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Building Solidarity in the Field of Asylum: From an Abstract Principle to an Effective Policy?

*La construcción de la solidaridad en el ámbito del asilo:
¿De un principio abstracto a una política eficaz?*

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Summary: I. Introduction.—II. Solidarity in international refugee regime: a brief overview. 1. A structural principle and fundamental value. 2. Solidarity crisis and the response of the Global Compact on Refugees.—III. Solidarity in the field of EU asylum law and policy. 1. A general principle, cardinal value and foundation. 2. Solidarity, from an abstract principle to an effective policy on asylum?—IV. Conclusions.

Abstract: Solidarity is widely present in European Union legislation. Several primary law provisions reflect its articulation, simultaneously assuming it as a value, an objective and a principle. Article 80 TFEU provides that the principle of solidarity and fair sharing of responsibility between Member States is the “guiding principle” of all common Union policies on border management, asylum, and immigration. Despite all this, solidarity has so far lacked a clear definition and meaning, appearing rather as an “amorphous concept”. Indeed, political narrative recognises solidarity as “the glue that holds our Union together”. However, in practice and as far as asylum is concerned, the conception according to which “solidarity must be given voluntarily, it must come from the heart, it cannot be forced” seems to prevail.

By critically reviewing the relevant literature and the CJEU’s jurisprudence, this paper pursues a twofold purpose: examining the doctrinal debates on the nature, scope and (abstract or binding) character of the solidarity principle; and gauging the role that the CJEU may be playing towards an effective solidarity, uncovering the constitutional bases that prevent from continuing to treat solidarity, in its multiple manifestations and policy areas, in particular that of asylum, as little less than the stone guest.

Keywords: solidarity principle, Article 80 TFEU, CEAS, solidarity a la carte, CJEU.

Resumen: *La solidaridad está ampliamente presente en la legislación de la Unión Europea. Varias disposiciones de Derecho primario reflejan su articulación, asumiéndola simultáneamente como un valor, un objetivo y un principio. El artículo 80 del TFUE establece que el principio de solidaridad y de reparto equitativo de la responsabilidad entre los Estados miembros es el «principio rector» de todas las políticas comunes de la Unión en materia de gestión de fronteras, asilo e inmigración. A pesar de todo ello, la solidaridad ha carecido hasta ahora de una definición y un significado claros, apareciendo más bien como un «concepto amorfo». En efecto, la narrativa política reconoce la solidaridad como «el pegamento que mantiene unida a nuestra Unión». Sin embargo, en la práctica y en lo que respecta al asilo, parece prevalecer la concepción según la cual «la solidaridad debe darse voluntariamente, debe salir del corazón, no puede ser forzada».*

Mediante la revisión de la pertinente literatura y la jurisprudencia del TJUE, este trabajo persigue un doble objetivo: examinar los debates doctrinales sobre la naturaleza, el alcance y el carácter (abstracto o vinculante) del principio de solidaridad; y calibrar el papel que el TJUE puede estar desempeñando en pro de una solidaridad efectiva, desvelando las bases constitucionales que impiden seguir tratando la solidaridad, en sus múltiples manifestaciones y ámbitos políticos, en particular el del asilo, poco menos que como un convidado de piedra.

Palabras clave: *principio de solidaridad, artículo 80 TFUE, SECA, solidaridad a la carta, TJUE.*

I. Introduction

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity” (Robert Schuman, 1950).

More than any other global risk, the Covid-19 imposed crisis has highlighted and accelerated the urgent need to establish and implement a sort of “pandemocracy”. According to this term’s coiner¹, like all global risks and challenges that may be considered “pandemocratic events”, the coronavirus crisis makes us all equal. At the same time, it reveals existing deep inequalities and generates others (especially socio-economic inequalities between societies) to the point of severely compromising fundamental rights, as well as testing or even undermining democracies, security and peace.

Forced displacement (internal or cross-border) is indeed and can be a real manifestation of this. That is why normative and institutional mechanisms for refugee protection and assistance at national, regional and global levels should shift to forms of cooperative intelligence that “pandemocracy” and the protection of human rights require. This should find in solidarity its necessary expression and cardinal principle.

This text borrows and aligns with the definition of international solidarity in the following terms:

the union of interests or objectives among the countries of the world and social cohesion among them, based on mutual dependence among States and other international actors, in order to preserve order and the very survival of international society, as well as to achieve collective objectives requiring international cooperation and joint action².

While it is widely affirmed and assumed as a structural principle and fundamental value of the international order and of the overall international refugee protection regime, solidarity is generally reduced to a mere political principle of a more or less abstract nature, the implementation of which hinges solely on the discretion and voluntarism of States.

On this basis, using a critical review of the relevant literature and the case law of the Court of Justice of the European Union (CJEU), this paper

¹ Daniel Innerarity, *Pandemocracia: una filosofía de la crisis del coronavirus* (Madrid: Galaxia Gutenberg, 2020).

² Consejo de Derechos Humanos, ‘Derechos humanos y solidaridad internacional. Nota de la Alta Comisionada de las Naciones Unidas para los Derechos Humanos’ (22 Jul 2009) UN Doc A/HRC/12/27, para 3.

seeks, on the one hand, to examine the doctrinal debates on the nature, scope and character (abstract or binding) of the principle of solidarity. On the other hand, it purports to gauge the role that the Court of Justice, through its decisions, may be playing for the construction of an effective solidarity, in particular within the Common European Asylum System (CEAS).

As for structure, this writing is divided into two sections. Without losing sight of the fact that its main interest is in the EU's common asylum policy as envisaged in Article 78 of the Treaty on the Functioning of the European Union (TFEU), it starts by taking a brief look at the invocation of solidarity in the international refugee regime. This is so given that, presumably, there are strengths and weaknesses, synergies and influences (positive and negative) that, in one way or another, may be occurring between the general and regional regimes, in particular that of the EU. The second section examines the extent to which solidarity assumed as general principle, cardinal value and foundation is or is not being translated into effective measures in the field of EU asylum law and policy, and what role the CJEU may be playing in this regard.

II. Solidarity in the international refugee regime: a brief overview

1. *A structural principle and fundamental value*

The term solidarity as such is not explicitly mentioned at all in the core instruments of international refugee law, the 1951 Convention relating to the Status of Refugees (Refugee Convention)³ and the 1967 Protocol thereto⁴. This, however, does not mean that the concept of solidarity is absent from both the spirit and the letter of these legal instruments and the international refugee protection regime. Quite the contrary, it has been present since the very inception of this regime. Indeed, the Refugee Convention recognises in its preamble (recital 4) the international nature and scope of the refugee problem. It correlatively acknowledges that satisfactory solutions to this problem cannot be achieved unless States act in concert in a true spirit of international cooperation.

³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁴ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

This understanding is in line with the notion of solidarity that is consubstantial with the United Nations (UN) itself. In fact, its Charter⁵ establishes as one of the UN's overarching purposes the achievement of international cooperation in solving "international problems of an economic, social or humanitarian character" (Article 1.3). And, accordingly, it provides for the obligation of member States (MMSS) to "take joint and separate action in cooperation" with the UN (Article 56).

In that sense, solidarity has aptly been regarded as a structural principle of international law⁶, along with the principles of human dignity, subsidiarity, equality, sovereignty, proportionality, democracy and the rule of law⁷. Meanwhile, all indications are that, despite its strong moral implications as a value-driven principle, in most of the branches of international law solidarity remains a mere aspiration. Yet, in certain areas, it is deemed to have gained significant levels of implementation⁸. This could be the case in the area of international refugee protection.

That said, in an international society marked by inequalities between States, whose disparity of individual interests often overrides the common good and the collective interest, it is not easy to determine the significance and dimensions (self-centred or altruistic) of solidarity that is predicated of the overall international legal order. This difficulty is not dispelled even by the description of solidarity as a fundamental value essential to international relations, contained in the UN Millennium Declaration in the following terms: "Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most"⁹.

What, at least from a theoretical perspective, is not so difficult to glimpse in this complex, multidimensional and diffuse solidarity concept is its dual addressee: the States and the populations. This is understandable given the fact that "sacrosanct" national sovereignty is eroded by

⁵ Charter of the United Nations (adopted 26 June, entered into force 24 October 1945) 1 UNTS XVI (the UN Charter).

⁶ Rüdiger Wolfrum and Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2010).

⁷ Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), 345-498.

⁸ Holger P. Hestermeyer, 'Reality or Aspiration? – Solidarity in International Environmental and World Trade Law', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, edited by Holger P. Hestermeyer et al. (Martinus Nijhoff 2012), Vol. 1, 45-63.

⁹ United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2, par. 6.

international recognition and protection of human rights, and both stand as constitutional principles of the contemporary international order¹⁰.

On this basis lies the essence of the international paradigm of solidarity, which, in the field of international refugee protection, comprises two levels of manifestation: prescriptive and operational. The first expresses the duty of solidarity with and on behalf of refugees, whereby states must act cooperatively to find appropriate solutions for their protection and assistance. The second, in turn, obliges States to cooperate with each other through effective responsibility-sharing mechanisms to assist communities hosting refugees¹¹. This two-pronged approach to solidarity is usually expressed in terms of responsibility-sharing and burden-sharing, understood as being the two constitutive elements of solidarity.

The prevailing interpretation has been that both terms require two main types of action. On the one hand, providing financial assistance to countries of asylum, to help them care for and maintain refugees. And, on the other hand, the distribution of refugees between states. Hence, whenever it has been possible to implement them, both actions have basically taken the form of two mechanisms: the provision of financial contributions to United Nations High Commissioner for Refugees (UNHCR) to support its mission in countries hosting large refugee flows - usually developing countries which, in 2021 for example, hosted 86% of the world's refugees¹²; and international resettlement.

Convinced of the value of international solidarity as the key to the protection of refugees and the resolution of their problems, the UNHCR¹³ highlights several regional and ad hoc good practice examples, which demonstrate the existence, within the international community, of a general commitment to international solidarity expressed through the above indicated dual mechanism. It also calls for the need not only to learn from such examples of good and successful experiences, but also to give international solidarity a comprehensive approach. As such, this approach should address the causes and consequences of refugee movements, as well as take into account “the economic, environmental, social, political and

¹⁰ José Antonio Carrillo Salcedo, *Soberanía de los Estados y derechos humanos en Derecho internacional contemporáneo* (Madrid: Tecnos, 1995), 21.

¹¹ Salvatore F Nicolosi and Solomon Momoh, ‘International Solidarity and the Global Compact on Refugees: What Role for the African Union and the European Union?’, *Journal of African Law*, 66, 1 (2022): 28, doi:10.1017/S0021855321000528.

¹² United Nations High Commissioner for Refugees (UNHCR), *Global Trends: Forced Displacement in 2021* (16 June 2022), accessed on 28 July 2022, <https://www.unhcr.org/publications/brochures/62a9d1494/global-trends-report-2021.html>.

¹³ UNGA, International solidarity and burden-sharing in all its aspects: national, regional and international responsibilities for refugees (7 September 1998) UN Doc A/AC.96/904.

security implications that refugee and returnee populations have on host countries and countries of origin”. The UNHCR therefore considers that international solidarity programmes aimed at assisting and protecting refugee and returnee populations should be linked to political processes, development and environmental programmes, as well as to peacekeeping and peacebuilding activities, including reconciliation, rehabilitation, reconstruction and reintegration projects¹⁴.

2. *Solidarity crisis and the response of the Global Compact on Refugees*

The above gives rise to acknowledge the significant efforts in both prescriptive and operational solidarity building that, in relation to refugee protection, have so far taken place especially in the regional contexts of the African Union (AU) and the European Union (EU). Thus, while in the African region solidarity has been elaborated and assumed as an institutionalised representation of African humanism, emphasising fraternity, reciprocity and compassion¹⁵, at the EU level solidarity is assumed to be the ‘soul’ of the regional project¹⁶ and, intimately linked to ‘fair sharing of responsibility’, has been established (under Article 80 TFUE) as a guiding principle governing common policies on asylum, immigration and border controls.

In the meantime, such efforts do not appear to have yielded effective and transformative results neither for refugees nor for States hosting them in large numbers. On the contrary, although the global number of refugees and asylum seekers has been rising steadily, reaching 27.1 million and 4.6 million respectively by the end of 2021¹⁷, it would not be appropriate to speak of a refugee crisis. Rather, what we are witnessing is an installed crisis of international solidarity on both a regional and global scale.

The so-called “sanctuary cities”¹⁸ and other significant initiatives promoted by civil society in a number of places around the world, particularly in Europe and the Americas, give rise to the hope that “the

¹⁴ *Ibid.* par. 28.

¹⁵ Nicolosi and Momoh, ‘International Solidarity and the Global Compact on Refugees...’, 33-34.

¹⁶ European Commission, ‘2021 State of the Union Address by President von der Leyen – Strengthening the soul of our Union’ (15 September 2021), accessed on 21 May 2022, https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_21_4701.

¹⁷ UNHCR, *Global Trends: Forced Displacement in 2021*, 2.

¹⁸ See among others David Kaufmann, Nora Räss, Dominique Strebel and Fritz Sager, ‘Sanctuary Cities in Europe? A Policy Survey of Urban Policies in Support of Irregular Migrants’, *British Journal of Political Science* (2021), 1-10, doi:10.1017/S0007123421000326;

future of international solidarity for refugee protection will be coauthored by various actors, not simply constituted through state action”¹⁹. Nevertheless, it seems evident that solidarity based on the states’ action and collective responsibility to protect refugees is experiencing a real crisis. This ultimately results in effective unprotection for the vast majority of asylum-seekers and refugees, as well as the helplessness of States and communities hosting them. In fact, long-term refugee camps and protracted refugees situations have become “normalised” and are no longer uncommon whatsoever. In the meantime, States continue to increasingly adopt and put in place restrictive border closure and migration control policies - including the externalisation of asylum management - with the aim of containing and limiting as much as possible the access of asylum seekers to their territories or, at least, to asylum procedures²⁰. In light of this, Aleinikoff and Zamore²¹ argue that the international refugee regime, designed after the Second World War to provide protection and assistance to people displaced by conflict and violence, is fundamentally broken and in need of urgent reform, placing refugee rights and responsibility sharing for their protection at the heart of this regime.

All that said, it would not be unwise to consider that the acknowledgement of the aforementioned solidarity crisis and the political will affirmation to overcome it was at the origin of the Global Compact on Refugees, which was endorsed by all UN MMSS in December 2018²². Indeed, in its background displayed in paragraphs 1-4, after acknowledging that predicament of refugees is a common concern of humankind, this remarkable document states that it is fundamental to translate the solidarity principle into concrete and practical measures. It also notes that “there is an urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees”, because “refugees and host communities must not be left behind”. Then it notes that, while not legally binding, this Global Compact “represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries”.

Blanca Garcés Mascareñas, ‘Ciudades santuario: una perspectiva global’, *Anuario Internacional CIDOB* (June 2019), 46-52.

¹⁹ Obiora Chinedu Okafor, ‘Cascading toward “De-Solidarity”? The Unfolding of Global Refugee Protection’, *Third World Approaches to International Review*, 2 (2019), 4-5.

²⁰ Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009).

²¹ T. Alexander Aleinikoff and Leah Zamore, *The Arc of Protection: Reforming the International Refugee Regime* (Stanford University Press 2019).

²² UN, *Global Compact on Refugees* (New York: UN, 2018), accessed on 28 July 2022, <https://www.unhcr.org/5c658aed4.pdf>.

Founded on the fundamental principles of humanity and international solidarity, the Global Compact on Refugees “seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities” (paragraph 5). Moreover, it pursues the following four interrelated and interdependent objectives: “(i) alleviating pressures on host countries; (ii) promoting refugee self-reliance; (iii) expanding access to solutions involving third countries; and (iv) fostering conditions in countries of origin conducive to return in safety and dignity” (paragraph 7). These goals are expected to be achieved through the mobilization of political will, a broadened base of support, and arrangements that facilitate more equitable, sustained and predictable contributions among States and other relevant stakeholders.

Designed in the New York Declaration for Refugees and Migrants²³ and integrated into paragraph 10 of the Global Compact on Refugees, the Comprehensive Refugee Response Framework is heralded as “a milestone for global solidarity and refugee protection”²⁴ today. As a multi-stakeholder and whole-of-society approach, it presumably seeks to articulate a major transformation in traditional models of refugee hosting, through the early inclusion of refugees in host communities, enabling them to achieve economic self-reliance and to contribute to the local economy and development.

It is worth noting that, despite their apparent innovative and transformative character, both the Global Compact on Refugees and its companion Comprehensive Refugee Response Framework largely evolved from and were influenced by policies adopted to handle the so-called “refugee crisis” occurred in Europe in 2015 and 2016. In this regard, Crawford and O’Callaghan argue that, while such policies envisage the return of refugees to their countries of origin and resettlement in third countries, the central motivation (and condition) that was and still is behind the solidarity they advocate lies in the local and sustained refugees’ integration in host countries, within their regions of origin and away from destination countries in the Global North²⁵.

²³ New York Declaration for Refugees and Migrants, (19 September 2016) UN Doc A/RES/71/1.

²⁴ UNHCR, *Bringing the New York Declaration to Life. Applying the Comprehensive Refugee Response Framework (CRRF)* (UNHCR, January 2018), accessed on 20 May 2022, <https://www.unhcr.org/593e5ce27.pdf>.

²⁵ Nicholas Crawford and Sorcha O’Callaghan, ‘The Comprehensive Refugee Response Framework Responsibility-sharing and self-reliance in East Africa’, *HPG Working Paper* (ODI September 2019) 1, accessed on 28 July 2022, <https://cdn.odi.org/media/documents/12935.pdf>.

Following this reasoning, we would arguably be witnessing a far-reaching political arrangement on burden- and responsibility-sharing for international protection which, nonetheless, takes no account whatsoever neither the human rights of refugees nor the interests of the poor countries and communities hosting the vast majority of them. In this regard, James Hathaway²⁶ peremptorily considers the Global Compact on Refugees and its Comprehensive Refugee Response Framework to be a pitifully “tepid” response to a reality that demands clear decisive action. It is also a “thin” approach to international protection reform, at a time when it is clear that both refugees and the poor countries that receive most of them deserve and need a robust approach. Hathaway argues that, “rather than proposing, for example, a binding optional protocol to remedy the operational deficiencies of the Refugee Convention, the refugee agency has instead drafted a highly partial Compact, applying to undefined ‘large’ movements of refugees”. And he concludes by stating:

I think we need to call out this ‘Compact’ for what it really is – a ‘cop-out’. We should be clear that we do not need a Compact ‘on’ refugees, in which refugees are simply the object, not the subject, of the agreement. It is high time for a reform that puts refugees – all refugees, wherever located – first, and which recognizes that keeping a multilateral commitment to refugee rights alive requires not caution, but rather courage.²⁷

At this point, it is compelling to note that, even after the Global Compact on Refugees has been “adopted”, the disjuncture that, as Alexander Betts points out²⁸, has existed since the creation of the modern refugee system “between a strongly institutionalised norm of ‘asylum’ and a weakly institutionalised norm of ‘responsibility-sharing’”, still persists, and may even have been reinforced. As Betts notes,

While States’ obligations towards refugees who are within their territory or jurisdiction are relatively clearly defined, States’ obligations to support refugees who are on the territory of another State are much weaker. Consequently, while law has shaped asylum, politics has defined responsibility sharing. This has long led to a major power asymmetry within the refugee system in which geography and proximity to crisis de

²⁶ James C Hathaway, ‘The Global Cop-Out on Refugees’, *International Journal of Refugee Law*, 30(4) (2018), 591, 594, doi:10.1093/ijrl/eeey062.

²⁷ *Ibid.* 604.

²⁸ Alexander Betts, ‘The Global Compact on Refugees: Towards a theory of change?’, *International Journal of Refugee Law*, 30(4) (2018), 623, doi:10.1093/ijrl/eeey056.

facto define State responsibility. Distant donor countries' commitments to provide money or resettlement have been viewed as largely discretionary.²⁹

Building on the above, it appears pertinent to emphasise that international solidarity is a structural principle of the contemporary international legal order and, in particular, of the refugee regime. As such, "this principle is the cornerstone of our responsibility to protect people and uphold their rights", in particular refugees. It is also "an essential component of justice, fairness, equity and equality" and should also be considered "a cornerstone of the construction of international relations in the 21st century"³⁰. Nonetheless, it seems clear that in refugee protection general regime, solidarity has not yet passed the test of being transformed from a mere principle into effective burden- and responsibility-sharing policies. Contingent upon individual States discretion and voluntarism, the operationalisation of the solidarity principle at global level remains an unresolved task. So what is happening in this regard at the EU regional level?

III. Solidarity in the field of EU asylum law and policy

1. *A general principle, cardinal value and foundation*

Similar to what was stated above in relation to the international legal order and the general international refugee regime, solidarity is also widely established and accepted as a value-laden general principle in the EU legal system. A number of its primary law provisions do reflect solidarity legal articulation as a value, an objective and a principle.

In this regard, it should be noted that, after expressing in its preamble (paragraph 6) the States Parties' desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions", in its Article 2 the Treaty on European Union (TUE) acknowledges that along with pluralism, non-discrimination, tolerance, justice, and equality between men and women, solidarity is and should prevail as one of the characteristics of a society that shares values common to the MMSS of the UE. In turn, Article 3 (paragraph 3) TUE provides that the EU "shall promote economic, social and territorial cohesion, and solidarity among Member States".

Solidarity is enshrined in Article 21(1) TEU as one of the guiding principles of the EU's external action. And, in relation to the construction of the

²⁹ *Ibid.* 623.

³⁰ Consejo de Derechos Humanos (n 3) paras 15-19.

common foreign and security policy, Article 24 TEU (paragraphs 2 and 3) proclaims the need for “mutual political solidarity” among MMSS.

Furthermore, in Article 67(2) the TFEU links common asylum, immigration and external border control policies to solidarity between MMSS. What is more, Article 80 TFEU provides that these policies and their implementation “shall be governed by the principle of solidarity and fair sharing of responsibility, including financial responsibility, between the Member States”, the implementation of which shall require the adoption of appropriate measures where necessary.

Article 122 TFEU states that EU decisions in the economic policy area - “in particular if severe difficulties arise in the supply of certain products, notably in the area of energy” - shall be taken “in a spirit of solidarity between Member States”. In the same vein, Article 194 TFEU sets out the so-called “principle of energy solidarity”, which must govern the establishment and functioning of the common energy market.

In addition, by stating that “the Union and its MMSS shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster”, Article 222 TFEU stipulates the so-called “solidarity clause”, which the EU must activate in contexts of crises deriving from terrorist attacks or natural or man-made disasters.

Among the primary law provisions founded on solidarity, mention should also be made of the EU Charter of Fundamental Rights, whose Title IV (Articles 27-38) brings together a number of rights - rights concerned with employment, industrial relations and social and environmental protection - under the heading of solidarity.

In view of the above, solidarity is considered “a regular feature of EU law”, which “plays different roles in different fields, ranging from constitutional-institutional to more substantive functions”. Accordingly, it is also seen as “a proactive means” to give effect to the Treaties’ goals, thus reinforcing economic and social cohesion in the EU³¹.

In reality, it would not be unreasonable to say that there is a broad consensus in both academic, political and judicial spheres around the recognition of solidarity as a founding principle of the EU project and the law thereof. “Solidarity is the glue that holds our Union together,” Jean-Claude Juncker once remarked³². In turn, the Court of Justice of the EU (CJEU), in

³¹ Dirk Vanheule, Joanne van Selm and Christina Boswell, *The implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration* (European Parliament 2011) 6.

³² European Commission, *State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends* (Strasbourg, 14 Sept 2016), accessed on 22 May

its judgment in Case C-848/19 P (*Germany v. Poland*), held that the principle of solidarity is the foundation on which the entire legal system of the Union rests. And as such “it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the EU and the MMSS are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties”³³. Elaborating on this same sense of the recognition of solidarity as a cardinal value of the EU, Advocate General Bot considered that, for this very reason, “the requirement of solidarity remains at the heart of the process of integration pursued by the Treaty of Lisbon”³⁴. Advocate General Sharpston, in turn, asserted that “solidarity is the lifeblood of the European project”. And in an attempt to dismantle the misinterpretation of solidarity as a one-way street, stated:

Through their participation in that project and their citizenship of European Union, Member States and their nationals have obligations as well as benefits, duties as well as rights. Sharing in the European ‘demos’ is not a matter of looking through the Treaties and the secondary legislation to see what one can claim. It also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.³⁵

Notwithstanding the aforementioned consensus in the political and judicial spheres, it should be noted, as Advocate General Campos Sánchez-Bordona does, that there is persistent dissent in the academic debate “between those who refuse to recognise solidarity as having the status of a legal principle (or, at least, as a general principle of law) and those who advocate its status as a constitutional or structural principle, or a general principle of law, closely linked to loyal cooperation, the features of which have been more clearly defined”³⁶.

The key to such debate is whether or not the solidarity underlying various provisions of primary law and expressed both in terms of the “spirit of solidarity” and the “principle of solidarity” is to be understood as a purely political concept and, therefore, not a legal criterion from which rights and obligations for the Union and its MMSS can be directly derived.

2022, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_3043.

³³ Case C-848/19 P *Federal Republic of Germany v. Republic of Poland* [2021] ECR II-598, para 41.

³⁴ Cases C-643/15 and C-647/15 *Slovak Republic, Hungary v Council of the European Union* [2017] ECR II-618, Opinion of AG Bot, para 19.

³⁵ Case C-715/17 *European Commission v Republic of Poland, Republic of Hungary and Czech Republic* [2019] ECR II-917, Opinion of AG Sharpston, para 253.

³⁶ Case C-848/19 P *Federal Republic of Germany v Republic of Poland* [2019] ECR II-218, Opinion of AG Campos Sánchez-Bordona, para 64.

2. *Solidarity, from an abstract principle to an effective policy on asylum?*

In his truly remarkable and famous Declaration, delivered on 9 May 1950, Robert Schuman stated that “Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity”³⁷. It is certainly a founding declaration charged with programmatic strength, from which effective developments in both legislative and political spheres are to be expected. Yes, reading this Schuman’s statement one can easily realise the extent to which, in the aftermath of the Second World War, the mothers and fathers of the EU conceived and devised solidarity as the core and soul, principle and driving force of the Community project. Nonetheless, apparently this declaration has not been enough to avoid a kind of interpretative drift of solidarity as a mere abstract concept, with the result that in almost all EU policy areas, solidarity has often been treated as less than the stone guest.

Such political (mis)treatment of solidarity is to a large extent nourished by the fact that, although it is widely present in legislation and also in the early case law of the Court of Justice, solidarity is characterised by a lack of a clear meaning³⁸. As such, it appears rather as “an amorphous concept” whose contours change according to the legal fields and actors involved, and generating different levels of commitment or lack thereof³⁹. For a long time, the Court of Justice does not seem to have contributed to overcoming this situation, since, although it has used the principle of solidarity in its case law, it has avoided determining its profiles in a general manner, having done so only partially and on an *ad hoc* basis “usually in the context of litigation in which State measures contrary to that principle were being judged”⁴⁰.

The “insistent” assertion of the supposed abstract nature of the principle of solidarity has been particularly evident in the area of common asylum policy. In this regard, it is worth recalling the words of Jean-Claude Juncker, who, while acknowledging that “solidarity is the glue that holds our Union together” and that “the word solidarity appears 16 times in the Treaties that all our Member

³⁷ European Commission, *The Schuman Declaration of 9 May 1950* (Publication Office, 2016), accessed on 27 July 2022, <https://data.europa.eu/doi/10.2775/619932..>

³⁸ The difficulty of inferring from the provisions of primary law “a full and all-encompassing definition of solidarity in EU law” has also been acknowledged by Advocate General Campos Sánchez-Bordona in his aforementioned Opinion on Case C-848/19 P, para 60.

³⁹ Kim Talus, ‘The interpretation of the principle of energy solidarity - A critical comment on the Opinion of the Advocate General in OPAL’, *Energy Insight*, 89 (2021), 1-10, accessed on 23 May 2022, <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2021/04/Insight-89-The-interpretation-of-the-principle-of-energy-solidarity-.pdf> .

⁴⁰ Opinion of AG Campos Sánchez-Bordona (n 37), para 65.

States agreed and ratified”, asserted: “I am convinced much more solidarity is needed. But I also know that solidarity must be given voluntarily. It must come from the heart. It cannot be forced”⁴¹. The Juncker’s declaration obviously adds on to the supposed abstract character of solidarity two other “essential” features, according to its dominant political interpretation: discretionality and voluntarism, which make its assumption and implementation as a legal principle and binding criterion practically impossible.

It should be mentioned that, uttered in the context of managing the misnamed “refugee crisis” and on the eve of the first UN Summit on Refugees and Migrants⁴², Juncker’s words quoted above clearly contradict the binding nature of the decisions on relocation of asylum seekers, which were imposed on 14 and 22 September 2015⁴³ by qualified majority in the European Council against the opposition of the Visegrad Group MMSS and Romania. It is worth recalling that the exceptional arrivals of migrants and applicants for international protection in Italy and Greece in 2015 led the EU institutions to adopt these two concrete measures of solidarity towards these MMSS. Moreover, by adopting them, the aim was to reinforce internal solidarity within the EU and to show the commitment of all EU MMSS to share the migratory burden with the two Mediterranean countries.

Both decisions derogated from the application of certain provisions of Regulation (EU) 604/2013⁴⁴ and obtained their legal basis in Article 78 TFEU, which empowers the EU to adopt laws that benefit MMSS overwhelmed by a sudden influx of asylum seekers, and in Article 80 TFEU, which, let us recall, lays down that such decisions must be governed by the principle of solidarity and fair sharing of responsibility among MMSS.

It appears that, with its recent case law, the Court of Justice has begun to reverse this dominant interpretative trend, which understands solidarity as a mere abstract principle, based on voluntarism and from which no politically and judicially enforceable obligations of any kind derive. In this regard, both the judgment of 2 April 2020 in joined cases C-715/17,

⁴¹ European Commission, *State of the Union Address 2016...* (n 33).

⁴² Held in New York on 19 September 2016, this summit gave rise to the New York Declaration on Refugees and Migrants, which in turn led, in 2018, to the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees.

⁴³ Council Decision (EU) 2015/1523 of 14 September 2015 on the establishment of provisional measures in the area of international protection for Italy and Greece (OJ 2015, L 239/146); 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 (OJ 2015, L 248/80).

⁴⁴ Regulation (EU) 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 2013, L 180, p. 31).

C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* (on the temporary relocation mechanism for applicants for international protection, adopted by the above-mentioned 2015 Decisions)⁴⁵ and the already mentioned judgment of 15 July 2021 in case C-848/19 P *Germany v Poland* are particularly relevant.

Faced with the MMSS of the Visegrad Group (Poland, Hungary, the Czech Republic and Slovakia), which have persistently and decisively refused to comply with the above relocation decisions and even challenged their legality, the Court confirmed the applicability of the duty of solidarity between EU MMSS. The Court of Justice rules that Poland, Hungary and the Czech Republic had failed to fulfil their obligations under EU law by refusing to apply the temporary mechanism for the relocation of applicants for international protection, citing, inappropriately, either their responsibilities for maintaining public order and safeguarding internal security or the alleged malfunctioning and ineffectiveness of that mechanism. It should be emphasised that the Court of Justice considers the temporary relocation mechanism for applicants for international protection in question as an example and concrete expression of the principle of solidarity referred to in Article 80 TFEU. In so doing, the Court of Justice firmly and resolutely upholds the values and principles of the EU, including the principle of solidarity. Furthermore, it seems to establish that the principle of solidarity between MMSS in the area of EU asylum policy can be a source of EU obligations susceptible to judicial enforcement.

Likewise, in case C-848/19 P *Germany v. Poland* (on the principle of energy solidarity), the Court of Justice carries out and fosters a judicial interpretation of the legislation that could be considered historic for three reasons. First, because it rescues the principle of solidarity from vagueness, abstraction and consequent ineffectiveness. Secondly, because it reveals the nature and scope of the principle of solidarity, the correct location of which must be the entire legal system of the Union, within which this principle is called upon to operate and to which it must confer unity and coherence. Third, because this interpretation is in stark contrast to the previous case law of the Court of Justice itself on the principle of solidarity, which seems to have been characterised by a lack of willingness to use arguments of solidarity with firmness and clarity.

The content of the judgment in this case (C-848/19 P) may be summarised basically by stating that the Court of Justice dismisses the appeal brought by Germany in its entirety and does so by refuting its argument concerning the alleged abstract nature of the principle of solidarity. Germany submits that that

⁴⁵ Joint Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic* [2020] ECR-257.

principle is a purely political concept and not a legal criterion from which rights and obligations can be derived directly for the Union and its MMSS. At most, solidarity (applied to the field of the common energy policy) would only determine an obligation of mutual assistance in situations of disaster or crisis. The Court states that this principle underlies the entire legal system of the Union and that it is closely linked to the principle of loyal cooperation. It also considers that the principle produces per se binding effects and that the legality of any act of the Union's institutions and MMSS - forming part of its common energy policy and, by extension, of other policy areas - is to be assessed in light of the principle of solidarity.

IV. Conclusions

Persistent distress suffered by both refugees and the poor communities that host the vast majority of them denotes the existence not of a refugee crisis per se, but rather the existence of a long-standing crisis of international solidarity, both regionally and globally.

Despite their apparent novelty and stated ambition to address this crisis by promoting solidarity in the service of durable and sustainable solutions to refugee and asylum state problems, the Global Compact on Refugees and its Comprehensive Refugee Response Framework seem far from resolving the original major flaw in the overall refugee regime: the absence of a common operational mechanism capable of ensuring the equitable sharing of protection burdens and responsibilities among states. Worse still, both policy arrangements resemble more a 'self-centred solidarity' in favor of the destination countries of the Global North than a solidarity mechanism that puts the human rights of refugees and the interests of poor host countries at its core.

Considering that the solidarity approach adopted in the Global Compact on Refugees and the accompanying Comprehensive Refugee Response Framework largely mirrors the migration policies adopted to address the misnamed 'European refugee crisis' of 2015, there is little room for optimism about the EU's potential contribution to the establishment and effective implementation of a global solidarity system for refugee protection.

Yet, at the regional level, there is room for hope that the interpretative efforts of the Court of Justice could already be promoting the understanding and deepening, assumption and correct enforcement of the principle of solidarity in heterogeneous areas and in its linkage to both horizontal relations (between MMSS, between institutions, between peoples or generations and between MMSS and third countries) and vertical relations (between the Union and its MMSS). In fact, the enormous current and potential challenges facing the EU in areas as diverse and interconnected as the management of

international protection and migration, energy, the fight against the devastating effects of the war in Ukraine, the climate emergency and pandemics, among others, demand no less. Meanwhile, a kind of ‘à la carte’ solidarity that is being forged in the framework of the New Pact on Migration and Asylum, presented by the Commission in September 2020, is perplexing and could continue to weigh down other areas of the EU project. In this sense, the impact of the Court of Justice’s contribution to overcoming the supposedly merely abstract and voluntarist nature of solidarity and the construction of effective solidarity policies in the field of asylum and beyond remains to be seen.

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