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Political asylum and the European Union. Proposals to overcome the impasse

Patrick Weil and Pierre Auriel

- 1 Today, the European Union asylum regime seems to be ruled by two mechanisms that provokes the anger of some member states and then of others. The Dublin III Regulation provides for the management of the asylum process by the applicant's country of first arrival: the Mediterranean coastal countries, Greece and Italy have been protesting for more than three years against the lack of solidarity, while facing major influx of refugees. On the basis of Article 78(3) of the Treaty on the Functioning of the European Union, temporary emergency relocation programs were established by two European Council Decisions adopted in September 2015 to relieve Greece and Italy. 160,000 people were to be relocated. In 2016, due in part to the agreement between the European Union and Turkey, this figure was reduced to 98,255. Some Member States refused to apply these decisions and brought an action before the Court of Justice of the European Union, which has proven them wrong¹. However, they refused to apply the Court's decision, humiliating the Commission, the Court and the Treaties by highlighting their lack of effectiveness in matters related to sovereignty. While they were required to accept 14369 and 1294 additional asylum seekers respectively, Poland and Hungary did not accept a single asylum seeker². The Czech Republic stopped relocating asylum seekers in August 2016 after having accepted only 12 of the 4569 it was required to accept. While the Commission launched an infringement procedure against these three Member States on 13 June 2017 - two years after the start of the relocation operations - none of the remaining Member States met their objectives. At the end of the temporary program, only Finland, Latvia, Luxembourg and Ireland accepted at least 50% of the asylum seekers for whom they were responsible.
- 2 For many, the respect of the right to political asylum is at the heart of Europe. In this field, the Member States are united by the same rule of law - the 1951 Geneva Convention born in Europe even before the creation of the European Union. The commitment to

respect its principle in a coordinated manner is the expression of an inalienable commitment to respect fundamental human rights and the principle of solidarity in the Union. For others, the Geneva Convention does not oblige applicants from abroad to enter its borders; the entry of foreigners may have a direct impact on the field of nationality (as the Council of State and the French Parliament have just indicated with regard to Mayotte), which falls within the exclusive competence of each Member State³. There is a risk today that on asylum, one of its most fundamental values, the European Union already divided, "demoralizes" and explodes. To get out of the impasse, we propose that, in the event of a crisis, the Commission should act in two distinct and successive stages:

- First, that it may, at the request of a Member State, request each other Member State to implement the discretionary clause of Article 17(1) of the Dublin III Regulation. Since the Dublin Convention, this clause allows a Member State to examine an asylum application even if, under the criteria laid down in the Dublin III Regulation, it is not responsible for it. This can therefore only be done on a voluntary basis.
 - Second, that if the commission envisages the application of Article 78(3) of the TFEU, which authorizes the adoption of an emergency mechanism organizing and constraining the relocation of asylum applications, this should not be done, without in parallel, referring the matter to the international community, first to the UN Security Council or, if necessary, to any other initiative taken by the Union. Massive asylum crises are not only European, if they occurred in a State that is not a member of the Union, it is the international community that would be called to take care of it; and this is what the Union must do on behalf of a Member State involved, through the European members of the Security Council, permanent or otherwise.
- 3 Our proposal is to start with the use of solidarity and volunteerism before the imposition of a constraint, which could not be imposed without a call to international solidarity. Against technocracy and legalism, it is the idea of involving the European citizens in a political debate and to force the European Union to place itself on the world stage where the right of asylum has been created and where its future is at stake.

I. The process of the current crisis

A) Dublin

- 4 The so-called "Dublin system" follows a logic that began with the Dublin Convention signed on 15 June 1990, which itself reflects the commitments made by each state in the union that signed the 1951 Geneva Convention. It is based on two principles currently expressed in recitals 3 et seq. of the Dublin III Regulation: a single Member State is responsible for an asylum application; common and hierarchical criteria make it possible to determine quickly which Member State is responsible. By rationalizing these asylum applications, the aim is to avoid overcrowding in asylum systems and the phenomena of asylum shopping or secondary movements, as well as to pursue European integration by advancing it on highly symbolic ground.
- 5 In practice, an asylum seeker entering the European Union must submit his application to the competent authorities of the Member State of entry. Before examining the substance of the asylum application, the authorities of the Member State must determine whether the Member State is responsible for this asylum application⁴. If it appears that he is not responsible, his authorities shall refer the matter to the State responsible so that it can

take charge of or take back the asylum seeker. The requested State then has two months to respond. Its silence within this period constitutes acceptance and the authorities of the requesting State must then notify the transfer decision to the asylum seeker who may contest this decision before a court. The authorities then have six months - twelve months in case of detention, eighteen months in case of flight - to transfer the asylum seeker to the responsible State. In the absence of a transfer, the requested State ceases to be responsible for the asylum application and the requesting State becomes responsible.

- 6 The Dublin system is thus nothing more than a mechanism for allocating responsibility for asylum claims. Its validity depends on a fundamental premise: "By entering the territory of the Union, a person who flees the circumstances and conditions which caused his flight and which may justify the granting of the right of asylum shall have access to an area in which such protection is provided". While the right of asylum is guaranteed throughout the territory of the European Union, it is irrelevant for an asylum seeker to have his asylum application examined by one Member State rather than another because "the holder of this right cannot be penalized by the fact that the examination of his application is the responsibility of one or other of the Member States"⁵.
- 7 The functioning of the Dublin system is therefore entirely dependent on the assumption that Member States correctly implement the Geneva Convention and the various directives governing the asylum procedure and the reception of asylum seekers. But this system tends to systematically make the first state in which asylum seekers arrive in the European Union responsible. For the majority of them, those following the Mediterranean route, Greece, Italy and Spain will be responsible for their asylum applications. However, Greece and Italy, which were affected by the economic crisis and are the main access routes to the European Union, experienced a massive influx of asylum seekers in 2015. Their asylum system was no longer able to offer these applicants the minimum guarantees required by the Geneva Convention and European directives. In view of these shortcomings, it then became necessary to reduce the volume of requests by implementing Article 78(3) of the Treaty on the Functioning of the European Union.

B) Implementation of Article 78(3) TFEU

- 8 This provision originated in the war in Yugoslavia. The 1990 Dublin Convention, adopted before the beginning of the war, could not be sufficient to cope with the massive influx of asylum seekers. In 1995, 4.5 million people had fled war-torn territories. Some Member States were already more directly concerned, with the majority of displaced persons heading for Germany, Austria, Switzerland, Italy, the Netherlands, Denmark and Sweden. Germany welcomed nearly 350,000 people⁶. A series of meetings and resolutions of the Parliament, the Council and the European Council then expressed the need for coordinated and supportive care for displaced persons⁷ and led to the adoption by the Council of two texts aimed at organizing the distribution of persons between Member States in the event of a mass influx⁸. The Dublin Convention was defective and appeared incapable of functioning in times of crisis. In the 2000s, these two different schemes were recast, in particular following the extension of the European Communities' powers under the 1997 Amsterdam Treaty. The main directives governing the application of the Geneva Convention were adopted and the Dublin Convention was transformed into a Dublin II Regulation. And the crisis mechanism became a directive on the basis of the new Article 73-1 of the Treaty on European Union⁹. The normal and the pathological were thus

separated, creating two distinct periods of time for the distribution of asylum seekers¹⁰. With the Treaty of Lisbon, Article 73-1 became Article 78(3) of the Treaty on the Functioning of the European Union, which provides that "in the event of one or more Member States being in an emergency situation characterized by a sudden influx of third-country nationals, the Council, on a proposal from the Commission, may adopt interim measures for the benefit of the Member State or States concerned. It shall act after consulting the European Parliament. It is on the basis of Article 78(3) that the Council adopted the temporary relocation mechanisms: the number of asylum seekers to be relocated was precisely determined as well as the number of applicants that each State had to accept. Solidarity imposed a constraint.

- 9 This quick look back implies a remark. Slovakia pointed out at the end of 2015 that the use of a mechanism as binding as the one adopted by the Council was not necessary because of the existence of alternatives based on the voluntary action of Member States. In particular, Slovakia considered that the European Union should have first implemented the mechanism for the distribution of persons displaced by the war in Yugoslavia. But this mechanism, still in force in principle, could not be applied, as it was unsuited to the current crisis: the situations of contemporary asylum seekers from Afghanistan, Syria, Eritrea or Somalia have nothing to do with those of people displaced during the war in Yugoslavia. It targeted displaced persons on the European continent by offering them temporary protection for one or two years before organizing their "safe and sustainable return" to their State of origin¹¹. However, the Court of Justice did not rule directly on the implementation of the arrangements for persons displaced during the war in Yugoslavia. It just held that the Council, by not using this non-binding mechanism, had not committed a manifest error of assessment. The Court in fact retraces the importance of the crisis then experienced by Greece and Italy, the inability of States to set up solidarity mechanisms based on voluntary action and then the urgent need to protect asylum seekers submitted to collapsing asylum systems. Its argument is crucial in that it first takes into account the sovereignty of States, then, in a second step, notes that from a certain stage onwards, coercion may be necessary. Within the crisis, it therefore makes it possible to distinguish two phases: a first phase of volunteering and the next one of constraint.
- 10 The arrival of asylum seekers in Greece and Italy in 2015 had created an emergency situation justifying the use of exceptional provisions because, due to a sudden and massive influx, the right to asylum was no longer guaranteed, as the asylum systems of the countries of first arrival were failing or outdated. It is because no other option seemed possible that coercion was justified. But coercion directly affects the sovereignty of Member States. As the Court of Justice has pointed out, however, it should only be a measure of last resort. Moreover, institutionally, it has occurred without any real discussion in the internal and European public spaces. To the contrary, European solidarity should be an issue in the public debate. It is therefore necessary to imagine a system based first on the voluntary action of the Member States which would not only make it possible but also force such a debate to take place. We need to refocus on this time of volunteering, which is the time when the Dublin Regulation can no longer be implemented, but which is not yet the time of binding urgency. It is also necessary to rethink the binding urgency and its involvement outside Europe, at the level of global solidarity. The massive crisis of 2015 did not only involve Europe.

II. Our proposals

A). Implementation of the discretionary clause in Article 17(1) of the Dublin Regulation

- ¹¹ We propose to take into account and seriously three steps. The time of "normality", when all Member States respect the requirements of European and international asylum law, is the time of the Dublin III Regulation. In the absence of any possibility of reforming this Regulation, our proposal is not to suspend its application or to call into question its economy, which the Court of Justice has already guaranteed in an obiter dictum in judgments *X and X*¹². It would be to use the possibilities opened up by the margins of appreciation left in the Dublin Regulation, of massively committing the discretionary clause in Article 17(1). Indeed, since the Dublin Convention, there is a discretionary clause allowing a Member State to decide to examine an asylum application even if, under the criteria laid down by the Regulation, it is not responsible for it. The origin of this clause is interesting to recall: it was created to enable France to continue to implement its constitutional asylum, i.e. to grant asylum not on the basis of the Geneva Convention, but on that of the preamble to the 1946 French Constitution, an integral part of the 1958 Constitution. This clause was used by the German authorities from 31 August 2015 to process asylum applications from all refugees arriving in Germany. The Dubs amendment concerning unaccompanied minors resulting from the Franco-British Treaty of Le Touquet of 4 February 2003 and confirmed by the Treaty of Sandhurst of 28 January 2018, is implemented on the basis of this clause. During the dismantling of the Calais jungle in 2016, prefects were instructed to examine asylum applications from refugees transferred to reception and guidance centres on the basis of Article 17 § 1. Similarly, Article 17§1 could be used by OFPRA to examine an asylum application and then grant it on the basis of constitutional asylum. In all these cases, Article 17(1) appears to be the expression of a sovereign decision by States to take charge of these asylum seekers. Could it be implemented, initiated by the committee or the European Parliament? We believe so because the ECJ in the *N.S.* decision clarified that this clause was not a sovereignty clause, but a discretionary power conferred by the Treaties, being "an integral part of the common European asylum system provided for by the TFEU Treaty and developed by the Union legislator"¹³. This interpretation is supported by the fact that the use of this clause has consequences governed by the Dublin system: its activation does not place the Member State outside the Regulation, but is only one of the mechanisms for determining the State responsible for the asylum application¹⁴. Therefore, the implementation of this clause is governed by European Union law¹⁵ and it is difficult to imagine that the Court of Justice would oppose a massive use of this clause to reduce the tension on a State's asylum system. A European and no longer merely national recourse to the discretionary clause of Article 17(1) in order to relieve some Member States would undoubtedly change the general scheme of the Dublin III Regulation but would do so on the basis of a principle whose structural value has been recognized by the Court of Justice in the European asylum system.
- ¹² This mechanism of using the discretionary clause to relieve a Member State's asylum system should be based on criteria separate from those of Article 78(3). For example, it could ignore the idea of urgency and sudden influx that requires the implementation of

binding solidarity mechanisms to focus on the observation that a State's asylum system has been overtaken, that the State is unable to cope and that there is a risk of a violation of the right to asylum and, in particular, that the various directives governing the asylum procedure in Europe have been breached. This would make it possible to correct the effects of the Dublin III Regulation, which was not designed to cope with significant increases in the number of asylum seekers before reaching the stage where it becomes necessary to force States.

- 13 Finally, as regards the conduct of this procedure, it should be seen both as a call for European solidarity on the part of a Member State and as a re-politicization of the debate, by creating an institutional space in which it can exist. States may refuse to participate - this is the power of democracy and state sovereignty - but they must publicly assume this position. The institutional organization of the mechanism could then be as follows. The initiative could be owned by the Commission, a percentage of the Parliament and a Member State. As provided for in the various crisis mechanisms, the identification and quantification of the arrival of asylum seekers in the country concerned should be carried out by the Commission and the ESAO. It will undoubtedly be necessary to determine thresholds for activating the various mechanisms, first of all solidarity and then emergency mechanisms, and criteria for assessing when an asylum system is no longer able to comply with the minimum guarantees laid down by European directives. First of all, the solidarity of the governments of each State may be called for. Then, if a second step were necessary, a vote of the European Parliament would decide on the activation of a mechanism requiring the official response of the representative bodies of each Member State. Even if the mechanism is not binding, this would make the debate public and prevent it from being limited to a discussion between the Commission and the Member States. This would force the Member States to take a public stance and would provide the citizens of each European state with a place to get involved in this debate. After the activation of the voted mechanism, a declaration by States would indicate whether they wish to participate in the relocation. In the event that the various European institutions are unable to agree on a new regulation creating this mechanism - which is likely given their inability to agree on a reform of the Dublin IV Regulation - this mechanism should take the form of a Commission Communication.
- 14 For the implementation of this clause in the name of the principle of solidarity, balances will have to be found. Such a system will mean that asylum seekers will have their asylum applications examined within the overcrowded asylum system but reinforced by the solidarity of other Member States. An appeal mechanism could be envisaged allowing asylum seekers to challenge not the merits of the decision to grant asylum but compliance with procedural standards and guarantees related to their reception. The existence of such an appeal mechanism under the supervision of an independent institution such as UNHCR will also make it possible to consider linking the activation of this mechanism with mutual recognition of asylum decisions. Rejection decisions could be automatically recognized in States implementing this emergency mechanism. Refugees recognized by the asylum system of the country of arrival may be offered residence in one of the volunteer countries.

B) The implementation of Article 78(3) linked to an internationalization of the process

- 15 When the voluntary solidarity mechanism has proved insufficient to resolve a crisis, we propose that any activation on the basis of Article 78(3) of the Treaty on the Functioning of the European Union of relocation mechanisms similar to those implemented between 2015 and 2017 should be accompanied by an appeal to the international community, first by referral to the Security Council, but also in other forms (international conference, etc.). The European Union, an observer member of the United Nations, cannot refer the matter directly to the Council, so one of the Member States of the Security Council must do so. Such an operation will make it possible to internationalize the debate on the asylum crisis without denying the specific nature of solidarity within the European project. The European asylum system was designed within the framework of the international asylum system embodied in the Geneva Convention and has never been separated from it¹⁶. In the eyes of the Member States, it should not be less supportive than the international system. Let us imagine that Greece was not a member of the European Union in 2015. Faced with an influx of asylum seekers, she would have called on the security council to meet and decide measures of solidarity. Today, it calls on the European Commission. If the latter does not have sufficient means of intervention, the call to the international community should be self-evident.
- 16 This de facto call has already taken place, but not with the right people. The agreement between the European Union and Turkey has relieved the Greek asylum system of congestion. The creation of hotspots in Libya is a recurring debate. However, it is the States involved in the armed conflicts in the Middle East that the Union should have called on in priority. And if they would not have wanted to show their solidarity, at least the debate would have been carried to the level of world opinion. Doing so will avoid reducing the external dimension of migration crises to bilateral relations such as the agreement between the European Union and Turkey.

Conclusion

- 17 These proposals can only be a step towards reforming the European asylum system. But they do not exclude any Member State and therefore do not divide the Union. They seek to take the Union out of its technocratic drift in this area, by forcing it to return to the political debate of its citizens and to world politics.

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NOTES

1. ECJ, 6 september 2017, *Slovak Republic and Hungary v Council of the European Union*, Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631.
2. In 2015, Hungary had received 177,135 requests in 2015. It was the second receiving country after Germany, which had received 476,510 requests. Poland had received 12,190 requests while Slovakia had received 330.
3. Article 9 of the Treaty on European Union states: "... A citizen of the Union is any person who holds the nationality of a Member State. Union citizenship is in addition to national citizenship and does not replace it. "It should be noted that, on the contrary, in the United States Constitution, a uniform rule of access to nationality is one of the few powers granted to the Federal Congress from the outset. (Article 1 Section 8 The Congress shall have Power....To establish an uniform Rule of Naturalization)
4. The determination of the responsible State is massively based on the Eurodac system. This system introduced in 2000 is now governed by a 2013 Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for the determination of the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person in respect of requests for comparison with Eurodac data submitted by the law enforcement authorities of the Member States and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice). It allows the comparison of asylum seekers' fingerprints. It contains three categories of fingerprints: those of persons who have applied for asylum in a Member State (category 1), those of persons checked during the irregular crossing of a border (category 2) or those of persons found illegally on the territory of a Member State (category 3). In the absence of a hit in the Eurodac system, any type of evidence can be used to establish the responsibility of a Member State.
5. Opinion general of Pedro Cruz Villalón (ECJ, 10 décembre 2013, *Shamso Abdullahi v. Bundesasylamt*, Case 394/12, pt.41).
6. Sophie Albert, « Personnes déplacées et demandeurs d'asile de l'ex-Yougoslavie », *Hommes & Migrations*, vol. 1198, no 1, 1996, p. 58.
7. See in particular the resolution of the Ministers responsible for immigration, adopted at their meeting in London on 30 November and 1 December 1992, on persons displaced by the conflict in the former Yugoslavia, resolution of the Ministers responsible for immigration, adopted at their meeting in Copenhagen on 1 and 2 June 1993, on certain common guidelines for the reception of particularly vulnerable groups of people in distress from the former Yugoslavia, the European Parliament resolution of 19 January 1994 on the general principles of a European refugee policy, which stresses the need for a fair distribution of refugees between the various countries of the European Union
8. Council Resolution of 25 September 1995 on burden-sharing with regard to the temporary reception and stay of displaced persons; Decision 96/198/JHA on an alert and urgent procedure for burden-sharing with regard to the temporary reception and stay of displaced persons

9. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

10. This link was confirmed by the Court of Justice in ECJ, 6 september 2017, *Slovak Republic and Hungary v Council of the European Union*, Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631, pt.41.

11. Temporary protection, a sui generis regime invented on the proposal of the UNHCR, was explicitly conceived as a separate mechanism from asylum under the Geneva Convention (Article 3(1) of the Directive).

12. ECJ, 7 march 2017 *X and X v. Belgium*, Joined Cases C-638/16 PPU, ECLI:EU:C:2017:173, pt.48.

13. ECJ, 21 december 2011, *N.S. v. Secretary of State for the Home Department*, Joined Cases C-411/10 et C-493/10, ECLI:EU:C:2011:865 pt. 60.

14. *Ibid*, pt.64.

15. See Fabrice Picod, « Article 51 - Champ d'application », in F. Picod et S. van Drooghenbroeck (dir.), *La Charte des droits fondamentaux de l'Union européenne*, Bruxelles, Bruylant, 2017, p. 1059-108

16. For instance, all the guidelines governing the reception and examination of asylum applications are based on the Geneva Convention. Article 3(3) of the 2001 IDP Directive provides that "the establishment, implementation and termination of temporary protection shall be the subject of regular consultations with the Office of the United Nations High Commissioner for Refugees (UNHCR) and other relevant international organisations".

ABSTRACTS

Today, the European Union asylum regime seems to be ruled by two mechanisms that provokes the anger of some member states and then of others. There is a risk that on asylum issues, the divided European Union explodes. This paper explores different options to avoid this outcome.

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