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**THE MIGRANT CRISIS AND REFUGEES –
A CRISIS OF EU SOLIDARITY**

Abstract: The migration and refugee crisis in Europe 2015–2016 has posed a great challenge to the international and European community in terms of solidarity with refugees, forced migrants and countries most vulnerable to large waves of migration. It would seem that solidarity in the European Union is well established, but it turned out that the crisis situation triggered a different interpretation of solidarity within the EU and revealed the weaknesses of burden sharing mechanisms. The intra-EU solidarity proved to be the most difficult to achieve in practice.

In this study considerable attention is paid to the principle of solidarity in the EU law and its interpretation by Member States as well as the Court of Justice. Moreover, the conducted analysis concerns three main EU solidarity and burden sharing measures – the Dublin mechanism, the applied in 2015 relocation schemes and ‘forgotten’ temporary protection measures. Their inadequacy in times of crisis became an important lesson both for the States as well as for the European Union itself and makes us rethink the concept of solidarity and its practical application.

Keywords: refugee crisis, solidarity with refugees, intra-EU solidarity, refugee relocation schemes

1.

The migrant flows that have been taking place in the second decade of the 21st century constitute the greatest challenge for the international community since the times of World War II. According to the report of the UN Secretary General, in the year 2015 the number of migrants and refugees in the world has reached 244 million – an increase of 71 million persons (41%) as compared to the year 2000. In the year 2019 this number was already 272 million.¹ Stressed must be the fact that 75% of migrants stem from just eleven countries, with seven countries of the world hosting over 50% of them.²

The years 2012-2016 saw a continued and dramatic (particularly in the years 2015-2016) increase of the number of migrants and persons seeking protection in EU Member States. This phenomenon was named as the migrant and refugee crisis.³

In the year 2013 431,000 people applied for international protection, in the year 2014 this number was already 627,000, and in the years 2015 and 2016 ca. 1.3 million.⁴ In the year 2017 the number of applicants fell to ca. 707,000, of which 650,000 were persons applying for protection for the first time. In the year 2018, 664,480 applications were filed for international protection in EU Member States, Norway, Iceland, Switzerland and Liechtenstein (EU+) together. The three main countries of origin of applicants are Syria (unchanged since 2013), Afghanistan and Iraq, which are together responsible for over a quarter of all applicants from the year 2018. The list of countries that accept the most applications for protection has largely been unchanged for years.⁵ In the year 2018 the majority

¹ UNDESA International Migrant Stock 2019 https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationStock2019_TenKeyFindings.pdf [accessed on 29.12.2019].

² Report of the Secretary-General, *In safety and dignity: addressing large movements of refugees and migrants. Report of the Secretary-General*, 21.4.2016, A/70/59, paras. 12 and 17 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%20 [accessed on 29.12.2019]

³ The crisis should be referred to as the migrant and refugee crisis, considering the various reasons for departure from the states of origin – from persecution to economic reasons. However, in many instances, these reasons overlap.

⁴ Including ca. 1.2 million persons filing their first applications.

⁵ One of the countries on the so-called Balkan migrant trail which, until the closure of borders in the year 2015, was threatened by large waves of migrants and refugees,

of asylum applications were filed in Germany, France, Greece, Italy and Spain. In these countries close to three quarters of all applications filed in EU+ were accepted. If one would consider the number of accepted persons per capita, then Cyprus, Greece, Malta, Liechtenstein and Luxembourg are in the lead.⁶

This ‘refugee picture’ must be amended by the tragic balance of death and losses. According to the International Organisation for Migration (IOM), since the year 2014, close to 25,000 people all over the world lost their lives or died attempting to reach countries, in which they could apply for asylum or just begin new, better lives. The worst statistics concern the Mediterranean Sea, where in the years over 15,000 people drowned or succumbed to the difficulties of the trip in the years 2014-2017. In the year 2018, these were 2992 persons, in the year 2019 – 1246.⁷ The Communication from the European Commission of October 2019 stated that since the year 2015 EU activity allowed close to 760,000 people to be saved on sea and close to 23,000 from the Nigerian desert.⁸ Seafaring refugees are also rescued by humanitarian organisations. It must be noted in this regard that the situation in the Mediterranean Sea started an international debate on the role of the civic society in expressing solidarity towards migrants, and revealed new aspects of ‘solidarity management’. There is even talk about the ‘criminalisation of solidarity’, when NGOs rescue migrants (mainly at sea) and provide other kinds of aid, including legal aid. In the time of migrant crisis, the role of bodies of civic society in the upholding of the basic rights of refugees and other migrants began to be questioned; such organisation

was Hungary. See N. Kogovsek Salamon, *Asylum Systems in the Western Balkan Countries: Current Issues*, ‘International Migration’ 2016, vol. 54, no. 6, p. 153; Eurostat and EASO, *Asylum statistics. Asylum in the EU Member States*. Eurostat. 46/2017 March 2017: <http://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1>; http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics; <https://www.easo.europa.eu/latest-asylum-trends-overview2017> [accessed on. 28.04.2019].

⁶ EASO, *EASO Annual Report on the Situation of Asylum in the EU+ 2018*: <https://www.easo.europa.eu/sites/default/files/ar-es-2018-english.pdf> [accessed on 28.04.2019].

⁷ As of 28.12.2019. See IOM Missing Migrants: <https://missingmigrants.iom.int> [accessed on 28.12.2019].

⁸ Communication from the Commission to the European Parliament, the European Council and the Council, *Progress report on the Implementation of the European Agenda on Migration*, Brussels, 16.10.2019, COM(2019) 481 final.

were even brought to justice for providing aid.⁹ In 2018, the Hungarian Government adopted new legislation justifying the imprisonment of NGO workers and attorneys who attempt to help potential refugees.¹⁰

Such actions seem to negate the 'solidarity' in its broad and common meaning, which entails taking responsibility by those not responsible for the relevant tasks and those who did not contribute to that particular unfavourable situation. Such an approach creates an 'Us' – a community. Its members take into account the fact that the misfortune experienced by other members of the community is also experienced by themselves.¹¹

Despite the refugee crisis started to subside in Europe in the year 2017, Europe remains under migrant pressure. This difficult situation compounded by the continued threat by terrorism and other risks¹² has become a solidarity test of the contemporary international community both with respect to persons seeking protection as well as other members of the international community.

This makes the questions about the essence and model of solidarity with newcomers and solidarity between countries constantly topical. This text considers the issue of solidarity in the field of asylum policy within the EU, the interpretation of solidarity and the solidarity measures that the Union has created in this field and applied (or could have applied) in times of migration crisis. European initiatives are not disconnected from global solutions, hence references to global initiatives are necessary.

2.

In the context of inflow of the great waves of migrants leaving their countries of origin for various reasons, the issue of 'migration solidarity' can be considered from various standpoints. One could, for instance,

⁹ L. Vosyliūtė, C. Conte, *Crackdown on NGOs and volunteers helping refugees and other migrants*, RESOMA Synthetic Report, European Commission 2019, p. 5.

¹⁰ Bill No. T/333 amending certain laws relating to measures to combat illegal immigration <https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf> [accessed on 28.12.2019].

¹¹ U. Steinworth, *Applying the solidarity idea in Europe*, [in:] A. Grimmel, S. My Giang (eds.), 'Solidarity in the European Union: A Fundamental Value in Crisis', Springer 2017, pp. 9-10.

¹² For example, COVID 19 epidemic in 2020.

consider the issue of solidarity with persons seeking protection or just a better life outside of their country of origin, or just the opposite – the case could be the establishment of a common front against the waves of migrants (that are frequently difficult to control). Ultimately, one could analyse the solidarity of States with other States that are most exposed to the effects of migrant influx, hence, those that accept the most of them and/or consider their motions for protection.

International solidarity with respect to the mass inflow of migrants is a fairly new issue on the international forum, and, accordingly, within doctrine as well. The issue of solidarisation with various types of refugees has been considered for centuries. Hugo Grotius, Christian Wolff or Emerich de Vattel already indicated the obligation to express compassion towards all those suffering and persecuted who are forced to leave their land, however, in case of different reasons they approved of declining a foreigner entry to a State.¹³ For centuries, the view was dominant that the right of a State to refuse foreigners entry is obvious and stems from a State's sovereignty. With time, however, it was assumed that this right may not be applied without reflection and limitation.¹⁴ As a consequence, the concept of the right to asylum was formed, being on the one hand the State's right to provide or refuse asylum, and, on the other hand, the right of a private person to seek asylum.¹⁵ This dual nature of the right to award and seek asylum formed the foundation of contemporary legal provisions concerning international refugee and migrant law.¹⁶ Refugees are protected from *refoulement*, as opposed to various kinds of migrants,

¹³ G.S. Goodwin- Gill, *The refugee in international law*, Oxford 1996, p. 172.

¹⁴ K. Libera, *Międzynarodowy ruch osobowy* [International movement of persons], Warszawa 1969, p. 86; S. Sawicki, *Prawo państwa do regulowania międzynarodowego ruchu osobowego* [The right of a State to regulate the international movement of persons], Warszawa 1986, p. 74.

¹⁵ B. Mikołajczyk, M. Zdanowicz, *Czy powrót do idei azylu?* [Is there a return to the idea of asylum?], [in:] M. Mikołajczyk, 'O prawie i jego dziejach księgi dwie: studia ofiarowane profesorowi Adamowi Lityńskiemu w czterdziestopięciolecie pracy naukowej i siedemdziesięciolecie urodzin' [Two books about the law and its history: the studies offered to Professor Adam Lityński on forty-five years of his academic career and seventieth anniversary], vol. II, Białystok – Katowice 2010, p. 1055.

¹⁶ B. Mikołajczyk, *Spółeczność międzynarodowa wobec niedobrowolnych imigrantów – dwa oblicza solidaryzmu* [The international community towards involuntary immigrants – two faces of solidarity], [in:] A. Łabno (eds.), 'Idea solidaryzmu we współczesnym prawie konstytucyjnym' [The idea of solidarity in modern constitutional law], vol. II, Warszawa 2015, p. 419.

and contemporarily nobody contests the right to apply for protection in other States in case of persecution in one's country of origin, as described in Article 14 of the Universal Declaration of Human Rights.¹⁷

Hence, the preamble of the Geneva Convention Relating to Status of Refugees of 1951 (Geneva Convention, Refugee Convention), besides the motives of its acceptance, which are humanitarian in nature and related to the right to seek protection outside of one's country of origin, also indicates the necessity of international cooperation. It was noted that 'the grant of asylum may place unduly heavy burdens on certain countries', and the issue of refugees cannot become 'the cause of tension between States'.¹⁸ Even though close to 70 years have passed since the Convention was accepted, disputes, obstacles and difficulties in solidarization of both with migrants as well as States susceptible to great waves of migration remain actual, and are even gaining momentum in relation to terrorist threats.

UN Secretary General Ban-Ki Moon noted in the above mentioned report with unease that xenophobic and racist reactions to refugees and migrants seem to be reaching new levels of fear that are followed by the lack of social acceptance. He stressed that the tendency of politics and public discourse on migrants and refugees must shift from threats to international solidarity, just sharing of burdens and protection of human dignity.¹⁹

This spirit is shared by the New York Declaration for Refugees and Migrants passed on 19.9.2016,²⁰ which constitutes a response of the international community to unprecedented relocations. In this document, States have declared solidarity with millions of people from various parts of the world, who for reasons independent of them were forced to leave their homes. It states that migration is a global phenomenon, which hence requires a global reaction based on respect between all participating entities.

On the other hand, States have accepted common responsibility for the management of great flows of refugees and migrants in a humanitarian, sensitive and human-oriented way. According to the Declaration, migration

¹⁷ Universal Declaration of Human Rights of December 10, 1948 A/RES/3/217: <https://www.un.org/en/universal-declaration-human-rights/> [accessed on 18.03.2018].

¹⁸ United Nations, *Treaty Series*, vol. 189, p. 137.

¹⁹ *In safety and dignity: addressing large movements of refugees and migrants. Report of the Secretary-General...*, para. 40.

²⁰ New York Declaration for Refugees and Migrants (A/71/389), https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1 [accessed on 27.03.2018].

can provide opportunities for everyone only if it is safe, orderly and regular, but even the strongest country is not able to manage migration by itself. It was stated that present legal solutions accepted by the international community are already insufficient, hence, it is necessary to develop new forms of sharing of burdens and responsibilities for migration issues.²¹

For this reason it was agreed that international cooperation is necessary, in particular with and between countries of origin, transit and destination. 'Win-win' cooperation in this regard can bring about enormous advantages for humanity. Intense flows of refugees and migrants must be provided with comprehensive political support, aid and protection that stem from international laws on human rights.

Accepting the declaration, all 193 UN Member States confirmed the permanent significance of the international system of migrant protection; they expressed the will to respect the rights of refugees and migrants, they bound themselves to provide more foreseeable and permanent support for refugees and communities who accept them, and also laid the groundwork for accepting towards the end of the year 2018 the *Global Compact on Refugees* and the *Global Compact on Safe, Orderly, and Regular Migration*.²²

It would seem that the acceptance of declarations by the UN General Assembly without a vote would mean that the international community has reached full agreement in this regard. However, already towards the end of the year 2017 the United States withdrew from activities set out in the New York Declaration, choosing their own path in terms of controlling migrant flows²³. The Marrakesh Declaration preceding the Global Compact in turn saw the withdrawal of 11 States, including Poland,²⁴ the Czech Republic,

²¹ J. Milner, *When norms are not enough: understanding the principle and practice of burden and responsibility sharing for refugees*, 'Global Leadership and Cooperation for Refugees Series', Paper no. 2, December 2016.

²² Global Compact on Migration: <https://www.iom.int/global-compact-migration> [accessed on 30.03.2018].

²³ M.L. Goldberg, *The Global Compact on Migration doesn't exist*, UNDispatch 4.12.2017: <https://www.undispatch.com/trump-administrationpulls-global-compact-migration-no-good-reason/> [accessed on 30.03.2018].

²⁴ Declining to accept the agreement, Poland argued, among others, that the Global Compact encourages illegal immigration, and besides, the agreement does not serve the best interests of Poland and its citizens. Another argument against the agreement was that Poland is one of the largest countries accepting economic migrants. It was also stressed that Poland retains its sovereign right to limit the acceptance of foreigners.

Hungary, Slovakia, Austria and Bulgaria. It is thus hard to speak of 'unity in solidarity' even within the European Union. However, the symptoms of a crisis of solidarity could already be observed earlier, as the conflict of interests quickly became apparent. In 2011, for example, France and Germany opted for changes to the Schengen agreements reintroducing internal border controls. At that time, Poland and Belgium claimed that such ideas are a denial of a 'Europe without borders'.²⁵

3.

The concept of solidarity is the basis of the process of European integration, and presently constitutes safeguards for the policies of the European Union. The definition of EU solidarity, which is frequently linked to loyalty and mutual trust, is difficult due to the multi-compound character and diverse dimensions, and may be considered from many vantage points.²⁶ The treaties establishing the European Union themselves contain various approaches. At times they just speak of 'solidarity', as in the preamble to the Treaty on the Functioning of the European Union (TFEU), which confirms 'solidarity which binds Europe and the overseas countries' and Article 67, in which the EU 'shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.²⁷ Deeper solidarity between nations is also expressed in the preamble to the Treaty on European Union (TEU),²⁸ and its Article 3(3) indicates as an objective of the Union the support of economic, social and territorial cohesion as well as solidarity between Member States, even the support of intergeneration solidarity.

See the statement of the Polish delegation: <https://www.unmultimedia.org/avlibrary/asset/2338/2338741/> [accessed on 25.11.2019].

²⁵ A. Potyrała, *W poszukiwaniu solidarności. Unia Europejska wobec kryzysu migracyjnego* [In search of solidarity. The European Union in the face of the migration crisis], 'Przegląd Politologiczny' 2015, no. 4. p. 35.

²⁶ See C. Mik (ed.), *Solidarność jako zasada działania Unii Europejskiej* [Solidarity as a principle of European Union action], Toruń 2009.

²⁷ Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.

²⁸ Treaty on European Union, OJ C 326, 26.10.2012, p. 13.

The necessity of activity in the ‘spirit of solidarity’ is expressed in Article 122 of the TFEU concerning the undertaking of efforts in case of grave difficulties in the supply of certain products to Member States, in particular in the area of energy. Article 194 of the TFEU confirms that EU policy in terms of energy is aimed at providing, in the spirit of solidarity between Member States, the assurance of operation of the energy market and the assurance of security of energy supply in the EU. Similarly, a solidarity clause is included in Article 222 of the TFEU, and describes common activity in the spirit of solidarity, if a Member State would become the target of a terrorist attack or fall to a natural disaster or a man-made catastrophe. The fulfilment of the obligation of solidarity in such situations is described in the declaration to Article 222.

Activity in the spirit of mutual solidarity is also mentioned within the context of the EU joint foreign and security policy, in Articles 24 and 31 of the TEU. Article 32 in turn stresses the fact that in this area, EU Member States act in solidarity with respect to each other.

One should, however, turn primarily to Articles 2, 3 and 21 of the TEU that foremost refer to solidarity as one of the values.²⁹ Article 2 lists values, among them solidarity, that are considered ‘meta-foundations’ of European integration, and solidarity itself pretends to be a ‘constitutive paradigm’ of the Union.³⁰

Similarly, the preamble to the Charter of Fundamental Rights of the European Union (the Charter), in which we read, among others, that ‘Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’.³¹ Within the Charter, solidarity is also understood as social solidarity, a fact that stems from its IV title.

²⁹ Article 2 states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

³⁰ 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, p. 23; E. Morawska, *Zasada solidarności w Karcie Praw Podstawowych Unii Europejskiej* [Principle of solidarity in the Charter of Fundamental Rights of the European Union], [in:] C. Mik (ed.), ‘Solidarność jako zasada działania Unii Europejskiej’ [Solidarity as a principle of European Union’s actions], Toruń 2009, pp. 172-176.

³¹ Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, p. 1.

It can therefore be assumed that the nature of solidarity in the European Union is complicated. It can be assumed to be both a value and a principle. However, this principle takes different forms. One of them is a principle of solidarity between the EU Member States. It is recognised as a concrete imperative overriding other legal norms and applies to many policies.³² It entails legal consequences. While before a court it is difficult to refer to ‘values’ of unclear scope,³³ one can much easier formulate a complain about a violation of a legal principle of solidarity.

Such an understanding of solidarity as a principle is rooted in the 1973 judgment, in which the Court of Justice held that ‘permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules [...] this failure in the duty of solidarity accepted by Member States by the fact of their adherence to the community strikes at the fundamental basis of the community legal order.’³⁴

This principle has become particularly relevant during the migration crisis 2015-2016, which has required ‘solidarity in action’. However, it turned out that it can be interpreted and implemented (or not implemented) in various ways. Questions were asked as to whether EU institutions are able to muster political power and acquire sufficient legitimation to overcome differences in opinions.³⁵

³² See I. Wróbel, *Zasada solidarności między państwami członkowskimi w prawie Unii Europejskiej. Zmierzch czy renesans?* [The principle of solidarity between Member States in European Union law. Twilight or the Renaissance?], ‘Przegląd Zachodni’ 2019, no. 2, pp. 37-59.

³³ M. Zieliński, *Wartości Unii Europejskiej* [Values of the European Union], [in:] B. Krzan, ‘Ubi ius, ibi remedium. Księga dedykowana pamięci profesora Jana Kolasy’ [Ubi ius, ibi remedium. A book dedicated to the memory of Professor Jan Kolasa], C.H. Beck, Warszawa 2016, p. 653.

³⁴ *Commission of the European Communities v Italian Republic (Premiums for slaughtering cows)*, Judgment of the Court of 7.2.1973, Case 39-72, ECLI:EU:C:1973:13.

³⁵ D. Thym, E. Tsourdi, *Searching for solidarity in the EU asylum and border policies. Constitutional and operational dimensions*, ‘Maastricht Journal of European and Comparative Law’ 2017, vol. 24, no. 5, p. 605.

4.

The implementation of the EU solidarity in the area of migration and asylum can be considered in many ways, first in relation to third country nationals seeking protection or just better life in the EU. Another aspect of solidarity is solidarity with third countries, these being countries of applicants' origin or place of their temporary shelter.

Member States are keenly experienced in terms of taking up various solidarity measures both with respect to refugees as well as against mass migration. It can be assumed that virtually all of the Common European Asylum System was created for solidarity with persons in need of international protection. Its the most solidarity element is undoubtedly the Reception Condition Directive aiming at ensuring that applicants for international protection have access to housing, food, clothing, health care, education for minors and access to employment under certain conditions.³⁶

Moreover there are other measures fostering migrants and policies towards migrants. They include for instance the establishment of various aid programmes, the creation of special funds, primarily the establishment in the year 2007 of the European Refugee Fund, and then the Asylum, Migration and Integration Fund, rescue operations at sea, development aid, creation of safe migration channels and assumption of legal instruments allowing the coverage by aid not only of migrants as understood by the Geneva Convention, but also other persons requiring protection, including beneficiaries of temporary and additional protection.

On the other hand, the same forum has since decades passed instruments aimed at driving migrants away or preventing in particular illegal migrants from entering 'Fortress Europe',³⁷ or at efficiently sending them back. This is served, among others, by readmission agreements, patrol operations at sea, the assumption of the concept of safe third countries, the return policy and re-settlements. The reinforcement of the outer borders of the EU and the protection of the coast with the use of the European

³⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116.

³⁷ See Report of Amnesty International, *The human cost of Fortress Europe. Human rights violations against migrants and refugees at Europe's borders*, London 2014.

Border and Coast Guard Agency (Frontex) supporting States are a significant component of fighting illegal migration.³⁸

An example of 'external EU solidarity' and at the same time of the lack of solidarity with migrants³⁹ is the agreement between Turkey and the EU of 16.3.2016, aimed at stopping migration to Europe⁴⁰ that facilitates the deportation of migrants that made it to the EU via Turkey or the Greek islands. In truth, since 2017 there has been a clear decline in the number of people arriving in Greece, however NGOs are stressing the lack of adherence to the rights of people remaining in or being sent back to Turkey.⁴¹ This in turn puts the idea of solidarity with respect to people seeking international protection into question.

Similarly, NGOs have protested against the extension in November 2019 of the migration agreement concluded in the year 2017 between the governments in Tripoli and Rome. It foresees financial aid and training of the coast guard of Libya as well as co-financing of resources for refugees and illegal migrants. In exchange, Libyans are patrolling their territorial waters and stop people illegally moving towards Italy. According to NGOs, unofficial centres are operating in Libya, not infrequently belonging to various kinds of armed groups, that are paid by the government to hold the migrants who were stopped. Such places frequently see the application of physical, psychological and sexual violence.⁴² In this case as well, solidarity with migrants seems doubtful.

³⁸ European Commission, *Securing Europe's External Borders: A European Border And Coast Guard*, September 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170906_ebcg_en.pdf [accessed on 28.03.2018].

³⁹ V. Moreno-Lax, *Solidarity's reach: meaning dimensions and implications for EU (external) asylum policy*, 'Maastricht Journal of European and Comparative Law' 2017, vol. 24, no. 5, p. 761.

⁴⁰ Agreement of 16.03.2016 facilitating deportation of refugees who made it to Europe through Turkey or the Greek islands. In exchange for cooperation, EU Member States promised three billion Euro to Ankara. Agreement assumptions in: *Communication from the Commission to the European Parliament, the European Council and the Council*, COM(2016) 166 final.

⁴¹ G. Heck, S. Heck, *Tracing the Effects of the EU-Turkey Deal. The Momentum of the Multi-layered Turkish Border Regime*, 'movements, Journal for Critical Migration and Border Regime Studies' 2017, vol. 3, no. 2, p. 35 and subsequent pages.

⁴² M. Strzałkowski, *Włochy przedłużyły umowę migracyjną z Libią*, EUACTIV 6.11.2019, <https://www.euractiv.pl/section/migracje/news/wlochy-przedluzily-umowe-migracyjna-z-libia/> [accessed on 29.12.2019].

If one would, on the other hand, consider ‘external solidarity’, a significant role is played by investment programmes (e. g. the External Investment Plan, the European Fund for Sustainable Development), which are not only in place to help countries of origin of migrants, but also to stop migration altogether.⁴³ Similarly, ‘soft’ tools such as various kinds of information campaigns in social media are not only in place to aid migrants in arriving and finding their way around Europe, but also to efficiently detract them from coming in the first place.⁴⁴

According to the Communication from the Commission of September 2019, the EU provides aid and supports to millions of migrants in third countries. As part of the EU Facility for Refugees in Turkey, there are currently 90 projects ongoing that foresee daily support, the organisation of education and medical treatment for close to 1.7 million migrants. The regional trust fund of the European Union runs as a response to the Syrian crisis over 75 projects, ensuring similar aid for Syrian refugees, internally-displaced persons and accepting communities in the region. Work was also undertaken aimed at improving difficult living conditions in Libya that have spanned the evacuation of over 4,000 persons and the voluntary return of over 49,000 persons since 2017, and as part of the European Union Emergency Trust Fund for Africa, 210 projects in 26 countries are ongoing, spanning five million persons living in difficult conditions.⁴⁵

5.

Another aspect of solidarity in relation to migration is solidarity within the EU. The first measure which should be presented here is obviously the Dublin Regulation establishing criteria and mechanisms to determine the Member State responsible for the examination of an asylum application

⁴³ X. Sol, *The External Investment Plan: innovative instrument or dangerous blueprint for EU development policy?*, Counter Balance/European Union, November 2017, http://www.counter-balance.org/wp-content/uploads/2017/11/CB_EIP_d.pdf [accessed on 5.04.2018].

⁴⁴ E.g. <http://www.infomigrants.net/en/> [accessed on 5.04.2018].

⁴⁵ Communication of the Commission. Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final.

(Dublin III).⁴⁶ Its main idea is to ensure quick access to asylum procedures and the examination of an application on the merits by a single, clearly determined Member State, usually a State of the first entry. However, it is worth noticing that the Dublin mechanism, at its core and contrary to the assumptions indicated in the preamble, is anti-solidary, as the main weight of analysis of international protection applications rests on the States along the outer EU borders. On the other hand, this facility allows for the abandonment of internal borders, what is a main advantage virtue of the contemporary European Union.

The migrant and refugee crisis had shown the insufficiency of national asylum systems anyway and revealed the deficiencies of the whole Dublin system, but we should remember that these defects have already been identified before⁴⁷ the biggest cumulation of migrant flows.

Cases of *M.S.S. vs Belgium and Greece*⁴⁸ handled by the European Court of Human Rights and the joined cases of *N.S. and M.E.*,⁴⁹ in which the Court of Justice responded to prejudicial questions on the application of the Dublin Regulation (Dublin II),⁵⁰ revealed all the weaknesses of the system. Both courts found it unacceptable to transfer asylum seekers to Greece (a country of first entry), where the entire asylum system is insufficient and procedures as well as conditions of acceptance threatened the violation of fundamental rights of third country nationals, primarily with respect to the ban on torture and inhuman treatment, as well as the right to efficient legal remedy.

Through these judgements, the majority of EU Member States stopped or limited transfers to Greece pursuant to the Dublin II Regulation

⁴⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, p. 31–59.

⁴⁷ Under Dublin II Regulation.

⁴⁸ *M.S.S. v Belgium and Greece*, Judgement of the ECHR of 21.01.2011, 30696/09, LEX no. 694185.

⁴⁹ *N.S. v Secretary of State for the Home Department* as well as *M.E. et al. v Refugee Applications Commissioner and Minister for Justice*, Judgement of the CJEU of 21.12.2011, C-411/10 and C-493/10, EU:C:2011:865.

⁵⁰ Council Regulation (EC) no. 343/2003 of 18.2.2003. establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10.

applying the sovereignty clause found in Article 3(2) of the Regulation⁵¹ or introducing other requirements for transfer.⁵² It can be assumed that, paradoxically, due to dramatic situation in Greece, the abstention from the application of the Dublin Regulation was an expression of solidarity both with Greece as well as with migrants.

The Dublin system also proved to be inefficient during the crisis. In 2015, facing a mass influx of migrants and real risk of humanitarian catastrophe, Germany and Austria, took their decision to temporarily suspend the Dublin mechanism and took over from other EU States third country nationals, who had not been registered in the Eurodac system.⁵³ Derogation of the Dublin rules could be considered as a gesture of solidarity with refugees and other EU Member States that could not cope (Hungary) with accepting and registering applicants. On the other hand, this situation may be understood in the opposite sense – as an act of non-solidarity

⁵¹ Article 3 of the Dublin II Regulation:

1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

⁵² See B. Mikołajczyk, *Europejski Trybunał Praw Człowieka a 'system dubliński'. Uwagi w związku z wyrokiem ETPCz w sprawie M.S.S. przeciwko Belgii i Grecji* [European Court of Human Rights and the 'Dublin system'. Comments on the ECtHR judgment in M.S.S. v Belgium and Greece], [in:] L. Brodowski, D. Kuźniar – Kwiatek, 'Unia Europejska a prawo międzynarodowe. Księga jubileuszowa dedykowana prof. Elżbiecie Dyni' [The European Union and international law. Liber Amicorum in honour of Professor Elżbieta Dynia], Rzeszów 2015, p. 270 and subsequent pages.

⁵³ B. Markowicz, *Uchodźcy – szansa, czy kryzys? Aktualne wyzwania prawne tzw. kryzysu uchodźczego w Republice Federalnej Niemiec w kontekście europejskim* [Refugees – opportunity or crisis? Current legal challenges of the so-called refugee crisis in the Federal Republic of Germany in the European context], [in:] G. Baranowska et al. (eds.), 'O prawach człowieka' [On human rights], Warszawa 2017, pp. 465-478; J.J. Więc, *Niemcy wobec reformy ustrojowej Unii Europejskiej w latach 2002-2016* [Germany in the face of the reform of the European Union's political system 2002-2016], Kraków 2017, p. 214.

due to putting other Member States under the threats brought about by uncontrolled and illegal migration.

This situation encouraged the European Union to take swift steps aimed at a further reform of the Common European Asylum System, including the Dublin Regulation. At the height of the migrant crisis, on 4.5.2016, the European Commission submitted a draft recast the Dublin III Regulation.⁵⁴ In relation to solidarity between EU Member States with respect to acceptance of third-country nationals and the analysis of their applications for protection, this project turned out to be at least controversial, and doubly so. First of all, it imposed on countries of entry new obligations in terms of identification of applicants, registration of applications and procedures concerning application admissibility. The State of first entry would be responsible for all issues of an applicant, even if he or she leaves its territory. The State of first entry was also to become responsible for inadmissible applications, those that are clearly unfounded and those submitted by persons that could constitute security threats. It is thus quite difficult to term this solution as solidary and assuming even distribution of burdens. Francesco Maiani even noted that it made States of first entry 'gatekeepers' of the European Union.⁵⁵

On the other hand, the project assumes solution in terms of subdivision of burdens in the form of an automatically-initiated corrective mechanism of assignment of applications should any State of first entry be overburdened by the inflowing applications for the provision of international protection. This excess burden was established to be more than 150% applications than foreseen by the key of assignment considering the population and GDP of that Member State. At the same time it was allowed for the assigning State to temporarily hold a third-country national applying for international protection, but it would then be obligated to provide a so-called solidary contribution of 250,000 euro for every person that

⁵⁴ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2016) 270 final.

⁵⁵ F. Maiani, *The Reform of the Dublin III Regulation*, Brussels 2016, p. 36, http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU%282016%29571360_EN.pdf [accessed on 3.04.2018].

was not accepted. The possibility of ‘buying oneself out’ of solidarity by an arbitrarily described amount seemed even more controversial.⁵⁶

The proposal of the Commission received a response in the form of the draft legislative resolution of the European Parliament of 6.11.2017.⁵⁷ If the draft of the Commission was very restrictive, the proposal of the Parliament exhibited a much more sensitive approach both to Member States as well as asylum seekers.⁵⁸ This solution significantly reduced the burden on States of first entry, as the majority of duties, according to the draft, was to be taken over by the new European Union Agency for Asylum, with the costs of transfer of applicants to be covered by the EU general budget. This draft was certainly more ‘solidary’ with respect to States on the outer EU borders and those registering asylum applications for the first time. The Parliament proposed that applicants would have a limited selection of destination States – they could pick from among four EU Member States least burdened by refugees. They could also apply for their application to be considered by the State they are in. In case of the solution suggested by the Parliament, some States could never be indicated as target States, which also does not correspond to the ‘spirit of solidarity’.

In the end, the reform of the Dublin mechanism failed. Until the European Parliament election of 2019, no agreement could be reached

⁵⁶ K. Strąk, *Reforma Wspólnego Europejskiego Systemu Azylowego – system dubliński* [Reform of the Common European Asylum System – the Dublin system], [in:] G. Baranowska, A. Gliszczyńska-Grabias, A. Hernandez-Połczyńska, K. Sękowska-Kozłowska (eds.), ‘O prawach człowieka. Księga jubileuszowa Profesora Romana Wieruszewskiego’ [About human rights. Liber Amicorum in honour of Professor Roman Wieruszewski], Warszawa 2017, pp. 451–464. S. Progin-Theuerkauf, *The ‘Dublin IV’ Proposal: Towards more solidarity and protection of individual rights?*, ‘Sui Generis’ 2017 p. 65, <http://sui-generis.ch/article/view/sg.34/524> (accessed on 17.03.2018 r.); UNHCR, *Better Protecting Refugees in The EU and Globally*. December 2016, p. 21, www.refworld.org/pdfid/58385d4e4.pdf [accessed on 16.03.2019].

⁵⁷ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2016)0270 – C8-0173/2016 – 2016/0133(COD) – hereinafter: draft regulation.

⁵⁸ B. Mikołajczyk, *Mechanizm dubliński na rozdrożu – uwagi w związku z pracami nad rozporządzeniem Dublin* [The Dublin mechanism at a crossroads – comments in connection with the work on the Dublin Regulation], ‘Europejski Przegląd Sądowy’ 2018, no. 3, pp. 6-8.

on the acceptance of the Dublin IV Regulation, just like in the case of the new regulation to replace Directive no. 2013/32 on general procedures of provision and withdrawal of international protection.⁵⁹ Consensus was reached in turn on five propositions – new regulations on the qualification of third-country nationals for international protection, the EU transfer framework, the European Union Agency for Asylum, the Eurodac and the directive on the establishment of norms concerning the acceptance of persons seeking international protection. However, lacking the key component that is the Dublin facility, based fundamentally on mutual trust, the entire package of remaining provisions becomes dysfunctional.

6.

The new migration situation and the inefficiency of the Dublin mechanism have led the Union to adopt other exceptional measures and to invoke the principle of Article 80 TFEU. This provision appears to be crucial for the analysed issue. It states that:

[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

According to this provision, Union's policies on border control, asylum and immigration and their implementation are subject to the principle of solidarity and fair sharing of responsibility. That is why, the EU acts adopted on the basis of the Treaty shall contain, appropriate measures to give effect to this principle. In times of the migration crisis, introducing relocation mechanism allowed the principle of solidarity between Member States to be filled with a content. However, these mechanisms caused a lot of controversies. The most controversy was garnered by two decisions

⁵⁹ Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013, on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, p. 60.

of the Council of September 2015 on relocations,⁶⁰ which assumed the acceptance of a specific number of third-country nationals that applied for protection in temporary camps, so-called hotspots, located in Greece and Italy. Making these decisions, the Council referred to the extraordinary situation characterised by the sudden inflow of third-country nationals as described in Article 78(3) of the TFEU and the principle of solidarity and just division of responsibilities between EU Member States (Article 80 of the TFEU). However, these decisions and the entire idea of forced assignment of applicants foreseen in resolution no. 2015/1601 were not accepted by all EU Member States. Romania, the Czech Republic, Hungary and Slovakia voted against obligatory relocation, with Finland abstaining.

It is quite difficult to conclude that the objective of obligatory relocation from Greece and Italy was achieved, if only 34,700 persons were relocated out of the 160,000 planned.⁶¹ Countries such as Poland and Hungary did not accept a single refugee in this system, and some (e.g. Slovakia) only accepted a dozen or so. This situation can certainly partly be blamed by the solution entailing the assignment of third-country nationals to Member States without consideration of the specific situation of that State and the will of the relocated persons themselves.⁶²

⁶⁰ Council Decision (EU) 2015/1523 of 14.09.2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146; Council Decision (EU) 2015/1601 of 22.09.2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80.

⁶¹ EASO data: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf [accessed on 4.04.2018]. It is worth noting that voluntary relocations are still taking place. These voluntary relations are coordinated since January 2019 by the Commission. Since the Summer of 2018, 1,103 people have been voluntarily relocated (Communication of the Commission: Progress report on the Implementation of the European Agenda on Migration, COM(2019) 481 final).

⁶² For instance, in the case of Poland and the number of concluded proceedings due to the applicants fleeing and the unstable situation in the Ukraine. See M. Kowalski, *From a different angle—Poland and the Mediterranean refugee crisis*, 'German Law Journal' 2016, vol. 17, no. 6, p. 972 and subsequent.

Slovakia and Hungary⁶³ (later supported by Poland as an intervening party) complained with the Court of Justice of the European Union (CJEU)⁶⁴ motioning for the decision on relocation foreseen through resolution 2015/1601 of 22.9.2015, to be found void. In the complaint they raised that the proceedings concerning the passing of this decision were burdened by procedural deficiencies, as the decision complained about should be passed within the scope of the legislative procedure, and in addition the resolution itself was passed on a flawed legal basis, as the two-year period of validity does not fulfil the condition of ‘temporary measures’ described in Article 78(3) of the TFEU. The complaining States also stated that this decision does not allow the undertaking of effective action as a response to the migrant crisis, and that it is not necessary for the purpose of achievement of this objective. In the assessment by Slovakia, the assumption of obligatory resources on the basis of Article 78(3) of the TFEU was not necessary, as earlier decision no. 2015/1523 of 14.9.2015, left it up to the Member States to decide, to what extent they would participate in the joint obligation. In the opinion of the complaining parties, the solution assumed on 14.9.2015, violates to a lesser extent the sovereignty of the States, and considering the fact that only eight days have elapsed between the decision, one could not conclude within such a short time that the solution entailing the voluntary relocation of forty thousand people was not adequate to the situation at hand at the time. When the decision complained about was made, the Council had no basis to believe that the resources dealing with the acceptance of persons foreseen by decision no. 2015/1523 would quickly turn out to be insufficient, and that it would be necessary to take up additional resources.

Hungary also raised the complaint that the challenged decision does not include criteria on the determination of the Member State that is supposed to be the objective of relocation, covering e. g. cultural, linguistic or other ties between the applicant and the indicated State.

The CJEU rejected all complaints, concluding that the legislative procedure is only applied in cases clearly indicated in the Treaty, and Article 78(3) of the TFEU does not *expressis verbis* indicate the necessity

⁶³ Originally, Hungary, beside Greece and Italy, were to be beneficiaries of the relocation programme, but in the end the Commission struck Hungary from the list of Member States making use of the facility.

⁶⁴ *Hungary and Slovakia v Council*, Judgement of 6.9.2017, C-643/15 and C-647/15, EU:C:2017:631.

of its application, in light of which the challenged decision could be passed within a non-legislative procedure. The Court also concluded that Article 78(3) of the TFEU allows bodies of the Union to undertake all temporary measures that will enable a quick and efficient reaction to an extraordinary situation characterised by a sudden inflow of refugees. In the opinion of the CJEU, the requirements concerning temporary measures were fulfilled, as the temporal scope of application of the challenged decision (from 25.9.2015 until 26.9.2017) was described precisely, and, in this regard, its temporary character must not be questioned.

Within the context of the present consideration, one must primarily note that the CJEU concluded that the relocation mechanism does not constitute a resource that is obviously inappropriate for the achievement of the objective that is the provision of aid for Greece and Italy, and the validity of the decision cannot depend on later evaluation of its efficiency. The EU legislator needed to assess the effects of the resolution in light of information they had available at the time it was passed. In addition, the Council assessed the situation and evaluated the potential influence of the assumed resource on the analysed extraordinary situation, primarily the low number of relocations conducted until the moment the challenged resolution was passed. It could not have foreseen the lack of cooperation by certain Member States. In the end, the Court concluded that the Council did not make an obvious mistake in course of the assessment, finding that the objective achieved by the challenged decision could not be reached with the application of less restrictive measures. In the opinion of the Court, the Council did not exceed its broad margin of assessment, as the mechanism put in place by the first resolution no. 2015/1523, foreseeing the voluntary relocation, turned out to be insufficient in light of the unprecedented influx of migrants, hence, the quick decision on the necessity of obligatory assignment of 120,000 third country nationals.

The CJEU also rejected the argument of Hungary about the lack of relocation criteria, finding that the description of the Member State of relocation should be based on criteria related to solidarity and just subdivision of responsibility between Member States, as described in Article 80 of the TFEU. Would the relocation be closely conditioned on the existence of cultural and linguistic ties between the third-country national and the Member State, the subdivision of these people among all Member States would simply be impossible.

Despite these remarks, the Court did not thoroughly analyse the scope of the principle of solidarity stemming from Article 80 of the TFEU, which, in the opinion of Henry Labaye, saw it lose an unprecedented chance at

passing a judgement that could have been a milestone in the interpretation of implementation of the EU principle of solidarity.⁶⁵

The CJEU turned out to be cautious in this regard and did not take on the notion expressed in the opinion of Advocate General Yves Bot,⁶⁶ who assumed, among others, that the challenged decision is an expression of the solidarity between Member States as expressed in the treaty. Solidarity is a foundation of the European Union and counts among its core values. It is a condition of its existence and an objective of the European project. At the same time, it is a pillar and superordinate rule of EU policies concerning border controls, asylum and migration, as expressed by Article 67(2) and Article 80 of the TFEU.

Yves Bot also stressed the superordinate character of the principle of solidarity, if inequalities exist between Member States depending on their geographic location and sensitivity to mass migrant flows. The undertaking and application of decisions passed on the basis of Article 78(3) of the TFEU is supposed to provide the principle of solidarity and the just subdivision of responsibility between Member States with substance. What is significant is that the Advocate General noticed that the opposition of Member States against the challenged decision may:

give the impression that, behind what is by common consent called the ‘2015 migration crisis’, another crisis is concealed, namely the crisis of the European integration project, which is to a large extent based on a requirement for solidarity between the Member States which have decided to take part in that project.⁶⁷

In December 2017, the Commission brought before the CJEU actions against Poland, Hungary and the Czech Republic to find a violation of obligations of a Member State stemming from decisions on relocation, thus violating obligations entailing the provision of aid to Italy and Greece.⁶⁸

⁶⁵ H. Labaye, Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice! (Slovakia and Hungary v Council, 6.9.2017, Joined Cases C-643/15 and C-647/15), 11.9.2017, <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/> [accessed on 28.3.2018].

⁶⁶ *Slovakia and Hungary v the European Union Council*, Opinion of Advocate General Yves Bot presented on 26.7.2017, Cases C-643/15 and C-647/15, ECLI:EU:C:2017:618.

⁶⁷ Opinion of Advocate General Yves Bot, p. 24.

⁶⁸ Cases C-715/17, C-718/17, C-719/17, OJ C 112, 26.3.2018, p. 18.

On 31.10.2019, Advocate General Eleanor Sharpston suggested to the CJEU the conclusion that these three States violated their obligations that burden them on the basis of EU law, refusing to apply the facility of obligatory relocation of persons applying for protection. They could not have violated their obligations concerning the maintenance of public order and internal security declining to apply a binding act of law of the EU that they oppose.

Stating her case, the Advocate General fused three aspects of the legal order of the EU: the 'rule of law', the obligation to loyal cooperation and the principle of solidarity. According to her, respect for the rule of law entails the adherence to legal obligations. Neglect of these duties, even if they are undesirable or unpopular, constitutes a dangerous step towards the decline of the orderly and organised society in which law prevails. The principle of solidarity describes at times, by necessity, acceptance of the assignment of burdens. Furthermore, in line with the principle of loyal cooperation, each Member State has the right to expect other Member States to fulfil their obligations with due diligence.⁶⁹

7.

It may be that mutual accusations could be avoided if the first facility developed within the course of the Common European Asylum System was activated– the Council Directive 2001/55/EC of 20.7.2001, 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.⁷⁰ The Directive, which was passed following the experiences of the war in former Yugoslavia and the Kosovo conflict of 1999 aimed at (Article 1) the introduction of a practical and efficient framework of action in a situation of mass influx of displaced persons from third party States,⁷¹

⁶⁹ Opinion of Advocate General Sharpston delivered on 31.10.2019, *European Commission v Republic of Poland*, *European Commission v Republic of Hungary*, *European Commission v Czech Republic*, Case C-715/17, Case C-718/17, Case C-719/17, ECLI:EU:C:2019:917

⁷⁰ OJ L 212, 7.8.2001, p. 12–23.

⁷¹ According to Article 2 of the Directive:

displaced persons means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in

who are unable to return to their countries of origin, and supporting the balance of effort of Member States related to the acceptance of the mass inflow of displaced persons, including the relevant consequences. This is the sole Directive that assumes a voluntary solidarity mechanism. This facility should take into consideration financial issues as well as those related to the actual acceptance of third country nationals by individual Member States. It is also worth remembering that the temporary form of this facility does not encourage persons not fleeing persecution, war, mass human rights violations, to come.

The voluntary character of this solidarity mechanism is primarily enshrined in Article 25, according to which Member States are to accept beneficiaries of temporary protection in the spirit of solidarity. The Member States are to report their capacities in this regard of their own accord. However, if the number of people qualifying for temporary protection as a result of a sudden mass inflow would exceed the possibilities of acceptance, the Council assesses the situation as an urgent case and takes relevant steps, including recommending additional support for the relevant Member States.

However, this facility was never activated by the Council⁷² despite the fact that the number of persons seeking protection, initially mainly from Iraq and Afghanistan, rose continuously since 2000. They were later joined by a group of refugees from Somalia, Eritrea, and finally Syria.

In the year 2011 (following the so-called Arab Spring) and again three years later, Italy and Malta unsuccessfully applied to the Commission to take steps to initiate the procedure foreseen in Article 5 of the Directive.⁷³ The failure to apply this facility was explained by issues related to the qualification of the phenomenon of the present migration as

response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

⁷² Pursuant to Article 5(1): 'The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council'.

⁷³ European Commission, *Study on the Temporary Protection Directive*, January 2016, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf [accessed on 3.4.2018].

a mass influx, which, according to the Directive (Article 2 d) describes the 'arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme'. The argument is the interpretation of mass influx suggested by the European Commission during work on the Directive. According to the proposal of the Commission of the time, the influx should also be sudden, and for this reason, a gradual inflow of third country nationals does not substantiate the decision to utilise temporary protection. On the other hand, the decision on temporary protection was allowed, if such gradual influx would reach a number of applicants that would prevent further acceptance of citizens of third countries.⁷⁴

A further obstacle referred to is the mixed character of migratory groups arriving from various countries and for different reasons, hence, both on economic grounds as well as due to war, mass human rights violations or persecution.

It would seem that all these interpretation problems are relatively easy to overcome as long as the political will of the States is there. For instance, there are suggestions of assignment of those arriving into smaller groups or treating everyone arriving by sea as coming as part of one great mass influx, which is in fact proven by statistics.⁷⁵

There are also no formal objectives against activation of the Directive, as Article 2d in the form that was finally accepted, which contains

⁷⁴ Article 2:

Influx must be from the same country or geographical area [...] the number of people must be substantial [...] the gradual arrival of asylum-seekers, refugees or displaced persons from a single country or region of origin cannot in itself justify the introduction of such temporary protection. However, a point may come at which the movement of people, gradual at the outset, intensifies in such a way that it becomes massive and the normal asylum system is unable to absorb the flow.

Proposal for a Council Directive 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 Brussels, 24.5.2000 COM(2000) 303 final 2000/0127 (CNS)

⁷⁵ M. Ingeli-Ciger, *Time to activate the Temporary Protection Directive. Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe*, 'European Journal of Migration and Law' 2016, vol. 18, p. 16.

the definition of mass influx, does not contain any negative notion of gradual influx any more.⁷⁶

8.

The (naturally incomplete) overview of the measures that were taken or are taking to cope with the mass influx of migrants indicates that today we can say that the migration crisis has brought not only a crisis of solidarity with refugees, but also a crisis of the European integration project. It is fairly easy for States to become 'solidarily opposed' the inflow of third-country nationals and to accept the individual components establishing 'Fortress Europe'. The improvement of solidarity of States in terms of aid for potential refugees here, in countries of origin or the region also seems real.

It becomes harder to become solidary with third-country nationals who flee conflicts, human rights violations and persecution. In such a case, becoming solidary would be easier if an effective method was found of coping with the mixed inflow and the efficient differentiation between illegal immigrants and refugees. Until now, the international community has not found a solution in this regard. The Global Compact treats refugees and migrants separately. Such an ordered approach is fully justified, but it is hard to assess today whether it will prove itself in practice.⁷⁷

In the end, it turns out that solidarity with other EU Member States threatened by the mass influx of diverse kinds of migrants is hardest to implement (for some Member States at least). It can be assumed that this is a higher form of solidarity that requires the rejection of the traditional perception of the prerogative of the State in terms of acceptance or rejection of foreigners in their territory. It also necessitates the conclusion that

⁷⁶ See note 53. Article 2 d) 'mass influx' means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme'.

⁷⁷ M. Kowalski, *Bezpiecznie i godnie – uwagi dotyczące raportu Sekretarza Generalnego ONZ z 2016 r. na temat kryzysu migracyjno – uchodźczego* [Safe and dignified – comments on the UN Secretary-General's 2016 report on the migration and refugee crisis], [in:] B. Krzan (ed.), 'Ubi ius, ibi remedium. Księga dedykowana pamięci profesora Jana Kolasy', [Ubi ius, ibi remedium. A book dedicated to the memory of Professor Jan Kolasa], Warszawa 2016, p. 278.

the kind of solidarity described in Article 80 of the TFEU does not just entail cooperation but full conviction of the common objectives, interests and responsibilities for tasks that do not directly apply to a specific State. Obligatory relocation turned out to be an overly advanced form of solidarity.

Maybe Article 80 needs a new interpretation. In Gregor Noll's opinion this provision has been defectively designed. Perhaps the problem is that Article 80 is limited to solidarity with other Member States, not with migrants or other recipient States in crisis regions (e.g. Lebanon or Jordan carrying a disproportionate burden in the reception of Syrian refugees). Moreover, Article 80 in its wording differs from other provisions of TFEU and TEU referring to solidarity and it is missing a social context as well as the Member States' situation.⁷⁸

Perhaps one should also ask the question 'whether obligatory/forced solidarity' is solidarity at all? Or perhaps, analysing the issue of solidarity between States in terms of migration and asylum one should reverse the assumption that solidarity is the basis of integration, and assume that integration processes lead to actual solidarity. Such a process, however, requires time and the achievement of subsequent stages. Such a stage, a 'higher level' could be the application at a specific moment of the mechanism of temporary protection. It is obvious that with this scale of the issue of migrants, the application of just this mechanism wouldn't solve all problems and that work on different levels is necessary.

The European migrant crisis of 2015-2016 became an important lesson both for the States as well as for the European Union itself. As a consequence, the new Commission, Council and European Parliament as well as EU Member States will have to answer questions concerning various aspects of solidarity, including: how to finance 'migration solidarity', should a permanent relocation facility (obligatory or voluntary) be financed, and should one assume the concept of so-called 'flexible solidarity' suggested by States of the Visegrad Group, and allow for lesser engagement in the execution of migration policy. The EU will have to consider solutions aimed at the improvement of operation of the Common European Asylum System, one of the hitherto unsolved problems of which is the prevention of secondary migration movements. In the context of the situation in Turkey, Libya or Morocco, one could also ponder whether one should

⁷⁸ G. Noll, *Failure by Design? On the Constitution of EU Solidarity*, <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf> [accessed on 20.10.2019].

express (in particular financial) solidarity with third countries that do not guarantee the protection of rights of those held or the migrants transferred back to their territories, and what should be the role of NGOs in the migration management system. And, finally, whether and how (considering the attitude of V4 States) to tighten the bond between EU asylum policy and the UN Global Compact on Refugees.⁷⁹

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