

CROATIA AND THE (NECESSARY) EUROPEAN UNION POLICY MAKING ON IMMIGRATION IN THE MEDITERRANEAN REGION

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Abstract

Migration is one of the most severe problems facing the European Union at present but, up to now, the EU has not proven very efficient in dealing with the issue. On the one hand, its primary law lays the ground for a common policy on migration and asylum and the EU Institutions are all involved in an attempt to find solutions. On the other hand, European countries are building fences along their borders, and some norms of the European Treaties seem to preserve their sovereignty in that field.

In light of the above, this paper analyzes the EU primary norms that can be considered "in favor" or "against" a common policy on asylum and the actions taken in the last year by the EU institutions and Member States, with the aim to argue that it is necessary to deal with the "refugee emergency" at a European level.

Key words: migration, refugee, Balkan route, European Union policy, solidarity, Croatia

I. General Remarks on Migration in Europe

Migration is one of the most severe problems facing the European Union at present. Every day European citizens witness the crossing of the Mediterranean Sea and the long journeys on the so-called "Balkan route" undertaken by hundreds of people in harrowing conditions. These mi-

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grants seek to reach the old continent in a hope that it may give them a better future than the one they would have in their own countries.

The "refugee crisis", accompanied by the constant fear that the situation will deteriorate further, poses a number of issues: ranging from the need to provide financial and structural aid and personnel, to that of distributing the burden between the regions involved, to the point of allowing even those territories which are heavily dependent on tourism – and which often find themselves in the frontline of receiving the immigrant flows – to not suffer dramatic losses for their businesses. One example is the Italian region of Sicily.

The best solution would be an intervention of the international community which, while respecting the sovereignty of the countries of origin, could contain the phenomenon by allowing every individual to live with dignity in his/her home country. In the (hopefully only temporary) absence of such a solution, it is necessary to deal with the emergency at a European level or, at least, with a joint action of all its Member States.

Even if the EU primary law lays the ground for a common policy on migration and asylum, Europe is now building a lot of walls. Some have been put up in the Balkans, for instance on the borders between Hungary and Serbia, Hungary and Croatia, Slovenia and Croatia. Another one was symbolically built during the last two summers, when the French *Gendarmerie* rejected migrants at the Italian border and a third one may be identified with the English Channel.

The more or less symbolic walls on the borders between various countries belonging to the EU reflect the difficulties that Brussels is encountering in the attempt to adopt a common policy to face the emergency. In a wider perspective, they are symptomatic of the hard and long-lasting challenge that the EU has strived to meet – to act as a single Entity while respecting, at the same time, the sovereignty claims of its Member States.

In light of the above, this paper will reflect on the apparent dichotomy between the norms of the European Union primary law that encourages the development of a common policy on migration and those allowing the Member States to make their own choices in that field. It will then briefly consider the actions taken in the last months by the European institutions on the one side and by the Member States, especially Croatia, on the other side, supporting the argument that the European Union needs a common migration policy which should be constructed

under the balanced entwinement of both the EU common values and the respect of national sovereignty.

2. The Provision of the EU Primary Law in Favor of the Development of a Common European Policy on Asylum

Until the entry into force of the Amsterdam Treaty, the EU Member States were completely independent in shaping their asylum policies. Asylum and immigration fell under the "Justice and Home Affairs" field of the Third Pillar, thus under the Member States' complete jurisdiction and exclusive competence, with the possibility to solve any interstate matters through inter-governmental cooperation. The EC/EU only intervened in case of inefficiency of their regulations and practices.

After the Amsterdam Treaty the asylum policy shifted to the first pillar, leading to greater harmonization. The Nice Treaty gave more powers on asylum policy matters to the Council and the European Parliament, taking "a further step away from the inter-governmental dimension" (Bačić 2012: 42-49). The Lisbon Treaty finally constitutionalized the competences of the European Union in developing an asylum policy, providing for all related measures to be adopted by the Parliament and the Council as a part of the ordinary legislative procedure and also strengthening the powers of the Court of Justice in that field (Bačić 2012: 55), thus defining "the framework for law-making in the years to come" (Thym 2013: 718).

Asylum and immigration are now regulated by the V Title of the Treaty on the Functioning of the European Union, "Area of Freedom, Security and Justice". This Title is made up of a first chapter on "General provisions", whose art. 67, par. 2, states "It (*the Union*) shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals", including stateless persons.

However, it is the second chapter of this Title, "Policy on border checks, asylum and immigration" that lays the ground for a common European policy on immigration. To mention only the most relevant norms, pursuant to art. 77, par. 1: "*The Union shall develop a policy in view to the gradual introduction of an integrated management system for external borders*".

Pursuant to art. 78: "1. *The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.*

2. *For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising", among others: "(c) a common system of temporary protection for displaced persons in the event of a massive inflow".*

"3. *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".*

Pursuant to art. 79 TFEU "1. *The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.*

2. *For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas..." among others:*

"(c) *illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization;*

(d) *combating trafficking in persons, in particular women and children.*

3. *The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfill the conditions for entry, presence or residence in the territory of one of the Member States".*

The norms mentioned above seem to allow the European Union to act as a single interlocutor in defining a policy on asylum and immigration, especially when facing an emergency, as is the case now. The same finding stems from some of the basic European principles, contained not only in the V Title of the TFEU but in all the Treaties.

Art. 80, the last one of the chapter on "Policy on border checks, asylum and immigration", states: "*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*" thus making the solidarity principle the *fil rouge* of the whole policy (Goldner Lang 2013: 8).

As regards the Treaty on European Union, in the V Title, General provisions on the Union's external action and specific provisions on the common foreign and security policy, at the beginning of Chapter 1, General provisions on the Union's external action, art. 21 par. 1 states that "*The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law*", thus underlining again the role of the solidarity principle.

Art. 3, par. 2, TEU refers to the need of appropriate measures in the field of immigration to support the freedom of movement, stating that "*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*"¹.

The approach currently adopted by some EU Member States in dealing with immigration not only fails to respect the solidarity principle invoked by the Lisbon Treaty about the Union's external relations and asylum policy (Favilli 2015: 785), but also diverges from other general principles of EU law.

That is the case with sincere cooperation, which should guide the relations between Member States (art. 4, par. 3 TEU); subsidiarity, which, even if referring to the vertical relations between different territorial

1 In the same line, pursuant to art. 3, par. 5, in its external relations the Union shall "*contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples...*".

levels, inevitably recalls the meaning of "help" (art. 5 TEU); and finally non-discrimination, which should apply to European citizens whose fundamental freedoms are now limited because they live on the Mediterranean coasts or along the Balkan route (among others, art. 10, 18, 19 TFEU).

Over the years the European Community and later the European Union started to elaborate a policy on asylum and immigration also through the EU secondary legislation, inspired by the solidarity principle. The main tool of that policy is actually the Dublin system that will not be analyzed in this paper.

3. What the EU Institutions are Doing for the Purpose of Developing a Common European Policy on Asylum

As the refugees' crisis worsens, the European Union has tried to act as a single entity, in line with the provisions of the Treaties. All its Institutions have been engaged in this sense, as the following brief overview of the main initiatives shows.

For what concerns the European Commission, in April 2015, at the meeting of the Foreign and Home Affairs Ministers, Dimitris Avramopoulos – Migration, Home Affairs and Citizenship Commissioner – presented a 10-point plan listing the immediate actions to be undertaken in response to the crisis situation in the Mediterranean which obtained the full backing of the joint meeting of the Ministers.²

In May, the Commission endorsed the Agenda on Migration. With the adoption of the Agenda, the European Commission wanted to draw up new guidelines to face the emergency. It contained various measures and initiatives for the years to come, some considered as short-term, others as medium- and long-term priorities. Among them are the possibility of increasing the financial support for the initiatives that were already in place and reconsidering the Dublin system. There is also a reference to the opportunity of temporarily distributing among the EU Member States the asylum seekers and those refugees who need international protection, which appears to be one of the main purposes of the plan (*"the proposal will include a temporary distribution scheme for per-*

² See <http://avramopoulos.gr/en/content/joint-foreign-and-home-affairs-council-presentation-commissioner-avramopoulos-10-point-action-plan-response> (last access 30/12/2015). The outcome of the Council meeting (where the plan is not explicitly mentioned) is contained in 8146/15.

*sons in clear need of international protection to ensure a fair and balanced participation of all Member States to this common effort*³).

The Commission went on monitoring the implementation of the priorities set in the Agenda and in September 2015 proposed another package of concrete measures to handle the crisis. These included, among various initiatives, the relocation of 120000 refugees from the more affected countries (see below for the following Council Decision) and the improvement of the return policy. To that aim, the Commission presented an EU Action Plan on Return and a Common Return Handbook.⁴

In the following months, the European executive body proposed several legislative acts with the aim of reforming the Common European Asylum System, through the harmonization of the procedures in the different Member States⁵ and establishing a Common Resettlement Framework.⁶

For what concerns the European Parliament, in December 2014 it stressed the need of a global approach in the *European Parliament resolution of 17 December 2014 on the situation in the Mediterranean and the need for a holistic EU approach to migration*⁷.

Other resolutions, the *European Parliament resolution of 29th April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies* and the *European Parliament resolution of 10 September*

3 *Communication 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*, COM(2015) 240 final, 13/05/2015, point II: 4.

4 European Commission Press Release, *Refugee Crisis: European Commission takes decisive action*, 9.09.2015, http://europa.eu/rapid/press-release_IP-15-5596_en.htm, last access 8.01.2016; *Communication from the Commission to the European Parliament and to the Council, EU Action Plan on return*, COM(2015) 453 final, 9 September 2015 and the Return Handbook, which is the Annex of the *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks*, C(2015) 6250 final.

5 European Commission Press Release, *Towards a sustainable and fair Common European Asylum System*, 4.05.2016, http://europa.eu/rapid/press-release_IP-16-1620_en.htm, last access 23.08.2016; European Commission Press Release, *Completing the reform of the Common European Asylum System: towards an efficient, fair and human asylum policy*, 13.07.2016, http://europa.eu/rapid/press-release_IP-16-2433_en.htm, last access 23.08.2016.

6 European Commission Press Release, *Enhancing legal channels: Commission proposes to create common EU Resettlement Framework*, 13.07.2016, http://europa.eu/rapid/press-release_IP-16-2434_en.htm, last access 23.08.2016.

7 2014/2907(RSP), P8_TA-PROV(2014)0105.

2015 on migration and refugees in Europe were adopted in 2015. In the first one, among other points, the Parliament "*calls on the Member States to make greater contributions to existing resettlement programs, especially those Member States which have not contributed anything*" and "*Calls on the Commission to establish a binding quota for the distribution of asylum seekers among all the Member States*". In the second one it more explicitly "*reiterates its calls on the Commission to amend the existing Dublin Regulation in order to include a permanent, binding system of distribution of asylum seekers among the 28 Member States*".⁸

More recently, it adopted the *European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration*, where it broadly analyzed several aspects related to migration.⁹

For what concerns ministerial meetings, the Foreign Affairs Council paid great attention to migration but tried to address the issue from the point of view of cooperation with third countries, rather than sharing the burden among the Member States.

The need to strengthen development cooperation, which should change migration from a necessity into a choice¹⁰, has thus been reiterated many times¹¹, along with the opportunity of enhancing the dialogue with Partner Countries and Regions and of combating human trafficking¹².

To that end, European representatives also held joint meetings with third Countries. On 8th October 2015 the Ministers for Foreign and Home Affairs gathered at a high-level conference on the Eastern Mediterranean/Western Balkan route to meet with their counterparts from all Western Balkan Countries, Turkey, Lebanon and Jordan, as well as some International Organizations and European Agencies. The outcome was a Declaration that reminded all the partners of the need to "*respond collectively with solidarity*", respecting international obligations

8 2015/2660(RSP), P8_TA-PROV(2015)0176, points 8 and 9; 2015/2833(RSP), P8_TA-PROV(2015)0317, point 9.

9 P8_TA-PROV(2016)0102.

10 See the Outcome of the (Foreign Affairs) Council meetings, 26 May 2015, 9240/15.

11 Outcome of the (Foreign Affairs) Council meetings, 26 May 2015, 9240/15; 26 October 2015, 13400/15; 16/17 November 2015, 14120/15 and 14 December 2015, 15278/15.

12 This issue has been discussed also during the ACP-EU Council of Ministers, <http://www.consilium.europa.eu/en/meetings/fac/2015/05/28-29/>, last access 03/01/2015.

and human rights. Increased support for development was promised to Jordan, Lebanon and Turkey and to affected transit countries; cooperation to fight organized crime was agreed and the will emerged to address the root causes of forced displacement, especially in Syria.¹³ Solidarity was mentioned at this point about the relations between EU and non-EU countries, but the need to respect the principle and to build a common European policy on migration was sometimes referred to also on the domestic front.

In July of the same year the Foreign Affairs Council reaffirmed that *"the implementation of a comprehensive migration policy is a joint undertaking and shared responsibility for EU institutions and Member States. The Council is ready to work together with the High Representative and the Commission in their efforts to carry forward a more active, comprehensive and effective external migration policy of the European Union"* and invited *"the High Representative and the Commission to report back to the October Foreign Affairs Council with concrete proposals to support the implementation of the external dimension of the European Agenda on Migration, taking into account the European Council statement of 23 April and its conclusions of 25 and 26 June, and ensuring coherence between internal and external policies to best effect"*.¹⁴

In September, migration was one of the main items on the agenda of an informal meeting held in Luxembourg. Before the summit, the Minister of Foreign and European Affairs of the host country recalled the importance of a European solution to migratory pressure, in the name of solidarity. The concept of European solidarity was also stressed by three other Ministers (the French, the Italian and the German one) in a proposal which underlined the need of achieving a more equitable distribution of refugees among the EU Member States, thus avoiding that only four or five of them support the whole burden.¹⁵

At the meeting held on 12th October 2015, the Foreign Ministers recalled that *"the unprecedented migratory and refugee crisis that the EU*

13 See the main results in <http://www.consilium.europa.eu/en/meetings/jha/2015/10/08/>, last access 03/01/2016 and the *Declaration of the High-level Conference on the Eastern Mediterranean/Western Balkan route*, 9 October 2015, 12876/15.

14 *Council conclusions on migration*, 20 July 2015, 11041/15, points 4 and 5 and Outcome of the (Foreign Affairs) Council meetings, 20 July 2015, 11095/15, "Migration", point 4.

15 See *Migratory pressure at the heart of statements made ahead of the Informal Meeting of Ministers for Foreign Affairs of the EU in Luxembourg*, 5 September 2015, <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/09/04-info-gymnich-doorsteps/>, last access 30/12/2015.

*is now facing has witnessed a sharp increase of mixed migratory flows along the Eastern Mediterranean and Western Balkans, in parallel with a constant flow along the Central Mediterranean route. The Western Balkans have been under increasing pressure... The crises in and beyond our neighborhood are at the very heart of forced displacement, exacerbated by other negative factors such as poverty, violations of human rights and poor socio-economic development, and confirm the need of a comprehensive and balanced external migration and asylum policy for the EU".*¹⁶

In the following months and up to now, the need to find a solution to migratory pressure continued to be among the Council's priorities. From a more practical point of view, one of the main achievements of the Foreign Affairs Council in 2015 was the launch of the EU naval operation (EUNAVFOR MED) which aims to disrupt the business patterns of human smugglers in the Mediterranean.¹⁷

For what concerns the issue of migrants, the Council has also been involved in its configuration made up of the Ministers of Home Affairs, whose work was extremely difficult because of a widespread disagreement among Member States, especially on the issue of relocation.

On several occasions the Ministers reaffirmed the need to carry on a joint action but putting such declarations into practice was decidedly harder. In October 2014, for instance, they affirmed that "*The challenge linked to increasing migratory flows and the shifting routes of access to the EU, also as a consequence of measures taken at national level, needs to be addressed with common actions. This is even more important as these migratory flows do not only affect countries on the frontline but Europe as a whole, also due to the large secondary movements taking place*".¹⁸

16 The Council also welcomed the progress made up by the EU in facing the crisis (increase in financial help to frontline Countries, dialogue with Countries of transit and origin, second phase of EUNAVFOR MED); *Council Conclusions on migration*, 12 October 2015, 12880/15.

17 The crisis management concept was first approved in May, along with the legal framework of the operation (Council Decision CFSP 2015/778, 18 May 2015), which was officially launched on 22nd June. See the Outcome of the (Foreign Affairs) Council meetings, 18 May 2015, 8966/15 and 22 June 2015, 10185/15. The idea of EUNAVFOR MED was the result of the decisions taken by the European Council on 23rd April 2015, see below.

18 To this end, the Member States should work to ensure in the short term the flexibility of their systems and to contrast the migrants' secondary movements within the EU, encouraged by the smuggler networks. The Ministers proposed a three-pillars approach to face the emergency, rooted on cooperation with third Countries, an increased role of Frontex and the implementation of the Common European Asylum System, *Draft (Home Affairs) Council Conclusions on "Tackling action to better manage migratory flows"*, 10 October 2014, 14141/14.

The disagreement on the issue of relocation emerged during the following December Council meeting, when the Commission's exhortation to spend more efforts to that end encountered the favor of only some of the Member States, while others underlined that resettlement could take place only on a voluntary basis.¹⁹ In June 2015, while discussing the Agenda on Migration proposed by the Commission (see above), several Countries stated that they were ready to help those Member States that were under pressure in the name of solidarity, in order to find the right balance between this principle and that of responsibility.²⁰

At the informal meeting held on 9th July, the Ministers, who were required to reach an agreement on the relocation or resettlement of 60000 migrants, managed in fact to reach a decision only on 20000.²¹ Provisional agreements on the relocation of 40000 migrants from Italy and Greece in a need of international protection and on the resettlement of other 20000 migrants were finally reached a few days later, along with an agreement on "Safe Countries of Origin", which aimed to urge Member States to determine their own lists following similar criteria.²²

In September 2015, given the favorable opinion of the European Parliament, the Decision on relocation was definitively adopted. Furthermore, having regard to the measures proposed by the Commission a few days earlier (see above), the Council proposed an additional relocation mechanism for 120000 refugees, in the framework of art. 78(3) TFEU. However it also recalled the importance of effective return and readmission policies. With regard to the issue of the reintroduction of internal border controls, announced by a Member State that was under consid-

19 Press Release of the Justice and Home Affairs Council meeting, 4 and 5 December 2014, 16526/14, par. on "Managing migratory flows".

20 Outcome of the (Justice and Home Affairs) Council meeting, 15 and 16 June 2015, 9951/15.

21 The informal meeting of EU Ministers of Justice and Home Affairs was attended also by other international and European partners, including the United Nations High Commissioner for Refugees; see the Press Release, *Informal Meeting of EU Ministers of Justice and Home Affairs (JHA) in Luxembourg*, <http://www.eu2015lu.eu/en/actualites/communiqués/2015/07/09-info-jai-migration/>; *Informal JHA Council – Ministers agree to the resettlement of 20,000 refugees in the EU, but delay their decision on the relocation of 40,000 asylum seekers until 20 July, announces Jean Asselborn*, <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/07/info-jai-asselborn/>, *António Guterres urges Europe to give a "robust response" to the refugee issue*, <http://www.eu2015lu.eu/en/actualites/articles-actualite/2015/07/info-jai-guterres/>, last access 7.01.2015.

22 Outcome of the (Justice and Home Affairs) Council meeting, 20 July 2015, 11097/15. Not all the EU Member States took part in the relocation effort but all of them, along with Norway, Iceland, Lichtenstein and Switzerland, shared the burden of the resettlement.

erable pressure by the migrants' flow, the Council underlined the need to fully apply the EU asylum and Schengen *acquis*.²³

The subsequent meeting officially endorsed the proposal of relocating for a two-year term 120000 persons from Greece and Italy to nearly all the other EU Member States.²⁴ Following the September Commission's proposal (see above) the next summits focused also on the issue of the return of migrants, inviting both the EU and the Member States to do more in that respect.²⁵ As regards the reintroduction of internal border controls, in December the presidency recalled the importance of the integrity of the Schengen area, reminding the Member States of the need to engage in consultations before deciding on the matter, and obtaining "broad support".²⁶

During the last months, since some of the EU Member States reintroduced border controls, the situation however changed. In 2016 the Home Affairs Council continued to pay attention to the issue of migration, underlining the importance of the agreement with Turkey.

As regards the European Council, in June 2014, referring to the framework of freedom, security and justice, it reaffirmed the need to shape a global migration and asylum policy to respect the principles of solidarity and responsibility.²⁷

23 Outcome of the (Justice and Home Affairs) Council meeting, 14 September 2015, 11969/15; Conclusions of the Presidency, 12002/1/15 REV 1; *Council decision establishing provisional measures in the area of international protection for the benefit of Italy and of Greece*, 14 September 2015, (EU) 2015/1523, which recalls art. 78(3) and art. 80 TFEU and asks the two Countries to speed up the reform process of their asylum systems.

24 *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, 12098/15. Artt. 78(3) and 80 TFEU are recalled as well.

25 Outcome of the (Justice and Home Affairs) Council meeting, 8 and 9 October 2015, 13293/15 and *Council Conclusions on the future of the return policy*, Press Release, 711/15; *Council Conclusions, Measures to handle the refugee and migration crisis*, 9 November 2015, 13880/15.

26 Outcome of the (Justice and Home Affairs) Council meeting, 3 and 4 December 2015, 14937/15. The Council discussed several other issues on migration; among the main ones, the need to strengthen, also financially, external border controls, giving more powers to Frontex, its joint operations Poseidon 2015 and Triton 2015, and to EUNAVFOR MED; the fight against criminal networks of smugglers; cooperation with third Countries; see the Outcome of the (Justice and Home Affairs) Council meetings, 12 and 13 March 2015, 7178/15; 20 April 2015, 8146/15; 14 September 2015, 11969/15; 8 and 9 October 2015, 13293/15; *Council Conclusions, Measures to handle the refugee and migration crisis*, 9 November 2015, 13880/15.

27 *European Council Conclusions*, 26 and 27 June 2014, EUCO 79/14, I, *Freedom, security and justice*. In the meeting held in October 2013, only days after the major tragedy occurred in the Mediterranean, the European Council announced that it would discuss asylum and migration policies in a broader perspective in June 2014, *European Council Conclusions*, 24 and 25 October

At the special meeting held on 23th April 2015, after yet another Mediterranean tragedy, the summit issued a statement, underlining the need to adopt measures to save human lives and to intensify the action of the Union on migration. In the points about "Reinforcing internal solidarity and responsibility", the Council proposed to "q) *set up a first voluntary pilot project on resettlement across the EU, offering places to persons qualifying for protection*".²⁸

In June 2015 the European Council stated that "*Europe needs a balanced and geographically comprehensive approach to migration based on solidarity and responsibility*"; "*wider efforts, including the reinforcement of the management of the Union's external borders, are required to better contain the growing flows of illegal migration*". Therefore it focused on three key aspects: relocation or resettlement; return or readmission or reintegration; cooperation with Countries of origin and transit.

As regards relocation or resettlement, the European Council agreed on the temporary relocation over two years of 40000 persons from Italy and Greece to nearly all the other Member States and on the resettlement of 20000 displaced persons in clear need of international protection and to set up reception facilities and immediately provide financial assistance to the Member States on the frontline.

As regards return, readmission and reintegration for those not qualifying for protection, the European Council defines the related policy as an essential tool in combating illegal migration, helping to discourage people from risking their lives. For this purpose it expresses the will to strengthen high-level dialogue with the main Countries of origin, invites the Commission to implement as soon as possible the existing readmission agreements, accelerate the negotiations already started and launch new ones with other third Countries; it then stated that Member States will fully implement the Return Directive and invited the Commission to make proposals in support of an EU return policy.

As regards relations with Countries of origin and transit, the European Council declared that it was crucial to consolidate them referring both to the African Countries, in view of the Valletta summit, and to Turkey and the countries in the Middle East. In this regard, it promises

2013, EUCO 169/13, point 49. On the measures adopted by EU Institutions at the end of 2013 see also De Vittor (2014: 63-67).

28 <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/>, last access 8.01.2016.

the organization of a high-level conference to address the challenges of the Western Balkans route (see above).²⁹

On 23rd September 2015 the European Council held an informal meeting on migration. The Heads of State and Government agreed to take, as soon as possible, "operational decisions" on the most pressing issues, in order to assist European and non-European Countries in handling the refugee flows, increase funding, strengthen controls at external borders. It underlined that "*in this context it is important to create the conditions for all Member States to participate fully in the Dublin system*".³⁰

At the meeting held on 15th October, reaffirming that "*tackling the migration and refugee crisis is a common obligation which requires a comprehensive strategy and a determined effort over time in a spirit of solidarity and responsibility*", the Council set the orientations concerning: cooperation with third Countries to stem the flows; strengthening the protection of the EU's external borders; responding to the influx of refugees to Europe and ensuring returns. Finally, it underlined the need of a continuous reflection on the overall migration and asylum policy of the EU.³¹

In November 2015, the European Heads of State and Government met in Valletta with their African counterparts to discuss the migration crisis. At the end of the summit, they agreed on an Action Plan containing several concrete actions to be taken in the next year to deal with the emergency and issued a Political Declaration. Here, they affirmed their will to "*respond decisively and together manage migration flows in all their aspects*", "*guided by the principles of solidarity, partnership and shared responsibility*", respecting "*human rights and the sovereignty of participating states*" and taking into account "*national legislations and specificities*".³²

After the Valletta summit, European leaders informally met again and reflected together on the need to speed up the implementation of

29 *European Council Conclusions*, 25 and 26 June 2015, EUCO 22/15, I, *Migration*.

30 <http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/>, last access 8.01.2016.

31 *European Council Conclusions*, 15 October 2015, EUCO 26/15, *Migration*.

32 See the Valletta Summit, 11 and 12 November 2015, *Political Declaration and Action Plan*, <http://www.consilium.europa.eu/it/meetings/international-summit/2015/11/11-12/>, last access 8.01.2016.

the measures agreed in September and October, as well as on the issues of external and internal border control and the relations with Turkey.³³ At this regard, one of the most discussed steps was the Agreement with Ankara, signed in March 2016. Turkey committed itself to keeping migrants on its territory and obtains, among other benefits, the speeding up of its accession process to the EU.³⁴ However the implementation of the Agreement seems still uncertain.

The European Council held in December 2015, demonstrates very clearly that the European leaders' concerns are no longer focused only on the issues of relocation and resettlement but on safeguarding the Schengen system, affected by the decisions of reintroducing controls or building fences along the internal borders. Among the several tasks imposed to the EU Members States and institutions are those of "*addressing the shortcomings at the Schengen external borders*" and "*taking concrete measures to ensure the actual return and readmission of people not authorized to stay*".³⁵

The following meetings focused on the issues of migration, with special attention to relocation and resettlement, but also with the aim "*to restore, in a concerted manner, the normal functioning of the Schengen area, with full support for Member States which face difficult circumstances*".³⁶ To that aim the leaders stated that "*priority will continue to be given to regaining control of our external borders*"³⁷ and welcomed the proposal to establish a European Border and Coast Guard.³⁸

33 For the EU informal meeting see <http://www.consilium.europa.eu/en/meetings/european-council/2015/11/12/>, last access 8.01.2016. The relations between the EU and Turkey were discussed in depth by EU Heads of State and Government, along with Turkey, in a meeting held on 29th November 2015 and resulting in the EU-Turkey Statement, available in <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>, last access 8.01.2016.

34 *EU-Turkey statement*, 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>, last access 23.08.2016.

35 *European Council Conclusions*, 7 and 18 December 2015, EUCO 28/15, I, *Migration*. On the need to strengthen the EU's external borders in order to ensure the absence of internal ones see also Raos (2013).

36 *European Council Conclusions*, 18 and 19 February 2016, EUCO 1/16, II, *Migration*.

37 *European Council Conclusions*, 17 and 18 March 2016, I, *Migration*.

38 *European Council Conclusions*, 28 June 2016, I, *Migration*.

4. What the EU Member States – and Especially Croatia – Are Doing

With each passing month, the phenomenon of migration has not diminished but has in fact increased in its numbers, becoming the largest refugee crisis since the Second World War. During the last year thousands of people have tried to enter the European Union not only through the Mediterranean but also, and even more so, through the Balkans.

While the institutions of the European Union are launching several initiatives to deal with this issue, the Member States mainly continue to disagree. As more meetings are convened, their leaders engage in endless discussions but cannot reach an agreement on the core content of the issue, that is, the definition of a common policy on migration, especially for what concerns the sharing of the burden of refugees among all the countries. A significant example of a European effort that almost failed to succeed is the meeting held on 25th October 2015, on the initiative of the EU Commission President Juncker, among the leaders of State or Government of the Countries involved in the Western Balkan Route, who finally agreed on the necessity to jointly take some measures to face the emergency.³⁹

Day after day Europe has witnessed the construction of new walls or fences along the borders between EU Member States or between EU Member States and other European Countries, which are followed by the modification of the migrants' route. The high migratory pressure induced some of the Schengen Members to reintroduce border controls, thus undermining the freedom of movement within the EU.

This trend reflects the overall European policy in the Mediterranean, which has often proved weak because it is shaped by the Member States who give more weight to their own interests than to the "European" ones (Zajac 2015: 68).

For what concerns Croatia in particular, in the first part of 2015 the country was not yet involved in the so-called Balkan route. However, it was clear that it would become one of the countries in the "forefront" of the inflow into the EU because of its extensive coastline and its Southern and Eastern borders.

39 See the Leaders' Meeting on refugee flows along the Western Balkans Route, *Leaders' Statement*, http://ec.europa.eu/news/2015/docs/leader_statement_final.pdf, last access 8.01.2016.

Since September 2015, the situation has changed dramatically and the Country is experiencing massive inflows of migrants who arrive by land and aim to reach other European countries. Croatia is now called to deal with this problem but it could also play a fundamental role in determining common European policies on migration, not only because of its geographical position but also because of other relevant factors: it is deeply linked to the Mediterranean region, having a centuries-old knowledge of it; it has recently been through the refugee experience itself, during the war in the 1990s; its legal rules on migration and asylum respect European and international standards.

In Croatia the phenomenon of refugees is not new, since the problem arose recently during the war in former Yugoslavia. In those years, thousands of people arrived in Croatia and thousands, fleeing from violence, tried to move from Croatia to other countries. Until now, the word "refugee" has thus been linked to the victims of war in former Yugoslavia (Gregović 2011: 135).

As regards the constitutional level, pursuant to art. 33 of the Constitution: *"Foreign citizens and stateless persons may be granted asylum in Croatia, unless they are being prosecuted for non-political crimes and activities contrary to the fundamental principles of international law. No alien legally in the territory of the Republic of Croatia shall be banished or extradited to another state, except in cases of enforcement of decisions made in compliance with an international treaty or law"*.

Before its entry into the European Union, Croatia's legislation on asylum, even if not frequently applied, had been modified several times, under the influence of the EU and it is now fully compliant with the international and European standards (Barberić 2014: 50-53). However, the phenomenon that the Country is facing now has no precedents and cannot be addressed effectively under any system prescribed by the norms.⁴⁰

5. What the European Primary Law Prescribes "against" the Development of a Common European Policy on Asylum

Having regard to the efforts that European institutions – in line with the Treaty provisions enshrined above – are making to deal with migration

40 On the difficulties encountered by Croatia in regulating its relations and even its borders with other Countries on the Mediterranean, above all before its EU membership, see Rudolf (2007).

it is necessary to consider the norms of the European Treaties that may allow Member States to be reticent in the shaping of a common policy, for what especially concerns the duty of relocation or resettlement.

In this regard, starting from the V Title of the Treaty on the Functioning of the EU, one may recall that art. 67, providing for an area of freedom, security and justice, specifies "*with respect for fundamental rights and the different legal systems and traditions of the Member States*"; art. 68 gives to the European Council – and not to other institutions – the responsibility of defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice; art. 72 affirms that "*this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*"; art. 79, par. 5, states that "*this article (that is the above mentioned article on a common European immigration policy) shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third Countries to their territory in order to seek work, whether employed or self-employed*".

Apart from these dispositions of the TFEU, there is another fundamental norm of the Treaties that can justify the choices made by some Member States as single sovereign entities. That is the case of art. 4, par. 2, of the Treaty on the European Union which states: "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*", thus providing the so-called "identity clause".

The notion of national identity was introduced into Community legislation – but not further explained – by the Maastricht Treaty. From the onset it was clearly open to a number of interpretations (Reestman 2009: 378; Ponthoreau 2007), the two main ones being the possibility of limiting it exclusively to the linguistic and cultural sphere of the Member States and that of including the constitutional system. The former speaks of the EU's intention not to standardize the wealth of cultural traditions in Europe; the latter refers to the constitutional systems of the Member States and specifically to the need for EU legislation not to

contrast certain features of the State's legal system which are considered key to national identity building processes.

The doctrine mainly followed the second interpretation and saw the national identity clause as an answer to the concerns the Maastricht Treaty raised in a number of Member States, that is, the fear of losing a large part of their sovereignty (Reestman 2009: 376; Ponthoreau 2007; Piqani). In fact, the identity clause is the result of the counter-limitation (*controlimiti*) theory that some national Constitutional Courts have opposed to the implementation of European legislation (Gambino 2012: 538).

European case law has not often had the opportunity to rule on the interpretation of the clause (Preshova 2012: 284; Simon 2011: 29). The 2004 European Constitution offers a more comprehensive definition of national identity, referring specifically to a political and legal aspect. Art. I-5 of the Constitutional Treaty was later referred verbatim to in art. 4, par. 2, of the Lisbon Treaty which only added the last sentence: "*In particular, national security remains the sole responsibility of each Member State*". In the European Constitution, the identity clause has a very specific meaning because it is placed before the supremacy clause (art. I-6) as if to stress that the prevalence of European legislation ends where it clashes with the supreme principle of Member States constitutional laws.

In the Lisbon Treaty, the supremacy clause is not referred to using the same wording as the Constitution, but the identity clause is maintained as a very far reaching definition, a bastion of national prerogatives (Faraguna 2015: 868), but also a bastion of European integration as the use of 'national identity' instead of 'state sovereignty' suggests.⁴¹

The new feature enshrined in art. 4 acquired great importance as it marks the prevalence of the principle of integration rather than hierarchy in the relationship between domestic and European legislation (Von Bogdandy and Schill 2011: 1419; Mengozzi 2011: 588).

National identity differs from constitutional identity. It is a European concept: it does not necessarily coincide with the principles expressed by the relevant national constitution, but principles can be drawn from the case law and European Treaties. Art. 4 par. 2 TEU lists the key functions of a nation, and specifically territorial integrity, law and order and

41 On the issue of sovereignty in the European Union see Orsolić Dalessio (2014). On the relations between national identity and European values see Editorial comments (2015).

national security, as well as the local self-government. However, other aspects can also be included, do long as they fall into the framework of a European common denominator (Reestman 2009: 378; Von Bogdandy and Schill 2011: 1430, 1432; Besselink 2012: 679).

In the post-Lisbon period, the rulings of the Court of Justice on national identity have always sought to balance it (national identity) with European citizenship and free movement in particular. Notable rulings include two that refer to the spelling of names of citizens, in cross-border situations, while a third refers to the right of a local authority in a Member State to introduce the exclusive use of their language in labour contracts (Cerruti 2014: 13-22).

In seeking a balance between free movement and the right of a Member State to maintain law and order, one of tenets of national identity, for the first time in 2010 the Luxembourg Court allowed the second to prevail, although the ruling stated that the principle of proportionality between restrictive measures of fundamental freedom and law and order requirements had to be respected⁴². Art. 4, par. 2, as interpreted by the European Judge, underlines that there is a sphere of State sovereignty completely independent from Brussels and national security evidently belongs to that field.

6. Final Remarks

As regards European primary law, the Treaties provide for a common policy on asylum and migration but they also protect the so-called "*domaine réservé*" of the Member States. In fact, the phenomenon of migrants is thus proving, once again, the difficulties of the EU Member States to think and to act as a Union.

At times when the future of the European Union seems to be rather unclear – consider the need to manage the consequences of Brexit, which could unsettle the ground on which the European "building" rests – it is worrying that the wall erected by some Member States against migrants appears also as a wall against those principles on which the EU itself is founded.

42 ECJ 22 December 2010, Case C-208/09, *Ilonka von Sayn-Wittgenstein v Landehauptmann von Wien*, on which see Aubert, Broussy, and Donnat (2011: 265); Murphy (2011: 137); Di Salvatore (2011: 435-436); Vecchio (2012); Faraguna (2011: 439).

It may also be considered a paradox that while European scholars are engaged in interpreting the case law of the European Court of Human Rights and of the European Court of Justice with the aim to ensure their widest possible protection (Barbera, 2015: 783), several European States, even if inspired by the reasonable will of avoiding illegitimacy and protecting the safety and the well-being of their citizens, do not feel the need to implement the principles stated in the European and international Charters on Human Rights.

The phenomenon of migrations (that from time to time has affected the story of the Old Continent) should be addressed. The best solution would be to limit it through effective and long-lasting solutions. However, it would be desirable that, when dealing with this phenomenon, European countries do not forget that they are a part of the Union and that this Union is founded on the principles of sincere cooperation, subsidiarity, non-discrimination and, above all, solidarity.

Bibliography

- Aubert, Michel, Broussy, Emmanuelle and Donnat, Francis.** 2011. Chronique de jurisprudence de la CJUE. Citoyenneté de l'Union et respect de l'identité nationale. *L'actualité juridique; droit administrative.* 67(5). 264-275.
- Bačić, Nika.** 2012. Asylum policy in Europe – The competences of the European Union and inefficiency of the Dublin system. *Croatian Yearbook of European Law and Policy.* 8. 41-76.
- Barbera, Augusto.** 2015. L'Europa di fronte alle tragedie del Mediterraneo. *Quaderni costituzionali.* 35(3). 783-784.
- Barberić, Jasna.** 2014. Azil u Republici Hrvatskoj godinu dan nakon ulaska u Europsku Uniju. *Sveske za javno pravo.* 18(5). 50-58.
- Besselink, Leonard F.M.** 2012. Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgment of the Court (Second Chamber) of 22 December 2010, nyr; Respecting Constitutional Identity in the EU. *Common Market Law Review.* 49(6). 671-693.
- Cerruti, Tanja.** 2014. Valori comuni e identità nazionali nell'Unione europea: continuità o rottura? www.federalismi.it. 12(24). 1-24.
- De Vittor, Francesca.** 2014. Il diritto di traversare il Mediterraneo... o quantomeno di provarci. *Diritti umani e diritto internazionale.* (1). 63-82.
- Di Salvatore, Enzo.** 2011. Il caso Sayn-Wittgenstein: ordine pubblico e identità costituzionale dello Stato membro. *Quaderni costituzionali.* 32 (2). 435-436.

- Editorial comments.** 2015. Safeguarding EU values in the Member States – Is something finally happening? *Common Market Law Review*. 52(3). 619-628.
- Faraguna, Pietro.** 2011. Il caso Sayn-Wittgenstein: la Corte di giustizia traccia un modello di "controlimiti europeizzati"? *Quaderni costituzionali*. 32 (2). 437-440.
- Faraguna, Pietro.** 2015. L'identità nazionale nell'Unione europea come problema e come soluzione. *Il Mulino*. (5). 866-875.
- Favilli, Chiara.** 2015. L'Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell'"emergenza" immigrazione. *Quaderni costituzionali*. 35(3). 785-787.
- Gambino, Silvio.** 2012. Identità costituzionali nazionali e *primauté* eurounitaria. *Quaderni costituzionali*. 32(3). 533-561.
- Goldner Lang, Iris.** 2013. Is there solidarity on asylum and migration in the EU? *Croatian Yearbook of European Law and Policy*. 9. 1-14.
- Gregović, Marko.** 2011. A human rights based evaluation of the Croatian asylum system in the context of Europeanisation. *Croatian Yearbook of European Law and Policy*. 8. 135-178.
- Mengozzi, Paolo.** 2011. La contribution du droit à la détermination de l'identité de l'Union européenne. *Il Diritto dell'Unione europea*. 16(3). 585-601.
- Murphy, Cian C.** 2011. La jurisprudence de la Cour de justice et du Tribunal de première instance. Commentaires des arrêts. Arrêt "Sayn-Wittgenstein". *Revue du droit de l'Union européenne*. (1). 131-138.
- Oršolić Dalessio, Tina.** 2014. The Issue of Sovereignty in an ever-closer Union. *Croatian Yearbook of European Law and Policy*. 10. 67-88.
- Piqani, Darinka.** National Identities in the European Constitution. <http://media.leidenuniv.nl/legacy/piqani.pdf>, last access 14.01.2016.
- Ponthoreau, Marie-Claire.** 2007. Constitution européenne et identités constitutionnelles nationales. *VIIe Congrès mondial de l'AIDC*. Athènes, 11-15 juin 2007.
- Preshova, Denis.** 2012. Battleground or meeting point? Respect for national identities in the European Union – Article 4(2) of the Treaty on European Union. *Croatian Yearbook of European Law and Policy*. 8. 267-298.
- Raos, Višeslav.** 2013. Pomicanje granice Europske unije na jugoistok i višestruki procesi teritorijalizacije. *Politička Misao*. 50(3). 33-55.
- Reestman, Jan-Herman.** 2009. The Franco-German constitutional divide: reflections on national and constitutional identity. *European Constitutional Law Review*, 5(3). 374-390.
- Rudolf, Davorin.** 2007. More pod vlašću Republike Hrvatske i odnosi sa susjednim državama. *Zbornik Radova Pravnog Fakulteta u Splitu*. 44(1). 67-75.

- Simon, Denys.** 2011. L'identité constitutionnelle dans la jurisprudence de l'Union européenne. In: Burgogue-Larsen, Laurence, ed. *L'identité constitutionnelle saisie par les juges en Europe*. A. Pedone. Paris.
- Thym, Daniel.** 2013. EU migration policy and its constitutional rationale: a cosmopolitan outlook. *Common Market Law Review*. 50(3). 709-736.
- Vecchio, Fausto.** 2012. La clausola di salvaguardia delle identità costituzionali, le occasioni perdute e lo "spettro" di Viking e Lavall. www.europeanrights.org. last access 14.01.2016.
- Von Bogdandy, Armin and Schill, Stephan.** 2011. Overcoming absolute primacy: respect for national identity under the Lisbon Treaty. *Common Market Law Review*. 48(5). 1417-1454.
- Zajac, Justyna.** 2015. The EU in the Mediterranean: Between Its International Identity and Member States' Interests. *European Foreign Affairs Review*. 20(1). 65-82.

Hrvatska i (potrebna) politika imigracije Europske unije u području Mediterana

Sažetak

Migracija je jedan od najzobilnijih problema s kojima se danas suočava Europska unija, no dosada se EU nije pokazala veoma efikasnom u njegovom rješavanju. S jedne strane, primarna legislativa polaže temelje zajedničkim politikama migracije i azila, te su sve EU institucije uključene u pokušaje pronalaženja rješenja. S druge strane, europske zemlje podižu ograde na svojim granicama i čini se da neke od normi europskih ugovora doprinose očuvanju suvereniteta u tom području.

Uzevši to u obzir ovaj rad analizira primarnu legislativu Europske unije koja može biti razmtrana kao "za" ili "protiv" zajedničkih politika azila i napora europskih institucija i država članica u posljednjih godinu dana, a s ciljem da se utvrdi kako je nužno "izbjegličku krizu" rješavati na europskoj razini.

Ključne riječi: migracija, izbjeglice, balkanska ruta, politike Europske unije, solidarnost, Hrvatska