



CEPS IN-DEPTH ANALYSIS

THE DECLARATION ON A VOLUNTARY SOLIDARITY MECHANISM AND EU ASYLUM POLICY

**One Step Forward, Three Steps Back
on Equal Solidarity**

Sergio Carrera and Roberto Cortinovis

October, 2022 - 04

SUMMARY

Policy debates on solidarity in EU asylum policy have been shaken by large-scale arrivals from Ukraine since the Russian invasion in February 2022. The unprecedented decision to grant temporary protection to displaced people from Ukraine, with the associated right for beneficiaries to move freely across Member States, has laid bare the structural inadequacies of the EU Dublin system and its compensatory arrangements for responsibility sharing among Member States.

This contribution explores the key features of the Declaration on a Voluntary Solidarity Mechanism adopted by a group of Member States in June 2022 under the auspices of the former French Presidency of the Council. The analysis argues that the 2022 Declaration is not a mechanism but a non-legally binding arrangement that gives preference to an intergovernmental, asymmetric and unequal notion of solidarity. It argues for an alternative approach to the EU solidarity principle that is subordinated to justice and safeguards humanitarian solidarity, and puts forward five action points to inform future EU asylum policy.



Sergio Carrera is Senior Research Fellow and Head of Unit at CEPS; Roberto Cortinovis is Researcher at CEPS.



This paper falls within the scope of the ASILE H2020 Project (Global Asylum Governance and the EU's Role in Implementing the UN Global Compact on Refugees). For more information please visit: www.asileproject.eu. The ASILE project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement n° 870787.

CEPS In-depth Analysis papers offer a deeper and more comprehensive overview of a wide range of key policy questions facing Europe. Unless otherwise indicated, the views expressed are attributable only to the authors in a personal capacity and not to any institution with which they are associated. This document reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains. Cover image: the statue of Justice standing above the Cork Hill entrance to Dublin, Ireland.

© CEPS 2022

We must live up to the new challenges that history always puts before us. Just like Europeans did when millions of Ukrainians came knocking on their door. This is Europe at its best. A Union of determination and solidarity. But this determination and drive for solidarity is still missing in our migration debate. Our actions towards Ukrainian refugees must not be an exception. They can be our blueprint for going forward.

We need [...] a permanent and legally binding mechanism that ensures solidarity. And at the same time, we need effective control of our external borders, in line with the respect of fundamental rights. I want a Europe that manages migration with dignity and respect. I want a Europe where all Member States take responsibility for challenges we all share. And I want a Europe that shows solidarity to all Member States.

Ursula von der Leyen, [State of the Union Address](#), 14 September 2022

INTRODUCTION

The former EU French Presidency's strategy to unlock stalled negotiations on the [EU Pact on Migration and Asylum](#), proposed by the European Commission in September 2020, relied on a 'gradual approach'. This implied an attempt to abandon the long-held '[package approach](#)' that linked the reform of the EU Dublin Regulation and a permanent relocation system to the rest of the legislative reforms comprising the Pact.

The gradual approach strategy favoured breaking down the negotiation processes into a set of distinct stages and pieces of legislation. As part of the [first stage](#) agreed on June 2022, EU Member States representatives adopted a [Declaration](#) on a voluntary solidarity mechanism. This has been presented as addressing issues of 'solidarity and responsibility-sharing' among EU Member States over who is responsible for assessing applications of asylum seekers rescued at sea.

The Declaration was endorsed by the ministers in charge of migration matters of 21 States (18 Member States and 3 Schengen-associated States). Under this plan, [10,000 asylum seekers](#) rescued at sea in Southern European countries are supposed to be relocated to other participating countries within a year.

The reforms to the EU Pact are being influenced by the large-scale arrival of persons fleeing the war in Ukraine since February 2022. In March the same year, the EU and its Member States decided to [activate](#) for the first time the 2001 [Temporary Protection Directive \(TPD\)](#). This instrument has granted people fleeing the war in Ukraine temporary protection status on a group basis, along with a wide set of common EU rights. In an unprecedented move, temporary protection (TP) beneficiaries have been recognised the right to [freely move](#) or self-relocate and enjoy the protection associated with that status across Member States.

The specific features of the TP regime activated to respond to the Ukraine situation have possible implications for the ongoing reform of EU migration and asylum policies in the context of the Pact, and raise questions more widely about the EU principle of solidarity enshrined in Article 80 of the Treaty on the Functioning of the EU (TFEU). What does the new Declaration on a voluntary solidarity mechanism tell us about the EU concept of solidarity? Is the Declaration another example of [unequal solidarity](#) in EU asylum policy?

This analysis closes the online Forum discussion on [The EU Temporary Protection Responses to the Ukraine War and the Future of the EU Asylum System](#), organised within the context of the Horizon 2020 ASILE Project. Section 2 examines the scope and key features of the 2022 Declaration. The assessment is carried out against the background of the EU Pact on Migration and Asylum and the EU response to the Ukraine situation. It argues that the Declaration constitutes another example of unequal solidarity in EU asylum policy. Section 3 puts forward an understanding of EU solidarity that moves away from a [state-centric alliance logic](#) driven by the priority of containing asylum seekers' mobility, and towards a rule of law and human rights-centred logic, which subordinates solidarity to justice.

Section 4 argues that TPD activation in response to the war in Ukraine has shown the feasibility of an alternative approach to the dysfunctional EU Dublin system and its compensatory arrangements. This alternative approach rests on the recognition of refugees' and asylum seekers' agency as key for ensuring the legitimacy and sustainability of the entire EU asylum system. This would give priority to upholding and delivering international human rights and the right to asylum enshrined in the EU Charter of Fundamental Rights. The concluding section outlines five action points for future EU asylum policy.

THE 2022 DECLARATION EXPLAINED: SCOPE AND KEY FEATURES

The 2022 Declaration has been explicitly framed as a non-legislative and temporary arrangement, focusing exclusively on human movements across the Mediterranean and the Atlantic seas; however, it is stated that its implementation may provide 'useful lessons' for the design of the 'permanent solidarity mechanism' envisaged in the [Asylum and migration management regulation \(RAMM\)](#) proposed by the Commission to reform the EU Dublin system as part of the 2020 Pact.

Despite their initial reluctance about the design of the Declaration and the volume of pledges initially mobilised, the 'Med 5' countries of Cyprus, Greece, Spain, Italy and Malta, were persuaded to give the green light to the Council 'general approach' on the screening and Eurodac legislative files. The Declaration didn't count on unanimous support. Nine EU Member States decided not to sign it, and [six of them](#) – Austria, Denmark, Poland, Hungary, Latvia and Slovakia – rejected it flat-out.

The Declaration bears close similarities to the [‘Malta Declaration’ adopted in September 2019](#). The latter consisted of a non-legally binding arrangement that expressed the willingness of a group of Member States’ interior ministers (initially Italy, Malta, France, and Germany) to take ‘voluntary commitments [...] for a Predictable Temporary Solidarity Mechanism’ in the form of a relocation scheme for asylum seekers rescued at sea. The initiative’s rationale was to provide a more predictable and stable alternative to the [ship-by-ship](#) approach that had been implemented since the summer of 2018 as a reaction to the controversial [closed-ports policy](#) adopted (or threatened) by EU Mediterranean states’ governments, such as those of Italy and Malta.

As explained in detail in Annex 1 of this analysis, the similarities between the two documents are many. Both are framed as [‘declarations’](#). This means that they are neither EU legal acts nor international agreements according to the EU treaties. They lack democratic legitimacy by preventing the European Parliament from exercising accountability in line with its role as co-legislator, and lack the checks and balances inherent in the use of formal EU legal acts, including judicial control by the Luxembourg Court. Rather, the declarations can be understood as political arrangements that are not fully binding for the parties and cannot be effectively enforced by the Commission in case of non-compliance.

The 2019 Malta Declaration’s purported aim was to lay down [Standard Operating Procedures](#) for the swift relocation – taking no longer than four weeks – of asylum seekers rescued at sea. Implementation of the relocation process has been described by the Commission in terms of a [workflow](#), laying down a list of actions to be undertaken by Member States’ authorities, the Commission and EU agencies (Frontex and the EU Asylum Agency (EUAA)). These include initial identification and screening, interviewing and ‘matching’ of candidates for relocation with receiving Member States.

The language of the 2022 Declaration is possibly even more vague than that of the Malta Declaration as it frames the proposed initiative in terms of a *‘modus operandi’*. Both the notions of workflow and *modus operandi* are equally alien to EU law and extraneous to any existing EU legal act on migration and asylum.

The two instruments are centred on intergovernmental voluntarism and differentiation. This means that participating EU Member States’ ministries remain by and large free to determine not only if they wish to participate in the first place, but also to pick and choose the nature and amount of their contribution – including in forms other than relocation – and ultimately to deliver on their expressed wish lists.

The 2022 Declaration states that relocations should primarily apply to ‘persons in need of international protection’, with priority accorded to the ‘most vulnerable’ ones. In line with relocation practices carried out in the framework of the Malta Declaration, it gives Member States the opportunity to preselect a profile of potential beneficiaries based on

their own political preferences, for example specific nationalities or only ‘vulnerable’ applicants.

The unclear personal scope, coupled with the documented lack of standardised and reliable procedures for assessing vulnerability in many contexts (as, for example, in the case of [Greek hotspot procedures](#)) runs the risk of legitimising prohibited discrimination and excluding applicants facing precarity but who don’t formally match [stereotypical or narrow understandings of vulnerability](#).

Another common feature of the two declarations is the focus on disembarkation following search and rescue (SAR) at sea. However, while the Malta Declaration focused exclusively on relocation of disembarked asylum seekers from Italy and Malta, the new arrangement extends its coverage to the Atlantic Sea and Spain, while potentially also applying to non-SAR cases, including the situation in Cyprus and the Greek Islands.

The relocation framework sketched out above is complemented by the following two elements selectively extrapolated from the system of [flexible solidarity](#) laid down by the 2020 RAMM proposal (see the comparative table included in Annex 1 for further details).

First, similarly to the criteria of the distribution key regulating relocation contributions in the RAMM, each participating Member State will be asked to present a ‘relocation pledge’ linked to a target number based on its population and GDP. By way of derogation, however, the Declaration envisages that a Member State facing a situation of ‘disproportionate pressure’ due to ‘secondary flows’ of asylum seekers within its territory, would be allowed to temporarily suspend its relocation commitment.

Second, in line with the logic of [asymmetric solidarity](#) of the RAMM, participating Member States may voluntarily choose contributions *other than* relocation. Alternative inputs may take the form of financial contributions or operational support to Member States of first entry in areas such as reception, border surveillance, detention, and return. The 2022 Declaration does not include any reference to the controversial concept of [return sponsorship](#), which was intended to be a key feature of the RAMM ‘solidarity system’. Mirroring a similar RAMM provision, Member States may also choose to contribute by financing projects in third countries expected to contain/prevent people from leaving or travelling towards the EU external borders.

What would happen in cases where EU Member States decide to voluntarily participate by offering financial contributions instead that relocation? The Declaration avoids reproducing the intricacies of the complex (albeit legally binding) [‘mass correction mechanism’](#) laid down in the RAMM proposal. Instead, it provides, in a convoluted manner, that ‘a minimum indicative contribution for each participating Member State will be foreseen so that this target is not reduced exceedingly in case a low number of Member States take part in relocation’.

No additional specification is provided on key points of the proposed relocation process. This leaves the door open on a number of fundamental questions: notably, who, and on the basis of which objective criteria and independent procedure, will determine that a Member State is facing a situation of disproportionate pressure? Additionally, what will happen if Member States do not provide enough relocation pledges or if they fail to fulfil their expressed relocation commitments?

The proposed *modus operandi* is thus, by design, fraught with a profound lack of foreseeability and predictability. This by-design legal uncertainty, combined with the absence of any obligation for the involved Member States, implies that the Declaration shouldn't be qualified as a mechanism. It is rather an arrangement or a [statement of intent](#) between participating ministries of interior, DG Home Affairs (HOME) of the Commission and the EUAA, which is not amenable to implementing the EU Pact on Migration and Asylum.

The arrangement is expected to run for an initial period of one year, after which a stocktaking exercise will be carried out by the Commission to monitor its implementation and consider a possible prolongation. The latter, however, will depend on a number of factors unrelated to its performance in ensuring effective relocation; these include progress made at the EU level towards the adoption and implementation of the screening and Eurodac regulation proposals, as well as the identified impact of the mechanism on the migration dynamics to the EU and intra-EU movements of asylum seekers.

Just a few days after the adoption of the Declaration, the Commission organised a meeting to establish a '[solidarity platform](#)' with the aim of starting its implementation. [According to public information](#) provided by the EU Home Affairs Commissioner, Ylva Johansson, as of July 2022, 13 EU Member States had expressed their 'readiness' to relocate people rescued at sea, bringing the total number of relocation pledges over one year to more than 8,000. The bigger pledges were made by France (3,000) and Germany (3,500), with other countries, including Luxembourg, Ireland, Portugal, and Belgium, making smaller relocation pledges. [On 25 August 2022](#), a group of 38 asylum seekers left Italy for France, the first to be relocated under the temporary solidarity mechanism.

The overall numbers of potential relocated persons are indeed low in scale and ambition, taking into account the wide geographical scope of the arrangement. The above numbers, however, still represent an increase compared to the volume of relocations in the framework of the Malta Declaration; according to the latest publicly available [data provided by the Commission](#) in September 2021, 2,100 applicants had been successfully transferred in that context since 2019 (1,145 from Italy and 959 from Malta). Still, from the perspective of scale, a quantitative comparison between the total number of people expected to be covered by the Declaration and those having fled Ukraine, which as of 27 September 2022 has been estimated to be around [7.4 million](#) since the start of the war, is staggering.

The exact practicalities concerning the functioning and monitoring of the arrangement have been deliberately left for a later stage. As in the context of the Malta Declaration, the Commission has accepted taking up the tricky role of coordinator of the implementation of the exercise, in close relation with the EUAA and with the operational support of the [International Organisation for Migration \(IOM\)](#).

It is surprising the way in which the Commission has taken full ownership of an intergovernmental declaration in another instance where [‘unity’ has not prevailed](#). Furthermore, given the informal and extra-EU treaty nature of the arrangement, the legitimacy costs for the Commission to assume this broker role remain large. This is particularly so for the way in which this negatively impacts von der Leyen’s State of the Union call for a permanent and legally binding mechanism and, more generally, the Commission’s own enforcement role as guarantor of the Treaties.

WHAT AND WHOSE SOLIDARITY?

In our previous analyses of EU responses concerning SAR and disembarkation of migrants rescued at sea, we qualified *ad hoc* disembarkation and relocation arrangements carried out in different modalities since the second half of 2018 as examples of [unequal solidarity](#). We expressed our doubts as to whether these intergovernmental arrangements furthered EU Treaties’ objectives and reinforced the European integration process in the area of asylum. We concluded that informal or even formalised manifestations of variable geometry in the asylum domain put at risk the Treaties’ objective stipulated in Article 78 TFEU to establish a *common* policy and *uniform* area of asylum in the EU.

Instead, we called for an understanding of the EU solidarity principle through the lens of ‘equal solidarity’, whereby clear [legally binding responsibility is upheld and equally shared](#) among all participating governments in line with treaty decision-making procedures and the EU Charter of Fundamental Rights.

[Karageorgiou and Noll](#) have argued that the language of solidarity should be abandoned altogether when it comes to analysing the EU response to the Ukrainian situation. In their view, the ‘open arms’ response to refugees from Ukraine - as labelled by President von der Leyen in her 2022 State of the Union quoted above - should be instead understood as the expression of a communitarian-instrumentalist concept of alliance. Favouring the mobility of Ukrainians into EU Member States would thus be – alongside providing equipment and intelligence to Ukrainian authorities – one of the components of the EU strategy of ‘projecting its power’ towards Russia.

In their view, the EU response to the Ukrainian situation should be considered as an exception to the prevailing practice of solidarity in the asylum field between EU Member

States, which has instead been usually deployed to the purpose of immobilising particular groups of third country nationals through collective border control practices. In this sense, Karageorgiou and Noll conclude that ‘any form of solidarity by states and international organizations is, by definition, unequal’.

In spite of the persuasiveness of this conclusion, we argue that it is still crucial to focus on an alternative understanding to the one conveying the EU solidarity principle as an interstate alliance clause. This is particularly so at times of understanding the EU policy developments that have emerged since 2015, and specifically the increasing use of non-treaty-based and variable geometry arrangements covering relocation and SAR, with the last instance being the 2022 Declaration on the voluntary solidarity mechanism examined in this contribution.

In our view, solidarity understood in terms of cooperation between EU Member States is not always unequal. The fact that some forms of solidarity may be more unequal than others has been illustrated by the controversies brought before the Court of Justice of the EU (CJEU) in Luxembourg regarding the [2015 emergency relocation Decisions](#) and the conclusions reached by the Court.

The emergency relocation mechanism was adopted by the Council in line with the Treaty decision-making parameters and therefore by means of qualified majority voting (QMV), rather than through a consensus-building logic. It was strongly opposed by a small group of Member States, in particular Slovakia, Hungary, the Czech Republic, and Romania. These governments voted against the second relocation decision in the Council – which didn’t prevent its formal adoption – and later [refused to fulfil their legal commitments under the legal act](#).

The [CJEU made clear](#) that the relocation Decisions were lawful. It then found the Slovak and Hungarian governments in violation of their obligations under EU law. The Court called for *equal* solidarity among EU Member States by stating that when one or more Member States are faced with an ‘emergency situation characterised by a sudden inflow of nationals of third countries, the responses *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’ (emphasis added).

[In a parallel ruling about the same 2015 emergency relocation mechanism](#), the Court held that allowing EU Member States’ authorities to make relocation of asylum seekers conditional on the selection of certain applicants with ‘cultural or linguistic ties’ with a specific EU Member State would make it unfeasible for any such mechanism to work in practice. The Court underlined that any considerations related to ethnic origin of asylum applicants – which often hides behind nationality selection criteria – would be discriminatory and run contrary to Article 21 of the EU Charter of Fundamental Rights.

Through its case law, therefore, the CJEU has recognised that specific manifestations of unequal solidarity run contrary to the essence of the EU solidarity and fair sharing of responsibilities principle enshrined in Article 80 TFEU. The Court has also placed equality and non-discrimination at the heart of the equation regarding the right to asylum under the EU Charter of Fundamental Rights.

Paradoxically, the response of the European Commission to the unsatisfactory implementation of the 2015 emergency relocation decisions and, later on, the failing [2016 reform of the EU Dublin Regulation](#) – envisaging a permanent corrective responsibility-sharing mechanism – has been that of fostering and facilitating inequality and differentiation in EU asylum policies. It has pursued an artificial need for [consensus building or de facto unanimity voting](#) among all EU Member States' governments in EU asylum policy reforms, including those in Budapest and Warsaw. This has been translated into the Commission's support and indirect involvement for the adoption of a set of intergovernmental declarations and non-legally binding arrangements implementing 'flexible solidarity' among the participating governments.

The notion of solidarity in the EU constitutional framework has been the subject of rich academic debate. [Habermas has](#) highlighted how solidarity can be understood as a political act calling for a 'cooperative effort from a shared political perspective' amongst EU Member States. In his view, the solidarity concept [describes](#):

[...] the mutually trusting relationship between two actors who have become part of a *joint political project* of their own free will. Solidarity is *not charity*, and it certainly isn't a form of *conditioning for the advantage of one of the actors*. Those who engage in solidarity are willing to accept short-term disadvantage in the service of their *long-term self-interest* and in the knowledge that the other *will behave the same way* in a similar situation (emphasis added).

The assumption of 'mutually trusting relationship' underlying Habermas' conceptualisation of solidarity should not be taken for granted in the current EU, however. Mistrust is in fact one of the most crucial challenges facing the Union across many policy areas, including those dealing with asylum. Some EU Member States' governments are instrumentally engaging in nationalistic and extreme-right agendas, which include rule of law backsliding and systematic anti-migration and anti-refugee policies running contrary to EU founding principles enshrined in Article 2 TEU. Mutual trust here no longer holds and therefore, as we argue below, a notion of solidarity understood in these terms needs to be integrated with a rule of law and human-rights centred concept that focuses on upholding justice.

To the interstate understanding of solidarity based on interstate cooperation, Habermas adds the concept of [civic solidarity](#), which he understands as solidarity among citizens who are willing to support each other in a joint political will-formation in the EU. This version

of solidarity presents interesting potential but remains too constrained to formal citizenship and ‘joint political will’ considerations. To this one we add another notion focused on individuals’ agency, which we call [humanitarian solidarity and activism](#) as enacted by individuals and civil society actors towards anyone in need – including in response to migration management [policies criminalising third country nationals’ unauthorised mobility and access to rights, as well as those who assist them.](#)

As the EU principle of solidarity is formally enshrined in the Treaties and is here to stay, it is necessary to rethink the ethical and legal foundations of Article 80 TFEU. This would provide the basis for moving beyond the prevailing interstate alliance logic, towards an understanding of solidarity that is read and interpreted in conformity with the EU Treaties and the EU Charter of Fundamental Rights, and which is therefore subject to the rule of law and justice principles in the EU legal system.

Article 80 TFEU must be read in light of the EU Charter which, according to its Preamble, places the individual at the heart of the Union’s activities. The same Preamble states that the Union is founded on the indivisible values of human dignity, freedom, equality and solidarity, as well as the principles of democracy and the rule of law.

Those same principles are enshrined in Article 2 of the Treaty on the European Union (TEU), which identifies ‘human dignity, freedom, democracy, equality, the rule of law and respect for human rights’, and ‘a society where solidarity prevails’, as key founding principles of the EU. Article 2 TEU seems in this way to posit legal principles such as human rights, rule of law and democracy as preconditions for solidarity to prevail. Accordingly, when Article 3.3 TEU mentions that the Union shall promote solidarity among EU Member States, it is obvious that this must be done in full compliance with Article 2 TEU.

Except for Title V, which deals with ‘Citizens Rights’, all the other Titles and provisions of the EU Charter provide crucial rights to *any person* – irrespective of migration status. These EU fundamental rights are of direct relevance when interpreting and implementing the EU principle of solidarity and fair sharing of responsibility. These include human dignity, the right to asylum, the obligation to treat asylum seekers without any prohibited discrimination ground and the protection of the freedom of association and independence of civil society and [human rights’ defenders.](#)

To the previous should be added that several contributions to the ASILE project forum discussion on TP have convincingly argued against the legitimacy of any argument suggesting that TP activation should be linked with the Union’s geopolitical interest of ‘projecting its power’ towards Russia. [Kostakopoulou](#) has showed how Article 78 TFEU – which calls the Union to develop ‘a common policy on asylum, subsidiary protection and temporary protection’ – does not mention the Union’s geopolitical interests or foreign

policy objectives. Accordingly, making EU asylum policy conditional to geopolitical interests would be simply unlawful.

Moreover, [Bueno Lacy and van Houtum](#) have unpacked the ‘geographical proximity trap’ that lies behind [arguments](#) that aim to rationalise unequal treatment between Ukrainian and other refugees. They have convincingly showed how geography considerations are misused to hide unjustified and illegitimate discrimination and unequal solidarity against asylum seekers coming from African as well as *some* Middle-East, South American and Asian countries – including the [main refugee and large displacement-producing states](#) around the world. This inequality is structurally embedded in current EU borders, visas and asylum policies.

In light of the above, an EU Charter proof-read version of the EU principle of solidarity could prove central to develop and include interpretations that contest or even run contrary to what [Karageorgiou and Noll](#) aptly define as an interstate alliance logic. Such rule of law and human rights-centred logic to the EU notion of solidarity provides an alternative vision that puts justice and individuals at the heart, not only that of people on the move but also of citizens, human rights’ defenders and civil society actors who mobilise against restrictive laws and who provide assistance to *anyone*, irrespective of their migration administrative status.

UNMET EXPECTATIONS FOR A SHIFT IN EU ASYLUM RESPONSIBILITY-SHARING

The EU responses to the Ukraine cross-border displacements provide an alternative way to understand solidarity towards individuals and among EU Member States in the framework of the Common European Asylum System (CEAS). It is particularly striking how the major pillars underpinning the EU Dublin system, previously defended as the untouchable cornerstone of the CEAS when responding to the 2015/2016 so-called ‘European Refugee Crisis’, were swiftly and easily put aside from one day to the next in the aftermath of large-scale movements of Ukrainians.

The TPD has led to the establishment of a free movement regime for Ukrainian refugees that sharply contrasts with the brutal containment response and ongoing human rights violations towards non-European asylum seekers at the [Polish and Hungarian external borders](#), as well as other unlawful and inhumane pushbacks at the EU external borders in countries like [Greece, Spain and Croatia](#). In this respect, [the UN High Commissioner for Refugees](#) has acknowledged the inherently discriminatory nature of ‘restrictive legislation, barbed wire, naval blockades, and pushbacks’ applying to non-Ukrainian refugees and asylum seekers, which he defined as a manifestation of racism.

Irrespective of the underlying logic driving its activation, TP as laid down in Council Decision 2022/382 sketches the contours of a policy framework that has for long been called for by scholars and refugee advocates. The TP regime set in place at the EU level shows that [a model of allocation of responsibility](#) that incorporates individuals' agency, leveraging existing networks with diasporas and other links with Member States, is a suitable option to achieve rapid inclusion and avoid the dysfunction and chronic implementation gaps that have characterised the EU Dublin system.

[The Commission itself has recognised](#) that granting agency to TP applicants can be expected to have a positive impact by not overwhelming Member States' asylum systems and reduce pressures on national reception systems. The 'double standards' emerging when comparing the EU responses dealing with Ukrainians fleeing war and people leaving other conflicts in African and Middle East countries has been recently underlined.

The [Greek Minister of Migration Affairs](#) reiterated his government's calls for the EU to recognise the free movement of refugees – yet not of asylum seekers – inside the Union's territory. This is also reflected in the text of the 2022 Declaration, which acknowledges the importance of 'ensuring that beneficiaries of international protection have access to legal mobility between Member States and that the relevant provisions in the Pact should be examined in that respect'.

Rather than opening a new chapter in the field of EU asylum policy, however, the gradual approach to the Pact reform devised by the EU French Presidency has remained rooted in a security and policing-focus framing of asylum policies. Its limited ambition and non-legally binding status reflect persistent challenges on the part of Member States' ministries of interior to overcome divergencies on the reform of the Dublin system and to agree on a predictable and fair mechanism of responsibility-sharing to underpin the CEAS, including in cases of large-scale cross-border displacements.

Ironically, the French Presidency 'mini-deal' on the Eurodac and screening Regulations and the 2022 Declaration represents a clear win for governments in countries like Hungary and Poland, which have opposed any relocation-based form of EU responsibility-sharing for asylum seekers. As underlined in [Vavoula's](#) contribution in the ASILE forum, the Polish and Hungarian governments have been successful in negotiating an 'opt out' of the application of the newly reformed Eurodac database to the TP regime activated to address displacement from Ukraine. In addition, as explained above, these two governments have stated their outright disagreement with the model advanced by the 2022 Declaration and have refused to participate in any relocation scheme.

The picture that emerges in light of these developments is one where flexibility and a consensus-building decision-making approach are pursued by the Commission and the former French Presidency. This approach, however, is providing for the illegitimate use of *de facto* unanimity voting inside the EU Council. It is granting a predominant role to

the European Council in deference to a closed-doors, intergovernmental, and largely undemocratic policy-making process which contrasts with the guarantees laid down in the EU Treaties. It is also allowing some EU governments to wrongly think that they can freely disregard and pick and choose their obligations under EU asylum law and, in some instances, even systematically engage in the violation of EU founding principles in the implementation of racist asylum and border policies.

The gradualist approach initiated by the French Presidency has now been taken over by the ongoing Czech Presidency of the EU Council, which is continuing the work on the Pact's legislative files on a [‘consensus method’](#). In this context, ‘Med 5’ countries are holding discussions on how to advance on the negotiations of the ‘solidarity mechanism’ foreseen by the RAMM proposal under the Pact. On the occasion of a meeting taking place in Cyprus on 7 and 8 October, [the Cypriot Minister of Interior](#) declared that ‘The ultimate goal of the summit is the revision of the existing legislative framework governing the European asylum and immigration system, so that it is based on the principle of *equal solidarity* and responsibility’ (emphasis added).

CONCLUSIONS

The EU responses to refugees fleeing Ukraine have underlined once again the urgent need to abandon the prevailing state-centric understanding of solidarity embedded in EU asylum policies and address the unequal, unfair and discriminatory elements that underline its use and fundamentals. Crucially, it has showed all the limits associated with an EU principle of solidarity understood merely as an ‘alliance clause’ aiming to immobilise asylum seekers and shifting responsibility towards non-EU countries.

The EU response to the Ukrainian situation has demonstrated that the containment paradigm entrenched in the 2020 EU Pact on Migration and Asylum, and its focus on restrictions and criminalisation of ‘secondary movements’, is not compatible with the justice and rule of law principles on which the EU legal framework and the EU Charter of Fundamental Rights are grounded. The activation of the TPD, with all its limitations, hints at an alternative and [realistic way](#) to deal with asylum phenomena. It embeds a model of addressing large-scale asylum movements different from *containment at all costs*.

As illustrated by the outcome of the 2022 Declaration on a ‘Voluntary Solidarity Mechanism’, however, this potential for the emergence of a different approach has not yet materialised. The Declaration rather shows the persistence of long-lasting ministries of interior-led dynamics, which have become ever more visible when compared to EU policies covering Ukrainian refugees fleeing the war. The Declaration constitutes yet another example of unequal solidarity at a time when – as emphasised in President von der Leyen’s 2022 State of the Union speech – a common, permanent and legally binding

EU action, firmly rooted in Article 2 TEU founding principles and fundamental rights, is most needed.

This analysis has called for a fundamental reconsideration of the EU principle of solidarity through a conceptualisation that is rule of law-centred, and which is *subordinated* to justice and safeguards humanitarian solidarity. To proceed in that direction, the EU needs to prioritise the following five action points:

1. abandoning the consensus-building practice in EU decision-making on the asylum reform by ensuring the application of QMV (as set out in the EU Treaties) and fully guaranteeing democratic accountability by the European Parliament in its role as co-legislator, and effectively enforcing current EU legal standards on asylum procedures and reception conditions.
2. assigning equal legal responsibilities to all EU Member States for the relocation of asylum seekers, coupled with the abolition of the EU Dublin regime's first irregular entry criterion.
3. delivering the right to asylum to every person irrespective of their nationality and/or origins, and tackling institutionalised manifestations of discrimination and racism against third country nationals, asylum seekers and refugees in relevant EU governments through a rule of law approach, i.e. based on Article 7 TEU, as these constitute serious threats to EU Treaties' founding principles.
4. upholding asylum seekers and refugees' access to effective remedies against negative asylum and expulsions' decisions, and recognising their agency by acknowledging their legitimate and humanitarian reasons for moving to a Member State different from the one of first unauthorised arrival, and guaranteeing the mutual recognition of positive asylum decisions among all EU Member States and the free movement of international protection beneficiaries.
5. prohibiting the policing and criminalisation of civil society actors and human rights' defenders, and ensuring their independence, in the provision of humanitarian assistance and rescue at sea, to anyone in need.

It is time for an honest and self-critical debate about the underlying causes for the failures experienced by the EU Dublin system over the past three decades of European integration. These mainly relate to the continuing persistence of the Member States' ministries of interior from the early 1990s onwards for a [contained mobility](#) policy paradigm focused on policing, deterrence and the criminalisation of asylum seekers and refugees' entry and mobility as well of civil society actors and individuals who assist their access to human rights and dignity. This paradigm has not only undermined the overall democratic legitimisation of the EU's contributions in these salient policy areas. It has also proved to be inhuman, unfeasible and contrary to the constitutive principles of the Union's legal system.

ANNEX 1. KEY FEATURES OF RECENT EU RELOCATION INSTRUMENTS AND ARRANGEMENTS

	2019 Malta Declaration	2020 Proposal for a Regulation on asylum and migration management	2022 Declaration on a <i>modus operandi</i> of a voluntary solidarity mechanism
Typology of instrument	Non-legally binding political declaration / arrangement	Proposal for an EU Regulation	Non-legally binding political declaration / arrangement
Objective	Set up a 'predictable and efficient solidarity mechanism' in order to ensure swift relocation of asylum seekers rescued at sea, taking no more than 4 weeks	Provide support to Member States facing diverse migratory situations by means of specific mechanisms to address disembarkations following SAR operations and situations of migration pressure or risk of pressure Provide the opportunity for Member States to make voluntary contributions at any time to other Member States in need, outside of the SAR and migration pressure mechanisms	Implement a 'voluntary, simple, and predictable solidarity mechanism' in favour of Member States most affected by migratory flows in the Mediterranean and mainly under pressure
Time frame	Temporary (initial period of not less than 6 months, renewable); it may be suspended in case of substantial increase of relocations with the first 6 months	Permanent	Temporary (initial period 1 year, renewable)
Geographical scope	Central Mediterranean	Not specified	Central Mediterranean, West Atlantic Route, other situations (particularly Cyprus and the Greek Islands)

<p>Personal scope</p>	<p>Asylum applicants rescued on the high seas and disembarked in a place of safety</p>	<p>Asylum applicants not subject to the asylum border procedure (as laid down in the related proposal for an asylum procedure regulation)</p> <p>Beneficiaries of international protection who have been granted international protection less than 3 years before</p> <p>In the case of voluntary contributions outside of the SAR and ‘migration pressure situations’, the scope extends to applicants subject to the border procedure and irregularly staying third country nationals</p>	<p>Persons in need of international protection, giving priority to the most vulnerable ones</p>
<p>Contributions other than relocation</p>	<p>None</p>	<p>Return sponsorship of irregularly staying third country nationals</p> <p>Capacity-building measures and operational support in the field of asylum, reception and returns as identified by the Commission</p> <p>Measures aimed at responding to migratory trends affecting the benefiting Member State through cooperation with third countries</p>	<p>Financial contributions or operational support to the benefiting Member State in the field of reception, border surveillance, control, detention, and return</p> <p>Financial contributions to projects in third countries that may have a direct impact on the number of arrivals/entries at EU external borders</p>

<p>Distribution system</p>	<p>Voluntary pre-declared pledges from participating Member States</p>	<p>Commission requests that Member States provide solidarity contributions in cases of recurring SAR arrivals or if a situation of ‘migration pressure/risk of pressure’ is identified</p> <p>If the Commission finds that contributions indicated by Member States fall short of identified needs, it can adopt an Implementing Act setting out the contributions each Member State will be required to provide, including the share of relocations according to a distribution key based on 50% GDP and 50% population</p>	<p>Voluntary pre-declared pledges from participating Member States of an indicative target number based on population and GDP, while maintaining the opportunity to go beyond this share; a total annual relocation volume is set</p>
<p>Corrective mechanism (in case of unbalances between different forms of contribution)</p>	<p>Not applicable</p>	<p>A critical mass-correction mechanism applies if contributions by Member States in the field of capacity building would lead to a shortfall greater than 30% of the total number of relocations as identified by the Commission</p> <p>In such a case, concerned Member States will be required to adjust their contributions to cover 50% of their share through relocation, return sponsorship or a combination of both</p>	<p>A minimum indicative relocation contribution for each participating Member State will be foreseen so that the total annual relocation target is not reduced exceedingly if a low number of Member States take part in relocation</p>

<p>Derogations</p>	<p>The mechanism may be suspended in the case of a substantial increase of relocations within the first 6 months of implementation</p>	<p>In the framework of the mechanism to address situations of migration pressure, a Member State may request a deduction of 10% of its relocation share if, over the preceding 5 years, it was responsible for more than twice the EU per capita average of applications for international protection</p> <p>If a Member State is facing a situation of force majeure, it may notify the Commission and suspend all its solidarity obligations for a maximum period of 6 months (as laid down in the proposal on a crisis and force majeure regulation)</p>	<p>Member States are allowed to temporarily reconsider their relocation commitment in situations of ‘disproportionate pressure’ to their reception system due to ‘secondary flows’</p>
<p>Coordination</p>	<p>European Commission, based on agreed Standard Operating Procedures; support provided by EBCGA and EUAA, e.g. on identification and registration, interviewing, ‘matching applicants’ with relocating Member States</p>	<p>European Commission with the assistance of EUAA and EBCGA; the Commission may convene a solidarity forum to coordinate Member States’ contributions</p>	<p>European Commission with the support of EUAA and in cooperation with IOM; a solidarity platform coordinated by the Commission is established to provide a forum for discussion and coordination on relocations and other contributions from Member States</p>



**CEPS
PLACE DU CONGRES 1
B-1000 BRUSSELS**

