

# A Tale of Stranding, Solidarity and Security: Perspectives from EU Asylum Law

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## Introduction

*Hiketides*: the suppliants, i.e. those who supplicate or plead<sup>1</sup> – for their escape, for their rescue, for their survival.

*Hikesia*, supplication, is an experience as old as humanity. Thomas Hobbes forcefully reminds us in his *Leviathan* that the natural condition of humankind is one of competition and rivalry. And he knew perfectly well that the *conditio humana* is not simply embodied by the “law of the stronger”: For “the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself.”<sup>2</sup> Thus, as human beings we are in – or may at least easily come into – situations in which we depend on the support of others, where *we* become *Hiketides*, i.e. suppliants.

Two ancient tragedians chose this fundamental experience as the theme of their plays. In Aeschylus’ *Hiketides*<sup>3</sup>, the fifty daughters of Danaos flee from Egypt to escape from a forced marriage to their cousins. When the Danaids reach Argos, they plead to King Pelasgus to protect them. Eventually, the Argives decide to give them shelter within the city walls, even though the Egyptians threaten to wage war against Argos.

A generation later, Euripides wrote his version of the *Hiketides*.<sup>4</sup> This time, the Argives were on the side of desperation. Adrastus, the King of Argos had authorized a military expedition against Thebes, an expedition which utterly

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1 From Greek ἱκετεῖω.

2 Thomas Hobbes, *Leviathan*, edited by Richard Tuck (Cambridge: Cambridge University Press, 1991), 87 (Book I, Chapter 13).

3 Aeschylus, *Suppliants*, edited by Alan H. Sommerstein (Cambridge: Cambridge University Press, 2019).

4 Euripides, *Suppliant Women*, edited by James Morwood (Cambridge: Aris & Philips, 2007).

failed. According to the decree of Creon, the King of Thebes, the corpses of the killed Argives were to remain unburied. Aethra, the mother of the Athenian king Theseus, asks her son to intervene on their behalf and is supported in her request by the mothers of the slain warriors, the suppliants, the *Hiketides*. Relying on the ancient customs of Hellas, Theseus requests the release of the dead bodies from Creon, but he refuses. After a successful military exchange, Theseus obtains the corpses, washes them himself, and prepares them for burial.

These two plays were first performed in Athens in the fifth century before Christ, that is 2,500 years ago. Hence, they are fairly remote from us in terms of time. Yet, they are not far from us in terms of subject-matter and geography. We only have to follow the media to see that the Mediterranean is still the scene of thousandfold supplications.

Every year, thousands attempt to set over the sea to reach the shores of Europe. Many are drowned on their risky passage. Those who manage to cross or are saved from distress, stand on the shores of Spain, Italy, Malta or Greece and supplicate, ask for asylum. The etymology of “asylum” is also Greek. It stands for “sanctuary”, “inviolable place”, “place of refuge”.<sup>5</sup>

The fifty Danaides from Aeschylus’ play were also refugees, coming from the sea and seeking asylum because they were fleeing from forced marriage. They asked for the solidarity of the people of Argos – and they could confidently do so because they had a claim of kinship with the Argives, as the Danaides did not forget to emphasize as early as the introductory chorus of the play.<sup>6</sup> Would the *Hiketides* also have had a case for asylum, if they had not been the flesh and blood of Argos?

What about real aliens, that are linked to us by nothing but the bonds of humanity, by the mere fact of “being an other”? Is there something like a right to asylum, just because one is a human being in distress? Perhaps such a solidarity of cosmopolitan vocation did not exist in antiquity, but this is different today,

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5 From Greek ἄσυλος.

6 Aeschylus, *Suppliants*, lines 15 et seq.

is it not? Some will confidently and proudly point to the 1951 Geneva Refugee Convention<sup>7</sup> – and they are 50 % right to do so.

But even if we believe in solidarity with refugees, are there not limits to this? Especially if there are serious security concerns? We will also see that the Refugee Convention balances the solidarity needs of refugees with the security interests of the receiving society. Solidarity and security – these two concepts set the frame within which international and European asylum law operates and is evolving. And international and European asylum law is the topic I was asked to address. This shall be done in four steps:

First, I would like to turn to the international or global level, and ask the question raised before: is there a right to asylum under contemporary international law? On this basis, we will explore in a second step the structure and functioning of the Common European Asylum System, and the balance it strikes between, on the one hand, the impulses to solidarity and, on the other hand, the security reflexes of the European States. In a further step, I would like to address, thirdly, the one set of questions that the European States can agree on in this era of conflict and dissent, i.e. a strongly security-driven agenda of protecting and cutting-off Europe's external borders, notably vis-à-vis Africa. In conclusion, we have to ask ourselves what the “asylum saga” teaches us regarding European identity. Furthermore, against this background, one could give this intervention the following subtitle: between aspiration and failure.

## 1 The Geneva Refugee Convention. Or: Is there a right to asylum?

Article 14 of the 1948 Universal Declaration of Human Rights<sup>8</sup> states: “Everyone has the right to *seek* and to *enjoy* in other countries asylum from persecution.”<sup>9</sup> Accordingly, the Declaration does *not* contain a right to *receive* asylum, but only a right to ask for it and to enjoy its benefits once someone is granted refugee

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7 Convention relating to the Status of Refugees (Geneva Refugee Convention), adopted on 28 July 1951, 189 UNTS 137.

8 Universal Declaration of Human Rights, adopted on 10 December 1948, United National General Assembly Resolution 217 A(III).

9 Article 14, paragraph 1 (emphasis added).

status. This telling gap did not come about by accident, but was a deliberate choice. States were reluctant to extend solidarity to aliens in the abstract and automatically, but wanted to reserve the individual decision to themselves.<sup>10</sup>

The 1951 Geneva Refugee Convention follows the same model: It contains a legally binding definition of who is a refugee.<sup>11</sup> Once a State recognizes someone as a refugee on this basis, the Convention provides for various rights, which the State must grant to a recognized refugee.<sup>12</sup> But once again: The Geneva Convention does not contain any right to be granted asylum, but only rights once someone is granted asylum – hence, *no right to asylum*, but only *in* or *because of* asylum.<sup>13</sup>

Moreover, the drafters of the Convention did not forget to include what was deemed to be legitimate security concerns of the host State. If a person had committed a war crime, a crime against humanity or a serious non-political crime, this person did not qualify as a refugee in the first place.<sup>14</sup> And in addition: while, once admitted, refugees are generally protected from expulsion, they can still be expelled if there are reasonable grounds to consider them “as a danger to the security of the country”<sup>15</sup>.

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10 See, for instance, Bardo Fassbender, *Menschenrechteerklärung. Universal Declaration of Human Rights – Allgemeine Erklärung der Menschenrechte* (München: Sellier, 2009), 115.

11 See Article 1(A)(2) of the Geneva Refugee Convention according to which a “refugee” is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

12 See Articles 2 to 30 of the Geneva Refugee Convention.

13 See Fassbender, *Menschenrechteerklärung*, 115-116.

14 See Article 1(F)(a) of the Geneva Refugee Convention according to which “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that [...] [h]e has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes”; see also in a similar vein Article 1(F)(c): “[h]e has been guilty of acts contrary to the purposes and principles of the United Nations.”

15 See Article 1(F)(b) of the Geneva Refugee Convention according to which “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that [...] [h]e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”.

In the plays we considered above, there were also security concerns. In both cases, there was a threat of war and military conflict. In modern times, the issue is not so much that of external, but of *internal* security concerns. How will the newly-arrived refugees fit into their host society? Are they willing and able to integrate? As we can see, the 1951 Refugee Convention was already sensitive to this type of question.

## 2 The Common European Asylum System and The Dublin Saga

Since the 1990s, the EU has developed its Common European Asylum System (the so-called CEAS).<sup>16</sup> As of today, asylum policy in Europe is to a very large extent a “communitarized” or “unionalized” policy field, i.e. governed by EU legislation, and therefore no longer in the hands of national parliaments.<sup>17</sup> This is merely to clarify that we are not here talking about a legal sideshow.

To begin with, EU asylum law has embraced the refugee definition of the Geneva Convention.<sup>18</sup> But it has done something important in addition: It has created a procedural regime. One should not consider this a trivial matter. For it implies that, whenever an asylum request is made, EU law requires that this request be examined on the basis of the binding refugee definition, and that a

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16 See Common European Asylum System (CEAS): [https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system\\_en](https://ec.europa.eu/home-affairs/policies/migration-and-asylum/common-european-asylum-system_en).

17 See in particular Article 78 of the Treaty on the Functioning of the European Union, Official Journal of the European Union 2016 C 202/47, according to which “[r]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection [...]”.

18 See the definition in Article 2(d) of Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Official Journal of the European Union 2011 L 337/9 (the so-called “Qualification Directive”): “‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...]”.

decision be taken by the State authorities which is reviewable by independent courts.<sup>19</sup> By virtue of this combination of substance and procedure, EU asylum law offers the “missing link” which we could not find before: as opposed to international law, EU asylum law has the added value of actually containing a fully-fledged individual right to asylum.<sup>20</sup>

This act of solidarity vis-à-vis persons fleeing from mortal danger and persecution has its price, as it gives rise to the question *who* within the European Union shall be in charge of taking care of those seeking refuge in Europe. This is the question of attribution of responsibility, or “burden allocation”. Hence, the granting of external solidarity provokes the question of internal solidarity within the EU.<sup>21</sup>

As you know, that is where the trouble begins – and this trouble has a name: Dublin. The so-called “Dublin Regulation”<sup>22</sup> creates a system of allocation of responsibility in asylum matters among 31 States: the 27 EU Member States plus Switzerland, Liechtenstein, Norway and Iceland, but (since Brexit) no longer the United Kingdom.

The basic rule of the Dublin regime is that for every asylum request made on European soil, there shall be one and only one competent State that is in charge of examining and deciding the request, and taking the responsibility of either receiving or returning the person in question. This system should avoid two

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19 See Articles 31 et seq. of Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, Official Journal of the European Union 2013 L 180/60 (the so-called Asylum Procedures Directive).

20 See also Article 18 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2016 C 202/389, in this regard: “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 [...]”

21 As regards this question see in general Andreas Oberprantacher and Andreas Th. Müller, “A Question of Solidarity: Re-Defining Europe Through the Rights of ‘Others?’,” *Annual Review of Law and Ethics* 25 (2017): 257-279 (263 et seq., with further references).

22 Regulation (EU) No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Official Journal of the European Union 2013 L 180/31. The Dublin (III) Regulation goes back to the so-called Dublin Agreement; Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, adopted on 15 June 1990, Official Journal of the European Communities 1997 C 254/1.

scenarios, considered equally problematic. On the one hand, the EU wanted to do away with so-called “asylum shopping”, i.e. the situation where, after the denial of an asylum request, an applicant turns to other countries and goes through the process elsewhere. On the other hand, Member States wanted to prevent the phenomenon of “refugees in orbit”, in which asylum seekers would desperately wander around the continent looking for a State prepared to examine their request.<sup>23</sup>

Yet, one must be very clear on one thing: Dublin is not an inner-European solidarity system, and was never meant to be such a system.<sup>24</sup> In practice, the most important rule of allocating responsibility is Article 13 of the Dublin Regulation, according to which that Member State shall be responsible across whose borders an applicant has irregularly crossed into the Union. Hence, the Dublin mechanism leads to the situation that the countries of the southern and south-eastern periphery of Europe become responsible for the bulk of the people seeking asylum in Europe.

There have been several attempts to amend the Dublin Regulation, so as to include a redistribution mechanism, a temporary suspension of the Dublin regime in emergency situations, or at least a meaningful financial compensation scheme to better distribute the responsibilities among the EU Member States.<sup>25</sup> Yet, whenever it comes to introducing an element of mandatory burden-sharing among Member States, all efforts to obtain the necessary qualified majority within the Council of the European Union have, so far, bitterly failed. The so-called refugee crisis of 2015/2016 has only further deepened the ditches.

It is important to understand that we are not simply talking about two opposing camps here: The southern states are, of course, strongly in favor of reforming the existing mechanism. And it is equally clear that many states in the north or west are fully defending the *status quo*. However, if we take countries such as

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23 See e.g. Valsamis Mitsilegas, “Solidarity and Trust in the Common European Asylum System,” *Comparative Migration Studies* 2 (2014): 185; Oberprantacher and Müller, “A Question of Solidarity,” 264. See also Court of Justice of the European Union, Joined Cases C-411/10 and C-493/10, N.S. and M.E., 21 December 2011, ECLI:EU:C:2011:865, para. 79.

24 See in this regard Oberprantacher and Müller, “A Question of Solidarity,” 269, with further references.

25 See Oberprantacher and Müller, “A Question of Solidarity,” 270.

Austria or Germany, the situation is more complicated. For a long time, they used to be part of the *status quo* camp. However, since the European courts have barred Member States in 2011 from sending asylum seekers back to Greece, on account of the disastrous living conditions for refugees there<sup>26</sup>, Austria and Germany have *de facto* become Dublin receiving countries, which has pushed them into the camp of reformers. However, their ideas of how to reform Dublin differ substantially from those of the southern states.

And then we have the so-called Visegrád States, notably Hungary and Poland. They insist on their “Christian values”, and are particularly eager to avoid every mechanism that would force them to admit Muslims, or other people that do not fit into their idea of a Christian or what they consider an “Occidental” society. The Visegrád States confront the cosmopolitanism of EU refugee law with a rather selective idea of “the Other”. Their anathema is the risk of a profound transformation of society. Accordingly, on the political level, they are completely in favor of what they call “flexible solidarity”, which means that every Member State should contribute what it considers best from its own national identity and national security perspective.<sup>27</sup>

Only once, in 2015, was the Council able to agree, by majority decision, on a one-time relocation of 120,000 asylum seekers from Italy and Greece.<sup>28</sup> This measure was immediately challenged by Hungary and Slovakia before the Court of Justice of the European Union – which confirmed the lawfulness of the measure.<sup>29</sup> Nonetheless, the obstruction policies, not only of the Visegrád, but also

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26 European Court of Human Rights, *M.S.S. v. Belgium and Greece*, 21 January 2011, No. 30.696/09; Court of Justice of the European Union, *Joined Cases C-411/10 and C-493/10, N.S. and M.E.*, 21 December 2011, ECLI:EU:C:2011:865.

27 See, for instance, the most recent proposal from the Commission, i.e. the Proposal for a Regulation on asylum and migration management, 23 September 2020, COM (2020) 610 final, recital 16.

28 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, *Office Journal of the European Union* 2015 L 239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, *Office Journal of the European Union* 2015 L 248/80.

29 Court of Justice of the European Union, *Joined Cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council*, 6 September 2017, ECLI:EU:C:2017:631.



other Member States have continued, so that only a quarter of the envisaged number of people were relocated, until 2017 when the measure was dropped. The result of this failure is that the EU institutions have not made any further attempt at (mandatory) relocation. In the meantime, the majority of Member States has even agreed on rejecting binding solidarity measures – however, to agree on what not to do is a bad substitute for deciding on how to go forward.

The fact is that many governments have become extremely hesitant, if not to say, hostile, vis-à-vis any appearance of being welcoming to refugees. In the course of the 2015/2016 refugee crisis, slogans like “wir schaffen das” (the German version of “yes, we can”), or “welcome policy” have turned from an *epitheton ornans* to a technique of discrediting political opponents. Many so-called “moderate” politicians would say: as a private person, I would be more open-minded and welcoming; but what can you do in these matters as a *democratic* politician, if your refugee policy does not have the backing of the general population?

And they might even refer us to the Hiketides, where both Kings, Pelasgus and Theseus, seek the democratic consent of the peoples of Argos and Athens, arguing that admitting the suppliants will create burdens and security risks for these very peoples. When Creon’s herald asks “Who is the tyrant of this land?”<sup>30</sup>, Theseus proudly responds: “First of all, you began your speech with a false assumption, stranger, when you sought a tyrant here. For our city is not ruled by one man. It is free. The people rule, taking turns in annual rotation, not giving the advantage to wealth. No, the poor man too has an equal share.”<sup>31</sup> But Theseus could also confidently say: “But I want the whole city to approve this too, and it will approve it since I wish it.”<sup>32</sup>

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30 Euripides, *Suppliant Women*, line 399.

31 Euripides, *Suppliant Women*, lines 403-407.

32 Euripides, *Suppliant Women*, lines 348-349.

### 3 Defense of European Borders: A Security-Driven Agenda

As we have seen, Europe is facing a huge solidarity crisis in regard to its Common Asylum System. This crisis has brought the project of European integration to the brink of collapse, and it is far from being resolved. One should be advised not to be too optimistic, since the structural problems remain.

In the absence on an inner-European solidarity consensus, the EU leaders can, at this time, only agree on one agenda: the walling-off from the outside. This prominently includes the fortification of the European external borders, which notably means the additional funding and staffing of Frontex. There is hardly an entity that embodies the idea of a “Fortress Europe”<sup>33</sup> more strongly than the EU’s border and coastguard agency, which is based in Warsaw.<sup>34</sup>

Secondly, there is consensus that more re-admission agreements, notably with African countries, should be concluded, and the existing ones shall be made more effective, so as to actually send more people back to their countries of origin.<sup>35</sup>

Thirdly, in the heated atmosphere of the European Council of June 2018, Member States agreed to explore the creation of so-called “regional disembarkation platforms” outside the European Union, in cooperation with volunteering third states.<sup>36</sup> Refugees saved in the Mediterranean should be brought back to these platforms, instead of admitting them into Europe. This idea was copied from the EU-Turkey deal brokered in March 2016.<sup>37</sup> However, at a follow-up meeting of the European Council in Salzburg in July 2018, during the Austrian presidency, the project of disembarkation platforms had already evaporated. In particular, no volunteering third countries could be found.

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33 See Matthew Carr, *Fortress Europe: Dispatches from a Gated Continent* (London: Hurst and Company, 2012).

34 For the human rights-based criticism with respect to Frontex operations see in particular Melanie Fink, *Frontex and Human Rights: Responsibility in “Multi-Actor Situations” under the ECHR and EU Public Liability Law* (Oxford: Oxford University Press, 2018).

35 See, for instance, the new Partnership Agreement between the EU and the members of the Organization of African, Caribbean and Pacific States, 15 April 2021, Article 74 (“Return and readmission”) as well as Africa Regional Protocol, Article 78 (“Return, readmission and reintegration”).

36 European Council Conclusions, 28 June 2018, nr. 5, available at < <https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>>.

37 European Council, EU-Turkey Statement, Press Release of 18 March 2016, available at < <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

Hence, at the moment consensus is only possible for a strongly security-driven agenda, which seems to be guided by *fear of the Other*, rather than *solidarity with the Other*. In fact, the solidarity challenge currently remains in total limbo. By this, I refer to both dimensions of solidarity: firstly, EU Member States are not capable of reforming Dublin in a way that guarantees at least a minimum measure of *internal* solidarity. This leads to a situation where, secondly, the European aspirations in regard to *external*, global solidarity are increasingly undermined.

#### 4 Implications for European Identity: Between Aspiration and Failure

What therefore, are the implications of these developments for European identity?

In the early 2000s, the European Union undertook a major self-realization exercise. It wanted to give itself a real constitution, and thus become a State Union, somewhat similar to the United States of America. After all, already in his Zurich speech of 1946, Winston Churchill had pondered on the vision of a “United States of Europe”.<sup>38</sup>

However, in 2005, the project of the “Treaty establishing a Constitution for Europe”<sup>39</sup> was democratically rejected at the ballot boxes of the Netherlands and France. The Lisbon Treaty – signed in 2007, in force since 2009 – nevertheless sought to save as much as possible of the substance of the Constitutional Treaty. This notably includes Article 2 of the TEU which contains the list of the values of the EU: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.

When defining the main objectives of its foreign policy, the Treaty remarkably states: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement,

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38 Speech delivered at the University of Zurich, 19 September 1946, available at < <https://rm.coe.int/16806981f3>>.

39 Draft Treaty establishing a Constitution for Europe, 18 July 2003, Official Journal of the European Union 2003 C 169/1.

and which it seeks to advance in the wider world [...]”<sup>40</sup> – followed by more or less the same list of values. Hence, the Union professes congruence of its internal and external values.

And this makes sense, especially in view of the refugee question. It is often – and rightly – recalled that the 1951 Geneva Refugee Convention was first and foremost a product of the huge refugee flows caused by the Nazi dictatorship and World War II. This is the very same intellectual and moral breeding-ground from which the project of European integration emerged.

In general, the EU likes to present itself on the global plane as the epitome of cosmopolitanism, trans-national citizenship, soft power, you name it. After all, that is what the EU received the 2012 Peace Nobel Prize for.<sup>41</sup>

If this is what represents European identity, then we are in real trouble when these high-flying aspirations are confronted with the sobering realities of the EU asylum policy of 2019, which is characterized by mistrust and fear of “the Other”, both vis-à-vis the outside and even within the European Union. Self-referentialism and unilateralism are the motto of the day.

In 2019, EU States were even fighting over what it means to save someone from distress at sea. Since ancient times, ships have been under an obligation to rescue people in distress. This customary duty has been formally enshrined in the 1982 Convention on the Law of the Sea.<sup>42</sup> Furthermore, it is required that survivors are “delivered to a place of safety [...] as soon as reasonably practicable”.<sup>43</sup> But during the last months and years, one could witness massive verbal rows between EU governments on how to implement this basic humanitarian duty, and whether or not to let ships enter a harbor on this basis.

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40 Article 21(1), Treaty on European Union, Official Journal of the European Union 2016 C 202/1.

41 The Nobel Peace Prize 2012 was awarded to the European Union “for over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe”; see <<https://www.nobelprize.org/prizes/peace/2012/eu/facts/>>.

42 United Nations Convention on the Law of the Sea, adopted on 10 December 1982, 450 UNTS 11, Article 98 (“duty to render assistance”).

43 International Convention on Safety of Life at Sea (SOLAS Convention), Regulation 33: Distress Situations: Obligations and Procedures, nr. 1; see also International Convention on Maritime Search and Rescue, adopted on 27 April 1979, 1405 UNTS 97.

One should not make the mistake of calming oneself by thinking that this is only an inner-European matter: the world is watching us. This became very visible in 2018, when the world agreed on the two Global Compacts on Migration and Refugees.<sup>44</sup> Eventually, several EU Member States – among them Austria, the Czech Republic, Hungary, Italy, Poland and Romania – distanced themselves from the legally non-binding Global Compact on Migration, fearing that it could further instigate migration flows to Europe. The bitter irony of the matter is that the EU had strongly pushed the African States into the negotiation process, in order to improve the EU-African cooperation on migration matters. When a quarter of Europe left the table at the very end of the effort, when there was already a broadly agreed-upon outcome, the African States were quite frustrated.

In conclusion: European identity remains frail, to say the least. And nowhere does this become as clearly and painfully manifest as in Europe's dysfunctionality with respect to the Common Asylum System. Europe has lost track on its ambitious solidarity agenda, both in an inside and outside perspective. At the moment, European asylum policy – insofar as we can address it as a consistent policy at all – is both fear-driven and inward-looking. This is a bad combination, not only for “the Other(s)”, but also for us on the inside.

Maybe the EU of today should actually honor its ancient “Occidental” heritage more, and embrace the role-model of the leaders of antiquity: firstly, by listening to the Hiketides, secondly, by winning over their own people for the granting of shelter and protection to the suppliants, and, thirdly, by having in mind the high aspirations of the EU values as enshrined in Article 2 of the Treaty on European Union, living up to the ideals that the city, the body politic, has given itself.

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<sup>44</sup> Global Compact on Refugees, 17 December 2018, United Nations General Assembly Resolution 73/151; Global Compact for Safe, Orderly and Regular Migration, 19 December 2018, United Nations General Assembly Resolution 73/195.

## As an epilogue ...

This text was written in 2019, and did not anticipate the Russian invasion of Ukraine which started on 24 February 2022. Nor did the EU Member States anticipate this momentous act of aggression (although Russia had already invaded and annexed Crimea in 2014), whose repercussions will be felt for decades to come.

The full-scale invasion of Ukraine triggered an unprecedented refugee wave, thus making it the fastest-growing and most extensive refugee crisis in Europe since World War II. This also resulted in unprecedented action on the part of the EU, namely the first-time activation of a so far dormant legal act: the so-called Temporary Protection Directive.<sup>45</sup> This legal act was adopted in the wake of the 1999 Kosovo crisis, in order for the Member States to provide for immediate temporary protection for displaced people when confronted with a mass influx of refugees; but the directive had never been actually relied upon, not even in the “refugee crisis” of 2015/2016. On 4 March 2022, the Council, i.e. the representatives of the 27 Member States’ governments, unanimously agreed to invoke the Temporary Protection Directive with respect to the persons fleeing from Ukraine to the EU.<sup>46</sup>

This decision offers “Ukrainian refugees” – i.e. according to the terms of the decision not only Ukrainian nationals, but also stateless persons and nationals of third countries who benefited from international protection (as well as the family members of these persons) – at least for the time being, a relatively stable legal status. This also implies access to various rights and benefits in the receiving EU Member States. In this regard, the decision really marks a “Hiketides moment” in European history. This also becomes manifest in the general atmosphere vis-à-vis Ukrainian refugees, which substantially differs from that experienced by refugees in recent years. The “welcome policy” appears to be back on the table.

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45 Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Union 2001 L 212/12 (the so-called Temporary Protection Directive).

46 Council Implementing Decision (EU) 2022/382 of 4 March 2022, Official Journal of the European Union 2022 L 71/1.

At the same time, the marked difference in attitude and reaction in the case of Ukrainian refugees when compared to other groups, notably those fleeing the Syrian civil war, gives rise to concerns with respect to equal treatment of those in need of protection: immediate neighbors rather than distant cousins, women and children rather than men, Christians rather than Muslims, light-skinned and fair-haired rather than dark-skinned and dark-haired. *Honi soit qui mal y pense.*

This new refugee situation, momentous as it is, seems to be much easier to digest for Europe than the one five years earlier. This becomes particularly manifest in the attitude of Poland which, for obvious geographical and political reasons, now hosts the bulk of Ukrainian refugees. This creates a highly ambiguous situation, which calls for a much more thorough analysis than can be provided in this epilogue. It remains to be seen whether this new “Hiketides-type” experience will contribute to a re-orientation of EU asylum policy, and thus have a sustainable effect or whether it will rather turn out as an ephemeral phenomenon. Let us recall that in Aeschylus’ version of the play, the solidarity of the people of Argos was solicited, and granted, due to the fact that the Danaides had a claim of kinship to the Argives. The next steps which the EU will take in its refugee policy will bear witness as to whether, and to what extent, the Union has really embraced a cosmopolitan vision, of refugees as despairing human beings, leaving the shores of their home countries in order to find a safe place: asylum.

## References

- Aeschylus. *Suppliants*. Edited by Alan H. Sommerstein. Cambridge: Cambridge University Press, 2019.
- Carr, Matthew. *Fortress Europe: Dispatches from a Gated Continent*. London: Hurst and Company, 2012.
- Euripides. *Suppliant Women*. Edited by James Morwood. Cambridge: Aris & Philips, 2007.
- Fassbender, Bardo. *Menschenrechteerklärung. Universal Declaration of Human Rights – Allgemeine Erklärung der Menschenrechte*. München: Sellier, 2009.
- Fink, Melanie. *Frontex and Human Rights: Responsibility in “Multi-Actor Situations” under the ECHR and EU Public Liability Law*. Oxford: Oxford University Press, 2018.

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Hobbes, Thomas. *Leviathan*. Edited by Richard Tuck. Cambridge: Cambridge University Press, 1991.

Mitsilegas, Valsamis. "Solidarity and Trust in the Common European Asylum System." *Comparative Migration Studies* 2 (2014): 181-202.

Oberprantacher, Andreas and Andreas Th. Müller. "A Question of Solidarity: Re-Defining Europe Through the Rights of 'Others?'" *Annual Review of Law and Ethics* 25 (2017): 257-279.