

CHANCES FOR MORE SOLIDARITY IN THE REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM?

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The contribution focuses on the notion solidarity in the Common European Asylum System (CEAS), noting examples of deficits and lack of solidarity in practice, with a particular emphasis on the events in the course of and following the mass arrival of migrants to Europe since 2014. It analyses the possibilities to invoke solidarity in the present system (such as the early-warning mechanism as part of the Dublin system, the Temporary Protection Directive and provisional measures in situations of emergency based on Article 78 (3) TFEU). In order to illustrate what would be required to improve solidarity in practice, the term solidarity is interpreted. Though the notion is frequently used, it is neither defined in public international law treaties, nor in EU law. The interpretation of the word solidarity shows that it means working together, sharing responsibilities and duties, and also comprises that positive effects of actions based on solidarity are shared in the community. It is a value, a concept and a legal principle, which requires acting together in order to reach common aims. The contribution continues with an analysis of the possibilities to invoke solidarity in the reform of the CEAS.

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INTRODUCTION

In September 2017 the Court of Justice of the European Union (CJEU) dismissed the two actions for annulment of the relocation decisions from September 2015 filed by the Slovak Republic and Hungary.¹ In the judgment the Court explicitly stressed the importance of solidarity as a legal principle in the Common European Asylum System (CEAS).²

The events in the course of and following the mass arrival of migrants to Europe since 2014 have revealed numerous examples of deficits and lack of solidarity in practice. This article deals with these practical deficits and analyses the existing possibilities to invoke solidarity in the present system (such as the early-warning mechanism as part of the Dublin system, the Temporary Protection Directive and provisional measures in situations of emergency based on Article 78 (3) TFEU). Subsequently the contribution refers to the current negotiations about the reform of the CEAS and the potential to improve the possibilities to enact solidarity in practice.

I. SOLIDARITY DEFICITS IN PRACTICE

The increasing numbers of applicants for international protection in the EU Member States between the end of 2014 and 2016 created pressure on national asylum systems and reception capacities in several states, especially in the main arrival States Italy and Greece,³ and in the main receiving States Germany, Sweden and Austria.⁴ Political reactions in Member States,

¹ Court of Justice of the European Union (CJEU), judgment of 6 September 2017, *Slovak Republic and Hungary v. Council of the European Union*, Joined Cases C-643/15 and C-647/15 (hereafter Judgment *Slovak Republic and Hungary v. Council*).

² *Supra*, para. 291: “Thus, in the circumstances of this case, there is no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take—on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein—provisional measures imposing a binding relocation mechanism, such as that provided for in the contested decision.”

³ For the relocation process from these two states see below in this contribution, Section II.2.c.

⁴ See for statistics: Eurostat, “Asylum and first time asylum applicants by citizenship, age and sex, Annual aggregated data (rounded)”,

http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en. In 2015, 476,510 applications were filed in Germany, in Austria 88,340 and in Sweden 162,450, in 2016 in Germany 745,155, in Sweden 28,790 and in Austria 42,266.

restrictions in national asylum and aliens law legislation, the reluctance to participate in the relocation process and the actions against the relocation decisions⁵ demonstrated the lack of solidarity. The following short overview of important events points to certain deficits in exercising solidarity.

The mass flight from Syria started in 2011/2012. The reasons are manifold, people have been fleeing from the civil war and generalised violence,⁶ from the Assad regime, or from fear of opposition and extremist groups, from IS terrorism, and for other reasons. Initially, the countries in the region (Lebanon, Turkey, Jordan, Palestinian territories, Iraq, Egypt) were the main destination countries for persons fleeing Syria. The general situation in the states neighbouring Syria, the duration of the conflict and ensuing violence, and the hope to find a safe place in Europe caused the onward move to Europe.

The situation in the first countries of arrival differed. In Turkey, where two million or even more persons found a certain form of shelter, the situation became increasingly difficult with the length of the sojourn, and many Syrians did not consider staying in Turkey as a long-term solution.⁷ The Turkish Government enacted a temporary protection regime in 2014,⁸ but early reports attested that it was only implemented with a certain delay.⁹

⁵ *Slovak Republic v. Council of the European Union*, Case C-643/15 in [2016] OJ C38/41 and for *Hungary v. Council of the European Union*, Case C-647/15 in [2016] OJ C 38/43. See Judgment *Slovak and Hungary v Council*.

⁶ See H. Lambert, *The Mass Flight of Syrian Refugees: What Are the Legal Obligations of States?*, OXHRH BLOG (2015), <http://ohrh.law.ox.ac.uk/the-mass-flight-of-syrian-refugees-what-are-the-legal-obligations-of-states/>. The author argues that a customary rule of public international law to protect persons fleeing from international and internal armed conflict emerges.

⁷ For the situation and the Temporary Protection system in Turkey see, *Struggling to Survive: Refugees from Syria in Turkey*, AMNESTY INTERNATIONAL (2014), https://www.amnestyusa.org/files/eur_440172014.pdf, p. 21: “[h]owever, for three and a half years the government of Turkey failed to provide clarity as to the legal status and entitlements of refugees from Syria once they entered Turkey. With the exception of free access to healthcare, refugees from Syria remained unsure of what they could expect in terms of support from the Turkish authorities and how long they would be welcome in the country. The situation was not helped by frequent statements from the authorities referring to Syrians as ‘guests’ rather than refugees [...] The authorities took an important and welcome step in addressing this situation when the Council of Ministers passed the Temporary Protection Directive in October 2014 [...] This long-awaited move replaces an unpublished circular from March 2012 setting out the terms of temporary protection. The Directive grants a secure legal status for refugees from Syria and enables them to receive identity cards. If fully and promptly implemented, it should help refugees to access a range of rights and entitlements. The Temporary Protection Directive—the secondary legislation envisaged by Turkey’s April 2013 asylum law—was finally passed by the Turkish Council of Ministers in October 2014, ... and applies to all Syrian refugees in Turkey (Provisional Article 1) [...] Although an important step forward, the Directive has shortcomings. It is framed principally in terms of opportunities rather than obligations”.

⁸ See A. İçduygu, *Syrian Refugees in Turkey: The Long Road Ahead*, MIGRATION POLICY INSTITUTE (2015), <http://www.migrationpolicy.org/research/syrian-refugees-turkey-long-road-ahead>.

⁹ *Supra*.

In other countries in the region, the reception of refugees had been financed and organised by International Organisations and their partner agencies, mainly by the World Food Programme. In recent years—especially since 2015—the amounts were reduced dramatically,¹⁰ and this lack of aid caused a situation where more and more persons decided to seek an alternative. The conclusion is that the lack of solidarity with the neighbouring states of Syria led to a massive increase of prospective applicants for protection who decided to move to Europe.

Because of the ongoing conflict and the volatile situation, there was and still is an increased demand to move onward from these first countries of asylum to other states, mainly to Europe. Flight routes¹¹ however changed due to increased border controls, the closure of the Balkan route, and also the EU-Turkey deal.¹² The main route until 2014 was via the Mediterranean Sea, from Libya, Egypt and Tunisia, towards Italy (and Malta). A further route was the way to enter the EU via Greece from Turkey. This route changed after the land border between Greece and Turkey was closed and smugglers used the sea borders between Turkey and various Greek islands.¹³

The main onward route used during the peak of the so-called crisis was the Balkan route to Greece and from there to Macedonia, Serbia and Hungary, or later Croatia, Slovenia and Austria to Germany. The majority of persons in search of protection were just transiting these countries. Very few applied in states outside the EU or in Slovenia and Croatia. Quite a considerable amount however filed asylum applications in Austria. For many others, Germany and Sweden were the main target countries. In several EU Member States, the overall number of applications did not raise significantly.¹⁴ There are various reasons for this unbalanced distribution, many of which are directly or indirectly influenced by the lack of solidarity.

With the arrival of increased number of applicants in Europe, the situation in Hungary, where thousands of applicants were stranded in

¹⁰ *Forced to Make Deeper Cuts in Food Assistance for Syrian Refugees due to Lack of Funding*, WORLD FOOD PROGRAM (2015), <https://www.wfp.org/news/news-release/wfp-forced-make-deeper-cuts-food-assistance-syrian-refugees-due-lack-funding>.

¹¹ See information on the flight routes in the website of FRONTEX, <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

¹² See the Statement of the EU Heads of State or Government, 7 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>.

¹³ U. Brandl, *Asyl und Einwanderung*, in *JAHRBUCH EUROPARECHT* 16, 353-380, 354-357 (G. Herzig (ed.), NWV Verlag 2016).

¹⁴ See for statistics Eurostat, *Asylum and First Time Asylum Applicants by Citizenship, Age and Sex*, Annual Aggregated Data (rounded), http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en.

substandard reception conditions, caused the German announcement not to apply the Dublin III-Regulation for applicants from Syria.¹⁵ This was an act of solidarity, and a humanitarian reaction towards persons in need of protection. This new policy development, however, also encouraged other prospective applicants to decide to move onwards to Europe.

In January 2016 Austria announced to limit the number of new applicants for international protection (the so-called caps) and introduced border controls on the Austrian-Slovenian border.¹⁶ The Austrian measures and the predicted limit were intended to warn the neighbouring states that Austria could close the borders for applicants when the limits are reached, and was also meant to serve as a signal accompanying Austria's demand for more solidarity in Europe. It was also intended to cause a domino effect in the states on the Balkan route.

The closure of the Western Balkan route was agreed on the occasion of a meeting held in Vienna on 24 February 2016. The Ministers present at the Conference agreed on a Joint Declaration.¹⁷ A few days later, the domino effect already reached the Macedonian-Greek border, which was completely closed. Slovenia, Croatia, Serbia, Macedonia, Bulgaria, Kosovo, Albania, Bosnia and Montenegro as states directly on the main route, or on an alternative route took part upon the invitation of Austria. Neither Greece, nor Turkey was asked to attend the conference, which led to massive criticism from Greece, and was also seen as a negative signal vis-a-vis Turkey, the intended main cooperation partner of the EU.

The immediate closure led to the precarious situation that many applicants and family members of persons already present in a Member State of the EU—either as applicants for protection, or as persons already having a status—stranded in Greece. There was a lack of solidarity with Greece, and again a lack of solidarity with individual applicants.

Another set of measures was aimed at negotiating with Turkey and other third countries, from where high numbers of protection seekers made their way to Member States of the EU. On 23 September 2015, a European

¹⁵ BAMF, *Verfahrensregelung zur Aussetzung des Dublinverfahrens für syrische Staatsangehörige*, Az. 411-93605/Syrien/2015, 2015. Regulation (EU) No 604/2013 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 [2013] OJ L 180/31 (hereafter Dublin III-Regulation). Zeitonline, *Deutschland setzt Dublin-Verfahren für Syrer aus: Flüchtlinge aus Syrien dürfen künftig in Deutschland bleiben. Sie werden nicht mehr in den EU-Staat zurückgeschickt, in dem sie zuerst registriert wurden*, 25 August 2015.

¹⁶ See U. Brandl, *In Search of a Legal Basis for the Austrian Asylum Caps*, EU IMMIGRATION AND ASYLUM LAW AND POLICY/ODYSSEUS NETWORK (31 May 2016), <http://eumigrationlawblog.eu/page/2/>.

¹⁷ Managing Migration Together 24 February 2016, *Vienna Declaration*, <http://www.bmi.gv.at/cms/cs03documentsbmi/1813.pdf>.

Council informal meeting took place where it was agreed to start negotiating with Turkey and to “reinforce the dialogue with Turkey at all levels, including at the upcoming visit of the Turkish President [...], in order to strengthen our cooperation on stemming and managing the migratory flows”.¹⁸

The EU-Turkey Statement was agreed on 18 March 2016.¹⁹ Civil society and academic commentators expressed harsh criticism, as the implementation of the agreed returns would lower the standards for the treatment of applicants, given that the Turkish system is not comparable with that of the EU.²⁰ The arrangement was beneficial for the EU Member States and was—as its unofficial name indicates—a “deal”, which aimed at reducing pressure on the receiving states, and at serving the purpose of preventing potential applicants from crossing over from Turkey to Greece.

Several states have introduced temporary border controls on internal borders within the Schengen area since 2014 so as to prevent persons who do not carry the necessary documents from crossing their borders. The Schengen Border Code allows such a temporary reintroduction of border controls at internal borders²¹ for a limited period of no more than 30 days, or for the foreseeable duration of the serious threat, if its duration exceeds the period of 30 days. Such a reintroduction requires a serious threat to public policy, or internal security. Meanwhile, these border controls have been

¹⁸ Informal Meeting of EU Heads of State or Government on Migration, *Statement* (23 September 2015), <http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/>.

¹⁹ See EU Heads of State or Government, *EU-Turkey Statement*, (18 March 2016) point 1: “[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. ... The costs of the return operations of irregular migrants will be covered by the EU”; point 2: “[f]or every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start” [...]; point 3: “[T]urkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect”.

²⁰ See E. Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (2016), <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>.

²¹ Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (hereafter recast Schengen Borders Code) [2016], OJ L 77, p. 1. See the previous version of the Schengen Border Code in force until 2016, Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, p. 1.

prolonged several times and are still in force on various borders.²² These controls do not reveal a spirit of solidarity, but exceed—at least after several prolongations—the limit of what is strictly necessary for security reasons and also exceed the maximum time limit of two years.²³

In September 2015 the European Council adopted two relocation decisions.²⁴ These decisions, which can legitimately be qualified as measures of solidarity in an emergency situation in favour of Greece and Italy, are dealt with in more detail below.²⁵ The legal basis for these decisions is Article 78 (3) TFEU,²⁶ allowing emergency action. Four EU Member States voted against the adoption of the decisions, essentially wishing to block the “sharing” of applicants, and thus refusing to act in a spirit of solidarity.²⁷ As mentioned above two states brought actions of annulment against these decisions.²⁸

II. SOLIDARITY AS A LEGAL BASIS FOR THE COMMON EUROPEAN ASYLUM SYSTEM

The following delineation shows that contrary to the lack of solidarity in practice, the founding treaties and the legal acts establishing the CEAS contain the principle of solidarity as a legal basis and refer to solidarity in

²² See for the state of play of border controls information available at the European Commission website, *Notifications of the Temporary Reintroduction of Border Control: Current Temporarily Reintroduced Border Controls*, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en. See Council Implementing Decision (EU) 2017/818 of 11 May 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk [2017] OJ L 122, p. 73.

²³ See recast Schengen Borders Code, Article 25, para. 1: “[t]he scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat”.

²⁴ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJ L 239 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L 248.

²⁵ See below Section II.2.c.

²⁶ Article 78 (3) TFEU reads: “[i]n the event of one or more Member States being confronted by an emergency situation characterized by a *sudden inflow of nationals of third countries*, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament” (emphasis added).

²⁷ G. Gotev & L. Bednářová & Z. Gabrizova, *Visegrad Countries Oppose Commission’s Revamped Asylum Policy*, EURACTIV (2016), <https://www.euractiv.com/section/justice-home-affairs/news/visegrad-countries-oppose-commissions-revamped-asylum-policy>.

²⁸ *Slovak Republic v. Council of the European Union*, Case C-643/15 in [2016] OJ C38/41 and for *Hungary v. Council of the European Union*, Case C-647/15 in [2016] OJ C 38/43. See Judgment *Slovak and Hungary v. Council*.

the preambles and the texts.²⁹

In EU law, solidarity is mentioned in a number of provisions in the founding treaties, either as a general basis for cooperation, or in a specific context and wording in certain policy areas. Article 2 TFEU enumerates the basic values of the European Union and also highlights that the societies in EU Member States are based on pluralism, non-discrimination, tolerance, justice, equality between women and men and also on solidarity. Solidarity is stressed twice in Title V of the TFEU (area of freedom security and justice), in Article 67 TFEU and especially in Article 80 TFEU. Article 80 TFEU stipulates that solidarity and fair sharing of responsibilities should be the governing principle for all policies in the Chapter on border checks, asylum and immigration.³⁰ This special solidarity clause for the asylum system was only inserted into the TFEU by the Treaty of Lisbon. Though the Council Conclusions constantly stress solidarity³¹ and Article 80 TFEU demands solidarity for the area of international protection, there are no direct mechanisms to implement solidarity in the legal acts establishing the CEAS.

Art. 80 TFEU provides for a possibility to enforce solidarity by legal means. Some commentators argue that Article 80 TFEU does not have the character of a justiciable provision.³² They mainly base their reasoning on a

²⁹ See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337, Recital 9; 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 (recast), [2013] OJ L180/96, Recitals 2 and 5, Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection (Recast), [2013] OJ L 180/60, Recitals 2 and 8, and Dublin III-Regulation, Recitals 7, 8, 9, 22 and 25, as well as Article 34 (for the mechanism on early warning).

³⁰ Article 80 TFEU states: “[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. ...”.

³¹ Since the beginning of the creation of the Common Asylum System, solidarity was demanded by the European Council, and was constantly mentioned and highlighted as the underlying principle by the legislative acts. The Tampere Conclusions and the following Conclusions adopted by the European Council, included solidarity in the development goals for the CEAS. In the Stockholm Programme, the European Council reiterated its commitment to the objective of solidarity by formulating that: “a common area of protection and solidarity, based on a common asylum procedure and a uniform status” should be established by 2012. European Council, The Stockholm Programme—An open and secure Europe serving and protecting citizens, [2010] OJ C 115, p. 1. European Council, Presidency Conclusions: Tampere European Council, 15 and 16 October 1999, para. 4 states: “[t]he aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity”.

³² See D. Thym, *Art. 80 AEUV*, in E. GRABITZ, M. HILF, M. NETTESHEIM (EDS.), *DAS RECHT DER EUROPÄISCHEN UNION: EUV/AUV* (C. H. Beck, 2011).

general assumption that solidarity is solely an underlying value. As Article 80 states: “whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”,³³ it might be legitimate to qualify the provision as justiciable.³⁴ In practice, no cases were brought to the CJEU forwarding this argument, and it is quite unlikely that this will happen, but it could be an option. This provision might be enforced by legal action, especially in cases where states are overburdened, and no rules are foreseen in the legal acts adopted. The most obvious example is the Dublin III-Regulation (or its successor under negotiation, the Dublin IV Regulation),³⁵ which most often allocates responsibility to deal with an asylum claim mainly to the states where persons seeking refuge enter the EU first—these are the states with external borders to the south and east. Since, however, these states agreed to the present allocation system, it seems to be unlikely that an action will be brought before the Court. Italy and Greece agreed to the system and finally accepted the obligations, and unfair balance of responsibilities.

A. *Definition of Solidarity in Public International and European Union Law, Consequences Deriving from the Notion Solidarity*

Though solidarity is the basis for cooperation in the area of freedom, security and justice and is a frequently used notion in public international and EU law in general, it is neither defined in international law treaties, nor in EU primary or secondary law. Especially in international human rights law, solidarity plays an outstanding role and is contemplated to build the basis for the development of third generation human rights.³⁶ These rights can be considered to have a collective or communal nature and are, as such, underpinned by the solidarity principle.

The interpretation of the word solidarity in its ordinary meaning according to Article 31 of the Vienna Convention on the Law of the Treaties³⁷ reveals that solidarity requires working together, sharing of responsibilities and duties, including positive results. In order to get some further indication about the content of the notion, we can use the text of

³³ Article 80 TFEU states: “... Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”.

³⁴ See U. Brandl, *Loyalität und Solidarität in der EU-Asylpolitik*, 70 ZÖR, 491-510, 497 (2015).

³⁵ See below Section III.1.

³⁶ See P. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETHERLANDS INTERNATIONAL LAW REVIEW 307-322 (1982); See also W. KÄLIN & J. KÜNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 32-33 (Oxford University Press, 2009).

³⁷ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

resolutions adopted by the United Nations (UN) General Assembly. UN General Assembly Resolution 59/193 on the “Promotion of a democratic and equitable international order” defines solidarity in an illustrative way. Solidarity is seen as: “a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most”.³⁸ This wording makes clear that solidarity as such is not conditional. It does not *per se* relate areas, which are not otherwise related. The notion does not include bargaining about how to share duties and responsibilities by bringing other areas into play, formulate demands, and even create a link between areas where no conditional relation exists. The only exception is directly related to the content of solidarity, and involves that partners in a solidarity system apply solidarity *whenever it is needed*.

Solidarity requires long-term perspectives. Results of exercising solidarity do not appear immediately, or instantly (with the exception of emergency actions in solidarity systems created to cater for special situations) but only in a mid-term, or even long-term perspective. Only a stable solidarity system can have the desired sustainable results. This interpretation of the term solidarity requires that measures resulting from a solidarity-based approach have to be included into the long term perspectives of EU’s policies in general.

According to the provisions in primary law and according to the interpretation of the term, solidarity is required in the conceptual structure of the CEAS. Thus the system itself should be based on mechanisms which are designed to reach a fair balance of responsibilities.³⁹ Furthermore a mechanism for situations of emergency has to be foreseen, where asylum systems might not work adequately because of extraordinary events, most likely mass arrivals of persons. The legislative acts have to provide for mechanisms which are designed to support state efforts in a first stage of emergency, as well as ultimately solving such situations in a spirit of solidarity. There is no difference between the asylum system and other systems of cooperation and sharing of duties and positive outcomes. As long as a system is in normal use without exceptional pressure, it works. In cases of threats to the system leading to an unfair distribution of duties with

³⁸ UN General Assembly, Promotion of a Democratic and Equitable International Order, 20 December 2004, A/RES/59/193.

³⁹ The CEAS itself is based on mutual trust that the other partners of the system fulfill their human rights, as well as other obligations, arising from the CEAS.

negative consequences for all actors, adequate emergency measures have to be foreseen. These measures must be suitably designed, allowing for their adoption and implementation within a short timeframe.

B. Specific Clauses and Mechanisms for Situations of Emergency

The CEAS legal acts do contain such possibilities to react when situations occur, where asylum systems of states are under extraordinary pressure because of a mass arrival of persons. There are two main possibilities to activate additional mechanisms in such cases of emergency. In practice however, the available possibilities have never been invoked. The only emergency measures adopted were the two relocation decisions from 2015 in favor of Greece and Italy. One could perhaps also qualify the support for the hotspot administration in Italy and Greece as a kind of emergency support.

1. Article 33 Dublin III-Regulation, Exceptional Clause for Early Warning, Preparedness and Crisis Management

The Dublin III-Regulation contains a kind of emergency clause, which was created to allow a reaction in situations of an increased arrival of applicants creating pressure on the asylum system of a Member State. Its Article 33 sets out the mechanism for early warning, preparedness and crisis management. This mechanism provides for that if the Commission establishes that the application of the Regulation may be jeopardised due to a substantiated risk of particular pressure on a Member State's asylum system, it could make recommendations to that Member State.

The Member State should then react by presenting a preventive action plan in order to overcome the pressure. In a second step, a crisis management plan should be established.⁴⁰ The responsibility still lies with this Member State and other Member States are not directly involved. The clause is not a solidarity clause *stricto sensu*, but could be qualified as an exceptional clause, which should prevent that the application of the Regulation may be jeopardised. The clause has not been invoked during the increased arrival in 2015 and 2016.

⁴⁰ See Dublin III-Regulation, Article 33 stating: "where there is a serious risk that the asylum situation in the Member State concerned develops into a crisis which is unlikely to be remedied by a preventive action plan".

2. The Temporary Protection Directive

The EU has a legal act created for situations of mass influx. The Temporary Protection Directive⁴¹ is a pre-Lisbon directive, still containing minimum standards and was adopted on the basis of unanimity in 2001. From the viewpoint of the present author, it would have provided a suitable option to deal with the crisis.⁴² As the full title reveals the granting of temporary protection in the event of a mass influx and measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, encompasses protection, as well as fair sharing of responsibility based on solidarity. The Directive was adopted with the experiences from previous mass influxes of applicants in mind, mainly from Bosnia and Kosovo. Though it was already adopted in 2001, it was never applied in practice. The Commission never proposed its application as it would be necessary for a subsequent Council decision.⁴³

The Directive contains a suitable basis for a distribution key for emergency situations. Temporary protection is defined as: “a procedure of *exceptional character* to provide, in the event of a *mass influx or imminent mass influx of displaced persons from third countries* who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.”⁴⁴ In Article 2 (d), the Directive defines mass influx as: “the arrival [...] 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”.⁴⁵

⁴¹ 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 [2001] OJ L 212 (hereafter Temporary Protection Directive), p. 12.

⁴² See also M. Ineli-Ciger, *Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe*, 18 EJML 1-33 (2016).

⁴³ Temporary Protection Directive, Article 5, para. 1 stating that: “[t]he 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”.

⁴⁴ Temporary Protection Directive, Article 2 (a).

⁴⁵ Temporary Protection Directive, Article 12.

Both the Commission proposal for the Directive, and the Directive itself, contain frequent references to the notion of solidarity, and to the spirit of solidarity that should prevail among Member States. The Directive's Explanatory Memorandum confirms that it should be a tool in the service of the CEAS, based on solidarity between the Member States.⁴⁶

There was not much debate about the reasons why the Directive was not applied during the arrival of increased numbers of applicants in 2014 and 2015. It might be assumed that there was uncertainty about the definition of mass arrival. The main reason seems to be the fact that the Commission did not see a realistic possibility that the Council would adopt a decision to activate it.

There would be certain advantages in activating the temporary protection system, which might—at present—just be estimated since no practice exists. Its application would have lowered the immediate pressure on the capacity of national decision making systems as the granting of a temporary protected status does not require the full assessment of the merits of individual applications. The status would have been granted for a certain period (maximum three years), and meanwhile national asylum systems could be prepared for effectively processing high numbers of asylum applications. A time limited status would have been a convincing argument against potential disagreements regarding the overall volume of protected persons and would have possibly created a higher acceptance by the population. The Directive would allow access to the labour market from the beginning, which would be favourable for the applicants.⁴⁷

There are of course counterarguments to its activation. The granting of a temporary status would only postpone the pressure on national asylum systems. The possibility to work would have created pressure on national systems, and labour market administrations. The necessary integration measures would only start later, and would lower the chances to fully integrate persons who finally stay in the country.⁴⁸

⁴⁶ 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, COM/2000/0303 final [2000] OJ C 311, p. 251.

⁴⁷ See for the rights attached to the temporary protected status, A. Schmidt, *Die vergessene Richtlinie 2001/55/EG für den Fall eines Massenzustroms von Vertriebenen als Lösung der aktuellen Flüchtlingskrise*, 7 ZAR 205-212, at 208 (2015).

⁴⁸ See for an assessment H. Beirens et al., *Study for the European Commission on the Temporary Protection Directive: Final Report* (2016), http://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf.

The Temporary Protection Directive was negotiated carefully. Experience gathered already during the Bosnian and Kosovo crises was taken into account. The Directive was designed for emergency situations and would be a suitable mechanism to react in a spirit of solidarity following a mass arrival of applicants. It is not a long-term solution, but a useful emergency tool. As it has never been applied, it could never prove its utility in practice.

3. Relocation Decisions

The relocation decisions⁴⁹ could legitimately be qualified as measures of solidarity in an emergency situation in favour of Greece and Italy. The legal basis for these decisions, which were adopted in September 2015 is Article 78 (3) TFEU,⁵⁰ allowing emergency action. Decision making under this provisions is based on qualified majority. The initial aim to reach consensus could not be realized. The Council decisions establishing the measures, however, were finally adopted with four states voting against and one state abstaining.⁵¹

According to these decisions, a total of 160,000 persons should be relocated from Italy and Greece to other EU States participating in the CEAS.⁵² Additional co-operation has been foreseen with associated Member States of the European Economic Area, and with Switzerland. These states take part in the ongoing relocation process on a voluntary basis.⁵³ Such a transfer to another state requires that there is mutual trust on each other's asylum systems. The relocation mechanism only applies to those nationals who have an average EU-wide asylum recognition rate equal to, or higher than 75% (basis of EUROSTAT data for the previous quarter). In 2014, two

⁴⁹ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJ L 239 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L 248.

⁵⁰ Article 78 (3) TFEU reads: “[i]n the event of one or more Member States being confronted by an emergency situation characterized by a *sudden inflow of nationals of third countries*, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament” (emphasis added).

⁵¹ Czech Republic, Hungary, Romania, and Slovakia voted against the decisions. See N. Nielsen & E. Zalan, *EU Forces “Voluntary” Migrant Relocation on Eastern States*, EU OBSERVER 41 (2 September 2015), <https://euobserver.com/migration/130374>.

⁵² A set of differentiated integration arrangements regarding the measures of the CEAS applies for the United Kingdom, Ireland and Denmark. Ireland has chosen to opt in the relocation decisions, while the UK and Denmark are not bound by them.

⁵³ European Commission Press release, *Relocation and Resettlement: Commission Calls on All Member States to Deliver and Meet Obligations*, 16 May 2017, IP/17/1302.

nationalities had a recognition rate above 75%: Syrians, and Eritreans. According to the data for the second quarter of 2015, the 75% threshold was passed by Syrians, Eritreans and Iraqis.

The distribution key is based on the size of the population (40%), the total Gross Domestic Product (GDP, 40%), a corrective factor based on the average number of asylum applications per one million inhabitants over the previous five years (10%), and a corrective factor based on the unemployment rate (10%). The first relocation flights took place on 9 October 2015. The Council decisions do not require the consent of asylum seekers to the allocation and there are no remedies against relocation. It seems that it was estimated from the beginning that relocations will in practice only be carried out on a voluntary basis. The measures entail a temporary derogation from the allocation on the basis of the country of first entry rule set out in Article 13 (1) of the Dublin III-Regulation, as well as a temporary derogation from the procedural steps, including the time limits, laid down in Articles 21, 22 and 29 of the Regulation. Article 10 of the decision foresees financial support, a smaller amount for Greece and Italy to cover the transport costs of individual asylum seekers, and a lump sum to be received by the relocating states. Commission reports on the operationalisation of the schemes attest that progress is made, especially compared to the initial slow start of the relocation process. It was however never really realistic to transfer the planned number of 160,000 applicants within the period foreseen.⁵⁴ The relocation process continues even after the initial period of two years elapsed. The Commission reported that as of 4th September 2017 27,700 people have been relocated (19,244 from Greece and 8,451 from Italy).⁵⁵

The CJEU made a number of interesting interpretative statements with regard to the notion solidarity in the judgment dismissing the annulment actions.⁵⁶ The Court again repeated the various documents where solidarity was stressed and where EU Member States were asked to act in a spirit of solidarity towards the mostly effected states Italy and Greece. The Court then concluded that “in the circumstances of this case, there is no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take—on the basis of Article 78 (3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down

⁵⁴ See European Commission, *Fifteenth report on Relocation and Resettlement*, COM (2017) 465 final, 6th September 2017.

⁵⁵ *Ibid.*

⁵⁶ Judgment *Slovak Republic and Hungary v. Council*.

therein—provisional measures imposing a binding relocation mechanism, such as that provided for in the contested decision.”

The judgment confirms that Member States are obligated to participate in the relocation of applicants for international protection. Several states however still refuse to act accordingly and the European Commission initiated proceedings against them.⁵⁷

III. CHANCES FOR IMPROVEMENT OF SOLIDARITY IN THE REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM?

As has been shown above there were massive deficits in the practical exercise of solidarity despite the possibilities already foreseen in the existing legal acts. Since 13 July 2016, when the Commission presented the missing part of the new asylum package under the heading “Reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy” all proposals for recasts of the legal acts are on the table and complex discussions and negotiations in the trilogue system are ongoing.

The proposed legal acts contain one additional solidarity clause—an amended corrective mechanism in the recast of the Dublin Regulation—, which is highly disputed and opposed by some Member States.⁵⁸ Further solidarity provisions are not proposed and it is even questionable whether such additional clauses would add any further value for the improvement of solidarity in the practice of Member States.

A. *Proposal for a Recast of the Dublin Regulation and Relocation Quota*

The Proposal for the recast of the Dublin Regulation (Dublin IV)⁵⁹

⁵⁷ Commission launches infringement procedures against the Czech Republic, Hungary and Poland, Brussels, 14 June 2017, available at http://europa.eu/rapid/press-release_IP-17-1607_en.htm.

⁵⁸ *Österreich und Slowakei gegen Flüchtlingsquoten*, WIENER ZEITUNG (9 January 2018).

⁵⁹ Proposal for a Regulation 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 (recast), (hereafter Proposal Dublin-IV), COM/2016/0270 final, 4 May 2016. Already in 2015, the Commission had proposed a crisis relocation mechanism and an amendment of the recast Dublin Regulation. See Proposal for a Regulation establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless persons, COM/2015/0450 final.

leaves the basics of the allocation system unchanged.⁶⁰ The mechanism for early warning, preparedness and crisis management however shall be replaced by a corrective allocation mechanism (Chapter VII of the proposed Regulation). The corrective allocation scheme is—as far as the criteria for allocation numbers are concerned—similar to the present emergency relocation system, which has been analysed in detail above.⁶¹ The allocation shall be applied for the benefit of a Member State where that Member State is confronted with a disproportionate number of applications for international protection.⁶² Member States would be obliged to accept the quota. The Commission promotes the proposed system as it contains a “reference key to determine when a Member State is under disproportionate asylum pressure” and includes a “fairness mechanism to address and alleviate that pressure”.⁶³

The Proposal intends to establish “a conditionality link between cooperation with the allocation mechanism and the benefit of the European

⁶⁰ See K. Hruschka, *Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission*, EU IMMIGRATION AND ASYLUM LAW AND POLICY (17 May 2016), <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>. The Dublin system as such was never designed as a model reaching a fair distribution of applicants for protection and it has never been an instrument of burden sharing, or solidarity. It creates a direct link between responsibility to deal with an application for international protection and the fact that a state is responsible for the presence of the person in that state (for example illegal entry via external borders, or via issuing residence permits). Alternatives have always been on the table, there was however not any political will to move away from the system as such. During the negotiations of the Dublin II and Dublin III-Regulation other options for the determination of responsibility were discussed; however the system remained as it was originally designed. See Proposal for a Council Regulation 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, COM/2001/0447 final [2001] OJ 304 E 30/10, Explanatory Memorandum, para. 2.2, stating: “[t]he most credible alternative scenario, in which responsibility would depend solely on where the application was lodged, would probably make it possible to set up a clear, viable system that meets a number of objectives: rapidity and certainty; no ‘refugees in orbit’; resolution of the problem of multiple asylum applications; and a guarantee of family unity [...]. However, as the Commission pointed out, it would require harmonisation in other areas [...]. At this stage of the construction of the common European asylum system, there are significant differences between the Member States [...]. It would therefore not be realistic to envisage a system for determining the Member State responsible for examining an asylum application which diverges fundamentally from the Dublin Convention” (emphasis added). [...] As the Commission indicated in its communication “Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum”, COM (2000) 755 final, “a system based on different principles could probably only be envisaged in the context of establishing a common procedure and a uniform status, i.e. at a later stage”.

⁶¹ See above Section II.2.c.

⁶² Proposal Dublin-IV, Article 34.

⁶³ See Committee on Civil Liberties, Justice and Home Affairs, *Reform of the Dublin System*, EU LEGISLATION IN PROGRESS BRIEFING 3 (2017), <http://www.statewatch.org/news/2017/mar/ep-eprs-dublin-reform.pdf>.

Structural and Investment Funds [...] Similarly, it is proposed to incite the border States by linking their performance in controlling the external border with the benefit of the allocation mechanism”.⁶⁴ This reasoning reveals that the solidarity clause is combined with a conditional link to other areas, especially the benefit of the European Structural and Investment Funds. Even if a solidarity system requires that burdens, obligations and benefits are shared and compensatory measures are agreed, it does not legitimize connecting unrelated policy areas.

The Proposal faced harsh criticism from many commentators. Positions in the Council are still diverging. The Parliament adopted a report⁶⁵ with amended criteria and two new features added, which intend to promote acceptance and cooperation on the applicants’ side.⁶⁶

Already in all previous negotiations the Member States with external borders demanded flanking measures preventing prospective applicants from arriving. Many of these measures have been adopted. These include projects on an enhanced co-operation on effective control at the external borders of Member States, airport control, control of the sea borders, exit controls in third states, control of Eastern external land borders, and visa control in Schengen international airports. During the current negotiations again an effective border control is one of the key issues.⁶⁷

B. Other Proposals to Allocate Responsibility and Enhance Solidarity

Quite a number of other proposals for more solidarity have been suggested by academics and practitioners. Some of them have already been considered during the negotiations about previous EU asylum legislation. Among them the proposal to allocate the responsibility to deal with a claim for international protection based on a fixed distribution key (taking various factors into account) is the most prominent one. This system could be

⁶⁴ Proposal Dublin-IV.

⁶⁵ Committee on Civil Liberties, Justice and Home Affairs, “Report on the 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 (recast)”, COM(2016)0270), Rapporteur: Cecilia Wikström, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0345+0+DOC+PDF+V0//EN>, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0345+0+DOC+PDF+V0//EN>.

⁶⁶ F. Maiani, *The Report of the European Parliament on the Reform of the Dublin System: Certainly Bold, but Pragmatic?*, EU IMMIGRATION AND ASYLUM LAW AND POLICY/ODYSSEUS NETWORK (20 December 2017), <http://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic/>.

⁶⁷ Proposal Dublin-IV.

combined with an easier possibility for persons who have been granted a protected status to move to other Member States.⁶⁸

As even the corrective mechanism, which would allow a reaction in case of an increased arrival of applicants in certain Member States, is likely to be not accepted,⁶⁹ such a fixed permanent distribution key seems to be unrealistic in the moment.

The possibility that persons who have been granted asylum or subsidiary protection are allowed to exercise freedom of movement in the EU is suggested in legal literature and seems to be a good option to enhance solidarity. The freedom of movement should be combined with a mutual recognition of the status granted by another Member State.⁷⁰ Mutual recognition has already been suggested by the Commission,⁷¹ Member States however oppose this option.

CONCLUSIONS

The increasing numbers of applicants for international protection in the EU Member States since the end of 2014 demonstrated that Member States only reluctantly act based on solidarity, as stipulated by the TEU and the TFEU, especially by Article 80 TFEU. Escalating numbers greatly challenged a spirit of solidarity in the Common European Asylum System. Despite the existing solidarity clauses in the TEU and TFEU and in the legal acts establishing the CEAS the practical application of solidarity clauses does not work as one could expect in a Common Asylum System.

The CJEU confirmed the importance of solidarity and justified the relocation decisions based on Art. 78 (3) TFEU. Despite the solidarity clauses in primary law and despite the judgment of the CJEU stressing the importance of solidarity, the corrective clause contained in the proposal for a recast of the Dublin Regulation is strictly opposed by several states. The chance for an improvement of the solidarity clauses in the CEAS are limited and it is questionable whether any improvement could be agreed. The conclusion that solidarity requires even a redesign of the asylum instruments

⁶⁸ Mitsilegas argues how the application of the principle of mutual recognition in the field of EU refugee law can contribute towards humanising solidarity in this context. V. Mitsilegas, *Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition*, 24 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 721-739 (2017).

⁶⁹ *Österreich und Slowakei gegen Flüchtlingsquoten*, WIENER ZEITUNG, 9 January 2018.

⁷⁰ V. Mitsilegas, *Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition*, 24 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 721-739, 737 (2017).

⁷¹ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions on an Open and Secure Europe: Making it Happen, COM (2014) 154 final, p. 8.

as such, and possibly of the system's implementation modes is legitimate.⁷² Current negotiations however do not lead to optimistic expectations.

With regard to other areas it is important to stress that the suggested interpretation of the term solidarity requires that solidarity perspectives have to be included into the external dimensions of the CEAS and the external policy in general. Extended development aid aiming to reach sustainable results and improvements for states of origin of migrants, human rights education, establishment of stable administrative structures and elimination of corruption, access to adequate medical treatment and access to education should play a key role within these actions.

Solidarity requires long term perspectives. The benefits of acting on the basis of internal and external solidarity do not appear immediately, or instantly, but only in a mid-term perspective. Co-operation and collective work could help to reach the desired sustainable result. The World Summit where the New York Declaration for Refugees and Migrants⁷³ was adopted revealed several perspectives for a new solidarity between UN Member States, and between various regions. One central aim is to achieve "a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees by adopting a global compact on refugees in 2018". These developments might have a decisive influence on the movement of persons from countries in the crisis regions to Europe.⁷⁴

⁷² As argued by E. Tsourdi, *Solidarity at work? The Prevalence of Emergency Driven Solidarity in the Administrative Governance of the Common European Asylum System*, 24 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 667-686, 675 (2017).

⁷³ UN General Assembly, *New York Declaration for Refugees and Migrants A/71/L.1* (19 September 2016).

⁷⁴ On December 3, 2017, the Trump administration declared to withdraw from the global migration compact process, claiming that it could undermine the sovereignty of the United States. See E. Yayboke, *The Strategic Implications of Exiting the Global Migration Compact Process*, December 22, 2017, available on <https://www.csis.org/analysis/strategic-implications-exiting-global-migration-compact-process>.