

INTERNATIONAL SOLIDARITY AND MIGRATION

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SOLIDARITY IN EU’ASYLUM POLICY

Good morning, thank you for letting me to participate in this parallel event with so many distinguished experts.

1. Introduction

In 2015 the European Union (EU) experienced an unprecedented influx of refugees and migrants: More than one million of first time asylum seekers applied for international protection in the Member States of the European Union (EU), most of them fleeing from war and terror in Syria and other countries. Migration, asylum and border management systems were put under huge pressure. The EU and its Member States were not prepared enough to respond effectively. The integrity of both the Common European Asylum System (CEAS) and of the Schengen area of free movement for European citizens was put into question.

In the European Agenda on Migration approved in May 2015 the European Commission set out both short- and long-term measures for EU action. Immediate measures based on solidarity were proposed to respond to the human tragedy in the whole of the Mediterranean. It also set out a comprehensive approach addressing all aspects of migration based on the four areas of (1) irregular migration, (2) border management, (3) asylum policy and (4) legal migration as key for delivering an effective and sustainable EU migration policy.

The problem is complex and we cannot deal with it in this moment in depth. In this presentation I will discuss some issues in relation to how the principle of solidarity has been understood in the context of the EU’s asylum policy and how it has been implemented internally – between Member States- and externally – with third countries.

2. Solidarity in EU' asylum law

It is commonly accepted that solidarity is among the cardinal values of the EU and is even among the foundations of the Community and later, the European Union. The European Court of Justice stated in 1970s that “solidarity” is at the bases of the whole of the Community system. And that a failure in the “duty of solidarity” accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order .

More specifically, solidarity is both a pillar and at the same time a “guiding principle” of the EU’s policies on border checks, asylum and immigration. In this context, the principle of solidarity is intended to ensure that support is given to those Member States, which, on account of geographical and demographic factors, carry a heavier burden of responsibility than others.

It is usually linked with the “general principle of sincere cooperation” established in Article 4 (3) TEU (“to assist each other in carrying out tasks which flow from the Treaties”) that applies to all policy areas. Additionally, Article 67(2) Treaty on the Functioning of the EU states that the EU is to “frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards nationals of third countries”. On this base of mutual trust and assistance, solidarity in EU’s asylum policy has at least two cardinal components: the respect for the fundamental rights of asylum seekers (human rights-based solidarity) and the fair sharing of responsibilities.

(A) *Human rights-based solidarity*

Asylum seekers have the right to seek and enjoy asylum according to Article 14 (1) of the Universal Declaration of Human Rights and the right to asylum according to Article 18 of the EU Charter of Fundamental Rights (“the Charter”). Even those who are irregularly present and liable to removal are *obviously* “human rights bearers”. Their human rights should not be violated, nor should they be treated as mere objects of state power. The EU and the Member States have human rights commitments such as the requirement to use detention sparingly, and procedural rights such as the right to be heard and the right to effective judicial protection. In *N.S. case* the Court made it clear that

“To ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ ... where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter”.

In EU law the right of asylum is generally guaranteed with the same content and legal scope as the Geneva Convention. International law does not impose on States the “duty to grant asylum” to aliens or stateless persons fleeing the country of their nationality or residence, the only obligation that can be extracted is the derivative of the principle of *non-refoulement*. This obligation is included in Article 19 of the Charter, that is, the prohibition to return a person to a situation where he or she has a well-founded fear of being persecuted or runs a real risk of torture or inhuman and degrading treatment or punishment. Likewise, this rule also prohibits collective expulsions, included, the so-called Spanish Push-Back practice, as the European Court of Human Rights ruled recently).

(B) The fair sharing of responsibility

The principle of solidarity is expressly included in Article 80 TFEU, providing that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications,. In EU’s asylum law solidarity can take many forms but falls broadly into two categories: (a) “internal solidarity” relates to the solidarity shown from one Member State to another Member State, or from the EU as a whole towards one of its Member States, or from EU citizens towards third country nationals present in the EU; (b) “external solidarity” refers to solidarity by the EU towards those people, not on the territory of the EU, who are affected by war, persecution, hunger or violent conflicts in their country of origin, those who are at risk of losing their lives in makeshift boats crossing the Mediterranean, and to solidarity with third countries that currently receive on their territories and in their communities huge numbers of refugees fleeing war, persecution and hunger in neighboring countries.

3. Intra-EU Solidarity

The EU's rules for determining which Member State is responsible for dealing with each asylum application (known as the Dublin system) were not designed to ensure a sustainable sharing of responsibility across the EU and guarantee timely processing of applications. It is not an “effective structural solidarity mechanism”.

To date major calls for internal solidarity in EU are either linked to emergency influxes, or to states that are not yet, for whatever reason, fully implementing the content of legislative instruments. Some of the internal solidarity measures adopted at EU level to compensate the deficiencies of the CEAS are the following: (a) Technical and operational solidarity; (b) Emergency Relocation Mechanism (Article 78 (3)); (c) Financial solidarity; (d) Temporary Protection Directive (TPD).

In the context of the CEAS reform, and despite the opinions of experts against, the Commission came to the conclusion that the current criteria in the Dublin system should be preserved, while supplementing them with a “corrective allocation mechanism” to relieve Member States under disproportionate pressure. The aim of the mechanism is “to complement” not to change the current system. The most critical consider “a reform which engages only superficially with long-standing and well-documented criticisms of the Dublin system runs a high risk of perpetuating inefficient and unworkable mechanisms for allocation of responsibility that are unfair to both asylum seekers and Member States”¹. And that “the proposal must take into account the lack of fairness underpinning the Dublin system, which creates different incentives for Member States to disregard the responsibility rules.

4. EU External Solidarity

According to article 21 TUE, the EU’s external action – included the external action in migration and asylum policies - shall be guided by the principles of 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. The principle of solidarity, in this context, appears as an “operational principle”.

¹ *ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270*, October 2016, p. 4 available at <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf> (last accessed 18 June 2018)

Furthermore, on the basis of these principles, the European Council “shall identify the strategic interests and objectives of the Union” (article 22 TUE). This means that external action of the EU (included international cooperation on asylum) it is not only guided by principles and values (as global solidarity) but also by its own political, economic and security interests.

The general objective of the “external solidarity measures” adopted by EU until now is to increase cooperation with relevant non-EU countries in order to strengthen their asylum and national asylum systems and to ensure compliance with international standards. The two principal (external) solidarity mechanisms are Regional Development/Protection Programmes and Resettlement.

5. CONCLUSIONS

I conclude with some considerations.

Asylum is a very sensitive EU’s policy that affects thousands of people trying to reach Europe in search of refuge. At the same time, it is affected by xenophobic and racist discourse that permeates public opinion. From this point of view, “the tenor of policy and public discourse on migrants and refugees must be shifted from one of threat to one of international solidarity”². The protagonism of host communities cannot be ignored. In EU’s asylum policy solidarity goes beyond interstate relations involving EU citizens in relation to third country nationals. As UN General Secretary has said:

“personal contact significantly reduces prejudice, more creative ways of fostering contacts between host communities on the one hand and refugees and migrants on the other are urgently needed”³.

From the point of view of global solidarity the question is not whether the number of asylum seekers has decreased in Europe, that is, if the pressure on EU national asylum systems has decreased, but if it has been resolved the global situation of people who need international protection. The emphasis should not be placed on “us” but on “them”. This is what solidarity in practice really means.

EU asylum primary law provides the legal basis to develop a coherent and holistic asylum system based on internal and external solidarity. Solidarity in EU’s asylum policy has at least two cardinal components: the respect for the fundamental rights of

² *Report of the Secretary General*, “In safety and dignity: addressing large movements of refugee and migrants”, A/70/59, 21 April 2016, p. 11

³ *Id.*

asylum seekers (human rights-based solidarity) and the fair sharing of responsibilities. So far it seems obvious that the current CEAS has failed to achieve both objectives. At the moment “internal solidarity measures” adopted at EU level are intended to compensate the deficiencies of the CEAS, mainly the fair sharing of responsibilities, more than the establishment of a “common asylum system” based on structural solidarity. Despite the good intentions with which have been launched “external solidarity measures”, in practice, these are more oriented to prevent asylum seekers access to the territory of Member States than to protect their right to seek asylum according to international refugee law.

In sum, a consensus must be achieved at national and EU level on how to implement the principle of solidarity in a way that human rights of asylum seekers are guaranteed inside and outside of the EU (extraterritoriality) while sharing responsibility fairly and equitably between Member States. A determining criterion should be the reception capacity of each Member State based on objective criteria. When necessary due to the urgency of the situation, mandatory solidarity measures could be imposed on all Member States according Article 78 (3) TFUE.

Thank you for your attendance