Opinion of Advocate General Bot*, 26 July 2017, para. 19.

the indivisible and universal values on which the Union is founded, together with human dignity and equality (Preamble). Title IV of the Charter is, in fact, about solidarity. [7]

Moreover, the same Advocate General added that "solidarity is both a pillar and at the same time a guiding principle of the European Union's policies on border checks, asylum and immigration", as set out in Article 67.2 and 80 TFEU. [8]

Solidarity is also mentioned with reference to mutual assistance between people and generations and among the Member States (Article 3.3 TEU), [9] and between Member States in the sector of natural disasters (Article 21.2TEU). [10]

The principle of solidarity may be considered as a parameter of lawfulness of the acts and policies adopted by the European Institutions as well as a tool of cooperation between Member States and third countries. In this respect, it should be remembered that "Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions". Moreover, "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area". (Article 24(2) TUE). Article 24(3) requires Member States to work together to enhance and develop their mutual political solidarity as well as to refrain from any action that is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

Finally, the Treaty of Lisbon provides for some solidarity clauses to be applied in the event of armed aggression (Article 42.7 TEU), [11] terrorist attacks

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[7] Charter of Fundamental Rights of the European Union was solemnly proclaimed by Parliament, the Council and the Commission in Nice in 2000. After being amended, it was proclaimed again in 2007. The Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. Cfr. G. Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument*, Brill Nijhoff, Leiden-Boston, 2014.

[8] CJEU, Joined Cases C-643/15 and C-647/15, *Opinion of Advocate General Bot*, para. 20.

[9] It shall promote economic, social and territorial cohesion, and solidarity among Member States.

[10] The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to assist populations, countries and regions confronting natural or man-made disasters (art. 21.2, g).

[11] If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter (art. 42.7).

(Article 222 TFEU)[12] and a sudden inflow of nationals from third countries (Article 78.3 TFEU).[13] In the first two cases, the Treaty imposes an obligation to act on Member States, which may only choose how to implement solidarity. However, in the last case, only the European Institutions may take temporary measures to help Member States concerned.

3. *The Principle of Solidarity in the Field of Asylum*

The principle of solidarity between Member States with reference to migration issues had already been recalled a number of times at a European level, but no incisive measures had been adopted until the Lisbon reform.[14]

At the beginning of the 1990s, after the crisis in the former Yugoslavia, the idea was considered to adopt a mechanism for sharing responsibilities between Member States in managing and receiving refugees.[15] Thus, the Treaty of Amsterdam provided that measures could be taken for managing sudden migration pressure (Article 73.k.2).[16]

However, an actual reference to solidarity is only found in the Conclusions of the Tampere European Council of 15-16 October 1999. With reference to the Common European Asylum System, the Council was urged to step up its efforts to reach an agreement on the issue of temporary protection for dis-

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[12] The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack (art. 222).

[13] In the event of one or more Member States being confronted by an emergency situation characterized 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.

[14] G. MORGESE, *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, 2014, pp. 365-405; 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, http://dx.doi.org/10.1111/eulj.12185.

[15] M. HOEL, *The European Union's Response to the Syrian Refugee Crisis an Analysis of the Response of Member States and EU Institutions*, 2015, p. 16.

[16] The Council (…) adopt measures on refugees and displaced persons within the following areas: (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection, (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

placed persons based on solidarity between Member States (para.16).[17] This request was acknowledged in Directive 2001/55, of 20 July 2001, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons.[18] Directive 2001/55 is still in force, but it has never been applied. Directive 2001/55 highlights the need for a solidarity system in order to balance efforts between Member States in managing displaced persons in the event of a mass influx.

A few years later, the European Pact on Immigration and Asylum (2008) proposed promoting voluntary and coordinated sharing of beneficiaries of international protection between Member States based on the principle of solidarity. The measure was intended to help the Member States that were subject to an excessive inflow of migrants due to their specific geographical or demographic situation.[19]

The setting up of mechanisms for the voluntary sharing of responsibility between Member States was also included in the Stockholm Programme, *An Open and Secure Europe Serving and Protecting the Citizen*, adopted by the European Council on 4 May 2010 (2010/C 115/01).[20] For this reason, it is not surprising that the Communication on enhanced intra-EU solidarity in the area of asylum proposed, among other things, *responsibility sharing*.[21] The idea was to support and correct the Dublin system by a mechanism of internal relocation of beneficiaries of international protection.

Nonetheless, this insight has not been translated into actions. For instance, Regulation No 604/2013 (Dublin III), adopted in June 2013, reproposed the pre-existing criteria, mainly the geographical one ('State of first entry' criterion).[22] It did not provide for a temporary suspension of the

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[17] Tampere European Council, Presidency Conclusions, 15-16 October 1999. It also argues that "The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union" (para. 4).

[18] Council Directive 2001/55/EC of 20 July 2001 on *Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof*.

[19] Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08.

[20] European Council, *The Stockholm Programme-An Open and Secure Europe Serving and Protecting the Citizens*, 2 December 2009, No. 16484/1/09 REV.

[21] EU Commission, *EU Agenda for Better Responsibility Sharing and More Mutual Trust*, (COM (2011) 835), 2 December 2011.

[22] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June

current asylum system in cases of heavy pressure on some Member States. This attitude of closure by Member States, disgraceful as it may be, is not surprising. In fact, all the proposals put forward until then were mostly based on Member States putting in place responsibility-sharing mechanisms on a voluntarily basis. No proposal was ever intended to change the Dublin system or its criteria. Clearly, the current anachronistic system ends up burdening border countries disproportionately, and it does not allow for full implementation of Article 80 TFEU. [23]

4. *The EU's Reaction to the Lampedusa Tragedy: Solidarity and Common Action*

The event that led to a change in the Union's approach to the management of migration flows was the shipwreck of an Eritrean vessel in the Strait of Sicily on the night between 18 and 19 April 2015 and the resulting death at sea of almost 900 migrants. [24] A few days after that tragedy, the European Commission submitted a ten-point action plan on migration, [25] endorsed by the extraordinary European Council of 23 April 2015, [26] and the European Agenda on Migration (13 May 2015), outlining the short- and long-term lines of actions that the Union intended to pursue as a response. [27]

The short-term measures included reinforced sea operations carried out by Frontex aimed at border control and countering trafficker networks; first aid and reception measures, the so-called 'hotspot approach'; and two proposed relocation and resettlement mechanisms. Moreover, within the

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2013, *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*.

[23] E. Karageorgiou, *The Law and Practice of Solidarity in the Common European Asylum System: Article 80 TFEU and its Added Value*, in *European Policy Analysis*, No. 14, 2016, pp. 1-12.

[24] G. Caggiano, *Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli episodi di massa: dinamiche intergovernative, condivisione delle responsabilità fra gli Stati membri e tutela dei diritti degli individui*, in *Studi sull'integrazione europea*, 2015, pp. 459-487.

[25] *Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration*, http://europa.eu/rapid/press-release_IP-15-4813_it.htm.

[26] Special Meeting of the European Council, 23 April 2015, Statement, http://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/.

[27] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An European Agenda on Migration*, COM(2015) 240 Final, 13 May 2015; https://ec.europa.eu/home-affairs/what-is-new/news/news/2015/20150513_01_en.

framework of stronger cooperation with third countries, an agreement was made between the EU and Turkey to stem the flow of migrants and asylum seekers.[28]

These emergency measures, adopted by different legal acts (decisions, international agreements, and soft low) were intended to create a more rational and efficient management of migrant arrival on European coasts.

Alongside these emergency responses, structural changes were proposed to better manage the migration and asylum phenomena. The long-term measures included a proposed regulation on a permanent relocation mechanism, similar to that provided for in the two decisions; the setting up of a European Border and Coast Guard, currently in operation; and the reform of the Common European Asylum System, at present under discussion in the European Parliament and the Council.[29]

4.1. *The EU Relocation Programme: a Practical Example of Solidarity*

Strengthened solidarity and responsibility between Member states was one of the action lines proposed by the European Agenda on Migration. In the light of of the principle of solidarity, requiring that the weight of irregular migration flows – and of asylum seekers in particular – should be absorbed by all Member States (Art. 80 TFUE), and not only by first-entry countries, the Agenda considered two different options: relocation and resettlement. Relocation is a temporary mechanism for the distribution of applicants for international protection who are already in the territory of the Union. Resettlement is a non-binding programme resettling refugees who are in the territory of third countries.

The Council adopted the relocation plan proposed by the Commission on 27 May 2015[30] with two Decisions: 2015/1523, of 14 September 2015, and 2015/1601, of 24 September 2015.[31]

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[28] N. IDRIZ, *The EU-Turkey Statement or the 'Refugee Deal': The Extra-Legal Deal of Extraordinary Times?*, Asser Institute, 2017, http://www.asser.nl.

[29] European Parliament, *Legislative Train Schedule: Towards a New Policy on Migration. Reform of the Common European Asylum System*, http://www.europarl.europa.eu. Cfr. V. TÜRK, M. GARLICK, *From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees*, in *International Journal of Refugee Law*, No. 4, 2016, pp. 656-678.

[30] Council of the European Union, *Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece*, COM(2015) 286 final, 27 May 2015.

[31] E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO LAX, *Enhancing the Common European Asylum System and Alternatives to Dublin*, in *CEPS Paper in Liberty and Security in Europe*, No. 83, 2015, p. 40 ss., www.ceps.eu.

The mechanism set up by the two Council decisions establishes a *temporary and mandatory exception to the responsibility criteria of the Dublin system*, based on Article 78.3 TFUE. This article, which had never been applied before, provides that, faced with "a sudden inflow of nationals from third countries", the Commission may submit to the Council, which decides by a qualified majority, "provisional measures for the benefit of the Member State(s) concerned". The Council acts after consulting the European Parliament.

In this specific case, the Council, referring to the principle of solidarity between Member States, as well as to the particular crisis situation in the Mediterranean, established "provisional measures in the area of international protection for the benefit of Italy and of Greece, in view of supporting them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States" (Article 1.1, Decision 2015/1601).

In this case again, Directive 2001/55 was not considered applicable, and it was decided to resort to provisional measures in the area of international protection.

These two Council decisions gave rise to obligations for Member States. The beneficiary States (Greece and Italy) were required to strengthen their asylum and return systems, with particular attention to the identification, registration and fingerprinting of the newly arrived. Failure to do so would result in losing the advantages arising from the relocation scheme. All other Member States had obligations to relocate 160,000 asylum seekers who arrived in Italy and Greece after 15 April 2015. Such relocation should have taken place over the course of two years, based on proportional quotas.

4.2. *The Relocation Mechanism*

The relocation system was a first implementation of the principle of solidarity and fair sharing of responsibility between Member States. The relocation mechanism established that a set quota of refugees was to be transferred from the Member State of entry to a second Member State. The latter would become responsible for examining the asylum application, making an exception to the Dublin III Regulation. [32]

The relocation scheme was expected to allow for the relocation of 160,000 asylum applicants in clear need of international protection, or of applicants of nationalities with an EU-wide average recognition rate of

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[32] Maiani F., *Hotspots and Relocation Schemes: the Right Therapy for the Common European Asylum System?*, in *EU Immigration and Asylum Law and Policy*, 2018, http://eumigrationlawblog.eu.

75% or higher (on the basis of EUROSTAT data for the previous quarter for the whole EU). [33] This obligation was to be fulfilled over a two-year period. It mainly covered Syrians and Eritreans who arrived in Italy and Greece after 15 April 2015, or after the adoption of the Council decisions. Clearly, the nationalities admitted to the relocation system only accounted for a small portion of asylum seekers in Italy and Greece. In practice, a considerable number of people in need of international protection were left out of the above measures.

The distribution criterion took into account a number of parameters, such as Member States' total population (40%), total GDP (40%), number of refugees already within the country in 2010-2014 (10%), and unemployment rate (10%). [34]

In an effort to balance out the principle of solidarity and the security needs of Member States, the two Council decisions provided that the final approval of the transfer lay with the Member State of relocation (Art. 5.4, Decisions). Member States retained the right to refuse to relocate an applicant if there were reasonable grounds for regarding that person as a danger to their national security or public order (Article 5.7 Decisions). Moreover, in exceptional circumstances, a Member State could notify the Council and the Commission that it was temporarily unable to take part in the relocation process of up to 30% of applicants allocated to it (Art. 4.5, Decision 2015/1601). However, outside these cases, a Member State could not unilaterally refuse to implement the relocation plan, or it might face an infringement procedure.

The Commission's initial proposal included a financial solidarity clause, which was removed when the proposal was adopted. According to that clause, a Member State that failed to to take part in the relocation was required to make a payment into the Asylum, Migration and Integration Fund.

Only after obtaining authorisation could Italian and Greek authorities take a decision on an individual applicant and order his or her relocation, in agreement with EASO. Relocation procedures were to take place within two months, and the authorities of the Member States concerned were required to cooperate to give priority to vulnerable applicants, with special attention to the best interest of the child and family unity (see Decision 2016/1601, Recital 33). In practice, however, relocation procedures lasted longer, due to poor cooperation on the part of Member States, and organisational difficulties on the part of Italy and Greece.

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[33] Council Decision 2015/1601, para. 25.

[34] *European Agenda on Migration*, p. 19.

The relocation mechanism, like the Dublin system, did not take into account the individual interests of the people involved and did not allow beneficiaries to choose their country of destination. In this respect, the two Council decisions were simply highlighting, in a general way, the need to consider applicants' preferences for the purpose of their integration, that is to say, to consider whether they had any family ties. If, instead, the relocation mechanism had taken into account the cultural and language preferences and the aspirations of applicants for international protection, it could have turned out to be an effective way to promote integration and discourage secondary movements.

4.3. *EU Member States' Reaction to Relocation Mechanism: Solidarity or Inaction?*

The relocation mechanism, adopted as an emergency measure and based on the principle of solidarity between Member States, faced strong opposition from some Member States. This undermined its full implementation.

Two fronts emerged. On the one side, there were border countries, supported by France and Germany. On the other side, there were the Visegrad countries (Poland, Czech Republic, Slovakia, and Hungary), plus the Baltic States and Finland, as well as Romania and Bulgaria outside the Schengen area. The former, with traditionally open systems, were in favour of a fair sharing of responsibility, also as a way to tackle the current population decline. The latter argued for the defence of their ethnic and national composition, using issues linked to minorities living within their territory. [35]

It should be recalled that some Member States had already adopted similar mechanisms in the past. In the second half of the 1990s, Germany distributed refugees, mainly from Former Yugoslavia, between its Länder. Later, similar situations took place in the United Kingdom, the Netherlands, Belgium, and Austria. [36]

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[35] B. NAGY, *Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrad Countries to the Post-2015 Arrival of Migrants and Refugees*, Working Paper No. 17, 2017, pp. 1-20, http://www.iai.it/sites/default/files/gte_wp_17.pdf.

[36] D. VANHEULE, J. VAN SELM, CHR. BOSWELL, *The Implementation of Article 80 TFUE on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration*, European Parliament Study, Civil Liberties, Justice and Home Affairs, 2011, pp. 39 ss.; A. BETTS, *Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory*, in *Journal of Refugee Studies*, No. 16, 2003, pp. 274-296.