Quotas as an instrument of burden-sharing in international refugee law: The many facets of an instrument still in the making

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Starting with the year 2015 Europe has come under unprecedented migratory pressure that put into question the very structure of the Common European Asylum System (CEAS). In fact, according to the so-called Dublin regime the country of first entrance is responsible for carrying out the asylum procedure leaving it open how the burden that the granting of asylum involves should eventually be shared between the EU Member States. Both the 1951 United Nations Geneva Convention Relating to the Status of Refugees (GCR 1951) and the CEAS are built upon the implicit assumption that refugee protection should be of a temporary nature, but in reality protection has most often become permanent. In order to avoid excessive burdens for front-line states in Europe and for Europe as a whole, the call for the introduction of burden-sharing mechanisms is becoming ever louder. In this context, quota systems have been presented as ideal problem solution instruments. The European Union has tried to establish such mechanisms but so far all these attempts proved to be insufficient and they met with considerable resistance by some EU Member States. As a consequence, the insufficiencies of the GCR and the CEAS become evident and the international asylum system as a whole becomes imperiled.

1. Introduction

Of all the challenges the European Union and its Member States (MS) are presently confronted with, the refugee problem is probably one of the hardest to address. At the same time, this problem is closely connected with many other tasks to be urgently solved in Europe, such as the financial crisis and the challenges to the very European integration process as it has been exemplified by the Brexit.[1] In the international

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[1] As is well known, there is a broad consensus that the Brexit decision was strongly influenced by the migration issue in general, the immigration issue in particular, and a broadly held conviction that the EU was unable to tackle these questions efficiently.

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system of multilevel governance, all subjects involved are strained. It is becoming evident that the international refugee protection and management system, which worked reasonably well over the last decades, is risking fatal failure in a situation in which the numbers of people seeking refuge has reached record-high numbers. According to the UNHCR Report 2015,[2] by the end of 2015, 63.5 million individuals were forcibly displaced worldwide.[3] If seen on a worldwide scale even such record numbers would appear to be manageable, but the crucial point lies in the uneven distribution of these people, with some countries having to bear the brunt of the problem while others are hardly scathed by it.

There is no doubt that a way out of this situation can be found only by recourse to solidarity, a concept that is now omnipresent in the discussion of the refugee issue.[4] The idea of solidarity also underlies the concept of "burden-sharing," which for a long time has been identified as an indispensable prerequisite for a functioning international refugee protection system.[5] Both concepts remain, however, vague in practical terms, and it may be that the reason for the great support they find lies exactly in the fact that they are so ambiguous and that there are no stringent criteria to implement them. Solidarity and burden-sharing remain conditions sine qua non for the survival of the existing international refugee protection system and for its further development toward an order that should cope more efficiently with modern-day challenges in the area of refugee law. Therefore, devices have to be found that should allow for at least a partial implementation of these concepts. It is well known that quotas are often seen as formidable instruments to this avail. In this article I will examine the extent to which the quota can meet these expectations. I will show that on the one hand, the quota is rather versatile and it can give expression to solidarity by a near-mathematical precision. On the other hand, however, it is exactly this precision that arouses opposition by those who prefer the solidarity concept to be preserved as a political principle with vague contours.

[2] *Available at* http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

[3] This number has risen by 5.8 million in relation to the previous year and it is composed of 21.3 million refugees, 40.8 million internally displaced persons, and 3.2 million asylum-seekers. *Id.*

[4] *See, e.g.*, Peter Hilpold, *Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union*, 34 Y.B. Eur. L. 25 (2015). On the concept of solidarity, *see also* Karl Wellens, *Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations*, *in* Towards World Constitutionalism 775 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005); Rüdiger Wolfrum & Chie Koijma, eds., Solidarity: A Structural Principle of International Law 55 (2010), and Peter Hilpold, *Solidarität als Prinzip des Staatengemeinschaftsrechts*, 51 Archiv des Völkerrechts (AVR) 239 (2013).

[5] *See, inter alia,* Gregor Noll, *Prisoner´s Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union*, 40 German Y.B. Int'l L. 405 (1997); J.-P.L. Fonteyne, *Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees*, 8 Australian Y.B. Int'l L. 162 (1983); Astri Suhrke, *Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action*, 11(4) J. Refugee Stud. 396 (1998); Paolo Biondi, *Human Security and External Burden-Sharing: The European Approach to Refugee Protection Between Past and Present*, 20 Int'l J. Hum. Rts. 208 (2016).

Solidarity and burden-sharing are concepts inherently based on consent; it is hard to imagine that they might be imposed unilaterally. What, however, if no such consent comes about, and if the danger of a "prisoner's dilemma"[6] in the management of the refugee crisis appears on the horizon, and consequently, what if the destruction of all cooperation in this field is looming? Should it be possible, then, to introduce refugee quotas unilaterally as is the case these days?

As I will show, this subject evidences many facets and the legal and practical assessment of such quotas will strongly depend upon the level (international, national, regional) they are applied on. Regarding the main field of application (i.e., national quotas introduced by governments in relation to their obligations resulting from the GCR 1951), they are most probably illegal. Nonetheless, I will show that they can be seen as International Law violations designed to achieve more solidarity on the multilateral level. In any case, such measures constitute a hazardous gamble in a highly delicate situation.

2. The GCR 1951: Turning a blind eye toward mass immigration

On a worldwide scale, the GCR 1951 is still the single most important document in the field of refugee protection. Currently, this instrument is subject to strong criticism. It is a widely held view that in many senses the GCR 1951 no longer provides adequate protection,[7] and at the same time, criticism that this set of rules no longer comes up to the needs of the destination country is becoming ever stronger. The perception is that we are standing in front of a divide: A set of rules that in the past by and large has sufficiently catered for the needs of refugees appears to be no longer up to the needs of modern times. The GRC was designed to provide protection for individuals based on specific and severe elements of persecution. The absorption and integration of the single refugee posed no perceptible problem for the accepting society. He or she integrated seamlessly. The modern flight problem, instead, has increasingly become a mass phenomenon. Now numbers count as they may create serious problems for integration. Some argue that the GCR 1951 is outdated and that it should be thoroughly overhauled or outright abandoned.[8] This perception misses an important point: The history of the GCR was by far not as calm and straightforward as commonly believed. It is

[6] As is well known, according to this concept developed within game theory cooperative behavior would allow subjects confronted with the same problem to be better off, but the lack of cooperative instruments and reciprocal distrust leads to a situation where an egoistic, unilateral attitude that seems rational at first sight leads to a situation where these subjects are finally worse off.

[7] For a good overview of the points of criticism voiced against the GCR in the past, *see* Chatham House, The Refugee Convention: Why Not Scrap It? (2005), *available at* https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilp201005.pdf. *See also* Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harv. Hum. Rts. J. 220 (1996).

[8] For a view to the contrary *see* Peter Hilpold, *Die Genfer Flüchtlingskonvention 1951—Reformbedarf angesichts der Flüchtlingskrise?*, 14(1) Migralex 2 (2016), sustaining that this document should be rather supplemented by further, integrating rules.

true that the cold war strongly reduced the number of refugees coming from the East, whereby the refugee crisis became manageable, but this was only one side of the coin. In reality, major refugee crises happened both before the entry into force of the GCR as well as afterward, but they were regularly resolved by the parallel adoption of international measures of solidarity in cases of mass inflows of refugees.[9] There were several periods of mass migration but they were accompanied by solidarity movements that took out the explosive power of these events. This was the case for the resettling solutions after World War II, where the International Refugee Organization (IRO) played a dominant role, as well as in the aftermath of the Yugoslav crisis where the UNHCR (United Nations High Commissioner for Refugees, or the UN Refugee Agency) and the EC (European Commission) assumed a leading role, and also when, starting in 1975, the resettling of Vietnamese refugees was high on the agenda.[10] In all these cases the state community or single state groupings bore the brunt of the problem as ad hoc solutions were adopted that often involved larger resettling agreements.

The mass exodus from Syria, Afghanistan, and Iraq in 2015 and as well as in 2016, accompanied by a parallel flight from other situations of war and political and economic crisis in Africa, differs, however, from previous mass flights in many ways, so that these events are unparalleled in modern history. This is true, although a look at numbers alone, as impressive as they may be,[11] might not justify such an extreme assessment, particularly if we think about the events following World War II with some 12–15 million people fleeing from Eastern and Central European countries to the West. A closer examination however reveals the absolute uniqueness of the present migration situation which has been exacerbated by the following facts:

- The cultural divide between refugees and the people in the destination countries is much higher than it was in 1945 when large groups of the refugees were ethnic Germans fleeing toward that part of Germany that was then occupied by the Western allies.
- The divide in relative welfare is now much higher than it was in 1945 when refugees from the East came to war-torn Western European countries where the local population often had to fight for survival as well. Paradoxical as it might seem at first glance, the conspicuous degree of welfare achieved in Europe increases resistance against refugees. When taking a closer look, however, the explanation for this apparent overly egoistic attitude lies at hand: The local European population has much to lose from immigration by poor and unqualified asylum-seekers as these people could either burden the social welfare systems or enter competition for low-skill jobs with the poorest groups in the destination countries. Contrary to the situation in 1945, highly industrialized countries do not have a large-scale need for manual reconstruction workers but rather for highly skilled white-collar

[9] *See* Suhrke, *supra* note 5, at 404, as well as Gil Loescher, Beyond Charity 35–36 (1994).

[10] *See* Suhrke, *supra* note 5, at 403ss.

[11] In the first quarter of 2016 the number of first-time asylum applicants in EU MS reached 287,100, marking an increase of more than 50 percent compared to the same quarter of 2015. *See* Eurostat, Asylum Quarterly Report, *available at* http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report.

workers. This situation is further complicated by the fact that the effective use of these skills, most often in the form of services, is often subject to specific language knowledges and a particular cultural proximity to the destination country—qualities that refugees presently applying for asylum in Europe are often lacking.

- Generally, a stronger sense of solidarity in the destination countries, as could be noticed in the occasion of previous mass flights that were eventually solved successfully, is presently missing. The rationale for this is a consequence of all the elements mentioned previously. Solidarity presupposes the existence of stronger ties regularly based on a relationship of reciprocity resulting either from a sense of common destiny as it stands at the roots of a nation (this may explain why Germans fleeing from the East were warmly accepted by their co-nationals in the West) or to a more limited, even indirect, extent on *do ut des* considerations.[12] As it has been said: "solidarity expects solidarity,"[13] at the least in the form of an insurance mechanism providing protection against incalculable risks for the single entity.[14] At the moment, none of these elements needed for a stronger sense of solidarity are in sight.

How do we begin to address this extraordinary challenge? The first-best solution would be to tackle the root causes of the refugee problem, i.e., to end the conflicts and oppressive situations that have caused the present refugee problem. As has been shown, the sheer demand for the services of traffickers by men fleeing from personal annihilation and confronted with ever-stronger closed borders has given life to a smuggling business growing so strong that its services were eventually offered at affordable prices also to economic refugees, which thereby aggravated the problem for the destination countries even further.[15] The "European Agenda on Migration,"[16] presently the most important position paper on migratory issues by the European Commission, gives some hints that the EU is also taking into consideration this fundamental issue when it posits that "[t]he EU's legal migration policy should also support the development of countries of origin."[17] While this objective surely would not suffice to solve the refugee problem, it could constitute a valuable instrument to ease it, at least in the longer run. In the more immediate term, the EU and its MS have to find ways to limit the burden and to divide it in a somewhat fair way internally and externally. To this end, the quota plays an important role. This instrument works both as a measure of "non-entrée" and as a means to implement a sort of solidarity. Several levels can be discerned on which this instrument potentially finds application: internationally, on the level of the EU (i.e., in the relationship between MS), and nationally. All levels present a series of particularities. I will show that this instrument, as appealing as it may seem at first

[12] For more details, *see* Hilpold, *supra* note 4.

[13] *See* Josef Isensee, *Solidarität—sozialethische Substanz eines Blankettbegriffs*, *in* Solidarität in Knappheit: Zum Problem der Priorität 97, 103 (Josef Isensee ed., 1998).

[14] *Id.* at 262.

[15] *See* Maarten den Heijer, Jorrit Rijpma, & Thomas Spijkerboer, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, 53 Common Mkt. L. Rev. 607, 622 (2016).

[16] COM(2015) 240 final.

[17] COM(2015) 240 final, at 16.

glance, is often either difficult to implement on a political level or even clearly unlawful. Prudence is therefore required in the face of the widespread enthusiasm toward this instrument. In the following sections, this article will examine the potential and the limits of quotas as a burden-sharing instrument primarily in their international and European context. As mentioned, there is also an intranational dimension to this issue, as a national refugee quota often gives rise to the need of a further regional redistribution of refugees. The way this happens is, however, a question of national law and dependent on a consensus that varies from state to state.[18]

3. Quotas in the system of the GRC 1951

3.1. The incomplete nature of the GRC

The GRC does not mention quotas and in its normative part, burden-sharing is not even indirectly referred to. This is, however, the case with the preambular part where we find the following consideration: "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation." This consideration stresses the necessity of "burden-sharing." In case of asylum requests of a broader dimension, solidarity becomes quintessential for the functionality of the entire refugee protection system. As it has been said, burden-sharing "is a virtual *sine qua non* for the effective operation of a comprehensive *non-refoulement* policy."[19]

In the normative part of the GRC, however, these considerations find no reflection. In this perspective, the GRC is truly European and plainly a product of the immediate post-war period: The experience of oppression, inhumanity, and ruthless persecution by totalitarian regimes has been so strong that excessive burden or limits of capacity should under no condition constitute an excuse for not granting protection. At the same time, this document was rather full of "constructive ambiguities"[20] that disguise its nature and goals.

[18] The parameters taken recourse to in this context may be partly similar but nonetheless their weighing remains subjective and dependent upon specific circumstances. As is well known, in Germany the so-called key of Königstein (*Königsteiner Schlüssel*) has been developed. According to this approach the tax revenues of each federal unit accounts for two-thirds, the number of population for one-third for this distributional key. *See* Carolin Beverungen, Daniel Thym, & Sigrid Gies, *Ein "Königsteiner Schlüssel" für die EU Flüchtlingspolitik*, *available at* http://verfassungsblog.de/koenigsteiner-schluessel-fuer-eu-fluechtlingspolitik/, who propose a similar rule for the EU-wide distribution of refugees. In Austria, a similar, but not fully identical approach has been taken. According to a Federal/Länder agreement of 2004 refugees are to be distributed on the basis of a certain key between the various Länder while the costs for basic social services are taken over at a rate of 60 percent by the Federation and 40 percent by the Länder. *See* Amt der Steirischen Landesregierung, Unterbringung von AsylwerberInnen im Rahmen der Grundversorgung, 2015, at 3, *available at* http://www.soziales.steiermark.at/cms/dokumente/12375176_125492751/87f2850e/AsylInfoGemeinden2015.pdf.

[19] *See* Fonteyne, *supra* note 5, at 175.

[20] On the origins of this concept *see* Peter Hilpold, *The Fight Against Terrorism and SC Resolution 2249* (2015); *Towards a More Hobbesian or a More Kantian International Society?*, 55(4) Indian J. Int'l L. 535 (2015).

- It starts with the question of what protection under the GCR should really mean. As is well-known, nowhere does the GCR grant a right to asylum but only a right of "non-refoulement," even though in common parlance mention is usually made of the former concept if the GCR is referred to.[21] In older literature, these two concepts are clearly distinguished as two distinct categories, but in the meantime, such an approach is no longer tenable. At the utmost, it could be sustained that there are gradual differences between these concepts: While asylum, according to this perspective, would imply a long-term stay and the granting of a broad set of rights to the asylee, non-refoulement would be associated only with limited and temporarily restricted rights.[22] Most often, however, no longer are such difficult—and in many senses fruitless—distinctions made. By and large, "non-refoulement" is interpreted as a specific explication of asylum and both concepts are often used in an indistinctive way when reference is made to the GCR.[23] As it has been stated,[24] the system of the GCR itself envisages a gradual shift from non-refoulement to asylum when it recommends in Annex I "that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement."[25] Nationally and regionally (and especially in the EU), refugee status and asylum status have largely become intermingled.[26] The concept of non-refoulement has become the subject of an evolutive development that has considerably expanded its dimension and strengthened its content.[27] To a certain extent, upholding at least a theoretical distinction between non-refoulement and asylum may be sort of a political expediency. In fact, thereby the impression may be conveyed that burdens charged on individual states are limited and only following the express consent that they may be extended (to asylum).[28]

[21] Also the practice of UNHCR goes in this direction. *See* UNHCR Comments on the EC Council Directive 2004/83/EC of 29 April on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted, 2005, at 10s.

[22] *See* Dieter Kugelmann, *Refugees*, *in* The Max Planck Encyclopedia of Public International Law ¶ 3 (online ed., 2010) [hereinafter MPEPIL online ed.].

[23] *See* Kay Hailbronner & Jana Gogolin, *Asylum, Territorial*, MPEPIL online ed. Of course, the GCR does not impose on states to adopt a durable, lasting solution. In particular, in view of the mass influx phenomenon states are wary about allowing the coming into being of such a far-reaching obligation. *See* Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 414ss. (2007).

[24] *See* William Thomas Worster, *The Contemporary International Law Status of the Right to Receive Asylum*, 26 Int'l J. Refugee L. 477, 495 (2014).

[25] *See* Final Act of the UN Conference on the Status of Refugees and Stateless Persons, s IV D, 189 UNTS 37, reprinted in UNHCR Handbook, Annex I, cited according to Worster, *supra* note 24, at 495.

[26] *See* Worster, *supra* note 24, at 495ss.

[27] On the role played in this regard by international human rights monitoring bodies *see* Maria-Teresa Gil-Bazo, *Refugee Protection Under International Human Rights Law: From Non-Refoulement to Residence and Citizenship*, 34 Refugee Sur. Q. 11 (2015). For Vincent Chetail, "[t]he authoritative intrusion of human rights has proved to be instrumental in infusing a common and dynamic understanding of the refugee definition that is more consonant with and loyal to the evolution of international law." *See* Vincent Chetail, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law 19, 28 (2014).

[28] *See* Goodwin-Gill & McAdam, *supra* note 23, at 343.

- From its basic idea, the protection of refugees should be of a provisional nature; it should last as long as the danger of persecution endures. This principle is also spelled out explicitly in the GCR. Pursuant to Article 1 C (5), the GCR 1951 shall cease to apply to a refugee if he can no longer continue to refuse or avail himself of the protection of the country of his nationality because the circumstances about his recognition as a refugee have ceased to exist.

  In view of the fundamental individual rights that come into play here, this provision must be applied very carefully. As has been stated in the literature, in practice, states have rarely had recourse to cessation.[29] This provision has acquired practical relevance particularly in relation to group situations, when a radical political change has taken place in the country of origin.[30] For the rest, protection that should theoretically be temporary has become factually permanent. Experts of refugee law have discerned this fact as one of the main reasons for the present crisis of international refugee law.[31]
- A further criticism toward the GCR posits that this document is unbalanced, as it does not give sufficient attention to state interests.[32] The state where asylum seekers first arrive is bearing all the burdens. Notably in cases of mass influx these burdens can become extremely heavy, but the GCR does not know any "security valve,"[33] no "technique of accommodation"[34] that would permit temporary suspension of Convention obligations in such situations. As has been shown, "security exceptions," i.e., derogatory regimes in cases of necessity, are of pivotal importance for the acceptance and the long-term sustainability of international treaties, in particular if they impose more extensive, permanent obligations upon the parties.[35] In fact, at the time of conclusion of a treaty, the whole dynamics these treaties will become exposed to once they enter into force is not foreseeable and therefore due consideration has to be made for these ongoing processes.

[29] *Id.*, at 142.

[30] *See* UNHCR Statement on the Ceased Circumstances Clause 3 (2008): "Cessation was considered appropriate in situations which reflected one of three types of fundamental change: accession to independent statehood, achievement of successful transition to democracy, and/or the resolution of a conflict." Cited according to Susan Kneebone & Maria O´Sullivan, *Comment to Article 1 C 501*, *in* The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 81 (Zimmermann ed., 2011).

[31] For an extensive analysis of this circumstance, *see contributions in* James C. Hathaway, ed., Reconceiving International Refugee Law (1997).

[32] *See extensively* James C. Hathaway, *Can International Refugee Law Be Made Relevant Again?*, *in* Reconceiving International Refugee Law xvii (James C. Hathaway ed., 1997).

[33] See Peter Hilpold, *Die Neuregelung der Schutzmaßnahmen im GATT/WTO-Recht und ihr Einfluß auf Grauzonenmaßnahmen*, 55(I) ZaöRV [Zeitschrift für ausländisches öffentliches Recht und Völkerrecht] 89 (1995).

[34] See Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 Brit. Y.B. Int'l L. 281, 315 (1976–177).

[35] This holds true for international law treaties in general, but also for the specific case of human rights treaties. For this latter case, see, *inter alia*, Ronald St. J. MacDonald, *Derogations Under Article 15 of the European Convention on Human Rights*, 36 Colum. J. Transnat'l L 225 (1997); Jamie Oraá, *The Protection of Human Rights in Emergency Situations Under Customary International Law*, *in* The Reality of International Law: Essays In Honour of Ian Brownlie 414 (Guy S. Goodwin-Gil & Stefan Talmon eds., 1999).

Absent such derogatory provisions, states confronted with extraordinary challenges may be inclined to dump the treaty altogether.

3.2. Introducing quotas as a way to rebalance interests

As this article has shown, the GCR is not an all-around migration management instrument and to pretend that this instrument should play such a role would clearly overstretch its capabilities. The GCR can be seen as a pillar in what should be a broader system of steering measures. As no treaty basis for such additional measures for an effective burden-sharing has come into being, measures of this kind can only be taken on an ad hoc basis. As the measures adopted in the face of the present extreme migratory crisis have proven to be largely insufficient up to this point, the Convention has come under considerable strain. And the dysfunctionalities of the Convention system itself have further added to this crisis: To end the refugee status in case of changed circumstances would be legally possible but politically would imply reputational costs[36] for governments that are hard to bear. Governments therefore prefer a "non-entrée" policy[37] that shifts away personal hardship from the lenses of TV cameras[38] and suggests political resolve to national constituencies. Consequently, removing refugees who are already to some extent integrated in the national society is much harder than to block refugees at the border, even though the first group may face resettlement to a pacified country (though admittedly much further hardship might to be expected because of this relocation) while the second group may be exposed to extreme forms of persecution.

If no first-best solution can be found that would either address the flight causes directly in the refugees' home countries or ensure that refugee protection is effectively granted only temporarily, as it was originally envisaged by the drafter of this Convention, signatory states have to look for alternative ways to defend their interests. Here the danger arises that this takes place in violation of central treaty obligations.

[36] On the importance of reputation as a driving force for the observance of international law, *see* Rachel Brewster, *Unpacking the State's Reputation* 50 Harv. Int'l L.J. 231 (2009); Sandeep Gopalan & Roslyn Fuller, *Enforcing International Law: States, IOS, and Courts as Shaming Reference Groups*, 39 Brook. J. Int'l L. 73 (2014); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997), and, on more general terms, Louis Henkin, How Nations Behave (2d ed., 1979).

[37] *See* Hathaway, *supra* note 32.

[38] In the whole refugee crisis, this aspect cannot be overestimated. As has been convincingly demonstrated for a long time, people have been willing to take part and to show solidarity with the pain of others the closer they have been to the respective events. *See* the concept of "vicinity" developed by Edmund Burke, *Letters on a Regicide Peace* (Third Letter on a Regicide Peace, 1796), *in* 321 (II) The Works of the Right Hon. Edmund Burke (reprinted 1834). He wrote as follows: "Men are rarely without sympathy in the sufferings of others, but in the immense and diversified mass of human misery, which may be pitied, but cannot be relieved, in the gross, the mind must make a choice." *See also* Peter Hilpold, *R2P and Humanitarian Intervention in a Historical Perspective*, *in* Responsibility to Protect (R2P)—A New Paradigm of International Law? 60, 100 (Peter Hilpold ed., 2015).

3.3 Necessity measures within the GCR system—the unilateral quota

In the last year, the idea has gained popularity that the interests of states and of refugees would best be balanced by the introduction of unilateral, national quotas. Signatories of the GCR could thereby continue to fulfill their treaty obligations at least partly, while at the same time, they could ensure that they would not be overburdened. The policy the Austrian government is now on its way to adopting is the best example of its kind. This policy will be further analyzed in all its facets later—both from international law and EU law perspectives. The decisive question is whether such measures are in conformity with the GCR. It is highly doubtful that this is the case.

Pursuant to Article 33 ¶ 2 of the GCR "[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serous crime, constitutes a danger to the community of the country."

These exceptions are to be interpreted restrictively as this is generally the case in human rights law for emergency measures.[39] As has been stated, the national security exception may be invoked "where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicting substantial harm on the host State's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions. Threats to goods such as property or economic interests or the international reputation of the destination country cannot, however, per se be considered as a danger to national security."[40]

Also, the danger to national security, as envisaged by Article 33 ¶ 2, has to be of a qualified nature.[41] The concept of "national security" refers to core interests of a state—to issues essential for its very survival. In this regard, it has been said that a restrictive interpretation of this provision is required already by the overarching humanitarian purpose of the GCR. Therefore, it is commonly stated that only a very serious danger to national security may justify refoulement.[42] In cases of individual risk of torture, or other inhuman or degrading treatment, the prohibition of refoulement operates again to the full (i.e., unconditionally).[43]

[39] See ECHR, Lawless v. Ireland (no. 3), Judgment of 1 July 1961 (Chamber), ¶ 28, where the Court qualified public emergency as "an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the community is composed." For a comprehensive analysis of this subject, *see* Evan J. Criddle, ed., Human Rights in Emergencies (2016).

[40] *See* Andreas Zimmermann & Philipp Wennholz, *Commentary to Article 33 para. 2*, *in* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol 1397, 84 (Andreas Zimmermann ed., 2011), referring to James C. Hathaway, The Rights of Refugees Under International Law 346 (2005).

[41] *Id.* at 89.

[42] *See* Goodwin-Gill & McAdam, *supra* note 23, at 237 (2007), with reference to the ground-breaking study by Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, *in* Refugee Protection in International Law 169 (Erika Feller, Volker Türk, & Frances Nicholson eds., 2001). Lauterpacht and Bethlehem sustain that there is a "high threshold for the operation of exceptions to the Convention." *Id.*

[43] *See* Zimmermann & Wennholz, *supra* note 40, at 90. *See also* extensively James C. Hathaway & Michelle Foster, The Law of Refugee Status 214 (2014).

Differently from the UN GA Declaration on Territorial Asylum of 1967,[44] the GCR does not foresee any exception for the case of a mass influx.[45] In view of the fundamental character of the rights that are here under discussion as well as in light of the difficulties in finding a consensus on the concept of mass influx, this would have been a far too risky enterprise.[46] In case a state is not able to respond adequately to a phenomenon of mass influx due to insufficient resources, it has been said that help should be sought from the international community as well as from international humanitarian organizations, and other appropriate actors should have the right to offer their services.[47] On the other hand, the international community as a whole has specific obligations, even though they may not be so extensive as to establish a burden-sharing duty.[48] These considerations have somewhat anticipated the discussion about a Responsibility to Protect (R2P) for refugees, but also this latter development has remained largely inconclusive.[49] If we address this issue from the perspective of *erga omnes* obligations and if we look at it by R2P lenses, the conclusion is that we are confronted here with a normative gap. Especially in cases of a mass influx of a larger dimension, single states may be confronted with considerable hardship: On the one hand there is an unconditional non-refoulement obligation to which no capacity problem may be opposed; on the other hand, any discussion about a burden-sharing right or duty oscillates between law and politics. In international law, to ask for such cooperation is possible only in the form of diplomatic pleas relying on moral considerations. The prospects of success are correspondingly limited.

[44] UN Res. 2312 (XXII), Declaration on Territorial Asylum.

[45] The Declaration on Territorial Asylum, on the contrary, contains in Article 3 the following provision:
1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of mass influx of persons.
3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the persons concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.
See also Jean-Françoise Durieux & Agnès G. Hurwitz, *How Many Is Too Many? African and European Legal Responses to Mass Influxes of Refugees*, 47 German Y.B. Int'l L. 105, 112 (2004).

[46] *See also* recently Mikaela Heikkilä & Maija Mustaniemi-Laakso, *Seeing the Individual in the Midst of Large-Scale Phenomena: Some Remarks on the European Approach to the Refugee Situation*, 16 Eur. Y.B. Hum. Rts. 187 (2016). According to these authors the principle of non-refoulement is non-derogable. *Id.* at 195.

[47] *See* Walter Kälin, Martina Caroni, & Lukas Heim, *Commentary to Article 33 para. 1 GCR*, *in* The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol 1327, 1380, at 137. (Andreas Zimmermann ed., 2011).

[48] *Id.* In this context the concept of *erga omnes* obligations comes to mind. *See* Paolo Picone, Comunità Internazionale e Obblighi "Erga Omnes" (2013).

[49] On the possible relevance of the R2P concept for the protection of refugees *see* Alice Edwards, *Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Border*, 30 Mich. J. Int'l L. 763 (2009). On the concept of R2P *see* Peter Hilpold, ed., The Responsibility to Protect (2015). For a discussion of the EU migration policy from the perspective of R2P *see* Emma Haddad, *EU Migration Policy: Evolving Ideas of Responsibility and Protection*, 2(1) Global Responsibility to Protect 86 (2010).

On the whole, it can therefore be stated that in international law as it stands there is little space for the unilateral introduction of restrictive measures in cases of a mass influx of refugees. The need for a more effective multilateral burden-sharing has been recognized on a political level, but in the legal area no consensus in this sense has yet been found.

Going one step further, it can be examined whether EU law has come closer to adopting a burden-sharing concept.

4. Refugee quotas in EU law

4.1. Preliminary considerations

The European continent has become a primary destination for persons seeking refuge from persecution on a world-wide scale. In the meantime, the EU Common European Asylum System has evolved to a role model for a detailed implementation of the GCR in its most extensive interpretation and for its adaptation to regional necessities as well as material possibilities. The GCR has proven to be a living instrument that was most receptive to actual needs of refugees and this dynamism was taken up by the CEAS. Consequently, an environment has been created that is extremely friendly toward asylum-seekers. Undoubtedly, this development has gone along with the creation of strong push factors. Thereby, the CEAS risks becoming a victim of its own success. Countertendencies are now emerging. Alongside the attempt to provide for a better migration management, the EU tries to sort out whether there would be sufficient space on the one hand for the introduction of an EU refugee quota and on the other for worldwide initiatives to achieve globally a fairer burden-sharing. For the time being, however, neither a broader quota system nor an effective burden-sharing mechanism has been established.

4.2. The EU internal quota

Attempts to establish quotas for the distribution of refugees among EU MS according to a somewhat fair allocation system date far back to the past, but up to this moment, none of these attempts have been successful. At least implicitly, however, the need for such an allocation system results from the Dublin system which, as a principle, attributes primary competences for carrying out the asylum procedure to the country of first entrance.[50] To avoid that the assumption of these administrative obligations subsequently translates into a duty for the respective country to also assuming the entire substantive burdens of care-taking for the refugees, a burden-sharing mechanism is needed. Without such a mechanism, the front-line states of the EU, and the Mediterranean countries in particular, would become soon overburdened, especially

[50] *See* art. 20 ¶ 1 and art. 3 ¶ 2 EU Reg. 604/2013. Part and parcel of this Dublin system is also the Eurodac Regulation and its 2013 Recast (EU Reg. 603/2013). For one of the most prominent international refugee law experts, Guy S. Goodwin-Gill, the Dublin system "contributes nothing to what is and always was clearly needed in Europe, namely, effective, equitable sharing of protection responsibilities among a community committed to common, fundamental principles." *See* Guy S. Goodwin-Gill, *Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action*, *in* A Mediterranean Perspective on Migrants' Flows in the European Union 25 (Giuseppe Cataldi ed. 2016).

in cases of mass influx as it takes place these days. In 2015, in view of a refugee crisis that risked getting out of control, the EC has undertaken serious attempts to establish a quota system in order to alleviate the burden of the most affected MS.

In the wake of a growing death toll among refugees trying to reach Europe over the Mediterranean route in May 2015, the EC tried for the first time to trigger the solidarity mechanism (or "emergence response system") in Article 78 ¶ 3 TFEU and presented a two-year plan. Here, 40,000 refugees stranded in Italy and Greece (Syrian and Eritrean nationals) should be resettled to other MS and a further 20,000 persons in clear need of international protection (i.e., asylum-seekers with a recognition rate of over 75 percent—Syrian, Eritrean, and Iraqi nationals) from outside the EU should be permitted entrance into the EU and distributed among MS per a specific key. According to this plan, the EU as a whole should show solidarity toward the MS taking in refugees by paying them €6,000 per refugee. This solidarity mechanism had some imperfections as it did not include Britain, Ireland, and Denmark—MS that are exempted from matters relating to justice and home affairs through "opt-in" and "opt-out" clauses.[51] The EU Council adopted this proposal by a decision of September 14, 2015.[52] Soon after it became clear that these measures would not suffice and so on September 9, 2015, the EC presented a second package of measures, adopted subsequently by the Council on September 22, 2015.[53]

This second package of measures went considerably beyond the original plans as now the relocation of 120,000 people from front-line states (Italy, 15,600; Greece, 50,400; and Hungary, 54,000)—on top of the 40,000 planned before—was envisaged. Regarding nationality, again, people "in clear need of international protection" (Syrian, Eritrean, and Iraqis) should be considered. As to the distribution, key reference was made to the size of the population (40 percent), GDP (40 percent) average number of past asylum applications (10 percent), and unemployment rates (10 percent).

Alongside this emergency relocation mechanism, the EC proposal on September 9 foresees also a permanent relocation mechanism to be triggered any time by the EC "to help any EU-Member State experiencing a crisis situation and extreme pressure on its asylum system as a result of a large and disproportionate inflow of third country nationals." This new solidarity mechanism can be seen as a structured response to the new challenge of mass influx and as an immediate consequence of the fact that the Temporary protection directive (Reg. 2001/55/EU), providing exactly for situations of mass influx, has not been implemented yet. Also the drafting of a common European list of safe countries has been set on the agenda.

The proposals of December 15, 2015 regarded the adoption of a set of measures to manage the EU's external borders and to protect the Schengen area without internal borders.

[51] *See* European Agenda on Migration, COM(2015) 214 final (May 13, 2015). However, in 2016 Ireland decided for an "opt in" and therefore fully participates in the relocation program. Denmark has agreed to accept 1000 refugees under the second Decision.

[52] Council Decision 2015/1523 of September 14, 2015, O.J. 2015, L 239/146.

[53] Council Decision 2015/1601 of September 22, 2015, O.J. 2015, L 248/80.

The relocation plan contained in the second package was approved by the EU interior ministers meeting in the Justice and Home Affairs Council on September 22, 2015. This plan was not, however, approved with unanimity: The Czech Republic, Hungary, Romania, and Slovakia voted against while Finland abstained.

On May 4, 2016 the EC proceeded further in proposing a so-called fairness mechanism according to which, on the one hand, MS should be exempted from further admission obligations in case of disproportionate migration pressure. On the other hand, MS should obtain permission to opt out from the relocation mechanism against payment of a proud sum of €250,000 per refugee rejected who otherwise should have been accepted according to the Dublin rules.

Conforming to the two Council decisions, the MS of relocation will receive €6,000 for each refugee relocated and additionally, in line with the second decision, Italy and Greece will receive €500 for each person relocated as a compensation for the administrative costs incurred by these states.

All these plans met with growing resistance by single MS. Slovakia has already filed a lawsuit at the European Court of Justice (ECJ) against the relocation plans approved on September 22, 2015, with qualified majority, calling this project "nonsensical and technically impossible,"[54] a criticism that may, however, not suffice to convince the ECJ on the legal plan to scrap this proposal. On December 3, 2015, Hungary filed a further case against the second Council decision claiming, inter alia, that Article 78 (3) TFEU would not empower the Council to adopt legislative acts.[55] Both actions were dismissed by the ECJ in their entirety, vindicating thereby both the majority principle in the EU decision-making process as the solidarity principle.[56]

Far more serious are the practical obstacles built up by many MS against this relocation mechanism. Because of this active and passive resistance by many MS against any broader relocation initiative, the plan was still largely unimplemented by September 2017.[57]

More successful was the EU–Turkey Statement of March 18, 2016,[58] according to which refugees newly arriving in Greece should be sent back to Turkey. At the same time, applications for asylum should find full examination on an individual basis, as requested by human rights organizations. Furthermore, a new agreement was found with Turkey

[54] *Available at* http://www.politico.eu/article/slovakia-files-lawsuit-against-eus-refugee-relocation-september/.

[55] *See* European Parliament, Briefing March 2016, Hotspots and emergency relocation—State of play, p. 5s. Hungary further claimed a violation of Article 78(3) TFEU as the Council departed from the Commission's proposal without reaching unanimity. *Id.* at 6.

[56] *See* ECJ, Judgment in Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v. Council, September 6, 2015, ECLI:EU:C:2017:631.

[57] As of September 4, 2017 only 27,695 refugees had been relocated. The plan is due to expire on September 26, 2017. *See* Jacopo Barigazzi, Bruxelles to End Mandatory Refugee Relocation (for Now), in Politico (September 15, 2017), *available at* http://www.politico.eu/article/brussels-to-end-mandatory-refugee-relocation-for-now/.

[58] O.J. 2014, L 134/3. This statement is often called an "agreement" but in this regard some specification is needed. In fact, no new agreement in a legal sense has been concluded. Even less so we are here faced with an international treaty to be dealt with according to Article 218 TFEU. This statement rather gave expression to a political consensus according to which the parties agreed to give more effective implementation to norms already in force. This results clearly from a written answer of May 12, 2016 given by the European Commission to Professor Tullio Scovazzi and Professor Giuseppe Cataldi (on file with author).

about the allocation of the Syrian refugees forming presently the largest refugee group. Between the EU and Turkey, a 50:50 quota was agreed and thus, the refugees should be distributed equally between these two entities. As a consequence, arrivals in Greece had fallen dramatically, reducing in this way also considerably the migration pressure on the Balkan route. The heightening of tensions in Turkey following the failed coup d'état of July 16, 2016, seemed, however, to jeopardize this first greater success in the refugee crisis. Furthermore, it should be considered that this agreement only partly brings relief in the refugee crisis, as it does not concern the refugees pouring into the EU over other outer borders of the EU. In this regard, further agreements, similar to those found with Turkey, are planned with other neighboring countries in the Mediterranean region. In this context, the policy of conditionality should play an important role: Development aid should be granted only on the condition of corresponding measures by the recipient countries, for example, in the field of borders controls.[59]

In April 2016, the EC proposed a more comprehensive reform of the CEAS[60] that should considerably change the Dublin system. In this context two options were presented to tackle situations of mass influx. Under both options, Member States of first point of entry should continue to be responsible for identifying, registering, and fingerprinting all migrants, and return those not in need of protection.

According to the first option the present Dublin system should more or less be preserved while being supplemented with a corrective fairness mechanism that would be triggered in case a MS is under great pressure due to a large and disproportionate inflow of third-country nationals seeking asylum. This option represents a further development of the relocation mechanism proposed by the EC in 2015. It could comprise arrangements according to which also refugees coming from other countries than Syria, Iraq, and Eritrea would be considered if there is "a reasonable likelihood of being granted international protection."

According to the second option, a completely new allocation system on the basis of a newly conceived distribution key should be designed. On the basis of this system the responsibility for processing the asylum applications would, as a matter of principle, no longer be allocated to the MS of first application or irregular entry but on the basis of a distribution key reflecting the relative size, wealth, and absorption capacities of the Member States. The MS of first application would be responsible for processing the asylum application only in exceptional cases (e.g., applications from safe countries that can be processed speedily). On the whole, in line with this option, the quota would become the central distribution criterion and therefore one should rather be skeptical regarding the prospects for this model to be accepted even in the medium range. Finally, the adoption of such a model would probably imply a complete harmonization of the national asylum systems, and this further reduces the probability for such a model to find broader acceptance.

[59] *See* Peter Hilpold, *EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance*, 7(1) Eur. Foreign Aff. Rev. 53 (2002).

[60] COM(2016) 217 final.

Based on anecdotal evidence, reference can be made to the announcement by Austrian government members in August 2016 that an action for failure to act against the EC pursuant to Article 265 TFEU was seriously considered. This action should be based on Article 80 TFEU and be directed against the EC due to the alleged inactivity of this institution in response to the need to adapt the Dublin III Regulation in order to achieve "a better distribution of refugees." This announcement, lacking any legal and factual foundation, caused considerable embarrassment on the political and the academic level and was finally not further pursued after the EC had responded in a sharp tone to this criticism.[61]

5. Prospects for a solution: Unilateralism v. multilateralism

The most recent—and most disputed—ramification of the discussion about this topic refers to the unilateral introduction of quotas and in particular the policy adopted in this regard by the Austrian government.[62] As is well known, after an unprecedented influx of asylum-seekers and growing resistance within the population, the Austrian government has taken the initiative for a broader revision of the Austrian asylum law enshrined in a law of 2005 (Asylgesetz 2005—AsylG 2005). Center stage of these reform attempts was the introduction of an "upper limit" of 37,500 asylum-seekers who would be accepted in Austria starting in 2016. In the following years, this quota should be further reduced. Conforming to the government such a measure would be in conformity with international and European law,[63] a claim that is obviously unsustainable.[64]

[61] As media reported, the Austrian government was prompted to adopt this ill-fated approach by the outcome of a written opinion commissioned by the Austrian government: *available at* http://kurier.at/politik/ausland/ultimatum-von-mikl-leitner-nur-drohgebaerde/147.905.888. An action by the Austrian government against the European Commission would have been problematic for several reasons. First, it was the European Commission that had previously proposed such quota systems while it was the Austrian government that had opposed them—together with other MS—in the European Council. Furthermore, it was not clear where the "infringement of the Treaties" by the Commission should lie. Finally, the principle of solidarity, on which this approach relies, is far too imprecise to serve as a basis for creating a legal obligation either for the EU institutions or for the MS.

[62] In this regard, the measures taken by the Swedish government in 2015 may have constituted, to a certain extent, a precedent. In fact, while Sweden in the past has been a very open country admitting a relatively high share of the asylum-seekers coming to Europe, growing opposition within the population against this policy has prompted the government to change its policy in this regard. It introduced immigration restrictions based on emergency measures confirming that the immigration had put high stress on state functions such as housing, health care and hospitals, and social services. Starting from this assessment the government deduced "that the current situation in a wide perspective constitutes a serious threat against public order and internal security." Lag 2015, 1073, cited according to Mark Klamberg, Reconstructing the Notion of State of Emergency Under Human Rights Law 7 (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812635.

[63] This claim is based on an opinion commissioned by the Austrian government after the decision to introduce such an "upper limit" had already been taken on the political level. In order to soothe somewhat the tone of the discussion, some political representatives tried to qualify this "upper limit" (*Obergrenze*) as a reference value *(Richtwert)*, but at the same time it was also—repeatedly—made clear that the government intended to stick to this value so that the first expression seems to give better expression to the actual political will.

[64] This author made this assessment already in an early stage of the respective discussion. *See* Peter Hilpold, *Die Obergrenze des Flüchtlingsrechts*, Die Presse, January 25, 2016, at 14, *available at* http://www.peterhilpold.com/wp-content/uploads/2016/01/Asyl-Presse-25Jan16.pdf.

In Austria, the overall reaction to this initiative was rather muted, and comments by high-ranking lawyers and this country's international law community were conspicuous in their absence. However, some very clear statements opining for the illegality of these measures were nonetheless published,[65] and finally, the Austrian government stopped short of issuing the decree necessary for the implementation of these urgency measures. Officially the reason for this restraint lay in the fact that the upper limit of the quota had not been reached by December 2016 and thus—so the political reasoning went—no need for such a measure was given. However, it should now be pretty clear for the Austrian government that any such measure as the discussed "upper limit" would constitute a violation of international law and of EU law. At first glance one would therefore be inclined to state that this attempt to tackle the refugee and migration crisis has failed. However, at a closer look, the following somewhat disconcerting finding shows up:

The unilateral measures taken by some MS (such as Austria), as objectionable they may be from a legal viewpoint, have factually reduced the "mixed migration flows"[66] toward Europe as a whole[67]—that of asylum-seekers who would fall under the asylum norm of the GCR or of the CEAS or that of other immigrants, especially economic immigrants. Consequently, we are confronted with the following legal—and in particular, human rights—quandary: Within the broader population in many EU MS surely a limit as to the willingness to accept further immigration, be it of humanitarian or economic nature, has been reached. At the same time, however, the criteria set by international law or EU law for the adoption of emergency measures have not been met.

We are therefore confronted here with a clear gap in international law and EU law. The only instrument that could give a comprehensive and lasting answer to this challenge, the Temporary Protection Directive of 2001, has not been activated due to fears that providing a stable basis for the management of this problem could unleash a further pull effect.[68] The "hotspot approach"[69] recently adopted by the EU may give

[65] *See*, already at a very early stage of this process, Hilpold, *supra* note 63, as well as Peter Hilpold, *Quotenregelungen zur Bewältigung des Flüchtlingsproblems—Ein rechtlich gangbarer Weg*, 14(3) Migralex 58 (2016), and David Lansky, *Dodging a Bullet? Austria's Asylum Policy and the TFEU*, Polemics (July 3, 2016), *available at* https://dapolemics.com/2016/07/03/dodging-a-bullet-austrias-asylum-policy-and-the-tfeu/.

[66] As to the concept of "mixed migration flows" *see* International Organization for Migration, Addressing Mixed Migration Flows, *available at* https://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/96/Mixed_Migration_Flows_FINAL.pdf.

[67] In this context, of considerable importance was the factual closure of the so-called Balkan route.

[68] For a recent contribution arguing for an activation of this directive in view of the mass influx Europe is confronted with, *see* Meltem Ineli-Ciger, *Time to Activate the Temporary Protection Directive*, 18(1) Eur. J. Migration 1 (2016).

[69] This approach was developed by the EC and consists in a bundle of assistance measures provided at specific sectors of the EU external border that are characterized by "disproportionate mixed migratory flows." So far, eleven hotspots (six in Italy and five in Greece) have been created. At these hotspots, with the help of the competent EU agencies (Frontex, European Asylum Office—EASO, and Europol) an attempt is made to better distinguish between irregular migrants and asylum-seekers and to provide apposite administrative procedures. *See* for more details European Parliament, Briefing March 2016, Hotspots and Emergency Relocation, State of Play.

expression to some sort of activity by the EU and also improve the situation of some frontline states, but it does not provide a real solution.

Thus, the dots can be connected to the considerations made at the beginning of this text: At the moment, a broader solidarity element, that in the past has been decisive for the solution of comparable challenges, is missing. The international crisis solution instruments have proven to be too weak to counter effectively the main roots of this migratory phenomenon. The unilateral measures recently introduced (or announced) by single states can be interpreted as an attempt to enforce solidarity by intentional violations of law. This development can be seen as symptomatic for broader weaknesses in the international norm-creating and norm-enforcing system. Progress seems to be possible only in an erratic, crisis-driven process[70] that accepts law violations while denying or diminishing them on a rhetoric level. Unilateral measures such as those taken (or announced) by Austria and a series of countries in the Balkans may eventually lead to a norm-setting process that might steer migratory flows in a way that reduces their impact on those states that are most affected at present. But we should take into consideration that such a unilateral approach comes at a high cost. The immediate result might be that many asylum seekers fleeing persecution are denied effective protection and that a culture of solidarity built up under enormous efforts after World War II is replaced by a culture of egoism and that highly evolved societies all over the world become more and more insensitive toward the plight of others. More generally, it might well be the case that unilateralism will lead to barriers and closed societies but will prove to be too weak to engender a law- and institution-creating process that could effectively solve the refugee and migration problem with an international law in the spirit of solidarity. For this reason, the far better approach would be to invest most of the energy and the means not in the unilateral creation of barriers but in the building up of central institutions,[71] preferably within the United Nations, that could provide for fairer relocation[72] and protection measures and, most of all, contribute to tackling the very roots of this asylum and migration crisis in the first place.

[70] On progress in international law *see* Russell A. Miller & Rebecca M. Bratspies, eds., Progress in International Law (2008).

[71] *See* in this sense also Guy S. Goodwin-Gill, *The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change*, 28(4) Int'l J. Refugee L. 679 (2016).

[72] For a plea for a fairer responsibility sharing *see* recently Volker Türk & Madeline Garlick, *From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees*, 28(4) Int'l J. Refugee L. 658 (2016).