



School of Law – MA Human Rights in Criminal Justice - Dissertation

Asylum in Europe: The Location and Dislocation of Solidarity

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Key words: Dublin III Regulation, human rights, Geneva Convention, Common European Asylum System, solidarity

September 2020

Author's Declaration

I, the undersigned, hereby declare that this submission is entirely my own work, in my own words, and that all sources used in researching it are fully acknowledged and all quotations properly identified. It has not been submitted, in whole or in part, by me or another person, for the purpose of obtaining any other credit / grade. I understand the ethical implications of my research, and this work meets the requirements of the Faculty of Arts, Humanities and Social Sciences Research Ethics Committee.

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Acknowledgements

I would like to thank the members of University of Limerick's School of Law for providing critical knowledge and research skills throughout the course of the MA Human Rights in Criminal Justice Programme 2019-2020. I would like to express gratitude to my supervisor Jennifer Schweppe for guiding me through the formation of this dissertation and for her unwavering resistance to all form of hate.

This dissertation is for every person who has found themselves caught in the crossfire of EU asylum policy and who struggles to have their humanity acknowledged.

Perhaps not wholly felicitous, I consciously present the following poem written by Syrian poet Amir Darwish to articulate to whom precisely I acknowledge the submission of this paper.

'Where I come from'

From the earth I come

To the earth I come

From the heart of Africa

From the kidneys of Asia

From India with spices I come

From a deep Amazonian forest

From a Tibetan meadow I come

From an ivory land

From far

From everywhere around me

From where there are trees, mountains, rivers and seas

From here, there, from everywhere

From the womb of the Mediterranean I come

From a mental scar

From closed borders

From a camp with a thousand tents

From shores with Alan the Kurd I come

From a bullet wound

From the face of a lone child

From a single mother's sigh

From a cut in an inflatable boat about to sink

From a bottle of water for fifty to share

From frozen snot in a toddler's nose

From a tear on a father's cheek

From a hungry stomach

From a graffiti that reads, "I was here once"

From another one a tree says "I love life"

From a missing limb

Like a human with everything I come to share the space.

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Abstract

The objective of this dissertation is to locate solidarity in the asylum processes operative in the European Union (EU) at present while at the same time trace its dislocation through these same processes. As a guiding principle, solidarity is quintessential to international relations such as the EU itself, and intrinsic to the functional implementation of international human rights law.¹ Solidarity, it may and will be argued, forms the normative touchstone of the EU asylum acquis.² However, since what is commonly referred to as the ‘refugee crisis’ of 2015, the very principles and frameworks of the international refugee protection regime have been floundering across the EU. This dissertation analyses the concept of solidarity through its *location* in interstate, inter-social and interpersonal relationships and its *dislocation* through its polarities: sovereignty, criminalisation and discrimination.

Methodology

To map this, the contours of solidarity from theory (international and EU law) and practice (the realities of asylum seekers in Europe) will be traced in four chapters;

Chapter 1 – The Intersection of Solidarity and Asylum: Definitions

An introductory chapter lays the foundations of legal terms and concepts used throughout the development of the paper.

Chapter 2 - Interstate cooperation: The tension between Solidarity and Sovereignty

This chapter explores the Dublin III regulation, one of the primary pieces of legislation governing asylum practices across the EU by looking at the basic tenets of the regulation, narratives of reform and the perception of solidarity as a threat to state sovereignty.

Chapter 3 – Inter-social provision: Solidarity or Criminalisation?

¹ For an international agreement like the European Convention of Human Rights (ECHR) for example, to which 52 nation-states are party, to function effectively all signatories must share an understanding of and commitment to the ideals presented therein, and the word solidarity in its broadest sense captures just that: **common commitment**.

² Most prominently as enshrined in Article 67 Treaty Functioning European Union which requires that EU policies on border checks, asylum and immigration and their implementation to be governed by the **principle of solidarity** and fair sharing of responsibility while Article 80 states “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” Consolidated version of the Treaty on the Functioning of the European Union *OJ C 326*, 26.10.2012.

Using the Geneva Convention as a frame of reference, this section focuses on the solidarity provided by states through assessing the main constituents of asylum practice and highlighting the various way that asylum seekers are criminalised.

Chapter 4 – Interpersonal attitudes: The spectrum between Solidarity and Discrimination

The final chapter reflects on the divergent sentiments in European countries which can be reduced to pro- and anti-immigrant. While solidarity movements emerge from the former; suspicion, discrimination and racism dominate the latter.

Equal analysis of each of the EU-27 member states is beyond the remit of this research, and therefore Ireland will be used referentially, along with comparative reference to the corresponding situations in other two other EU states: Greece and Germany.³ **Ireland** has been selected for local relevance, and generally can be used to exhibit a relatively unaffected state in the EU migration crisis. **Greece** provides an example of a frontline country that by virtue of its geography has received a disproportionate number of asylum claims. Furthermore, its asylum system is widely recognised as grossly deficient.⁴ **Germany** serves as a striking contrast to the other two states in its liberalisation of immigration policies in response to the so-called refugee crisis. It demonstrates a state who has independently taken a very active role and has relocated the ‘crisis’ from the fringes to the heart of the bloc.

Employing a socio-legal epistemology, this dissertation relies on law and social theory to guide its argument. The material presented herein has been constructed through desk research and has endeavoured to incorporate a diverse academic insight from theorists hailing from over 20 different nationalities in order to present an authentically pluralist analysis.

³ For example in 2019, Ireland received 4,781 applications for international protection (International Protection Office, Monthly Statistical Report, December 2019) while Greece received 77,287 first time applications and Germany 165,938, according to Country Reports compiled by Asylum Information Database (AIDA) as part of research commissioned by the European Council of Refugees and Exiles (ECRE); Ireland is of domestic interest while Germany and Greece represent counterpoints in the EU with respect to their response to ongoing migratory challenges: both nations have received a large number of asylum claims but Germany has generally been perceived to have a far more solidary, efficient response in contrast to Greece.

⁴ See European Court jurisprudence such as that compiled in the European court of Human Rights ‘Factsheet: Dublin Cases’ (June 2016).

Chapter 1

The Intersection of Solidarity and Asylum: Definitions

Linguistically, solidarity is defined as “support by one person or group of people for another because they share feelings, opinions, aims, etc.”⁵ Conceptually, it is best conceived of as a mutuality between individuals comprising two levels; a *factual* common ground as well as a *normative* dimension of obligation toward each other.⁶ Politically and ideologically, it emerged in the 1970’s through the democratisation of Poland’s working class.⁷ Since then, two distinct understandings of solidarity have been shored up. In the communitarian tradition, solidarity is generally considered as something to be shared exclusively with people of the same legal status or ethnic, cultural or national origin.⁸ This conception of solidarity sets its parameters as the physical community, which tends to be circumscribed along ethno-national lines. On the other hand, the liberal-cosmopolitan tradition perceives all humans as potential benefactors of solidarity, using the human rights paradigm as its frame of reference. Rather than being *contextual*, i.e. contingent on common ground or shared qualities, this approach is *conceptual* and thus all-encompassing in its universality.⁹

At least rhetorically, the principle of solidarity pervades the highest level of international law formation and is foundational to both the UN Convention Relating to the Status of Refugees and the Dublin III Regulation, two essential pieces of legislation affecting asylum practices in the EU that will be used as a springboard for analysis in subsequent chapters.¹⁰ The former defines a *refugee* and prescribes their rights.¹¹ The latter provides a determination mechanism for which EU member state must process a claim for international protection (a concept explained shortly). The former provides a contract of values and ideals as to the minimum treatment of refugees; while the latter represents the contemporaneous rules of allocating responsibility of refugee status determination (RSD) to one state in the Common European Asylum System (CEAS).¹²

⁵ Oxford Learners Dictionaries entry for ‘solidarity’.

⁶ Kurt Bayertz, *Solidarity* (Springer Science & Business Media 1999).

⁷ The essential emergent texts theorising ‘solidarity’ in this context are Roman Andrew Laba, *The Roots of Solidarity: A Political Sociology of Poland’s Working Class Democratisation* (University of Wisconsin, 1989) and Lawrence Goodwyn, *Breaking the Barrier: the Rise of Solidarity in Poland* Oxford University Press, 1991).

⁸ Andrew Mason, *Community, solidarity and belonging: Levels of community and their normative significance* (Cambridge University Press 2000).

⁹ Hauke Brunkhorst, *Solidarity: From civic friendship to a global legal community* (Cambridge MIT Press 2005).

¹⁰ The United Nations Convention Relating to the Status of Refugees, also known as the Refugee or Geneva Convention (as it will be referred to herein), was adopted on the 28th June 1951 in Geneva; Dublin III is officially codified as Regulation (EU) 604/2013 of the European Parliament and Council, OJ L 180.

¹¹ See Article 1 for the definition of a refugee as per the Convention *ibid*.

¹² For a detailed description of the aims of the formation of the Geneva Convention see Paul Weis, ‘The Refugee Convention 1951’ < <https://www.refworld.org/pdfid/53e1dd114.pdf> > accessed 25 June 2020 ; for more information

Indeed, solidarity is a multi-dimensional concept to which various social groups ascribe various meanings.¹³ In terms of the asylum process, solidarity is associated with many of the relationships between the various actors involved. It extends laterally at institutional, as well as grassroots levels for example, and horizontally from states to the individual, in this case the asylum seeker.¹⁴ It exists between states in the form of burden-sharing; it underlies top-down service provision and it develops across communities through the medium of activism.

Employing these three dynamics between actors in the asylum process, the variances of solidarity will be discussed in terms of each of these relationships. **Interstate**, which refers to the relationships between EU member states; **inter-social**, which denotes the activity between a state and individuals; and **interpersonal** relationships that occur amongst individuals. The *location of solidarity* between states, within societies and among people manifests distinctly is the primary focus of this paper. The *dislocation of solidarity* will be explored through its polarity in each of these differentiated dynamics.

This paper argues that solidarity is used in a variety of ways in narratives of asylum. Since the refugee crisis, solidarity is on the forefront of the EU policy agenda as well as rising in activist movements, however its salience in these two spheres may be conflictual. The discrepancies between its usage in *institutional* parlance and its emergence as the modus operandi of *individual* pro-immigration activism are presented herein. **Moreover, solidarity in the asylum process evokes a series of contradictions that will be the subject matter of this paper.**

as to the centrality of Dublin III please see Sarah Progin-Theuerkauf 'The Dublin IV Proposal: Towards more solidarity and protection of individual rights?' (2017) <<file:///C:/Users/eurur/Downloads/1551-Artikeltext-858-1-10-20171004.pdf>> accessed 9 June 2020.

¹³ For a detailed account of the varied uses of the word 'solidarity' in refugee and migration scholarship please see Harald Bauder & Lorelle Juffs, 'Solidarity' in the migration and refugee literature: analysis of a concept' (2020) *Journal of Ethnic and Migration Studies* 46(1) pp.46-65.

¹⁴ European Parliament Briefing Paper, 'Reform of the Dublin System' (Brussels: European Parliamentary Research Service, March 2019).

Definitions

Firstly, to lay the foundations for conceptual clarity. Etymologists locate the origin of the word **refugee** in the 17th century with the flight of the Huguenots, a group of French protestants who faced persecution following the revocation of the Edict of Nantes in 1685.¹⁵ The French word *réfugié* gave rise to its modern Anglophonic equivalent.¹⁶ Legally, according to Article 1 of the Geneva Convention a refugee is someone who;

“owing to **well-founded fear of persecution** for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹⁷

Refugee **status** is awarded after a process of determining if the individual meets the criteria set out in this definitional article.¹⁸ Any person who flees their native country and seeks refuge in another country invokes the **right to claim asylum**, enumerated in Article 14 of the Universal Declaration of Human Rights (UDHR) which states;

“(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

Therefore, an essential prerequisite of the refugee identity is someone who has traversed a border and no longer finds themselves in their country of origin. In contrast to an individual who is displaced within the parameters of their own country, who is referred to as an **Internally Displaced Person (IDP)**.¹⁹ By the end of 2019 there were 79.5million people forcibly displaced worldwide, internally and externally.²⁰

¹⁵ Merriam Webster ‘The Origin of Refugee’ accessed online on the 24/07/20: <https://www.merriam-webster.com/words-at-play/origin-and-meaning-of-refugee>.

¹⁶ *ibid.*

¹⁷ The Geneva Convention (n 7).

¹⁸ Cormac Ó Gráda, *Black '47 and Beyond: The Great Irish Famine in History, Economy and Memory* (Princeton University Press 2000).

¹⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

²⁰ UNHCR, ‘Figures at a Glance’ accessed online on the 02/08/20; <https://www.unhcr.org/en-ie/figures-at-a-glance.html>.

The loss, or failure of state protection toward an individual necessitates **international protection**.²¹ This individual who, owing to various reasons, finds themselves as a **stateless person** applies for international protection in another state. International protection is offered in various statuses depending on the personal circumstances of the individual;

- Convention Refugee – the individual’s personal circumstances meet the definition stipulated in the Geneva Convention.
- Subsidiary Protection – the individual does not qualify for refugee status but their reasons for applying for asylum are validated.²²
- Humanitarian Protection – is a status not mandated through EU law, and as such is unilaterally determined.²³ In Ireland it is known as Permission to Remain.²⁴ In other parts of Europe, this protection takes the form of Temporary Protection of Stay Arrangements (TPSAs) these are short term protections offered in response to extenuating circumstances.²⁵

Before protection has been awarded, the individual may be referred to in numerous ways including; **asylum seeker, person seeking refuge, international protection applicant or third-country national**.²⁶

Another prominent area of policy concern and crucial to humanitarian obligations is the delineation between an asylum seeker/refugee *per se* and a migrant.²⁷ The typically conceded difference is that of agency. An asylum seeker has left their native country *involuntarily*; whereas a migrant has done so *voluntarily*. However, under scrutiny, this reductive dichotomy does not bear up. History has proved that the complexity of human migration may not be so simply categorised. During the Irish famine, 1.5 million Irish people emigrated, yet the push factors that compelled them to do so were insurmountable.²⁸ At present, many people leave their homelands for economic reasons: to escape deprivation and severe poverty. Not

²¹ Gilbert Jaeger, ‘On the History of International Protection of Refugees’ (2001) *International Review of the Red Cross* 83(843) pp.727-738.

²² Directive 2004/83/EC defines the minimum standards for qualifying for subsidiary protection status in Article 2(e) ‘a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.’ Its enactment was a most welcome development in the humanitarian field as it is the first supranational European legislative act that extended the right of protection to those who did not meet the narrow definition as provided in the Refugee Convention.

²³ Section 49 of the International Protection Act sets out Ireland’s ‘permission to remain’ which is awarded at the discretion of the Minister for Justice and Equality.

²⁴ Irish Naturalisation and Immigration Services (INIS), ‘Permission to Remain for Non E.E.A. Nationals’ (April 2020).

²⁵ UNCHR, ‘Guidelines on Temporary Protection and Stay Arrangements’ (February 2014).

²⁶ Any person who is not a citizen of the European Union within the meaning of Art. 20(1) of TFEU and who is not a person enjoying the European Union **right to free movement**, as defined in Art. 2(5) of the Regulation (EU) 2016/399 (Schengen Borders Code).

²⁷ Peter Tinti & Tuesday Reitano, *Refugee, Migrant, Smuggler, Saviour* (Oxford University Press 2017); see also Markus Rheindorf, Prof. Ruth Wodak, *Sociolinguistic Perspectives on Migration Control: Language Policy, Identity and Belonging* (Multilingual Matters 2020).

²⁸ Cormac Ó Gráda, *Black ’47 and Beyond: The Great Irish Famine in History, Economy and Memory* n13.

unlike the Irish famine in 1845, modern flows of human migration are caused by the instinct to survive. As Climate Change continues to wreak ecological instability in various part of the world, it is likely the number of climate migrants will rise, as economies in many parts of the world are by their nature, ecologically contingent.²⁹ The experience of these migrants challenges the simplistic notion of migration being taken for granted as voluntary, and precipitates the idea of *forced migration*, which has significant ramifications for the future trajectory of the asylum process.

Another concept worth noting is that of a **safe-third country**. Initially displaced persons may end up in a border country. These *transitory* zones are referred to as **countries of first asylum**.³⁰ Social unrest and political instability in South West Asia in countries such as Iraq, Afghanistan and more recently Syria have meant that Lebanon and Jordan have consistently been countries of first asylum in the advent of the 21st century.³¹ To date, they host most refugees per capita internationally.³² These transit countries have hosted an extremely high number of stateless individuals from countries including Afghanistan, Iraq, and Syria.³³ The relocation of refugees from countries of first asylum to safe-third countries, primarily by the United Nations Human Rights Commission (UNHCR), has been the *sine qua non* of international asylum best practice.³⁴

One final concept mentioned in the paper is that of **secondary movements**. The CEAS, and the Dublin III Regulation in particular, aims to identify one member-state to be responsible for **refugee status determination** (RSD).³⁵ But often, the country deemed responsible for processing an asylum claim is not the destination of choice of the applicant and they move elsewhere in the EU. These impermissible mobilisations are referred to as secondary movements.³⁶

For the purposes of this paper, the concept of ‘asylum seekers’ is to be used interchangeably with ‘people seeking refuge’ and ‘international protection applicants’ and ‘refugee.’³⁷ These semantic

²⁹ Sujatha Byravan & Sudhir Chella Rajan, ‘Taking Lessons from Refugees in Europe to Prepare for Climate Migrants and Exiles’ (2017) *Environmental Justice* 10(4) pp.108-111.

³⁰ The legal definition of countries of first asylum is set out in Article 25 of the Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180.

³¹ UNHCR, Statista, June 2019; accessed online 26/07/20 <https://www.statista.com/chart/8800/lebanon-has-by-far-the-most-refugees-per-capita/>.

³² *ibid.* In Lebanon this figure stands at 156 refugees per 1,000 local population while in Jordan it is 72 per 1,000.

³³ At present of 5 million displaced Afghans, 90% are in Iran and Pakistan; while of 5.5 million registered Syrian refugees, 3.5 are in Turkey; these statistics were located on the UNHCR Operational Data Platform.

³⁴ Paul Weis, ‘The Refugee Convention 1951’ (n 12).

³⁵ European Commission, ‘Evaluation of the Dublin III Regulation Final Report’ (DG Migration & Home Affairs, 2015).

³⁶ European Parliament Briefing Paper, *Secondary Movement of asylum seekers in the EU asylum system*, PE608.728 (Brussels: European Parliamentary Research Service, October 2017).

³⁷ Since the development of the Geneva Convention, these terms have been debated upon, see Paul Weis ‘The Refugee Convention 1951’ and the travaux préparatoires of said legislation (n 12).

distinctions could be the subject matter of a wholly separate thesis, however herein, all labels are literal variants of the same reality.

Origins: Solidarity & the Asylum Process

Arguably, one of the most hopeful achievements of the 20th century was the sense of solidarity epitomised in the Geneva Convention and the international cooperation it enshrined.³⁸ This solidarity extended in all directions and made very real the sense of a *global community*, in which states would share the burden of dealing with flows of refugees, and refugees themselves would have the opportunity to rebuild their lives in a safe third country.³⁹ Epitomised in Kantian political philosophy of *cosmopolitanism*, and even more blatantly in his seminal work ‘The Doctrine of Right’ in which he ascribes to all human beings ‘a right to be wherever nature or chance (apart from their will) has placed them.’⁴⁰

In the wake of WW1, the League of Nations acknowledged that a unified response to the large volume of displaced persons was necessary, 1.5 million Russians to be precise.⁴¹ This awareness was reinforced and heightened in the aftermath of WW2. The Human Rights agenda was in its embryonic form, and the ‘right to asylum’ became enshrined in the UDHR under Article 14.⁴² Since then, 167 nation-states have signed at least one of the Refugee Convention 1951 and its subsequent protocol in 1967 making it one of the most ubiquitous legislative frameworks vis-à-vis refugee rights.⁴³ The dissolution of the internal borders within the EU, arose from the introduction of the Single European Act which came into effect in 1993.⁴⁴ This means common EU asylum policy is not only a normative requirement, but an invariable actuality and has resulted in traversing EU’s external border being analogous to *accessing* the EU as a whole. The very opening of the EU or Schengen Zone or Area of Freedom, Security and Justice (AFSJ) necessitated

³⁸ Dr. Sadako Ogata, Forward to the 1951 Refugee convention.

³⁹ Roberto Cortinovis, ‘Asylum: The Role and Limits of the Safe Third Country Concept in EU Asylum’ (ReSOMA Discussion Brief, July 2018); the other feasible options for dealing with refugees in the middle of the 20th century were integration or voluntary repatriation however the longer individuals spent in their place of asylum, the more likely they were to integrate fully.

⁴⁰ Immanuel Kant, ‘The Doctrine of Right’ (1797) Section 1 in *The Metaphysics of Morals*.

⁴¹ Paul Weis, ‘Human Rights and Refugees’ (1972) *International Review of the Red Cross Archive*, 537-546.

⁴² Article 14 states that (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

⁴³ The initial Convention enumerated specifically the rights of refugees fleeing persecution following the events of the Second World War. The New York Protocol of 1967 expanded this definition to include refugees internationally.

⁴⁴ Paul Weis, ‘Human Rights and Refugees’ (n 42).

compensatory measures to be taken at its external borders.⁴⁵ This has led to what is informally referred to as ‘Fortress Europe’.⁴⁶

Fast forward almost seven decades and the spirit of solidarity that was very much alive when this Convention came to fruition seems to have been derailed. Solidarity in the EU confronts member-states contested sovereignty while issues pertaining to the EU’s collective response to asylum pressures have shifted from the periphery to the centre of EU law and policy.⁴⁷ The term ‘refugee crisis’ refers to over 1.3 million asylum claims being made across the EU in 2015.⁴⁸ With media representation and its corollary public awareness peaking in 2016 with the infamous image of Alan Kurdi’s body washed up on a beach in Kos, attention has waned in the general public as to the continuation of the situation at Europe’s external borders.⁴⁹ Since then, numbers of first time international protection applicants have decreased significantly but humanitarian issues persist.

Year	Greece	Germany	Ireland
2014	9,430	202,645	1,450
2015	13,205	476,510	3,275
2016	51,110	745,115	2,245
2017	58,650	222,560	2,930
2018	66,970	184,180	3,665
2019	74,913	165,938	4,781

The unprecedented influx of asylum seekers in 2015 precipitated fragmentation of EU consensus as to how to best respond as a collective to migratory challenges, with Brexit exemplifying the pinnacle of this geo-political disintegration.⁵⁰ This climate of immigration sensitivity across the EU has brought to the fore a polarising effect evidenced in a rise in activity on either end of the political spectrum. Pro-immigrant solidarity networks on the Left e.g. Antifa versus anti-immigrant sentiment and popularity for populist

⁴⁵ European Council on Refugees & Exiles (ECRE), *Position Paper on the Implementation of the Dublin Convention* (1st December 1997).

⁴⁶ Almut Schlepper ‘Another Drop in the Ocean: Dispatches from the Ground’ (2018) *Studies in Arts and Humanities Journal: Grassroots Perspectives* 4(2).

⁴⁷ Liam Thornton ‘EU Asylum Policy: Reception Conditions for Asylum Seekers’ in Lewis, T. *Report on coherence of human rights policy making in EU Institutions and other EU agencies and bodies* (September 2014), pp. 105-111.

⁴⁸ 1,321,600 to be precise as record by Eurostat available at: <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> (accessed on the 29 June).

⁴⁹ Alice Tidey ‘Alan Kurdi: Five years on from boy's tragic death, 'refugee and migrant children worse off’ (Infomigrants, 9 February 2020) < <https://www.euronews.com/2020/09/02/alan-kurdi-five-years-on-from-boy-s-tragic-death-refugee-and-migrant-children-worse-off> > accessed 24 August 2020.

⁵⁰ Ronald F. Inglehart and Pippa Norris ‘Trump, Brexit and the Rise of Populism, Economic have-nots and cultural backlash’ (2016) *HKS Faculty Research Working Paper Series* RWP16-026.

political parties on the Right, illustrated by their presence in coalition governments across 11 Western democracies including Austria, Italy and Switzerland.⁵¹ Changes in social policy engendering restriction in migrant and refugee rights have been noted in the U.K., Germany and Austria.⁵² Political climates vary from country to country as to the reception of refugees and the challenge to construct CEAS policy that satisfies both the principle of solidarity to burden-share as well as the sovereignty of each state to manage their own inward flow of migrants is looming.⁵³ As are the corollary challenges of populations of refugees in EU countries such as integration, equality, racism and hate crime at a human level.

As complex as the issue of asylum is in and of itself, its analysis requires reference to diverse fields. Asylum is a human issue; while the asylum process is a political, social and legal issue. This paper is constructed from a socio-legal ontological approach and thus draws equally on law and social science research. Using international and European asylum law and policy; European Court of Human Rights (ECtHR) and Court of Justice of the EU (CJEU) jurisprudence; grey literature published by civic and non-governmental organisations (NGOs) and relevant publications in critical literature from academics from multi-cultural perspectives, an in-depth analysis of multi-faceted *solidarity* in contemporaneous EU asylum processes will be provided.

⁵¹ *ibid.*

⁵² Tamas Dezso Ziegler, 'EU Disintegration as cultural insurrection of anti-Enlightenment tradition' (2020) *Journal of Contemporary European Studies*, DOI: 10.1080/14782804.2020.1784109.

⁵³ Lillian M. Langford 'The Other Euro Crisis: Rights Violations Under the Common EU Asylum System and the Unravelling of EU Solidarity' (2013) *Harvard Human Rights Journal* 26(1).

Chapter 2

Interstate cooperation: The Tension between Solidarity and Sovereignty

This section will focus on the lynchpin of the CEAS *acquis*, namely EU Regulation 604/2013 otherwise known as the Dublin III Regulation (herein ‘the regulation’). Since its conception in 1999 the CEAS’s primary objective is the harmonisation of asylum policy across the EU.⁵⁴ The other extensions of this framework are the Asylum Procedures Directive, Reception Conditions Directive, Qualification Directive and Eurodac Regulation.⁵⁵

To begin, the processes and core components of the Dublin III regulation will be outlined and their implementation against the backdrop of human rights obligations evaluated. Then, narratives of reform will be presented. Finally, how solidarity between states and its inevitable impact on the lives of asylum seeker will be considered.

The Dublin Procedure & Human Rights

As the name suggests, the Dublin III Regulation is in its third iteration. The Dublin Convention of 1990 gave rise to the Dublin II Regulation in 2003.⁵⁶ These ‘Dublin’ legislations delineate both the Dublin region and the Dublin procedure. The Dublin region refers to 32 state system that comprises the EU-27 and 5 other states: the U.K., Norway, Switzerland, Iceland and Liechtenstein, into one common policy area.⁵⁷ The primary aim of the Dublin procedure is to *efficiently* identify the state responsible for refugee status determination, and under Article 3(1) and the principle of authorisation, this means singling out one state.⁵⁸ In order to identify the responsible state, under Article 13, a *hierarchy of criteria* are taken into consideration. The ordering of criteria is as follows;

⁵⁴ María-Teresa Gil-Bazo, ‘Refugee status, subsidiary protection, and the right to be granted asylum under EC law’ UNHCR Research Paper No. 136 (November 2006).

⁵⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304; Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints OJ L 180 respectively. It is noteworthy that while some of the EU asylum law instruments takes the form of ‘Regulations’ which are directly legally binding, most are ‘Directives’ which require a state to achieve a particular result, without specifying the means to do so, which has resulted in widely disparate asylum practices among EU member-states, see Sarah Craig and Karin Zwaan ‘Legal Overview’ in eds. Nick Gill & Anthony Good, *Asylum Determination in Europe: Ethnographic Perspectives* (Springer 2018) pp.27-49.

⁵⁶ Regulation (EU) No. 343/2003 of the European Parliament and Council, OJ L 50/2.

⁵⁷ At the time of writing the U.K. was still a part of the Dublin area and was going to be incorporated until the 31st December 2020.

⁵⁸ Regulation (EU) 604/2013 of the European Parliament and Council, OJ L 180.

1. Family reunification
2. Place of legal residence or awarded documentation
3. Place of entry
4. Place of application.⁵⁹

Secondary aims include to prevent abuse of the system through lodging multiple asylum claims in more than one member-state, asylum shopping (applicants picking and choosing their destination country), orbit cases (whereby no member state assumes responsibility for an asylum seeker's claim and the applicant is transferred between member-states unnecessarily or remains undocumented) and secondary movements in general.⁶⁰

The UNHCR have noted that the way in which information is gathered to inform a Dublin decision, indirectly prioritises certain criteria over others.⁶¹ In order to ascertain the state responsible, the applicant is interviewed. Some evidence is relied upon more routinely than others. A hit on the 'Eurodac' system for example (the EU asylum seeker fingerprint database), provides much more concrete, convenient evidence than potentially untenable claims of family members elsewhere in the EU.⁶² This has led to the application of the hierarchy of criteria in a way that is inconsistent with how it was intended, a trend emphasised across academic sources.⁶³

If responsibility is conferred to another state, the state in which the applicant is lodges a *take-back request* (if an asylum claim has already been made in another state) or a *take-charge request* (if another jurisdiction is proven as a point of entry and the state of first entry rule is invoked).⁶⁴ Then, if the requested state accepts the decision and assumes responsibility, provisions are made for a transfer. To date, the main issue that has arisen as a result of the Dublin procedure involves transfers to member states with problematic asylum processes and reception conditions as has been highlighted by EU court case-law.⁶⁵ There remains ambiguity regarding what constitutes a safe-third country, and membership in the EU-27 no longer renders a state *prima facie* up to standard.⁶⁶ Since jurisprudential precedence was set in *Soering v U.K.*, both the ECtHR and the CJEU have ruled that the extradition of an applicant to another member-state that is

⁵⁹ As stipulated through Articles 4-8 of EU Regulation 604/2013.

⁶⁰ Elizabeth Collett, 'The Asylum Crisis in Europe: Designed Dysfunction' (Migration Policy Institute Europe: September 2015).

⁶¹ UNCHR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation* (August 2017).

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Sarah Craig & Karin Zwaan 'Legal Overview' (n 55).

⁶⁵ See *M.S.S. v Belgium and Greece*, App. No. 30696/09 (21/01/11) for precedence.

⁶⁶ As explicated under Article 38 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 OJ L 180/60.

routinely infringing upon the human rights of asylum seekers infers responsibility of the extraditing state under Article 3 of the Convention.⁶⁷

Financially, the efficacy of the Dublin procedure is questionable. The operation the Dublin system, through direct and indirect costs, was estimated at €1bn. in 2018.⁶⁸ What complicates this staggering figure, is the fact that a relatively small number of Dublin transfers come to fruition. Estimated figures range from 8-35%.⁶⁹ Which suggests that the protracted, costly process of allocating responsibility may be rendered *tan vanem*.

Narratives of Reform

It is noteworthy, albeit disheartening, that as early as 2015, EU institutions have been aware of the shortcomings of the regulation and thus been drafting reports for its reform.⁷⁰ The complexity EU level legislative reform is not to be taken lightly and although precipitated by peak numbers of arrivals that year, it is a point of concern that the regulation solicited calls for reform so early on in its operation. The narratives surrounding the reform of the Dublin procedure can generally be seen in two veins of thought;

1. *Soft reform* – this involves maintaining the general thrust of the current regulation but streamlining administration through an **automated system**; developing a **reference key** to facilitate early identification of states with disproportionate claims; and introducing a **fairness mechanism** which works to redistribute surplus asylum seekers once a member state's quota exceeds 150%. Other member states are then obliged to accept transfers from over-burdened states, but can 'opt-out' if they make a solidary payment of €250,000 to the EU in order to offset the costs incurred by hosting the asylum seeker in another state (as advocated for by the European Commission).⁷¹
2. *Fundamental reform* – this entails a complete overhaul of the system and in lieu of the hierarchy of criteria, asylum seekers would be allocated across the EU from 'hotspots' through a centralised EU institution (as proposed by the European Parliament).⁷² In this scenario there are various degrees of theoretical autonomy for the person seeking refuge; whether they would have free

⁶⁷ *Soering v. the United Kingdom*, App. No. 14038/88 (ECHR, 02 July 1989).

⁶⁸ European Commission, 'Evaluation of the Dublin III Regulation Final Report' (DG Migration & Home Affairs, 2015).

⁶⁹ Eurostat, 'Dublin statistics on countries responsible for asylum application' September 2019.

⁷⁰ European Parliament, *The Reform of the Dublin III Regulation* (Brussels 2016) and European Commission, *The Reform of the Dublin System* (Brussels 2016).

⁷¹ European Parliament Briefing Paper, 'Reform of the Dublin System' (Brussels: European Parliamentary Research Service, March 2019).

⁷² *ibid.*

choice, limited choice or no choice in their country of destination. Proponents of offering choice to the applicant, suggest this would reduce the number of secondary movements across the Union.⁷³

Whether or not the systemic alterations contained in the soft reforms package would catalyse the radical revision needed to provide genuine relief to the over-burdened administrative systems, as well as the relief needed by asylum seekers waiting in abject conditions, is a point of conjecture.⁷⁴ Concerns over the rudimentary proposals for a Dublin IV framework abound, most vociferously with reference to the soft reform proposals, and can be summarised as follows;

- Distribution of responsibility – opponents claim frontline member-states will still bear an unfair share of responsibility. Many critics believe the supposed ‘corrective allocation mechanism’ would not remedy the baseline disparity between states at the EU’s external borders and those not.⁷⁵ Disparities would be aggravated by the counter-intuitive accrual of bureaucratic responsibilities through the pre-Dublin procedures, which require these states to assess the admissibility of a claim and orchestrate transfer to a safe-third country outside of the EU where necessary.⁷⁶ To add an extra bureaucratic process to an already heavily bureaucratized system does not seem to be the most strategic option. Furthermore, it compounds the gatekeeping responsibilities of frontline member-states and as proposed, these ‘checks’ would be voluntary under normal circumstances but mandatory during times of high inward-flow which seems blatantly illogical at best, capricious at worst. The European Council on Refugees and Exiles (ECRE) have maintained a position which expresses concern as to the paradox of annexing a singular mechanism in order to correct a fundamentally flawed system.⁷⁷
- Tokenistic solidarity - Some authors note that the soft reforms provide a hollow version of solidarity, whereby it’s possible to mitigate responsibility by literally, *buying out* of burden-sharing.⁷⁸ Others insist that this set of amendments do not alter the inherently transactional nature of asylum seeker swapping, where the individual is stripped of their agency and reduced to a file

⁷³ *ibid.*

⁷⁴ Sarah Progin-Theuerkauf ‘The Dublin IV Proposal: Towards more solidarity and protection of individual rights?’ *Sui-Generis* 2017, S. 61

⁷⁵ European Parliament ‘The Reform of the Dublin III Regulation’ (Brussels: LIBE Committee, 2016); see also ECRE ‘Beyond Solidarity Rights and Reform of Dublin (Legal Note No.3, 2018).

⁷⁶ In these circumstances, frontline countries would have to determine whether the asylum application is in and of itself valid and then deport those with inadmissible claims directly back to the country they arrived from see Sarah Progin-Theuerkauf ‘The Dublin IV Proposal: Towards more solidarity and protection of individual rights?’ (n 74).

⁷⁷ European Council on Refugees & Exiles (ECRE), *Position Paper on the Implementation of the Dublin Convention* (1st December 1997); also see European Council on Refugees and Exiles, *The Road Out of Dublin: Reform of the Dublin Regulation* (December 2016).

⁷⁸ Sarah Progin-Theuerkauf ‘The Dublin IV Proposal: Towards more solidarity and protection of individual rights?’ (n 74).

number, that ultimately is not rights-oriented.⁷⁹ If the root causes of the protracted, delayed nature of Dublin decisions being made are not addressed then no improvements in terms of the procedural efficacy of the system will ensue.

- Defensive logic – Many analysts see the projected Dublin project as being premised upon a defensive logic which views the individual as a perpetual flight-risk.⁸⁰ This dynamic is thus governed by coercion in lieu of cooperation. *Coercion* has many human and economic costs associated to it, and engenders a series of negative knock-on effects whereby the individual may attempt to evade the system; which in turn requires more coercive measures to carry out the Dublin procedure including detention and involuntary transfer.⁸¹ Alternatively, the threat of coercion may compel applicant to resort to secondary movements and its corollary challenges, which serves to further compromise the functionality of the CEAS *acquis*.⁸² There is a growing body of policy documents and academic research to suggest that more coercive measures will not bring about widespread compliance.

Effectively the nature of the solidarity espoused in the Dublin III Regulation and the policy documents proposing avenues for its reform, as well as the TFEU, is not reflective of the EU human rights regime. It neglects the agency of the asylum seeker which produces devastating consequences.⁸³ Indeed, the primary preoccupation of international organisations such as the EU is the welfare of its contracting nation-states. The currency may be nations; but nations are comprised of people, a fact at odds with the current operation of the regulation it would seem. The main form of solidarity discernible in the Dublin regulation exists in the discourse around ‘burden-sharing’, however the association between an individual, and the full set of rights and responsibilities they embody, as being a *burden* is symptomatic of the dehumanisation of the asylum seekers who find themselves in the international protection process.

Human rights pioneer and eminent political historian Hannah Arendt observed that colonialism birthed two new devices that were deployed in the imperialist agenda of European states: race and bureaucracy.⁸⁴ ‘Discovered’ independently, they morphed into a conglomerate affront on native populations

⁷⁹ *ibid*; see also European Parliament ‘The Reform of the Dublin III Regulation’ (Brussels: LIBE Committee, 2016).

⁸⁰ Valsemis Mitsegalis ‘Solidarity and Trust in the Common European Asylum System’ (2017) *Comparative Migration Studies* 2(2) 181-202.

⁸¹ Guy S. Goodwin Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalisation, Detention and Protection’ (UNHCR Global Consultation Research Paper, 2001).

⁸² European Parliament Briefing Paper, *Secondary Movement of asylum seekers in the EU asylum system*, PE608.728 (Brussels: European Parliamentary Research Service, October 2017).

⁸³ European Parliament ‘The Reform of the Dublin III Regulation’ (Brussels: LIBE Committee, 2016).

⁸⁴ Hannah Arendt, *On the Origins of Totalitarianism* (Harcourt Inc., 1951) p.243.

in what she refers to as ‘administrative massacres’.⁸⁵ Since 2015, it is the opinion of this author that EU asylum policy is creating series of *administrative massacres*. Or what one commentator notes as a ‘thousand little Guantánamos’.⁸⁶ Paradoxically, it is the unintended effect of globalisation and the aftermath of centuries of de-stabilising activities by European powers in the America, Asian and African continents that has produced such large numbers of people seeking refuge in the EU.⁸⁷

Solidarity between States

Solidarity is needed for both member states unable to manage the numbers they are faced with *and* the people themselves who are in double jeopardy, fleeing from persecution and then re-victimised at the hands of an inhospitable European society.⁸⁸ Ostensibly, the Dublin procedure *necessitates* solidarity between states as they deliberate as to where responsibility for status determination lies. It is being echoed across multiple layers of analysis ranging from EU institutions such as Council, Parliament and Commission documentation as well as grey literature produced by civil society groups that **solidarity** must be a guiding principle moving forward.⁸⁹ *But what of the current state of interstate solidarity?*

Since its conception, it has been apparent that the Dublin procedure is not designed to distribute asylum seekers evenly across the EU, thus contradicting common aims of burden-sharing and fairness.⁹⁰ While the refugee crisis of 2015 demonstrated that the procedure is ill-equipped to deal with large, sudden volume of refugees, it’s underlying logic places disproportionate responsibility on member-states by virtue of their geography.⁹¹ Critics of the Dublin procedure have long pointed to the Achilles heel of the legislation which is the primacy of the ‘state of first entry’ rule, which has effectively become the *de facto* deciding factor in a majority of Dublin cases.⁹² Overreliance on this rule creates asymmetrical obligations and leads to countries at the EU’s external borders such as Greece, Italy, Hungary and Austria invariably being overburdened. Growing resentment toward the ever-increasing divergence of realities between the Eastern

⁸⁵ *ibid.*

⁸⁶ Matthew J. Gibney ‘A Thousand Little Guantánamos: Western States and Measures to Prevent the Arrival of Refugees’ in Kate E. Tunstall (ed) *Displacement, Asylum and Migration* (2006 Oxford Press).

⁸⁷ *ibid.*

⁸⁸ Joint Agency Briefing Paper ‘A Dangerous ‘Game’ The pushback of migrants, including refugees, at Europe’s borders’ (Belgrade Centre for human Rights, Macedonian Young Lawyers Association & Oxfam 2017).

⁸⁹ European Commission, ‘Evaluation of the Dublin III Regulation Final Report’ (DG Migration & Home Affairs, 2015); European Parliament Briefing Paper, ‘Reform of the Dublin System’ (Brussels: European Parliamentary Research Service, March 2019) and European Parliament ‘The Reform of the Dublin III Regulation’ (Brussels: LIBE Committee, 2016).

⁹⁰ Elizabeth Collett, ‘The Asylum Crisis in Europe: Designed Dysfunction’ (Migration Policy Institute Europe: September 2015); see Article 67 & 80 of the TFEU for reference to the principle of solidarity.

⁹¹ Lillian M. Langford ‘The Other Euro Crisis: Rights Violations Under the Common EU Asylum System and the Unravelling of EU Solidarity’ (2013) *Harvard Human Rights Journal* 26(1).

⁹² European Council on Refugees and Exiles, *The Road Out of Dublin: Reform of the Dublin Regulation* (December 2016).

and Western fronts of the EU, coupled with the lack of compensatory measures being introduced by unaffected states threatens the principle of solidarity that the CEAS is premised upon.⁹³ Here some of the human rights issues presented by the regulation will be assessed.

In the landmark case of *M.S.S. v Belgium and Greece*, the ECtHR ruled that both the Belgian and Greek governments were in violation of the claimant's rights.⁹⁴ The Belgian government were held accountable for the unexecuted transfer to the claimant to Greece where the systematic deficiencies were universally acknowledged. Greece, in this instance, did not constitute a safe-third country. However just three years prior in *K.R.S. v United Kingdom*, a case contesting a Dublin ordered transfer to Greece was deemed inadmissible as there no grounds to suggest the claimant would not be afforded their procedural and substantive rights upon return.⁹⁵ Perhaps more puzzling, is the 2013 case of *Sharifi v Austria*, where there was no violation found on behalf of the state, to transfer the claimant to Greece, for although the 'serious deficiencies' existed, the Austrian government was held as 'unaware' and thus unaccountable.⁹⁶ Seminal judgements from the CJEU, prescribed a new precedent which has been incorporated into Article 3(2) of the recast Dublin regulation that transfers may not assume conclusive application of human rights law in corresponding states and therefore imposes an additional obligation on states to assess the effects a return order would produce. Interestingly, in the case of *Mohammadi v Austria*, the states proposed transfer to Hungary due to the first state of entry rule was not found to be in violation of Article 3 of the Convention despite the fact that Hungary has a detention rate of 99% coupled with one of the lowest recognition rates across the EU.⁹⁷ Evidently, standards of compliance to human and refugee right vary significantly across the EU and the assumption that each nation in the Dublin region is a safe-third country is no longer guaranteed.

The primary understanding of interstate solidarity is that of intergovernmentalism: both in communication and compliance with human rights law. Lateral bureaucracy involved in following the mandate set out in the Dublin procedure entails significant interstate, and therefore intergovernmental communication.⁹⁸ Inadvertently, EU member states may be compromising their obligation under the Geneva Convention by striking deals with states who are not party to the standards codified in that

⁹³ Hanne Beirens, 'Cracked Foundations, Uncertain Future: Structural Weaknesses in the Common European Asylum System' (Migration Policy Institute Europe: March 2018).

⁹⁴ *M.S.S. v Belgium and Greece*, App. No. 30696/09 (21/01/11).

⁹⁵ *K.R.S. v United Kingdom*, App. No. 32733/08 (02 December 08).

⁹⁶ *Sharifi v Austria*, App. No. 60104/08 (5 December 2013).

⁹⁷ In particular see *Mohammadi v Austria*, App. No. 71932/12 (17 November 2014); for information regarding the situation of asylum seekers in Hungary please see European Commission, 'Evaluation of the Dublin III Regulation Final Report' (DG Migration & Home Affairs, 2015).

⁹⁸ See Articles 34 & 35 as per the onus on member-states to share information freely during the Dublin procedure in Regulation 604/2013 OJ L 180/33.

legislation. Although it has been reiterated across EU case-law and position papers from international humanitarian groups, evidence of solidarity between states often carries the cost of rights protection for the individual.⁹⁹ Take for example the E.U. Turkey deal which came into effect in 2016.¹⁰⁰ This bilateral deal between Greece and Turkey mandates a human exchange; for every ‘irregular’ migrant returned from the Greek islands to Turkey, one registered Syrian refugee will be relocated from Turkey to an EU member-state.¹⁰¹ This agreement has been subject to outcry across human rights groups as Turkey has a volatile application of refugee rights.¹⁰²

Ultimately the true test of interstate solidarity should be against the level of cooperation in the Dublin transfer system i.e. the acceptance rate of take-back and take-charge requests. According to data from 2018, only 9 of the 32 of the state parties had an acceptance rate of more than 50%. Both Portugal (94.4%) and Estonia (90.9%) ranked highest in national acceptance rates. While Greece (2.5%) and Hungary (18.8%) were the states with the lowest acceptance rates. In 2019 Greece lodged 5,459 transfer requests to other EU states, 2,542 of which were executed. On the other hand, it received 12,718 incoming requests – only 33 of these potential transfers were carried out. The logic underpinning the Dublin procedure is that of *automaticity*. High levels of interstate communication and cooperation are taken for granted which, do not occur so seamlessly.

The Dublin III document highlights that ‘[s]olidarity, which is a pivotal element in the CEAS, goes hand in hand with mutual trust.’¹⁰³ The usage of the concept of ‘solidarity’ in EU asylum law and policy reflects its relevance as a *crisis management* strategy through prescribing a contingency approach, rather than it being asserted as a core value. The so-called ‘solidarity clause’ which allows EU states to *work together to respond quickly, effectively and consistently in the event of terrorist attacks or natural or man-made disasters*, is indicative of the tendency to equate solidarity with emergency measures elsewhere.¹⁰⁴ In the roadmap documents (chiefly TEU and TFEU) detailing EU’s organisation as a collective bloc,

⁹⁹ Esin Küçük, ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) *European Law Journal* 22(4) pp.448-469; see also Polly Pallister Wilkins, ‘The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros’ (2015) *International Political Sociology* 9(1) pp.53-69.

¹⁰⁰ Council of Europe (CoE) ‘The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016.’ (2016) *Parliamentary Assembly Resolution 2109*.

¹⁰¹ Council of Europe (CoE) ‘The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016.’ (2016) *Parliamentary Assembly Resolution 2109*.

¹⁰² Lisa Haferlach & Dilek Kurban, ‘Lessons Learnt from the EU-Turkey Refugee Agreement in Guiding EU Migration Partnerships with Origin and Transit Countries’ (2017) *Global Policy Special Issue: Europe and the World Global Insecurity and Power Shifts* 8(54) 85-93.

¹⁰³ Regulation 604/2013 OJ L 180/33 Section 22.

¹⁰⁴ Valsamis Mitsilegas, ‘Solidarity and Trust in the Common European Asylum System’ (2014) *Comparative Migration Studies* 2(2) pp.181-202.

solidarity is referenced heavily. Yet, as has been argued, the dimensions of interstate solidarity are invariably state-centric, securitised and exclusionary.¹⁰⁵

This chapter has highlighted that although solidarity is given ample lip-service and rhetorical reference, it does not translate into rights-based, consistent practices between member states. What will be outlined in the following chapter is how this tension between solidarity and sovereignty extends to how a state develops their asylum policy, and how the reconciliation between international human rights obligations and domestic interests is not a seamless fit.

Chapter 3

Inter-social provision: Solidarity or Criminalisation?

In this chapter, the relationship between states and asylum seekers will be explored. The EU asylum *acquis* claims to operate in full consideration and application of the Geneva Convention (herein the Convention).¹⁰⁶ According to the Convention, to which 167 states internationally (including the EU-27 member-states) are party, states are obliged to offer a set of rights to refugees *and* potential refugees, meaning asylum seekers fall under the protection of this framework. Globally, this varies between region in degree of application.¹⁰⁷ In Africa and Latin America there are regional refugee regimes in place, while in the Middle East there is a culture of non-commitment to the Convention and other similar frameworks.¹⁰⁸ This resistance is particularly paradoxical considering the centrality of forced migration in the reality of life in that area over successive decades.¹⁰⁹

Several steps will be taken in order to examine this relationship in the EU context. Firstly, the solidarity states *legally* must offer asylum seekers is summarised through reference to the Convention. Secondly, and the relationship between ‘state’ and ‘asylum seeker’ is examined through pertinent EU case law. Thirdly, the legitimacy of EU provision of ‘solidarity’ will be contested through analysis of the lawfulness of controversial practices such as the use of camps, detention and pushbacks.

¹⁰⁵ *ibid.*

¹⁰⁶ In the Dublin III Regulation for example, Article 3(5) affirms that “Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third State ... in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol” EU Regulation No. 604/2013.

¹⁰⁷ Hafner-Burton E.M. and Tsutsui, K. ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (2005) *American Journal of Sociology* 110(5).

¹⁰⁸ Maja Janmyr ‘No Country of Asylum: ‘Legitimizing’ Lebanon’s Rejection of the 1951 Refugee Convention’ (2017) *International Journal of Refugee Law* 29(3) 438-465.

¹⁰⁹ *ibid.*

International Refugee Protection Regime and the Law of Solidarity

The cornerstone of the International Refugee Protection Regime is the Geneva Convention. Some authors point to the anachronism of the Convention to guide contemporaneous migratory challenges.¹¹⁰ Originally formulated with post-WW2 refugees in mind, the initial instrument was amended in 1967 in New York to extend its provisions to other displaced peoples.¹¹¹ However, if one scours the *travaux préparatoires* of the legislation and its concomitant extensions, it is evident that the generous provisions enshrined within have been divisive since their genesis, leading some commentators to question if nation-states would become signatories in the present day international arena.¹¹² The Convention makes provisions for a refugee's, *inter alia*;

- Right to work
- Right to education
- Right to housing
- Right to freedom of religion
- Right to access the courts and to public relief and assistance.¹¹³

Perhaps most central to the set of rights granted in this framework is Article 33, which articulates the **principle of non-refoulement**. It states;

“No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹¹⁴

It is this provision that has become paramount in matters of refugee law and the litigation of migration. However, it is frequently a locus for various conflicting interpretations. Critics of the Convention point to the fact that it does not confer the right to assistance until an individual reaches a signatory country.¹¹⁵ Usage of the verbs ‘expel’ or ‘return’ implies obligation is only activated once the individual finds

¹¹⁰ Adrienne Millbank, ‘The Problem with the 1951 Convention’ Research Paper [5 2000-01](#) (Social Policy Group, Parliament of Australia 2000).

¹¹¹ Liisa Malkki, ‘Refugees and exiles: From ‘Refugee Studies’ to the national order of things’ (1995) *Annual Review of Anthropology* 24, 495-523.

¹¹² Paul Weis, *travaux préparatoires* and the 1951 Refugee Convention; see also Adrienne Millbank, ‘The Problem with the 1951 Convention’ (n 107).

¹¹³ Articles 17-19; 22; 21; 4; 16 and 23 of the UN 1951 Convention on the Status of Refugees respectively.

¹¹⁴ *ibid.*

¹¹⁵ Adrienne Millbank, ‘The Problem with the 1951 Convention’ (n 107).

themselves in the territory itself; this nuance is routinely used to justify harsh border controls and denial of entry.¹¹⁶ Concerns over a host of *non-arrival* measures executed by EU member-states have been raised from various civil society groups and human rights watchdogs, some of which will be mentioned later in the chapter.¹¹⁷ Consideration of the inter-social dynamic prompts acknowledgement of inherent tension in the competing agendas of both the state (through their objective of maintaining sovereignty in the capacity to control inward migration) and the individual (through their interest in generating solidarity in the form of asylum).

This tension has reemerged at various points of policy formation as states endeavoured to balance their obligations under international human rights law with their national interests. Take for example the development of Article 14 of the Universal Declaration of Human Rights (UDHR): the right to asylum. In its initial phrasing it appeared as:

*“Everyone has the right to seek and to be granted asylum in other countries from persecution.”*¹¹⁸

But it was objected by several states on the ground that it located the right firmly in the hands of the refugee and compromised the sovereignty of the state.¹¹⁹ It was then reworded as:

*“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”*¹²⁰

Ergo, the right to **seek** asylum is absolute, but to be **granted** the privilege is subject to state discretion. The present version was referred to as ‘artificial to the point of flippancy’ by one international lawyer.¹²¹ The negation of the right being in the propriety of the individual has been meticulously crafted through deliberate strategic language.¹²² Herein lies a crucial conflict of understanding and semantic minefield. The concept of ‘asylum’ has been repeatedly constructed as *a right of the state to exercise* in line with their sovereignty, as opposed to the construction of the individual as the rights bearer.¹²³

In another vein of thought, the ‘state’ and the ‘refugee’ are not in conflict, rather they inform each-other. Historically, both the refugee and the nation-state became consolidated in the European landscape through the middle of the last century, in which sovereign nation-states became the default organising constituent of the global order; while diverse groups of displaced peoples became

¹¹⁶ Paul Weis, ‘Human Rights and Refugees’ (1972) *International Review of the Red Cross Archive* pp.537-546.

¹¹⁷ Joint Agency Briefing Paper ‘A Dangerous ‘Game’ The pushback of migrants, including refugees, at Europe’s borders’ (Belgrade Centre for human Rights, Macedonian Young Lawyers Association & Oxfam 2017).

¹¹⁸ As cited in Paul Weis, ‘Human Rights and Refugees’ (n 42) 541.

¹¹⁹ Sir Hersch Lauterpacht, ‘The Universal Declaration of Human Rights’ (1948) *British Yearbook of International Law* 374.

¹²⁰ *ibid.*

¹²¹ Sir Hersch Lauterpacht, ‘The Universal Declaration of Human Rights’ (n 118).

¹²² Paul Weis, ‘Human Rights and Refugees’ (1972) *International Review of the Red Cross Archive*, 537-546.

¹²³ *ibid.*

homogenised under the umbrella label of ‘refugee’.¹²⁴ Citizenship became the criteria of one as a rights-bearer, and the demarcation between nationals and non-nationals was blatant.¹²⁵ Even the concept of a ‘refugee’ itself relies on the existence of a nation-state to deliver its salvation in the form of asylum. Refugee discourse has typically assumed the axiomatic presence of the nation-state; *stateless individual need states*. Malkki asserts that ‘the implementation of [refugee] policies and practices becomes a moment where national sovereignty is reasserted, reconstructed and reproduced in the present.’¹²⁶ Therefore it can be argued that although there exists a tension in the practical dynamic of sovereignty versus solidarity, the nation-state and the refugee, at least conceptually, reinforce each other. Dialectically, the truth resides amidst these two viewpoints. Indeed, the concept of the ‘refugee’ is predicated on prescription to the credence in the nation-state system. But their very existence, and the extent of *solidarity* it demands, compromises the core characteristic of nation-states: their sovereignty.

This tension is not novel. However, the unprecedented numbers of asylum applicants in Europe in recent years has shed new light on it as EU legal systems, member-state’s interests and the rights of people trying to access international protection all jar against each other, increasingly and blatantly.¹²⁷ The visibility of these tensions is also novel, as owing to technology we are more aware than ever of what is happening geopolitically in other parts of the world.¹²⁸ One author refers to refugee rights as ‘destabilisation rights’ as their enforcement, and the invariable ramifications it has on domestic and international constitutionalism, calls into question the legitimacy of the nation-state.¹²⁹ It has been noted that the ‘refugee crisis’ may be more aptly viewed as a crisis of law, human-rights crisis and/or state-system collapse.¹³⁰ What Kant or Derrida would have envisioned as modern day *cosmopolitics* is in fact grossly dysfunctional in 21st century asylum practice, as the fragility of EU commitment to cosmopolitan norms is becoming progressively exposed and revealing a ‘longstanding ambivalence to non-EU asylum

¹²⁴ Eithne Luibhéid, ‘Childbearing Against the State? Asylum Seeker Women in the Irish Republic’ (2004) *Women’s Studies International Forum* 27(4), 335-349.

¹²⁵ Bryan Fanning, *Racism and Social Change in the Republic of Ireland* (Manchester University Press 2002).

¹²⁶ Liisa Malkki, ‘Refugees and exiles: From ‘Refugee Studies’ to the national order of things’ (1995) *Annual Review of Anthropology* 24, 495-523.

¹²⁷ Hannah Beirens, ‘Cracked Foundations, Uncertain Future: Structural Weaknesses in the Common European Asylum System’ (Migration Policy Institute Europe: March 2018).

¹²⁸ Maya Stewart & Ulrike Schultze ‘Producing solidarity in social media activism: The case of My Stealthy Freedom’ (2019) *Information & Organisation* 29(3).

¹²⁹ Galina Cornelisse, ‘Immigration detention and human rights: rethinking territorial sovereignty’ (Martinus Nijhoff Publishers, 2010).

¹³⁰ *ibid.*

seekers.¹³¹ The fatal consequences of the exclusionary nature of EU asylum policy is numerable: there have been 40,555 documented deaths of refugees and migrants trying to access the EU since 1993.¹³²

At times, the repeated conceptualisation of the refugee ‘crisis’, obscures the fact that in Ireland our immigration organisations such as the Irish Naturalisation and Immigration Services (INIS) and International Protection Office (IPO) are **not** under the inordinate amount of pressure experienced in other EU states. The very real crises taking place at Europe’s external borders does not translate to our national circumstances. As has been highlighted, because of its geography, Ireland is not confronting the same intensity of pressure to process and accommodate exponential number of asylum seekers. Similarly, Ireland has only ever been charged with a marginal role in hosting refugees for resettlement in any of the successive waves of destabilisation that defined 20th century geopolitics.¹³³ In this period only roughly 400 refugees from Nazi Germany; 517 from Hungary 1956-58; 120 Chileans in the 70s; 582 Vietnamese between 1979-88 and a meagre sum of 25 Iranians were resettled in Ireland.¹³⁴ Even more recently, in the aftermath of the Syrian war and the inordinate pressures in the asylum processes of Greece and Italy, the Irish state agreed to resettle 4,000 Syrian refugees, of which only 3,151 have arrived safely.¹³⁵ It is concerning that even the arguably small numbers committed to have not been met. The situation in Ireland is distinct although it receives relatively small numbers of asylum applications, its service provision is still subject to significant speculation and criticism from local civil society groups.¹³⁶ Ironically, Ireland received a relatively low number of asylum applications in 2015 (3,276) while applications peaked in 2002 (11,634).¹³⁷ On average, from 2008 to 2020 the monthly number of asylum applications has been 206.35, reaching a peak in September 2019 with 665 and an lowest number of 30 in April 2020.¹³⁸ In total, the number of asylum seekers in Ireland has never exceeded 0.3% of the total population, a fractional amount.

¹³¹ Kani, J.K. ‘The Erasure of Race: Cosmopolitanism and the Illusion of Kantian Hospitality’ (2017) *Millenium Journal of International Studies* 45(3).

¹³² Over the period 1993-2020, as recorded by the UNITED List of Refugee Deaths < <http://unitedagainstrefugeedeaths.eu/wp-content/uploads/2014/06/ListofDeathsActual.pdf>> accessed 19 August 2020.

¹³³ Joe Moran, ‘Refugees and Social Policy’ in Suzanne Quin, Patrice Kennedy, Annie O’Donnell and Gabriel Kiely (eds) *Contemporary Irish Social Policy* (UCD Press 2005).

¹³⁴ *ibid.*

¹³⁵ Relocation schemes were developed in the wake of the large volumes of international protection applicants in 2015 (Council Decision (EU) 2015/1601 *OJ L248/80.*, and on the 10th September the Irish government launched the Irish refugee Protection Programme (IRPP)

¹³⁶ NASC & Irish Human Rights and Equality Commission, ‘Beyond McMahon – The Future of the Irish Asylum Reception System (Dublin: July 2018).

¹³⁷ Statistics as cited in Piaras Mac Éinrí & Allen White ‘Immigration into the Republic of Ireland: a bibliography of recent research’ (2008) *Irish Geography* 41(2), pp.151-179; and others taken from the Irish International Protection Office (IPO) website.

¹³⁸ Official International Protection Office (IPO) statistics.

Yet the simple fact remains, even when presented with the task of providing for minimal amounts of asylum seekers, state provision still results in abysmal living conditions. In Ireland, Asylum seekers are accommodated through a system called Direct Provision. Originally designed as a short-term response, designed as an interim measure in 1999 the system has been operational for over 20 years and has garnered significant criticism.¹³⁹ Much has been researched as to the inefficacy in terms of extremely long waiting times of RSD as well as the inadequacy of the accommodation standards themselves.¹⁴⁰ In 2020, amid the Covid-19 pandemic self-organised asylum seekers have been campaigning against their treatment in their respective accommodation centres and their efforts culminated in recognition from the state that several of these centres were not fit for purpose and their closures have been mandated.¹⁴¹

Until 1999 the set of rights granted to an asylum seeker were not unlike those granted to an EU national on arrival to Ireland: full access to social welfare, immediate entry into the labour market, and equivalent eligibility for educational and other forms of social assistance.¹⁴² Up until this point an asylum seeker was considered in the same way an Irish citizen would be if they presented in circumstances of homelessness, and responded to accordingly. However, since the introduction of Direct Provision there has been radical departure from this equitability. Literature points to a cumulative shift from asylum seekers being equal to lawful citizens as being systematically discriminated against by virtue of their documentation, or lack thereof.¹⁴³ There is a significant corpus of research detailing the multiple ways in which asylum seekers in Ireland are denied their basic civic and human rights.¹⁴⁴ It is the view of this author that the Irish government has in fact *digressed*, in recent history in terms of the solidarity it proffers to asylum seekers. Quite often, defensive positions on EU asylum policy present existent deficiencies as a direct result of impossible volumes of applicants, but in the Irish context at least the numbers do not support this argument. Changes in social policy, not only in Ireland but in the U.K., Austria and Hungary have amounted to the incremental erosion of asylum seekers rights.¹⁴⁵ Now, some of the more extreme derogations of inter-social solidarity will be documented.

¹³⁹ NASC & Migrant and Refugee Rights Centre ‘Submission to the Joint Oireachtas Committee on Justice and Equality on Direct Provision and the International Protection Application Process’ (Cork: June 2019).

¹⁴⁰ NASC & IHREC, ‘Beyond McMahon – The Future of the Irish Asylum Reception System’ (n 163).

¹⁴¹ Harry McGee, ‘Controversial Skellig Star direct provision centre in Kerry to close’ *The Irish Times* (30 July 2020).

¹⁴² Liam Thornton ‘Social Welfare Law & Asylum Seekers in Ireland: An Anatomy of Exclusion’ (n 166).

¹⁴³ Luibhéid, E. ‘Childbearing Against the State? Asylum Seeker Women in the Irish Republic’ (2004) *Women’s Studies International Forum* 27(4) 335-349; Irish Refugee Council, *The Reception Conditions Directive: One year on July 2019* (Dublin: July 2019).

¹⁴⁴ *ibid.*; see also Liam Thornton ‘Social Welfare Law & Asylum Seekers in Ireland: An Anatomy of Exclusion’ (n 166) as well as various reports issued by domestic rights activist groups including NASC & Migrant and Refugee Rights Centre ‘Submission to the Joint Oireachtas Committee on Justice and Equality on Direct Provision and the International Protection Application Process’ (n 138) and NASC & Irish Human Rights and Equality Commission, ‘Beyond McMahon – The Future of the Irish Asylum Reception System’ (n 135).

¹⁴⁵ *ibid.* and Inglehart, R. F. and Norris, P. ‘Trump, Brexit and the Rise of Populism, Economic have-nots and cultural backlash’ (August 2016) *HKS Faculty Research Working Paper Series RWP16-026*.

Contentious treatment of Asylum Seekers at EU's External Border

The terms of the Convention apply to only those who find themselves *within* a territory that is party to the Convention, which has been critiqued as a weakness of the framework, and has resulted in a situation whereby EU's external border has become fraught with mass human rights violations.¹⁴⁶ Obligations are strategically evaded through non-arrival measures or 'pre-emptive measures of exclusion' which are usually implemented extra-territorially.¹⁴⁷ This means states are not *technically* in contravention of their international human rights obligations but have creatively avoided a situation where an individual in need can enter their territory and gain full access to non-derogable rights.¹⁴⁸ In this section some of the most contentious practices in EU asylum processes will be outlined including; **camp**, **detention** and **push-backs**. At this point it is worth drawing attention to the founding principles of the EU: human dignity, freedom, equality and solidarity.¹⁴⁹ All of which, this paper argues, are being unequivocally violated at Europe's border.

The **camp** is the standard asylum seeker accommodation apparatus and unfortunately, has become synonymous with systemic human rights violations.¹⁵⁰ Over-crowding, scarce resources and conditions that represent gross dereliction of obligation under the Convention have been consistently reported and confirmed.¹⁵¹ In Greece, many of the camps located on the islands in the Aegean sea have received media coverage and public condemnation.¹⁵² Moria Camp on Lesbos island, in which upward of 19,000 individuals inhabited despite its capacity being 2,800 was burned to the ground on 9 September 2020 as the humanitarian situation escalated to a dangerous peak.¹⁵³ Concerns had been raised from local community groups and international organisation *inter alia* Médecins Sans Frontières (MSF), the United Nations High Commissioner for Refugees (UNHCR) and European Council for Refugees and Exiles (ECRE) for 5 consecutive years as to the conditions in Moria among other camps, yet substantive reform has yet to transpire. Although a state is required under the Convention to offer the *right to housing*, an ideal reaffirmed

¹⁴⁶ Adrienne Millbank 'The Problem with the Refugee Convention' (n 105)

¹⁴⁷ Matthew J. Gibney 'A Thousand Little Guantanamos: Western States and Measures to Prevent the Arrival of Refugees' in Kate E. Tunstall (ed) *Displacement, Asylum and Migration* (Oxford Lecture Series 2011).

¹⁴⁸ Nuala Haughey, 'Immigrants turned back by Ferry Staff' Irish Times (2001, February 3).

¹⁴⁹ EU Charter of Fundamental Freedoms, OJ EC 364/8.

¹⁵⁰ Maja Janmyr, 'Attributing Wrongful Conduct of Implementing Partners to UNHCR' (2014) *Journal of International Humanitarian Legal Studies* 5(2) 42-69.

¹⁵¹ UNCHR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation* (August 2017).

¹⁵² Leslie Carretero 'Life in the Moria Camp on Lesbos; Every day, someone is injured' (Infomigrants, 24 January 2020) <<https://www.infomigrants.net/en/post/22268/life-in-the-moria-camp-on-lesbos-every-day-someone-is-injured>> accessed 6 August 2020.

¹⁵³ Euronews 'New fire at overcrowded migrant camp on Greek island of Lesbos' (10 September 2020) <<https://www.euronews.com/2020/09/10/new-fire-at-overcrowded-migrant-camp-on-greek-island-of-lesbos>> accessed 12 September 2020.

in the Receptions Conditions Directive, accommodation is provided in the way of camps which invariably does not meet these standards.¹⁵⁴

Another area of alarm is the inappropriate use of **detention**. The ever-increasing securitisation of the EU's external borders has inadvertently led to the criminalisation of migrants, a topic attaining burgeoning consensus across EU migration scholarship.¹⁵⁵ The Convention states in Article 31 that states cannot penalise refugees 'on account of their illegal entry or presence' in a territory.¹⁵⁶ The practice of both unlawful and arbitrary detention have been identified in EU asylum case law.¹⁵⁷ Observers have signposted inappropriate, excessive and unlawful use of detention in several EU states for a successive number of years.¹⁵⁸ In Greece, there is a longstanding lobby by civil society groups and NGOs to refrain from the unlawful deprivation of liberty of asylum seekers, something which is prohibited in the UDHR, the EU Charter and the ECHR.¹⁵⁹ This prohibition is qualified in the EU asylum *acquis* specifically where it is asserted that a return decision (i.e. Dublin transfer or deportation order following a rejected protection claim) in and of itself does not justify detention, the state must make a *reasoned decision* explicating its use.¹⁶⁰ This remains a firmly theoretical standard and is not practiced by many EU states.¹⁶¹ Legislation abounds to delimit detention as a last resort, yet there is ample evidence to suggest that it is used routinely, in direct contravention to law.¹⁶² Detention is warranted in few situations: in order to prevent unauthorised entry and preceding a return order when there is a legitimate flight risk.¹⁶³ The most recent domestic legislation in Greece, the International Protection Act, has not substantiated the procedural rights needed

¹⁵⁴ Directive 2013/33/EU of the European Parliament and of the Council 26 June 2013.

¹⁵⁵ Academic interest in this area reflects the proliferation of immigration control practices that incorporate increasing reliance on militarisation, coercion and incarceration, see for example texts such as Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015); see also Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers, 2010) and Lillian M. Langford, 'The Other Euro Crisis: Rights Violations Under the Common EU Asylum System and the Unravelling of EU Solidarity' (2013) *Harvard Human Rights Journal* 26(1).

¹⁵⁶ Article 31 in the UN Convention Relating to the Status of Refugees.

¹⁵⁷ The detention involved in the following cases has been arbitrated as unlawful; *Rahimi v. Greece*, App. No. 8687/06 (05 July 2007); *S.Z. v. Greece*, App. No. 66702/13 (21 June 2018); and *SH.D & others v. Greece, Austria, Croatia, Hungary, Macedonia, Serbia and Slovenia*, App. No. 14165/16 (13 June 2019). For an example of case-law based on arbitrary detention please refer to *Khalifa & Others v. Italy*, App. No. 16483/12 (15 December 2012).

¹⁵⁸ Minos Mouzourakis, 'All but last resort: the last reform of detention of asylum seekers in Greece' *EU Immigration and Asylum Law and Policy* blogpost <<http://eumigrationlawblog.eu/all-but-last-resort-the-last-reform-of-detention-of-asylum-seekers-in-greece/>> accessed 14 July 2020.

¹⁵⁹ Article 3 of the Declaration; Article 6 of the Charter and Article 5 of the Convention all speak to the right to liberty.

¹⁶⁰ Guy S. Goodwin Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalisation, Detention and Protection' (UNHCR Global Consultation Research Paper 2001).

¹⁶¹ Minos Mouzourakis, 'All but last resort: the last reform of detention of asylum seekers in Greece' (n 143).

¹⁶² Article 6 of the EU Charter 'Everyone has the right to liberty and security of person'; Article 5 of the ECHR

¹⁶³ European Asylum Support Office, Detention of applicants for international protection in the context of the Common European Asylum System (EASO 2019).

by asylum seekers to avoid unlawful detention.¹⁶⁴ In fact, to the contrary, one author suggests it has further entrenched blurred boundaries between legitimate and illegitimate detention in various ways.¹⁶⁵

Elsewhere in Europe, Hungary has recently been found in breach of EU law. Both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have found Hungary's asylum practices to be in violation of EU law.¹⁶⁶ The latter court, in the case of *Ilias and Ahmed v Hungary* in 2019 found that returning the two asylum applicants to Serbia constituted *refoulement*, as they may have been subjected to inhumane or degrading treatment on arrival.¹⁶⁷ Furthermore, the CJEU heightened the gravity of Hungary's return of the applicants by ruling that their confinement for 23 days in the Röszke transit zone along the Serbian-Hungarian border, amounted to arbitrary detention.¹⁶⁸ The relevance of this judgement is yet to be determined and whether it will precipitate any concrete improvement for asylum seekers seems unlikely. The fact that the Commission itself lodged the infringement proceedings is worth noting however, as it did not follow the prior trend of claimants being asylum seekers themselves. If this shift is indicative of EU institutions intervening in certain member-states non-compliance with human rights law, then that is a welcome development indeed to the humanitarian regime.

The above case demonstrates not one, but *two* border practices raising questions of legality: detention and push backs. Push backs occur extrajudicially, referring to the *informal expulsion* of an individual or group to another state, in contrast to deportations which follow due process.¹⁶⁹ Article 4 in Protocol 4 to the Convention prohibits the 'collective expulsion of aliens.'¹⁷⁰ Pushbacks have become progressively standard in the Balkan region, where the EU threshold lies.¹⁷¹ Effectively, they involve the prevention of an individual to cross a border in order to apply for international protection and become safeguarded by international refugee protection mechanisms. They necessitate the use of force and are

¹⁶⁴ The IPA came into effect in 2018, for more information see Minos Mouzourakis, 'All but last resort: the last reform of detention of asylum seekers in Greece' (n 143).

¹⁶⁵ *ibid.* Including increasing the maximum length of asylum detention orders, repealing the binding prerequisite of a recommendation from the Asylum Service preceding enforcing a detention order and expanding upon the grounds for detention.

¹⁶⁶ Judgment in Joined Cases C-924/19 PPU and C-925/19 PPU from the CJEU; see also *Ilias and Ahmed v. Hungary*, App. No. 47287/15 (21 November 2019).

¹⁶⁷ *Ilias and Ahmed v. Hungary*, App. No. 47287/15 (21 November 2019).

¹⁶⁸ Amnesty International, 'Hungary: European Court declares authorities broke EU law by detaining asylum-seekers in transit zone' (14 May 2020) < <https://www.amnesty.org/en/latest/news/2020/05/hungary-european-court-declares-authorities-broke-eu-law-by-detaining-asylum-seekers-in-transit-zone/> > accessed 1 August 2020.

¹⁶⁹ Joint Agency Briefing Paper 'A Dangerous 'Game' The pushback of migrants, including refugees, at Europe's borders' (n 116).

¹⁷⁰ As stipulated in Article 3 of Protocol 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁷¹ Joint Agency Briefing Paper 'A Dangerous 'Game' The pushback of migrants, including refugees, at Europe's borders' (n 116).

unequivocally located on the coercive rather than cooperative end of the inter-social relationships' spectrum.

They also occur at sea, where boats are prevented from landing and disembarking through an array of measures. The European Border and Coast Guard Agency (commonly known as Frontex) has become increasingly militarised.¹⁷² Again, the objective of this institution is the securitisation of EU's external border. The extent to which that is reconcilable with humanitarianism is open to debate. Critical literature repeatedly echoes the paradox of protection; in order to protect the interests of the nation-state is the protection of the asylum seeker jeopardised? Conflict arises in the tensions between care and control; the subject (asylum seekers, police forces and local population) and object (border control, territory and the nation-state).¹⁷³

The efforts by the EU to propagate additional measures to prevent potential protection applicants from ever leaving their countries is an extreme cause for concern.¹⁷⁴ These phenomena comprise a systematic evasion of refugee rights as espoused in the Convention. The gravitas of the human rights agenda is massively undercut when states obviate from their application to certain individuals. Refugees, by definition, must rely on the solidarity of states outside of their country of origin to uphold and vindicate their human rights. Granted, the irony of vulnerable groups of individuals being effectively criminalised is not without attention and has garnered consistent outcry from human rights activists, legal professionals and academics.¹⁷⁵ Their substandard living conditions, unlawful detention and non-arrival measures constitute structural violence and litigation in this area is likely to increase. Furthermore, the call for more 'solidarity' evinced in EU level policy proposal is hollow and self-referential. It speaks almost exclusively to the *supposed* solidarity of burden-sharing and continues to reflect a *crisis mentality*, aimed at alleviating perceived urgent pressures on member-states as opposed to sustainably championing the rights of individuals in need.¹⁷⁶

¹⁷² Polly Pallister Wilkins, 'The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros' (2015) *International Political Sociology* 9(1) 53-69.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.* and Tamas Dezso Ziegler, 'EU Disintegration as cultural insurrection of anti-Enlightenment tradition' (2020) *Journal of Contemporary European Studies*, DOI: 10.1080/14782804.2020.1784109.

¹⁷⁵ Polly Pallister Wilkins, 'The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros' (n 156)

¹⁷⁶ Valsamis Mitsilegas 'Solidarity and Trust in the Common European Asylum System' (2017) *Comparative Migration Studies* 2(2) 181-202.

Chapter 4

Interpersonal attitudes: The Spectrum between Solidarity and Discrimination

So far, this paper has posited the aspects of solidarity as it occurs in state-to-state and state-to-individual dynamics. In the first chapter, contrast was drawn between solidarity and sovereignty, and in the second, solidarity and criminalisation were used as counterpoints mapping the discrepancies between the theory of solidarity and its practical application.¹⁷⁷ The polarities of these realities has been developed to inform our understanding of a multi-faceted solidarity, through its location and dislocation, in EU asylum processes.

In this ultimate chapter of the paper, interpersonal relationships will be explored. Specifically, the dynamic (attitudes and actions) between local communities and asylum seekers. The objective of this section is twofold.

1. To discuss the emergence of solidarity movements by local populations as a countermeasure to the lack of solidarity extended by the EU and national governments, as a human reflex and speak to the *value* of this activism.
2. To address the polarity of interpersonal solidarity in this instance, which is taken as discrimination.

The experience of the asylum seeker in a foreign territory falls into two rudimentary categories: they may experience solidarity in the form of **inclusion**, through acceptance and integration into the local community, or they experience discrimination which results in social **exclusion** through discriminative attitudes. Clearly, these experiences are not mutually exclusive, an asylum seeker may experience inclusion and exclusion concurrently, consecutively or alternatively. What determines whether an asylum seeker has a positive or negative experience? Although cursory, this section explores potential avenues of research to this question.

¹⁷⁷ Ontologically speaking, duality is a system that prevails European meaning-systems, the development of the argument in this paper is hinged upon various oppositions; cooperation/coercion, inclusion/exclusion, hospitable/hostile etc. Across various paradigms, in order to understand complex concepts, we use their antitheses to consolidate meaning. Although dichotomous thinking can be overly reductive, it is instructive in this instance.

Solidarity as a Human Reflex

Since the ‘long summer’ of 2015, much has been written accounting for the rise of solidarity movements across the EU.¹⁷⁸ This activism encompasses the concerted efforts of individuals or groups of individuals (civil society groups) to extend solidarity to asylum-seekers. These movements occur organically, are not mandated through statutory or institutional organisations and extend horizontally. They are often referred to as grassroots mobilisations.¹⁷⁹ Naturally, these movements are more nebulous and difficult to quantify, which explains their notable absence from a vast majority of academic literature. However, the people who have the most expertise in terms of the direct lived experience of EU asylum policy are refugees themselves and frontline workers, yet their voices are rarely translated into academic analysis.

One of the more anomalous dimensions of solidarity movements in the EU is the fact that they have emerged in both culturally hospitable climates and conversely, in societally hostile contexts. There have been studies to suggest more solidarity generally occurring in populations where there has been an inclusive public narrative regarding immigration, such as in the case of Germany.¹⁸⁰ Similarly, they have arisen in national contexts where the political agenda and/or media coverage are either explicitly or implicitly anti-solidarity, such as the Greek solidarity movement.¹⁸¹ The interplay of the discursive attitudes conveyed in political and media channels has been shown to have a direct effect on public perception.¹⁸² However, in Greece it is noteworthy that although state-level narrative remained antipathic, solidarity mobilisations emerged nonetheless.¹⁸³

State actors tend to be *exclusive* in their conceptions of solidarity, and have more of a media presence, therefore influencing public opinion.¹⁸⁴ Therefore despite the national context not being conducive to solidarity, this section demonstrates how the spirit of solidarity resists the most hostile of climates. This author suggests that even when there are no affective-discursive environmental stimuli,

¹⁷⁸ Inter alia, eminent edited volumes include those by Christian Lahusen & Maria Grasso, *Solidarity in Europe* (Palgrave Macmillan, 2018) and Donatella della Porta, *Solidarity mobilizations in the ‘refugee crisis’*. *Contentious moves* (Palgrave Macmillan, 2018).

¹⁷⁹ *ibid.*

¹⁸⁰ Ulrich Hamann & Serhat Karakayali, ‘Practicing Willkommenskultur: Migration and Solidarity in Germany’ (2016) *Intersections* 2(4) 69-86.

¹⁸¹ Verena K. Brandle, Olga Eisele & Hans-Jorg Trezn, ‘Contesting European Solidarity During the “Refugee Crisis”: A Comparative Investigation of Media Claims in Denmark, Germany, Greece and Italy’ (2019) *Mass Communication and Society* 22(6) pp.708-732.

¹⁸² Anna Triandafyllidou, ‘A “Refugee Crisis” unfolding: “Real” events and their interpretation in media and political debates’ (2018) *Journal of Immigrant & Refugee Studies*, 16(1) 198–216.

¹⁸³ Leonida Oikonomakis, ‘Solidarity in Transition: The Case of Greece’ Chapter 3 (ed) Donatella della Porta, *Solidarity mobilizations in the ‘refugee crisis’*: *Contentious moves*.

¹⁸⁴ *ibid.*

solidarity efforts persist. Furthermore, in the face of authoritative condemnation of these efforts through the criminalisation of solidarity activism, it is suggested that solidarity is a particularly resilient principle governing human relations.¹⁸⁵ It is beyond the purview of this dissertation to explore this deeply, but further research would yield valuable insight into the wellsprings of solidarity despite state doctrine asserting a contrary stance.

In Germany, however there is a long-established culture of solidarity.¹⁸⁶ 2015, Germany received 440,000 first time asylum claims, the highest in 20 years.¹⁸⁷ The figuratively *open-door*, policy generated attention internationally and in the EU arena of nation-states, Germany's response reflected the most concerted reflection of solidarity across the region.¹⁸⁸ Following 4 years of Angela Merkel's radical opening of Germany's borders and extension of the tradition of *Willkommenskultur* (welcome culture) to asylum seekers as well as migrants, the further liberalisation of immigration policy is unlikely.¹⁸⁹ The country's most salient right-wing party 'Alternative für Deutschland' gained ground with 12.6% of the popular vote in the most recent elections in 2017, considerably higher than previous elections, which may be indicative of traction in the anti-immigration movement.¹⁹⁰ Over the period 1996-2014 anti-immigration in public opinion has dissipated considerably. In 1996, 57.1% of Germans wanted immigration of non-EU citizens to be restricted and 34.8% believed it should be entirely banned. In 2004 71% wanted to restrict immigration and only 27% believed that migration contributes positively to the economy. Fast-forward 10 years, pro and anti-immigration sentiment has reached equilibrium, 51.4% of respondents thought that migration has a positive impact on the economy and 49% wanted less immigration.¹⁹¹

If German citizens have shifted toward a more solidary attitude to refugees over the past 20 years, the same case cannot be made for Ireland. In Ireland, popular perception remains shrouded in what one researcher calls *ambivalent paternalism*. Research has shown that cognitive dissonance itself is evidenced

¹⁸⁵ Lahusen, C. & Grasso, M. *Solidarity in Europe* (Palgrave Macmillan 2018).

¹⁸⁶ Ulrich Hamann & Serhat Karakayali, 'Practicing Willkommenskultur: Migration and Solidarity in Germany' (n 179).

¹⁸⁷ Verena K. Brandle et al. 'Contesting European Solidarity During the "Refugee Crisis"' (2019) *Mass Communication and Society* 22(6) 708-732.

¹⁸⁸ Patrick F. Kotzer, Sarina J. Schäfer & Ulrich Wagner, 'Meeting a nice asylum seeker: Intergroup contact changes stereotype content perceptions and associated emotional prejudices and encourages solidarity-based collective action intentions' (2019) *British Journal of Social Psychology* 58(3) pp.668-690. The rationale for embracing the large numbers of immigrants stemmed from economic considerations but is still noteworthy.

¹⁸⁹ *ibid.*

¹⁹⁰ Serhat Karakayali, 'Feeling the Scope of Solidarity: The Role of Emotions for Volunteers Supporting Refugees in Germany' (2017) *Perspectives on the European Border Regime: Mobilisation, Contestation and the role of civil society groups* 5(3).

¹⁹¹ These statistics were published in ALLBUS 2018, as part of the International Social Survey Programme (ISSP) a biennial general social survey of the German population, conducted since 1980.

through simultaneous expressions of sympathy to refugees and aversion to more inclusive social policies.¹⁹² Irish people can articulate empathy and unwillingness to call for policy a more active role in the resettlement of refugees from overburdened countries such as Greece, meaning their solidarity extends on a theoretical level, as opposed to a practical one.

Through the institutionalisation of asylum seekers in Direct Provision centres in Ireland, residents typically do not have the opportunity to prepare their own food. In the last few years however, response to the deleterious approach to accommodating asylum seekers, solidarity networks have created new spaces through which to reconceptualise agency, activism and community.¹⁹³ Projects such as Our Table, Cooking for Freedom and Sligo Global Kitchen showcase how the solidarity between asylum-seekers and the local community can evolve into positive intergroup experiences, something which is proven to have a knock-on positive effect of perceptions of the ‘asylum seeker’ figure in popular perception.*

Not only is there a disparity between Irish citizens and asylum seekers, which can also be traced along racial lines where ‘whiteness’ is correlated positively with higher opportunities while Black populations experience the inverse, but there is also a correlation between colour and equality of outcome. A study looking using statistical data from the 2016 Irish census at country of origin and employment, corroborates the association between colour and equality to outcome: Black migrants fare the worst compared to migrants from any other ethnicity in terms of labour outcomes.¹⁹⁴ While ethnicity most strongly affects Black Africans. This leads to a situation that despite idiosyncrasies and exceptions among few populations, it is arguably, a black and white issue.

In Greece, a very dynamic refugee solidarity movement emerged. Initially, efforts galvanised area two key areas: the provision of transport and food. Under the EU-Turkey deal in 2016, people who had been *in transit* were effectively relegated to the limbo of Greek hotspots. At this juncture Greek authorities stepped in to claim the initiatives and commissioned NGOs to co-opt the solidarity measures established informally. The disbanding of the movement from providing ‘reception’ conditions led to the redirection of attention toward agitating for concrete policy change. 58% of respondents to a 2016 public opinion poll claimed to have actively expressed solidarity with refugees in one form or another.¹⁹⁵ These statistics reflect sentiment in flux and capture how attitudinal preference is continuously being formed and reformed

¹⁹² Alastair Nightingale, Michael Quayle, & Orla Muldoon, “It’s just heart breaking”: Doing inclusive political solidarity or ambivalent paternalism through sympathetic discourse within the “refugee crisis” debate’ (2017) *Journal of Community and Applied Social Psychology* 27(2) 137-146.

¹⁹³ Fiona Murphy, ‘Seeking solidarity through food: the growth of asylum seeker and refugee food initiatives in Ireland’ (2018) *Studies in Arts and Humanities* 4(2).

¹⁹⁴ Frances McGinnity et. al Origin and integration: A Study of Migrants in the 2016 Irish census’ (n 172).

¹⁹⁵ As cited in Leonida Oikonomakis, ‘Solidarity in Transition: The Case of Greece’ Chapter 3 in (ed) Donatella della Porta, *Solidarity mobilizations in the ‘refugee crisis’*. *Contentious moves* (n 4).

societally. The welcome culture, with undeniable underpinnings of solidarity, developed in Germany over the course of the last few years effectively mainstreamed what are usually peripheral mindsets.¹⁹⁶

Across all three national contexts referenced here, solidarity toward refugees in in no uncertain terms fluid and changes across time. The correlation between state doctrine and the mobilisation of solidarity efforts in communities is by no means clear. As has been argued, pro-immigration sentiment exists on a continuum and varies from country to country. In Germany, the state adopted a solidary approach which reflected in the citizenry. Conversely, there is evidence to suggest that solidarity movements can also emerge as a response to blatantly pejorative public discourse towards asylum seekers. The polarity of this more open society approach is one in which the asylum seeker is perceived negatively, which is the topic of the following section.

Discrimination and the ‘Other’

It would be remiss to analyse the relationship between local and foreign populations without reference to the psychological concept of the ‘Other’. Migration scholarship shows how the migrant is constructed as the perpetual outsider, and this attitude is reinforced through legal, political and media discourse.¹⁹⁷ Just as easily as solidarity can emerge organically in a society, as has been showcased in the above examples, so too can discrimination. The stance that the most influential thought leaders of any given society, namely politicians and media figures take on this, i.e. pro- or anti-immigration has a recognised yet unquantified effect on the public opinion.¹⁹⁸ But perhaps beyond public discourse, it is necessary to unveil the inherently racialised attitudes we possess and project into the world.

Critical Race Theory (CRT) presents racism as normal and not ‘aberrational’ as most narratives imply.¹⁹⁹ Therefore, critical race theorists contend formal attempts to address equality will not affect underlying prejudice, which is inherently racial. In polarity to the rise of solidarity movements outlined in the previous section, the EU has also witnessed the proliferation of anti-immigration sentiment.²⁰⁰ This presents in various ways; islamophobia, anti-semitism, xenophobia, hate-crime, racial violence etc. and one

¹⁹⁶ Ulrich Hamann & Serhat Karakayali, ‘Practicing Willkommenskultur: Migration and Solidarity in Germany’ (n 168).

¹⁹⁷ Natalie J. Grove & Anthony B. Zwi ‘Our health and theirs: Forced Migration, Othering and Public Health’ (2006) *Social Science & Medicine* 62(8) 1931-1942.

¹⁹⁸ Verena K. Brandle, et al. ‘Contesting European Solidarity During the “Refugee Crisis”’: A Comparative Investigation of Media Claims in Denmark, Germany, Greece and Italy’ (2019) (n 187).

¹⁹⁹ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (3rd edn, NYU Press 2017).

²⁰⁰ Richard F. Inglehart and Pippa Norris, ‘Trump, Brexit and the Rise of Populism, Economic have-nots and cultural backlash’ (August 2016) *HKS Faculty Research Working Paper Series RWP16-026*.

author warns against the categorisation of these seemingly disparate forms of discrimination.²⁰¹ It is also the opinion of this author that all of these attitudes need to be viewed as racist. This is echoed elsewhere in critical race literature, where it is demanded that all forms of structural, systemic, attitudinal racism, from the gross to the minutiae; from the macro to the micro; be acknowledged if we are to truly develop global systems that are not racially biased.

It is naïve to think that the world could operate as one globalised economic system without their being monumental social and human repercussions. Although migration is a tendency as old as humanity itself, globalisation has heightened mass migratory movements across the globe.²⁰² Old paradigms are being eroded as traditional concepts of nationality and belonging are being contested through plurality and multiculturalism, the resultant friction is what one author has noted as the ‘globalisation of hate’.²⁰³

Discrimination must be understood as having both individual and systemic dimensions, which are inexorably related. A system is made up of individuals and therefore prone to the ill-effects of unchecked prejudice and bias. One way this is evidenced is through the metrics of employment, which reflects the integration, mobilisation and potential access to social capital for asylum seekers. It is another representation of how open or closed, the society in which an asylum seeker finds themselves. Migrants generally, do not have equality of opportunity or outcome in terms of employment.²⁰⁴ This inequality is embedded in systematic and structural racialised undertones of prejudice, exclusion and bias. Research highlights several ways that this applies. Firstly, the exclusion of non-European credentials results in the racialisation of access to the labour market. Non-recognition of academic attainment or work experience that was obtained outside of the EU results in preferential treatment of Europeans. Studies have pointed to the fact that discrimination in and of itself exist on a continuum and Black migrants face the most exclusion and suspicion in terms of the legitimacy of their credentials.²⁰⁵ This means that equality of opportunity in the labour market cannot be taken as a *de facto* level pay field once the market has been made accessible through the provision of work permits. Secondly, it demonstrates that even when changes are made at policy level to rectify inequality, individualised internal bias can lead to discriminative outcomes. Efforts must be made to upturn the deep-seated racial preferences. One study in Germany for example showed that basic inter-group contact can mitigate assumptions of ‘Otherness’ and improve majority community members of

²⁰¹ Liz Fekete, *Europe’s Fault Lines – Racism and the Rise of the Right* (Verso Books 2018).

²⁰² Kate E. Tunstall, *Displacement, Asylum & Migration* (Oxford University Press 2006).

²⁰³ Jennifer Scheppe & Mark Austin Walters, *The Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016).

²⁰⁴ Frances McGinnity, Ivan Privalko, Éamonn Fahy, Shannen Enright & Doireann O’Brien, ‘Origin and integration: A Study of Migrants in the 2016 Irish census’ Economic and Social Research Institute: Department of Justice and Equality (Dublin: June 2020).

²⁰⁵ Ebon Joseph, ‘Discrimination against credentials in Black bodies: counterstories of the characteristic labour market experiences of migrants in Ireland’ (2019) *British Journal of Guidance and Counselling* 47(4) 524-542.

minorities.²⁰⁶ Another study in the Irish context affirms the advocacy for intergroup contact as a way of mitigating the ill-effects of deep-seated prejudice.²⁰⁷ In order to harness the organic manifestation of solidarity in the various movements mentioned in this paper, further research is needed. However, this author submits that it may prove an invaluable resource in mitigating the sense of EU disintegration that currently threatens the very foundations of a shared sense of humanity.

²⁰⁶ Patrick F. Kotzer et al., 'Meeting a nice asylum seeker: Intergroup contact changes stereotype content perceptions and associated emotional prejudices and encourages solidarity-based collective action intentions' (n 170).

²⁰⁷ Ní Raghallaigh, M. 'The Causes of Mistrust amongst Asylum Seekers and Refugees: Insights from Research with Unaccompanied Asylum-Seeking Minors Living in the Republic of Ireland' (2013) *Journal of Refugee Studies* 27(1) 82-100.

Conclusion

The struggle for, and solidarity toward, the rights of asylum seekers is best located on a wave of successive social movements centred around a broader definition of social inclusion. Solidarity, in the various meanings that have been catalogued in this dissertation stands as the best way of achieving a just, pluralist world of societies. As one author notes ‘from aboriginal rights, women’s rights, civil rights and sexual rights for gays and lesbians, language rights and disability rights, we have experienced a major trend in modern Western nation-states towards the formation of new claims for inclusion and belonging.’²⁰⁸ In the current salience of identity politics, the *asylum seeker* represents a contested identity in national and international arenas, and the solidarity extended to them is by no means universally agreed upon and practised. The refugee crisis that has been impacting the cohesion of the EU since its peak in 2015, is perhaps best viewed as crises of law, systems and values.²⁰⁹ There is a severe tension between the international, humanitarian solidarity compelling states to assist individuals in need and the in-built contract of solidarity between member-states of the EU in various aspects of operating as a bloc, including organised response to forced migration.

The word ‘solidarity’ is used in myriad ways. This paper has been an attempt to locate its usage within various dynamics across various levels of current EU asylum processes: interstate, inter-social and interpersonal. The polarities that contradict the practice of solidarity in the EU, namely *sovereignty*, *criminalisation* and *discrimination* have been the main veins of analysis in this paper. This dissertation has used this series of polarities to bring into focus the tensions which exist in the relational dynamics of the asylum system.²¹⁰

This paper has been constructed through a socio-legal lens. Equal weight has been afforded to both law and sociological theory.

Law has been incorporated through primary sources in the form of national legislation (e.g. the International Protection Act 2015), the EU asylum *acquis* (summarily the Dublin III regulation) and international human and refugee rights frameworks (the primacy of the Geneva Convention in this context). All of which are legally binding, to a *technically* equal degree but this author suggests that their application

²⁰⁸ Donatella della Porta, *Solidarity mobilizations in the ‘refugee crisis’: Contentious moves* (Springer 2018).

²⁰⁹ Küçük, E. ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) *European Law Journal* 22(4) 448-469.

²¹⁰ Anna Vogel, ‘A cognitive approach to opposites: The case of Swedish *levande* ‘alive’ and *död* ‘dead’ (2009) *Approaches to Language and Cognition* 3.

is implemented to varying degrees. The asylum process, that is the administration and treatment of asylum seekers in any given territory in the EU, remains very much circumscribed by domestic and national interests and pressures.²¹¹

Social logos have been interwoven through academic commentary from various fields such as social anthropology, political philosophy, linguistics and psychology. Reference to academic theorists from 23 countries has been a deliberate attempt to imbue the paper with a pluralistic, multicultural voice.

Throughout the paper, the trajectory of **solidarity** as it pervades distinct relationships in the EU asylum processes has been presented. From the upper echelons of EU interstate cooperation, within societies as State actors provide for individuals in need, and as it is brokered between local and refugee communities through interpersonal relationships. The same subject i.e. the asylum seeker is on one side these disparate dynamics and the way in which they relate to the EU as an entity; the institution of the state and the population of local inhabitants varies greatly. It is best then to understand, the *asylum seeker* as a fluid concept prone to permutations depending on their relational placement. They are problematised and reduced to a ‘burden’ in EU level consideration; transformed into an ‘international protection applicant’ within the nation-state and ‘Othered’ within their respective communities. In stark contrast to the standard of life espoused in the Convention, civil society groups and supranational human rights watchdogs have been researching and evidencing the quality of life of asylum seekers in Europe.²¹² The cleavage between the normative espousal of EU policy and the material reality of those snared in the system is gaping.

Solidarity is *located* across multiple levels of the asylum process; from international human rights law, to EU policy, to national discourse to community activism. However, it is *dislocated* across these channels and is used in a variety, and often conflicting, ways. As has been argued, solidarity is transfigured into sovereignty, criminalisation and discrimination at various points of the asylum process. However, ultimately, this author submits that solidarity is a potentially transformative social phenomenon as certain sections of the world’s population see themselves in the ‘Other’ and an inclusive vision of our race is collectivised.²¹³ In order to remedy a fragmenting EU, in order to facilitate true plurality and integration of foreign populations into local communities, and in order to realise the highest nature of our species we must

²¹¹ Tamas Dezso Ziegler, ‘EU Disintegration as cultural insurrection of anti-Enlightenment tradition’ (2020) *Journal of Contemporary European Studies*.

²¹² Elizabeth Collett, ‘The Asylum Crisis in Europe: Designed Dysfunction’ (Migration Policy Institute Europe: September 2015); see also Joint Agency Briefing Paper ‘A Dangerous ‘Game’ The pushback of migrants, including refugees, at Europe’s borders’ (Belgrade Centre for human Rights, Macedonian Young Lawyers Association & Oxfam 2017).

²¹³ Maya Stewart & Ulrike Schultze ‘Producing solidarity in social media activism: The case of My Stealthy Freedom’ (2019) *Information & Organisation* 29(3).

transform a narrow, contextual extension of solidarity into an inclusive expression of humanity that is enforceable and regulated across the EU.

Bibliography

Primary Sources

Case-Law

Abdulaziz, Cabales and Balkandali v. the United Kingdom (ECHR, 24 April 1985).

Hirsi Jamaa and Others v Italy, App. No. 27765/09 (ECHR, 23 February 2012).

Ilias and Ahmed v. Hungary, App. No. 47287/15 (ECHR, 21 November 2019).

Judgment in Joined Cases C-924/19 PPU and C-925/19 PPU (CJEU, 14 May 2020).

Khalifa & Others v. Italy, App. No. 16483/12 (ECHR, 15 December 2012).

K.R.S. v United Kingdom, App. No. 32733/08 (ECHR, 02 December 2008).

M.S.S. v Belgium and Greece, App. No. 30696/09 (ECHR, 21 January 2011).

Mohammadi v Austria, App. No. 71932/12 (ECHR, 17 November 2014).

Rahimi v. Greece, App. No. 8687/06 (ECHR, 5 July 2007).

S.F. and Others v. Bulgaria, App. No. 8138/16 (ECHR, 7 December 2017).

Sharifi v Austria, App. No. 60104/08 (ECHR, 5 December 2013).

Soering v. the United Kingdom, App. No. 14038/88 (ECHR, 02 July 1989).

S.Z. v. Greece, App. No. 66702/13 (21 June 2018).

S.H.D & others v. Greece, Austria, Croatia, Hungary, Macedonia, Serbia and Slovenia, App. No. 14165/16 (ECHR, 13 June 2019).

Legislation

Council Decision (EU) 2015/1601 *OJ L248/80*.

Dublin Convention OJ C 254, 19.8.1997, p. 1–12.

Directive 2013/33/EU of the European Parliament and of the Council 26 June 2013.

European Convention on Human Rights Act 2003

EU Charter of Fundamental Freedoms, OJ EC 364/8

EU Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337

EU Regulation (EC) No. 343/2003

EU Regulation No. 604/2013

International Protection Act 2015

United Nations Convention Relating to the Status of Refugees 1951

United Nations Protocol Relating to the Rights of Refugees 1967

Secondary Sources

Arendt, H. *On the Origins of Totalitarianism* (Harcourt Inc. 1951).

Bauder, H. & Juffs, L. 'Solidarity in the migration and refugee literature: analysis of a concept' (2020) *Journal of Ethnic and Migration Studies* 46(1) 46-65.

Beirens, H. 'Cracked Foundations, Uncertain Future: Structural Weaknesses in the Common European Asylum System' (Migration Policy Institute Europe: March 2018).

Brandle, V.K., Eisele, O. & Trenz, H.J. 'Contesting European Solidarity During the "Refugee Crisis": A Comparative Investigation of Media Claims in Denmark, Germany, Greece and Italy' (2019) *Mass Communication and Society* 22(6) 708-732.

Brown, G.W. 'The European Union and Kant's Idea of Cosmopolitan Right: Why the EU is Not Cosmopolitan', *European Journal of International Relations* 20, no. 3 (2014): 671-93.

Brunkhorst, H. *Solidarity: From civic friendship to a global legal community* (Cambridge MIT Press 2005).

Byravan, S. & Chella Rajan, S. 'Taking Lessons from Refugees in Europe to Prepare for Climate Migrants and Exiles' (2017) *Environmental Justice* 10(4) pp.108-111.

Carretero, L. 'Life in the Moria Camp on Lesbos; Every day, someone is injured' published on 2020/01/24 Infomigrants; <<https://www.infomigrants.net/en/post/22268/life-in-the-moria-camp-on-lesbos-every-day-someone-is-injured>> accessed 18 August 2020.

Central Statistics Office (CSO), *Components of the Annual Population Change 1987-2019*.

Collett, E. 'The Asylum Crisis in Europe: Designed Dysfunction' (Migration Policy Institute Europe: September 2015).

Cornelisse, G. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nihhoff Publishers, 2010).

Cortinovis, R. 'Asylum: The Role and Limits of the Safe Third Country Concept in EU Asylum' (ReSOMA Discussion Brief, July 2018).

Council of the European Union 'The Stockholm Programme –An open and secure Europe serving and protecting the citizens' (17024/09 2017).

Council of Europe 'The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016' Parliamentary Assembly Resolution 2109 (CoE 2016).

Delgado, R. & Stefancic, J. *Critical Race Theory: An Introduction* (3rd edn, NYU Press 2017).

Derrida, J. 'On Cosmopolitanism' (Routledge 2001).

Dezso Ziegler, T. 'EU Disintegration as cultural insurrection of anti-Enlightenment tradition' (2020) *Journal of Contemporary European Studies*.

European Asylum Support Office, 'Detention of applicants for international protection in the context of the Common European Asylum System' (EASO 2019).

European Commission, 'Evaluation of the Dublin III Regulation Final Report' (DG Migration & Home Affairs, 2015).

European Council on Refugees and Exiles, *The Road Out of Dublin: Reform of the Dublin Regulation* (December 2016).

European Court of Human Rights ‘Factsheet: Dublin Cases’ (Strasbourg: June 2016).

European Parliament Briefing Paper, ‘Reform of the Dublin System’ (Brussels: European Parliamentary Research Service, March 2019).

European Parliament Briefing Paper, *Secondary Movement of asylum seekers in the EU asylum system*, PE608.728 (Brussels: European Parliamentary Research Service, October 2017).

European Parliament ‘The Reform of the Dublin III Regulation’ (Brussels: Policy Department Citizen’s Rights and Constitutional Affairs, 2016)

Fanning, B. *Racism and Social Change in the Republic of Ireland* (Manchester University Press 2002).

Fekete, L. *Europe’s Fault Lines – Racism and the Rise of the Right* (Verso Books 2018).

‘Migrants, Borders and the Criminalisation of Solidarity in the EU’ Institute of Race Relations Research Paper (12 February 2018).

Goodwin Gill, G.S. ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalisation, Detention and Protection’ (UNHCR Global Consultation Research Paper, 2001).

Goodwyn, L. *Breaking the Barrier: The Rise of Solidarity in Poland* (Oxford University Press, 1991).

Grove, N. J. & Zwi, A. B. ‘Our health and theirs: Forced Migration, Othering and Public Health’ (2006) *Social Science & Medicine* 62(8) 1931-1942.

Haferlach, L. & Kurban, D. ‘Lessons Learnt from the EU-Turkey Refugee Agreement in Guiding EU Migration Partnerships with Origin and Transit Countries’ (2017) *Global Policy Special Issue: Europe and the World Global Insecurity and Power Shifts* 8(54) 85-93.

Hafner-Burton E.M. and Tsutsui, K. ‘Human Rights in a Globalizing World: The Paradox of Empty Promises’ (2005) *American Journal of Sociology* 110(5).

Haughey, N. ‘Immigrants turned back by Ferry Staff’ Irish Times (2001, February 3).

Inglehart, R. F. and Norris, P. ‘Trump, Brexit and the Rise of Populism, Economic have-nots and cultural backlash’ (August 2016) *HKS Faculty Research Working Paper Series* RWP16-026.

Irish Naturalisation and Immigration Services (INIS), ‘Permission to Remain for Non E.E.A. Nationals’ (Dublin: April 2020).

Irish Refugee Council (IRC), *The Reception Conditions Directive: One year on July 2019* (Dublin: July 2019).

Jaeger, G. 'On the History of International Protection of Refugees' (2001) *International Review of the Red Cross* 83(843) pp.727-738.

Janmyr, M. 'Attributing Wrongful Conduct of Implementing Partners to UNHCR' (2014) *Journal of International Humanitarian Legal Studies* 5(2) 42-69.

'No Country of Asylum: 'Legitimizing' Lebanon's Rejection of the 1951 Refugee Convention' (2017) *International Journal of Refugee Law* 29(3) 438-465.

Joint Agency Briefing Paper 'A Dangerous 'Game' The pushback of migrants, including refugees, at Europe's borders' (Belgrade Centre for human Rights, Macedonian Young Lawyers Association & Oxfam 2017).

Kani, J.K. 'The Erasure of Race: Cosmopolitanism and the Illusion of Kantian Hospitality' (2017) *Millennium Journal of International Studies* 45(3).

Karakayali, S. 'Feeling the Scope of Solidarity: The Role of Emotions for Volunteers Supporting Refugees in Germany' (2017) *Perspectives on the European Border Regime: Mobilisation, Contestation and the role of civil society groups* 5(3).

Kotzer, P.F., Schäfer, S.J. & Wagner, U. 'Meeting a nice asylum seeker: Intergroup contact changes stereotype content perceptions and associated emotional prejudices and encourages solidarity-based collective action intentions' (2019) *British Journal of Social Psychology* 58(3) 668-690.

Kubik, J. 'Who done it: Workers, Intellectuals or someone else? Controversy over Solidarity's origins and social composition' (1994) *Theory and Society* 23(3) 441-466.

Küçük, E. 'The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?' (2016) *European Law Journal* 22(4) 448-469.

Laba, R. *The Roots of Solidarity: A Political Sociology of Poland's Working Class Democratisation* (University of Wisconsin, 1989).

Lahusen, C. & Grasso, M. *Solidarity in Europe* (Palgrave Macmillan 2018).

Langford, L. M. 'The Other Euro Crisis: Rights Violations Under the Common EU Asylum System and the Unravelling of EU Solidarity' (2013) *Harvard Human Rights Journal* 26(1).

Laubenthal, B. 'Refugees Welcome? Reforms of German Asylum Policies Between 2013 and 2017 and Germany's Transformation into an Immigration Country' (2019) *German Politics* 28(3) pp.412-425.

Lauterpacht, H. 'The Universal Declaration of Human Rights' (1948) *British Yearbook of International Law* p. 374.

Luibhéid, E. 'Childbearing Against the State? Asylum Seeker Women in the Irish Republic' (2004) *Women's Studies International Forum* 27(4) 335-349.

Malkki, L. 'Refugees and exiles: From 'Refugee Studies' to the national order of things' (1995) *Annual Review of Anthropology* 24 495-523.

Mason, A. *Community, solidarity and belonging: Levels of community and their normative significance* (Cambridge University Press 2000).

McGee, H. 'Controversial Skellig Star direct provision centre in Kerry to close' *The Irish Times* (30 July 2020). Mac Éinrí, P. & White, A. 'Immigration into the Republic of Ireland: a bibliography of recent research' (2008) *Irish Geography* 41(2) 151-179.

McGinnity, F., Privalko, I., Fahy, E., Enright, S. & O'Brien, D. 'Origin and integration: A Study of Migrants in the 2016 Irish census' Economic and Social Research Institute: Department of Justice and Equality (Dublin: June 2020).

Millbank, A. 'The Problem with the 1951 Convention' Research Paper [5 2000-01](#) (Social Policy Group, Parliament of Australia 2000).

Mitsilegas, V. *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015).

'Solidarity and Trust in the Common European Asylum System' (2017) *Comparative Migration Studies* 2(2) 181-202.

Moran, J. "Refugees and Social Policy" in Quin, S., Kennedy, P., O'Donnell, A. & Kiely, P. (eds) *Contemporary Irish Social Policy* (Dublin, UCD Press, 2005).

Mouzourakis, M. 'All but last resort: the last reform of detention of asylum seekers in Greece' *EU Immigration and Asylum Law and Policy* blogpost; <<http://eumigrationlawblog.eu/all-but-last-resort-the-last-reform-of-detention-of-asylum-seekers-in-greece/>> accessed 28 July 2020.

Ní Raghallaigh, M. 'The Causes of Mistrust amongst Asylum Seekers and Refugees: Insights from Research with Unaccompanied Asylum-Seeking Minors Living in the Republic of Ireland' (2013) *Journal of Refugee Studies* 27(1) 82-100.

Nightingale, A., Quayle, M. & Muldoon, O. 'It's just heart breaking': Doing inclusive political solidarity or ambivalent paternalism through sympathetic discourse within the "refugee crisis" debate' (2017) *Journal of Community and Applied Social Psychology* 27(2) 137-146.

Ó Murchadha, C. 'The Great Famine: Ireland's Agony 1845 – 52' (Bloomsbury 2011).

Oikonomakis, L. 'Solidarity in Transition: The Case of Greece' Chapter 3 (ed) Donatella della Porta, *Solidarity mobilizations in the 'refugee crisis': Contentious moves* (Springer 2018).

Pallister Wilkins, P. 'The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros' (2015) *International Political Sociology* 9(1) 53-69.

Pollet, K. 'All in vain? The fate of EP positions on asylum reform after the European elections' (*EU Immigration and Asylum Law & Policy*, 23rd May 2019) <http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections/> accessed 7 July 2020.

Progin-Theuerkauf, S. 'The Dublin IV Proposal: Towards more solidarity and protection of individual rights?' (2017) <<file:///C:/Users/eurur/Downloads/1551-Artikeltext-858-1-10-20171004.pdf>> accessed 9 June 2020.

Rheindorf, M. & Wodak, R. *Sociolinguistic Perspectives on Migration Control: Language Policy, Identity and Belonging* (Multilingual Matters 2020).

Schlepper, A. 'Another Drop in the Ocean: Dispatches from the Ground' (2018) *Studies in Arts and Humanities Journal: Grassroots Perspectives* 4(2).

Schweppe, J. & Walters, M. A. *The Globalisation of Hate: Internationalising Hate Crime* (Oxford University Press 2016).

Stewart, M. & Schultze, U. 'Producing solidarity in social media activism: The case of My Stealthy Freedom' (2019) *Information & Organisation* 29(3).

Thielemann, E. 'Why refugee burden-sharing initiatives fail: Public goods, free-riding and symbolic solidarity in the EU' (2018) *JCMS: Journal of Common Market Studies* 56(1) 63–82.

Thornton, L. 'EU Asylum Policy: Reception Conditions for Asylum Seekers' (2014) in Lewis, T. (ed) *Report on coherence of human rights policy making in EU Institutions and other EU agencies and bodies* 105-111.

'Social Welfare Law & Asylum Seekers in Ireland: An Anatomy of Exclusion' (2013) *Journal of Social Security Law* 20(2) 66-88.

Tidey, A. 'Alan Kurdi: Five years on from boy's tragic death, 'refugee and migrant children worse off' (Infomigrants, 9 February 2020) < <https://www.euronews.com/2020/09/02/alan-kurdi-five-years-on-from-boy-s-tragic-death-refugee-and-migrant-children-worse-off->> accessed 24 August 2020.

Tinti, P. & Reitano, R. *Refugee, Migrant, Smuggler, Saviour* (Oxford University Press 2017).

Triandafyllidou, A. 'A "Refugee Crisis" unfolding: "Real" events and their interpretation in media and political debates' (2018) *Journal of Immigrant & Refugee Studies* 16(1–2) 198–216.

Tunstall, K. E. *Displacement, Asylum & Migration* (Oxford University Press 2006).

UNHCR, 'Figures at a Glance' < <https://www.unhcr.org/en-ie/figures-at-a-glance.html>> accessed online 2 August 2020.

Global Trends: Forced Displacement in 2018 (Geneva: 2019).

Guidelines on Temporary Protection and Stay Arrangements (February 2014).

Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation (August 2017).

The 1951 Convention Relating to the Rights of Refugees and its 1967 Protocol (Geneva: 2011).

UNITED List of Refugee Deaths < <http://unitedagainstreducedeaths.eu/wp-content/uploads/2014/06/ListofDeathsActual.pdf>> accessed 19 August 2020.

Vogel, A. 'A cognitive approach to opposites: The case of Swedish levande 'alive' and död 'dead' (2009) *Approaches to Language and Cognition* 3.

Weis, P. 'Human Rights and Refugees' (1972) *International Review of the Red Cross Archive*, 537-546.

'The Refugee Convention 1951' < <https://www.refworld.org/pdfid/53e1dd114.pdf>> accessed 25 June 2020.