



UNIVERSITY OF TWENTE.

Bachelor Thesis

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Solidarity in the Common European Asylum
System:

Application and implementation of a principle in the
Dublin Regulation and the ERF/AMIF



University of Twente
Enschede, 30th November 2015

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Abstract

Since 2011 the EU is facing an increasing number of asylum seekers who are fleeing from violence and instability. Most of them are entering the Union through the southern European Border States, like Greece, Italy and Malta. Studies have shown that there is an unequal balance between MSs when it comes to the reception of asylum seekers. This research paper analyzes the extent to which the principle of solidarity is respected by the European Union (EU) and its Member States (MSs) in the EU's Common European Asylum System (CEAS). To do so, the study takes its cue from the notion of solidarity itself and conceptualizes it as a principle of the EU. Secondly, the study analyzes the extent to which this principle is respected in the field of asylum in the application and interpretation of primary and secondary EU law, policy papers and case law. Amongst the different measures composing the CEAS, this study focuses on two key legal instruments: the ERF and the so-called Dublin system. This paper will argue that in spite of the existing obligation to create a common asylum system based upon the principle of solidarity, only the ERF/AMIF seems to be an instrument of solidarity. The Dublin system on the other hand can be seen as a distribution or transfer system of asylum seekers between MSs that seems to impose heavier responsibilities on some MSs. The paper will conclude that with the Dublin's criteria of country of first entry in place, the principle of solidarity cannot fully be respected by the CEAS.

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Introduction

Recent years have shown that the numbers of asylum seekers increased significantly in the European Union (EU). In 2013 more than 431 thousand people were seeking asylum in the EU, increasing to a total of 626 thousand in 2014¹. Already in the first quarter of 2015, people seeking protection in the EU have increased by 40 percent compared to the first two quarters of last year². According to an article by The Economist, two thirds of the total worldwide refugees are seeking asylum in the EU³. The recent mass influxes are, among other things, owed to the ongoing (civil) wars in Syria and Iraq, and the instability in Afghanistan⁴. But people are also coming from the African continent, most prominently from Somalia, Libya, Eritrea and Nigeria fleeing from human rights violations, unstable states, terrorism and poverty⁵. These people are taking on a quite often deadly ending journey to enter the EU through the southern border states at the Mediterranean Sea, mostly Greece and Italy, the so-called *countries of first entry*, who are according to EU legislation responsible for an application⁶.

Calls for more support and solidarity have become more urgent and calls for a fair and equal system to distribute asylum seekers across the Union have been issued⁷. With the abolishment of internal EU borders, in order to create the Single Market, the resulting free movement of goods and people, together with the influxes of asylum seekers, discussions for enhanced external border protection and a Common European Asylum System (CEAS) based on the full application of the Geneva Convention have taken place and the first initiatives were finalized at the Tampere Council Meeting in 1999. The main objective is to achieve a coherent system between the Member States (MSs) through policy harmonization of national asylum policies and to enhance cooperation in the reception of asylum seekers⁸. Consisting of five regulations and directives, the Qualification Directive (2011/95/EU), the Minimum Standards Reception Directive (2013/33/EU), the Procedure Directive (2013/32/EU), the Dublin Regulation (604/2013/EU), and the Eurodac Regulation (603/2013/EC), the CEAS is to set common standards and enhance cooperation in the field of asylum within the EU and between MSs. In the

¹ Eurostat (2015)

² Die Presse (2015)

³ The Economist (2015)

⁴ UN Refugee Agency (2015)

⁵ BBC News (2015)

⁶ Regulation 604/2013/EC

⁷ Makrkakis (2015)

⁸ European Parliament (1999)

long run the CEAS shall ultimately lead to a uniform and single European asylum policy⁹. In addition to these five policies, the EU has adopted financial instruments in form of the European Refugee Fund (ERF) that is now replaced by the Asylum Migration and Immigration Fund (AMIF). For the period of 2008-13 the ERF provided an amount of 628 million Euros, with the objective of supporting MSs in receiving refugees and financing projects that promote cooperation between them and the EU¹⁰. Since 2014, the new AMIF for the years 2014-20 consists of 3.137 billion Euros to support the development of the CEAS, and to contribute to the objective of establishing solidarity between MSs¹¹.

Since the CEAS is in place, about 6 million people applied for asylum in the EU¹². However, the current crisis puts its focus on the much criticized CEAS, which is failing to have a system in place as MSs have diverging reception conditions, for instance different standards of housing, health care and food¹³, and diverging quality standards when examining applications¹⁴. Moreover, the objective to have solidarity and cooperation between the MSs is not achieved. This can be seen in the unequal distribution of asylum seekers in the Union¹⁵. Although the EU and its MSs have agreed to establish a CEAS based on solidarity and cooperation¹⁶, which is also enshrined in the Treaties in Articles 67 (2)¹⁷, 78 (2, 3)¹⁸ and 80¹⁹ TFEU, there are large differences between MSs' acceptance rates of granting asylum²⁰. Many scholars have examined the development and impact of national asylum policy, the known 'race to the bottom' issue or as Thielemann argued in his paper, that policy harmonization is not an instrument for enhancing actual cooperation or establishing solidarity, but rather as a tool to eliminate differences between MSs' legal systems to enhance co-operation.²¹ Further research has been conducted by scholars, who analyzed the actual data, having a regression model about MSs Population, GDP and reception rates in regards to the application and acceptance

⁹ European Parliament (1999)

¹⁰ Decision No 458/2010/EU

¹¹ European Commission (2014)

¹² Hatton (2015)

¹³ Directive 2013/33/EU

¹⁴ Directive 2013/32/EU

¹⁵ UK Reuters (2015)

¹⁶ COM (2008: 3) 360 final: "provide for a single, common procedure [...] establish uniform statuses [...] increase practical cooperation [...] determine responsibility and support solidarity"

¹⁷ TFEU, art. 67 (2) "shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States", 2008 OJ L 306

¹⁸ TFEU, art. 78 (2.3), "a uniform status [...] valid throughout the Union", 2008 OJ L 306

¹⁹ TFEU, art. 80 "shall be governed by the principle of solidarity and fair sharing of responsibility", 2008 OJ L 306

²⁰ Thielemann (2003)

²¹ Thielemann (2004)

rate²². Intentions of researchers in the past were more substantive, analyzing quantitative data sets about the extent of policy harmonization and recognition rates. Although the treaty provisions provide for the legal basis to work on a CEAS based on solidarity, mutual respect and responsibility sharing, as mentioned above, they are concerned with establishing mechanisms to manage the external border in the absence of internal borders. The Directives' objectives are to foster common high standards and co-operation to manage asylum seekers within the EU equally and fair. However, Directives are only *binding to the results to be achieved*²³, and therefore it is the MS' government who decide on the form and methods of implementing these. Research has shown, that asylum seekers are distributed unequally between the MSs, as some have more favorable policies, thus creating pull factors; others intentionally implement stricter policies to keep asylum seekers away.

Solidarity has been applied in EU law and policies from the very beginning, dating back to the Schumann Declaration. The term solidarity is present in various EU policies and laws, from regional, local, social, financial and economic, to asylum and migration policies. Although the principle is frequently evoked, there is no single definition, yet a mutual meaning and understanding as it depends on factors such as perspective, context and people. Contrary to past research, this thesis will focus on a new approach that structurally analyzes the meaning of solidarity from various perspectives, like political, sociological and constitutional, to provide a definition of solidarity that determines the extent of solidarity implemented and applied in the CEAS. After defining the term, a set of criteria for the Dublin Regulation, as well as for the ERF/AMIF will be established on which basis these policy papers are going to be analyzed. This is to give a conclusion as to what extent solidarity is respected and applied in the CEAS, and if it could provide as a solution to the current asylum crisis in the EU.

Research Question

The current asylum policy in the EU comprises different measures that implement the objectives of harmonizing national asylum policy, establishing practical cooperation and increasing solidarity and responsibility between MSs. In EU law and policies, the principle of solidarity is widely used and referred to, expressing its importance and referring to it as a value on which the EU is founded. However, as the recent asylum and refugee crisis in the EU is showing, there

²² Vink & Meijerink (2008)

²³ Summaries of EU legislation (n.d.)

seems to be rather low forms of solidarity between EU MSs, if not to say no solidarity. This leads to the problem of analyzing the extent to which the principle of solidarity is respected in the application and interpretation of the existing policy and legal instruments of the CEAS. This will be answered by posing the following research question (RQ):

To what extent does the CEAS respect the principle of solidarity?

By posing this particular RQ the thesis contributes to the ongoing debate of solidarity and an equal and fair distribution system for asylum seekers within the EU. In order to be able to make an analysis, the paper will focus on two main instruments of solidarity under the CEAS; namely the ERF/AMIF as a financial solidarity tool by sharing money, and the Dublin Regulation, although not established to be a solidary redistributive system in the first place²⁴, it can be seen as an instrument of apportioning people in the EU. The thesis will provide an analysis of what solidarity actually defines and what its scope is within EU law, thus, what value and obligation it poses in legislation. In order to be able to make a conclusion as to what extent solidarity is respected in the current CEAS, a set of criteria that represents solidarity is established that will be used for the analysis of the Dublin and ERF/AMIF policies. The hypothesis is that there is legal obligation in EU law to have solidarity applied and implemented in the legislation; however, in practice the obligation is not respected. With this in mind the thesis will provide new ideas and perspectives in the ongoing debate of the refugee and asylum crisis, and will give a definition of the solidarity principle from different perspectives. Moreover, the set of criteria could be used to reconsider the interpretation of the CEAS of how EU legislation and policy could be designed to specifically endorse the application of the principle of solidarity. Before the main RQ can be analyzed and answered, the following five descriptive sub-questions were identified: the first sub-question will examine how solidarity can be conceptualized from different perspectives. The second one focuses on the meaning of solidarity in the EU Treaties to have a general understanding of the legislative scope of the principle. Thirdly, the meaning of solidarity in the context of the CEAS will be analyzed to have a reference about the coverage of the principle in the CEAS. The fourth sub-question will analyze the scope in the context of the financial solidarity instrument of the ERF/AMIF. The last sub-question will analyze the scope in the Dublin Regulation.

²⁴ Thielemann (2004)

The five sub-questions can be summarized as follows:

- *How can one conceptualize the solidarity principle?*
- *What is the meaning of the solidarity principle in the EU Treaties?*
- *What is the meaning of the solidarity principle in the policy context of the CEAS?*
- *What is the scope of the solidarity principle in the ERF/AMIF?*
- *What is the scope of the solidarity principle in the Dublin Regulation?*

The first three sub-questions will take a broader understanding of the principle since both of them will clarify the political and legal understanding of solidarity. The last two sub-questions, on the other hand, are more specific as they will clarify the impact of the principle of solidarity in the context of two legislative acts. It has to be mentioned however, that the last two sub-questions are not to be mistaken with the main RQ because the main RQ focuses on the legal application of the principle whereas the sub-questions will analyze the scope and the impact of the principle in the legislative acts. This will serve as a metric system for discussing the extent to which the principle is actually applied and implemented in the CEAS.

Scientific Relevance

Solidarity is a complex principle; nonetheless it is of big importance to the EU, its MSs and their legislation. Especially in the European asylum field, with the current refugee crisis in mind, solidarity is questioned and discussed on a daily basis. The purpose of this paper is to conceptualize solidarity and to analyze to what extent the CEAS and its Dublin and ERF/AMIF Regulation respect the principle of solidarity. The thesis aims to give a comprehensive conceptualization and criteria of the solidarity principle that could be used for future policy recommendations and creations to apply and implement the principle in such a way as to fully respect the principle's meaning.

Structure

This thesis is divided into four chapters. Chapter 1 will give an overview of the development of the CEAS, with special attention to the Dublin Regulation and the ERF/AMIF that will be used for analysis. Chapter 2 gives an overview of the most relevant academic scholars that discussed solidarity and burden-sharing within the European asylum system. This is supplemented by an extensive conceptualization of solidarity from various angles to give the reader a clear definition and understanding of the meaning in the context of this paper. Chapter 3 provides the reader with

two sets of criteria regarding solidarity, on the one hand for the Dublin Regulation, and on the other hand for the ERF/AMIF. The criteria will be the basis on which the policy papers are analyzed in order to answer the RQ. Followed by this, is Chapter 4 with the analysis of the policy papers to answer the sub-questions and the main RQ. The last chapter is then concerned with a conclusion and outlook of the posed problem statement.

Chapter 1 – Methodology/Conceptual Framework

In this chapter the analytical and conceptual framework will be provided on which the thesis is conducted. It will start with a literature review on the most important academic research that has been conducted thus far on the topic of solidarity and responsibility sharing in the EU's asylum policy. This is followed by an extensive conceptualization of solidarity from various perspectives, answering the first sub-question of *How can one conceptualize the solidarity principle?* After this the Dublin Regulation and the ERF/AMIF' objective is explained to lay down their commitment to solidarity and what mechanisms and instruments are in place to apply the objectives. Consequently, the Chapter on Criteria for the Dublin Regulation and ERF/AMIF will enhance the understanding of what solidarity means in the context of these two policy papers. The Chapter on the Analysis will look into the two mentioned policy papers to analyze how the solidarity principle is implemented and applied. In the last Chapter the paper gives a conclusion to the stated RQ.

Literature Review

As the data by Eurostat show, the current situation in the EU's CEAS shows that the numbers of asylum seekers has risen intensively in the past months²⁵. This situation, moreover, triggers more restrictive policy approaches by MSs in order to decrease the number of applicants in their own country^{26,27}. The objective of the CEAS is on the one hand concerned with the distribution of asylum seekers and on the other hand to establish instruments that enhance cooperation. According to the Commission this cooperation is to be based on solidarity²⁸. Already in the Amsterdam Treaty in 1997 the EU posed its objective for a CEAS “promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons”²⁹. Recent policy papers are more explicit about the principle of solidarity in the asylum field, stating that it should be based on solidarity that is to have mechanisms in place that promote a balance of efforts in asylum applications³⁰. The Treaty of Lisbon states that

²⁵ Eurostat (2014)

²⁶ Al Jazeera (2015)

²⁷ Gotev (2015)

²⁸ COM (2008) 360 final

²⁹ TFEU, art. 63, 2008 OJ C 115

³⁰ COM/2005/0123 final

the asylum policy in the EU “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States”³¹.

Many scholars have analyzed the framework of the EU’s asylum policy from various perspectives. One of the known scholars is Thielemann, who analyzes in one of his papers the distribution of asylum applications between the MSs. Like many others, Thielemann used relative data sets of asylum applications and MS’ population size and gross domestic product (GDP). His results showed that smaller countries within the EU are mostly receiving more applications than larger countries, which usually have more resources to take on more applications³². In another paper, Thielemann & El-Enany posed the question as to why MSs decided to cooperate in the first place and agreed to give more control to EU institutions. This research has been focused on MSs motivations for cooperation³³. In a research paper on the CEAS by Bovens et al. (2012) the analysis focused on new ways to measure the common standards between MSs in the CEAS and the extent to which responsibility is shared in the EU asylum policy³⁴. Other scholars, like Hatton, have focused on examining the CEAS whether or not more harmonization and deeper integration in that field is possible and feasible under the current status quo³⁵. Another study conducted by Vink & Meijerink in 2003, discussed the application and recognitions rates in EU MSs, and analyzed if there is a linking mechanism between European and domestic asylum politics. The main conclusion stated that those countries who receive more applications have higher burdens and responsibilities to deal with and that those MSs could hypothetically decrease their burden and extent of responsibility via more restrictive policy measures³⁶. In 2006, Thielemann and Dewan issued their paper on the question why some MSs accept a system that appears to be disproportionate and inequitable. Their theoretical considerations focused on the exploitation rule by Olsen and Zeckerhaus (1966), arguing that small countries take advantage of big countries. The hypothesis that countries with a large income take on more applications than those with a lesser income has

³¹ TFEU, art. 80, 2008 OC J 115

³² Thielemann (2008)

³³ Thielemann & El-Enany (2010)

³⁴ Bovens, Chatkupt & Smead (2012)

³⁵ Hatton (2015)

³⁶ Vink & Meijerink (2003)

been refuted by the authors, who concluded that smaller countries, mostly Scandinavian countries contribute more to the reception of refugees than the other way around³⁷.

The literature review shows that none of the mentioned scholars has focused their research on identifying first, the meaning of the principle of solidarity in the EU context and more specifically in the asylum policy. As mentioned above, solidarity has been stated in many respects in context of the CEAS; however, the focus in previous research has been to discuss the unbalance in recognition and application rates and the reasons for discrepancies between MSs. Thus, the focus of this paper is twofold, first the principle of solidarity in the EU will be conceptualized, and secondly, the study will analyze whether or not this principle is respected in the CEAS.

Conceptualization of Solidarity

The principle of solidarity comes along with different perceptions of the actual meaning of the term, it has different meanings and understandings depending on the context the term is applied to. As Sterno writes in his book *Solidarity in Europe* “solidarity was applied in general, non-specific ways, meaning something positive”³⁸. With the amendment of the Lisbon Treaty, the concept/principle of solidarity is used “in a number of different senses and glaringly does not define it”³⁹, however, as Ross argues, solidarity does offer ways for interpretation of what the term constitutes. Thus, this chapter aims at giving conceptualizations of the term solidarity from the various perspectives present, for instance referring to the term from a sociological, political, philosophical and legal perspective. After defining the term under different perspectives, the meaning and definition of solidarity in an EU context will be conceptualized, that is, in what context and policy fields is the term being applied and the wanted outcome of using the term is. In order to give a conceptualization one has to rely on academic and scientific sources to combine a definition to be used for the analysis of the paper.

Development of a term/concept

The term solidarity dates back to the 16th century where it was first used by French lawyers in cases where for instance one member of a group incurred a debt which then became the debt of

³⁷ Thielemann & Dewan (2006)

³⁸ Sterno (2013: 171)

³⁹ Ross (2014: 41)

the whole group⁴⁰. Solidarity dates back many years and centuries, before it was even formulated and wide spread, from being closely linked to the family, then the community, to further developing in the pre-industrial society and in the French Revolution to a political idea of fraternity, brotherhood. Solidarity within the family refers to being there for one another, having mutual trust and support from family members, taking care for one another, not leaving the weaker and poorer behind. Within a community it is characterized by mutual reciprocity “if I help you then you will help me, if and when the need arises”⁴¹.

Solidarity did not explicitly develop within the EU framework until the European Social Fund (ERF), as a tool to promote social and employment inclusion. Solidarity is not only a concept used in the field of asylum, immigration, but also as an important part of European health related matters and social policy, and especially in the field of finance and economy (financial and economic crisis). Solidarity is for a long time a principle of the EU integration project, as it reflects the common interest between its MSs of creating a union based on unity, peace and prosperity.

A general perspective

The idea of solidarity has been considered by a number of academics, either as a concept or as a principle. If one looks at solidarity as a concept, Rapotnik et al. have argued that the concept “is embedded in the development of the EU nation state: “the nation, which members are united by a social bond, is considered a community”⁴². It refers to a feeling of unity between members of different or similar backgrounds and can be seen as an (unwritten) agreement that is based on reciprocity. This suggests that solidarity is not only supporting the weakest member in that community, but can be seen more as a give and take. Sangiovanni defines the concept of solidarity on reciprocity, based on internationalism, which he defines as “demands for social solidarity at all levels of governance can be understood as demands for a fair return in the mutual production of important collective goods”⁴³. According to the Council Decision of 28 September 2000, solidarity is a concern for fellow human beings and society in general. According to Fernandes and Rubio solidarity can be referred “to a moral value (the moral imperative to help

⁴⁰ Sterno (2013)

⁴¹ Sterno (2013:25)

⁴² Raspotnik et al. (2012:19)

⁴³ Sangiovanni (2013:20)

someone in need) or to a contractual promise of mutual assistance linking the Member States of a community”⁴⁴.

A sociological perspective

The rise of capitalism and liberalism in the early 19th century “prompted French social philosophers to find a way to combine the idea of individual rights and liberties with the idea of social cohesion and community”⁴⁵. Solidarity can be seen as a principle of insurance, having common responsibility within a group. Furthermore, it concerns the preparedness and willingness of a group to share resources with those in need. According to Frourier solidarity is also to have a guarantee to public minimum income and family support⁴⁶. Already in the pre-industrial phase (1750-1850) with social cleavages between the bourgeoisie and the proletariat existed a feeling of solidarity, seen as an “obligation to reciprocally assist one another [...] based on common identity and a feeling of sameness with some, and of difference to others”⁴⁷. According to Comte, the division of labor is “an expression of human solidarity”⁴⁸ as people within specific work groupings share a common set of values and ideas that is the only mechanism that can unite people and create harmony between them. For him it is that “the more intense social relationships are, the stronger the sentiments of solidarity”⁴⁹. Durkheim’s work on solidarity distinguishes between two forms, mechanical solidarity in traditional societies and organic solidarity in modern societies. The former develops in societies that are simple and homogeneous, meaning, societies that are characterized by “*sameness* in living conditions, lifestyles, common culture and beliefs and by religion and rituals”⁵⁰. According to Durkheim, people living in these societies have two consciousnesses, an individual and a collective one, where the latter is dominant over the former. In such an environment, solidarity is strong because its members act and think alike. The latter form, organic solidarity, refers to societies with occupational specialization and social differentiation. People living in this society are more interdependent. Thus, inherited norms, values and traditions do not have a big influence on them. That being said, mechanical solidarity has its foundation on social interaction in a homogeneous society with shared values, norms, rituals and a common consciousness, including everyone who

⁴⁴ Fernandes & Rubio (2012:21)

⁴⁵ Sterno (2013:46)

⁴⁶ Frourier, in Sterno (2013)

⁴⁷ Sterno (2013:25)

⁴⁸ Comte, in Sterno (2013)

⁴⁹ Sterno (2013:36)

⁵⁰ Sterno (2013:25)

is alike. For a modern society, social interaction and norms are present as well; however, people are more interdependent due to a division of labor. Concluding, Weber conceives solidarity to be found on interest, honor, norms and duties with the objective to realize interests and increase one's power. For him, it is rather restricted to certain social groups or professions, as solidarity refers to a feeling of 'we' that always includes an opposing 'they', that is an exclusion of others.

The work of Karl Marx, Marxism, refers to solidarity in reference to class solidarity in the context of capitalism, arguing that the "development of industrial capitalism destroyed social bonds and older forms of community where people were firmly integrated in local and social structures"⁵¹. Although Marx rarely used the term solidarity in his work, but rather used the terms community, association or unity, the meaning of all of them can more or less be used interchangeably. Important though is, that Marx used the concept in regards to labor movement only. In this context he argues solidarity can only be realized under communism where each and every member of society has the same circumstances and resources to build their lives. From this theory it can be derived that solidarity according to Marx refers to having the same economic and social structures within a community. There are two forms of solidarity; the classic Marxist solidarity of capitalism of the working class, and the ideal Marxist solidarity of communism. In the former, the working class is united by a common situation and similarity in social and political circumstances. This group is restricted to the working class that wants to realize their common interest. In a communistic society, however, as Marx argues, true solidarity can develop as everyone will be included as long as no private ownership exists. According to Hetcher "solidarity is the preparedness of individuals to use private resources for collective ends and to follow up such preparedness by action"⁵².

Social solidarity is thus characterized by a group of people whose members are characterized by sameness in their identity, consciousness, experience and oppression. This sameness creates a social bond, a mutual obligation between them, whose strength will be defined by the degree of cohesiveness within the group. Solidarity within a group is reflected in a feeling of responsibility or obligation towards fellow members/citizens to protect and support them. In a modern state this form of solidarity is most obviously reflected in redistributive policies and/or the welfare state.

⁵¹ Sterno (2013:43)

⁵² Sterno (2013:294)

A political perspective

According to Sterno, solidarity developed and expressed itself with the establishment of trade unions and political parties. Here workers willingly sacrificed their personal freedom to enter into a work contract. Taking on a political viewpoint, one can cite Kautsky who argues that “the goal of a social democracy was to transform society into one where the economy was based upon solidarity”⁵³. Thus, solidarity means to create and establish a feeling of togetherness, “that develops among workers when they recognize their common interests”⁵⁴. In the UN Declaration of Human Rights it is stated that “all individuals should feel a responsibility to ensure that others are living under conditions worthy of human beings”⁵⁵. This means that solidarity is perceived as every man and woman is born free and equal, this freedom and equality represents solidarity, as to grant equality in terms of income, power, property, education and culture. According to Sterno, only after the Second World War, the term solidarity has been used more often in social democratic party programs. With the golden years of capitalism in the 1950s/60s, solidarity was used in reference to a reciprocal contract between the population and the government, as every citizen has his or her duty to work, on the other hand, however, the government would establish a welfare state to care for those who need help and support. Solidarity in the late 20th century contains a form of solidarity with the next generation, as global warming issues for instance, were included in party programs, and mentioned in reference to the future generation, nature, immigrants, and refugees and so on. During this time, solidarity was used in the context of being an instrument to create social justice and equality, “social security and equal opportunities for everybody”⁵⁶. From this perspective solidarity encompasses reciprocal feelings with fellow citizens, recognizing interdependence within society and creating a feeling of belonging together. Scholz distinguishes three characteristics that form solidarity, these are; social unity which binds a community together, solidarity as a mediator between the individual and the community, building a collective identity, and lastly, solidarity as collective responsibilities to “have positive moral obligations to fellow members and in some cases beyond”⁵⁷.

Thus, political solidarity within a group is often characterized by a common consciousness to a commitment, often towards an unjust situation that will be challenged by that

⁵³ Sterno (2013:48)

⁵⁴ Sterno (2013:48)

⁵⁵ Sterno (2013:108)

⁵⁶ Sterno (2013:185)

⁵⁷ Scholz (2008)

particular group. It is rather a shared commitment than shared characteristics. This means that a moral obligation to do something positive is at first more important than to have a social bond based on common characteristics. Moral obligations can be defined according to consciousness-raising, cooperation, and mutuality.

A constitutional/legal perspective

According to Raspotnik et al. solidarity in the Maastricht Treaty is “supplemented by idealistically phrased common European norms and values”⁵⁸, which means that the MSs are being specifically addressed to establish common norms and values. In this case, common norms and procedures refer the harmonization of asylum policy, as it is argued that harmonized systems do not have an incentive for asylum seekers to prefer one state over the other, thus, it is believed to result in an equal distribution of asylum seekers. The concept of solidarity has been applied and mentioned in the European Treaties ever since the European Coal and Steel Community (ECSC), to the Single European Act (SEA) and Maastricht. As the author puts it “the Treaty of Lisbon not only continues this commitment but also expands it, mentioning it both as a value binding together member states and as a value binding together the citizens of each and every member state”⁵⁹. In the Amsterdam Treaty, Article 63 (2b) states that the EU (then EC) should be “promoting a balance of effort between MS in receiving and bearing the consequences of receiving refugees and displaced persons”⁶⁰. In the Treaty of Lisbon, solidarity is referred to in Article 67 (2) TFEU setting out the general objective of the AFSJ, that the EU is to create a common policy in the field of asylum, immigration and border control that is “to be based on the principle of solidarity between MSs”⁶¹. Furthermore, Article 80 TFEU states that the EU’s policies and their implementation in the field of border checks, asylum and immigration “shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications” (European Commission). This gives the EU the scope to cooperate in these policy areas, most obviously in the form of sharing responsibility as an expression of solidarity.

⁵⁸ Raspotnik et al. (2012:1)

⁵⁹ Sangiovanni (2013:2)

⁶⁰ Peers (2011:299)

⁶¹ European Commission (2014)

A religious perspective

From a Christian perspective solidarity's objective is to have social peace and harmony and a population where everyone is socially integrated. This understanding is linked to the term equality in that those with fewer resources shall be supported to have an equal balance of same circumstances in life. It is "founded upon the equal worth of each and every human being in the eyes of God"⁶². Thus, a Christian understanding of solidarity is to "encompass all classes of people across all social and economic barriers"⁶³.

Solidarity in the asylum context

In the context of asylum, the insurance-based logic relates to MSs sharing responsibility, in order to be guaranteed assistance in cases where they do not have the necessary resources in place to precede applications. This is supported by Lang's definition of solidarity which is, according to him, "to provide a common and fundamental rights compliant mechanism which is able to respond to all the migratory and asylum-related pressures in all EU Member States, also at times of global crisis and increased migratory flows"⁶⁴. The European Commission (2007) defines solidarity in the CEAS as the "mutual assistance among the member states in shouldering the responsibilities"⁶⁵. According to Thielemann et al. (2010), solidarity is seen in MSs' willingness to share responsibility when it comes to asylum seekers. Defining solidarity often refers to responsibility-sharing, as mentioned by Lang, "implying a fair distribution of burdens consequent to EU borders, immigration and asylum policies"⁶⁶. Looking at the ERF Decision, the concept of solidarity is referred to as being an instrument of international burden-sharing which is to create a 'balance of efforts' in the reception of asylum seekers and refugees⁶⁷. In the asylum context, a big part of solidarity is the financial contribution as a solidarity mechanism, to support especially those MS that have higher numbers in asylum applications. Solidarity is not only about responsibility-sharing in form of financial aid or equal sharing of people, but moreover accounts for MS' resources, such as their capacities to process applications. To summarize it, the principle of solidarity in the asylum context can be seen in the physical relocation of asylum seekers, in practical and administrative cooperation between MSs, in

⁶² Sterno (2013:73)

⁶³ Sterno (2013:74)

⁶⁴ Gouldner Lang (2012:3)

⁶⁵ Bovens et al. (2012:11)

⁶⁶ Gouldner Lang (2012:9)

⁶⁷ Decision No 2000/596/EC

financial compensation, and in policy harmonization, as a mechanism to create solidarity to overcome inequalities between MSs⁶⁸.

Concluding remarks

Many scholars argue that the concept of solidarity is associated with the nation state, as it is the nation state that creates a social contract with its tax and social system. However, the EU evolved from an economic to a political, social and human rights-based Union, taking solidarity to the supranational level. The Treaties and secondary law mention solidarity in different contexts a number of times, for instance as a fundamental value (Article 2 TEU), between generations (Article 3, 3 TEU) and among MSs (Article 3, 3 TEU). It is obvious that solidarity is an important principle, as being referred to many times; however, its legal nature and scope are less clear and less analyzed amongst law scholars. On the basis of the conceptualization, one notices the different meanings depending on the perspective and context. From having a general meaning of unity and reciprocity between people, to the sociological perspective of being an ‘insurance’ for common responsibility and the preparedness and willingness to share resources, to the political perspective of standing for social justice and equality. In the constitutional perspective the principle refers to norms and values that shall create a balance of efforts, harmonization and mutual assistance between the EU and its MSs. In the next chapter the conceptualization of solidarity will be used to analyze the development of the CEAS, and two of its normative measures; the Dublin Regulation and the ERF/AMIF, on their stands towards the solidarity principle.

⁶⁸ Thielemann et al. (2010)

Chapter 2 – Development of the CEAS

Dating back to the 1990s discussions about a common European asylum system started as the EU was facing a massive inflow of Balkan refugees. In 1992, with the changes in the Maastricht Treaty, EU MSs started to cooperate on migration and asylum related issues on an intergovernmental basis⁶⁹. In the Maastricht Treaty it was the first time that a legal instrument calls for harmonizing and cooperative policies in the field of asylum⁷⁰. During the Tampere Council Meeting in 1999 and the amendment of the Treaty of Amsterdam in 1997, it was the first time that the EU was able, with the necessary legislative base, to establish binding minimum norms and standards on an EU level⁷¹. The main objectives at that time were, on the one hand, to harmonize MSs' asylum policies to prevent asylum shopping, and on the other hand, to provide better standards for asylum seekers⁷². The Amsterdam Treaty (1997) paved the way for a supranational asylum policy “promoting a balance of efforts between the Member States in receiving and bearing the consequences of refugees and displaced persons”⁷³. This was further enhanced and strengthened at the Brussels European Council Meeting stating that asylum policies “should be based on solidarity and fair sharing of responsibility including its financial implication and closer practical cooperation between Member States”⁷⁴. The establishment of the CEAS was divided into two main phases; the first phase was to harmonize national policies and to establish common minimum standards. In the second phase improvements were made to increase the effectiveness of the policies to have in the end a common European policy with uniform standards⁷⁵. For the Multiannual Hague Programme, the second phase, national policies were to be further aligned with the rest of the MSs “based on solidarity and fair-sharing of responsibility, including its financial implications and closer practical cooperation”⁷⁶. During the second phase it became obvious that the objectives stated in the Tampere and the Hague Programme were not be achieved within the deadline, and flaws in the system, such as the Dublin Regulation, have been recognized⁷⁷. As an answer the European Commission issued a Green Paper in 2007 on the Future of the CEAS to ensure a higher degree of solidarity and that

⁶⁹ Peers (2011)

⁷⁰ Peers (2011)

⁷¹ Peers (2011)

⁷² Wijnkoop (2014)

⁷³ Article 63, OJ L 340

⁷⁴ Brussels Council Meeting

⁷⁵ European Commission (2014)

⁷⁶ The Hague Program, C 53/01

⁷⁷ Thielemann (2008)

the responsibility for processing an application would be shared equally and fairly. The last Multiannual Programme was developed during the Stockholm Council Meeting with its aim to consolidate the second phase of the CEAS to further adjust and establish practical coordination via further harmonizing policies. Harmonization was seen as the basis for having solidarity and responsibility-sharing between EU MSs. According to the Stockholm Program the main difference with The Hague Programme is that instead of emphasizing on harmonizing policies across MSs, the focus rests now on having ‘practical solutions’ as a priority⁷⁸.

In the following the chosen legislative instruments of the Dublin Regulation and the ERF/AMIF will be analyzed.

Dublin Regulation

The Dublin Regulation is an instrument which establishes criteria and mechanisms for the determination of a MS who is responsible for the examination of an asylum application; this procedure is called the ‘Dublin Procedure’⁷⁹. All EU-28 MSs and Lichtenstein, Norway, Switzerland and Iceland are part of that Regulation. The Regulation states that third country nationals have the right to apply for asylum in the EU at its border states and in the transit zones (Art. 3(1))⁸⁰. The Dublin rationale is that only one MS shall be responsible for an application. The so-called rule of ‘country of first entry, as defined in Art. 3 (2), states that the MS where the applicant entered the EU first shall be responsible for the application of the asylum seeker⁸¹. Asylum seekers are distributed according to criteria set out in Chapter III of the Regulation. The Articles are to be applied hierarchical to establish which MS will be responsible. Art. 8 states that unaccompanied minors have the right to lodge their application in the MS where family and relatives have a permit to stay or where they issued an application. Minors and family members can join those who are already beneficiaries to international protection in one MS⁸², or who are applying for international protection⁸³. Furthermore, families have the right to have their applications processed

⁷⁸ European Council (2010)

⁷⁹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm

⁸⁰ Regulation No 604/2013, art. 3 (1): Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

⁸¹ Regulation No 604/2013, art. 3 (2): Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

⁸² Regulation No 604/2013, art. 9

⁸³ Regulation No 604/2013, art. 10

together in those instances where their examination dates are close together⁸⁴. In those circumstances where an applicant has received a resident document or a visa the issuing MS becomes responsible for the asylum application⁸⁵. With increasing numbers of asylum seekers in the EU, border countries like Italy and Greece are set under high pressure to deal with the influxes and supply reception conditions that are in accordance with the European Convention on Human Rights (ECHR). With the living conditions for asylum seekers being disproportionately worse in Greece than in the rest of the EU, the ECtHR ruled that no MS is allowed to send applicants back to Greece, even if the MS is found responsible under the Dublin criteria⁸⁶. This decision was made in the case *M.S.S. versus Belgium and Greece*, where on the one hand Greece violated the human living conditions of the Afghan asylum seekers who was exposed to detention, and on the other hand Belgium was found guilty according to Art. 3 ECHR, by sending the applicant back to Greece although knowing about the conditions and detention⁸⁷.

According to the European Commission the Dublin Regulation “enhances the protection of asylum seekers during the process of establishing responsibility for examining the application, and clarifies the rules governing the relations between states”⁸⁸. The Dublin Regulation (former Convention) was not designed as an asylum policy per se, but for the border and migration control objectives, due to the implementation of the Area of Freedom Security and Justice (AFSJ) and the abolishment of EU internal borders⁸⁹. However, according to Advocate General Trstenjak the Regulation is first to establish criteria for determining the MS responsible for an application, and only secondly, to prevent abuse of issuing multiple applications⁹⁰.

European Refugee Fund, and Asylum, Migration and Integration Fund (AMIF)

The ERF⁹¹/AMIF⁹² has been chosen for this analysis because, as Moreno-Lax states it is one of the main financial solidarity instruments in place under CEAS as it covers the financial

⁸⁴ Regulation No 604/2013, art. 11

⁸⁵ Regulation No 604/2013, art. 12

⁸⁶ Moreno-Lax (2012)

⁸⁷ ECtHR – *M.S.S. v Belgium and Greece*, Application No. 30696/09

⁸⁸ European Commission (2015)

⁸⁹ Mitselgas (2014)

⁹⁰ Opinion of Advocate General Trstenjak, C411/10

⁹¹ Decision No 573/2007/EC

⁹² Regulation No 516/2014

aspects of the EU's asylum policy⁹³. It can be described as a redistributive fund that was reformed a number of times in order to respond to the growing inflow of asylum seekers in the EU⁹⁴. One of the purposes of the ERF/AMIF is to make “sure that EU States which are most affected by migration and asylum flows can count on solidarity from other EU States”⁹⁵. According to the ERF Decision, the EU asylum policy should be implemented on the basis of solidarity between the MSs “and requires the existence of mechanisms intended to promote a balance of efforts by the Member States in receiving and bearing the consequences of refugee and displaced persons”⁹⁶. More specifically, it is to give financial compensation to those MSs that have the highest application rates, thus, the more applications the more the Fund allocates money in proportion to their burden, by reason of their effort, to demonstrate solidarity between those MS who receive less and those who take on more. The distribution of asylum seekers and refugees under the ERF/AMIF is based on the proportion of asylum seekers⁹⁷. MSs are granted a fixed amount for each resettled person, as an incentive to take over more people. In order to receive their share of the Fund MSs have to prepare their Multiannual Programmes that have to be approved by the Commission. Money will then be used to support national reception conditions, integration programs, capacity building of national asylum systems. Part of the money is taken aside as a financial reserve for implementing emergency measures⁹⁸. An example of ERF funding can be seen in the EU Pilot Project on Intra-EU Relocation from Malta (EUREMA) in 2010/11. Due to the Arab spring and the civil war in Syria, Malta faced increasing numbers of asylum seekers which called for solidarity and support on the EU level. With the Funds issued by the ERF over 250 people were relocated from Malta to six participating MSs, trying to relieve the burden for Malta's government⁹⁹. Although, it was only a small impact, it shows the possibilities under the ERF/AMIF. Thus, the ERF/AMIF is a tool of solidarity as they specifically support those MSs within financial aid that receive more applications and/or do not have the necessary resources to have certain standards and conditions in place.

⁹³ Peers (2011)

⁹⁴ Moreno-Lax (2013)

⁹⁵ European Commission (2014)

⁹⁶ Decision No 573/2007/EC

⁹⁷ Decision No 573/2007/EC, art. 2

⁹⁸ Directive 2001/55/EC

⁹⁹ European Parliament (2011)

Concluding remarks

While Chapter 1 defined the meaning of solidarity from various perspectives that give insights on different stands of the principle, in this Chapter policy papers and two key normative measures of the CEAS (the Dublin Regulation and the ERF/AMIF) have been analyzed on their reference towards solidarity. The European Council on Refugees and Exiles (ECRE) emphasized on the critical situations that EU Border States are faced with due to an unequal balance regarding the reception and processing of asylum seekers¹⁰⁰. Although the EU refers to solidarity and responsibility-sharing in its Treaties and policy papers regarding asylum and migration matters, an equal and fair balance between MSs in receiving and bearing asylum seekers is not in place. This is to large extent attributable to Chapter II on General Principles and Safeguards of the Dublin Regulation, where Article 3 (2) states that where none of the criteria is applicable the applicant has to be examined by the MS (s)he first entered¹⁰¹. One can argue that the Articles 7-12 of the Dublin Regulation establishing the hierarchical criteria for determining the MS responsible for the examination of the asylum seeker is a form of solidarity towards the asylum seekers, however, not for or between the MSs, as it legally allows MSs to send an applicant back to a fellow MS that may already have too much registrations to deal with. Furthermore, there is an emerging lack for a concrete definition of how to interpret solidarity in the context of the CEAS. In the following Chapter a set of criteria for each instrument (Dublin and ERF/AMIF) will be developed so as to assess the extent to which these instruments respect the principle of solidarity as codified in the Treaties for the analysis in Chapter 4.

¹⁰⁰ ECRE (2014)

¹⁰¹ Regulation No 604/2013, art. 3 (2)

Chapter 3 – Criteria to analyze solidarity in the CEAS

The urgency of the current refugee crisis in the EU, and especially in the Eastern and Southern EU MSs is urging for a relocation of refugees within the EU under the principle of solidarity. Believing experts' forecasts Germany alone will be facing over one million refugees this year¹⁰². In the last weeks one is to notice a divided EU when it comes to the question of accepting refugees. It ranges from those MSs who completely shut down their borders and any discussions, to MSs who accept refugees in high numbers, to MSs who are not part of the discussion. However, it is obvious that a solution, not only to the roots of the problem but also to the influxes need to be established. This part critically analyzes criteria, on the one hand for the distribution of people, and on the other hand, for the distribution of money. It aims at establishing a set of criteria for the Dublin Regulation (distribution of refugees) and the ERF/AMIF (distribution of money) that are based on solidarity. Based on solidarity in this context means that it must be analyzed objectively how much asylum seekers and refugees each EU MS is able to examine and accept, based on their capacity to absorb and integrate those. These criteria will be used as a mechanism to analyze the existence of the solidarity principle in the two policies.

Criteria concerning the Dublin Regulation

The most important criterion, among many, is the Gross Domestic Product (GDP) of MSs. This needs to be influenced to a high extent when calculating a certain distribution key. Not every MSs can guarantee a human-rights-based treatment of asylum seekers, if all would receive the same amount of people in absolute numbers. The GDP is an indicator that, if taken into account, represents the principle of solidarity as those MSs with a stronger economy, will receive more asylum seekers, as a strong economy increases the absorption and integration capacity of refugees and asylum seekers. All MSs are responsible, however, with reference to the GDP; those with better economic performance have to commit themselves to taking over more asylum seekers and refugees to ensure an equal and fair balance of efforts between the MSS. According to the Commission Proposal of last week, the GDP should account for 40 percent in the calculation¹⁰³.

Another criterion, as discussed by the Commission as well, concerns the relative unemployment rates of MSs. This is an important aspect as accepting refugees successfully, can only be done by

¹⁰² Al Jazeera (2015, September 14th)

¹⁰³ European Commission Statement (2015, September 22nd)

quickly integrating them. The lower the unemployment rates relative to the population size of MSs, the more refugees should be accepted, as there are higher chances to integrate them on the labor market. This refers to solidarity, as it is not only in the interest of the asylum seeker itself, but also of the MSs to get refugees on the job market as soon as possible. This ensures that they do not become a burden to the social welfare system, but have the freedom to provide for them. Population size needs to be considered as well, to have an assessment of the population density in a country. It could be discussed from two viewpoints, first the higher the density the more resources are already in place that make integration easier, for instance infrastructure and educational facilities. The other perspective, however, is that city can become highly dense, no jobs are left, the schools are too crowded, etc. The latter one seems to be more crucial, as almost all EU MSs are suffering from demographic challenges, with low child birth numbers and an ageing society. Here, asylum seekers could actively help to balance the trend. With this criterion the principle of solidarity is that MSs with low population areas and ageing societies receive more asylum seekers. This represents solidarity towards and between the MSs that again everyone will be involved in the registration and relocation, however, those MSs who have better circumstances for successful integration and worthy living conditions will have to take on more. Analyzing the economic situation of a MSs, and thus the possibilities for the people to integrate them, and become independent quickly is a form of solidarity, as these criteria represent a concern for others (integration, opportunities), and social justice and equality between MSs (better economy means more involvement).

Joint Processing represents solidarity as it takes the form of relocating asylum seekers for administrative purposes to another MS other than the MS in which the asylum seekers first entered the EU. This would take the burden off MSs who cannot deal with influxes as they do not have the resources and capacities. To prevent such shortage of administrative capacity, MSs should be able to transfer asylum seekers to other MSs in order to relieve the burden. Or they should send work force to those countries whose capacities are overstretched. In order to fulfill the Dublin Regulation in such a way that it is solidary, the EU and its MSs would need to build reception centers in the countries of first entry, the external border countries. MSs should send work force to those countries to support the MS itself to ensure smooth and quicker registration. To be solidary an early warning, preparedness and crisis management mechanisms has to be put in place where their national asylum systems are exposed to high pressures that they cannot deal

with on their own. In these instances, the subsidiary principle shall be applied, where the problem will be dealt with at the supranational level in order to support the MS concerned. Article 33 of the Dublin Regulation concerns a mechanism for an early warning, preparedness and crisis management provision that is to steer solidarity, however, it is no tool of sharing responsibility between MSs¹⁰⁴. In cases of mass influxes, the Temporary Protection Directive could easily and quickly relocate a displaced person from one MS to another. This shall take off the pressure of a MS who is receiving a high influx of refugees and asylum seekers that it cannot register and treat the person as defined by EU regulation and Human Rights norms.

Criteria concerning the ERF/AMIF

An important criterion in allocating the Fund should be based on the number of applicants a MS is receiving. The higher the number of asylum seekers and refugees in a given MS, the more pressure that MS will face to ensure human rights based treatment as laid down in Article 3 of the ECHR. Moreover, will it be more difficult to have a functioning administration in place for the examination, treatment of applicants and integration of asylum seekers. Important is that the number of applicants will be a relative number, that accounts for the MSs' economic situation by looking at their GDP, unemployment rates and population size. Those MS that have lower GDPs and higher unemployment rates compared to fellow MSs shall be granted more money in relation to others with better circumstances. In addition, the allocation of money should also take into account the past reception and acceptance rates, this is to financially relieve MSs' effort to receive and accept applicants and beneficiaries to international protection. This is a form of solidarity as the platform for assisting and shouldering responsibility is created, and the emphasis is on making asylum a common responsibility.

When the money will be allocated based on the abovementioned criterion, it needs to be monitored and controlled that the money will be used for asylum and migration purposes only. Here, the MSs have to establish National Annual Programmes where they lay down how much money they need, for what purposes and projects the money will be spent. It is known that Eastern and Southern EU MSs do not have such well-developed asylum systems, due to the short time of being a MS and the less developed economic systems. These MSs need to receive more money to build and run their reception capacities than their Nordic and Western partners, but

¹⁰⁴ Regulation No 604/2013, art. 33

also because they are exposed to higher migration pressures. This is because asylum seekers try to enter the EU mostly via two routes; via the Mediterranean Sea or via the Balkan Route. The work load for those countries can be released by issuing them money for the administration and capacity building programmes.

Furthermore, the money needs to be spent on the application and implementation of the Directives and Regulations under the CEAS. This will ensure an increased feeling of mutual responsibility, but also mutual trust that will lead to more cooperation and collaboration between MSs in the field of asylum. If the objective of a European asylum system is to be realized, national asylum systems need to be harmonized to diminish existing differences. This is important as those differences can lead to certain pull factors for asylum applicants and refugees that they favor one MS over the other due to its policies. Agencies like FRONTEX and the European Asylum and Support Office (EASO) need to be financed as they are an important aspect of balancing the differences between MSs due to their practical support. For instance, FRONTEX operations in the Mediterranean take off the pressure of Greece and Italy in the rescue of asylum seekers at sea. It is not the sole responsibility of these MSs, thus EU funding needs to be used so these operations can be increased and continued. For EASO money needs to be spent on bringing MSs together, initiating cooperation and coordination of asylum matters. With these organizations and more harmonized policies willingness, but also preparedness situation is established to share responsibility.

Concluding remarks

On May 27th 2015 the European Commission decided on a proposal to adopt a measure for the relocation of 40 000 refugees from Greece and Italy¹⁰⁵. This was the first time that the emergency response mechanism as laid down in Article 78 (3) TFEU has been applied. The allocation scheme addresses Syrian and Eritrean refugees to allocate them among the EU MSs over the next two years. Referring back to the criteria mentioned above and the conceptualization of solidarity, this decision is not implementing solidarity. If one speaks of an emergency situation, a relocation of just 40 000 people over two years is not a sign of responsibility sharing within and between the EU, nor does it support those MSs in the processing of asylum seekers and refugees. On September 9th 2015 the European Commission issued another proposal for the

¹⁰⁵ European Commission Press Release (2015, May 27th)

relocation of 120 000 refugees and asylum seekers in addition to the ones from May. After the migration and refugee crisis intensified over the summer, this step is to relieve the burden and pressure from MSs most affected currently. If looking at the numbers of people already allocated, one finds more reason to argue that there is no respect for the principle of solidarity. If believing the conceptualization, solidarity in the legal and asylum perspective would mean a willingness and readiness to share resources and responsibility. However, if only 158 people have been allocated thus far, there seems to be neither willingness nor then feeling of urgency and responsibility to support MSs¹⁰⁶. The Commission decided upon a distribution key based on factors mentioned above, the size of population (40%), the GDP (40%), the average number of past applications (10%), as well as accounting for the unemployment rates (10%)¹⁰⁷. For the relocation based on the proportions above there will be a financial Fund of €780 million to ensure swift and quick relocation. The solidarity for relocation is, however, rather enforced, as MSs who do not participate in this mechanism will have to pay a financial penalty of 0.002 per cent of their GDP. Considering the costs involved in registering and integrating asylum seekers, this may be seen as the easier and cheaper way. Furthermore, as in May, there is now a common European list of safe third countries in addition to making the return policy more efficient for MSs. On the one hand this can be seen as a form of solidarity as the EU is trying to relieve the burden off MSs by making deportations easier, on the other hand, however, it does not apply to its characteristics of responsibility sharing and supporting each other.

Relating the criteria to the conceptualization of solidarity, there is first of all, solidarity in form of respecting and implementing a European norm and value. That is to ensure a balance of efforts, as with relative numbers that respect MSs economic and demographic situation, a feeling of unity and common responsibility is created, as every MS would have to accept his part in the distribution that is defined to his capacities. This respects mostly solidarity between MSs themselves, but also with the EU, whereas distributions based on demography and unemployment rates, is respecting the social justice and equality part of solidarity not only with MSs, but also with the asylum seekers. Having joint processing and cooperation in asylum matters indicates the promise of mutual assistance, but also the mutual production of collective goods to secure the external borders.

¹⁰⁶ Mark (2015)

¹⁰⁷ European Commission Statement (2015, September 22nd)

Chapter 3 – Criteria to analyze solidarity in the CEAS

In this Chapter the discussion focused on laying down criteria for the Dublin Regulation and the ERF/AMIF that responds to the solidarity principle. It was compared the proposals of the European Commission from May and September to manage the current crisis more effectively and united. In the following Chapter the focus will be on the analysis of the policies to what extent their provisions contain characteristics of solidarity that are mentioned in Chapter 2 and if they apply and implement or leave room for the criteria mentioned in this Chapter, or if in order to implement the criteria a change in the Treaties is needed.

Chapter 4 – Analysis

The Chapter on the analysis of the CEAS and its extent of respect for solidarity is divided into the four sub-questions, answering first the application and implementation of the principle in the EU Treaties, secondly in the CEAS, thirdly in the ERF/AMIF, and fourthly in the Dublin Regulation. With the conceptualization of solidarity in Chapter 1 and the analysis of the stands on solidarity in the CEAS and its two normative measures (Dublin Regulation and ERF/AMIF) in Chapter 2 this Chapter analyzes to what extent the principle is applied and implemented in the policies, and whether or not it leaves room for the criteria established in Chapter 3, or if a change in Treaty law would prove necessary to implement and apply the solidarity principle to have a CEAS that fully respects the principle.

The solidarity principle in the EU Treaties

In the Treaty of Lisbon solidarity is first mentioned in the Preamble stating “to deepen the solidarity between their peoples [...]”. This reference can be understood as a guiding value that is to manage the community life of 28 countries that are characterized by different nationalities, cultures, and languages. Rather than being an obligation to act upon solidarity this reference is reminding the MSs and its people to mutually respect each other’s differences, however, it does not oblige the EU or its MSs to adopt policies that create respect between the MSs. Article 2¹⁰⁸ TEU mentions solidarity as being a value that is fundamentally important, as it is mentioned in context of legal principles such as non-discrimination, the rule of law and democracy. It is implied in this Article that all MSs are solidary, thus they mutually respect the values mentioned in the provision. This understanding is further developed in the following Article 3 TEU¹⁰⁹, coming back to the conceptualization where it was stated that solidarity is among other things a feeling of reciprocity but also on mutually caring for one another, this understanding implies in this context. *Solidarity between generations* reflects this thought as; not only ageing, but also demographic change implies responsibility between and for fellow people and generations. Article 3(5) TEU¹¹⁰ mentions solidarity, as the previous Articles in regards to the EU’s values,

¹⁰⁸ TEU, art. 2 “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”, 2008 OJ L 306

¹⁰⁹ TEU, art. 3 (3) “It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States”, 2008 OJ L 306

¹¹⁰ TEU, art. 3 (5) “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among

which need to be upheld by solidarity and mutual respect. When reading the Preamble and Articles 3(3) and (5) TEU one notices that solidarity in these contexts is referred to the values and norms of the EU that bind together the MSs, creating a feeling of unity and togetherness.

Article 21(1) TEU¹¹¹ is putting solidarity for the first time in the perspective that it is the EU that needs to act on the basis of solidarity. Its external relations need to *be guided* by this principle, meaning that the EU has the responsibility to treat third countries equally to EU MSs, and that its values and norms need to be represented inside as well as outside the EU. From the sociological perspective, this represents the common responsibility feeling, but also a balance of efforts and mutual assistance as the MSs committed themselves to the EU.

The following Article, 24(2) and (3)¹¹² TEU, mention that MSs need to have *mutual political solidarity* between them by implementing the objectives and principles of their common foreign and security policy. This means that the Union has the right to develop such policies that ultimately lead to a convergence of MSs National policies. Thus, in this context solidarity is a principle that establishes unity and mutual trust, as having convergence implies that MSs have the policies in place that guarantee the same outcome. Moreover, MSs are invoked to actively support the policy objectives of the Union. Solidarity in this Article means to loyally support Union's actions. It is the obligation of a community to be united in the action, and not to stray from EU's objectives, thus obliging MSs to comply with the Union's actions. Solidarity in the Treaties not only means to act in unity and have a common approach, but it is also allowed for MSs in certain circumstances to restrain from Union external action, as Article 31(1) and (2) TEU imply¹¹³. This signifies solidarity as mutually respecting one's decision, but obliging the refraining MS from taking any action that could impede Union action.

peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter", 2008 OJ L 306

¹¹¹ TEU, art. 21 (1) "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law", 2008 OJ L 306

¹¹² TEU, art. 24 (2, 3) "Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions", 2008 OJ L 306

¹¹³ TFEU, art. 31(1, 2) "The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations", 2008 OJ L 306

Article 67(2) TFEU¹¹⁴ states that the Union shall establish a common European asylum policy which is to be based on solidarity between MSs. As the provision is referring to the abolishment of external borders in the Union, the reference to solidarity is to be perceived as referring to a balance of efforts and mutual support amongst each other. Although Article 78 TFEU is not mentioning the principle of solidarity, in the context of this paper it is nevertheless of relevance as it creates the obligation of the Union to establish a CEAS with *a common system of temporary protection for displaced persons in the event of a massive inflow, a uniform status of asylum for nationals of third countries, valid throughout the Union, a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection*¹¹⁵. These references are indirectly referring to solidarity, as they underlie the meaning of the principle. This is because it states that where a MS is confronted with a massive inflow, the EU and its MSs need to support that particular MS by relocating asylum seekers. Moreover, is the aspect of mutual trust that solidarity implies referred to, in such a way that it commits the MSs to accept one's decision of the application status. Article 80 TFEU is the solidarity clause in the asylum policy, stating that:

*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*¹¹⁶.

The meaning in this context refers to an equal balance of efforts in the application and implementation of the asylum system. It states that in cases where it proves necessary the Union may adopt acts that are solidary, thus support those MSs who have more asylum seekers than others due to geographic or demographic factors. Article 122 TFEU establishes the possibility of having solidary measures in place in cases where a MS is suffering a severe economic situation, and the supply of goods is endangered, especially energy. The last Article to mention solidarity is Article 222 TFEU on terrorist attacks, natural disasters or man-made disasters. It is the only provision that explicitly states that *the Union and its Member States* shall act based on

¹¹⁴ TFEU, art. 67(2) "It 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. For the purpose of this Title, stateless persons shall be treated as third-country nationals", 2008 OJ L 306

¹¹⁵ TFEU, art. 78, 2008 OJ L 306

¹¹⁶ TFEU, art. 80, 2008 OJ L 306

solidarity¹¹⁷. With this it is meant to have a united front to defend the MS, and with it the values and norms of the Union.

Concluding, one can answer the first sub-question: *What is the meaning of the principle of solidarity in the EU Treaty?* that it is not always clear what is actually meant in that provision. That is, most of the times, the term is mentioned in an Article without referring to its particular meaning. With phrases like *whenever necessary* or *appropriate measures* it remains unclear as to what, but also to when the principle is to be applied. Although, it is mentioned that solidarity means to mutually support and respect each other, cooperation between the EU and its MSs, but also with third countries, and that sharing responsibility and having a balanced approach is part of it, there is no ultimate meaning of solidarity. Thus, it is always a question of perception for the need to mutually support and share responsibility, and be loyal to common policies and objectives.

The solidarity principle in the CEAS

In the following paragraphs the meaning of the principle of solidarity in the CEAS will be analyzed.

Solidarity in the CEAS means to that “States need to have a joint approach” in the asylum system. This reflects the thought of solidarity to be based on mutual support and mutual implementation of policies to ensure a smooth functioning of the objectives of the CEAS¹¹⁸. Furthermore, it signifies a degree of cooperation and exchange of information in order to commonly and unified apply the Geneva Convention of 1952, as stated in the CEAS and the Treaties. With a joint approach it is also implied that the EU needs to have “common high standards” and “stronger co-operation”. According to the Stockholm Program having a CEAS based on solidarity is to have “a common asylum procedure and a uniform status for those granted international protection”¹¹⁹. Furthermore, solidarity in the CEAS means to have a provision like the Temporary Protection Directive in place, which allows for the relocation of beneficiaries of international protection in those cases where a national asylum system is overwhelmed by the influx of asylum seekers, and its capacity cannot handle the inflow.

¹¹⁷ TFEU, art. 222, 2008 OJ L 306

¹¹⁸ European Commission (2015)

¹¹⁹ Stockholm Program (2010:69), C 115

Thus, the second sub-question *What is the meaning of the principle of solidarity in the CEAS?*, can be answered as initiating cooperation and a joint approach in the application of the policy, but also in the actions concerning asylum and refugee applications. Solidarity in this context is furthermore described as having a harmonized policy that is to set the same standards. Mutually supporting and implementing the provisions is equal to the having a balance of efforts in the asylum policy.

The solidarity principle in the ERF/AMIF

According to Council Decision 573/2007/EC amending the ERF from 2008-2013 the “implementation of this policy should be based on solidarity between Member States and requires mechanisms to promote a balance of efforts between Member States”¹²⁰. In this regards, the ERF is to be a mechanism which is contributing to responsibility sharing. However, if reading Article 19 it states that this support, called *burden-sharing operations* is to be conceived on a voluntary basis. Although its objective indeed is solidarity its scope is rather limited, as Article 19 shows. Moreover, most of the remaining Articles only relate to superficial objectives like supporting MS’ capacity building, resettlement programs, financing transfers from MS to MS, and providing assistance to local, regional and national actions. The fact that actions on a national basis need to be co-financed is hindering a possible truthful solidarity approach¹²¹. The fact, that actions to be supported by the Fund “shall not exceed 15 percent of total annual resources allocated to each Member State”¹²² is limiting the effectiveness of the Fund’ objective.

The ERF was taken over by the AMIF with Regulation 516/2014 which “should contribute to the application of the principles of solidarity and responsibility-sharing between the Member States [...] through financial assistance”¹²³. With a higher budget this new financial solidarity has a larger scope to apply solidarity as it can use more money to fulfill its objectives. Like the ERF, the current Fund is also supporting administrative, capacity building, resettlement and cooperation actions. In comparison to the ERF, MS who resettle an applicant or beneficiary of international protection receive now a lump sum of 6 000 € instead of the previous 4 000 €¹²⁴. However, when looking at Annex I of the Regulation a list with distributed money to each EU

¹²⁰ Decision No 573/2007/EC, art. 6

¹²¹ Decision No 573/2007/EC, art. 14(2, 4)

¹²² Decision No 573/2007/EC, art.14(7)

¹²³ Regulation No 516/2014/EC

¹²⁴ Regulation No 516/2014/EC, art. 17(1)

MSs (apart from Denmark) is given which questions the solidarity scope. For instance, is Germany receiving 208 416 877 € in aid, Greece 259 348 877 €, and Great Britain 370 425 577 €. This indicates a rather unequal distribution of funding, as obviously EU Border States like Greece and Italy (310 355 777 €) are exposed too much higher and significant pressure than Great Britain is. Reflecting on the Great Britain's current policy on migration (closing the Euro Tunnel, threatening asylum seekers and its own people with prison) one has to question if this is representing solidarity. Because if referring to Article to Article 3(2) (d) the AMIF is to “enhance solidarity and responsibility-sharing between Member States in particular those most affected”.

Concluding, the third sub-question *What is the scope of the principle of solidarity in the ERF/AMIF?* it can be argued that it is rather limited. Although the budget increased it is not enough to fully support those MS that are subject to mass influxes like Greece and Italy for instance. Indeed, the ERF/AMIF are solidarity instruments as they support MSs in implementing the CEAS, supporting administrative and capacity building measures, the fact that actions need to be co-financed is hindering the effectiveness of the objective. One important hindrance is that, as can be seen in Annex I of the AMIF, is that the money is not necessarily equally distributed, those who obviously receive higher influxes, like border countries, do not get more money. This indicates the flaw of not having a distribution index in place that fairly distributes the money based on a set of relative criteria to the MSs.

The solidarity principle in the Dublin Regulation

The current Dublin Regulation III No 604/2013 states in its Preamble that, as established during the Stockholm Council Meeting, to create a common area of protection and solidarity in accordance with Article 78 TFEU. With the EASO in place, and the early warning, preparedness and crisis management in place, cooperation and mutual trust is to be established. However, as can be seen in the current asylum crisis, such mechanisms are either not working or not being used, as MSs not concerned (none-border countries) do not wish to support fellow MSs. Although a provision allowing for voluntary transfers (No 1560/2003) is in place, none of the MSs is obliged by the Regulation to take over transfers in instances where a MS' asylum system is breaking down due to massive influxes. Moreover, Article 18(1, a-c) is obliging a MSs to take back any applicant who issued an application in another MS, although this is to hinder *applicants in orbit*, it does not allow for another MS to examine an application. Article 18(1, d) states that a

MS has to take back those applicants who have been rejected but issued another application in a different MS. If solidarity is to mean mutual trust, then the question arises as to why negative applications are accepted mutually, but positive asylum/refugee status is not. Like the ERF/AMIF the Dublin Regulation has provisions that are to enhance cooperation and support for MSs for instance through the EASO. However, this is hardly a form of solidarity if a MS is responsible where the asylum seeker first entered EU territory. The absurdity of this is that no asylum seeker will ever be entering the EU for the first time in MSs in central, Western or Northern Europe.

Legal application of the solidarity principle in the CEAS

Reflecting on the discussion of the sub-questions above one can now turn to the main RQ of *To what extent does the CEAS respect the principle of solidarity?* Starting with the ERF/AMIF the criterion of distributing funding according to the number of applications a country is receiving is not exactly given. The provision in Article 2 of the AMIF is unspecific, stating only that those who are subject to an emergency situation are to be supported more. It would be necessary, however, to clearly define what an emergency situation is. Article 14(1) allocates 3.137 million € to Union actions such as emergency situations, supporting national programs and supplying technical assistance¹²⁵. Article 10 and 13 ensure the practical cooperation and capacity building program, in addition with Article 6(a) to enhance capacities in general, but also with having in mind the early warning systems, preparedness and crisis management instruments¹²⁵. At first instance these Articles seem to reflect the principle of solidarity, as they stand for cooperation and support. However, if going to the root of this, and reflecting on the current asylum crisis, a provision which is financing reception capacities as needed at the moment is not present. Article 23 states that the Fund needs to spend money on technical assistance; however, the amount is limited to 5.5 percent of the total budget plus one million. Together with Article 21 for emergency assistance and the Articles mentioned above the objective laid down can be conceived as solidarity instruments¹²⁵. What is diminishing this solidarity, however, is that the money provided is not enough to balance out the structural problems. Furthermore, if the Funds are to be solidarity instruments they would need to be allocated based on the GPD of a MS, the unemployment rates, the population and territory size. Based on these four criteria a relative distribution key could be developed to not only allocate the money fairly and equal but in the

¹²⁵ Regulation No 516/2014/EC

long run use this key to distribute not just money but asylum applications in general. Solidarity in the Funds would also imply that the money is distributed according to the numbers of asylum seekers and refugees a MS has already accepted, to ensure a fair distribution of the money. However, the only financial incentive that could be comparable to this criterion is Article 17 which allocates 6 000 € to a MS for each resettled person¹²⁵. This is 2 000 € more than was allocated under the ERF, however, it is not increasing the idea of solidarity behind it. This is because the amount is highly unlikely to cover the costs a MS is facing if taking over the resettled person, as costs such as administration, food, housing, social security, health care need to be considered. The obligation under the ERF and the AMIF for a MS are to strengthen and harmonizing their national asylum system to strengthen developing the CEAS.

With the Dublin Regulation III No 604/2013 responsibility should be allocated quickly to a single MS in order to prevent applicants in orbit that is to prevent an applicant from issuing various applications in different MSs and prevent them from moving freely in the EU. Although this is the most obvious provision which is hindering solidarity, as it is a mechanism which shifts the responsibility to the Border States, there are some Articles which decrease the extent of solidarity that could be established through the Regulation as well. For instance, Article 20 argues that is an applicant does not need to be taken back where the MS of first entry can establish that the applicant has not lived for the last three months in its territory¹²⁶. This is a threat to solidarity as it, like the rule of first entry in Article 3, 2, establishes the incentive to not register an applicant in order to send him/her to another MS. What is missing in the Dublin Regulation is a distribution key, which is allocating the people according to the economic strength of a country, thus based on the GDP, unemployment rates in a country. Moreover, the size and the population must be considered, as small countries have a different impact of asylum seekers than do bigger countries, with a stronger economy have. This leads to another point of criteria which states that the distribution should be based on relative instead of absolute numbers, as they give a better indication of how many applicants are actually shouldered by a MS. Article 33 is establishing a mechanism for early warning, preparedness and crisis management in cooperation with EASO, which meets the criteria of providing assistance and cooperation¹²⁶. However, a provision for joint processing, that is to registrar and process the application of an asylum seeker other than in the MS of first entry is not present. Although the Temporary

¹²⁶ Regulation No 604/2013/EC

Protection Directive is amended in the CEAS it has never been used. It does not account for all the deficiencies in the Dublin Regulation regarding the principle of solidarity, however, it would allow for countries with massive influxes to relieve their burden, by sending applicants to those MSs who do not have such high numbers to deal with. Mentioned in the Preamble, Decision No 1560/2003 for voluntary transfers seems to be mechanisms for solidarity, as it legally allows for sending an applicant to another MS if all parties concerned, that are the MSs and the asylum seeker, are agreeing to this. However, as there is no legal obligation to actually do this, not even in cases of massive influxes that result in a breakdown of the asylum system, meaning that a MS is not in a position to ensure safe and human conditions.

Concluding remarks

After the analysis of the Dublin Regulation and the ERF/AMIF one can conclude that, although solidarity is being a key objective in the CEAS, its application and implementation of mechanisms and instruments to establish solidarity is not present. The Dublin Regulation is an instrument which shifts, rather than shares, responsibility between MSs. This is mainly due to Article 3, 2 of the Dublin Regulation which establishes that the country of first entry shall be the one to be responsible for an application. Although there are mechanisms, like setting up EASO and Frontex for practical cooperation and exchange of information and best practices, they cannot make up for the criterion of country of first entry. In the current crisis especially, administration and capacity-building measures are no instrument that respect solidarity. Furthermore, it is the wording in the provision, like *appropriate measures, what proves to be necessary and emergency situations* is neither indicating in what situations this applies, and what can be done about, nor does it oblige MSs in these emergency situations to make use of the Temporary Protection Directive or initiative resettlement. For the financial sharing instrument, it is not as severe as with the Dublin Regulation. Here, one can speak of being solidary, however, its extent is limited to practical cooperation and supporting mechanisms like administration, and ensuring national programs to further harmonize and unify the asylum policy.

Chapter 5 – Conclusion

In the light of the preceding chapters it becomes clear, (the principle of) solidarity is rather an expression and objective than a legal obligation. If solidarity were meant to be a legal obligation, the policies and measures would be expressed in such a way, as to make clear first of all what the term really implies and, secondly, to be specific on solidarity instruments and how its obligation can be enforced. Because what is missing seems to be a clear and unified understanding of the term and, on the other hand, there needs to be a legal obligation to implement solidarity instruments. By making use of a principle which meaning is left undefined by the EU, the risk of fragmentation exists, as can be seen in the current asylum crisis. This leads to the question of whether a principle that has no unified, widely accepted meaning should be used in the first place.

What can be derived from the solidarity principle as stated in the Treaties is that there needs to be solidarity between the institutions and the MSs, as well as between the MSs themselves. This principle should regulate the relations between them; however, this proves to be difficult as MSs' interests vary to a great extent and the meaning of solidarity remains to be undefined. However, as can be seen in relation to the two key legislative instruments for the CEAS, the Dublin Regulation and the ERF/AMIF, the concept of solidarity is deeper than 'sincere cooperation' as defined in Article 4 (3) TEU, and as explicitly stated in Article 80 TFEU. As the Council argued in 2012, the EU affirms "that the framework for genuine and practical solidarity is a flexible and open 'tool box' compiled of both existing and possible new measures"¹²⁷. The use of 'inclusive' in Article 80 TFEU shows that financial solidarity is not exhaustive and that there is leverage for further adoptions of the solidarity principle. That is, as been discussed in the previous chapters solidarity is mentioned in the Treaties several times, not only in reference to asylum issues and granting financial solidarity, but it refers to a broader concept. However, MSs need to be in agreement, as well as the use of the principle in policies, needs to be clear as to what is to be achieved with it. However, as it is the EU MSs that are party to the Geneva Convention of 1952 that establishes the right to seek asylum, and not the EU as a whole, the EU Charter of Fundamental Rights¹²⁸ and the Treaty of Lisbon¹²⁹ lay down the respect to grant asylum according to the Geneva Convention. Thus creating an obligation for every MSs to take part in

¹²⁷ Council Conclusion (2012: para. 4-6)

¹²⁸ EU Charter of Fundamental Rights, art. 18 and 19, 2

¹²⁹ TFEU, art. 78, 2008 OJ L 306

granting asylum, however, the possibility under the Dublin Regulation to transfer asylum seekers back to the MS responsible relieves MSs of the obligation somehow.

Compared to the Dublin Regulation, one can argue that the ERF/AMIF are successful solidarity instruments because, as it was argued in Chapter 4, the funds support administrative capacity building, harmonization policies, and resettlement operations. However, if we look at the current situation in Greece and Italy, it becomes clear that the budget is too low. Although the Funds are to support MSs in theory, the situation at the Mediterranean proves differently. Remembering that Italy had to cancel its Mare Nostrum operations because MSs were reluctant to have a share in the costs involved, it shows that the principle does not influence political and policy decision-making in this field¹³⁰. It creates a feeling that as long as a MS is not affected it is not concerned with the need of another MS. And even though it is a tool to share the financial burden arising from the influx of asylum seekers, it is not large enough to fully take account of the responsibility shifting as established by the Dublin Regulation.

Since the beginning of the CEAS in 1990s, solidarity has become an integral principle in EU legislation. It has been included in political discussions, as well as implemented in the political documents setting up the CEAS. However, as can be seen in the current crisis MSs actions neither represent solidarity nor do they comply with the full implementation of international obligations and the policies under the asylum system. Even though solidarity is indeed applied in different EU policy areas, it remains an unspecified principle concerning its concrete meaning and its enforceability in the asylum context. However, looking at international obligations, such as the right to asylum, the principle of non-refoulement, the EU resettlement and the temporary protection directive, one can argue that there is room for the implementation and application of the principle. However, applying the principle in the asylum context, it will be difficult to implement solidarity, as it would mean that MSs have to accept to let people enter their country against their will. With the AMIF financial solidarity is guaranteed, however, as the analysis has shown, there is not enough money available in relation to massive influxes. Moreover, bureaucracy in the National Annual Programmes and co-financing are hindering its effectiveness. The issue with solidarity in the asylum context is that MSs want to remain sovereign when it comes to crucial debates such as internal security and deciding on who should

¹³⁰ Davies & Neslen (2014)

enter the country. Another important problem when it comes to solidarity is the fact that it is not only referring to one actor, but that it involves various, different actors that must be considered and satisfied to have solidarity. With the creation of the AFSJ the asylum policy developed from being truly intergovernmental to becoming more supranational where the principle and the CEAS should have a common understanding and approach for its objectives and application, reality, however, proves different. The establishment of the CEAS, with its Directives, Regulations and agencies like FRONTEX and EASO has laid down the conditions for more cooperation and higher standards that represent solidarity. These agencies actively participate in resettlements, sharing information and best practices between MSs and the EU. But a major flaw remains the Dublin System and its criteria on distributing asylum seekers. If it were to be a true solidarity mechanism, then the distribution and allocation would not be based on geographical criteria. A first step in the right direction might be seen in the rulings of the European Courts, laying down the shortcomings and setting aside the mutual trust and safe country principle. With the rulings in the M.S.S¹³¹, N.S and M.E¹³² cases there is now a legal possibility to challenge the principle of mutual trust. This is against the meaning of solidarity as discussed in the conceptualization part where it was stated that one form of solidarity includes to mutually respecting each other (that is MSs). However, now that mutual trust can be rebutted there is a loss of potential solidarity between MSs as it indicates that some MSs are not playing by the rules, either on purpose or due to lack of resources. In the Dublin Regulation this means that MSs will be held responsible for the mal-treatment of refugees and asylum seekers if they send them back to a MS that does not implement standards that are in line with the European Convention on Human Rights. Of course one can argue that this ruling is an implementation of humanitarian solidarity in the asylum context, however, it is not voluntarily, but by a threat imposed on MSs who would send an applicant back in case it would not have been prohibited by European case law. In the context of the CEAS solidarity refers to the willingness to actually share responsibility, mutual assistance and cooperation.

As can be derived from the previous chapters, the CEAS does provide a framework for respecting solidarity, for instance in the Temporary Protection Directive, Resettlement Procedures, financial support under the ERF/AMIF, and mechanisms for supporting MSs in

¹³¹ ECtHR – M.S.S. v Belgium and Greece, Application No. 30696/09

¹³² N.S. v. Secretary of State for the Home Department No. C411/10

cases of mass influxes, emergency situations. The Temporary Protection Directive in the CEAS can be seen as an external solidarity mechanism with third countries, taking off the pressure by offering international protection within the EU. The same can be said for the resettlement procedure, that can fall under Article 78 (2, g) TFEU, and thus under Article 80 TFEU, to have solidarity not only between MSs but also with third countries. But, resettlement is still on a voluntary basis, thus it a MSs cannot be obliged to accept resettled refugees and asylum seekers. As long as resettlement procedures, early warning mechanisms are voluntary, and the country of first entry rule remains, the CEAS cannot respect the principle of solidarity. What is needed is an obligation for MSs to equally share responsibility in the acceptance and distribution of asylum seekers. This obligation should consider the criteria established on which basis asylum seekers are to be redistributed.

A CEAS that would be fully applying the principle of solidarity would integrate a distribution scheme that is based on the GDP, population size, territory size, accepted asylum seekers, thus far, current asylum seekers, and unemployment rates. These are important factors on which a distribution key would need to be established that gives weight to the criteria and then allocates asylum seekers proportionally to the MSs. As the MSs all agreed to have a Schengen Area, to abolish the internal borders of the EU it is the obligation of all MSs to support and manage an efficient migration flow at the external borders, and not leaving the responsibility with the countries at the external border. For that to happen there would need to be a re-definition of the Dublin Regulation, deleting the It would need further discussion if ideas like decreasing the amount of the Cohesion Fund for MSs who are not willing to accept asylum seekers, as has been recently issued by the Commission really is a solution.

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