Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2023, n. 1

EDITORIALE SCIENTIFICA
ES

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

Indice-Sommario
2023, n. 1

Editoriale

Saggi e Articoli

Commenti e Note

RELOCATION: EXPRESSION OF SOLIDARITY OR STATE-CENTRIC CHERRY-PICKING PROCESS?

Chiara Scissa*

SUMMARY:1. The undefined contours of the principle of solidarity under EU law. – 2. The 2009-2013 EUREMA relocation project for the benefit of Malta. – 3. The 2015 relocation decisions for the benefit of Italy and Greece. – 4. The 2020 relocation plan for the benefit of Greece. – 5. Relocation in the New Pact's proposal on asylum and migration management (RAMM). – 6. The 2022 Declaration on a Voluntary Solidarity Mechanism and other steps forward. – 7. Concluding remarks.

1. The undefined contours of the principle of solidarity under EU law

Only recently has solidarity been introduced in international law, which is rather governed by the idea of sovereignty. Most notably, in the early 2000s the UN General Assembly has defined solidarity as

"a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly in accordance with basic principles of equity and social justice and ensures that those who suffer or who benefit the least receive help from those who benefit the most".[1]

Solidarity in international law often takes the form of mutual cooperation, shared responsibility, or assistance, although lacking a clear meaning and nature.[2] Over the last years, the idea of solidarity has become prominent in migration matters. To mention but a few examples, the 2016 New York Declaration on Refugees and Migrants commits signatory States to "*profound solidarity with, and support for, the millions of people in*

Double blind peer reviewed article.

* PhD candidate in Law at Sant'Anna School of Advanced Studies in Pisa and Expert in International Protection and Human Rights at the Territorial Commission for the Recognition of International Protection in Milan – Section 1. E-mail: chiara.scissa@santannapisa.it.

[1] UN General Assembly, *Resolution on the Promotion of a democratic and equitable international order*, A/RES/56/151, 19 December 2001; and UN General Assembly, *Resolution on the Promotion of a democratic and equitable international order*, A/RES/57/213, 18 December 2002. See S. VILLANI, *The concept of solidarity within EU disaster response law. A legal assessment*, Bononia University Press, 2021.

[2] In this sense, see the African Charter on Human and Peoples' Rights, Article 21(4); the Preamble of the Charter of the Association of Southeast Asian Nations (ASEAN), where solidarity plays a key role in proclaiming the union, integration and collaboration among the Member States.

different parts of the world".[3] Through the means of the two Global Compacts for Safe, Orderly and Regular Migration and on Refugees, the international community, and most of EU Member States, aimed to honour their obligations under international law, agreed to act on the basis of trust and solidarity in the field of migration, and to give efforts to these complementary international cooperation frameworks. However, the actual implementation of solidarity via the two Global Compacts has so far been fragmented and vague, at least partially because different interpretations coexist of what solidarity is and entails, leading to different conceptions of State responsibilities.[4]

Similarly, and despite the EU founding Treaties anchor the Area of Freedom, Security and Justice to the principle of solidarity, its contours and, therefore, its implications are not well defined in EU law.[5] EU institutions share contrasting views on the question whether art. 80 TFEU constitutes a legal basis within the meaning of EU law.[6] And this is one relevant reason why EU institutions have not revised the Common European Asylum System (CEAS) accordingly, failing to provide for adequate measures of solidarity, while persistently addressing migration emergencies through temporary and *ad hoc* solutions. Another good reason for such inactivity lies in the misconception that solidarity has a single meaning in EU law. Rather, as Marin explained, this principle "*gets a clearer meaning as a legal principle in relation to the area where it is supposed to operate*".[7] More into detail,

[3] United Nations, UN General Assembly Resolution, *New York Declaration on Refugees and Migrants*, 19 September 2016, p. 2.

[4] S. CARRERA, A. GEDDES (eds.), *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees. International Experiences on Containment and Mobility and their Impacts on Trust and Rights.* European University Institute, 2021.

[5] From a legal perspective, among others, M. KOTZUR, *Solidarity as a Legal Concept*, in A. GRIMMEL, S. MY GIANG (eds.) *Solidarity in the European Union. A fundamental value in crisis*, Springer, 2017; M. ROSS, *Solidarity: A New Constitutional Paradigm for the EU?*, in M. ROSS, Y. BORGMANN-PREBIL (eds.) *Promoting Solidarity in the European Union*, Oxford University Press, 2010; S. ROSSI, S. RODOTÀ, *Solidarietà un'utopia necessaria*, Laterza, 2014; A. J. MENÉNDEZ, *The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the Union*, in *Ratio Juris*, 2008, Vol. 16, no. 3, p. 374; R. WOLFRUM, C. KOJIMA (eds.), *Solidarity: A structural principle of international law*, Springer, 2010; H. BAUDER, L. JUFFS, *'Solidarity' in the migration and refugee literature: analysis of a concept*, in *Journal of Ethnic and Migration Studies*, 2019; B. MIKOŁAJCZYK, *The migrant crisis and refugees – a crisis of EU solidarity*, in *Polish Review of International and European Law*, 2020, Vol. 9, n. 2; V. MITSILEGAS, *Humanizing solidarity in European refugee law: The promise of mutual recognition*, in *Maastricht Journal of European and Comparative Law*, 2017, Vol. 24, n. 5, p. 721-739; E. KÜÇÜK, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, in *European Law Journal*, 2016, Vol. 22, n. 4, pp. 448-469; G. MORGESE, *Il nuovo meccanismo di solidarietà volontaria, il gattopardismo degli Stati membri e la lezione non appresa della crisi ucraina*, in *Quaderni AISDUE*, 2022, n. 2; P. MENGOZZI, *L'idea di solidarietà nel diritto dell'Unione Europea*, Bologna University Press, 2022.

[6] Please see, COUNCIL OF THE EUROPEAN UNION, *Statement of the Council on Article 80 TFEU*, 2011/0366 (COD), 7 April 2014. Contra, R. METSOLA, K. KYENGE, *European Parliament Working document of July 2015 on Article 80 TFEU*. European Parliament Working Document, 15 July 2017; A. RADJENOVIC, *Solidarity in EU asylum policy*. Report of the European Parliamentary Research Service, March 2020; R. BEJAN, *Problematizing the Norms of Fairness Grounding the EU's Relocation System of Shared Responsibility*, in *EUI Working Papers*, 2018, n. 35, p. 10.

[7] L. MARIN, *Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation*, in this *Journal*, 2019, n. 1, p. 61.

"*[p]rovisions on solidarity, indeed, are found in different parts of the treaties and of the Charter* [EU Charter of Fundamental Rights]: *solidarity is therefore worked out in different ways in relation to the actors concerned (states or persons), the relations it aims to cover, and the situations to regulate*".[8]

Beyond these legal difficulties, there is an additional, prominent, reason for such an impasse. Maiani, indeed, suggested that it is not the principle of solidarity to be blurry, rather it is the EU that

"has hitherto been incapable of accurately gauging the distributive asymmetries on the ground, to articulate a clear doctrine guiding the key determinations of 'how much solidarity' and 'what kind(s) of solidarity', and to define commensurate redistributive targets on this basis".[9]

Indeed,

"*Although its concrete content may be fluid, contextual, and with varying degrees of thickness depending on the circumstances, it does permeate the European project in a structural way, whatever the policy area, type of competence, and level of integration concerned*".[10]

Among others, EU Treaties expressly mention the principle of solidarity among the Union's values and objectives, and it has been also interpreted as the "glue" that keeps the Union together.[11] Emblematically, the Preamble of the EU Charter affirms that the Union is founded on the indivisible values of human dignity, freedom, equality, and solidarity, as well as democracy and the rule of law. These same principles are enshrined in Article 2 TEU, which identifies "*a society where solidarity prevails*" as a key founding principle of the EU. Finally, Article 3(3) TEU posits that the Union shall promote solidarity among EU Member States. It comes with no surprise, then, that the principle of solidarity has been interpreted by some scholars as a founding value and constitutional (meta) principle of EU law, which gives rise to legal obligations to fair responsibility-sharing and compliance with fundamental rights, "*as a uniform/all-pervading structural command generally applicable across policy fields*".[12] Solidarity seems therefore a grounding element of the past and current structure of the EU system. Hence, "*a failure by the Union and its Member States to implement solidarity, which by their very accession to the Union the Member States have accepted, strikes at the fundamental basis of the Union legal order*"[13]. Art. 80 TFEU crystallizes solidarity as the fundamental

[8] *Ibid*, p. 58.
[9] F. MAIANI, *A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact', EU Immigration and Asylum Law and Policy*, in *EU Migration Law Blog*, 20 October 2020, p. 5.
[10] *Ibid*.
[11] EUROPEAN COMMISSION, *State of the Union 2016: Towards a better Europe – a Europe that protects, empowers and defends*, 14 September 2016, p. 16.
[12] V. MORENO-LAX, *Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, Vol. 24, n. 5, p. 740-762. See also, S. PEERS, *Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon*, in *European Journal of Migration and Law*, 2008, Vol. 10, pp. 219-236.
[13] R. METSOLA, K. KYENGE, *European Parliament Working document of July 2015 on Article 80 TFEU*, cit., p. 3.

"imperative"[14] principle governing the Union's asylum, migration, and border policy as well as its implementation. In other words, this provision sets the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States as "*the overarching norm guiding the development and implementation of policies on borders, asylum and immigration*"[15]. Art. 67(2) TFEU adds that this policy should be based on the principle of solidarity between Member States, which must be fair towards third country-nationals. Both arts. 67(2) and 80 TFEU predominantly focus on inter-state relations as they focus on the relation *between* Member States. Thym, however, points out that this

"is not to say that the individual is irrelevant to the constitutional design of the Area of Freedom, Security and Justice, but the place of the individual is usually framed in terms of compliance with human rights norms and the Geneva Convention, while the discussion of solidarity usually refers to the Member States. This focus on inter-state relations is an important contrast to the debates in domestic legal orders about the meaning of solidarity"[16].

While the scope of this article is limited to Union's relocation schemes[17], inter-state solidarity can take different forms, including the establishment of redistribution quotas or of operational support to migration management, or the harmonization of standards of treatment for third-country nationals[18]. In this regard, Moreno-Lax points out that the emphasis that art. 80 puts on solidarity between Member States should not overshadow its final goal, namely that "*all institutional and material efforts (both single and collective) must converge*" in the achievement of refugee protection needs. Combined, arts. 78 and 80 TFEU are deemed to provide a legal basis for action to that effect:

"Solidarity modulates the quality of that action, as one that must apportion responsibilities in a way that amounts to real 'sharing', as opposed to the mere 'allocation', of protection duties. Considerations of equity and justness ought to be taken into account in such an exercise. The final result must be one that is doubly fair: between Member States and towards asylum seekers/refugees. Structurally, this 'double fairness' criterion should permeate the CEAS on a permanent, ex ante basis"[19].

---

[14] V. MORENO-LAX, *Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy*, cit., p. 751. See also, M.C. CARTA, *Il "nuovo" Patto europeo sulla migrazione e l'asilo: recenti sviluppi in materia di solidarietà ed integrazione*, in this *Journal*, 2021, n. 2.

[15] L. MARIN, *Governing Asylum with (or without) Solidarity?*, cit., *p. 59.* See also, G. MORGESE, *Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea*, in G. CAGGIANO (ed.), *I percorsi giuridici dell'integrazione*, Torino, 2014, p. 364.

[16] D. THYM, *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, in *Maastricht journal of European and comparative law*, 2017, Vol. 24, n. 5, pp. 605-621.

[17] Bilateral relocation schemes go beyond the scope of this article and will not be examined. For references on this point, see C. KRUSCHKA, *The border spell: Dublin arrangements or bilateral agreements? Reflections on the cooperation between Germany and Greece / Spain in the context of control at the German-Austrian border*, in *EU Migration Law Blog*, 26 February 2019; ECRE, *Bilateral Agreements: Implementing or Bypassing the Dublin Regulation*, Policy Paper 5/2018.

[18] D. THYM, *Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions*, cit., p. 611.

[19] V. MORENO-LAX, *Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy*, cit., p. 732.

Despite nuanced positions on the matter, what can be concluded is that when it comes to asylum, migration, and border management, the principle of solidarity between Member States can hardly be separated from solidarity to third-country nationals.[20] This contribution engages with this dual dimension of solidarity between Member States, which must be *fair* towards international protection-seekers (IP-seekers). Both arts. 67(2) and 80 indeed refer to fairness. This opens the door to many interpretations of what fair means. According to some, the principle of solidarity will be reached only after extinguishing inequalities in asylum matters[21]. For others, measures of solidarity can be fair if they have been approved through a decision-making process in which all those potentially affected by those measures have been adequately involved and had an equal opportunity to participate and influence the final outcome[22]. Aware of the fact that no one-fits-all conceptualization of fairness exists, as its meaning strongly depends on the policy field in which it is applied, akin to the concept of solidarity, and that different actors may have a different view of fairness according to their respective interests, this contribution engages with the concept of fairness in the specific context of relocation, and particularly with the criteria, nature and modalities of relocation mechanisms to evaluate whether they have fulfilled the requirement of being fair towards IP-seekers.

Overall, this paper notes that a solidarity crisis[23] is currently affecting the EU with severe consequences on IP-seekers and which, in recent years, has manifested in at least three emblematic occasions.[24] Among these, this contribution deals with the relocation of

[20] *Ibid*, p. 739.
[21] E. KÜÇÜK, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, in *European Law Journal*, 2016, Vol. 22, pp. 448-469.
[22] J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. The MIT Press, 1996, pp. 166-167.
[23] M. TAKLE, *Is the Migration Crisis a Solidarity Crisis?*, in A. GRIMMEL (ed.), *The Crisis of the European Union*. London: Routledge, 2018, pp. 116-129; UN, *Refugees and Migrants: A Crisis of Solidarity*, https://www.un.org/en/academic-impact/refugees-and-migrants-crisis-solidarity.
[24] Other two illustrative examples are, but are not limited to, the COVID-19 pandemic and the mass influx of people from Ukraine. As for the former, coronavirus has been exploited by certain Member States to tighten the grip on migrants' access to essential services, rather than as an occasion to firmly maintain their full entitlement to human rights. Among others, in several Italian municipalities, migrants were excluded from essential relief economic measures in violation of the principle of non-discrimination along with other Constitutional and supranational human rights provisions. Please see, F. BIONDI DAL MONTE, *Cittadini, stranieri e solidarietà alimentare al tempo del coronavirus*, in *Questione Giustizia - Diritti senza Confini*, 21 May 2020. As for the latter, the EU emergency response to manage the ongoing migration plights in Ukraine, Afghanistan and Belarus widely diverge, despite the fact that most migrants are fleeing from war and are equally in need of immediate protection. This leaves a high degree of legal uncertainty concerning inconsistent and potentially discriminatory EU and national approaches to migration emergencies. The decision to activate temporary protection to people fleeing Ukraine and not to people fleeing Afghanistan and Belarus illustrates the severe implications of putting national interests before human rights and the grave repercussions of such unfair policy decisions on third country nationals. Among others, see L. RAINERI, F. STRAZZARI, *Dissecting the EU response to the 'migration crisis', in The EU and crisis response*. Manchester University Press, 2021; F. DÜVELL, I. LAPSHYNA, *On war in Ukraine, double standards and the epistemological ignoring of the global east*, in *International Migration*, 2022, Vol. 60, No. 4, pp. 209-212; N. LARSEN, *Europe's Double-Standard: Implications of the Disparity of Refugee Policy in Ukraine, Bosnia, and Syria*, in *Balkandiskurs*, 7 October 2022; C. SCISSA, *Ukraine, Afghanistan and Belarus: What EU emergency response to ongoing migration plights?*, in *Security Praxis*, 17 June 2022; ID., *Misure emergenziali al confine tra UE e Bielorussia: uno scontro tra "titani" con gravi ripercussioni per i*

IP-seekers among EU Member States, an overlooked topic in the literature despite its relevance. Relocation was originally conceived as an expression of solidarity between Member States with the aim to ease the burden of frontline Member States or those exposed to great migration flows beyond their management capacity. Relocation, therefore, involves the transfer of IP-seekers or beneficiaries from a Member State that, for the abovementioned reasons, cannot adequately provide for their protection and assistance to other Member States. In all phases of such transfers, the fundamental rights of IP-seekers and beneficiaries shall be always and duly taken into account, as repeatedly found by the European Court of Human Rights as well as by the Court of Justice.[25]

In light of the foregoing, the aim of this article is to assess whether the Union's relocation schemes have been fairly implemented in response to the serious migration plights. The article reviews the selection criteria adopted by Member States in three relocation operations (2009-2013, 2015, 2020) and, most recently, in the Declaration of a Voluntary Solidarity Mechanism signed by a group of Member States in June 2022. It examines whether the implementation of these relocation exercises and the selected criteria reflect the dual dimension of solidarity which has to be fair to IP-seekers, or whether they prioritize national interests over human rights considerations. In light of the proposals presented by the European Commission under the New Pact on Migration and Asylum also in the field of relocation, this contribution analyses the proposal for a regulation on asylum and migration management (RAMM). This paper concludes that the procedural and substantive shortcomings of the relocation plans at stake as well as the inadequate adjustments under the New Pact are to be seen as factors hardly compliant with the principle of non-discrimination and as unfair towards IP-seekers. This inevitably affects the efficacy of relocation as a tool of inter-state solidarity for managing ongoing migration plights, such as those concerning Afghanistan, Syria or Ukraine.

2. The 2009-2013 EUREMA relocation project for the benefit of Malta

Even though relocation is seen as a traditional feature of inter-state solidarity, its implementation is rather recent and coincides with greater migration flows reaching the EU since the beginning of the 2000s. The first Union's voluntary relocation mechanism, called Pilot project for intra-EU Relocation from Malta – EUREMA, has been set out in two phases between 2009 and 2013, and involved highly vulnerable IP beneficiaries to be relocated from Malta to other Member States.[26] Although most participating States

migranti, in *European Papers*, 2022; M. FORTI, *Questioni giuridiche e problemi di tutela dei diritti fondamentali nella risposta dell'Unione europea alle pratiche di strumentalizzazione dei flussi migratori*, in this *Journal*, 2022, n. 3.

[25] ECtHR, *MSS v. Belgium and Greece*, Application No. 30696/09, 21 January 2011; CJEU, Joined cases C-411/10 and C-493/10, *N.S. and M.E*, 21 December 2011, ECLI:EU:C:2011:865.

[26] COUNCIL OF THE EUROPEAN UNION, *Presidency Conclusions*, 10 July 2009, para. 37. The Council had called for the coordination of voluntary measures for intra-EU relocation of beneficiaries of international

affirmed that their decision to take part in the EUREMA project was "*a political decision of solidarity towards Malta, in line with the EU spirit of solidarity and burden sharing*"[27], this first exercise unveiled an overall reluctant climate concerning the possibility to facilitate the transfer of third-country nationals into Member States' territory. In fact, only 12 Member States joined either the first or the second phase of the scheme, while 10 did not take part in either relocation phase.[28] National pledges were often narrowed down to the minimum: Luxemburg and Portugal committed to relocate 6 persons only, the UK and Ireland filled 10 places, Liechtenstein only 1 place.[29] The Visegrad group constituted another emblematic example of maintaining a united front in denying solidarity in the field of migration: Hungary failed to respect its pledge to relocate between 8 and 10 vulnerable IP beneficiaries, followed by Poland, Slovakia, and Romania.[30]

In that occasion, IP beneficiaries were allowed to express their preferences in terms of relocation destinations, which mainly coincided with the Member States in which they had family relations or contacts with same nationality members.[31] Yet, participating Member States were allowed not to take their preferences into account in the selection process. Often, IP-seekers were approached by only one Member State. In that case, IP-seekers were only given the choice whether or not to accept the offer of relocation. Due to integration difficulties – mainly linked to the fact that in the country of destination there were no community members of the same origin, perceived lack of social safety net, or because living, integration and welfare conditions were poorly perceived, among others – some candidates chose not to be relocated.[32]

In the first phase of the EUREMA project, participating Member States selected relocation beneficiaries on account of a wide range of criteria.[33] These included: language skills (all Member States); education and vocational skills (6 out of 10); family units or family ties (respectively 6 and 3 out of 10); international protection (5 out of 10); vulnerability (3 out of 10); being a minor (3 out of 10). In some cases, States required IP beneficiaries to be in good health or not to represent a threat to public order. Additionally, belonging to an ethnic or religious minority as well as having work experience or being ready for employment constituted further, in some cases determining, factors.[34] For its part, Romania restricted the access to relocation only to recognized refugees to the

protection from Member States exposed to specific and disproportionate pressures and highly vulnerable persons, starting with a pilot project for Malta.

[27] EASO, *EASO Fact finding report on intra-EU relocation activities from Malta*, July 2012, p. 8.

[28] *Ibid*, pp. 3-5.

[29] *Ibid*, p. 4.

[30] *Ibid*, p.10.

[31] Other factors of attraction were labour market, favorable reception conditions, general living conditions, social benefits/welfare guarantees, language, protection status, family reunification prospects and prospects for citizenship.

[32] EASO, *EASO Fact finding report on intra-EU relocation activities from Malta*, cit., p. 12.

[33] *Ibid*.

[34] D. VANHEULE, J. VAN SELM AND C. BOSWELL, *The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the Field of Border Checks, Asylum and Immigration.* Directorate-General for Internal Policies, European Parliament, 2011, p. 5.

detriment of subsidiary protection beneficiaries, which constituted the majority of the actual pool of applicants. It seems clear that the selection criteria were primarily based on socio-cultural integration and economic potential rather than on the vulnerability of the IP beneficiaries and their protection needs. Relocation largely reflected national interests, whereby the transfer of IP-seekers was conditioned to the States' priority to attract workforce with a similar socio-cultural background. EASO confirmed that "*some of the selection criteria did not match the characteristics of the beneficiaries of international protection in Malta, making it difficult to carry out the relocation to some of the participating States*"[35]. Emblematically, some countries were only willing to accept families, while most IP beneficiaries in Malta were single men, thus hampering their possibility to be relocated. The attitude endorsed in EUREMA unveiled the Member States' attempt to turn relocation from being a solidarity mechanism into a cherry-picking process based on national preferences. The representation of IP-seekers' needs and voice was limited, as was the consideration of their vulnerability. The relocation emergency plans implemented in 2015 and in 2020 contributed to further deteriorating solidarity between the Member States to the detriment of vulnerable IP beneficiaries.

3. The 2015 relocation decisions for the benefit of Italy and Greece

In the framework of the 2015 European Agenda on Migration, the Commission issued a proposal for a European Relocation Scheme by means of distribution quotas.[36] While the immediate aim was to ease the burden on frontline Member States, the long-term objective was to address the manifest deficiencies of the CEAS following the tragic death of 800 migrants in the Mediterranean Sea in April 2015. Two Council Decisions established that the plan to relocate 160.000 migrants from Italy and Greece[37] applied to third-country nationals who were *prima facie* in clear need of IP, namely those belonging to nationalities for which the Union's average recognition rate at first instance was above 75%. At that time, almost only Syrians and Eritreans reached such a high level of recognition rate.[38] Wide divergences in national procedures and modalities to evaluate IP claims undermined the possibility for other nationalities to be included in the exercise.[39] The volatile recognition rates at the domestic level led to the definitive exclusion of Iraqis

[35] EASO, *EASO Fact finding report on intra-EU relocation activities from Malta*, cit., pp. 10-11.
[36] Communication COM(2015)286 final of 27 May 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece.
[37] Council Decision 2015/1601, Establishing Provisional Measures in the Area of international protection for the benefit of Italy and Greece aimed at relocating 120.000 international protection seekers. It was followed by Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece concerning additional 40.000 applicants.
[38] E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, Study for the LIBE Committee, 2017, p. 20.
[39] *Ibid.*

from relocation, although initially included among the *prima facie* beneficiaries in light of the severe and worsening insecurity conditions in Iraq. What is more, the Council set forth hierarchical grounds to proceed with priority relocations of vulnerable IP-seekers and those whose qualifications would have facilitated their integration process. The choice of the Council to take nationality as main selection criterion was deemed as "*legally and ethically problematic*".[40] In an influent piece, Guild, Costello, Garlick, and Moreno-Lax considered the nationality ground hardly compliant with the individual assessment that both international refugee law and EU asylum law require.[41] In particular, nationality does in no way exhaust the wide range of reasons substantiating an individual's "genuine" need of protection, nor succeeds in capturing the myriad serious forms of vulnerability they may face. Privileging certain national groups hardly reflects the idea of fairness, whereby migrants fleeing analogous situations and manifesting the same protection needs are treated differently. An additional element of concern referred to the beneficiaries' destination preferences that, in contrast to EUREMA, were not taken into account at all. Furthermore, the prioritization of vulnerable IP-seekers resulted in a cumbersome sub-categorization process. For instance, several Member States chose to relocate teenagers instead of families and minors owing to the lack of special reception and accommodation facilities.[42] In the absence of common guidelines to detect vulnerability, some Member States applied national definitions of "minor children", thus further fragmenting the EU scheme.

Although it is manifest that principle of solidarity does not only entail assistance and relief from migratory pressures but also a fair allocation and sharing of responsibilities, the latter seems difficult to achieve when the Member States have major discretion in the relocation exercise. Two years after the Council Decisions, in February 2017, only 248 out of 523 registered unaccompanied minors were effectively relocated from Greece and only 1 child was relocated from Italy.[43] In September 2017, only a handful Member States had effectively relocated more than half of the pledges made.[44] Partially, this was due to

[40] E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, cit., p. 19. See also E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *The 2015 Refugee Crisis in the European Union*, CEPS Policy Brief, 2015, n. 332; and V. GUIRAUDON, *The 2015 refugee crisis was not a turning point: Explaining policy inertia in EU border control*, in *European Political Science*, 2018, Vol. 17, p. 151.

[41] E. GUILD, C. COSTELLO, M. GARLICK, V. MORENO-LAX, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, cit.

[42] *Ibid*, p. 34. This was the case of Estonia, Luxemburg and Ireland.

[43] *Ibid.* See also, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Relocating unaccompanied children: applying good practices to future schemes*. Luxembourg: Publications Office of the European Union, 2020, p. 14.

[44] As of September 2017, Austria relocated 15 persons out of 1953 legally foreseen (0.8%), Bulgaria 50 out of 1302 (3.8%), Czech Republic 14 out of 2691 (0.4%), Hungary and Poland 0 (0%). Finland, which abstained from voting on the EU relocation plan, not only gave effect to the Council decisions (and as of September 2017 had relocated 95% IP-seekers formally pledged) but is one of the very few Member States that pledged more quotas than the Commission expected. See, S. Š. ŠABIĆ, *The Relocation of Refugees in the European Union. Implementation of Solidarity and Fear.* Friedrich Ebert Stiftung, October 2017, p. 6.

political and technical obstacles, which played a significant role in restraining the efficacy of the 2015 exercise. First, mandatory relocation of IP-seekers alimented an anti-refugee sentiment in many countries, which constrained the political commitment to implement national pledges. Plus, the identification, registration, and fingerprinting procedures in Greece and Italy encountered some difficulties in relation to low investments in the necessary reception capacities and facilities, and the lack of adequate infrastructures for reception. IP-seekers themselves were somehow reluctant to being relocated elsewhere as they received little information about how the relocation was supposed to work, and some feared to be relocated to certain traditionally anti-migrant EU countries, such as Croatia.[45] Overall, no more than 20.000 out of 160.000 vulnerable IP-seekers were transferred. Akin to the EUREMA project, the 2015 relocation exercise revealed a profound lack of solidarity between the Member States aggravated by procedural weaknesses, which did not benefit vulnerable IP-seekers.

Beyond problematic selection criteria and lack of coordinated efforts, the overall efficacy of the 2015 scheme was also undermined by the vehement opposition to the fair distribution scheme, which led Hungary, Romania, and Slovakia to vote against it and Finland to abstain.[46] This political turmoil brought Slovakia and Hungary to challenge the second Council's relocation decision before the Court of Justice.[47] In *Slovak Republic and Hungary v Council of the European Union*, the Court made clear that the Council relocation decisions were lawful and binding for all Member States, thus finding the Slovakia and Hungary in violation of their obligations under EU law. The Court stressed the relevance of the principle of solidarity in managing emergency situations, such as those characterised by a sudden inflow of third-country nationals, where

"*the burdens entailed by the provisional measures adopted under that provision* [art. 78(3) TFEU] *for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and*

See also, C. MORSUT, B. IVAR KRUKE, *Crisis governance of the refugee and migrant influx into Europe in 2015: a tale of disintegration*, in *Journal of European Integration*, 2018, Vol. 40, No. 2, pp. 145-159.

[45] M. DE LA BAUME, *Why the EU's refugee relocation policy is a flop*, in *Politico*, 6 January 2016; V. PAVLIĆ, *Group of refugees moving to Croatia*, in *Total Croatia News*, 11 April 2017.

[46] R. BEJAN, *Problematizing the Norms of Fairness Grounding the EU's Relocation System of Shared Responsibility*, cit, p. 20. The UK opted out, but committed to contribute to aid for Syria and to take in 20.000 refugees from Turkey and North Africa within the resettlement scheme. Denmark also opted out from relocation but agreed to take part in resettlement and aid assistance programs with third countries outside the EU. See, S. Š. ŠABIĆ, *The Relocation of Refugees in the European Union. Implementation of Solidarity and Fear*, cit., p. 5.

[47] CJEU, Joined Case C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union*, ECLI:EU:C:2017:631, 6 September 2017. Thorough analyses of this case include S. PEERS, *A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers*, in *EU Law Analysis*, 8 September 2017; M. OVÁDEK, *The EU as the Appropriate Locus of Power for Tackling Crises: Interpretation of Article 78(3) TFEU in the case Slovakia and Hungary v Council*, in *Verfassungsblog*, 9 September 2017; D. OBRADOVIC, *Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy*, in *European Law Blog*, 2 October 2017; T. RUSSO, *Quote di ricollocazione e meccanismi di solidarietà: le soluzioni troppo "flessibili" del Patto dell'Unione europea su migrazione e asilo,* in this *Journal*, 2021, n. 2.

fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy".[48]

Importantly, the Court of Justice recognized the crucial function of art. 80 TFEU in governing the CEAS.[49] However, it missed the significant opportunity to define the principle of solidarity as core value of EU law, as instead purported by Advocate General Bot[50]. In his Opinion, solidarity figured as part of a set of values and guiding principles at the core of the European construction, a pillar to be used to compensate for the "d*e facto inequality between Member States because of their geographical position*".[51] The Court went not this far.

Despite the rejection of their instances, Hungary, the Czech Republic, and Poland refused to contribute to the scheme. Following the consequent infringement proceedings launched by the Commission, in April 2020 the CJEU echoed its findings in the previous judgment, ruling that EU law does not allow for a unilateral derogation from the relocation scheme, thus finding the defendants liable for violation of EU obligations.[52] In *European Commission v. Republic of Poland, Hungary and the Czech Republic*, the Court made another point of utmost importance. It reiterated that the principle of solidarity pursuant to Article 80 TFEU shall not only govern the relations between Member States, but should be *fair* towards third-country nationals, thus prohibiting any form of direct and indirect discrimination to access the relocation mechanisms. In the Court's words:

"*If relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, consequently, the adoption of a binding relocation mechanism would be impossible. It should be added that considerations relating to the ethnic origin of applicants for international protection cannot be taken into account since they are clearly contrary to EU law and, in particular, to Article 21 of the Charter of Fundamental Rights of the European Union"*[53].

In this judgement, therefore, the Court of Justice has made clear that discriminatory or unfair solidarity runs counter to the essence of the principle of solidarity. At the same time, however, Mengozzi noted that in neither judgement the Court of Justice gave the principle of solidarity the status of a "general principle" of Union law, invalidating the

[48] CJEU, *Slovak Republic and Hungary v Council of the European Union*, cit., par. 291.
[49] L. RIZZA, *Obbligo di Solidarietà e Perdita di Valori*, in *Diritto, Immigrazione e Cittadinanza*, 2018, no. 2.
[50] CJEU, *Slovak Republic and Hungary v Council of the European Union*, Opinion of AG Bot, 26 July 2017, same references, paras. 17-18: Solidarity is "among the cardinal values of the EU and is even among the foundations of the Union".
[51] *Ibid*, parr. 16-21.
[52] CJEU, Joined Cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland, Hungary and the Czech Republic*, ECLI:EU:C:2020:257, 2 April 2020. For a comment, see J. BORNEMANN, *Coming to terms with the refugee relocation mechanism,* in *European Law Blog*, 14 April 2020.
[53] CJEU, *European Commission v. Republic of Poland, Hungary and the Czech Republic*, cit., parr. 304-305.

particular novelty introduced by the Lisbon Treaty, namely that to give prominence to the principle of solidarity in the field of asylum by binding Member States regardless of their consent continuously renewed over time.[54]

4. The 2020 relocation plan for the benefit of Greece

In 2020, three tragic events occurred almost simultaneously convinced the European Commission to launch a third relocation plan. These were the political crisis at the Turkish-Greek border, the spreading of Covid-19 in the EU, and the devastating fire in the Greek reception camp of Moria. Two voluntary relocation mechanisms were set up to transfer "*some of Europe's most vulnerable people*" to willing Member States[55]. This support, however, suffered from two immediate curtailments. First, the Commission automatically restricted the pool of beneficiaries to unaccompanied minors and teenagers and, subordinately, to accompanied children, provided that they suffered from severe medical conditions, which the Commission strictly interpreted as "*chronic, incurable, cause severe disabilities and/or impairments and/or entail significant healthcare costs*".[56] Second, the Commission specified that, on the one hand, priority ought to be given to migrant children on the Greek islands located in protective custody or hosted in precarious accommodation on the mainland; on the other hand, unaccompanied minors with a pending IP claim who were eligible for family reunification under the Dublin III Regulation were not included in this exercise. It is evident that the inherent vulnerability of unaccompanied minors and children with families is undeniable, and their highest protection shall be always guaranteed.[57] It follows that the Commission's choice to prioritize their immediate assistance is surely laudable. Less laudable is, in the author's view, the *a priori* decision to restrict access to relocation to this category only. The Commission neither justified its decision, nor explained the reasons that led to the automatic exclusion of all the rest of IP-seekers present on the Greek Islands. In particular, the Commission did not explain why, how, and to what extent the structural and systematic deficiencies of the Greek asylum system would not significantly impact on other IP-seekers beyond targeted children and families. Another element of concern refers to the further restriction applied even on minors' access to relocation according to the severity of their health conditions. For the third time, relocation seems to be outdone by Member States' stark reluctancy to reception. The tangible risk of selecting only IP-seekers with the most severe and evident forms of vulnerability is to ignore less evident

[54] P. MENGOZZI, *L'idea di solidarietà nel diritto dell'Unione Europea*, cit., p. 120.
[55] EUROPEAN COMMISSION, *Migration: Commission takes action to find solutions for unaccompanied migrant children on Greek islands*. Press Release of 6 March 2020.
[56] EUROPEAN COMMISSION, *Relocation of unaccompanied children from Greece to Portugal and to Finland*. Questions and answers of 7 July 2020.
[57] The "extreme vulnerability" of minors is undisputable and it has been in fact repeatedly recognized by the European Court of Human Rights. See for instance, ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga c. Belgium*, App. n. 13178/03, 12 October 2006.

yet equally serious expressions of vulnerability (such as trauma, physical abuses, psychological violence, mental illness among others), thus neglecting their need of being relocated.[58]

Despite being an EU-coordinated action, the selection criteria were not further delineated at the Union's level, leaving a wide discretional margin to the 13 Member States participating in the plan. No additional specification is provided on the national criteria selected for the relocation process. This leaves the door open on a number of fundamental questions: Did the Member States opt for a group- or individual-based vulnerability assessment? Did they consider the conditions spent by IP-seekers in Greece as a criterion, for instance the duration or location of their stay? Did they provide for more favourable conditions than the ones set by the Commission, for instance by broadening the pool of relocation beneficiaries? Finally, it is relevant to note that only half Member States participated in this relocation scheme, with Lithuania and Slovenia pledging to accept 2 and 4 unaccompanied minors respectively.[59] As of December 2022, 5.040 people mostly coming from Afghanistan and Syria have been relocated out of a total pledge of 5.200 vulnerable IP-seekers and beneficiaries, including 1.600 unaccompanied minors, and children with severe medical conditions accompanied by their family members.[60] Despite welcoming the success of the operation, the scheme results too limited in its scope, and the overall numbers remain low in scale and ambition, considering the number, GDP, and population of the Member States involved in the relocation plan. The fairness of this last relocation plan has been undermined by criteria, driven by national interests instead of humanitarian considerations, which unreasonably constrained the scope of application of an emergency instrument which could have provided relief to many more lives.

5. Relocation in the New Pact's proposal on asylum and migration management (RAMM)

Overall, it is debatable whether the implementation of the three relocation mechanisms examined in the previous sections served their solidarity purpose in managing migration emergencies and were fair towards third-country nationals. By means of the New Pact on Migration and Asylum, the Commission had the opportunity to reinforce the overarching principle of solidarity and to reinvigorate Member States' commitment to relocation. Arguably, this opportunity has been completely missed. The

[58] For a deeper analysis of migrants' vulnerability, please see C. SCISSA, *Il Nuovo Patto sulla Migrazione e l'Asilo dalla prospettiva della vulnerabilità: Un'occasione mancata*, in this *Journal*, 2021, no. 2; ID., *Vulnerable States, threatening migrants. The paradoxical end of the right to asylum*, in *AmbienteDiritto*, 28 April 2022.

[59] EUROPEAN COMMISSION, *Relocation of unaccompanied children from Greece to Portugal and to Finland*, cit.

[60] IOM, *Factsheet: Voluntary Scheme for the Relocation from Greece to other European Countries*, 20 December 2022.

Commission's proposal for a regulation on asylum and migration management (RAMM) aimed to replace the Dublin III Regulation and allegedly contributed to establishing a comprehensive approach to migration management. Indeed, the Commission admitted that *"[t]he current migration system is insufficient in addressing these realities. In particular, there is currently no effective solidarity mechanism in place and no efficient rules on responsibility*".[61] Against this backdrop, the Commission set forth what was meant to be a new, ambitious solidarity mechanism, intended to be flexible and adjustable to adequately respond to different migration emergencies. This solidarity mechanism is composed of three main instruments: relocation, return sponsorship, and measures to strengthen Member States' capacity in the field of asylum, reception and return as well as in the external dimension[62]. According to proposed art. 47, the Commission has unlimited discretional power to determine in full autonomy whether a Member State is confronted with a situation of recurring disembarkation operations, which in turn allows for the activation of the solidarity mechanism (proposed art. 45). When the Commission establishes that a Member State is affected by great migration flows following recurrent disembarkations, the other Member States are invited to notify the contributions they intend to provide for the benefit of the affected Member State. In this case, relocation applies "*only to persons who are more likely to have a right to stay in the Union*"[63], having in mind IP-seekers not subject to border procedure, giving priority to those in vulnerable conditions. Relocation is established according to the existence of any meaningful links between the IP-seeker and the relocating Member State.[64] Transfers mostly follow the procedures under the Dublin III Regulation with regards to transfers' deadlines, notification, and appeals; however, failing in implementing the transfer before the deadline does not cancel the relocation (proposed art. 57(10)).[65] If the Member State of relocation has relocated an IP-seeker for whom the Member State responsible for their IP claim has not yet been determined, that Member State has to run a Dublin procedure and transfer again the applicant to the State responsible (proposed art. 58(2)). In those cases

[61] Communication COM (2020) 610 final from the Commission of 23 September 2020 on the proposal for a Regulation on asylum and migration management, p. 2.

[62] Given the focus of this work, only relocation and return sponsorship are further examined. For an in-depth understanding of the solidarity mechanisms established under the New Pact, please see, among others, V. MORENO-LAX, *A New Common European Approach to Search and Rescue? Entrenching Proactive Containment,* in *EU Migration Law Blog*, 3 February 2021; E. PISTOIA, *Il Nuovo Patto e la Gestione degli Sbarchi*, in *ADiM Blog*, Analyses & Opinions, November 2020; M. MORARU, *The new design of the EU's return system under the Pact on Asylum and Migration,* in *EU Migration Law Blog*, 14 January 2021; F. R. PARTIPILO, *The European Union's Policy on Search and Rescue in the New Pact on Migration and Asylum: Inter-State Cooperation, Solidarity and Criminalization*, in this *Journal*, 2021, n. 2; T. RUSSO, *Quote di ricollocazione e meccanismi di solidarietà: le soluzioni troppo "flessibili" del Patto dell'Unione europea su migrazione e asilo,* cit.

[63] COM/2020/610 final, cit., para 26.

[64] *Ibidem*, art. 49(2).

[65] It is worth noting that the RAMM expands the responsibility criteria currently into force under Dublin III so to include siblings into the family definition (proposed art. 2(2)). It also extends the criterion based on the possession of one or more residence documents, even if expired (Article 19(4)); and introduces a new, further criterion based on the possession of diplomas and other qualifications in a Member State (Article 20).

where no Member State is designated as responsible, the Member State of relocation shall be responsible for examining the IP claim.

If offers for contributions for the benefit of the Member State affected by recurring disembarkations are sufficient, the Commission combines them and formally adopts a "solidarity pool" (proposed art. 48). If insufficient, the Commission adopts an implementing act summarizing relocation targets and other contribution for each Member State (proposed art. 48(2)). If the offers made by the Member States to support the capacity or external dimension of the State concerned would lead to a shortfall greater than 30% of the total number of relocations indicated by the Commission, then each Member State would be obliged to meet at least 50% of the relocation quota it has indicated according to its GDP and population. Under proposed art. 48(2), the Asylum Agency and the European Border and Coast Guard Agency shall draw up the list of eligible persons to be relocated and to be subject to return sponsorship. The list shall outline the distribution of the relocation beneficiaries among the contributing Member States taking into account national pledges, the nationality of those persons and the existence of meaningful links between them and the Member State of relocation or of return sponsorship.

Indeed, Member States may discharge their duties by offering "return sponsorships" instead of relocations. Under proposed art. 55 of the RAMM, relocation serves the additional, and unprecedented, purpose of removal. In other words, relocation is no longer envisaged as a pure solidarity instrument, but also as tool to carry out returns. Under the return sponsorship mechanism, the sponsoring Member State should assist the benefitting Member State in the removal of irregular third-country nationals, for instance, by providing financial support, counselling, or relying upon bilateral cooperation agreements. If, after eight months, such efforts are unsuccessful, the returnee is relocated to the sponsoring Member State that consequently becomes responsible for carrying out the removal.[66] In this regard, Moraru highlights that if the return sponsorship passes in its current form,

"*the EU return policy will risk being managed by fewer Member States", namely those "[…] with a track record of human rights violations in return procedures […] or Member States that will return on the basis of diplomatic relations they have with certain third countries instead of the ties existent between the returnee and the third country*"[67].

If a Member State is exposed to migratory pressure instead of disembarkation (proposed art. 53), relocation extends also to IP beneficiaries, whose express consent to be transferred is exceptionally required. By contrast, consent is not envisaged in the rest of the cases[68]. Finally, if the Member State is subject to a situation of crisis, the rules set

[66] COM/2020/610 final, cit., art. 55(4). See, J. P. CASSARINO, *Readmission, Visa Policy and the "Return Sponsorship" Puzzle in the New Pact on Migration and Asylum,* in *ADiM Blog*, Analyses & Opinions, November 2020, p. 5.

[67] M. MORARU, *The new design of the EU's return system under the Pact on Asylum and Migration*, cit., p. 6.

[68] The frequent irrelevance given to applicants' preferences in the framework of relocation operations corroborates Brown, Ecclestone and Emmel's thesis, according to which assistance and protection may risk

forth in the Proposal for a Migration and Asylum Crisis Regulation apply. Thus, IP-seekers under border procedure and persons having irregularly crossed an EU border also become eligible for relocation, while third-country nationals subject to return sponsorship are transferred to the sponsoring Member State if their removal does not occur within four – instead of eight – months. In this last scenario, contributions other than relocation or return sponsorship are excluded. Once cannot fail to stress that the expression of interstate solidarity via return sponsorship raises several concerns. Indeed, it is questionable whether return sponsorship can provide tangible solidarity to (frontline) Member States and be fair towards third country nationals. The option to support and/or take care of the removal of irregular migrants in their country of origin involve the sponsoring Member State's political will to engage in the financial, administrative, and organizational aspects of return, and to accept additional irregular migrants onto their own territory pending removal. As Member States are mostly unwilling to accept regular IP-seekers in genuine need of protection, it is likewise unlikely that they will show solidarity in the context of return sponsorship. It is probable that States in need of solidarity will still bear most of the responsibility for irregular migrants.

It is clear from this very brief analysis that the solidarity mechanism is a highly bureaucratic and complex mechanism, which does not appear to be able to solve the real problems of uneven solidarity and responsibility sharing since, as the RAMM suggests, a Member State which is reluctant to relocation is allowed to keep avoiding relocation commitments by preferring other types of contribution. Relocation, therefore, is far from being binding, as the Commission itself provides for many easy ways out (financial, operational, counselling support among others) to reluctant Member States. As conceived, it is hard to understand how other contributions can be proportional to relocation and to what extent this solidarity mechanism could contribute to balancing responsibility-sharing. The existence of meaningful links between the beneficiaries of relocation and the State of relocation lacks clarity, despite its relevance in determining the list of people to be relocated. From the text of the RAMM, it seems that "meaningful links" cover at least the presence of family members in the State of relocation and the possession of diploma or other qualifications, but further guidelines need to be provided. Overall, it seems that the RAMM gives little or no regard for IP-seekers' vulnerability and need of protection:

"*They can be 'matched', transferred, re-transferred, but subject to few exceptions their aspirations and intentions remain legally irrelevant. In this regard, the New Pact is as old school as it gets: it sticks strictly to the 'no choice' taboo on which Dublin is built*".[69]

It is submitted here that the proposed solidarity mechanism perpetuates the same loopholes as the previous Union's relocation plans where people are given no voice and

advancing new forms of migration governance that limit individual agency or choice, by exploiting migrants' fragile conditions. K. BROWN, K. ECCLESTONE, N. EMMEL, *The Many Faces of Vulnerability*, in *Social Policy & Society*, 2017, Vol. 16, p. 500.

[69] F. MAIANI, *A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact*, cit., p. 10.

misses the objective to provide for adequate protection and assistance to vulnerable persons.[70] Despite being a key aspect of the New Pact, IP-seekers and beneficiaries' integration is not foreseen in this proposal and a person-centred approach severely lacks[71]. As Maiani recalls, disregarding people's agency is one of the key factors that led to the failure of the Dublin system, a pitfall that the RAMM proposal does not seem to dismantle.[72]

6. The 2022 Declaration on a Voluntary Solidarity Mechanism and other steps forward

Since 2020, negotiations on the revision of the Dublin III Regulation and the related adoption of the RAMM have been on hold. However, in 2022, three important events shook the dialogues on the New Pact. First, the European Parliament and the rotating Presidencies of the Council of the EU declared their plan to finish negotiating all proposals by February 2024. Second, and related to the first, during its six-month Presidency of the Council of the EU from January to June 2022, France adopted a step-by-step approach to refresh discussions on single proposals of the New Pact. In the context of solidarity and responsibility-sharing, this step-by-step approach encouraged Member States to find a compromise on the RAMM. In this context, in June 2022, a group of Member States (18 Member States and 3 Schengen-associated States)[73] endorsed the Declaration on a Voluntary Solidarity Mechanism[74], a non-binding and temporary arrangement which envisages the relocation of 10.000 IP-seekers rescued in the Central Mediterranean or the Atlantic Sea from frontline States (including Greece and Cyprus) to other participating States within a year. As explained by Carrera and Cortinovis, this Declaration lacks not only legal force, but also, and this is very important, democratic legitimacy. Political statements as such, in fact, steer clear of the EU Parliament from democratic scrutiny, and the Court of Justice from judicial control.[75] Akin to the RAMM and previous relocation mechanisms, the Declaration states that relocations should be

[70] *Ibid*, p. 4.
[71] U. BRANDL, *Integration in the New Pact: A difficult compromise between a limited EU competence and a successful policy*, in *EU Immigration and Asylum Law and Policy*, 26 March 2021.
[72] *Ibid*, p. 10, citing P. DE BRUYCKER, M. DE SOMER, J-L. DE BROUWER (eds.), *From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration*. European Policy Centre, December 2019, pp. 112-113.
[73] Nine EU Member States decided not to sign the Declaration, and most of them (Austria, Denmark, Poland, Hungary, Latvia and Slovakia) rejected it. See, S. CARRERA, R. CORTINOVIS, *The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy. One Step Forward, Three Steps Back on Equal Solidarity*, in *CEPS In-Depth Analysis*, October 2022, p. 2.
[74] EUROPEAN COMMISSION, *Press Release: Migration and Asylum: Commission welcomes today's progress in the Council on the New Pact on Migration and Asylum*, 22 June 2022. See also, FRENCH PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, *First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism*, 22 June 2022.
[75] S. CARRERA, R. CORTINOVIS, *The Declaration on a Voluntary Solidarity Mechanism and EU Asylum Policy*, cit., p. 3.

voluntary and primarily apply to persons in need of international protection, with priority accorded to the most vulnerable, yet preserving the discretional power of the Member States "*to have preferences on the nature and the amount of their contributions, regarding for example the group of persons concerned by relocations (nationality, vulnerability, etc.)"*. In doing so, the Declaration reiterates the persisting shortcomings detected in all relocation plans developed since 2009, which failed in finding a balance between national interest and the full respect of human rights, with particular reference to violation of the principle of solidarity and non-discrimination. As observed

"It gives Member States the opportunity to preselect a profile of potential beneficiaries based on their own political preferences, for example specific nationalities or only 'vulnerable' applicants. The unclear personal scope, coupled with the documented lack of standardised and reliable procedures for assessing vulnerability in many contexts (as, for example, in the case of Greek hotspot procedures) runs the risk of legitimising prohibited discrimination and excluding applicants facing precarity but who don't formally match stereotypical or narrow understandings of vulnerability".[76]

Moreover, and even though this document is purely declaratory in intent, it already considers potential causes of derogation from relocation pledges, including in the event of disproportionate pressure due to secondary flows of IP-seekers. Furthermore, it allows participating States to voluntarily choose contributions other than relocation in terms of 1) financial contributions or operational support to frontline Member States; or 2) financial contributions to run projects in transit countries that may have a direct impact on the flows at the external border.

In practice, however, tensions between Member States rose again to the surface. According to the latest ECRE report on solidarity, France refused to relocate several beneficiaries on security grounds, while Sweden opted out from the relocation scheme due to the Declaration's uncertain legal basis. Moreover, France declared that it would not fulfil its pledges until Italy complies with its search and rescue obligations under the international law of the sea. As a result, by November 2022, the number of relocated applicants was just over 100.[77]

The last event occurred on 24 October 2022 and refers to a discussion paper, entitled "*Way forward on EU migration solidarity and crisis response mechanism*"[78] put forward by the Czech Presidency of the Council of Europe with the aim to advance on the solidarity aspects of the RAMM. Accordingly, the Czech Presidency encourages the adoption of a mechanism of compulsory solidarity either in terms of minimum national pledges for the relocation of IP-seekers, ranging between 5.000 or 10.000 relocations per year from frontline Member States, or financial contributions. The selection criteria for relocation are not specified, but priority should be given to, unsurprisingly, vulnerable

[76] *Ibid*, p. 4.
[77] ECRE, *Solidarity: The Eternal Problem Recent Developments on Solidarity in EU Asylum Policies: ECRE's Analysis and Recommendations*, January 2023, p. 6.
[78] COUNCIL OF THE EUROPEAN UNION, *Pact on Migration and Asylum. Way forward - discussion paper*, 25 November 2022.

claimants. To guarantee the predictability and flexibility of the solidarity mechanism, the Czech Presidency suggests that the Commission should set a minimum annual threshold as well as a "fair share" principle as a distribution key for calculating solidarity commitments and additional solidarity requirements under specific, yet not clarified, circumstances. The discussion paper does not prevent the risk of turning relocation into a cherry-picking process based on national preferences, such as nationality. It has already been demonstrated in previous relocation efforts that such an approach to relocation can breach the principle of non-discrimination in international law. Overall, it seems that EU institutions will continue down the road already traced.

7. Concluding remarks

Solidarity is a grounding principle of EU law which, in the context of migration and asylum, must be fair towards third country nationals. This contribution engaged with relocation as an expression of interstate solidarity. It closely studied the implementation of this instrument with particular regards to its criteria, nature and modalities to evaluate whether the implementation of relocation exercises has fulfilled the requirements set out in Articles 80 and 67(2) TFEU. This paper showed that, although it is manifest that principle of solidarity does not only entail interstate assistance and relief from migratory pressures but also fair measures towards migrants, fairness seems difficult to achieve when the Member States have major discretion in the relocation exercise.

Indeed, the three relocation operations hereby described hardly reflect its inherent scope to serve as inter-state solidarity mechanism to deal with migration emergencies. The first relocation exercise in the context of the EUREMA project for the benefit of Malta (2009-2013) reveals the Member States' attempt to turn relocation from being a solidarity mechanism into a cherry-picking process based on national preferences rather than on IP-seekers' vulnerability. In 2015, political tensions on fair responsibility-sharing led to a weak implementation and a harsh rejection of the relocation schemes despite the legal force of the Council Decisions. The latter led to the initiation of an infringement procedure by the Commission, and two judgments of the Court of Justice finding opposing Member States in violation of their obligations under EU law. Plus, the State-centric approach that dominated these exercises resulted in an unreasonably wide margin left to the Member States, which were allowed to restrict access to relocation to few categories selected through reportedly discriminatory criteria, and to limit their relocation pledges to the minimum. Beneficiaries were indeed selected according to their cultural and economic profile. These elements ultimately turned relocation into a cherry-picking process, completing the transformation initiated under EUREMA. These plans demonstrated that national interests were prioritized over the IP-seekers' protection needs and vulnerability. In 2020, following the tragic events occurred on the Greek islands, the Commission launched two voluntary relocation mechanisms to transfer *some of Europe's most vulnerable people* to willing Member States. The selection criteria, too rigid to

respond to the then humanitarian emergency, were not fair towards IP-seekers in Greece, as little or no consideration was given to their rights, vulnerability and agency. Once again, these schemes manifestly reflected the political interests of the EU and its Member States over human rights and humanitarian considerations.

In sum, the three relocation exercises here examined seem hardly compliant with human rights standards, especially the principle of non-discrimination, and unfair to IP-seekers. Aware of the lack of an effective solidarity mechanism as well as of efficient rules on responsibility, the New Pact on Migration and Asylum could have paved the way for a reinvigorated faith in interstate solidarity and better relocation management. However, the RAMM proposal replicates the structural flaws of previous relocation plans and fails in upholding IP-seekers' considerations, which are also echoed in the context of the 2022 Declaration for a Voluntary Solidarity Mechanism, where IP-seekers' vulnerability is reduced to an empty word. As implemented, relocation cannot serve as an efficient tool for managing (potentially) migration flows from conflict-torn countries, such as Afghanistan, Syria or Ukraine.

There are a number of lessons learned that stem from the above. First, although relocation is an expression of solidarity between Member States, it must still be fair and human rights-compliant towards third-country nationals, especially in situations of emergency. So far, little has been done to consider the needs and voice of IP-seekers and beneficiaries in the relocation process. Importance has been given prominently to their socio-cultural affinity and economic skills which could make them a resource and not a burden for the hosting State, overall neglecting their vulnerability, on the one hand, and their aspiration for integration in hosting societies, on the other hand. Second, it is clear that leaving the Member States in charge of deciding the relocation beneficiaries, selection criteria and pledges risks leading to fragmentation, uneven responsibility sharing, and excessively restricted pools of beneficiaries. The RAMM Proposal in the New Pact seems to treat IP-seekers as passive objects, deprived of their voice, agency, and preferences. Without their consent, they can be transferred many times from one State to another before settling down and enjoy their right to asylum. As noted, a fair solution to solidarity and responsibility sharing should be informed by the interests and needs of IP-seekers, the absence of which raises questions about the constitutionality of the system proposed in light of arts. 67(2) and 80 TFEU.[79] EU institutions should therefore adequately manage the relocation process in full respect with the fundamental rights of the persons in need of IP. Third, the EU should engage more in creating incentives for solidarity and responsibility sharing to counteract uneven migration management between Member States. What the RAMM, the 2022 Declaration and the Czech Presidency's discussion paper do is rather providing several alternatives to relocation commitment, which however have already proved insufficient to tackle all the relevant aspects of the unequal distribution of responsibilities among Member States.[80]

[79] E. KÜÇÜK, *The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?*, cit., p. 463.
[80] F. MAIANI, *A 'Fresh Start' or One More Clunker? Dublin and Solidarity in the New Pact,* cit., p. 8.

ABSTRACT: This article deals with the relocation of international protection-seekers between EU Member States, an instrument originally intended as an expression of solidarity and protection of the most vulnerable claimants. It evaluates three relocation exercises (2009-2013, 2015, 2020), the Commission's proposal for a regulation on asylum and migration management (RAMM), which amends the nature and functions of relocation, and the Declaration of a Voluntary Solidarity Mechanism signed by a group of Member States in June 2022. The paper concludes that, so far, relocation has been implemented in a way which is hardly compliant with the principle of non-discrimination or fair to international protection-seekers, in contrast with the principle of solidarity. This inevitably affects the efficacy of relocation as a tool of interstate solidarity for managing (potential) migration flows from conflict-torn countries, such as those concerning Afghanistan, Syria or Ukraine.

KEYWORDS: Solidarity – International protection – Relocation – New Pact on Migration and Asylum – Discrimination.