Consiglio Nazionale delle Ricerche

Migration Issues before International Courts and Tribunals

Edited by Giovanni Carlo Bruno
Fulvio Maria Palombino
Adriana Di Stefano

CNR edizioni 2019

National Research Council of Italy
Institute for Research on Innovation
and Services for Development

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14.
THE DUBLIN SYSTEM VIS-À-VIS EU SOLIDARITY BEFORE THE EUROPEAN COURT OF JUSTICE: THE LAW, THE WHOLE LAW, AND NOTHING BUT THE LAW![*]

Giuseppe Morgese

1. – Introduction

The currently pending reform of the Common European Asylum System ('CEAS') in the European Union ('EU') – whose future is still unknown in the 2019-2024 European Parliamentary term – is largely affected by sharp contrasts between the Member States on the reform of the allocation criteria of the so-called 'Dublin

[*] The research has been carried out within the Italian PRIN 2017 "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues". Principal Investigator: Prof. Angela Di Stasi (prot. 20174EH2MR).

BRUNO, PALOMBINO, DI STEFANO (eds.), Migration Issues before International Courts and Tribunals, Rome, CNR Edizioni, 2019, ISBN 978 88 8080 367 6, pp. 381-407.

system',[1] due to the difficulty of finding a mutually acceptable solution to the responsibility-sharing dilemma. The Dublin III Regulation,[2] as its predecessors,[3] set out a strict hierarchy of criteria[4] aimed at figuring out which State is responsible for applications lodged by asylum seekers arrived in the territory of those Member States. Despite some family and sovereignty clauses, the main criterion is indeed the 'State of the first entry' one, either legal or illegal. Due to the actual migration flows in Europe, the problem lies in the fact that the Member States of the first entry are usually those located at the southern external borders (i.e. Greece, Italy, Spain,

[1] See CAGGIANO, "Ascesa e caduta della rotta balcanica. Esternalizzazione contro solidarietà per i richiedenti asilo", *Studi sull'integrazione europea*, 2016, p. 221 ff., p. 235 ff.; DI FILIPPO, "The Reform of the Dublin System and the First (Half) Move of the Commission", SIDIBlog, 12 May 2016, available at: <http://www.sidiblog.org/2016/05/12/the-reform-of-the-dublin-system-and-the-first-half-move-of-the-commission>; MORI, "La proposta di riforma del sistema europeo comune d'asilo: verso Dublino IV?", *Eurojus*, 7 September 2016, available at: <http://rivista.eurojus.it/la-proposta-di-riforma-del-sistema-europeo-comune-dasilo-verso-dublino-iv>; VITIELLO, "Du vin vieux dans de nouvelles outres? Réflexions sur la proposition de reglement 'Dublin IV'", *European Papers - European Forum*, 27 December 2016, available at: <http://www.europeanpapers.eu/en/europeanforum/du-vin-vieux-dans-de-nouvelles-outres-reflexion-sur-la-proposition-de-reglement-dublin-iv>; FAVILLI, "La crisi del sistema Dublino: quali prospettive?", in SAVINO (ed.), *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive*, Napoli, 2017, p. 279 ff., p. 293 ff.; MAIANI, "The reform of the Dublin system and the dystopia of 'sharing people'", *Maastricht Journal of European and Comparative Law*, 2017, p. 622 ff.; MORGESE, "Principio di solidarietà e proposta di rifusione del regolamento Dublino", in TRIGGIANI et al., (eds.), *Dialoghi con Ugo Villani*, Bari, 2017, p. 471 ff.; DE PASQUALE, "Verso la refusione del regolamento 'Dublino III'", *Studi sull'integrazione europea*, 2018, p. 267 ff.; MOSCHETTA, "I criteri di attribuzione delle competenze a esaminare le domande d'asilo nei recenti sviluppi dell'iter di riforma del regime di Dublino", *Federalismi.it*, 2018, No. 5; RIZZA, "La riforma del sistema di Dublino: laboratorio per esperimenti di solidarietà", *Diritto, immigrazione e cittadinanza*, 2018, No. 1; VITIELLO, "The Dublin System and Beyond: Which Way Out of the Stalemate?", *Diritti umani e diritto internazionale*, 2018, p. 463, p. 473 ff.; MORGESE, "Dublin System, 'Scrooge-Like' Solidarity and the EU Law: Are There Viable Options to the Never-Ending Reform of the Dublin III Regulation?, *Diritto, Immigrazione e Cittadinanza*, 2019, No. 3; NICOLOSI, "La riforma del sistema europeo comune di asilo tra impasse negoziale e miopia normativa", *Rivista trimestrale di diritto pubblico*, 2019, No. 2, p. 521 ff.; POLLET, "All in vain? The faith of EP positions on asylum reform after the European elections", *EU Immigration and Asylum Law and Policy*, 23 May 2019, available at: <http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections>.

[2] Regulation (EU) No 604/2013 of the European Parliament and of the Council, of 26 June 2013, OJ L 180, 29 June 2013, p. 31 ff.

[3] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990, OJ C 254, 19 August 1997, p. 1, and Council Regulation (EC) No 343/2003 of 18 February 2003, OJ L 50, 25 February 2003, p. 1.

[4] *Infra*, Section 2.

Malta, Cyprus). As a consequence, the 'First Entry Rule' has put a considerable burden on the latter States over the years.

In this chapter, starting from a legal analysis of both the Dublin III Regulation and solidarity provisions set out in the TFEU (Section 2), attention will be paid to the applicable European Court of Justice ('ECJ' or 'the Court') case-law regarding the possibility to ease the Dublin system's strict allocation criteria in a fairer responsibility-sharing way (Section 3). Attention will be paid to the ECJ pragmatic approach aimed at preserving the overall Dublin system, where on the contrary a sharper approach has been put in place in case of those mandatory solidarity-based provisions adopted in 2015 by the EU Council as a temporary derogation to the Dublin III Regulation itself.

2. – The Legal Framework: The Dublin System and EU Solidarity Provisions in Asylum Matters

The Dublin III Regulation is considered a cornerstone of the CEAS, insofar as its hierarchy of criteria "clearly allocates responsibility for the examination of asylum application".[5] Based on the principles of mutual trust between the Member States and (albeit in principle) equal treatment of asylum seekers in every Member State, the Regulation aims at ensuring that at least one, and only one, Member State shall examine an asylum application,[6] thus removing the possibility of multiple examinations and the risk of positive/negative conflicting decisions.[7] In so doing, Chapter III of the Regulation set out the above mentioned hierarchy of criteria. First of all, where an applicant is an unaccompanied minor, responsibility for examining its application lies with the Member State where a family member, a sibling or a relative is legally present, provided that it is in the best interests of the minor[8] (Article 8). Secondly, responsibility lies with the Member State where the applicant has a family member who is beneficiary of (Article 9) or applicant for (Article 10) international protection.

[5] See European Council, The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4 May 2010, p. 1 ff., para. 6.2.1.

[6] Article 3(1).

[7] See also GARLICK, "The Dublin System, Solidarity and Individual Rights", in CHETAIL, DE BRUYCKER and MAIANI (eds.), *Reforming the Common European Asylum System: The New European Refugee Law*, Leiden-Boston, 2016, p. 159 ff., p. 161.

[8] In the absence of such family members, siblings or relatives, the Member State responsible is the one where the unaccompanied minor has lodged his or her application.

In the absence, the First Entry Rule does apply insofar as the Member State responsible is the one (a) that issued to an applicant a visa or residence document (Article 12), (b) that waived a visa for such applicant (Article 14), (c) whose external borders the applicant has irregularly crossed (Article 13), or (d) in whose international transit area of an airport the application has been lodged (Article 15). Where no Member State can be designed as responsible, the first Member State "in which the application for international protection was lodged shall be responsible for examining it" (Article 3(2), first subparagraph).

It is important to take into account that – except subsequent transfers of competence due to the expiry of specific time limits related to taking charge and tacking back procedures[9] – the hierarchy of criteria set out above may be derogated only in three cases: where a non-responsible Member State independently decide to examine an asylum application ("sovereignty clause": Article 17(1)); where the responsible Member State requests a non-responsible one to take responsibility of an applicant "in order to bring together any family relations, on humanitarian grounds" ("humanitarian clause": Article 17(2)); and where the transfer of an applicant to the responsible Member State proves to be impossible "because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment" (Article 3(2), second subparagraph).[10]

The strict criteria foreseen in the Dublin III Regulation and the lack of a mechanism aimed at redistributing asylum responsibilities between the Member States in a fairer way, especially in cases of massive influx of asylum seekers, have become important shortcomings over time. Leaving aside the question of whether or not each Member State is always able to comply with its fundamental rights obligations even in the case of massive inflow of asylum seekers and, consequently, to what extent the principle of mutual trust enshrined in the Dublin system is suitable of working properly without an intra-EU fair sharing of burdens,[11] we should face with the question whether other EU legal provisions are capable of counterbalancing the negative

[9] Chapter IV, Articles 20-33.

[10] In such case, the non-responsible Member State must continue to examine the criteria in order to find another Member State that can be designated as responsible; in the absence, the former State shall take responsibility. This provision takes into account the Court's decision in the Joined Cases C-411/10 and C-493/10, *N. S. and others*, 21 December 2011, ECLI:EU:C:2011:865 (hereinafter, the "*N.S.* case").

[11] On the topic, see the ECJ decision in the *N.S.* case (cit. *supra*, note 10) further explained *infra*, note 40 and accompanying text.

redistributive impact of the Dublin system criteria.

At first glance, the First Entry Rule seems to be in contrast with the wording of at least two provisions, namely Articles 67(2) and 80 TFEU. Following the former, "[the EU] shall frame a common policy on asylum […] based on solidarity between Member States […]". Such a Treaty provision seems to be *programmatic in nature* insofar as, on the one hand, it stresses the fundamental character of intra-EU solidarity in the common policy on asylum, immigration and external border control but, on the other hand, it says nothing about the resulting obligations on Member States themselves.[12]

In turn, Article 80 TFEU states that "[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle".

It must be pointed out that such a provision – unlike Article 78 – does not contain a stand-alone legal basis for the adoption of EU asylum acts promoting solidarity among the Member States. Indeed, nothing in Article 80 indicates a legislative procedure to be followed[13] or at least the EU Institution(s) competent to adopt non-leg-

[12] See MORGESE, *La solidarietà tra Stati membri dell'Unione europea in materia di immigrazione e asilo*, Bari, 2018, p. 59.

[13] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, 6 September 2017, ECLI:EU:C:2017:631 (hereinafter, the "*relocation* case"), para. 62. See LABAYLE, "Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice", *EU Immigration and Asylum Law and Policy*, 11 September 2017, available at: <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council>; MESSINA, "La Corte di giustizia afferma la validità giuridica del meccanismo provvisorio di ricollocazione obbligatoria dei richiedenti protezione internazionale. A quando la volontà politica di alcuni Stati membri UE di ottemperarvi?", *Ordine internazionale e diritti umani*, 2017, available at: <http://www.rivistaoidu.net/sites/default/files/1_paragrafo_1_CGUE_4_2017.pdf>, p. 603 ff.; OBRADOVIC, "Cases C-643 and 647/15: Enforcing solidarity in EU migration policy", *European Law Blog*, 2 October 2017, available at: <https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy>; PEERS, "A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum- seekers", *EU Law Analysis*, 8 September 2017, available at: <http://eulawanalysis.blogspot.com/2017/09/a-pyrrhic-victory-ecj-upholds-eu-law-on.html>; PENASA, "La relocation delle persone richiedenti asilo: un sistema legittimo, giustificato e … inattuato? Brevi riflessioni sulla sentenza Slovacchia e Ungheria c. Consiglio", *DPCE on line*, 2017/3, available at: <http://www.dpceonline.it/index.php/dpceonline/article/view/451>, p. 735 ff.; RIZZO, "Ricollocazione *infracomunitaria* e principio di solidarietà: un nuovo paradigma per le

islative acts. Given that EU asylum policy and its implementation shall be "governed" by the solidarity principle "whenever necessary" and with "appropriate measures", the material scope of Article 80 seems rather to be supplementary to EU asylum acts adopted pursuant to Article 78. In other words, Article 80 should be understood as an *enabling rule* giving EU Institutions, whenever necessary, the power to supplement asylum acts adopted (or to be simultaneously adopted) following Article 78 TFEU with appropriate solidarity and responsibility-sharing measures.[14] Furthermore, it is not even strictly required to indicate Article 80 TFEU as a joint legal base together with Article 78 TFEU (as the European Parliament suggests),[15] having EU Institutions not made use of such an opportunity so far.[16]

Even though we are dealing with a single principle of solidarity and fair sharing of responsibility, where the latter is a specification of the wider concept of the former,[17]

politiche d'asilo dell'Unione", *La Comunità Internazionale*, 2017, p. 397 ss.; DE WITTE and TSOURDI, "Confrontation on relocation - The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: *Slovak Republic and Hungary* v. *Council*", *Common Market Law Review*, 2018, p. 1457 ss.

[14] See MCDONNELL, "Solidarity, Flexibility, and the Euro-Crisis: Where Do Principles Fit In?", in ROSSI and CASOLARI (eds.), *The EU after Lisbon. Amending or Coping with the Existing Treaties?*, Cham-Heidelberg-New York-Dordrecht-London, 2014, p. 57 ff., p. 66; PEERS et al. (eds.), *EU Immigration and Asylum Law. Volume 3: EU Asylum Law*, Leiden, 2015, p. 14; HAILBRONNER and THYM, "Legal Framework for EU Asylum Policy", in HAILBRONNER and THYM (eds.), *EU Immigration and Asylum Law. A Commentary*, München-Oxford-Baden-Baden, 2016, p. 1023 ff., p. 1044; ROSENFELDT, "The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFEU", 31 March 2017, available at: <https://ssrn.com/abstract=2944116>, p. 10. *Contra* GARLICK, *Solidarity under Strain*, Doctoral Thesis, Radboud University, 19 September 2016, p. 230.

[15] Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 1.

[16] For instance, the so-called "relocation decisions", while indicating Article 80 TFEU in their premises, were only based on Article 78(3) TFEU: see Council Decision (EU) 2015/1523, of 14 September 2015, OJ L 239, 15 September 2015, p. 146 ff.; and Council Decision (EU) 2015/1601, of 22 September 2015, OJ L 248, 24 September 2015, p. 80 ff.

[17] See MORGESE, "Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea", in CAGGIANO (ed.), *I percorsi giuridici per l'integrazione. Migranti e titolari di protezione internazionale tra diritto dell'Unione e ordinamento italiano*, Torino, 2014, p. 365 ff., p. 373; DE BRUYCKER and TSOURDI, "The Bratislava Declaration on migration: European irresponsibility instead of solidarity", EU Immigration and Asylum Law and Policy, 27 September 2016, available at: <http://eumigrationlawblog.eu/the-bratislava-declaration-on-migration>; PAPA, "Crisi dei rifugiati e principio di solidarietà ed equa ripartizione delle responsabilità tra gli Stati membri dell'Unione europea", *Costituzionalismo.it*, 2016, No. 3, p. 287 ff., p. 290; MORANO-FOADI, "Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures", *European Journal of Migration and Law*, 2017, p. 223 ff., pp. 230-231; MORENO-LAX, "Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy", *Maastricht*

it is crucial to stress out that that principle is not further defined in Article 80 or elsewhere in the EU law. What should be meant by 'solidarity'? When can we assume that a responsibility sharing is 'fair'? The lack of definition is actually a major obstacle in finding a proper balance between responsibilities of the Member States under the Dublin system and solidarity among themselves, insofar as the vagueness of the first sentence of Article 80 leaves room for different possible interpretation of the principle. It is no secret that, on the one hand, frontlines Member States ask for more solidarity calling upon, above all, a reform of the Dublin system allocation criteria in a more redistributive way, either by reforming the hierarchy of criteria in order to set aside such a rule or introducing a corrective mechanism capable of mitigating their burdens[18]. On the other hand, the 'Visegrad Group' of Member States (Czech Republic, Hungary, Poland and Slovakia) persistently advocates more responsibility to frontlines Member States and a "voluntary" or "flexible" approach to solidarity,[19] thus refusing to take into account any amendments of those criteria. In general, those Member States less affected by migration flows from third countries are not just enthusiastic to put in place such amendments[20]. In the absence of a clear interpretation of what the principle

Journal of European and Comparative Law, 2017, p. 740 ff., p. 751. *Contra* GRAY, "Surveying the Foundations: Article 80 TFEU and the Common European Asylum System", *Liverpool Law Review*, 2013, p. 175 ff., p. 180.

[18] *Supra* note 1.

[19] Joint Statement of the Heads of Governments of the V4 Countries, Bratislava, 16 September 2016, available at: <https://www.vlada.cz/assets/media-centrum/aktualne/Bratislava-V4-Joint-Statement-final-15h30.pdf>. See also the Slovak Presidency Non-Paper on "Effective Solidarity: a way forward on Dublin revision", November 2016, available at: <http://www.statewatch.org/news/2016/nov/eu-council-slovak-pres-non-paper-dublin-effective-solidarity-11-16.pdf>. See GRAY, *cit. supra* note 17, pp. 182-185; VÉGH, "'Flexible solidarity'. Intergovernmentalism or differentiated integration: the way out of the current impasse", *Visegrad Insight*, 19 December 2016, available at: <https://visegradinsight.eu/flexible-solidarity>; DEN HEIJER, "Corrective allocation or effective solidarity? The Slovak Presidency non-paper on the revision of the Dublin system", *EU Immigration and Asylum Law and Policy*, 10 March 2017, available at: <http://eumigrationlawblog.eu/corrective-allocation-or-effective-solidarity-the-slovak-presidency-non-paper-on-the-revision-of-the-dublin-system>; MORANO-FOADI, *cit. supra* note 17, pp. 240-241. Sometimes, the voluntary approach to solidarity has been stressed also by EU Institutions: see JUNCKER, "State of the Union Address 2016: Towards a better Europe - a Europe that protects, empowers and defends", 14 September 2016, available at: <http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm>.

[20] See for instance KÜÇÜK, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?", *European Law Journal*, 2016, p. 448 ff., p. 453, with respect to the fact that the United Kingdom, Ireland and Denmark decided not to participate in the 2015 relocation agreement (*supra*, note 16).

of solidarity and fair sharing of responsibility means (or should mean), each interpretation can be considered as legitimate in principle.

In my opinion,[21] taking into account the overall solidarity provisions laid down in the EU Treaties together with both the aims of the EU asylum policy and the legitimate expectations of beneficiaries of Article 80 (i.e. the Member States), the term "solidarity" should be understood as a non-selfish way of carrying out that policy. In turn, it means that Member States and EU Institutions should have responsibility both (i) to avoid in advance that other Member States find themselves in trouble and (ii) to give assistance to those Member States facing difficulties or an emergency situation, due to unbalances stemming from the implementation of the CEAS. As part of such a broad notion of solidarity in asylum matters, the concept of 'fair sharing of responsibility' should be intended as the mutual support between the Member States aimed at helping those States most affected by the management of migration flows. If this is true, the single principle referred to in Article 80 TFEU should play a threefold role: (i) a *preventive* one, consisting in prior mutual assistance between the Member States especially in modifying existing EU asylum legislation if necessary, before problems arise; (ii) a *rebalancing* role, consisting in mutual assistance between the Member States in order to counterbalance the existing responsibility-sharing proved to be unfair in difficult cases; and (iii) an *emergency* role, consisting in mutual assistance between the Member States with the aim of providing practical assistance to those Member States facing genuine emergency situations, especially in the case of massive inflows of asylum seekers.

However, even if we agree to the above, the inherent vagueness of the solidarity principle is further accentuated by the fact that, following the second sentence of Article 80, EU asylum law shall contain "appropriate" solidarity measures "whenever necessary". As a result of the wording, the EU Institutions enjoy a wide margin of discretion in deciding whether and to what extent such measures are required. In the absence at least of an objective system of assessment of the Member States' reception capacities, suitable to point out with a certain degree of predictability the fair or unfair nature of the EU asylum law and its implementation (including responsibility allocation provided for in the Dublin system), it must be concluded that Article 80 – read together with the EU (shared) competence under Article 78 – essentially gives the Institutions a huge discretionary power to decide (i) whether or not an EU action in asylum matters is needed due to the inadequacy of corresponding Member

[21] Further explained in MORGESE, *cit. supra* note 12, p. 74 ff.

States' actions, (ii) whether or not such action is likely to affect the Member States in case of difficulties or emergency, and (iii) whether or not one or more preventive, rebalancing or emergency EU solidarity measures are likely to lessen or remove the adverse effect on the Member States. After all, it is not a case that the Institutions have so far decided in a wide discretionary manner whether or not one or more Member States were in a difficult or emergency situation and which kind of solidarity measures (financial, technical or physical) to adopt.

Therefore, it can be stated that Article 80 in itself, insofar as it requires to take appropriate solidarity measures only if necessary, *imposes no positive obligations on the Institutions*: the latter are only allowed but not required to put in place appropriate solidarity measures. Even more, Article 80 in itself *cannot impose positive obligations on the Member States*: firstly, due to the fact that a fairer responsibility-sharing scheme does unavoidably require the adoption of collective measures, one or more Member States acting alone in a spirit of solidarity would bring some relief but not a sustainable solution in the event of inaction at the EU level;[22] secondly, on the contrary, some national unfair measures are currently permitted in accordance with the EU law.[23]

Rather, the principle of *effet utile* lets us to stem from the general aim of Article 80 in itself – i.e. preventing the EU asylum policy and its implementation to be detrimental to the Member States – a *(quite narrow) negative obligation on both the EU Institutions and the Member States*. Indeed, the Institutions should avoid, as far as possible, to take measures that are clearly and entirely in conflict with the core of the solidarity principle as defined above:[24] such a negative obligation would be a sort of 'shield' for the Member States aimed at preventing the adoption of clearly unfair EU asylum acts.[25] Likewise, the Member States should refrain from national conducts

[22] See, for instance, some recent events concerning migrants arrived by sea in Italy and the subsequent relocation agreements between some Member States. See PAPASTAVRIDIS, "Recent 'Non-Entrée' Policies in the Central Mediterranean and Their Legality: A New Form of "Refoulement"?, *Diritti umani e diritto internazionale*, 2018, p. 493 ff.; CARRERA and CORTINOVIS, "Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility?", CEPS Paper in Liberty and Security in Europe, No. 2019-10, available at: <www.ceps.eu>.

[23] See, for instance, those national measures concerning temporary reintroduction of internal border controls, in line with the Schengen Borders Code and aimed at preventing movements of third-country nationals in the Schengen area.

[24] It would be quite a *stand-still obligation* similar to that imposed to the Member States in case of directives that have not yet been implemented: see Case C-129/96, *Inter-Environnement Wallonie*, 18 December 1997, ECLI:EU:C:1997:628, para 45.

[25] See also KÜÇÜK, *cit. supra* note 20, p. 458.

leading to the violation of the negative obligation stemming from Article 80 in itself, provided however that unfair national measures in accordance with the EU law could never be regarded as a violation of such negative duty.[26]

3. – A Pragmatic-But-Not-Bold Approach by the ECJ

So far, the ECJ case-law related to Article 80 TFEU is very limited in number. This is the reason why it is important to review the Court's overall approach to solidarity-related asylum matters. Bringing forward the end of the story, such approach could be seen as pragmatic but certainly not bold,[27] insofar as the Court seems quite determined to keep the EU Institutions' room for manoeuvre safe, and not to impose obligations on the Member States other than those deriving from secondary binding acts adopted by the Institutions themselves.

3.1. – The Limited Role of Article 80 in Itself in Disputes before the ECJ Involving the EU Institutions…

First of all, as regards the possibility for a Member State to bring an action against the Institutions *for failure to act consistently with the principle of solidarity* referred to in Article 80, it should be recalled the Court's case-law on the Institutions' margin of appreciation whenever an open-ended legal provision – and even more a principle as manifold and contested as the solidarity one – involves complex evaluations of a political, economic or social nature, which in turn requires a judicial review limited to the existence of manifest errors of assessment.

For instance, in *Racke* the ECJ stated that "because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily […] be limited to the question whether […] the Council made manifest errors of assessment concerning the conditions for applying those rules".[28] Likewise, in *Vodafone* it has been argued that "in the exercise of the powers conferred on it the [EU] legislature must be allowed a broad discretion in areas in

[26] On the contrary, as discussed below, solidarity-based measures provided for in EU mandatory acts (as the second relocation decisions: *supra*, note 16) are binding for the Member States.

[27] Here I refer to and rephrase the title of a paper of MAIANI and HRUSCHKA, "The Report of the European Parliament on the reform of the Dublin system: certainly bold, but pragmatic?", *EU Immigration and Asylum Law and Policy*, 20 December 2017, available at: <http://eumigrationlawblog.eu/the-report-of-the-european-parliament-on-the-reform-of-the-dublin-system-certainly-bold-but-pragmatic>.

[28] Case C-162/96, *Racke*, 16 June 1998, ECLI:EU:C:1998:293, para. 52.

which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations".[29] Furthermore, in *Star Fruit* the ECJ recalled that, on procedural ground, whenever an Institution "is not bound to [act] but in this regard has a discretion[, it] excludes the right for [the applicant] to require that institution to adopt a specific position" pursuant to Article 265 TFEU.[30]

Due to the fact that the necessity and appropriateness of solidarity measures are left entirely to the discretion of the Institutions in accordance with Article 80, second sentence, then it would be very difficult – if not impossible at all – for a Member State to find out a positive obligation on those Institutions and, as a result, to bring an action for failure not only to adopt a specific solidarity-based measure but also to modify the Dublin III Regulation in a manner consistent with Article 80. Such a conclusion does not seem to be at odds with two Court's statements in the *relocation* case.[31] In para. 252, the ECJ stressed that

> "the Council, when adopting the [EU Council Decision 2015/1601], was in fact required, as is stated in recital 2 of the decision, to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented".

Furthermore, in para. 291, the Court stated that

> "[w]hen one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy".

While the Court apparently claimed the existence of a solidarity obligation on the EU Institutions, the afore-mentioned statements should however be framed in the light

[29] Case C-58/08, *Vodafone and Others*, 8 June 2010, ECLI:EU:C:2010:321 para. 52.
[30] Case 247/87, *Star Fruit v. Commission*, 14 February 1989, ECLI:EU:C:1989:58 para. 11.
[31] *Cit. supra* note 13.

of the overall *relocation* case, dealing with an action for annulment of a binding Council decision establishing a relocation scheme (in temporary derogation to the Dublin III Regulation) on, *inter alia*, the substantive ground of the breach of the principle of proportionality, and where the reference to the solidarity principle was quite secondary.[32] Here, the Court was only asked to state whether or not there had been a manifest error of assessment by the Council in its decision to adopt such a temporary relocation measure, considered as disproportionate by Slovakia and Hungary. In doing so, the ECJ recognised that, before the adoption of the contested decision,

> "the Council found that many actions had already been taken to support the Hellenic Republic and the Italian Republic in the framework of the migration and asylum policy and […] that, since it was likely that significant and growing pressure would continue to be put on the Greek and Italian asylum systems, the Council considered it vital to show solidarity towards those two Member States and *to complement the actions already taken* with the provisional measures provided for in the contested decision" (para. 251).[33]

As a consequence,

> "there [was] no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take – on the basis of Article 78(3) TFEU, read in the light of Article 80 TFEU and the principle of solidarity between the Member States laid down therein – provisional measures imposing a binding relocation mechanism, such as that provided for in the contested decision" (para 253).

In my opinion, it clearly shows that the assumed Council obligation to act consistently with Article 80 (para. 252) has been linked by the ECJ both to the *previous verification of the need to show solidarity* towards those Member States in difficulty (para. 251) and the *assessment of the appropriateness* of the temporary relocation scheme among other possible solidarity measures. In other words, saying that Article 80 TFEU is mandatory only whenever appropriate solidarity measures are necessary is another way to state that the Institutions have a wide margin of appreciation in deciding if and to what extent a solidarity action has to be taken. So, it can be concluded that the Institutions themselves are not bound to act consistently with Article 80, at least as long as such a need has not been previously acknowledged.

[32] See PENASA, *cit. supra* note 13, p. 740.
[33] Emphasis added.

The same ample room for manoeuvre that the Institutions enjoys in deciding when and to what extent to take a solidarity action would prevent one or more Member States to successfully bring an action before the ECJ *for annulment of an act considered to be inconsistent with the principle of solidarity in itself*.

It is true that there is no ruling on the issue yet,[34] but the Court would hardly deviate from its previous case-law in similar cases. For instance, in the *relocation* case, concerning an action for annulment of a solidarity-related measure albeit not based on the breach of Article 80, the Court stressed that "the EU institutions must be allowed broad discretion when they adopt measures in areas which entail choices, in particular of a political nature, on their part and complex assessments".[35] Bearing in mind the above-mentioned negative obligation lying on the Institution to avoid, as possible, measures that would be clearly and entirely in conflict with the core of Article 80,[36] one can assume that *only an act in a very manifest breach of the principle of solidarity might be annulled according to Article 263 TFEU*: i.e., due to its inherent anti-solidarity balance, the lack of any other measures intended to lessen its adverse effect, the non-temporary nature of the contested act or the seriousness of the injury suffered by the applicant State(s), and so on.

The main point at stake is, therefore, whether the Dublin III Regulation could be deemed in a manifest breach of the principle provided for in the Article 80. Despite the fact that the Dublin system constitutes, to a certain degree, the antithesis of solidarity and the result of an unfair responsibility-sharing,[37] it seems nonetheless not so easy to declare its manifestly anti-solidarity nature. On the one hand, the First Entry Rule is not the only criterion for the allocation of Member States' responsibility; on the other hand, the Regulation itself lays down some subsequent responsibility-shifting clauses that allow other Member States to bear responsibility instead of the States of the first entry: one may refer to Article 16 of the Dublin Regulation, according to which the Member States have the obligation to keep together or reunify "dependent"

[34] This is because the *relocation* case was dealing, on the contrary, with an action for annulment of an act assumed to be, in short, too solidarity-based.

[35] *Cit. supra* note 13, para. 124. See also Case C-358/14, *Poland v. Parliament and Council*, 4 May 2016, ECLI:EU:C:2016:323, para. 79.

[36] *Supra*, Section 2.

[37] See MORGESE, *cit. supra* note 17. See also BAST, "Deepening Supranational Integration: Interstate Solidarity in EU Migration Law", *European Public Law*, 2016, p. 289 ff., p. 296, and GARLICK, *cit. supra* note 14, p. 29 ff..

applicants among themselves; or the above-mentioned "sovereignty clause" and "humanitarian clause".[38]

Pending further clarification from the ECJ, the question is therefore whether the latter provisions are enough to counterbalance – or at least to mitigate – those inequalities stemming from the application of the First Entry Rule. If this is the case, one may conclude that the Dublin III Regulation remains fully valid; otherwise, the latter should be deemed as invalid in its entirety. What it seems inadmissible, however, is a declaration of invalidity of the First Entry Rule as such: in that case, there would be a legal void that would not be possible to overcome in an interpretative way; moreover, strictly speaking, it would not result in a fairer responsibility-sharing due to the fact that, in the absence of the First Entry Rule, an increased and unfair responsibility would fall in the end on "the first Member State in which the application for international protection [has been] lodged"[39].

In my opinion, the rationale according to which judicial introduction of a fairer responsibility-sharing system for some Member States would likely result in an unfair one for other States is behind the pragmatic-but-not-bold ECJ case-law aimed at preserving the overall balance of rights and duties laid down in the Dublin III Regulation and, in the end, leaving the EU Institutions a wide political margin for further amendments. Even though such a jurisprudence has been developed following some references for interpretative preliminary ruling according to Article 267 TFEU, its conclusions are relevant also for future direct proceedings.

In *N.S.* – a case concerning the return of an Afghan national from the U.K. to Greece under the Dublin Regulation – the Court stated that the presumption that every Member State as such is safe for asylum seekers cannot be conclusive[40] and

[38] *Supra*, Section 2.

[39] Article 3(2) of the Dublin Regulation.

[40] *N.S.* case, *cit. supra* note 10, para. 103. See MORGESE, "Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso *N.S.* e *altri*", *Studi sull'integrazione europea*, 2012, p. 147 ff.; MORGADES-GIL, "The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?", *International Journal of Refugee Law*, 2015, p. 433 ff., p. 441 ff. In *N.S.*, the ECJ had partly complied with the European Court of Human Rights' case-law referred to in *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011: see ITALIANO, "La protezione dei diritti dei richiedenti asilo nella CEDU e nell'Unione europea non è necessariamente equivalente?", *Gli Stranieri*, 2011, p. 117 ff.; LABAYLE, "Le droit européen de l'asile devant ses juges: précision ou remise en question?", *Revue fran-*

that, as a consequence, a Member State should not transfer asylum seekers to the responsible Member State where there are substantial grounds for believing that asylum seekers would face a real risk of being subjected to inhuman or degrading treatment in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State.[41] *Inter alia*, the Court stressed that such a rule could be derived from the fact that "Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States".[42]

That very short reference to Article 80 in *N.S.* has been welcomed as an (albeit indirect) example of a solidarity-based interpretation of the Dublin Regulation[43]. However, from the purely incidental reference to Article 80, one can conclude that in the *N.S.* case the Court has only limited the automatic adverse effects of the Dublin system on the protection of asylum seekers' human rights, where a fairer responsibility-sharing among the Member States were just an indirect, quite accidental secondary effect:[44] in fact, should the Member State concerned by the *N.S.* rule be not a frontline one (unlike Greece in the *N.S.* case), such a case-law would have, on the contrary, anti-solidarity effects also for overloaded frontline States, insofar as they would be forced to "continue to examine the criteria set out in [the Dublin Regulation] in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application"[45] and, where necessary, to "examine the application in accordance with the procedure laid down in Article 3(2)" of that Regulation.

In *Cimade and GISTI*,[46] also the financial burden-sharing resulting from asylum-seekers' minimum reception obligations held by the Member States following the

çaise de droit administratif, 2011, p. 273 ff., p. 287 ff.; MARCHEGIANI, "Regolamento 'Dublino II' e Convenzione europea dei diritti umani: il caso *M.S.S.* c. *Belgio* e *Grecia*", *Studi sull'integrazione europea*, 2011, p. 357 ff.

[41] *N.S.* case, *cit. supra* note 10, para. 106.

[42] *Ibid.*, para. 93.

[43] See GRAY, *cit. supra* note 17, p. 179; CASOLARI, "EU Loyalty After Lisbon: An Expectation Gap to Be Filled?", in ROSSI and CASOLARI (eds.), *cit. supra* note 14, p. 93 ff., p. 126; MITSILEGAS, "Solidarity and Trust in the Common European Asylum System", *Comparative Migration Studies*, 2014, No. 2, p. 181 ff., p. 190.

[44] See also ROSENFELDT, *cit. supra* note 14, p. 5.

[45] *N.S.* case, *cit. supra* note 10, para. 107.

[46] Case C-179/11, *Cimade and GISTI*, 27 September 2012, ECLI:EU:C:2012:594.

Dublin system has been left untouched by the ECJ. The reference for a preliminary ruling concerned the interpretation of the so-called Reception Directive[47] on the issue whether or not the obligation, incumbent on the Member State of the first reception, to guarantee the minimum reception conditions ceased at the moment of the acceptance decision by the Member State to which the applicants were to be transferred under the Dublin system and, in particular, which Member State should assume the financial burden of providing the minimum reception conditions during the period between the decision of a Member State to call upon another Member State considered responsible (or the latter's acceptance decision) and the effective transfer. The Court, recalling that a Member State of the first reception has to grant the minimum reception conditions until applicants have actually been transferred to another Member State,[48] stated that the related financial burden "is usually assumed by the Member State which is subject to the obligation to satisfy those requirements […] unless European Union legislation provides otherwise",[49] irrespective of other solidarity-based burden-sharing than those possible financial assistance instruments provided for in the EU law itself.[50]

The Court's pragmatic approach is also present in *Halaf*,[51] a case concerning a reference for preliminary ruling on the interpretation, *inter alia*, of the "sovereignty clause".[52] Called upon to rule on whether such a clause could be interpreted to be in line with Article 80 TFEU in the absence of any other solidarity provisions, the ECJ has merely stressed that "the exercise of that option is not subject to any particular

[47] Council Directive 2003/9/EC of 27 January 2003, OJ L 31, 6 February 2003, p. 18, now replaced by Directive 2013/33/EU of the European Parliament and of the Council, of 26 June 2013, OJ L 180, 29 June 2013, p. 96.

[48] *Cimade and GISTI*, *cit. supra* note 46, para. 58.

[49] *Ibid.*, para. 59.

[50] *Ibid.*, para. 60, according to which "[i]t should furthermore be added that, with a view to responding to the need to share responsibilities fairly between Member States as concerns the financial burden arising from the implementation of common policies on asylum and immigration – a need which can in particular manifest itself in the case of major migration flows – the European Refugee Fund […] provides for the possibility of financial assistance being offered to the Member States with regard, inter alia, to reception conditions and asylum procedures".

[51] Case C-528/11, *Halaf*, 30 May 2013, ECLI:EU:C:2013:342.

[52] *Supra*, Section 2.

condition",[53] thus simply avoiding to provide a response on the submitted question from the referral court.[54]

The ECJ's will to preserve the overall balance of the Dublin system is even more clear in those decisions issued after the 2015 refugee crisis. In *X. and X.*,[55] a case concerning some Syrian nationals that had submitted applications for visas with limited territorial validity on humanitarian grounds ("humanitarian visas") at the Belgian Embassy in Beirut on the basis of Article 25(1)(a) of the Visa Code,[56] with a view to applying for asylum immediately upon their arrival in Belgium, the Court highlighted that the Member States are not obliged to issue such visas. Due to the fact that "no measure has been adopted, to date, by the EU legislature […] with regard to the conditions governing the issue by Member States of long-term visas […] on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law".[57] It is of paramount importance to note that, in the ECJ's view, a different conclusion would allow "third-country nationals to lodge applications for [humanitarian visas] in order to obtain international protection in the Member State of their choice, *which would undermine the general structure of the system established by [the Dublin Regulation]*".[58]

An even more unequivocal reasoning – maybe a closing one – can be found in the *A.S.* and *Jafari* cases,[59] where the Court stated that the Dublin system cannot be

[53] *Halaf*, *cit. supra* note 51, para. 36.

[54] KÜÇÜK, *cit. supra* note 20, p. 464.

[55] Case C-638/16 PPU, *X and X*, 7 March 2017, ECLI:EU:C:2017:173. See CAGGIANO, "Are You Syrious? Il diritto europeo delle migrazioni dopo la fine dell'emergenza alla frontiera orientale dell'Unione", *Freedom, Security & Justice: European Legal Studies*, 2017, No. 2, p. 7 ff., pp. 14-16; CELLAMARE, "Sul rilascio di visti di breve durata (VTL) per ragioni umanitarie", *Studi sull'integrazione europea*, 2017, p. 527 ff.; DEL GUERCIO, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", *European Papers - European Forum*, 12 maggio 2017, available at: <http://www.europeanpapers.eu/en/europeanforum/la-sentenza-x-e-x-della-corte-di-giustizia-sul-rilascio-del-visto-umanitario>; FAVILLI, "Visti umanitari e protezione internazionale: così vicini così lontani", *Diritti umani e diritto internazionale*, 2017, p. 553 ff.

[56] Regulation (EC) No 810/2009 of the European Parliament and of the Council, of 13 July 2009, OJ L 182, 29 June 2013, p. 1.

[57] *X. and X.* , *cit. supra* note 55, para. 44.

[58] *Ibid.*, para. 48 (emphasis added). Therefore, no relevance has been given to the opposite Opinion of the Advocate General: see Case C-638/16 PPU, *X and X* (Opinion), 7 February 2017, ECLI:EU:C:2017:93, para. 174.

[59] Case C-490/16, *A.S.*, 26 July 2017, ECLI:EU:C:2017:585, and case C-646/16, *Jafari*, 26 July 2017, ECLI:EU:C:2017:586. See DI STASIO, "Il 'sistema Dublino' non è derogabile: note a margine della sentenza della Corte di giustizia del 26 luglio 2017, causa C-646/2016, Jafari", *Dirittifondamentali.it*, 2017,

derogated even in the event of a massive refugee crisis. The issues at stake concerned some Syrian and Afghanistan nationals that, after having entered Europe from Turkey during the refugee crisis of the summer of 2015, taken the so-called "Western Balkan route", crossed some other Member States' borders and here lodged their asylum applications. National asylum authorities refused to examine (in the *A.S.* case) or rejected (in the *Jafari* case) those applications on the ground that the State of the first entry was Croatia: such a Member State, indeed, faced with the arrival of an unusually large number of third-country nationals seeking transit through its territory in order to lodge an application for international protection in other Member States, had simply tolerated the entry of such nationals who do not fulfilled the entry conditions. Moving away from the Advocate General's Opinion,[60] in the Court's reasoning even a refugee crisis must be seen as an 'ordinary' irregular crossing situation under the Dublin III Regulation, "irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals".[61] Unambiguously, the ECJ concluded that "[t]he fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection *cannot affect the interpretation or application of […] the Dublin III Regulation*".[62]

As to the main question of whether or not the Dublin system is enough solidarity-based, the Court in *Jafari* also recalled that, on the one hand, there is a "direct link between the responsibility criteria established in a spirit of solidarity and common efforts towards the management of external borders, which are undertaken […] in the interest not only of the Member State at whose external borders the border control is carried out but also of all Member States which have abolished internal border

No. 2, 4 September 2017, available at: <http://www.dirittifondamentali.it/fascicoli/anno-2017/numero-22017/c-di-stasio-il-sistema-dublino-non-è-derogabile-note-a-margin>; FERRI, "Il regolamento 'Dublino III' tra crisi migratoria e deficit di solidarietà: note (dolenti) sulle sentenze Jafari e A.S.", *Studi sull'integrazione europea*, 2018, p. 519 ff.; THYM, "Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: *Jafari*, *A.S.*, *Mengesteab* and *Shiri*", *Common Market Law Review*, 2018, p. 549 ff.

[60] Cases C-490/16, *A.S.*, and C-646/16, *Jafari* (Opinion), 8 June 2017, ECLI:EU:C:2017:443, para. 262: see CAGGIANO, *cit. supra* note 55, p. 16 ff.

[61] *Jafari*, *cit. supra* note 59, para. 92.

[62] *Ibid.*, para. 93 (emphasis added).

control";[63] and that, on the other hand, in the event of massive influx of asylum seekers, *the demand of solidarity under the Article 80 could be met by other means than interpretative derogations of the Dublin III Regulation*, such as the enactment of the sovereignty clause,[64] the mechanism for early warning, preparedness and crisis management,[65] the mechanism provided for in the Temporary Protection Directive[66] and those provisional measures that could be adopted under Article 78(3) TFEU.[67]

It is apparent that the Court does not seem willing to change its mind, as recently stated in *X.*: indeed, while the Advocate General recalled that "the automatic nature of the transfer of responsibility is difficult to reconcile with the principles of sincere cooperation and solidarity between Member States underpinning the Common European Asylum System and the Dublin III Regulation",[68] the Court concluded in brief that "this is a result of the choices made by the EU legislature".[69]

In view of the above, even the option for the Member States not to comply with the Dublin Regulation – like any other EU asylum binding provision – as a reaction to the lack of solidarity by the Institutions does not seem a feasible one.

Indeed, the fact that the Member States cannot act upon the *inadimpleti non est adimplendum* rule as a reaction against unfair EU asylum provisions stems from the mere conclusion that such conduct would constitute a breach of the principle of loyalty according to Article 4(3) TEU. Following the latter, the Member States are bound to take all the appropriate measures to implement EU obligations and facilitate the fulfilment of Institutions' tasks, in addition to avoiding undermining the implementation of the EU common objectives. So, it is not a case that in *Commission v. Italy*[70] the ECJ had linked the breach of the solidarity between the Member States to

[63] *Ibid.*, para. 85.

[64] *Ibid.*, para. 100, according to which "the taking charge in a Member State of an unusually large number of third-country nationals seeking international protection may also be facilitated by the exercise by other Member States – unilaterally or bilaterally with the Member State concerned in a spirit of solidarity, which, in accordance with Article 80 TFEU, underlies the Dublin III Regulation – of the [sovereignty clause], to decide to examine applications for international protection lodged with them, even if such examination is not their responsibility under the criteria laid down in that regulation".

[65] *Ibid.* para. 95. Such a mechanism is laid down in Article 33 of the Dublin Regulation.

[66] *Jafari cit. supra* note 59, para. 97. See Council Directive 2001/55/EC of 20 July 2001, OJ L 212, 7 August 2001, p. 12.

[67] *Jafari*, *cit. supra* note 59, paras. 98-99.

[68] Case C-213/17, *X* (Opinion), 13 June 2018, ECLI:EU:C:2018:434, para. 99.

[69] Case C-213/17, *X*, 5 July 2018, ECLI:EU:C:2018:538, para. 39.

[70] Case 39/72, *Commission v. Italy*, 7 February 1973, ECLI:EU:C:1973:13.

a violation of the duty of loyal co-operation, stating that "for a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations",[71] and that, as a consequence, "[t]his failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order".[72] Moreover, the *inadimpleti non est adimplendum* rule does usually work in bilateral contracts as a response to the lack of the owed consideration by the counterpart: in the case of Article 80 TFEU, the lack of positive obligations on the Institutions does remove *ex ante* any owed consideration by the latter (that therefore are, technically speaking, not counterparts of the Member States), so making such a rule simply not applicable.

Accordingly, a Member State not complying with EU asylum provisions – even if deemed as unfair – would be exposed to an infringement procedure according to Article 258 TFEU and following, facing a quite likely declaration of failure to fulfil its obligations under EU law. This could be, for instance, the case of the infringement procedures brought by the Commission against Italy, Greece and Croatia in December 2015 for their failure to correctly implement the Eurodac Regulation.[73] Such non-compliance has been somewhat a reaction by those three Member States for the non-response of the Institutions to their reiterated requests for a fairer and solidarity-based responsibility-sharing of asylum seekers. But it remains the case that the Commission has decided to send three letters of formal notice[74] and, after the closure of the procedures against Italy and Greece for the latter's subsequent almost fully compliance,[75] to continue the procedure against Croatia sending to the latter a reasoned opinion.[76]

3.2. – … and the Member States

It is also highly questionable whether the Commission or a Member State could bring an action against other Member States for their assumed lack of solidarity.

[71] *Ibid.*, para. 24.
[72] *Ibid.*, para. 25.
[73] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013, OJ L 180, 29 June 2013, p. 1.
[74] IP/15/6276, 10 December 2015.
[75] IP/16/4281, 8 December 2016.
[76] MEMO/17/1577, 14 June 2017.

Actually, it would be impossible for the Commission under Article 258 TFEU (or a Member State after it has brought the matter before the Commission, following Article 259 TFEU) to bring an infringement procedure against other Member States for their failure to adopt *positive solidarity measures* based on Article 80 in itself. Indeed, where the Institutions have not (yet) decided to adopt such measures, it is a matter of fact that there would be no unfulfilled obligations on the Member States to bring before the ECJ. It seems equally difficult to bring an infringement procedure against those Member States that failed to fulfil the above-mentioned *negative obligation* aimed at refraining from the adoption of national measures that are manifestly contrary to the spirit of Article 80. In such a case, the Commission and the Court should consider not only specific national acts or omissions but rather the overall national legislation and practice: to this effect, therefore, only national legal systems acknowledged as fully and manifestly against the solidarity principle in itself could – maybe – lead to an infringement decision by the ECJ. Obviously, the option for a Member State not to comply with EU law as a reaction to the lack of solidarity by other Member States seems as unfeasible as in the case concerning EU Institutions, already discussed above.

This is why one can also conclude that Article 80 in itself is not directly applicable in the Member States. Indeed, if according to the *Van Gend en Loos* case-law[77] only those Treaties provisions that are clear and unconditional should be considered as having direct effect, Article 80 cannot be deemed as such due to its lack of clarity and the need for implementing measures by the Institutions.[78] As a consequence, while no obligation can be imposed by national courts on the Member States as well as natural and legal persons, it would be difficult to find even those rights of individuals that the direct application of Article 80 should protect.[79] Moreover, it is not even entirely clear whether or not EU solidarity-based acts – as the relocation decisions – would be deemed by national courts as having direct application against the Member States concerned: according to some Dutch courts, such decisions have no direct

[77] Case 26/62, *van Gend en Loos*, 5 February 1963, ECLI:EU:C:1963:1.

[78] See DE BRUYCKER and TSOURDI, "Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension", in CHETAIL, DE BRUYCKER and MAIANI (eds.), *cit. supra* note 7, p. 473 ff., pp. 499-500.

[79] See MORGESE, *cit. supra* note 12, pp. 110-112.

effect;[80] on the contrary, the *Tribunal Supremo* has recently sentenced the Spanish government for its failure to completely relocate its quota of asylum seekers.[81]

3.3. – The Full Effectiveness of Solidarity-Based Measures Provided for in the EU Secondary Law

In contrast, what seems unquestionable is the acknowledgement of *the fullest possible effect to those solidarity-based provisions laid down in EU mandatory acts of the Institutions*. Indeed, in the case of the adoption of solidarity-based emergency asylum measures according to Article 78 TFEU – irrespective of whether or not those measures are jointly based on Article 80 or make a mere reference to it – the Member States are therefore bound to give them full effect[82] and, in the case of a non-completely or incorrect implementation, it could be brought actions pursuant to Articles 258 and following.

This could be, for instance, the case concerning the alleged incorrect implementation of Council Decisions 2015/1523 and 2015/1601.[83] With those Decision the EU Council had put in place – on the emergency legal basis of Article 78(3) TFEU –[84] a temporary derogation to the Dublin III Regulation through an emergency relocation of 40.000 and 120.000 asylum seekers, respectively, from Italy and Greece to other States, due to the massive migratory inflows occurring in the 2015 summer. It must

[80] See OOMEN and RODRIGUES DE OLIVEIRA, "Relocation and its Numbers - Which Role for the Courts?", *EU Immigration and Asylum Law and Policy*, 31 May 2017, available at: <http://eumigrationlawblog.eu/relocation-and-its-numbers-which-role-for-the-courts>.

[81] See MOYA, "Are National Governments Liable if They Miss Their Relocation Quota of Refugees?", *Verfassungsblog*, 20 July 2018, available at: <https://verfassungsblog.de/are-national-governments-liable-if-they-miss-their-relocation-quota-of-refugees>; PELACANI, "Il Tribunal Supremo condanna il Governo spagnolo per l'inadempimento dei suoi obblighi di ricollocazione, ma è bene non farsi illusioni", *SIDIBlog*, 9 October 2018, available at: <http://www.sidiblog.org/2018/10/09/il-tribunal-supremo-condanna-il-governo-spagnolo-per-linadempimento-dei-suoi-obblighi-di-ricollocazione-ma-e-bene-non-farsi-illusioni>; ROSANO, "La sentenza del Tribunal Supremo di Spagna del 9 luglio 2018 sui meccanismi di ricollocazione di migranti del 2015: note a prima lettura", *Eurojus*, 31 July 2018, available at: <http://rivista.eurojus.it/la-sentenza-del-tribunal-supremo-di-spagna-del-9-luglio-2018-sui-meccanismi-di-ricollocazione-di-migranti-del-2015-note-a-prima-lettura>.

[82] *Relocation* case, *cit. supra* note 13, para. 291, according to which "the burdens entailed by the provisional measures adopted under [Article 78(3) TFEU] for the benefit of that or those Member States must, as a rule, be divided between all the other Member States".

[83] *Cit. supra*, note 16.

[84] According to which "[i]n the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned".

be stressed that Decision 2015/1601 – unlike Decision 2015/1523 – set out a national binding quota of asylum applications to be examined by the Member States (and some EEA States) other than Italy and Greece. While Decision 2015/1523 had been unanimously adopted insofar as the distribution would have been made "reflecting the specific situations of Member States",[85] the mandatory relocation scheme provided for in the Decision 2015/1601 was adopted by only a majority of the Member States (with Czech Republic, Romania, Slovakia and Hungary voting against). The subsequent implementation of such measures has been strongly opposed by the Visegrad Group of Member States, that have substantially failed to fulfil their obligations. Moreover, Slovakia and Hungary has brought actions before ECJ for annulment of the Decision 2015/1601. Having the ECJ dismissed in their entirety those actions in September 2017,[86] the Commission in the following December has decided to refer the Czech Republic, Hungary and Poland to the ECJ for a declaration of failure to fulfil their obligations on relocation.[87]

In October 2019, Advocate General Sharpston has provided her Opinion on the matter, suggesting to the ECJ to declare the infringement proceedings brought by the Commission admissible and, as a consequence, that Poland, Hungary and the Czech Republic have failed to fulfil their obligations under EU law.[88] In short, Advocate

[85] European Council Conclusions of 25-26 June 2015, EUCO 22/15, para. 4(b).

[86] *Relocation* case, *cit. supra* in note 13.

[87] Cases C-715/17, *Commission v. Poland*; C-718/17, *Commission v. Hungary*; and C-719/17, *Commission v. Czech Republic*. See FULLERTON, "Borders, Bans, and Courts in the European Union", *Roger Williams University Law Review*, 2018, p. 393 ff., p. 414 ff.

[88] Cases C-715/17, *European Commission v. Republic of Poland*, C-718/17, *European Commission v. Republic of Hungary*, C-719/17, *European Commission v. Czech Republic* (Opinion), 31 October 2019, ECLI:EU:C:2019:917 (hereinafter: *relocation infringement* case). See COLOMBO, "Le conclusioni dell'Avvocato Generale Sharpston sulle Relocation Decisions: la condanna dei Paesi convenuti per preservare lo Stato di diritto e il principio di solidarietà", *Eurojus*, 25 November 2019, available at: < http://rivista.eurojus.it/le-conclusioni-dellavvocato-generale-sharpston-sulle-relocation-decisions-la-condanna-dei-paesi-convenuti-per-preservare-lo-stato-di-diritto-e-il-principio-di-solidarieta>; FERRI, "L'assassino è il maggiordomo? Primi rilievi sulle conclusioni dell'Avvocato generale nel giudizio di infrazione contro Polonia, Ungheria e Repubblica ceca in materia di ricollocazioni", *SIDIBlog*, 20 November 2019, available at: < http://www.sidiblog.org/2019/11/20/lassassino-e-il-maggiordomo-primi-rilievi-sulle-conclusioni-dellavvocato-generale-nel-giudizio-di-infrazione-contro-polonia-ungheria-e-repubblica-ceca-in-materia-di-ricollocazioni>; KIRST, "The Three Villains and the Lifeblood of the European Union Project – Advocate General Sharpton's Opinion in C-715/17 (the asylum relocation mechanism)", *EU Law Analysis*, 27 November 2019, available at: < http://eulawanalysis.blogspot.com/2019/11/the-three-villains-and-lifeblood-of.html>; PENASA, "La relocation come 'minaccia' alla sicurezza nazionale? Prerogative statali, obblighi di solidarietà e spinte sovraniste nelle Conclusioni dell'Avv. Gen. Sharpston (casi C-715/18, C-718/18 e C-719/18, 31 ottobre 2019)", *ADiM Blog*, November 2019, available at: < http://www.adimblog.com/wp-content/uploads/2019/11/ADiM-Blog-Novembre-2019-Analisi-Opinioni-Penasa_DEF.pdf>.

General stressed, on the one hand, that any consideration related to the maintenance of law and order and the safeguarding of internal security should have been resolved, by the three States, in a spirit of cooperation and mutual trust between all the other Member States involved, rather than peremptorily disregard their obligations under those Decisions; and, on the other hand, that any practical risk inherent in processing large numbers of applicants should have been addressed by applying for and obtaining temporary suspensions of relocation obligations under those decisions, and certainly not by deciding unilaterally that compliance with the Relocation Decisions was not necessary.

While the matter is still under consideration, it would be very hard for the Court not to come to a solution other than the one discussed here. Indeed, one must consider that the issue at stake in the relocation infringement procedures is not so much a breach of Article 80 in itself but the breach of the general duty of a proper implementation of EU law by the Member States. In other words, the violation of the principle of solidarity here is only one part of a much wider violation of the principle of loyalty provided for in Article 4(3) TEU. This conclusion is in line with the Advocate General's Opinion in the *relocation* case, according to which

> "the non-application of the [Decision 2015/1601] also constitutes a breach of the obligation concerning solidarity and the fair sharing of burdens expressed in Article 80 TFEU. To my mind there is no doubt that, in an action for failure to fulfil obligations on this matter, the Court would be entitled to remind the offending Member States of their obligations, and to do so in no uncertain terms, as it has done in the past".[89]

and with the Advocate General's Opinion in the *relocation infringement* case, by which

> "under the principle of sincere cooperation, each Member State is entitled to expect other Member States to comply with their obligations with due diligence. That is, however, manifestly not what has happened [in the case of the implementation of the relocation decisions]".[90]

It should also be recalled that it would be very difficult for the Czech Republic,

[89] Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union* (Opinion), 26 July 2017, ECLI:EU:C:2017:618, para. 242.

[90] *Relocation infringement* case (Opinion), para. 245.

Hungary and Poland to justify their non-implementing conduct on the ground of the previous non-completely implementation of other EU asylum provisions by those Member States that were beneficiaries of the relocation measures:[91] actually, it would constitute an unlawful application of the *inadimpleti non est adimplendum* rule that, in a reverse order, has been discussed and rejected above.

In the end, it can be observed that *only the non-appropriate nature of solidarity-based measures* for attaining the objective which they pursue could be a strong argument for a Member State not to fulfil its obligations. This argument would involve the scope of application of the proportionality principle and, in turn, a review of the wide margin of manoeuvre of the Institutions "in areas which entail choices on their part, including of a political nature, and in which they are called upon to undertake complex assessments".[92] While the topic has been yet discussed above,[93] it can be useful to remind in short that, in the ECJ's view, only a manifestly inappropriate measure could be deemed as unlawful,[94] in particular where "another measure that was less restrictive, but equally effective, could [be] adopted within the same period".[95]

It is important, therefore, to bear in mind that, where not manifestly inappropriate, such a choice by the Institutions "is an essentially political choice, the appropriateness of which cannot be examined by the Court".[96] The latter would be the case, for instance, where solidarity-based measures (like the relocation decisions) have an adverse impact on some Member States as a consequence of a re-balance between the different interests involved: indeed, such a re-balance "tak[es] into account not the particular situation of a single Member State, but that of all Member States",[97] which is in accordance to the very nature of Article 80.[98] After all, following the

[91] *Relocation* case, para. 210: indeed, one of the arguments of the Slovakia for the annulment of Decision 2015/1601 was its inappropriateness "for attaining that objective because the relocation mechanism for which it provides is not capable of redressing the structural defects in the Greek and Italian asylum systems. Those shortcomings, which relate to lack of reception capacity and of capacity to process applications for international protection, need to be remedied before the relocation can actually be implemented".

[92] *Relocation* case, *cit. supra* note 13, para. 207.

[93] *Supra*, subsection 3.1.

[94] *Relocation* case, *cit. supra* note 13, para. 207.

[95] *Ibid.*, para. 236.

[96] *Ibid.*, para 257.

[97] *Ibid.*, para. 290.

[98] *Ibid.*, para. 291.

Advocate General in the *relocation infringement* case, on the one hand,

> "[i]n what was clearly an emergency situation, it was the responsibility of both the frontline Member States and the potential Member States of relocation to make that mechanism work adequately, so that relocation could take place in sufficient numbers to relieve the intolerable pressure on the frontline Member States. *That is what solidarity is about*";[99]

and, on the other hand,

> "[s]olidarity is the lifeblood of the European project. 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*".[100]

4. – Concluding Remarks

It can be concluded that, at the present time, there is very little room for a judicial solidarity-based interpretation or amendment of the allocation criteria of the Dublin III Regulation. Indeed, as explained above, the Court does seem very unwilling to undertake a breakthrough review of what is still considered "a cornerstone in building the CEAS",[101] limiting itself to – we might say – apply the law, the whole law, and nothing but the law.

Such an approach depends in part from quite an 'original sin', i.e. the wording of Article 80 TFEU: linking the legal force of the principle of solidarity and fair sharing of responsibility to the necessity and appropriateness of its implementation by the Institutions resulted in depriving the ECJ of the possibility of giving such a Treaty provision in itself full binding effects and, as a consequence, implementing it

[99] *Relocation infringement* case (Opinion), para. 234 (emphasis added).

[100] *Ibid.*, para. 253 (emphasis added). It is noteworthy that Advocate General Sharpston has further stressed that "[r]especting the 'rules of the club' and playing one's proper part in solidarity with fellow Europeans cannot be based on a penny-pinching cost-benefit analysis along the lines (familiar, alas, from Brexiteer rhetoric) of 'what precisely does the EU cost me per week and what exactly do I personally get out of it?' Such self-centredness is a betrayal of the founding fathers' vision for a peaceful and prosperous continent. It is the antithesis of being a loyal Member State and being worthy, as an individual, of shared European citizenship. If the European project is to prosper and go forward, we must all do better than that" (para. 254).

[101] The Stockholm Programme, *cit. supra* note 5, para. 6.2.1.

'against' the unfair responsibility-sharing system resulting from the strict application of the Dublin system. But such a conclusion also depends in part from the 'political' will of the Court not to substitute its own solidarity-based vision of the CEAS, if any, to the one of the Institutions and the Member States. To this effect, refusing to acknowledge that "the Dublin III Regulation was not conceived as an instrument to deal with determining the Member State responsible for international protection in the event of a massive inflow of people"[102] and therefore maintaining the First Entry Rule 'alive and kicking' even in times of refugee crisis,[103] the ECJ has opted for a somewhat purely technical and formalistic approach to the Dublin system that has been suggestively defined as 'judicial passivism'.[104]

How the contrast between the high symbolic value of the solidarity principle and its judicial implementation – as well as the tension between the need to preserve the administrative integrity of the Dublin system and the potentially broad constitutional function of Article 80 – should be resolved, is still an open and debatable question.[105] What does seem unquestionable is that, on the one hand, where solidarity-based measures are enacted by the EU Institutions, they should have to be fully respected even by those Member States unwilling to act in a spirit of solidarity; and, on the other hand, that the very problem lies in the persistent political unwillingness of the Member States to resolve in a mutually acceptable manner the 'solidarity conundrum', on which the Court is showing to be reluctant to intervene.

[102] As the Advocate General stated in *A.S. and Jafari*, *cit. supra* note 60, para. 171.

[103] See POULARAKIS, "Responsibility drifting in the sea – Search and rescue operations and the Dublin Regulation", *European Database of Asylum Law*, 25 June 2018, available at: <http://www.asylumlawdatabase.eu/en/journal/responsibility-drifting-sea---search-and-rescue-operations-and-dublin-regulation>.

[104] See GOLDNER LANG, "Towards 'Judicial Passivism' in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference", *EU Immigration and Asylum Law and Policy*, 24 January 2018, available at: <http://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference>.

[105] See also THYM, *cit. supra* note 59, p. 561 ff.

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Graphic project : Angela Petrillo

ISBN 978 88 8080 367 6