ON THE AGENDA:
THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

REFUGEES, THE EUROPEAN UNION AND THE 'DUBLIN SYSTEM'. THE REASONS FOR A CRISIS

BRUNO NASCIMBENE*

TABLE OF CONTENTS: I. The current scenario. Dublin and Schengen in crisis? – II. The initiatives of the European institutions. A censurable delay. The need for solidarity between Member States. – III. The first derogation of the "Dublin system". The controversial mechanism of replacement and the institutionalisation of exceptions. – IV. The criticality and inadequacy of the current system. The prospects for reform. What rights for the migrant? – V. Some final considerations.

ABSTRACT: The huge surge in migration into the European Union, particularly over the last two years, has revealed the inadequacy of the current legal framework. The Dublin III Regulation, which establishes 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protection lodged in one of the Member States by a third-country national or a stateless person, now appears outdated. The initiatives devised by the European Commission to alleviate the burdens on the countries most exposed, activating for the first time the emergency mechanism under Art. 78, para. 3, TFEU, have proven to be largely ineffective and have faced stiff opposition from various Member States on both political and legal grounds. The resettlement programme introduced to ensure safe and legal access into the European Union has also failed to achieve the desired results. The debate has now turned to how to overcome the limitations of the current system. The European Agenda on Migration presented in May 2015 proposed the establishment of a single asylum decision process, to guarantee equal treatment of asylum seekers throughout Europe, and a mechanism for mutual recognition of positive asylum decisions. The European Commission now seems set to develop a relocation mechanism based on a distribution key. The new system must nonetheless ensure a fairer sharing of responsibility while guaranteeing effective solidarity between Member States and respect for the fundamental rights of people.

KEYWORDS: international protection – Dublin Regulation – re-location – resettlement – solidarity – fundamental rights.

* Professor of European Union Law, University of Milan, b.nascimbene@unimi.it. The Author wishes to thank Dr. Alessia Di Pascale for her valuable comments and assistance in drafting the paper.

I. The current scenario. Dublin and Schengen in crisis?

In recent years the increase in forced migration on a global scale, caused by wars, violence and persecution, has reached the highest levels yet recorded. And it is expected to increase in the coming years. This is concerning the legal expert, the politician, those responsible for governing as well as civil society seriously.[1] In addition to the ordinary flows of migrants seeking employment opportunities and better living conditions, a growing number of people, coming particularly from Syria, Iraq and Afghanistan, are seeking protection in Europe,[2] risking their lives in the process. It has been almost a daily occurrence to witness a tragedy of deaths at sea; and in public opinion, as well as in political circles, a censurable indifference appears to be growing.

In 2015, over one million of people fled their home countries[3] and most illegally crossed the European Union borders, compared to approximately 280,000 in 2014.[4] Italy and Greece were most exposed to the flows, via the central-eastern Mediterranean route, with growing tension in the Western Balkans.[5]

The situation thus created, worsened by recent terrorist attacks, has given new impetus to the debate on the effectiveness of border controls, on the suitability and relevance of the Dublin system, on burden-sharing in light of the principle of solidarity and on the need to identify mechanisms for distributing asylum seekers, as well as on safe and legal avenues. The reaction of many European States, for reasons related to public order and national security, has been to restore internal border controls to prevent migrants from entering, questioning their commitment to the Schengen *acquis*.[6] Are

[1] Forced migrants numbered 59.5 million at the end of 2014 compared with 51.2 million a year earlier and 37.5 million a decade earlier. United Nations Refugee Agency (UNHCR), *World at war*, *UNHCR Global Trends, Forced Displacement in 2014*, 2015, www.unhcr.org.

[2] News Release of Eurostat, *Record number of over 1.2 million first-time asylum seekers registered in 2015*, 4 March 2016, www.ec.europa.eu/eurostat.

[3] Annual risk analysis 2015 of Frontex, April 2015, available online at frontex.europa.eu. For updated figures see the information published on the Frontex website: www.frontex.europa.eu. According to the EU agency for the management of border operational cooperation, throughout 2015, there were 1.83 million illegal border crossings detected at the EU's external borders compared to the previous year's record of 283,500, see: News of Frontex, *Greece and Italy Continued to Face Unprecedented Number of Migrants in December*, 22 January 2016, www.frontex.europea.eu.

[4] The UNHCR figures (available at www.unhcr.org) show that some 1,000,573 people had reached Europe across the Mediterranean, mainly to Greece and Italy, in 2015. The UNHCR also indicates that 84 per cent of those arriving in Europe came from the world's top 10 refugee producing countries.

[5] See Frontex, *Western Balkan Route*, available at frontex.europa.eu.

[6] The proliferation of national plans B is evidence of the failure of the European Plan A (D. Thym, *Towards a Plan B: The Rejection of Refugees at the Border*, in *EU Migration Law Blog*, 28 January 2016, eumigrationlawblog.eu). The suspension of the Schengen commitments was decided, albeit temporarily, by Sweden, Norway, Denmark, Germany, Austria, Belgium, Slovenia specifically to cope with the flow of migrants. The updated list is published by the Commission at www.ec.europa.eu.

Schengen and Dublin in crisis, then? And what are the prospects, in particular, for the Dublin system?

II. The initiatives of the European institutions. A censurable delay. The need for solidarity between Member States

In March 2015, the "new" European Commission which took office in autumn 2014 launched a debate on the future European agenda on immigration.[7] The communication presented in May proposed measures to be implemented immediately,[8] aimed at addressing the crisis situation in the Mediterranean and identified actions to be developed in future years to improve the management of migration as a whole. This was followed by several initiatives in the subsequent months, including a) the definition of a new framework for coordination and cooperation with the countries of the Western Balkans; b) the establishment of a partnership with Turkey;[9] c) a proposal for a new European border and coast guard;[10] d) the launch of a numerous infringement procedures to ensure the coherence of the Common European Asylum System;[11] and e) the strengthening of the framework on the return of irregular migrants.[12] Nevertheless the effectiveness of such measures appears questionable.

[7] A. Di Pascale, *La futura agenda europea per l'immigrazione: alla ricerca di soluzioni per la gestione dei flussi migratori nel Mediterraneo*, in *Eurojus.it*, 9 April 2016, www.eurojus.it.

[8] Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *A European Agenda On Migration*. The implementation of the measures adopted on that basis is constantly monitored and updated. See Legislative documents of the European Commission Migration and Home Affairs, ec.europa.eu. S. Carrera, D. Gros, E. Guild, *What Priorities for the New European Agenda on Migration?*, in *Centre for European Policy Studies*, 22 April 2015, p. 1 *et seq.*

[9] On 18 March, following on from the European Union (EU)-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March EU-Turkey statement, the European Union and Turkey reached an agreement providing for the re-admission of migrants who have crossed irregularly into the EU borders from Turkey. See www.consilium.europa.eu. See also Communication COM(2016) 166 final from the Commission to the European Parliament, the European Council and the Council, *Next operational steps in EU-Turkey cooperation in the field of migration*. See the remarks by S. Peers, *The Final EU/Turkey Refugee Deal: a Legal Assessment*, in *EU Law Analysis*, 18 March 2016, www.eulawanalysis.blogspot.it.

[10] Proposal for a Regulation COM(2015) 671 final of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC. See the remarks by S. Peers, *The Reform of Frontex: Saving Schengen at Refugees' Expense?*, in *EU Law Analysis*, 16 December 2015, www.eulawanalysis.blogspot.it.

[11] Annex 8 to the Communication COM(2016) 85 final from the Commission to the European Parliament and the Council on the state of play of implementation of the priority actions under the European Agenda on Migration, *Implementation of EU Law State of Play*.

[12] Recommendation C(2015) 6250 final of the Commission establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks; Communication COM(2015) 453 final from the Commission to the European Parliament and to the Council, *EU Action*

The most significant aspect of the framework of an asylum policy that has its cornerstone in the Dublin system lies in the provision of a mechanism that, for the first time, has implemented Art. 78, para.3, of the Treaty on the Functioning of the European Union (TFEU). The aim is to support Member States most exposed to the flow of migrants,[13] in implementation of the principles of solidarity and fair burden-sharing[14] which must guide policies on asylum and immigration (art. 80 TFEU):[15] a principle that cannot simply be stated but must actually be implemented. It was also recommended to establish a European mechanism of resettlement, aimed at allowing for the arrival in the European Union, directly from third countries, of people in need of international protection.

The relocation mechanism therefore represented an initial important derogation of the Dublin Regulation. A regulation intended at preventing both the phenomenon of so-called refugees in orbit, establishing with certainty that at least one State is responsible for examining asylum applications, and so-called asylum shopping, preventing the simultaneous submission of a number of applications in different countries. By virtue of the current rules, essentially based upon the attribution of responsibility for the reception and examination of applications at the first country of arrival (in the absence of

Plan on return; proposal for a Regulation COM(2015) 668 final of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals.

[13] A measure specifically intended to deal with temporary situations of mass influx of displaced persons had actually been adopted in 2001 (Directive 2001/55/EC of the Council 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). The so-called "temporary protection directive" sets up a procedure of exceptional character to provide, in cases of mass influx, or imminent mass influx, of displaced persons from third countries who cannot return to their country of origin, immediate and temporary protection, also for the purpose of burden sharing between Member States. It was, however, never used, although it was invoked in relation to the events of the so-called "Arab Spring" in 2011. The legal basis of this instrument is found in Art. 63, para. 2, lett. a) and b), of the Treaty establishing the European Community (TEC). Moreover, in the Regulation (EU) No 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 (so-called "Dublin Regulation III") an early warning and crisis management mechanism was added, intended amongst other things to deal with special situations of pressure on the asylum system of a Member State. None of these instruments is apparently deemed adequate to deal with the current situation.

[14] See C. FAVILLI, *L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'«emergenza» immigrazione*, in *Quaderni Costituzionali*, 2015, p. 785 *et seq.*

[15] The TFEU does not contain any indication of how this provision should be enacted. See: A. ADINOLFI, *La politica dell'immigrazione dell'Unione europea dopo il Trattato di Lisbona*, in *Rassegna di Diritto pubblico europeo*, 2011, p. 11 *et seq*. For an analysis of the initiatives taken so far to implement the principle of solidarity in the field of asylum, see G. MORGESE, *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. CAGGIANO (a cura di), *I percorsi giuridici per l'integrazione*, Torino: Giappichelli, 2014, p. 366 *et seq*.

special criteria), the result has been strong disparity between Member States.[16] In 2014, five Member States (Germany, Italy, Sweden, Hungary and Austria) dealt with 72 per cent of all asylum applications submitted in the EU. The Dublin system, designed in 1990, clearly appears to be outdated and inadequate.

The system also appears to be questionable from the perspective of protection of the fundamental rights of applicants for international protection. A mechanism that imposes, on the foreigner, a country of destination needs in the first place a uniform application of the Common European Asylum System.[17] Conversely, there are strong discrepancies between the Member States, in some cases so serious as to be censured by the European Court of Human Rights and the Court of Justice of the European Union (CJEU). Particularly important is the suspension, by the Member States, of transfers to Greece, in 2011, following a ruling of the Strasbourg Court and another ruling of the EU Court,[18] in which systematic deficiencies in the Greek asylum system were identified.

[16] Regulation No 604/2013 replaced Regulation (EC) No 343/2003 which had "communitarised" the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990. The Dublin Regulation III is the fundamental act of the "Dublin system", i.e. the system for identifying the country responsible for examining the application for international protection, together with Regulation (EU) No 603/2013 of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 (which replaced previous Regulation (EC) No 2725/2000). In the absence of special criteria (which aim to protect above all minors and the family unit, as well as any previous link with another Member State), it is noted that the Member State in which the asylum seeker entered the European Union for the first time becomes responsible for examining the asylum application; more particularly, where it is established that that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection (Art. 13, para.1). The asylum application must be examined by a single Member State, but this is subject to the right of a Member State to examine an application lodged by a citizen of a third country, even if that examination is not its responsibility based upon the criteria established in the regulation. In that case, that Member State becomes the State responsible in accordance with the regulation and accepts the obligations related to that responsibility. By virtue of that system, the Member State responsible for examining the application is also that responsible for any protection granted.

[17] The Common European Asylum System consists of four specific directives (on the reception conditions of applicants for international protection, on temporary protection, on the recognition and status of international protection and on the procedures for obtaining that recognition) in addition to the Dublin and Eurodac regulations. That system was implemented in two phases, with a gradual harmonisation process. It is supplemented, in addition, by some provisions on family reunification contained in the specific directive and the directive extending the right to obtain the EU long term residence permit to holders of international protection.

[18] European Court of Human Rights (Grand Chamber), judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*; and Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department*. Albeit in a more limited manner, the reception conditions offered by Italy were also condemned denounced. See, in particular, European Court of Human Rights (Grand Chamber), judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*,

Transfers to Greece could resume in 2016 if the measures indicated by the Commission are effectively implemented.[19]

III. The first derogation of the "Dublin system". The controversial mechanism of replacement and the institutionalisation of exceptions

In its May communication, the Commission identified a series of emergency measures to help frontline Member States to deal with migrant arrivals, establishing a new approach based upon "crisis points" or *hotspots*. This provides that the European Asylum Support Office (EASO), Frontex and the European Police Office (Europol) will work on the ground with those Member States to swiftly identify, register and fingerprint incoming migrants. It also announced the submission of a legislative proposal to activate the emergency scheme under Art. 78, para. 3, TFEU on the basis of a distribution key.

Two decisions establishing temporary measures in the area of international protection for the benefit of Italy and Greece, deemed to be the countries most exposed to inflow of migrants and asylum seekers, were approved in September 2015, with opposition from some Member States.[20] It was an initial derogation, albeit temporary, of Dublin Regulation III, and in particular Art. 13, para. 1, according to which the two countries would otherwise have been responsible for examining the applications for international protection in accordance with the criteria set out in Chapter III of that Regulation, as well as the procedural phases, including the time limits, set out in Arts 21, 22 and 29 of that Regulation.[21] So, compared to the ordinary criteria of responsibility, that mechanism provides for the transfer to other Member States (which will become responsible

which indirectly ascertains the severe inadequacy of the reception conditions offered by Italy, with specific reference to the protection of the family and children.

[19] Recommendation C(2016) 871 of the Commission addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013.

[20] In relation to the difficulties in adopting the two decisions and the division between Member States, see H. LABAYLE, *Angela Merkel au Parlement européen, des paroles aux actes?*, in *Espace de liberté, sécurité et justice*, 12 October 2015, www.gdr-elsj.eu. Some Eastern European countries (Hungary, Slovakia, Romania and the Czech Republic) objected to the emergency mechanism, even though the benefits would have been extended to Hungary and so the second decision was adopted by majority. In addition, Slovakia and Hungary filed two actions for annulment of the Decision (EU) 2015/1601 of the Council establishing provisional measures in the area of international protection for the benefit of Italy and Greece (Court of Justice, application of 15 January 2016, case C-643/15, *Slovakia v. Council*; and application of 15 January 2016, case C-647/15, *Hungary v. Council*). In addition to procedural matters, the two actions dispute the violation of some general principles of the legal system of the European Union, particularly that of proportionality.

[21] Decision (EU) 2015/1523 of the Council establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Decision 2015/1601.

for examining the applications) of 160,000 persons[22] in clear need of international protection[23] who reached Italy and Greece between 15 August 2015 and 16 September 2017. The distribution is carried out on the basis of criteria relating to the reception and absorption capacity of each Member State.[24] In confirmation of the commitment of the European Union to find solutions aimed at greater burden-sharing between all the Member States, in September 2015 a proposal for a regulation was also submitted which establishes a mechanism of permanent relocation in the presence of certain conditions.[25]

As the two decisions established temporary measures of "exceptional nature", applicable to Greece and Italy by virtue of their exposure to significant migratory pressure and the deficiencies identified in their respective systems of asylum,[26] the two countries were asked to identify solutions to obviate the criticalities identified, submitting to that

[22] Approximately 40,000 from Italy and 66,000 from Greece should be relocated. The remaining 54,000 were originally destined for Hungary which rejected this possibility, however, objecting to the European Union's relocation plan and voting against the decision adopted by the Justice and Home Affairs Council dated 22 September 2015. The final text therefore allocates the remaining 54,000 to a relocation to be defined at a later stage, in an amount proportional to the tables annexed to the Decision 2015/1601 or on the basis of other criteria, in light of the constant monitoring activity of flows that the Commission will perform in accordance with the Decision. See Art. 1, para. 2, Decision 2015/1601.

[23] Relocation only applies in respect of an applicant belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection as referred to in Chapter III of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 per cent or higher. See Art. 3 of both decisions. According to Eurostat data for the third quarter of 2015, nationals of eight countries would be eligible for relocation: Central African Republic (85 per cent recognition rate), Eritrea (87 per cent), Iraq (88 per cent), Yemen (88 per cent), Syria (98 per cent), Bahrain (100 per cent), Swaziland (100 per cent), and Trinidad and Tobago (100 per cent).

[24] Relocation is based on defined criteria: GDP, population, unemployment rate and past number of asylum seekers and resettled refugees. Applying these criteria Cyprus is due to receive the lowest percentage of transferred asylum seekers and Germany the highest.

[25] See the proposal for a Regulation COM(2015) 450 final of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 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. The proposal differs from the two decisions as it has the same legal basis as Regulation No 604/2013, i.e. Art. 78, para. 2, lett. e), TFEU. The crisis relocation mechanism provided involves permanent derogations (to be activated in certain crisis situations to the benefit of specific Member States), particularly of the principle set out in Art. 3, para. 1, of Regulation No 604/2013. The proposal establishes, in clearly specified crisis circumstances, the mandatory use of a distribution key for determining the responsibility for examining applications.

[26] See, in that regard, the considerations expressed in the explanatory memorandum.

end a roadmap,[27] under penalty of suspension of the decisions. The Commission does not exclude that similar measures may be applied to other Member States, where the conditions arise.

In addition to relocation, the proposal provides for an increase in support given by other Member States to Italy and to Greece, by sending national experts,[28] under the coordination of EASO and the other agencies involved. The aim is to assist Italy and Greece, in particular in the screening and initial phases of dealing with the applications, as well as in the relocation procedure (particularly in providing information and specific assistance to the persons involved and in the practical implementation of the transfers). The response of the Member States has, to date, been insufficient[29] and the initiatives of the European Institutions have proven to be largely ineffective.

Member States are not entitled to reject the transferred persons (for whom they receive a lump sum of 6,000 Euro per person), except for reasons of national security or public order, to be ascertained following individual assessment. However, under the second decision of 22 September it was permitted to notify the Commission and the Council (within three months from the entry into force of the decision) of the temporary incapacity to participate in the relocation process, for up to 30 per cent of the assigned applicants, for duly justified reasons compatible with the fundamental values of the European Union in accordance with Art. 2 of the Treaty on European Union (TEU).[30] National requirements play a significant role, and the mechanism at stake does not place into discussion one of the cornerstones of the current system, i.e. the lack of choice of the migrant in relation to the State that will examine the application. The decisions do

[27] The roadmap prepared by the Italian Ministry of the Interior is available here: www.asylumineurope.org.

[28] Art. 7 Decision 2015/1601.

[29] Communication COM(2015) 510 final from the Commission to the European Parliament, the European Council and the Council, *Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration*, pp. 3-4, and Annex to the Communication COM(2016) 165 final from the Commission to the European Parliament, the European Council and the Council, *First report on relocation and resettlement*, p. 11.

[30] Art. 4, para. 5, Decision 2015/1601. Sweden and Austria have made use of this option. See proposal for a Council Decision COM(2015) 677 final of the Commission establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The proposal is currently in the Civil Liberties Committee in the European Parliament. On 10 February 2016, the Commission presented another proposal to suspend for one year the relocation of 30 per cent of applicants allocated to Austria in view of assisting Austria in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in its territory, proposal for a Council Implementing Decision COM(2016) 80 final of the Commission on the temporary suspension of the relocation of 30 per cent of applicants allocated to Austria under Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

not provide that the beneficiaries of the programme be consulted or that they may object to the destination, although they leave to the national authorities some margin in assessing personal situations. In selecting the Member State of relocation, account must be taken, in particular, of the qualifications and specific characteristics of the relevant applicants, such as their language skills and other individual indications based upon demonstrated family, cultural or social links that could facilitate their integration into the Member State of relocation. For particularly vulnerable applicants, the ability of the Member State of relocation to ensure adequate support must be taken into consideration. These profiles are emphasised in the second decision, with the emerging concern that the protection of fundamental rights may be compromised. The decision emphasises that the integration of asylum seekers in clear need of international protection into the host society is the cornerstone of the correct functioning of the Common European Asylum System. The importance of migrants' personal characteristics is confirmed by the fact that the decisions, albeit recalling respect of the principle of non-discrimination, allow the Member State of relocation to indicate its preferences. States have not applied this provision appropriately. A faculty aimed at promoting integration has been used as a tool for refusing the reception of potential beneficiaries.

IV. The criticality and inadequacy of the current system. The prospects for reform. What rights for the migrant?

The debate of the last period[31] and the recent discussion concerning the criticalities of the Dublin system allows for some comments and proposals to be made in light of the proposal put forward by the Commission.[32] In March 2016, the Commission published the first report on the implementation of the mechanisms of relocation and resettlement.[33]

The Dublin system has a number of critical aspects. These include: a) excessive burdens for only some Member States on the border or those States favoured by applicants – where they are able, in any case, to reach by evading fingerprinting; b) limited implementation (approximately 30 per cent in 2008-2012) of transfers where a Member State different from where the application was lodged is found to be responsible; c) absence of equal treatment for migrants due to differences identifiable with reference to the reception rates of applications, reception conditions and the possibilities of subse-

[31] Communication COM(2016) 197 final from the Commission to the European Parliament and the Council, *Towards a return of the Common European asylum system and enhancing legal avenues to Europe*.

[32] See in particular E. Guild, C. Costello, M. Garlick, V. Moreno-Lax, S. Carrera, *Enhancing the Common European Asylum System and Alternatives to Dublin Study for the Committee on Civil Liberties, Justice and Home Affairs*, 2015, www.europarl.europa.eu.

[33] Communication COM(2016) 165 final from the Commission to the European Parliament, the European Council and the Council, *First report on relocation and resettlement*.

quent integration, which in some cases also translate into serious violations of human rights; d) imposition on the migrant of a final decision without considering individual specific aspects.

The Commission, in its Agenda of May 2015, put forward some innovative changes that would allow for mobility within the European Union for the beneficiaries of international protection and greater uniformity in the implementation of the Common European Asylum System. It suggested a reflection both on the introduction of a possible mechanism for the reciprocal recognition of positive decisions on asylum,[34] and on the establishment of a single decision-making process, in order to ensure equality of treatment of asylum seekers across the whole European Union. The mutual recognition of positive decisions is not currently covered by Union legislation, but has been proposed in various guidance documents, particularly recently.[35] As to the second aspect, it is clear that there is a need to strengthen the coherence of the system. The gaps are confirmed by the infringement proceedings launched by the Commission in recent times, but a more incisive role could be played by EASO in supporting the Member States and guaranteeing more uniform conditions in the examination of applications, also with a view to strengthening mutual trust. It has also been suggested to create an EU Migration, Asylum and Protection Agency, instructed to perform the centralised examination of applications for international protection.[36] This solution would appear a success, outside the Union system, in realising the condition or harmonisation that is missing today. The question that arises today concerns the rights that the Union should grant to the migrant. The impossibility for the migrant to express any preference for his destination is an aspect worthy of serious consideration. The resistance of asylum seekers to be fingerprinted highlights the need to consider preference requests, particularly where these are based upon concrete motivations such as family and personal connections or employment opportunities. Preferences could be taken into consideration when lodging the application, but also at a later stage, allowing for movement after recognition of the status, now possible only for beneficiaries of international protection who have ob-

[34] C. Favilli, *Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione europea*, in *Rivista di diritto internazionale*, 2015, p. 701 *et seq*.

[35] See in particular the programme of the Italian Presidency of the Council of the European Union, *Europe, A Fresh Start: Programme of the Italian Presidency of the European Union*, 1 July – 31 December 2014, available at www.italia2014.eu; Communication COM(2014) 154 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Open and Secure Europe: making it happen*.

[36] G. Goodwin-Gill, *Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action*, 11 May 2015, www.jmcemigrants.eu; S. Carrera, D. Gros, E. Guild, *What Priorities for the New European Agenda on Migration*, cit.

tained the status of long-term residents (i.e. after five years of uninterrupted legal residence in the first reception country).[37]

The revision of the Dublin Regulation appears, however, to focus particularly on defining suitable methods to guarantee fairer burden-sharing between the Member States, through a permanent allocation formula,[38] substantially developing, or better defining, the emergency mechanism implemented in recent months. Hence, no *revolutionary* modification. The permanent codification of the system of derogation adopted more recently incited, however, imaginable resistance by those Member States that, more than the others, are subject to migratory burdens and pressure. Nor can the fact be overlook that the European Commissioner himself, Mr. Avramopoulos, has admitted that the mechanisms adopted up to now have not provided the expected results.[39] Until March 2016 only a thousand people had been transferred from Italy and Greece. The Member States made available only roughly 7,000 places, with some Member States not having given any availability (Austria, Croatia, Hungary, Slovakia and Slovenia).[40] Although there has been a slight increase since February, the results are inadequate compared to the aim of transferring 160,000 people in two years. One can clearly understand the perplexities and criticisms of initiatives that have expressed a mere hope, from the very moment they were proposed and publicised. Yet it should be ensured that member accept responsibility. To this effect the multiplication of infringement procedures could help to pursue common objectives, and thus to avoid a) the incorrect use of the right to indicate preferences by the Member States; b) the excessively lengthy response timescales; c) the unjustified rejections of applications; d) the lack of adequate information to migrants who, consequently, do not collaborate in the procedures. Reports on the implementation of the mechanism in Italy show a clear criticism not only of the screening methods for access to the procedure (summary interviews, conducted soon after disembarkation when the people are still traumatised and without providing adequate information on the mechanism of relocation), but also highlight the lack of a legal qualification and definition of the hotspots and the pre-selection methods of people based upon their presumed belonging to a nationality. This is against the guarantees and principles established by the "procedures directive", Directive 2013/32 whereby anyone may have a personal history that justifies international protection and

[37] Directive 2011/51/EU of the European Parliament and of the Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection Text with EEA relevance.

[38] S. PEERS, *The Dublin Regulation: Is the End Nigh? Where Should Unaccompanied Children Apply for Asylum?*, in *EU Law Analysis*, 21 January 2016, www.eulawanalysis.blogspot.it.

[39] European Commission, *Remarks by Commissioner Avramopoulos to the LIBE Committee at the European Parliament*, Press Release (SPEECH/16/76), 14 January 2014.

[40] See weekly updates published by the European Commission, available at ec.europa.eu.

should be entitled to a correct individual assessment, while collective expulsions under simplified procedures are prohibited.[41]

Another aspect of concern, also with regard to the protection of fundamental rights, relates to the possibility of using force to acquire fingerprints, where the migrant objects. The European Commission invited the necessary changes to be made to national legislation,[42] but some perplexity – ethical over legal – remains.

The new mechanism makes the costs of management and reception of migrants the responsibility of the most exposed Member States, albeit with financial help from the European Union and support staff sent by the other Member States and agencies of the Union. The responsibility for the hotspots lacks equal sharing of costs and efforts: "To provide for a hotspot approach that reflects solidarity, the EU should establish European hotspots where the provisions of the Reception directive are applied as minimum standards".[43]

The planning of a distribution of asylum seekers between the Member States, in application of the principle of solidarity, requires a definition of the criteria of allocation that takes account of the actual reception capacity of the different Member States, with an update and periodic revision of the same in light of the gradual evolution. The migrant must be allowed to indicate a preference, in the presence of a substantial connection between the asylum seeker and the Member State, favouring the existence of family relationships, reasons of opportunity or professional requirements that are objectively verifiable. The legal entry channels must be used better or be more accessible, also introducing humanitarian visas, expanding the possible beneficiaries of family reunification, introducing forms of sponsorship by non-governmental organisations, private companies or associations to allow for the entry of people worthy of protection who could be guaranteed reception in the territory.[44]

[41] See European Court of Human Rights, judgment of 1 September 2015, no. 16483/12, *Khlaifia and Others v. Italy*; the case was referred to the Grand Chamber in February 2016. See A.R. Gil, *Collective expulsions in times of migratory crisis: Comments on the Khlaifia case of the ECHR*, in *EU Migration Law Blog*, 11 February 2016, available at: www.eumigrationlawblog.eu.

[42] Staff working document SWD(2015) 150 final of the Commission on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, 27 May 2015. Communication COM(2015) 679 final from the Commission to the European Parliament and the Council, *Progress Report on the Implementation of the hotspots in Italy*, p. 4.

[43] See in these terms E. Brouwer, C. Rijken, 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, www.eumigrationlawblog.eu.

[44] M. Di Filippo, *From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures*, in *European Area of Freedom Security & Justice*, 6 February 2016, www.free-group.eu.

V. Some final considerations

The announced, now necessary, revision of the Dublin system[45] presents elements that cannot be easily solved. The current system no longer appears to be adequate and requires overall rethinking, not only by proposing methods of distribution that avoid excessive burdens for some States – and therefore ensuring greater burden-sharing – but also taking into consideration fundamental rights.

The distribution mechanism implemented in recent months should only be viewed as an experiment. It should be useful for improving the procedures and filling the gaps in respect of fundamental rights. In particular, the means of appeal and the modalities of assessment of the citizenship of the asylum seeker, the stance to be taken with migrants who do not collaborate – with unaccompanied minors, and with vulnerable groups – and the duration of acceptance and transfer procedures need to be carefully considered.

It is therefore to be hoped that the response will not simply be a sterile reproposition of a mechanism of distribution that has shown to be inadequate and ineffective. Excessive burdens cannot be combated by sending the migrants to Turkey.

The conclusions of the European Council of 17-18 March appear to be a compromise addressing all the problems posed by Turkey. An adequate solution ought not to be limited to the closure of the borders or to the transfer to third countries. The Union certainly cannot deem the problem to be solved by way of a sort of "subcontracting" of low profile[46] both in legal and political terms.

[45] E. Guild, C. Costello, M. Garlick, V. Moreno-Lax, *The 2015 Refugee Crisis in the European Union*, in *Centre for European Policy Studies Policy Brief*, September 2015. A proposal of a new Dublin regulation is due to be submitted by the Commission.

[46] See H. Labayle, P. De Bruycker, *La Marche turque: quand l'Union sous-traite le respect de ses valeurs à un État tiers*, in *EU Immigration and Asylum Law and Policy*, 9 March 2016, eumigrationlawblog.eu.