

Part III
Transnational Solidarity and EU Migration Governance

Chapter 8 What EU Solidarity in the European Neighbourhood and with whom?

Elsbeth Guild (University of Liverpool)

1 Introduction

In this chapter, I examine the shifting meaning of solidarity in the EU's Common European Asylum System as it relates to neighbouring states. From the perspective of two crises on the EU's external borders: the arrival of asylum seekers from the Syrian, Iraqi and Afghan crises via Belarus and the opening of a Temporary Protection scheme for those fleeing the Russian invasion of Ukraine, the EU has revealed very different approaches driven by geopolitical considerations rather than international refugee law. On the one hand, in categorising the Belarus situation as one of crisis, the EU's response was one seeking to punish the political authorities of Belarus through exceptions to the CEAS (and possibly also international law duties), resulting in severe action against the asylum seekers themselves. In the second case, the EU also found a crisis but opened a temporary protection scheme using, for the first time, a tool designed in 2001 allowing those fleeing the invasion to enter the EU freely and to move to the Member State where they wish to live. What lessons are learned from two crises on the EU's borders and the EU's solidarity response to each of them?

I will examine this question in the following sections: In the first part I examine the meaning of solidarity in the European Neighbourhood and its position in the legal framework regarding third-country nationals and refugees in the Treaty on the Functioning of the European Union (TFEU) (2). Next, are set out the case studies of Belarus-Poland and the Ukraine Temporary Protection scheme the meaning of EU solidarity in the neighbourhood from the perspective of two situations both treated as crises (3). In the next section, I look at the political conditions which have resulted in the very different treatment of the two legal responses to the situations (4). Following this, I regard how fundamental rights may be a form of solidarity (5). In the conclusions, I seek to answer the question posed in this chapter, looking again at the institutional tensions which have resulted in the very different configurations of solidarity in the case studies (6).

2 Solidarity in the legal framework of European Neighbourhood policy

Solidarity is a concept embedded in Article 80 TFEU applicable to all action in the area of borders, migration and asylum.¹ While generally applicable, it comes into its own when the EU is faced with a crisis. As set out in the introduction, crises are both a threat and an opportunity for solidarity. They permit the re-configuration of solidarity as will become apparent in this chapter regarding the use of the concept as regards arrivals of different groups of persons fleeing war towards the EU. The unsettled nature of the concept of solidarity becomes particularly evident when it comes to refugees. The EU's appreciation of the political frameworks which result in people fleeing their countries to seek protection in the EU appears to take precedence over the obligations of EU states, contained in binding international conventions, which constitute elements of solidarity within the international community and are acknowledged within EU law. Key to my analysis here is the flexibility of the content of solidarity as regards its purposes and participants. The scope of solidarity relations discussed in the introduction is central to this chapter. Article 80 TFEU makes clear that solidarity is an essential element of the Common European Asylum System (CEAS) among Member States. Solidarity is also set out in Article 67(2) TFEU, which requires the absence of internal border controls for persons and also frames a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. This provision can be read in different ways, firstly, that solidarity is exclusively among Member States and only fair treatment is required as regards third country nationals or that fair treatment of third country nationals is a form of solidarity among Member States. The later meaning is preferred as it reflects better the objective of abolition of border controls which is premised on third country nationals

1 Article 80 TFEU: "The 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"; Madeline Garlick, 'Solidarity under Strain: Solidarity and Fair Sharing of the Responsibility for the International Protection of Refugees in the European Union' (Dissertation, Radboud University Nijmegen 2016); Jürgen Bast 'Deepening supranational integration: Interstate solidarity in EU migration law' in Andrea Biondi, Eglė Dagilytė and Esin Küçük (eds), *Solidarity in EU Law* (Edward Elgar Publishing, 2018) 114–132; Violeta Moreno-Lax, 'Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy' (2017) 24 *Maastricht Journal of European and Comparative Law* 740–762.

being treated fairly in every Member States and therefore do not move irregularly thereby disrupting the border control free area.

The solidarity of the Member States must also encompass the solidarity expressed in the common undertaking of the CEAS correctly to apply the Refugee Convention. Thus, it includes at least indirectly solidarity with the United Nation's High Commissioner for Refugees (UNHCR) which is the guardian of that convention. Similarly, as the Refugee convention sets out the rights of refugees, which is incorporated into the CEAS, solidarity of Member States to those claiming to be refugees (generally described as beneficiaries of international protection) which is incorporated into the CEAS, solidarity among the Member States to those claiming international protection is essential to the fulfilment of Article 80 TFEU solidarity requirement. For example, Member States must conform to the CEAS obligation contained in a directive to provide reception conditions to everyone seeking international protection. Those reception conditions must ensure a standard of living compatible for the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) (see below on human rights standards). The correct delivery of reception conditions to those seeking international protection is an essential element to intra-Member State solidarity as regards the allocation of responsibility for determining asylum application (the Dublin system). If Member States fail to comply with their duties regarding reception conditions, intra-EU Member State solidarity as regards allocation of asylum seekers cannot be applied.² This constitutes a profound failure of Article 80 TFEU solidarity. This failure has been the basis of a number of legal challenges to the EU policy against persons seeking international protection moving from one host Member State to another in (legitimate) search for CEAS compliant reception conditions.³ In the solidarity language of the CEAS, allocation of asylum seekers to one Member State for determination of their asylum applications is premised on the provision of a common minimum standard of reception conditions applicable across Member States. The failure of delivery of such a common standard is characterised as a 'push' factor whereby the failing Member State off-loads its responsibility onto other Member States by making reception on its territory incompatible with international human and

2 Case C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865 (ECJ, 21 December 2011); *MSS v Belgium and Greece*, App No 30696/09 (ECtHR, 21 January 2011).

3 *ibid.*

fundamental right standards. Turning the language of solidarity around, the failure to provide reception conditions may in certain circumstances entitle the individual seeking international protection to move to another Member State in contradiction of the CEAS rules, because of the duty of the receiving state to provide him/her with solidarity in light of the other Member State's failure to do so.

3 Two Neighborhood Crises: two EU Solidarity responses

3.1 The Belarus Crisis

In June 2021, Lithuania, Poland and Latvia experienced a substantial rise in asylum seekers entering their states across their common borders with Belarus. People mainly coming from Middle Eastern countries⁴ had arrived in Belarus notwithstanding visa requirements.⁵ They appear or it is alleged that the Belarus authorities encouraged them to continue travelling onwards towards EU states, in particularly the three, Lithuania, Poland and Latvia. According to the Commission “this has been initiated and organized by the Lukashenko regime [the leader of Belarus] luring people to the border, with the cooperation of migrant smugglers and criminal networks.”⁶ By November 2021 according to the Commission, 7,698 people had entered the EU via Belarus. This was sufficient for the President of the Commission in her State of the Union address to identify the Belarus action as a hybrid

4 Amnesty International, ‘Poland/Belarus: New evidence of abuses highlights ‘hypocrisy’ of unequal treatment of asylum seekers’ (11 April 2022) <https://www.amnesty.org/en/latest/news/2022/04/poland-belarus-new-evidence-of-abuses-highlights-hypocrisy-of-unequal-treatment-of-asylum-seekers/> accessed 11 November 2022; according to the Commission mainly Iraqi and Afghan nationals were present. According to Eurostat, Iraqi asylum seekers had a 35.6 % protection recognition rate in 2021 and Afghans 64.6 % Eurostat and European Migration Network, *Annual Report on Migration and Asylum 2021: Statistical Annex* (European Union, 2022) <https://ec.europa.eu/eurostat/documents/7870049/14760013/KS-01-22-123-EN-N.pdf/283e6304-acb8-cde1-a09c-6f7a55e7241a?t=1655230090489> accessed 10 November 2022.

5 Ministry of Foreign Affairs Belarus, Visa-free travel, <https://mfa.gov.by/en/visa/freemove/general/> accessed 05 May 2024.

6 European Commission, ‘Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Responding to State-Sponsored Instrumentalisation of Migrants at the EU External Border’ (Joint Communication, 23 November 2021) JOIN(2021)32, 1.

attack to destabilise Europe.⁷ In the Council Conclusions of 21–22 October 2021, it is stated “The EU will continue countering the ongoing hybrid attack launched by the Belarusian regime, including by adopting further restrictive measures against persons and legal entities, in line with its gradual approach, as a matter of urgency.”⁸ This was certainly not the first time the EU has reacted to the arrival of asylum seekers with the claim that migrants are being weaponised by foreign states in the neighbourhood⁹ but it is one which is having long term legislative consequences including the proposed reform of the Schengen Borders Code to include provisions on ‘instrumentalization.’¹⁰ The language of the EU institutions is to claim a crisis requiring inter-Member State solidarity against an illegitimate migration policy of a neighbouring country.

Only a couple of weeks later, on 10 November 2021, UNHCR and IOM issued a joint call for the immediate de-escalation at the Belarus/Poland border to ensure that the safety and human rights of migrants and refugees are upheld. These organisations noted that a number of people seeking to cross the border out of Belarus had died recently and they had received information regarding a group which was blocked at the border in terrible conditions. Their communique stated “UNHCR and IOM remind states of the imperative to prevent further loss of life and ensure the humane treatment of migrants and refugees as the highest priority.”¹¹ This joint call

7 Ursula von der Leyen, ‘State of the Union: Address 2021’ (European Commission, 15 September 2021) https://state-of-the-union.ec.europa.eu/state-union-2021_en accessed 3 January 2023.

8 General Secretariat of the Council, ‘European Council Meeting (21 and 22 October 2021) – Conclusions’ EUCO 17/21 (European Council, 22 October 2021) 6 <https://www.consilium.europa.eu/media/52622/20211022-euco-conclusions-en.pdf> accessed 3 January 2023.

9 Felix Peerboom, ‘Protecting Borders or Individual Rights? A Comparative Due Process Rights Analysis of EU and Member State Responses to ‘Weaponised’ Migration’ (*European Forum*, 17 September 2022) <https://www.europeanpapers.eu/en/europeanforum/protecting-borders-individual-rights-comparative-due-process-rights-analysis-weaponised-migration> accessed 10 November 2022.

10 Vasiliki Apatzidou, ‘Schengen Reform ‘Alternatives’ to Border Controls to Curb ‘Secondary Movements’ (European Forum, 31 July 2022) <https://www.europeanpapers.eu/en/europeanforum/schengen-reform-alternatives-to-border-controls-to-curb-secondary-movements> accessed 10 November 2022.

11 UNHCR, ‘UNHCR and IOM Call for immediate de-escalation at the Belarus-Poland border’ (10 November 2021) <https://www.unhcr.org/neu/70501-unhcr-and-iom-call-for-immediate-de-escalation-at-the-belarus-poland-border.html> accessed 11 November 2022.

was an initiative of the organisations, not requested by the EU institutions. According to NGOs which are following this matter, the safety and well-being of people crossing the border in search of refuge was never properly addressed by any EU institution or agency, (notwithstanding the deployment to the EU-Belarus borders of 104 Frontex officers, 73 EU Asylum Agency staff and two Europol guest officers)¹² and even a year later many asylum seekers are still living in appalling conditions in camps at the border.¹³

From the perspective of the EU, there was no hesitation in finding that there was a crisis which engaged it with (in November 2021) 2,000 people close to the EU border and 15,000 in total stranded in Belarus.¹⁴ The Commission was firm that there was a humanitarian crisis which had been created by Belarus. Thus, Belarus should bear the primary responsibility for addressing it. The Commission notes that Belarus is bound by the Refugee Convention and the principle of non-refoulement therefore it should provide protection to refugees there. UNHCR and other international organisations agreed that there was a crisis but considered that the crisis was not only of Belarus' making but also the result of legislative changes made in Poland to exclude people seeking international protection at the border from being able to make an asylum claim or have it considered.¹⁵

12 European Commission (n 6) 3.

13 Amnesty International (n 4).

14 European Commission (n 6) 3.

15 Among others see: Polish Ombudsman, 'Letter by the Polish Ombudsman to the Polish Minister of Interior' (25 August 2021), <https://bit.ly/3K8KV2> accessed 12 January 2024; Helsinki Foundation for Human Rights, 'The Draft Amendment of the Act on Foreigners and the Act on Granting Them Protection Violate EU Asylum Law Principles – Legal Opinion of the HFHR' (6 September 2021) <https://hfhr.pl/en/news/the-draft-amendment-of-the-act-on-foreigners-and-the-act-on-granting-them-protection-violate-eu> accessed 14 January 2024; OSCE, 'Urgent Opinion on Draft Amendments to the Aliens Act and the Act on Granting Protection to Aliens on the Territory of the Republic of Poland and Ministerial Regulation on Temporary Suspension of Border Traffic At Certain Border Crossings' (10 September 2021) https://www.osce.org/files/f/documents/3/3/498252_0.pdf accessed 12 January 2024; UNHCR, 'UNHCR Observations on the Draft Law Amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)' (16 September 2021) <https://www.refworld.org/docid/61434b484.html> accessed 12 January 2024; Council of Europe Commissioner for Human Rights ('CoE CHR'), 'Commissioner Calls for Immediate Access of International and National Human Rights Actors and Media to Poland's Border with Belarus to End Human Suffering and Violations of Human Rights' (19 November 2021) <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-w>

In the Commission Communication, the same people are called refugees when referring to their presence in Belarus but as potential irregular migrants when referring to the same persons in the EU Member States.¹⁶ In this context, the specter of secondary movement, that these refugees will move from the first Member State of arrival (Poland, Lithuania or Latvia) to another Member State is central. As designated in the document, this unauthorised secondary movement is an enormous problem. The Commission estimates that “over 10,000 detections at the German border with Poland ...can be traced back” to these arrivals in Poland. In response to this problem, the reader is told that the German Federal police and the Polish police were cooperating by patrolling their border area (a Schengen control free border) to detect potential irregular migrants.¹⁷ Thus the problem of secondary movement is implicitly the reason for the temporary reintroduction of border controls between Germany and Poland.¹⁸ The reduction of this secondary movement through the blocking of people (if they might be asylum seekers) within the first Member State where they arrive is the purpose of one of the CEAS cornerstone measures, the Dublin III Regulation. Indeed, the CEAS itself is largely built around the principle that the EU determined according to its own rules where someone should seek asylum and asylum seekers’ efforts to move elsewhere in the EU are to be prevented.¹⁹

ith-belarus-in-order-to-end-hu accessed 12 January 2024; Council of Bars and Law Societies of Europe, ‘CCBE Statement on the Situation at the EU Border with Belarus’ (15 December 2021) https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Statement/EN_MIG_20211215_CCBE-Statement-on-Situation-at-the-EU-border-with-Belarus.pdf accessed 12 January 2024, 3.

16 European Commission (n 6) 2–3.

17 *ibid.*

18 Under the rules of the Schengen Borders Code, Germany has an existing temporary reintroduction of border controls on persons but limited to Secondary movements, situation at the external borders; land border with Austria and while in force since 13 September 2015, it was most recently renewed until 11 November 2022, European Commission, ‘Temporary Reintroduction of Border Control’ https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en accessed 12 January 2024.

19 Francesco Maiani, *The Reform of the Dublin III Regulation: Study for the LIBE Committee*, (European Union, 2016); Daniel Thym, ‘Secondary Movements: Improving Compliance and Building Trust among the Member States?’ in Daniel Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022) 129–148.

The Commission's response to the crisis (notwithstanding the legal challenges – see below), crafted by DG HOME, has been to include in a proposed new Schengen reform package provisions intended to weaken access to asylum determination under the CEAS.²⁰ The particular measures include extending border procedures which permit rapid decision-making attached to expulsion as an exception to the regular asylum procedure and the disapplication of reception conditions requirements during border procedures.

3.2 The Ukraine-Russia Crisis

On 24 February 2022 Russia invaded Ukraine creating a crisis which most observers agree is indeed a crisis for Europe. Here the crisis is not about the dubious behaviour of the ruler of a neighboring country involving what would seem to be about 20,000 (maximum) third country nationals²¹ most coming from countries with high recognition rates as refugees in the EU. In the case of the invasion of Ukraine, for many in the EU there was sense of incredulity, a lack of understanding how this could have come about. Since then there has been much re-writing of recent history of the EU's relationship Russia and Ukraine²² and a terrific volte-face on a policy of integration of energy markets between the two which has left many EU states scrambling for new sources of fuel.²³ On 4 March 2022, the EU opened a temporary protection scheme for people fleeing Ukraine after 24 February (for Ukrainian nationals or long-term residents who are not able to return to their home country). In October 2022, it seems, according to the EU Asylum Agency, that 4.5 million Ukrainians (and others covered by the scheme) have registered as beneficiaries of temporary protection in a Member State. According to UNHCR, more than 7 million people have

20 Costica Dumbrava for European Parliamentary Research Service, 'Revision of the Schengen Border Code' (European Union, April 2022) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729390/EPRS_BRI\(2022\)729390_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729390/EPRS_BRI(2022)729390_EN.pdf) accessed 10 November 2022.

21 Persons who are not nationals of EU Member States nor of the third state facilitating their movement.

22 Aziz Elmuradov, *Russia and EU in the New World Disorder: Revisiting Sovereignty and Balance of Power in the study of Russian Foreign Policy* (Routledge 2022).

23 Laurent A Lambert, 'The EU's natural gas Cold War and diversification challenges' (2022) 43 Energy Strategy Review 100934.

fled Ukraine since the beginning of the war, mainly headed to EU (and associated) states.

According to the Council Implementing Decision, which justified the opening of the temporary protection scheme,²⁴ the measures are based on solidarity with Ukraine. At preamble (3) it states that the invasion undermines European and global security and stability. The invasion constitutes unprovoked and unjustified military aggression against Ukraine and a gross violation of international law and the principles of the UN Charter. The European Council demanded the full respect for Ukraine's territorial integrity, sovereignty and independence within its internationally recognized borders: "In solidarity with Ukraine, the European Council agreed on further sanctions, called for work to be taken forward on preparedness at all levels and invited the Commission to put forward contingency measures."²⁵ Further, the Council states that it is resolute in supporting Ukraine and its citizens faced with an unprecedented act of aggression.

The Temporary Protection Directive²⁶ states that one of the requirements for opening a temporary protection scheme is evidence that there is likely to be a mass influx from the state subject of the scheme towards the EU. The Council Decision examines the evidence commencing with a note that Ukrainian nationals have not been subject to mandatory visa requirements on entry to the EU since 2017. Thus, if pushed, Ukrainian nationals are not faced with the obstacle of obtaining a visa before they can travel to the EU.²⁷ The Decision does not recommend the re-introduction of the visa requirement, which would make departure from Ukraine much

24 Council of the European Union, 'Council Implementing Decision (EU) 2022/382 of 4 March 2022' [2022] OJ L 71/1.

25 *ibid.*

26 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 L212/12.

27 Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine) [2017] OJ L133/1; now replaced by: Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) PE/50/2018/REV/1 [2018] OJ L303/39.

more difficult. It presents the visa-free travel situation as self-evident and immutable.²⁸

The Decision examines arrivals from Ukraine following the 2014 annexation of Crimea concluding that about half of the arrivals will either seek family reunification or employment and the other half will seek asylum. It then estimates that the conflict will give rise to between 2.5 and 6.5 million arrivals of which 1.2 – 3.2 million would apply for asylum.²⁹ Accordingly, the Decision concludes that there is evidence of a likely mass influx. The numbers are so different from the Belarus case that it barely deserves comment (seemingly 0.003 %). As required by the Directive, the Decision concludes that a situation is likely to occur on account of the mass influx that Member States' asylum systems would be unable to process the arrivals without adverse effects on their efficient operation and the situation of those seeking asylum. This is somewhat ironic in light of the heavy criticism of the temporary protection scheme as privileging Ukrainians to the detriment of asylum seekers who hold other nationalities (very few Ukrainians have applied for asylum in Member States though they are entitled to do so under the directive). The argument is that asylum seekers go through a much more harrowing and lengthy procedure, having to struggle to get into the asylum system at all in many Member States, let alone to access benefits which are more limited under the Reception Conditions Directive than under the temporary protection scheme.³⁰ According to the Decision, the whole purpose of the scheme was to take those benefiting under the scheme out of national asylum systems so that they could continue to operate normally, though 'normally' seems to be specifically the problem.

According to the directive, UNHCR must be consulted regularly regarding the establishment, implementation and termination of any temporary

28 The UK did not participate in the 2017 measure lifting visa requirements for Ukrainians. When the invasion occurred while the UK opened its own protection scheme for Ukrainians this has been hugely hampered by the visa requirement, see: Alan Desmond, 'Visas Still Required: The UK Response to the Protection Needs Generated by Russian Aggression in Ukraine' (ASILE Project, 13 April 2022) <https://www.asileproject.eu/visas-still-required-the-uk-response-to-the-protection-needs-generated-by-russian-aggression-in-ukraine/> accessed 14 November 2022.

29 In fact, the numbers have exceeded these estimates.

30 See the ASILE blog series which focuses mainly on this question: Sergio Carrera and Meltem Ineli Ciger (eds), 'EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System' (ASILE Project, April 2022) <https://www.asileproject.eu/eu-temporary-protection-responses-to-the-ukraine-war-and-the-future-of-the-eu-asylum-system/> accessed 14 November 2022.

protection scheme (Article 3(4)). This is an indication of solidarity with the international organization responsible for the protection of refugees generally. While the directive does not require that the EU take UNHCR's advice, it is clear that temporary protection is not merely a matter of internal EU policy but fits into an international framework for the protection of refugees in respect of which UNHCR is the guardian.³¹ The Decision states that UNHCR has welcomed the support of Member States for activating the temporary protection scheme and also for facilitating the sharing of responsibility for people fleeing in Ukraine among the Member States.

One of the more surprising aspects of the Decision is that the Council notes the agreement of the Member States not to apply Article 11 of the directive which is the provision which seeks to prevent secondary movement. When the directive was negotiated, the Dublin system of allocation of responsibility for asylum seekers among the Member States was also in the process of being transformed into a regulation.³² Incorporated into the directive is the principle that beneficiaries of temporary protection will be subject to the 'no secondary movement' principle of the Dublin system. The decision to allow secondary movement of those enjoying protection under the Ukraine scheme is a major departure from EU policy. Since the development of the Dublin system, the EU has maintained that the limitation of consideration of any asylum application to one state only as determined by EU rules is an inherent part of solidarity among Member States.³³ Now under the temporary protection scheme, freedom of choice where to go and where to live in the EU is presented as solidarity among the Member States as well as solidarity with beneficiaries of the scheme.³⁴ Thus one of the logics of the treatment of Syrians and Afghans at the Belarus-Poland/

31 UNHCR, 'About UNHCR: The 1951 Refugee Convention' <https://www.unhcr.org/1951-refugee-convention.html> accessed 14 November 2022.

32 The Dublin II Regulation was adopted in February 2003 while the Temporary Protection Directive was adopted in July 2001.

33 Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' (2017) 24 Maastricht Journal of European and Comparative Law 721; Eleni Karageorgiou, 'The Distribution of Asylum Responsibilities in the EU: Dublin, Partnerships with Third Countries and the Question of Solidarity' (2019) 88 Nordic Journal of International Law 315.

34 Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'' (*EU Migration Law Blog*, 7 March 2022) <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/>; Lucas Rasche, 'Ukraine: A Paradigm Shift for the EU's Asylum Policy? Policy Brief' (*delorscentre.eu*, 23 March 2022) <https://www.delorscentre.eu/en/publications>

Lithuania/Latvia border is that secondary movement transforms refugees into irregular migrants who must be prevented from moving to another Member State and thus is the embodiment of solidarity, is turned on its head. Instead, allowing temporary protection beneficiaries free movement is the expression of solidarity.

4 The Politics of Solidarity in the European Neighborhood

Crises act as triggers for the activation of the language of solidarity and its deployment as a legal and operational tool.³⁵ Two questions arise immediately, first what qualifies as a crisis to activate solidarity tools and secondly what solidarity tools must be activated with neighboring states where refugee rights are at stake? Another chapter in this book will focus on solidarity exercised by civil society actors.³⁶ This chapter focuses on states and the EU as actors and examines the scope of EU solidarity through the question: what solidarity with whom? One of the questions that remains open is what internal divisions within EU institutions resulted in such different approaches set out in the case studies above.³⁷

4.1 The Commission: DG HOME and Member State Interior Ministries concerns

DG HOME, the Commission directorate which deals with interior ministry border, asylum and migration concerns and has its ear close to the borders and immigration departments of the interior ministries of the Member

/detail/publication/ukraine-a-paradigm-shift-for-the-eus-asylum-policy accessed 16 February 2024.

35 Paul McDonough and Evangelia Tsourdi, 'The "Other" Greek Crisis: Asylum and EU Solidarity' (2012) 31 (4) *Refugee Survey Quarterly* 67; Luisa Marin, Simone Penasa and Graziella Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) 22 *European Journal of Migration and Law* 1.

36 See Nora Markard, in this volume.

37 An interesting examination, limited to one EU institution, the European Parliament can be found here: Ariadna Ripoll Servent, 'Failing under the 'Shadow of Hierarchy': Explaining the role of the European Parliament in the EU's 'Asylum Crisis' in Edoardo Bressanelli and Nicola Chelotti (eds) *The European Parliament in the Contested Union: Power and Influence Post-Lisbon* (Routledge 2020) 29.

States, clearly carved out the policy in respect of Belarus, following what has become path dependent behaviour of taking measures against asylum seekers in an effort to punish the leaders of neighbouring countries³⁸ for their actions in assisting the asylum seekers to move. However, the EU's Ukraine response is remarkably different. It appears to have been prepared at the level of the Presidency of the Council, Commission and Parliament sidelining DG HOME but engaging the European External Action Service. At Member State level it is axiomatic that interior and foreign ministries often find themselves at odds. The former is charged with protecting matters within the state while the latter is charged with diplomacy with other states. Borders and migration lie exactly on the fault line between the two, seen by interior ministries as area of security within the state and by foreign ministries as an increasing irritant in international relations. The complexity of the EU's management of the competing interests has been examined by Lavenex in her groundbreaking work.³⁹ I have also touched on this issue in some of my work.⁴⁰

4.2 The Object of Solidarity

In so far as solidarity is concerned, in respect of the Belarus crisis, the EU has been inward looking. Solidarity has been only for EU Member States – the whole of the EU expressing solidarity with the three affected Member States through providing immediate financial and technical support and in the longer term changes to EU law to relax the functioning of various CEAS measures which might be unwelcome to Member States which consider that they are being subject to what the Commission has called a “cruel form of hybrid threat...state sponsored instrumentalization of people for political ends.”⁴¹ EU documents reveal no concern for solidarity with UNHCR, the

38 Cecilia Rizcallah, ‘Facing the Refugee Challenge in Europe: a *Litmus Test* for the European Union: A Critical Appraisal of the Common European Asylum System through the Lens of Solidarity and Human Rights’ (2019) 21 *European Journal of Migration and Law* 238.

39 Sandra Lavenex, ‘Shifting Up and Out: The Foreign Policy of European Immigration Control’ (2006) 29 *West European Politics* 329.

40 Elspeth Guild, ‘The Pitfalls of Migration Diplomacy: The EU Pact and Relations with Third Countries’ in Daniel Thym (ed) *Reforming the Common European Asylum System* (Nomos 2022) 209.

41 Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (n 6).

asylum seekers or Belarus though it does identify that a number of Belarus nationals have been seeking to escape from their country's regime. This seems to be an example of the DG HOME norm where solidarity is not only simply intra-state excluding international organisations and asylum seekers but also intra-EU.

In the EU's response to the Ukraine crisis, little attention (though a fair amount of lip service) appears to have been paid to interior ministry concerns about the numbers of people fleeing and arriving in the EU and the costs of their reception when the policy was developed. The adoption of the Decision establishing the scheme reveals a strong political willingness across the Member States to create a free movement regime for beneficiaries of the Ukrainian scheme in a language rarely heard from interior ministry officials. In the implementation of the temporary protection scheme that has been developed, resources have been deployed with generosity not often seen in the area of asylum seekers' reception.

Indeed, in the fairly closed political world of DG HOME, a 2020 new directions policy entitled the New Pact for Migration and Asylum⁴² precluded the kind of move which the Presidencies of the three main EU institutions adopted in opening the temporary protection scheme. Instead, the Pact proposes the repeal of the temporary protection directive,⁴³ the measure which the Presidencies used to legalise the arrival and reception of those fleeing Ukraine. DG HOME was obliged to take ownership of the Temporary Protection Scheme, though its antagonism to the directive remains strong and, at the time of writing, before the end of the 2024 Commission, it remains committed to its repeal.

The temporary protection crisis remains one of Russian invasion, not the arrival of those needing international protection, as in the case of the Syrian, Iraqi, and Afghan refugee arrivals in 2021 via Belarus, where the crisis was the arrivals of individuals coupled with the behaviour of the leader of a neighbouring state (Belarus) allowing this to happen. The crisis was not the fall of Kabul to the Taliban (on the withdrawal of US and allied

42 European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance between Responsibility and Solidarity' (23 September 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706 accessed 12 November 2022.

43 European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum [23 September 2020] COM/2020/613 final.

forces from the country), or the continuing human rights violations in Syria and Iraq carried out by their authorities.

4.3 The Institutional Setting of Solidarity

The shift of approach from Syria-Belarus to Ukraine is so enormous that it clearly did not come out of DG HOME itself. Instead of arrivals of people fleeing war (civil or otherwise, such as Syrians, Afghans or Iraqis) being seen as a threat to EU internal solidarity, those fleeing the Ukraine invasion are painted as the living face of solidarity with a neighbouring country to be received as an exercise of solidarity among Member States to stabilise that neighbour.

No temporary protection scheme was opened for the Syrians in 2015–2016. Instead, they had to walk across the Balkans to achieve human rights compliant reception conditions most notably in Germany, a main destination. The utter failure of reception in Greece, Italy and elsewhere in Southern Europe created the conditions of crisis for Member States, UNHCR and the people in need of protection. For those fleeing the Russian invasion of Ukraine the policy of open borders and immediate access to reception conditions everywhere stands in stark contrast. The crisis remains one of the Russian invasion not arrival of those needing international protection. Of course, numbers and geography matter. In 2015–2016 about 2 million people arrived in the EU. In the twelve months following 24 February 2022, about 5–6 million people arrived in the EU from Ukraine. Between Syria and the EU, Turkey constitutes the largest single intermediary state through which most people seeking to enter the EU at that time passed. Between Ukraine and the EU there is no ‘buffer’ state along much of the border – access to the EU did not engage transit through a non-EU state (the exception in the Ukraine crisis has been Moldova).

4.4 The Institutional Response to Incoherence

Those within the EU institutions at the highest levels, may have been aware of the incoherence in the policy. When the President of the Commission made her State of Union address in September 2022 she stated: “*Our actions towards Ukrainian refugees must not be an exception. They can be our*

blueprint for going forward. We need fair and quick procedures, a system that is crisis proof and quick to deploy, and a *permanent and legally binding mechanism that ensures solidarity.* And at the same time, we need effective control of our external borders, in line with the respect of fundamental rights. I want a Europe that manages migration with dignity and respect. I want a Europe where all Member States take responsibility for challenges we all share. And I want a Europe that shows solidarity to all Member States. We have progress on the Pact, *we now have the Roadmap.* And we now need the political will to match.” [emphasis added]⁴⁴ The President’s emphasis on solidarity as intra-EU is not however, promising for a wider understanding of the term and indeed, the negotiating positions of the EU legislators on the measures proposed in the Pact do not reflect an inclusive meaning of solidarity.

5 Fundamental Rights as Solidarity in the Neighborhood

In this section I examine the role of fundamental rights in the two crises and how they were incorporated or otherwise in the response and how they relate to solidarity. There are three main frameworks of human rights which apply to the EU and its neighbourhood. First, the EU has developed its own Charter of Fundamental Rights, which is formally connected to the ECHR (Article 6 TEU). There is a system for coherence of the Charter with the ECHR, requiring the interpretation of the Charter never to fall below the standard applicable to the equivalent human rights in the ECHR. However, the Charter only applies to EU Member States. For the 46 countries which are Council of Europe Member States, the ECHR is the regional human rights standard. All of the rights contained in the ECHR are also included in the Charter (though the reverse is not the case). Consistent with the rules of admissibility, individuals (or Member States) which are aggrieved regarding what they considered to be a violation of their human rights may petition the ECtHR to determine their complaint. The interpretation of an ECHR right by the ECtHR has legal consequences for the EU (Article 6 TEU) though the reverse is not the case.

The EU is bound by the Charter, solidarity in the Area of Freedom, Security and Justice must include, for the purposes of ensuring the correct

44 Ursula von der Leyen, ‘State of the Union: Address 2023’ (European Commission, 14 September 2023) https://state-of-the-union.ec.europa.eu/state-union-2022_en accessed 3 January 2024.

delivery of Chapter rights, solidarity among state institutions responsible for monitoring and oversight of human and fundamental rights compliance. These state bodies include ombudspersons, national human rights bodies and national preventive mechanisms (under the Convention against Torture).

As regards the Belarus crisis, the three EU Member States most affected had all declared states of emergency, reinforced their external border controls and called upon their armed forces to act. They also passed emergency legislation resiling from their obligations under the CEAS to accept and determine asylum applications. Specifically, as regards Lithuania, the decree introduced a state of emergency under which no asylum application was admissible by persons coming across the border without authorization. The crossing of the border in such circumstances was illegal, and such persons were subject to immediate detention. Three fundamental rights in particular were at issue: the right to access the territory to seek asylum, access to a fair asylum procedure and the right to liberty of the person except where an interference is lawful, necessary and proportionate. The Commission took no specific action as regards the correct application of the CEAS or its integrity as regards compliance with the Charter. However, an urgent reference was made from a Lithuanian court to the CJEU regarding the compatibility of the emergency legislation with its CEAS obligations which the Court determined in June 2022. It held that the Procedures Directive must be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access, in the territory of that Member State, to the procedure in which applications for international protection are examined (para 75). It further held that the Reception Conditions Directive must be interpreted as precluding legislation of a Member State under which, in the event of a declaration of martial law or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, an asylum seeker may be placed in detention for the sole reason that he or she is staying illegally on the territory of that Member State.⁴⁵

Rather than deal directly with the rule of law crisis raised by the emergency legislation, the Commission offered support to the most affected states through a civil protection mechanism and mobilising additional

45 Case C-72/22 PPU *MA v Valstybės sienos apsaugos tarnyba* EU:C:2022:505, para 93.

funds. The Commission did provide Lithuania with Euros 36.7 million for the purpose of implementing asylum procedures, and reception conditions, including for vulnerable people. Poland and Latvia seem to have been reluctant to access EU aid for these purposes.

The CJEU is not the only supranational court to be engaged by the human rights crisis taking place on the Belarus-Poland/Lithuania/Latvia border. The European Court of Human Rights received in total, between 20 August 2021 and 18 February 2022, 69 requests for interim measures⁴⁶ brought by 270 applicants trapped there. Poland has yet to apply the interim measures. As Belarus is not a member of the Council of Europe, it is not bound by the European Convention on Human Rights (ECHR). But Poland, Lithuania and Latvia are, and thus, the complaints on grounds of violations of rights contained in the ECHR are against them. In the lead case, which has been communicated to Poland, 32 Afghan nationals complain about a breach of Article 3, the prohibition on torture, inhuman or degrading treatment or punishment, and Article 4 Protocol 4, the prohibition on collective expulsion (and Article 13, the lack of an effective remedy) regarding an incident in August 2021.⁴⁷ They claim that they crossed the Belarus-Polish border but were forcibly pushed back to Belarus by Polish border guards. Since that action, they claim to have been stranded between Belarus and Polish border guards in problematic sanitary and humanitarian conditions with no access to an asylum procedure, no remedy, and unable to go back to Afghanistan from which they fled when the Taliban took power.⁴⁸

From the legal challenges and the decision of the CJEU and ECtHR, the question of solidarity with whom becomes somewhat clearer. Both courts found that the treatment of individuals whose asylum claims were not considered and their detention unjustified and constituting inhuman and degrading circumstances was incompatible with the Charter and ECHR. In this way the courts required the states to comply with fundamental and

46 Interim measures can be ordered by the Court in accordance with Rule 39 of its procedures where there is imminent risk of irreparable damage at stake, see: European Court of Human Rights, 'General Presentation of Interim Measures' (*echr.coe*) https://www.echr.coe.int/documents/pd_interim_measures_intro_eng.pdf accessed 14 November 2022.

47 *RA and others v Poland*, App No 42120/21 (ECtHR, introduced 20 August 2021).

48 See Registrar of the Court, 'Court gives notice of 'R.A. v. Poland' case and applies interim measures' (ECHR 283 (2021), 28 September 2021) <https://hudoc.echr.coe.int/eng-press?i=003-7134761-9667819> accessed 16 February 2024.

human rights irrespective of the states' decisions to exclude some persons for the legal framework designed to provide consistency and coherence to these rights. In so far as fundamental rights provide a foundation for equal treatment (one could also have regarding to the relationship of fair treatment and solidarity in Article 67(2) TFEU discussed in the introduction) they also require the exercise of solidarity by states towards individuals. The failure of fundamental and human rights protection constitutes also a failure of solidarity.

6 Conclusions

In this chapter I have examined solidarity in Article 80 TFEU from the perspective of the actors entitled to it. I have identified found possible actors/recipients of solidarity: the EU Member States, (clearly specified in Article 80 TFEU) EU institutions, Member States and international organisations responsible for international conventions on refugee protection (as referred to in the TFEU); EU Member States and third countries dealing with refugee pressures; EU institutions and Member States with persons in need of international protection in accordance with international conventions commitments of all Member States (Commitments to the international community and one another under the CEAS). Examining two refugee situations categorised by the EU institutions as crises, the arrival of Syrians, Iraqis and Afghans at the Belarus/Poland-Lithuania-Latvian borders, and the flight of people out of Ukraine as a result of the Russian invasion, I have sought to parse the inconsistencies in the EU's arguments and choices about the nature of Article 80 TFEU solidarity. While in the former 'crisis' the EU closed its approach to any claims to solidarity wider than that among the Member States for the purpose of excluding people seeking international protection from access to fair asylum procedures, in the second, the invasion of Ukraine, the EU institutions and Member States characterised the crisis as one of Russian aggression and normalised the arrival of people fleeing it through the opening of a temporary protection scheme. The consequence here was equally exclusion from asylum procedures but for Ukrainian temporary protection beneficiaries accompanied by a right of residence, to social benefits, healthcare, housing, labour market access and education. Additionally, temporary protection beneficiaries were immediately entitled to free movement to any Member State and the right to access their temporary protection rights wherever they chose to live. Solidarity

under Article 80 TFEU was designed to include a third country, Ukraine, solidarity with Ukrainian temporary protection beneficiaries being a manifestation of that solidarity. Intra-EU solidarity was completely transformed from requiring the halting of secondary movement of asylum seekers to embracing secondary movement of temporary protection beneficiaries as a means to reduce reception pressure on the first EU Member State of arrival. The EU definitions of crisis and solidarity in the two situations are irreconcilable. Our understanding of these two responses must be examined through the EU institutional frameworks which informed them and by which they were moulded. Yet, by any standards, transnational solidarity has been much better served by the EU response to the invasion of Ukraine than the dubious behaviour of a Belarusian leader in respect of people who really do need international protection in the EU.

In the preceding section, I made reference to the struggles within EU institutions and, in particular, the EU Commission regarding the different definitions of solidarity on evidence in the two crises. I posited the tensions which are generally apparent in Member States between conceptions of security and benefit in interior ministries, which are focused on what happens at internal borders and within them, and foreign ministries, where international relations are at stake and the movement of persons across borders has traditionally been seen as a side issue which only complicates negotiations on more general matters. But within the EU, both are changing. With the rise of DG HOME, the voice of interior ministries and migration concerns have risen in the EU agenda. With the creation of the EU External Action Service, the Member State foreign ministries' monopoly over international relations has been challenged yet further with coordination provided by an EU agency. Efforts within the EU institutions to find equilibria and balances of interests has proven particular difficult not least because of the challenges in defining solidarity and crisis both of which have provided platforms for actors with different conceptualisations of security and EU/national interests to instrumentalise relations with third countries. Rare are examples such as the response to Russian invasion of Ukraine which, on account of their gravity, have led to a consensus in which the interior ministries have accepted a conceptualisation of solidarity and crisis which encompasses both a third country and those in need of protection.