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The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value**

Abstract

Given the current scale of global displacement, in particular from Syria, and the rising death toll of individuals crossing the Mediterranean, the European Union has emphatically stressed the need to work on an effective asylum and immigration policy, through more robust forms of cooperation between the Member States. Following the Agenda on Migration in May 2015, a set of new measures and proposals to reform the existing framework on asylum has been launched, including, inter alia, an emergency relocation mechanism, a proposal to reform the Dublin Regulation, and the development of the EU-Turkey partnership. The main objective is “to ensure an efficient response to the increased arrivals of refugees and migrants in the EU” and “a high degree of solidarity between the Member States” along the lines of Article 80 TFEU. This begs the question of what solidarity, as the guiding principle of European immigration and asylum policies, entails in terms of states’ obligations and to what extent these obligations have been enforced in view of the current critical situation in Europe. The present paper explores the meaning and functions of the principle of solidarity enshrined in Article 80 TFEU based on the ways in which it has been operationalized through these measures.

Introduction

Since 1990, the European Union (EU) has sought to codify a regional system concerned with Member States’ obligations *vis-à-vis* refugees. The so-called Common European Asylum System (CEAS) remains a work-in progress, detailing rules and mechanisms concerning the reception of persons seeking protection, the asylum determination procedures, the requirements and content of protection as well as the

allocation of responsibilities amongst Member States.¹ The legal basis for establishing a common system on asylum is to be found in EU primary law and, more specifically, in Chapter 2 of the Treaty on the Functioning of the European Union (hereafter TFEU)². Although the CEAS is considered to be one of the most advanced regional protection frameworks,³ with harmonization of national asylum legislations being its

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** This paper covers legal and policy developments up to June 2016.

¹ Tampere European Council 15 and 16 October 1999 Presidency Conclusions, 16/10/1999 – Nr: 200/1/99, 13–17.

² Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012 O.J. (C 326) 55, Chapter 2, Policies on Border Checks, Asylum and Immigration, Art. 77–80.

³ See H. Lambert, ‘Introduction: European refugee law and transnational emulation’ in H. Lambert, J. McAdam and M. Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press, 2013). Also see V. Chetail, ‘The Common European Asylum System: Bric-a-brac or System?’ in V. Chetail, Ph. De Bruycker and Fr. Maiani (eds), *Reforming the Common European Asylum System, The new European Refugee Law* (Brill Nijhoff Leiden, 2016) 1.

main objective, much criticism has been raised in relation to its nature as a “common” system.⁴ Such criticism appears to have regained fertile ground since last year, as a severe humanitarian crisis⁵ has been unfolding at Europe’s outer borders and within its territory.

The acute situation in the Mediterranean, which peaked last summer, followed by a cascade of restrictive asylum policies being put into law by many EU states,⁶ has exposed the flaws and deficiencies of the CEAS architecture, stretching the asylum systems of the countries along EU’s outer border to their limits. Acknowledging that this is not a Greek or Italian problem, but rather a problem that calls for a coordinated European response,⁷ the European Commission has initiated a number of measures to assist states in fulfilling their international legal obligations *vis-à-vis* protection seekers and also their immigration and border management duties stemming from EU commitments, in line with the principle of solidarity in EU asylum policies, as enshrined in Article 80 TFEU.

In the following sections, the law and policies adopted by the European institutions as a response to the so called “refugee crisis” will be discussed in an attempt to provide some clarity on how solidarity has been conceptualized and applied within the EU. In particular, Section 1 traces solidarity in relevant international and EU legal instruments focusing on Article 80 TFEU and its legal interpretation. Section 2 examines the measures employed by the EU in order to give effect to Article 80 TFEU and draws conclusions on

solidarity’s functions within the EU asylum context in times of “crisis”.

1 The law of solidarity in refugee protection

1.1 International refugee law, solidarity and the CEAS

Before diving into the concrete measures taken to implement solidarity, let us begin with a conceptual exercise, namely an attempt to shed light onto solidarity’s meaning and role in the refugee regime. Is there a common understanding of what solidarity is and of what it entails for states and for refugees? I am afraid the answer to this is no.

In the human rights realm, solidarity is reflected in the concern of states for the protection of the rights of all people, regardless of their nationality.⁸ In that sense, solidarity gives the idea of humane policies, of going beyond the individual. As regards international action towards refugees, the principle of solidarity has in fact underpinned the international refugee regime since its origins under the League of Nations.⁹ The refugee phenomenon has always been recognized as international in nature, not only due to the fact that people are moving between states but also because its resolution is one that “*demand[s] consultation and cooperation between states*”.¹⁰ In particular, states are required to cooperate with respect to the care of refugees, as indicated in the preamble of the 1951 UN Convention relating to the Status of Refugees/1967 Protocol (‘the Refugee Convention’),¹¹ which reads as follows:

⁴ See e.g. Aida Annual Report 2014/2015, ‘Common Asylum System at a Turning Point: Refugees Caught in Europe’s Solidarity Crisis’ <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf> accessed 2 November 2016.

⁵ See <<http://data.unhcr.org/mediterranean/country.php?id=83>> accessed 2 November 2016.

⁶ See <<https://www.foreignaffairs.com/articles/western-europe/2016-01-13/all-none-and-none-all>> accessed 2 November 2016.

⁷ See <http://europa.eu/rapid/press-release_IP-16-271_en.htm> accessed 2 November 2016.

⁸ P. Leuprecht, ‘La solidarite internationale et les droits de l’homme’ in *Congress on International Solidarity and Humanitarian Actions Organized under the Auspices of the International Red Cross and the United Nations High Commissioner for Refugees* (San Remo, Italy, 1980) 27, 27–28; T. van Boven, ‘International Solidarity and Human Rights’ in *Congress on International Solidarity and Humanitarian Actions Organized under the Auspices of the International Red Cross and the United Nations High Commissioner for Refugees*, (San Remo, Italy, 1980) 15, 17.

⁹ P. Hartling, ‘International Solidarity and the International Protection of Refugees’ in *Congress on International Solidarity and Humanitarian Actions Organized under the Auspices of the International Red Cross and the United Nations High Commissioner for Refugees* (San Remo, Italy, 1980) 237, 238.

¹⁰ See, inter alia: League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663; UN General Assembly Resolution 62(I)[I–II] of 15 Dec. 1946 on Refugees and Displaced Persons; UN General Assembly Resolution 319(IV) of 3 Dec. 1949 on Refugees and Stateless Persons.

¹¹ U.N. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 137; U.N. Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S. 267 [together hereinafter 1951 Refugee Convention].

“Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation”

This preambular provision aside, the Refugee Convention regime offers no agreed formulae, for such cooperation. This, combined with the shadowy existence of a legal principle of international solidarity and the strong tension between sovereignty and solidarity,¹² has triggered much scepticism with respect to solidarity’s legal function. Alston, a leading international law scholar, notes that:

*[...] solidarity has a vague, almost metaphysical meaning unless its specific implications are spelt out in each particular context in which it is used. For this reason, it can readily be abused as a means of avoiding any tangible commitment while at the same time appearing virtuous.*¹³

On the other hand, Hurwitz, currently a senior Policy Advisor at UNHCR, has been quite firm, arguing that even in the absence of a customary norm of solidarity and burden sharing, its legal relevance as soft law principle should not be underestimated.¹⁴

One would expect the meaning, scope and functions of solidarity in EU law to be more concrete. The notion

of solidarity in the EU, a Union of states which by definition have a set of common interests and need to work together to uphold them, indeed constitutes a recognized European value, appearing in numerous treaty provisions¹⁵ and different EU domains,¹⁶ and has thus become a constitutional element within EU’s cooperative architecture. EU Member States are all parties to the Refugee Convention and have accepted the same obligations towards individuals described and defined according to the same criteria. The full and inclusive application of the Refugee Convention is provided for in Article 78 TFEU, which forms the basis for the obligation underpinning the development of a common policy on asylum in the EU.¹⁷ The adoption of common asylum policies in areas enlisted in Article 78 TFEU should be governed by the principle of solidarity, as provided for in Article 80 TFEU.¹⁸ The provision reads as follows:

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Despite the great significance attached to this principle through its incorporation in EU primary law, however, its nature, scope, and implications remain highly debatable. In the following section a brief analysis of the provision’s

¹² M.T. Kotzur, and K. Schmalenbach, ‘Solidarity Among Nations’ (March 2014) 52(1) *Archiv des Völkerrechts*, 68, 89–90.

¹³ P. Alston, ‘A Third Generation of Solidarity Rights: A Progressive Development or Obfuscation of International Human Rights?’ (1987) 29(3), *Netherlands International Law Review*, 307, 318.

¹⁴ A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, Oxford, 2009) 285.

¹⁵ Articles 2, 3(3), 21 and 24 Treaty on European Union (TEU), Articles 67, 80, 122, 194 and 222 TFEU, as well as in the Charter of Fundamental Rights of the EU, CHAPTER IV.

¹⁶ See e.g. EU environmental policies, European Social policies, European monetary policies. For an in depth discussion see M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press, Oxford, 2010).

¹⁷ Article 78 TFEU states that “1. *The 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 and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.* 2. *For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (...)*”.

¹⁸ The origins of the provision can be traced to the working groups’ discussions leading up to the Draft Treaty establishing a Constitution for Europe, which eventually paved the way for the Lisbon Treaty (Convention Working Group X “Freedom, Security and Justice”, The European Convention).

material content, based on the literal meaning of the words, context and *telos*¹⁹ will be attempted.

1.2 The principle of solidarity in Article 80

TFEU: main components

Arguably, Article 80 TFEU takes the preambular provision of the Refugee Convention, discussed above a step further, demanding more than mere cooperation between states. The provision explicitly couples solidarity with “fair sharing of responsibilities”. The fact that two distinct terms are deployed to describe the drafters’ intentions is rather telling; the concept of solidarity is chiefly concerned with approaching an issue collectively, in support of each other, whereas fair sharing of responsibilities is related to a concrete division of labour. Following this line of reasoning, Article 80 TFEU could be saying “*The Union and its Member States shall approach asylum, immigration and border management collectively by sharing the corresponding responsibilities in a fair manner*”. In that context, a common and effective asylum and immigration policy could be seen as the end, solidarity as the means to this end and fair sharing of responsibility a specification of this means. The fact that solidarity is referred to as a “principle” indicates that its nature differs from strict binary rules that prescribe or prohibit certain behaviour (“do this – don’t do that”). Instead, solidarity and fair sharing as enshrined in Article 80 TFEU is to be realized to the highest degree that is actually and legally possible, depending on the circumstances at hand.²⁰

The provision’s wording puts forth concrete limitations as regards to its scope and the solidarity beneficiaries. It provides for an obligation, owed by the institutions of the Union and/or Member States to other Member States, to be achieved through a set of measures allocating responsibility

in fair terms. Solidarity as a principle and fair sharing of responsibilities as a concretization of this principle should govern both law- and policy-making as well as implementation and enforcement.

However, there are many issues on which the provision remains silent. Concrete legislative, policy and other kinds of measures giving effect to the principle are not defined therein. The phrase “*including its financial implications*” indicates an emphasis on financial solidarity as an example of ways in which support could materialize, allowing for additional sharing practices to be agreed upon.²¹ The fact that the operationalization of solidarity is left to the discretion of the Union is indicated by the phrase “*whenever necessary*”. Here, the principles of subsidiarity and proportionality could prove useful. Arguably, these principles require double scrutiny before concrete solidarity action is taken: a) establishing whether or not Union measures are required in the particular field (Articles 77 to 79 TFEU); and 2) determining whether or not Member States will be able to implement them by themselves or whether additional solidarity measures are necessary.²² Yet, the content as well as the forms of solidarity remain circumstance-particular and context specific.

Furthermore, the fact that Article 80 TFEU covers three policy areas – all concerned with human mobility yet pursuing distinct aims – is highly problematic. Solidarity between states with respect to refugee protection may clash with solidarity in areas such as regular and irregular migration or border management. As a result, the way in which the notions of ‘solidarity’ and ‘fair sharing of responsibilities’ are to be defined in terms of their objectives and the standards necessary to meet them is characterized by a high degree of controversy.

¹⁹ Literal interpretation. For more on the so-called “classical methods of interpretation” see K. Lenaerts and J. A. Gutiérrez-Fons, ‘To say what the law of the EU is: methods of interpretation and the European Court of Justice’ (2013) EUI Working Paper, AEL 2013/9, 4 <http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf?sequence=1&isAllowed=y> accessed 2 November 2016; H. Kutscher, ‘Methods of Interpretation as Seen by a Judge at the Court of Justice’ in *Reports of a Judicial and Academic Conference held in Luxembourg on 27–28 September 1976*, 1–21; G. Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ (2011) 10(5) *German Law Journal*, 537; J. Bengoetxea, N. MacCormick and L. Moral Soriano, ‘Integration and Integrity in the Legal Reasoning of the European Court of Justice’ in G. de Búrca and J.H.H. Weiler (eds), *The European Court of Justice*, Collected Courses of the Academy of European Law, (Oxford, Oxford University Press, 2001) 48.

²⁰ See R. Alexy, ‘On the Structure of Legal Principles’ (2000) 13(3) *Ratio Juris*, 294.

²¹ See G. Noll, *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague, Kluwer Law International, 2000) 279. Noll has laid the foundations for a conceptual analysis of burden sharing, its scope and objectives. His distinction between *sharing norms*, *sharing money* and *sharing people*, highly informs the way in which solidarity is conceptualized in contemporary EU asylum policies.

²² D. Vanheule, J. Van Selm and Chr. Boswell, ‘The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration’ (2011) EP Study, PE 453.167, 8.

Another critical point relates to the addressees of solidarity. The prevailing view so far is that Article 80 TFEU is concerned with states and thus solidarity's addressees are national governments. This is reflected in the provision's wording, providing for solidarity and fair sharing of responsibilities "between the Member States".²³ Nevertheless, a human rights based approach is not inconceivable. As suggested earlier, Article 80 TFEU does not stand alone. It has to be read in conjunction with the rest of the provisions of the Chapter on the Creation of an Area of Freedom, Security and Justice (AFSJ), of which asylum policies form a significant part. According to Art. 67 TFEU par. 2

It [the Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.

Although a definition of fair treatment is not provided in the TFEU, it can be assumed that this includes, at a minimum, compliance with the fundamental rights protected in the European Convention on Human Rights²⁴ and other relevant international treaties, such as the 1951 Refugee Convention.²⁵ The fair treatment or fundamental rights

rationale of EU migration law, which has gained strength since the Tampere Conclusions,²⁶ adds another dimension to the solidarity principle, which, although not explicitly referred to in Article 80 TFEU, is central to the context the principle is to be applied in. This is a question which touches on the core of CEAS's inherent tensions, namely the uneasy cohabitation of nation-statism and securitization goals versus supranationalism and human rights protection.²⁷

To sum it up, notwithstanding the undoubted centrality of the principle of solidarity to European asylum policies, its understanding as the governing principle of such policies is so vague and oftentimes contradictory in its legal construction that it is hardly possible to draw conclusions about its implications for states with certainty and to translate these into, or to let these guide, tangible action.²⁸ The range of actors involved in sharing practices, namely states, humanitarian organizations, and governmental agencies as well as the interplay of the principle with identical concepts – such as 'sincere cooperation',²⁹ 'mutual trust',³⁰ 'balance of effort',³¹ 'burden sharing',³² and 'responsibility sharing'³³ – creates conceptual uncertainty. While such conceptual proliferation can be confusing in its own right, the variety of legal regimes (international refugee law, international human rights law, European Union law)

²³ G. Noll, 'Failure by Design? On the Constitution of EU Solidarity' in *Searching for Solidarity in EU Asylum and Border Policies, A Collection of Short Papers following the Odysseus Network's First Annual Policy Conference* (26–27 February 2016, Université libre de Bruxelles) 3.

²⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

²⁵ L. Azoulay and K. de Vries (eds), *EU Migration Law, Legal Complexities and Political Rationales* (Oxford University Press, Oxford, 2014) 3.

²⁶ Tampere European Council 15 And 16 October 1999 Presidency Conclusions, 16/10/1999 – Nr: 2001/1/99, 13–17. The European Council in the Tampere Meeting reaffirmed "the importance the Union and Member States attach to absolute respect of the right to seek asylum" and concluded that the establishment of the Common Asylum Policy would be "based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement".

²⁷ See S. Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer-Verlag Berlin Heidelberg, 2014) 5.

²⁸ G. Noll, 'Why the EU gets in the way of refugee solidarity' (openDemocracy, 22 September 2015) <<https://www.opendemocracy.net/can-europe-make-it/gregor-noll/why-eu-gets-in-way-of-refugee-solidarity>> accessed 2 November 2016.

²⁹ Consolidated Version of the Treaty on European Union, TEU, [2008] OJ C115/13, Art. 4 par. 3.

³⁰ European Commission, 'An EU agenda for better responsibility-sharing and more mutual trust', (Communication on enhanced intra-EU solidarity in the field of asylum) Brussels, 2 December 2011, COM(2011) 835 final.

³¹ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, as signed in Amsterdam on 2 October 1997, Art. 73k, 2(b).

³² On burden-sharing see e.g. G. Noll, *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague, Kluwer Law International, 2000); G. Noll, and J. Vested-Hansen, 'Temporary Protection and Burden Sharing: Conditionalising Access Suspending Refugee Rights?2 in E. Guild, and C. Harlow (eds), *Implementing Amsterdam. Immigration and Asylum Rights in EC Law* (Oxford: Hart Publishing, 2001) 195–224; E. Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' (2003) 16 (3) *International Journal of Refugee Law*, 253.

³³ Parliamentary Assembly, 'Asylum Seekers and Refugees: Sharing Responsibilities in Europe' (Resolution, 1820/2011) Text adopted on 21 June 2011 (22nd Sitting).

involved in the area of asylum, along with solidarity's strong political, social and moral connotations³⁴ add a further level of complexity. This is why the ways in which solidarity is being operationalized by EU institutions, especially in times of "crisis", is expected to be more revealing of the principle's meaning and implications.

1.3 Article 80 TFEU: the added value

Does the above suggest that Article 80 TFEU adds little normative significance to the law making process as well as to the ways the law is implemented? I am afraid that this would be a rather aphoristic observation. There are different views expressed in the literature. One view is that Article 80 TFEU does not mean concrete obligations for states beyond those they are already committed to, having signed the 1951 Refugee Convention. It has been argued that this new provision does not constitute a legal basis in itself, but provides justification for the adoption of measures to enhance solidarity.³⁵ There is, however, a counter view that the insertion of the principle of solidarity and fair sharing of responsibility in the EU treaties equals legal obligatoriness of the principle both for EU institutions and for the Member States when they implement EU policies.³⁶

The view that solidarity as enshrined in Article 80 TFEU shall not be treated as a mere moral commitment, where compliance would be highly reliant on the good will of the actors, their intentions or motives, has merit. Equally, the fact that the provision is silent with respect to concrete solidarity measures should not be interpreted as linking solidarity with voluntary unilateral action or inaction by states. An absence of new legal obligations does not equal

an absence of normative effect. Rather, solidarity in Article 80 TFEU should be seen as entailing legal implications for states. Even if European states had no intention of taking on new obligations to provide assistance to individuals in need or other states, Article 80 TFEU could still be seen to have normative significance in a public law-sense – that is, as a form of law that confers powers of an official nature, and provides legal authorization for certain kinds of executive action.³⁷ Article 80 TFEU delegates power to officials – i.e. governments, EU institutions – to make rules through which a fair sharing of asylum-related responsibilities ought to be gradually realized, taking into account the specificities of the case at hand.

In light of the above, solidarity as enshrined in Article 80 TFEU is to be seen as an obligation for the EU and its Member States to undertake optimal action to realize a common European asylum policy that is as fair and effective as possible. This means that the principle of solidarity can be fulfilled to different degrees³⁸ and that the EU and the Member States do enjoy certain discretion as to the kind of solidarity measures they suggest and adopt. This, however, should not be interpreted as offering EU Member States the discretion to decide whether to apply those measures, once they are adopted, or not. In case of noncompliance with binding EU legislation adopted on the basis of Article 80 TFEU, states should be brought before the Court of Justice of the EU. Equally, the Court could annul EU laws or certain provisions that counteract Article 80 TFEU.³⁹

What does the above analysis of the law pertaining to a solidaristic approach to asylum in the EU leave us with? It

³⁴ See *inter alia*, S. Stjernø, *Solidarity in Europe: The History of an Idea* (Cambridge, Cambridge University Press, 2005); K. Bayertz, *Solidarity*, Philosophical Studies in Contemporary Culture (Springer Netherlands, 1999); S. J. Scholz, *Political Solidarity* (Penn State University Press, 2008); J. Habermas and P. Dews, *Autonomy and Solidarity* (Verso Books, 1992).

³⁵ S. Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon' (2008) 10 *European Journal of Migration and Law*, 236.

³⁶ See V. Moreno-Lax, 'Solidarity as a Legal Obligation and the Future of Refugee Law', paper presented at the RLI 1st Annual Conference "The Future of Refugee Law" University of London, 1 July 2016; See also, Fr. Maiani, 'Article 80 and Solidarity across Migration Policies', paper presented at a closed workshop, Queen Mary University of London, Refugee Law Initiative, Human Rights Consortium, School of Advanced Study, University of London, 27 April 2015; and Ph. De Bruycker, Ph. and E. Tsourdi, 'Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension' in V. Chetail, Ph. De Bruycker and Fr. Maiani (eds.) *Reforming the Common European Asylum System, The New European Refugee Law* (Leiden: Brill Nijhoff, 2016) 499.

³⁷ For a discussion on the distinction between laws of a public or official nature that confer powers and "those that impose duties" see H.L.A. Hart, *The Concept of Law* (Oxford, Oxford University Press, 1961); see also A. Orford, *International Authority and the Responsibility to Protect* (Cambridge, Cambridge University Press, 2011) with regard to that distinction and its relevance to the responsibility to protect concept.

³⁸ On principles as "optimization commands" see R. Alexy, 'On the Structure of Legal Principles' (2000) 13 (3) *Ratio Juris*, 295; R. Alexy, 'Zum Begriff des Rechtsprinzips' in R. Alexy, *Recht, Vernunft, Diskurs* (Frankfurt: Suhrkamp, 1995) 177; R. Alexy, *Theorie der Grundrechte* ((3rd edn, Frankfurt: Suhrkamp, 1996).

³⁹ See Articles 258–260 and 263 TFEU. A breach of European values may also trigger Article 7 TEU.

leaves us with one main proposition: the vagueness in the construction, meaning and concrete implications of Article 80 TFEU for states and the EU, does not mean that the provision lacks normative significance. The principle of solidarity and fair sharing of responsibility, as enshrined in Article 80 TFEU is to be seen as an ongoing obligation for the EU and its Member States to realize a common European asylum policy that is as fair and effective as possible by taking new measures or modifying the existing ones. What I will attempt in the following section is an analysis of the measures through which the EU and the Member States implement solidarity in practice.

2 The practice of solidarity within the CEAS

2.1 European asylum solidarity in times of “crisis”

Solidarity appeared in broad daylight after two shipwrecks close to the Libyan coast provoked over 1,100 deaths in the Mediterranean on 18 April 2015.⁴⁰ This triggered a number of developments at the EU level.⁴¹ Until then, states were operating mainly on the basis of responsibility determined by the Dublin system⁴² and, thus, solidarity was perceived as a means to eventually enhance Dublin’s proper implementation.

This section provides a brief overview of three arrangements at the EU level, dealing with the allocation of asylum related responsibilities: the relocation schemes, the EU-Turkey cooperation framework,⁴³ and the Commission’s proposal to reform the Dublin III Regulation.

As part of the EU policies intended to offer short-term relief to Member States at the EU’s external borders, the European Commission presented on 13 May 2015 its communication on the European Agenda on Migration.⁴⁴ The operational measures proposed by the Commission and approved at the informal meeting of Heads of State on 23 September 2015 included, among others, a proposal to temporarily suspend the Dublin rules regarding persons in clear need of international protection, and relocating them to other EU Member States on the basis of a distribution key.⁴⁵ In view of these proposals, the Council of the EU adopted two relocation decisions, on 14 and 22 September 2015 respectively,⁴⁶ providing for the temporary and exceptional relocation, over two years, from Italy and from Greece to other Member States, of 160,000 persons in clear need of protection, mainly from Syria, Iraq, Eritrea, Burundi and Central African Republic. A measure proposed by the Commission to accompany the relocation system is the development of a “Hotspot approach”. This

⁴⁰ See P. Kingsley, A. Bonomolo and S. Kirchgassner, ‘700 migrants feared dead in Mediterranean shipwreck’ *The Guardian* (19 April 2015) <<http://bit.ly/1D1DmHi>> accessed 2 November 2016; ECRE, ‘400 people feared dead – EU under pressure to do more to prevent further deaths in the Mediterranean’ (17 April 2015) <<http://bit.ly/1HebG8k>> accessed 2 November 2016; P. Kingsley and D. Gayle, ‘Migrant Boat Disaster: rescue hopes led to sinking in Mediterranean’, *The Guardian* (15 April 2015) <<http://bit.ly/1OBy4dY>> accessed 2 November 2016.

⁴¹ European Commission, ‘Joint Foreign and Home Affairs Council: Ten point action plan on migration’, (Press Release) IP/15/4813, Luxemburg, 20 April 2015; European Council, ‘Special Meeting of the European Council, 23 April 2015 – statement’ <<http://bit.ly/1byWVks>> accessed 2 November 2016; European Commission, ‘A European Agenda on Migration’ (Communication) Brussels, 13 May 2015, COM(2015) 240 final.

⁴² The term is used to refer to all the relevant instruments adopted to determine the Member State (EU Member States, Norway, Iceland, Liechtenstein and Switzerland) responsible for examining an asylum application lodged in Europe by a third country national or stateless person; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 recast, Council Regulation (EC) No 343/2003 of 18 February 2003, Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01), Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013, recast, concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the recast Dublin Regulation, and Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014 which amends Regulation (EC) No. 1560/2003 laying down detailed rules for the application of the Council Regulation (EC) No 343/2003.

⁴³ Despite the fact that the EU-Turkey statement is not framed as a solidarity mechanism, it is concerned with the distribution of responsibilities concerning asylum seekers and, thus, relevant to a discussion of how sharing is operationalized within EU policies.

⁴⁴ European Commission, ‘A European Agenda on Migration’ (Communication) Brussels, 13 May 2015, COM(2015) 240 final.

⁴⁵ <<http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/>> accessed 2 November 2016.

⁴⁶ 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, L 239/146, 15.9.2015 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, L 248/80, 24.9.2015.

entails a temporary intervention by four EU agencies – namely the European Asylum Support Office (EASO), the EU Border Agency (Frontex), the EU Police Cooperation Agency (Europol), and the EU Judicial Cooperation Agency (Eurojust) – to help Italy and Greece fulfil their obligations under EU law. Their main mission is to assist national authorities with the identification, registration and fingerprinting of incoming migrants⁴⁷.

Additionally, and in view of the recent situation in Greece with more than 50.000 asylum seekers stranded in its territory as a result of the border controls introduced by many EU states,⁴⁸ the EU decided to promote more drastic policies building on the existing EU-Turkey cooperation framework. Within this framework, EU and Turkey have negotiated instruments “dedicated to addressing the migration crisis”, including a Joint Action Plan in October 2015,⁴⁹ a statement on 7 March 2016⁵⁰ and a joint statement on 18 March⁵¹, which should be read alongside the EU summit conclusions,⁵² as well as the relevant Commission communication.⁵³ Through the latter statement, Turkey committed to readmit migrants who have not applied for asylum in Greece or whose application has been found ‘inadmissible’ or unfounded under the EU’s Asylum Procedures Directive.⁵⁴ On the other hand, the EU accepted that, for every Syrian being returned to Turkey from the Greek islands, a Syrian will be resettled from Turkey to the EU. The EU also committed to accelerate visa liberalization for Turkish citizens and to ‘speed up’ the disbursement of 3 billion euros allocated under the Facility for Refugees in Turkey, a fund constituted by the EU and

its Members States, providing for humanitarian aid to refugees in Turkey.

Finally, to facilitate the objectives behind the EU-Turkey statement, the European Commission recently proposed a reform of the Dublin III Regulation, yet to be approved by the Parliament and the Council.⁵⁵ The suggested reforms include an obligation for states to assess the inadmissibility of an application on ‘safe third country’ or ‘first country of asylum’ grounds before the determination of responsibility according to the Dublin criteria is activated.⁵⁶ This confirms the current practice with respect to asylum-seekers coming from Turkey to Greece, which aims to return as many of them as possible to Turkey. In connection with this, it is suggested that penalties be imposed on asylum seekers who do not obey the rules of the system, justified by the Commission as a way to tackle secondary movements within the EU.⁵⁷ Last but not least, the proposal emphasizes the need for fairer sharing of responsibilities, providing for a “corrective fairness mechanism” to address the issue of the uneven distribution of asylum applications amongst EU states. Within this mechanism, rules of relocation will be triggered once a state is found by reference to its income and population, to be handling a disproportionate number of asylum applications. The proposal provides for the possibility of financial contributions made by states in exchange of accepting individuals, referring to it as “solidarity contribution”.⁵⁸ The question that the following section deals with is what one can infer from the above measures with respect to the meaning, functions and implications of the principle of solidarity in EU asylum policies.

⁴⁷ See the Explanatory note on the “Hotspot” approach, <<http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>> accessed 2 November 2016.

⁴⁸ <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm> accessed 2 November 2016.

⁴⁹ <http://europa.eu/rapid/press-release_MEMO-15-5860_it.htm> accessed 2 November 2016.

⁵⁰ Statement of the EU Heads of State or Government, 07/03/2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>> accessed 2 November 2016.

⁵¹ EU-Turkey statement, 18 March 2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 2 November 2016.

⁵² European Council Conclusions, 17–18 March 2016, <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/>> accessed 2 November 2016.

⁵³ European Commission, ‘Next Operational Steps In EU-Turkey Cooperation In The Field of Migration’ (Communication) Brussels, 16.3.2016 COM(2016) 166 final.

⁵⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60.

⁵⁵ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council 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 (recast)’ Brussels, 4 May 2016, COM (2016) 270 final.

⁵⁶ *Ibid.*, p. 15.

⁵⁷ *Ibid.*, p. 13–15.

⁵⁸ *Ibid.*, p. 19.

2.2 Critical examination of the EU's effort to operationalize solidarity

The mechanisms described above, designed to respond to asylum demands as well as to inequality in the reception of refugees amongst EU states, seem to share three core characteristics: short-sightedness, conditionality, and responsibility shifting.

With regard to the relocation schemes, the conditions attached to the provision of support to Member States under constraint are worth noting. States beneficiaries of support pursuant to the relocation decisions are expected to implement a series of measures enhancing their asylum systems' capacities, with focus on first reception and return as well as the quality and efficiency of the procedures.⁵⁹ This underlines the myopic pursuit of an exceptional and "conditioned" solidarity, in relation to the first reception facilities in the countries under pressure, on the condition that these countries deal with their structural problems themselves.⁶⁰ The "hotspot approach", adopted to facilitate relocation, illustrates precisely this point, with support being limited to identification, registration, fingerprinting and return, and thus represents a response to the issue of

external border management rather than asylum demands and the need for capacity building.

The EU-Turkey statement forms part of the external dimension of CEAS, already referred to in the Tampere preamble and conceptualized as an intrinsic part of the European asylum policies, reflected in TFEU Article 78 2g.⁶¹ What is worth underlining here is the promotion of the "protection elsewhere" rationale,⁶² which basically encourages responsibility shifting to an external partner based on mutual benefits. The safe third country rules provide a wide margin of discretion to EU states to transfer or shift responsibility for refugees between themselves and with third countries, the emphasis being on restricting secondary movements and combating irregular migration.⁶³ The EU-Turkey statement very much replicates such practices, with the emphasis being on coercion and deterrence.⁶⁴ At the same time, though, it makes room for solidarity, providing for the possibility of resettling Syrian refugees from Turkey to EU Member States.⁶⁵ What is highly questionable is the fact that resettlement comes as a replacement to one's right to seek asylum⁶⁶ outside of state-initiated practices aimed chiefly at controlling entry to EU territory. As many

⁵⁹ Council Decision 2015/1523 Article 8, Council Decision 2015/1601 Article 8.

⁶⁰ Council Decision 2015/1523 Rec. (14), Council Decision 2015/1601 Rec. (18).

⁶¹ Article 78 par. 2 "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (...) (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection."

⁶² United Nations High Commissioner for Refugees, UNHCR, 'Background Note on the Safe Country Concept and Refugee Status', 26 July 1991, EC/SCP/68, par. 12 <<http://www.refworld.org/docid/3ae68ccec.html>> accessed 2 November 2016; See also K. Hailbronner, 'The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5(1) International Journal of Refugee Law, 31, 58–59; R. Byrne and A. Shacknové 'The Safe Country Notion in European Asylum Law' (1996) 5(1) Harvard Human Rights Journal, 185, 189–190.

⁶³ See among others, S. Lavenex, *Safe Third Countries* (Central European University Press, New York, 1999); J. Hathaway, 'The Michigan Guidelines on Protection Elsewhere, Adopted January 3, 2007' (2007) 28 (2) Michigan Journal of International Law, 207; M. Kjaerum, 'The Concept of Country of First Asylum' (1992) 4(4) International Journal of Refugee Law, 514; S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15(4) International Journal of Refugee Law, 566.

⁶⁴ For a more detailed discussion of the EU-Turkey deal see, *inter alia*, M. den Heijer and Th. Spijkerboer, 'Is the EU-Turkey refugee and migration deal a treaty?' (EU Law Analysis, 18 March 2016) <<http://eulawanalysis.blogspot.se/2016/04/is-eu-turkey-refugee-and-migration-deal.html>> accessed 2 November 2016; S. Peers, 'The final EU/Turkey refugee deal: a legal assessment' (EU Law Analysis, 7 April 2016) <<http://eulawanalysis.blogspot.se/2016/03/the-final-euturkey-refugee-deal-legal.html>> accessed 2 November 2016; M. Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy' (EJIL: Talk!, 18 April 2016) <<http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>> accessed 2 November 2016.

⁶⁵ <<http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/>> accessed 2 November 2016.

⁶⁶ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) Article 14(1); Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 18; American Convention on Human Rights, Costa Rica, 22 November 1969, Article 22 (7).

critics have put it, resettlement should supplement and not substitute the provision of asylum⁶⁷.

Finally, the Commission's proposal to reform the Dublin Regulation not only maintains the fundamental inequality permeating the system,⁶⁸ reflected in the so called "first entry rule",⁶⁹ but, rather, it seems to strengthen it. The proposed obligation of asylum seekers to ask for asylum in the first Member State which they find themselves in, seen in conjunction with the obligation of that Member State to examine all asylum claims in terms of admissibility is rather indicative of the Commission's focus on the link between responsibility and border management as well as on preventing deflection. In practice, this means that Greece, for instance, will have to receive, fingerprint, register and examine all asylum claims lodged in its territory as well as carry out the transfer or return of the applicants to another Member State if the application is admissible or to the "safe third country" to which the applicants should have sought protection, if the application is inadmissible. In addition to that, the conceptualization of fairness within the "corrective fairness mechanism"⁷⁰ seems to be self-interest driven, allowing for contributions to be traded between European states.

In light of the above, the measures taken so far in order to put a halt to human suffering, on the one hand, and relieve the EU states that are under particular migratory pressure, on the other, seem to adhere to a rather weak version of solidarity. First, it is questionable whether the support provided through the new mechanisms truly relieves EU states that are under strain or rather interferes in their policy, making sure that responsibility is placed precisely with these states. Second, drawing on the relocation's poor implementation so far (as of June 2016, 2280 people have been relocated),⁷¹ one wonders to what extent it is fair for Italy and Greece to have to fulfil the conditions to the provision of a support that barely arrives. Third, the success

of a reform of the Dublin Regulation that does not seek to tackle the two main grounds that have significantly contributed to its failure so far, namely responsibility shifting and coercion, is highly doubtful. To put it differently, how much of a difference is to be expected by a Dublin reform which maintains the first entry criterion and does not take refugees' preferences into account? Finally, the fact that the principle of solidarity is to be fulfilled gradually does not mean that states should be able to get away in cases of non-compliance. Today, in the absence of strong EU monitoring and enforcement mechanisms, states seem to take advantage of the slow and rather "soft-touch" procedures at the EU level and circumvent their solidarity obligations stemming from binding EU legislation, like the aforementioned 2015/1601 Council decision, which includes a mandatory relocation quota for all EU states.⁷² These are some of the challenges that the sustainability of a common approach to asylum based on solidarity between EU states is confronted with.

3 By way of epilogue

As has been shown, the intensity with which law and policy documents concerned with asylum in Europe refer to solidarity as a guiding legal principle, favours the argument of it being more than a rhetorical device. Nonetheless, this is still far from the argument that considers Article 80 TFEU as a rule which entails certain positive obligations for states. Its content and actual wording creates an ambiguity as to solidarity's nature, scope and implications to an extent that can be hardly sufficiently concrete to oblige states to do anything in particular. What this paper suggests is that solidarity, as a principle enshrined in Article 80 TFEU, should be seen as an "optimization command" that obliges the EU and its Member States to adopt measures which to a certain degree – depending on the circumstances – optimize a system of fair responsibility sharing between the Member States.

⁶⁷ See Human Rights Watch, 'Europe's Refugee Crisis, An Agenda for Action' 16 November 16 <<https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>> accessed 2 November 2016; Red Cross, 'Resettlement in the European Union' Position Paper, REF. RCEU 06/2015 – 002, 19.06.2015 <http://www.redcross.eu/en/upload/documents/pdf/2015/Migration/RCEU_Resettlement%20in%20the%20EU_FinalJune2015.pdf> accessed 2 November 2016.

⁶⁸ See European Commission, 'Green Paper on the future of the Common European Asylum System' Brussels, 6 June, 2007, COM(2007) 301 final, p. 10 where it is stated that the "*Dublin system may de facto result in additional burdens on Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location.*".

⁶⁹ Regulation (EU) 604/2013 recast and Regulation (EC) 343/2003 Article 13.

⁷⁰ See <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the_reform_of_the_dublin_system_en.pdf> accessed 2 November 2016.

⁷¹ <http://europa.eu/rapid/press-release_IP-16-2178_en.htm> accessed 2 November 2016.

⁷² See M. Wagner et al, 'The Implementation of the Common European Asylum System' (2016) Study, PE 556-953, p. 31–33.

European institutions do seem to make small steps towards recognizing the necessity of transforming the CEAS to a system based on common and fairer policies for all Member States. However, the above analysis depicts that, considering the severity of the situation at hand, the EU's response to the so-called "refugee crisis" realizes solidarity to a rather insufficient degree. Introducing relocation schemes that promote solidarity as an exceptional and emergency tool and maintaining a costly, unworkable and unfair system like Dublin, replicating it externally through the EU-Turkey deal, are indications of action that can hardly be considered as optimal. Strictly speaking, this does not mean that the policies in question do not comply with Article 80 TFEU. Rather, it means that the EU and its Member States have not been able to fulfil solidarity to a sufficient degree, so that the "crisis" could be adequately and humanely addressed. Article's 80 TFEU optimization seems "trapped" within a short-sighted vision of the CEAS.

In light of the above, what is required is a more comprehensive European approach to asylum based on solidarity and not a patchwork approach to solidarity invoked to address an exceptional situation. The EU needs to re-conceptualize the CEAS as a protection tool, focusing on harmonizing national legislation and improving national asylum systems, so that regardless of where in Europe asylum seekers find themselves, they are received without discrimination, granted equivalent protection and integrated into environments that enable them to live independent lives according to international

law. Sharing money and expertise at the EU level could help to move things in this direction. Perhaps, the EU should reflect on whether more far-reaching steps to achieve harmonization of domestic asylum policies should be attempted: for instance, establishing a centralized European asylum agency deciding on asylum applications and also establishing a European asylum appeal court which will monitor compliance with international human rights standards. As regards the allocation of responsibilities, the Dublin system currently in place has been literally counterproductive, creating incentives both for EU countries along EU's external border to make their asylum systems as unattractive as possible, in order to encourage onward movement, and for refugees to make secondary movements to access countries with functional systems. The alternative for Europe would be to move beyond a coercive system like Dublin, towards systems where all EU states play a role in accordance with their capacities and potential and where asylum seekers will in the long run be granted free movement rights.

Solidarity is – no doubt – a nice word. What is often sidestepped is that when it comes to EU policies on asylum, solidarity constitutes a legal principle with certain procedural and substantive implications. This is why, the question to be asked is not whether European states can afford to take their fair share and comply with solidarity but rather, whether they can afford not to, especially in times of "crisis" when fundamental European values and basic human rights are at stake.

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