

Special Issue
Constitutional Dimensions of the Refugee Crisis

**From a Different Angle—Poland and the Mediterranean
Refugee Crisis**

*By Michał Kowalski**

Abstract

This Article aims at presenting and clarifying the Polish perspective towards the Mediterranean refugee crisis. Poland has not been directly affected by this crisis so far and this makes the Polish case significantly different from the European Union Member States that are directly affected by a large influx of people seeking protection. This Article briefly presents the Polish legal framework and its origins and analyzes the particular governmental (in)actions towards the Mediterranean refugee crisis, including references to the politicized debate on the issue. Also, the specific context of a potential future Ukrainian crisis is addressed. The Article finishes with concluding remarks and suggestions to employ temporary legal measures to address large movements of refugees and migrants, as such measures deal with the specificity of such movements in the best way that can be achieved.

* Dr. Habil., Associate Professor, Faculty of Law and Administration, Jagiellonian University in Krakow, Poland. Since 2009 the author has been an adjudicating member of the Polish Refugee Board of the Third and the Fourth Term—the quasi-judicial independent appeal authority in the procedure for granting and withdrawing refugee status. The views expressed in the present text are solely that of the author.

A. Introduction: Poland's Double Inaction

As of mid-2016, Poland has not been directly affected by the Mediterranean refugee crisis. The numbers of Syrian asylum seekers in Poland were only 104 in 2014 and 295 in 2015.¹ This aspect makes the Polish case significantly different from the European Union Member States that are directly affected by a large influx of people seeking protection. There has not been a debate on the constitutionality and legality of governmental reactions to the refugee crisis as there have been no such reactions. Rather, there has been something that could be called double inaction. First, no specific governmental action was needed because Poland has not been affected. Second, the predominant attitude among the public and the government has been that this is not our crisis. This might explain Poland's most skeptical approach towards the European Commission's proposals aimed at burden sharing among the Member States based on the relocation of refugees.

At the same time, Polish authorities have not managed—or even have not tried so far—to change the perception of the refugee crisis and to put it in a broader context that would be more in line with Poland's specific situation and interests. Instead of challenging the need for solidarity within the EU in the face of the Mediterranean refugee crisis, Polish authorities might have attempted to present it from a different angle. Poland's specific situation has been determined by the situation in Ukraine. The annexation of the Crimean Peninsula by the Russian Federation in 2014 and, most importantly, the armed conflict in the Eastern Ukraine in the Donbas region have resulted in hundreds of thousands of displaced persons. Many fled for Russia but most of them remained in Ukraine as internally displaced persons (IDPs). The number of the Ukrainian IDPs has been constantly growing, exceeding 1.7 million in mid-2016. Some Ukrainians have sought refuge in Poland and other EU Member States. Although the number of Ukrainian asylum seekers in Poland is not very high, barely exceeding 6,000 applications since the beginning of the conflict in 2014, it has turned out to be a challenging test for the relevant procedures. More importantly, the liberal migration policy towards Ukraine has resulted in the presence of tens of thousands working migrants from Ukraine in Poland. It bears mentioning that approximately 1 million visas were issued by the Polish authorities to Ukrainian nationals in 2015 alone.

The other factor behind the passivity of the Polish authorities is strictly political in nature. Due to an unfortunate coincidence, at the height of the Mediterranean refugee crisis, double general elections were held in Poland: A presidential election in May 2015 and a parliamentary election in October 2015. This resulted in an extreme politicization of the debate on the refugee crisis and made all leading political parties reluctant to advocate a more active role for Poland within the EU debate on the issue. This was the approach of the

¹ In 2015, refugee status was granted in 203 Syrian cases. In 2014, it was granted in 115 Syrian cases. In previous years the number of Syrian applications was as follows: 2013: 255; 2012: 107; 2011: 12; 2010: 8; 2009: 7; 2008: 10; 2007: 6; TOP 5 – ochrona międzynarodowa [TOP 5 – International Protection], URZĄD DO SPRAW CUDZOZIEMCÓW, <http://udsc.gov.pl/statystyki/raporty-specjalne/top-5-ochrona-miedzynarodowa/> (last visited Oct. 27, 2016).

departing liberal government coalition in power since 2007, which consisted of *Platforma Obywatelska* (the Civic Platform) and *Polskie Stronnictwo Ludowe* (the Polish Peasants' Party). It reluctantly accepted and backed the EU quota plan of September 2015, but for domestic purposes underlined that only low numbers of refugees would be admitted to Poland and suggested that further quotas not be adopted. The new conservative government of *Prawo i Sprawiedliwość* (Law and Justice) that gained power in October 2015 has consistently rejected any further relocation quotas, yet was far less clear on its position on the admittance of refugees under quotas that the previous government had agreed upon in September 2015. The practical collapse of the EU relocation and resettlement program² has made such indecisiveness a convenient strategy so far.

Another characteristic feature of the situation in Poland is the lack of any sophisticated legal debate regarding the refugee crisis. This is especially true as far as constitutional law is concerned. An important aspect which should be mentioned in this context is the serious political and legal conflict regarding the position of the Polish Constitutional Court. This conflict—whose origins reach back to actions of the former government aimed at the advance appointment of some judges of the Constitutional Court—erupted and escalated with the change in power in October 2015 and the actions of the new government undermining the legal status of the Court, and has been predominating the constitutional debate in Poland. The legal debate on the refugee crisis—which is focused on aspects of international and EU law rather than constitutional law—has been pushed into the background.

This Article aims at presenting the situation in Poland and clarifying the Polish perspective towards the refugee crisis. First, a brief presentation of the legal framework and its origins will be presented. Second, this Article analyzes the particular governmental (in)actions towards the Mediterranean refugee crisis in more detail, with reference to the politicized debate on the issue. Subsequently, the Ukrainian context will be more specifically addressed. The text will finish with conclusions linking the above aspects and including some suggestions for further initiatives addressing the refugee crises in Europe.

B. Polish National Legal Framework

In Poland international refugee law has become an issue since the turn of the 1980s and the 1990s only. It was then—after the end of the Cold War era and after the change of the political system and its democratization—that the 1951 Geneva Convention³ and the 1967

² "Member States are far from complying with their allocations under the Council Decisions. As we approach the half-way point of the duration of the Council Decisions, the rate of implementation of relocation stands at a mere 2%." COMM'N FROM THE COMM'N TO THE EUR. PARLIAMENT, THE EUR. COUNCIL AND THE COUNCIL, FOURTH REPORT ON RELOCATION AND RESETTLEMENT 2 (June 15, 2016) [hereinafter FOURTH REPORT].

³ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

New York Protocol⁴ stopped being perceived as the instruments of the “imperialistic West,” as it previously had been in the whole Soviet bloc. Poland acceded the 1951 Geneva Convention and the 1967 New York Protocol on September 27, 1991 and subsequently introduced the refugee definition into its national legislation. The processes were gradual; the first comprehensive Polish legislative regulation on granting international protection to foreigners was adopted in 1997. This delay can be explained by the fact that Poland and the other Central and Eastern European states were definitely not the major destination countries for asylum seekers at that time.⁵

The protection of asylum seekers and refugees in Poland was also enshrined in the constitution. The Constitution of the Republic of Poland of 1997 states:

Article 56

1. Foreigners may enjoy the right of asylum in the Republic of Poland in accordance with principles specified by statute.
2. A foreigner who, in the Republic of Poland, seeks protection from persecution, may be granted the refugee status in accordance with international agreements to which the Republic of Poland is a party.⁶

Accordingly, the constitutional regulation introduces two distinct legal institutions: asylum and refugee status. The distinction between asylum and refugee status may be perceived reminiscent in the constitutional text of the time before the change of the political regime.⁷ According to the statutory regulation, asylum may be granted when a foreigner needs protection and when granting asylum is in the best interest of Poland. As such, it is discretionary in nature. The practical importance of the institution is marginal and only recently has it been more extensively used in order to legalize the admittance of some Ukrainian nationals of Polish origin from the Donbas region who did not qualify for refugee status or any other forms of protection. The strict distinction under Polish law between asylum and refugee status causes irritating disorder as far as the Polish terminology of the EU Common European Asylum System is concerned. It could be claimed that the only reason this distinction is still upheld in Polish law is the constitutional text and the prospect of a

⁴ Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

⁵ Michał Kowalski, *International Refugee Law and Judicial Dialogue from the Polish Perspective*, in INTERNATIONAL LAW THROUGH NATIONAL PRISM (A. Wyrozumska, ed.) (forthcoming 2016).

⁶ Art. 56, Rozdział VII, Konstytucja Rzeczypospolitej Polskiej.

⁷ Article 88 (initially Article 75) of the 1952 Constitution of the Polish People’s Republic provided for the right to asylum for foreigners “persecuted for defending the interests of the working masses, struggling for social progress, defending peace, fighting for national liberation, or because of their scientific activity”, Art. 88, Rozdział VII, Konstytucja Rzeczypospolitej Polskiej. The right was reformulated into ideologically neutral form in 1992 and subsequently survived in the new 1997 Constitution supplemented by the refugee status.

politically disturbing constitutional amendment, which would be necessary to remove it from the constitution.

The statutory legal framework for granting protection to foreigners in Poland has been created under the dominant influence of EU legislation and policies. Initially it was adopted as part of the process of the EU accession, which included adjusting Polish migration and asylum regulations to EU standards. In 2003, the comprehensive Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland (the 2003 Act)⁸ was adopted. It has been repeatedly amended in the process of adopting developing EU legislations into Polish law. The 2003 Act provides for the four forms of protection that may be granted to foreigners: Refugee status and subsidiary protection determined in the procedure initiated by a request for international protection as regulated in the Qualification Directive,⁹ temporary protection as regulated in the Temporary Protection Directive,¹⁰ and the above-mentioned institution of asylum *sui generis*. Moreover, the permit to remain for humanitarian reasons (the humanitarian permit) and the permit for tolerated stay (the tolerated stay permit) may be granted to foreigners within the return procedure under the Foreigners Act adopted in 2013.¹¹ As far as the changes in Polish migration and refugee regulations are concerned, there is continuous reform. As in the other Member States of the EU, the influence of developing asylum case law of the Court of Justice as well as that of the European Court of Human Rights (ECtHR) is growing.¹² The direct effect of the current refugee crisis is the legislative initiative to introduce the institutions of the border procedures and the list of safe countries of origin that have yet to be seen into Polish law. Yet the legislative works are, as of mid-2016, at an early stage. One cannot exclude further legislative changes, including the replacement of the 2003 Act with a new one. Also, the institutional framework¹³ is under scrutiny at the moment and relevant changes should be expected.

⁸ Act on granting protection to foreigners within the territory of the Republic of Poland, Journal of Laws 2012, item 680, as amended.

⁹ Council Directive 2011/95/EU of the European Parliament and of the Council of December 13, 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 (recast), 2011 O.J. (L 337/9).

¹⁰ Council Directive 2001/55/EC of July 20, 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212/12).

¹¹ Foreigners Act, Journal of Laws 2013, item 1650, as amended.

¹² For extensive analysis see Kowalski, *supra* note 5.

¹³ The competent authorities for the refugee status determination procedure are: The Head of the Office for Foreigners (*Szef Urzędu do Spraw Cudzoziemców*) as the first instance and the Refugee Board (*Rada do Spraw Uchodźców*) as the appeal instance. A Refugee Board decision may be appealed to an administrative court. The judicial administrative procedure consists of two instances. The first instance is the Warsaw District Administrative

As far as the statistical data on refugee flows into Poland is concerned, the numbers of lodged applications for international protection oscillate around ten thousand *per annum*. According to the data from the Office for Foreigners the exact numbers in the last six years are as follows: 12,248 applications in 2015, 8,195 in 2014, 15,150 in 2013, 10,753 in 2012, 6,887 in 2011, and 6,534 in 2010. Definitely these numbers must be considered as low for a state of more than 38 million inhabitants. What is more, a great number of the initiated refugee determination proceedings become discontinued because the asylum seekers leave Poland and go further west, illegally crossing the Polish-German Schengen border. For example, 8,724 proceedings were cancelled by the Head of the Office for Foreigners in 2015.¹⁴ This tendency unequivocally proves that for many asylum seekers, Poland still remains nothing more than a country of transit.

Also, it is significant that the numbers of cases in which protection has been granted are very low. Indeed, in 2015 refugee status was granted both by the Head of the Office for Foreigners and the Refugee Board in 360 cases, while subsidiary protection was granted in 197 cases. It is estimated that even those granted protection often leave Poland illegally for other EU Member States, especially after the end of the one-year-long dedicated integration social support scheme.

Another specific issue is that the majority of asylum seekers in Poland come from the Russian Federation. The vast majority of these are Russian nationals from the Northern Caucasus, mainly from Chechnya. In 2015 they were responsible for 64.82% of all applications. The second biggest country of origin in 2015 was Ukraine with 18.70% of all applications. This is a new phenomenon that started in 2014 due to the outbreak of the armed conflict there. It is also characteristic that the numbers of applications by nationals of other countries did not exceed 5% in any. There is, however, a recent growth in the number of applications from Central Asian states—mainly from Tajikistan with 541 (4.39%) applications in 2015.

C. Poland's Position Towards the Mediterranean Refugee Crisis

As previously mentioned above, the number of Syrian applications for international protection in Poland has been very low so far. Also, Poland is not perceived by the Syrian asylum seekers as the target destination country. A telling example is a group of almost 160 Syrian Christians that were resettled from Syria by a private foundation in cooperation with

Court (*Wojewódzki Sąd Administracyjny w Warszawie*) and its judgments may be appealed (a cassation appeal) to the Supreme Administrative Court (*Naczelny Sąd Administracyjny*). Whether the Refugee Board amounts to a court or tribunal within the meaning of the EU law remains unclear. The Board has not yet tried to submit a reference for a preliminary ruling to the Court of Justice of the EU.

¹⁴ Obviously the reasons for cancellation decisions vary, but the disappearance of an applicant remains the highly dominant one.

and with support from the government in mid-2015 and, among them, eighty-six persons left Poland shortly after the resettlement and many more left in the subsequent months.¹⁵ Such results of the initiative, which had gained much social support and interest and received wide media coverage, definitely contributed to a more reserved attitude of the Polish public opinion towards the admittance and relocation of Syrian asylum seekers.

Poland backed the Council Decision of September 22, 2015¹⁶ in which EU Member States agreed to relocate 120,000 people from Italy and Greece by September 2017, in addition to the 40,000 people previously set to be relocated. Thus, at that time, Poland did not join the partner States from the Visegrad Group¹⁷ and Romania opposed the Decision. Nonetheless, after the parliamentary elections in October 2015 and the subsequent change in power, the new conservative parliamentary majority expressed its criticism. The *Sejm* (the lower house of the Polish parliament) adopted a non-binding resolution on Polish immigration policy on April 1, 2016. The resolution negatively assessed the Council Decision of September 22, 2015, which was supported by the previous government, and criticized any mechanisms to be adopted within the EU that would introduce relocation of refugees. Also, the new conservative government joined the rest of the Visegrad Group in its skepticism on the European Commission's proposals regarding migration and asylum policies.¹⁸ Like the other Visegrad Group States, the new Polish government backed the EU-Turkey Agreement of March 2016 and insisted on addressing the root causes of the migration and refugee flows and strengthening EU external border control.

In mid-2016, Poland is among the five Member States—along with Austria, Croatia, Hungary and Slovakia—that have not relocated a single applicant.¹⁹ On December 16, 2015 the relevant Polish authorities submitted a pledge to admit—within the first phase of the process—100 persons (sixty-five from Greece and thirty-five from Italy). Yet, the process was suspended in early April 2016 because of operational problems. Polish authorities claimed that Italian and Greek authorities failed to cooperate properly and provide the requested information to help with the identification and security checks of the persons concerned.

¹⁵ *Syryjczycy nie chcą do Polski* [Syrians Don't Want to Stay in Poland], RZECZPOSPOLITA DAILY (Sept. 16, 2015), <http://www.rp.pl/>.

¹⁶ Council Decision (EU) 2015/1601 of Sept. 22, 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 2015 O.J. (L 248/80).

¹⁷ The Visegrad Group, known also as the Visegrad Four or V4, is a non-institutionalized forum of cooperation among the Czech Republic, Hungary, Poland, and Slovakia.

¹⁸ See, e.g., *Joint Statement of the Heads of Governments of the V4 Countries*, Warsaw, July 21, 2016. Interestingly enough, the upcoming United Nations high-level plenary meeting of the General Assembly, to be held on September 19, 2016 is mentioned in the Statement in the context of "better cooperation [on migration and asylum issues] with our neighbors and other third countries and [. . . the need to] elaborate broader commitment at the international level." *Id.*

¹⁹ FOURTH REPORT, *supra* note 2, at 2.

The European Commission labeled the Polish government's action as "a *de facto* suspension of the relocation procedure."²⁰ Indeed, no further actions aimed at relocation are being taken as of July 31, 2016.

As mentioned above, it is hardly possible to speak of a debate on the constitutionality and legality of governmental actions in Poland in relation to the refugee crisis. Yet, for obvious reasons, migration and refugee issues have been among the leading subjects of public debate in recent years. This debate, dominated by security concerns, and with arguments for and against openness to migration representing the highest degree of naivete on one hand and xenophobia on the other, has been similar to those pending in other EU Member States, and, as such, has not been necessarily instructive. But some arguments deserve notice, as they regard the specific Polish situation. They have mainly regarded the mass character of the crises and may be summarized as follows.

First, Polish society is highly homogeneous. This is the effect of World War II and the subsequent decisions of the Great Powers that transformed multiethnic, inter-war Poland into a single ethnic State isolated for more than four decades behind the iron curtain. Twenty-five years after the transformation of the political system from totalitarian to democratic, substantial changes have taken place in all spheres of public domain. That includes the developing openness of society for foreigners and different cultures with, for example, small yet visible Vietnamese or Chechen communities and a rapidly growing Ukrainian community. Indeed, it should not be overlooked that Western societies have become multicultural gradually and as a result of differentiated historical, cultural, and political determinants. Poland deserves to go through a similarly gradual process of social change, whereas the relocation scheme—consisting in a rapid influx of large numbers of culturally different populations—prevents this and can be expected to result in serious social problems.

What is more, the relocation has been perceived as a reaction to the increased influx of people into the EU as the result of, among others, the openness individually declared by other EU Member States and, thus, as a contradiction of the European solidarity.

Others criticize the EU burden sharing based on relocation because Poland, like some other EU Member States, is not the target destination State and, as the above indicated Polish experience has proved, because the vast majority of those relocated will leave Poland for other EU Member States sooner or later. Additionally, introducing measures and sanctions as proposed by the EU Commission "across the whole *asylum acquis* to ensure that the functioning of the system is not disrupted by secondary movements of asylum applicants

²⁰ *Id.* at 4.

and beneficiaries of international protection to the Member States of their choice”²¹ causes serious concerns with regard to the protection of fundamental rights.

Lastly, the perception of the Mediterranean refugee crisis within the EU is considered to leave out a desirable broader perspective of other potential refugee crises and migration flows into Europe that have been experienced by the Central and Eastern European EU Member States. The situation in Ukraine, which is regrettably overlooked in many of the Western European EU Member States, is the main issue in this context. For this reason, it will be analyzed in the subsequent subsection.

D. The Ukrainian Context: Another Potential Refugee Crisis at the EU Gates

As mentioned above, due to the annexation of Crimea by the Russian Federation in 2014 a considerable number of individuals have fled Crimea and sought protection in other parts of Ukraine or abroad. Many have left the Eastern parts of Ukraine, specifically the Donbas region, because of the pending armed conflict in this area. The majority of them found protection in the other safe parts of Ukraine controlled by the authorities in Kiev, yet some sought protection abroad. The United Nations High Commissioner for Refugees (UNHCR) reported that as of May 2016 the number of Ukrainian IDPs exceeded 1.7 million. The number refers to people registered as IDPs by the Ukrainian authorities and does not include several thousand people displaced within Crimea under Russian occupation. The number of externally displaced people reached 1.4 million as of June 2016. Most of them sought refuge in Russia (almost 1.1 million) and Belarus (almost 140,000). Fewer people have gone to EU Member States. UNHCR reported that as of June 10, 2016, “since the beginning of the crisis, in the top five receiving countries of the European Union there were 7,967 applications for international protection in Germany, 7,267 in Italy, 5,153 in Poland, 3,176 in France and 2,742 in Sweden.”²²

The quoted figures show that the major burden is on the Ukrainian authorities. Indeed, they have made considerable efforts to ensure protection to the IDPs and to meet non-binding international standards on IDPs treatment.²³ Yet, there are serious concerns regarding the effectiveness of the protection granted to the IDPs. This is crucial in the approach to Ukrainian asylum seekers abroad because what determines the status of Ukrainian

²¹ COMM’N FROM THE COMM’N TO THE EUR. PARLIAMENT AND THE COUNCIL, TOWARDS A REFORM OF THE COMMON EUROPEAN ASYLUM SYSTEM AND ENHANCING LEGAL AVENUES TO EUROPE 11 (Apr. 6, 2016) COM(2016).

²² UNHCR Operational Update, May 14 – June 10, 2016. The data from the Polish Office for Foreigners shows that as of September 4, 2016 the number of Ukrainian applications in Poland reached 6.173; *Bieżąca sytuacja dotycząca Ukrainy* [Current Situation regarding Ukraine], URZĄD DO SPRAW CUDZOZIEMCÓW (Sept. 4, 2016), <http://udsc.gov.pl/statystyki/raporty-specjalne/biezaca-sytuacja-dotyczaca-ukrainy/> (last visited Sept. 14, 2016).

²³ See generally UNHCR, HANDBOOK FOR THE PROTECTION OF INTERNALLY DISPLACED PERSONS (June 2010), including the extensive source materials.

applicants in EU Member States is the availability of an internal protection alternative (IPA). Any applicant for international protection in an EU Member State is to be granted protection if he or she qualifies for refugee status or subsidiary protection. Yet, an EU Member State may determine that an asylum seeker is not in need of international protection if the risk of persecution or serious harm is limited to only a part of the country of origin, so that the asylum seeker may relocate internally and avoid the risk. This IPA mechanism is explicitly provided for in Article 8 of the Recast Qualification Directive of 2011. Note, however, that IPA is also accepted under the general international refugee law²⁴ and human rights law²⁵ and predates the EU *asylum acquis*.

It is also clear that the current number of Ukrainian asylum seekers in the EU is low and not comparable to the influx of asylum seekers from the Mediterranean. Even so, the present situation again revealed the weakness of the EU Common European Asylum System (CEAS). In early 2015 the European Asylum Support Office (EASO) reported significantly different approaches to Ukrainian applications in the EU Member States. Most of them applied IPA, but the relevant practices varied. Many reported serious difficulties related to the IPA applications process, including the evaluation of the situation in the country of origin. Only in the second half of 2015 did the EASO start coordinating a network for the exchange of information among the EU Member States on the situation in Ukraine. According to the EASO, some Member States (such as Germany, Bulgaria, and Belgium) have frozen all applications from Ukrainian nationals. Belgium is an EU Member State which clearly opposed the possibility of applying the IPA procedures to Ukrainian applicants. Some other States, such as Norway, Sweden and Latvia, introduced special procedures for the determination of the status of Ukrainian applicants. It is not possible to provide a detailed analysis and assessment of the policies of the EU Member towards asylum seekers from Ukraine in this Article, but the above examples clearly show that there have not been any harmonized or coordinated approaches.

Polish authorities do apply IPA to Ukrainian applications, and this is the basis for negative determination decisions. In principle, applicants from Crimea meet the criteria to be granted refugee status and applicants from the Donbas region meet the criteria to be granted subsidiary protection due to the situation in the parts of Ukraine they come from. Yet, they

²⁴ UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, para. 91 (1992). UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 4: "INTERNAL FLIGHT OR RELOCATION ALTERNATIVE" WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/03/04 (July 23, 2003); JAMES C. HATHAWAY, THE MICHIGAN GUIDELINES ON THE INTERNAL PROTECTION ALTERNATIVE (Apr. 11, 1999); G.S. GOODWIN-GILL & J. McADAM, THE REFUGEE IN INTERNATIONAL LAW 201–84, 345–54, 123–26 (3d ed. 2007).

²⁵ See, e.g., the recent case law of the ECtHR referring to the changing situation in Somalia: Salah Sheekh v. The Netherlands, App. No. 1948/04 (Jan. 11, 2007); Sufi and Elmi v. The United Kingdom, App. Nos. 8319/07 and 11449/07 (June 28, 2011); K.A.B. v. Sweden, App. No. 886/11 (Sept. 5, 2013); R.H. v. Sweden, App. No. 4601/14 (Sept. 10, 2015), <http://hudoc.echr.coe.int/>.

are refused any protection as they are able to find shelter in safer parts of Ukraine. The challenge is to establish relevant criteria for the assessment of the actual accessibility of effective protection. This may vary in different parts of Ukraine and in particular individual circumstances. The case law from Polish determination authorities is not consistent, varying from references to the UNHCR guidelines, to the reasonableness test (which requires a determination of whether the person concerned may lead a relatively normal life in the relocation region without undue hardship), to an approach based on the ECtHR case law, with its "compelling humanitarian grounds" test—that is, unless "compelling humanitarian grounds" exist in the individual circumstances of the person involved or the prevailing circumstances in the safe part of the Ukraine, IPA might be applied.²⁶

Importantly, however, in spite of the negative determination of Ukrainian applications for international protection,²⁷ the Polish migration policy towards Ukrainian nationals is much more liberal. As mentioned above, more than 1 million visas were issued to Ukrainian nationals in 2015 alone. Moreover, according to the data from the Office for Foreigners from the beginning of 2014, until September 4, 2016, 79,766 Ukrainian nationals were granted temporary leave to remain.²⁸ Also, the recent survey of public opinion shows that the general attitude of Poles towards the Ukrainian migration is positive.²⁹ This is especially worth noting in the context of the historical, yet still vivid, difficult mutual relations between both nations.

The Ukrainian refugee crisis continues. One cannot exclude a deterioration of the situation in the Eastern Ukraine and an intensification and expansion of the armed conflict pending there. More importantly, the economic situation of Ukraine has been worsening and the growing number of IDPs has become a real hardship. UNHCR reports serious protection concerns such as suspension of social and pension payments to IDPs as well as problems with registration as IDPs and renewal of the IDP certificates.³⁰ In light of this, it is possible that a new serious potential refugee crisis is lurking at the EU gates. It definitely should be addressed by the EU before it turns into an actual refugee crisis with a mass influx of Ukrainian nationals seeking protection in the EU Member States. The EU should learn from past experiences to avoid making the same mistakes again. The EU should realize that the major, and ignored, symptom of the Mediterranean refugee crisis was the internal displacement within Syria.

²⁶ See Kowalski, *supra* note 5, for an extensive analysis of the Polish case-law in this regard. Cf. Marta Szczepanik, Ewelina Tylec, *Ukrainian Asylum Seekers and a Polish Immigration Paradox*, 51 FORCED MIGRATION REV. 71–73 (2016).

²⁷ URZĄD DO SPRAW CUDZOZIEMCÓW, *supra* note 22, at 3–4.

²⁸ *Id.* at 9.

²⁹ Centrum Badania Opinii Społecznej, Komunikat z badań Nr 111/2016: Stosunek do przyjmowania uchodźców [Study Communiqué No. 111/2016: Attitude towards admittance of Refugees], Warszawa, July 2016.

³⁰ UNHCR Operational Update, May 14 – June 10, 2016.

E. Conclusion: Towards Temporary Solutions

Refugee crises would be much easier to manage were they not misused by migrants that are not in need of actual protection against persecution and other violations of human rights. Distinguishing between refugees and migrants may contribute to alleviating the negative narratives towards refugees, so frequent in Europe nowadays, and turning them into positive or at least neutral ones. The negative narratives are often based on misunderstandings that include equating a refugee endangered by persecution with a migrant seeking better living conditions. The indispensable promotion of openness towards migration should never negatively affect the potential of granting protection to those in need. The specificity of large movements of refugees and migrants is that its mass character makes it extremely hard—if even possible—to pursue the determination processes and separate those in need from those who are not. Refugee status determination procedures, as well as other procedures on granting international protection to foreigners, demand careful and time-consuming considerations. That is why such procedures appear to be ineffective in dealing with mass influxes of people. That is also why the best—although far from perfect—legal measures to address large movements of refugees and migrants are temporary in nature. They aim to deal with the specificity of such movements. An example of such a legal measure is the temporary protection regime as provided for in the EU Temporary Protection Directive of 2001. Failure to activate the temporary protection regime to the Syrian asylum seekers remains the most enigmatic characteristic of the Mediterranean refugee crisis.

Temporary measures aimed at a mass influx of people seeking protection have at least two undeniable advantages. First, these measures are much more acceptable for States that are not eager to permanently admit large numbers of foreigners. Admittedly, granting refugee status or subsidiary protection is of a permanent character as human rights guarantees ensuring the respect of private and family life as well as the respect of children's rights generally make involuntary returns to countries of origin impossible even if the situation there has improved. Also, the temporary protection regime offers a better option for national authorities to promote more social openness and to deal with negative attitudes in public opinion without paying a high price at the ballot box, or at least reducing this risk significantly.

Second, the temporary character of protection provides a clear discouraging signal to those who are not in actual need of protection not to abuse protection procedures for legalizing their stay in a target country, as the protection is interim only and assumes the return to a country of origin when possible. Thus, the temporary protection mechanisms may allow States to fulfill their legal and moral obligations towards those in need of protection, but at the same time discourage others from rash migration decisions.

The main lesson of the Mediterranean refugee crisis is that such crises may be effectively prevented preemptively when the first symptoms of future mass movements of people appear. There is obviously nothing original in claiming support from the EU institutions and from the EU Member States for Greece and Italy, as well as financial support for Syria's neighboring states—mainly Lebanon and Turkey—linked with limited resettlement programs would have helped prevent the Mediterranean refugee crisis or to reduce its range, if that support had come two or three years earlier. The EU and its Member States need to learn this lesson and draw appropriate conclusions. The situation in Ukraine is the first test for that. It is also a true test for solidarity within the EU. Obviously, in a more general perspective, early warning mechanisms triggering preemptive actions based on the principle of solidarity should be developed. The European Commission proposals should take this into account instead of forcing ineffective relocation mechanisms.

Consequently, the Polish authorities should have opted and still should opt more explicitly and clearly for a coordinated and preemptive approach towards preventing refugee crises. The Mediterranean refugee crisis is definitely not the only refugee crisis the EU should deal with now—the situation in Ukraine should be addressed as well. Obviously, to some extent the actions to be taken require solidarity and involvement of all Member States. As far as the Ukrainian context is concerned, addressing the root causes of the displacement is a must and resolute steps aimed at the termination of the armed conflict in Eastern Ukraine definitely require the involvement of the EU and all Member States. As far as the intensified financial support and the admittance of individuals in need of protection are concerned, the EU Member States might need to respond to various refugee crises, adequately and proportionally to their geographical location, historical and cultural determinants, and other interests. Such simultaneous diversified responses would also suit the EU solidarity principle.

Last but not least, one should not overlook that the Temporary Protection Directive of 2001 allows for preemptive actions³¹ and its application towards Ukrainian IDPs could be possible, yet it is not very politically realistic if the temporary protection regime was not activated in case of the actual influx of Syrians. This example shows that the legal tools have always been available on the political table. What is missing is the consensual will to employ them and accept the nuanced and diverse perspectives of all the EU Member States.

³¹ Note especially Article 2(d): “mass influx means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.” (emphasis added).

