

Please, quote as: V Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions, and Implications for EU (External) Asylum Policy' (forthcoming) *Maastricht Journal of European and Comparative Law*.

**Solidarity's Reach:
Meaning, Dimensions, and Implications for EU (External) Asylum Policy**

Violeta Moreno-Lax*

ABSTRACT:

Solidarity has a key role to play in the allocation of responsibility for refugee protection, as Article 80 TFEU implies. Yet, EU law fails to provide a definition and a clear indication of what it entails, especially as for its external reach. Against this background, this contribution embarks on a theoretical/practical investigation of the normative bases of 'EU solidarity'. Building on a cosmopolitan vision, it unpacks the multi-polar/multi-functional nature of the concept, as a founding value and constitutional (meta-)principle of EU law. In such guise, it will posit that solidarity gives rise to an (autonomous) primary law duty of responsibility sharing/good faith cooperation that requires 'fairness' and 'respect for fundamental rights', as a uniform/all-pervading structural command generally applicable across policy fields. So configured, solidarity governs intra/extra-EU relations (based on the principle of coherence). The institutional, material, and procedural aspects of solidarity are thus explored to distil its horizontal, vertical, and systemic facets. Combined, they arguably produce a triple duty of conduct, loyalty, and result that permeates EU integration as a whole, calling into question the self-serving approach currently guiding the CEAS' 'external dimension', as exemplified by the EU-Turkey 'deal'.

KEYWORDS:

Solidarity; shared responsibility; Article 80 TFEU; EU-Turkey deal; external dimension of the Common European Asylum System (CEAS)

1. Introduction: More than Meets the Eye

Talks about the importance of solidarity within the refugee law regime are not new. The international protection system is predicated on international cooperation and discussions about ‘burden sharing’ have been common in the recent past.¹ The preamble to the 1951 Refugee Convention (CSR51) contains precisely a reference to the need for ‘international co-operation’ for a ‘satisfactory solution’ to be found to situations of forced displacement, ‘considering that the grant of asylum may place unduly heavy burdens on certain countries’.²

Perspectives on the principle, however, vary, with stark differences between countries along the ‘North-South’ axis. While Western countries generally embrace the ‘Safe Third Country’ (STC) notion,³ maintaining that earlier presence in the territory of a State, through passage or stay, engages legal responsibility to determine status and provide protection,⁴ developing countries emphasize the negative impact of such a rule, highlighting its ‘burden shifting’ rather than ‘burden sharing’ effect.⁵ Very tellingly, prior to the conclusion of the EU-Turkey deal in March 2016,⁶ Turkey persistently opposed STC transfers, underlining the unfair result to which they lead,

* Lecturer in Law, Queen Mary University of London.

¹ See, e.g., M. Gottwald, ‘Burden Sharing and Refugee Protection’, in E. Fiddian-Qasmiyeh et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP, 2014) 525; A. Hurwitz,

¹ See, e.g., M. Gottwald, ‘Burden Sharing and Refugee Protection’, in E. Fiddian-Qasmiyeh et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP, 2014) 525; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP, 2009); E. Thielemann, ‘Between Interests and Norms: Explaining Burden-Sharing in the European Union’, 16 *JRS* (2003), p. 253; J. Hathaway (ed.), *Reconceiving International Refugee Law* (Martinus Nijhoff, 1997); A. Suhrke, ‘Burden Sharing during Refugee Emergencies: The Logic of Collective Action versus National Action’, 11 *JRS* (1998), p. 396.

² Convention relating to the Status of Refugees 189 *UNTS* 150 (hereafter: CSR51), Recital 4.

³ For analysis, see V. Moreno-Lax, ‘The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties’, in G. Goodwin-Gill and P. Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (The Hague Academy of International Law Centre for Research/Martinus Nijhoff, 2015), p. 665.

⁴ See, e.g., Statement by the UK on behalf of the European Community and Member States, A/AC.96/SR.472, para. 78. See also UNHCR, EXCOM Conclusion No. 58 (XL) of 1989, Report of the 40th Session, A/AC.96/737.

⁵ See, e.g., Statement by Brazil, A/AC.96/SR.485, para. 2; Statement by Bulgaria, A/AC.96/SR.485, para. 47; Statement by Poland, A/AC.96/SR.475, para. 37; Statement by Sudan, A/AC.96/SR.427, para. 69; Statement by China, A/AC.96/SR.427, para. 10.

⁶ EU-Turkey Statement, 18 March 2016, at: <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> (hereafter: EU-Turkey Statement).

regionalizing protection and concentrating responsibility on transit countries that happen (by geographical chance) to be closer to refugee-producing States.⁷

Imbalances and disagreement on how to allocate international protection duties have not been overcome over the years. Discussions on the ‘irregular secondary movements’ strand of the *Convention Plus* initiative, launched in 2002 by UNHCR, have yielded no results,⁸ and calls for a ‘New Deal’ on burden sharing, nearly ten years later, have yet to materialize.⁹ The debate has regained momentum during the ‘refugee crisis’ and, particularly, after the 2016 New York Summit, ‘acknowledg[ing] a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner’.¹⁰ Such ‘shared responsibility’ is considered essential to demonstrating ‘solidarity with, and support for, the millions of people [...] who, for reasons beyond their control, are forced to uproot themselves[...]’.¹¹

In response, the UNHCR Executive Committee programme (EXCOM) has ‘reaffirmed’ its ‘commitment to international solidarity and responsibility- and burden-sharing involving all members of the international community’ and has engaged itself ‘to further strengthening international cooperation and solidarity and equitable responsibility and burden sharing’.¹² Yet, a codified ‘solidarity obligation’ at the universal level is still lacking,¹³ which diminishes the legal strength of the principle and its practical traction as an ordering standard to apportion responsibility for ‘durable solutions’ on the global scale.

Nonetheless, this contribution argues that there is more than meets the eye, especially within the Common European Asylum System (CEAS), upon the

⁷ *Report of the Sub-Committee of the Whole*, A/AC.96/671, para. 68. See also statements by Turkey, A/AC.96/SR.418, para. 74; A/AC.96/SR.430, para. 66; A/AC.96/SR.456, para. 6-7.

⁸ For an overall presentation and related documents see:

<<http://www.unhcr.org/pages/4a2792106.html>>.

⁹ ‘UNHCR chief calls for “New Deal” in managing the world’s displaced’, *UNHCR News Stories*, 8 Oct. 2010, at: <<http://www.unhcr.org/4caf29e79.html>>.

¹⁰ *New York Declaration for Refugees and Migrants*, A/71/L.1, 13 Sept. 2016, para. 11.

¹¹ *Ibid.*, para. 8.

¹² EXCOM Conclusion on international cooperation from a protection and solutions perspective, No. 112 (LXVII) 2016, Recital 4 and para. 1. See also Conclusions No. 18 (XXXI) 1980; No. 40 (XXXVI) 1985; No. 52 (XXXIX) 1988; No. 56 (XL) 1989; No. 80 (XLVII) 1996; No. 67 (XLII) 1991; No. 100 (LV) 2004; No. 101 (LV) 2004; No. 104 (LVI) 2005; No. 105 (LVII) 2006, para. (i) (i); No. 107 (LVIII) 2007, para. (b) (xiii); No. 109 (LX) 2009; No. 111 (LXIV) 2013; and No. 91 (LII) 2001.

¹³ G. Noll, *Negotiating Asylum* (Martinus Nijhoff, 2000), at 277; M. Barutciski and A. Suhrke, ‘Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing’, 14 *JRS* (2001), p. 95, at p. 109; and G. Noll, ‘Protection in a Spirit of Solidarity’, in R. Byrne, G. Noll, and J. Vedsted-Hansen (eds.), *New Asylum Countries?* (Kluwer, 2002).

positivization of imperative ‘solidarity clauses’ in several areas across EU law, including the immigration field.¹⁴ It submits that there is an (autonomous) EU requirement to engage externally with the wider world in a manner that is ‘solidarity-prone’ and produces ‘fair’ outcomes for refugees;¹⁵ that EU solidarity produces ‘hard’ legal obligations on the regional plane, adding concretion to international statements on sharing and cooperation, as part of the principal obligation to ‘develop a common policy on asylum [...] with a view to offering appropriate status to any third-country national [TCN] requiring international protection [...]’ enshrined in Article 78(1) TFEU.

With this in mind, the article tracks the normative bases, structure, and function(s) of solidarity within primary law. It identifies three complementary dimensions: the inter-state or ‘horizontal’ dimension; the state-refugee or ‘vertical’ dimension; and the state-regime or ‘systemic’ dimension of solidarity, requiring commitment to the international protection system as such, the EU and the other Member States, and the refugees themselves. This definitional effort draws on the related principles of fairness and respect for fundamental rights,¹⁶ good faith engagement with third countries (or ‘partnership’ principle),¹⁷ and the principle of loyal cooperation enshrined in the EU treaties.¹⁸ Article 80 TFEU is assessed against this background to distil the key features and effects of the (composite) principle it encloses (of ‘solidarity *and* fair sharing of responsibility’) on CEAS norms. An argument is then put forward, on the basis of the principle of coherence between internal and external policies of the EU,¹⁹ on the reach of solidarity in relations with third countries and refugees abroad.

2. The Normative Foundations of EU Solidarity

¹⁴ Note the ‘shall’ in Art 80 TFEU. See also Art 2(4) of the 1969 OAU Convention on Refugee Problems in Africa: ‘Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States [...] and such other Member States *shall* in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum’ (emphasis added).

¹⁵ TFEU, Article 67(2).

¹⁶ TFEU, Articles 67 and 2, as well as TEU, Article 6.

¹⁷ TEU, Articles 3(5) and 21.

¹⁸ TEU, Articles 4(3) and 13(3).

¹⁹ TE, Article 21(3), 2nd indent. See also TEU, Articles 13(1), 16(6), 18(4), 26(2).

The idea of solidarity as an ordering principle of legal relations has a long pedigree. In the civil law system of post-revolutionary France, the notion was linked with the republican ideals of *liberté, égalité, fraternité*, which found articulation in the Napoleonic Code of 1804.²⁰ Classical sociologists have built on this and theorised the normative foundations of the principle, concluding to the existence of a ‘societal community’ as an essential condition of possibility for solidarity to thrive.²¹ Under this conception, recognition and identity or affinity with others is what allows for a sense of belonging, mutuality, and common struggle to emerge that motivates the pooling of resources and joint action towards a shared objective.²²

Alternative elaborations have added ideological elements to the more empirical understandings of solidarity,²³ underscoring the unifying traits of the group, such as class, race or other features, and the political importance of their collective cause,²⁴ allowing for several allegiances to materialize and co-exist or compete against one another.²⁵ Solidarity then transpires as a feeling of reciprocal empathy and responsibility among members of a more or less defined group, triggering communal assistance and support in pursuance of a ‘higher’ goal.²⁶

This is why solidarity may strike as antagonistic to cosmopolitanism.²⁷ The presupposition of a more or less defined community, whose members ‘feel’ solidarity between them, seems in contradiction to ideas of *global* justice towards the generic,

²⁰ See, extensively, S. Stjerno, *Solidarity in Europe: The History of an Idea* (CUP, 2005); V. Boon and G. Delanty, ‘Cosmopolitanism and Europe: Historical Considerations and Contemporary Applications’, in C. Rumford (ed.), *Cosmopolitanism and Europe* (Liverpool University Press, 2007), p. 31.

²¹ Applying Durkeim and Weber’s theories to contemporary European integration, see H.-J. Trenez, *Elements of a sociology of European Integration*, ARENA Working Paper No. 11/May 2008, at: <http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2008/wp08_11.html>.

²² L. Wilde, ‘The Concept of Solidarity: Emerging from the Theoretical Shadows?’, 9 *British Journal of Politics and International Relations* (2007), p. 171. See also, W. Rehg, ‘Solidarity and the Common Good: An Analytic Framework’, 38 *Journal of Social Philosophy* (2007), p. 7.

²³ On the distinction between empirical and normative interpretations of solidarity, see M. Pensky, ‘Solidarity as Fact or Norm? Social Integration between System and Lifeworld’, 32 *Philosophy and Social Criticism* (2006), p. 819.

²⁴ P. Baldwin, *The Politics of Social Solidarity* (CUP, 1990), specially p. 29-31.

²⁵ N. Karagiannis, ‘Introduction’, in N. Karagiannis (ed.), *European Solidarity* (Liverpool University Press, 2007), P. 2; L. Magnusson and B. Strath (eds.), *European Solidarities: Tensions and Contentions of a Concept* (Peter Lang, 2007).

²⁶ D. Heyd, ‘Justice and Solidarity: The Contractarian case against Global Justice’, 38 *Journal of Social Philosophy* (2007), p. 112.

²⁷ See, generally, A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers*, (WW Norton, 2006), building on J. Derrida, ‘Politics of Friendship’, 50 *American Imago* (1993), p. 3; and U. Beck, *The Cosmopolitan Vision* (Polity, 2006).

all-inclusive, non-group of humanity as a whole.²⁸ Under this optic, solidarity requires exclusion and positioning against a perceived ‘other’. So, in principle, while *transnational* forms of solidarity may be possible beyond *national* iterations of the same—provided there is an underpinning sense of community within, and across, the groups concerned—a *universal* type of solidarity would be unworkable.²⁹

Some authors have found a way to transcend (in part) this apparent incompatibility by underscoring the inclusive facet of solidarity, positing that ‘cosmopolitan forms of solidarity do not extend to the universal moral community’ (thus, accepting the need of a pre-defined group different from the whole of mankind) ‘but still transcend ethnic or national delimitations’³⁰ (organising solidarity along ethical lines, instead of around classic communitarian concerns).³¹ Solidarity, within this framework, consists in the ‘ability to see more and more traditional differences [...] as unimportant when compared with similarities’, it is ‘the ability to think of people wildly different from ourselves as included in the range of “us”’,³² albeit accepting the premise of the need for a ‘community’ (i.e. an ‘us’ opposable to a ‘them’) as an existential, *sine qua non* precondition for distributive justice to be realized.³³

For others, the notion of a *globale Gemeinschaft* is entirely disposable. Brunkhorst, for instance, urges thinkers to stop yearning for an impossible global political society, and embrace the alternative concept of a global legal community (*globale Rechtsgenossenschaft*) instead. From his perspective, this suffices to guarantee dignity and equality for all, even in the absence of a universal *demos* or

²⁸ See, among others, K. Bayertz, ‘Four Uses of Solidarity’, in K. Bayertz (ed.), *Solidarity* (Springer, 1999) 3; J. Bohman, ‘Democracy, Solidarity and Global Exclusion’, 32 *Philosophy and Social Criticism* (2006), p. 809; and C. Calhoun, ‘Constitutional Patriotism and the Public Sphere: Interests, Identity and Solidarity in the Integration of Europe’, 18 *International Journal of Politics, Culture and Society* (2005), p. 257.

²⁹ Cf. N. Stevenson, ‘European Cosmopolitan Solidarity: Questions of Citizenship, Difference and Post-Materialism’, 9 *European Journal of Social Theory* (2006), p. 485; J. Schwartz, ‘From Domestic to Global Solidarity: The Dialectic of the Particular and the Universal in the Building of Social Solidarity’ 38 *Journal of Social Philosophy* (2007), p. 131.

³⁰ S. Derpmann, ‘Solidarity and Cosmopolitanism’, 12 *Ethical Theory and Moral Practice* (2009), p. 303, p. 313.

³¹ See, generally, M. Walzer, *Spheres of Justice* (Basic Books, 1983).

³² R. Rorty, *Contingency, Irony and Solidarity* (CUP, 1989), p. 192. Cf. ‘Organic solidarity’ originating from interdependency rather than similarity between group members, which rather constitutes ‘mechanic solidarity’, based on emotion and empathy, in E. Durkheim, *The Division of Labour in Society* (Macmillan, 1984), at 68 ff.

³³ D. Miller, ‘Community and Citizenship’, in S. Avineri and A. De Shalit (eds.), *Communitarianism and Individualism* (OUP, 1992), p. 94; Mason, *Community, Solidarity and Belonging* (CUP, 2000), p. 134.

politically organised *Bruderschaft*.³⁴ The starting point is no longer the specific group and the bonds uniting its members, as putative ‘generators’ (and recipients) of solidarity, but rather their legal *ethos* and substantive commitment to (universal) basic rights. The focus of analysis is not the empirical ‘origin’ in any particular social reality, but the normative ‘result’ and aspiration of solidarity embedded in the legal rules and ideals they encapsulate. It is this ‘communion through law’ that a (cosmopolitan) ‘solidarity of values’ denotes. In this vein, several authors recognise the configuration of human rights as *erga omnes* obligations like an expression of a rudimentary *bonum commune* approach present at the universal level; as proof of a certain degree of (global) solidarity inscribed in international law, enshrining a value-based commitment.³⁵

This version of solidarity, based on (positivized) universal minimum standards of fairness, is present in the EU legal order—alongside other community-based, transnational forms of solidarity.³⁶ Plausibly, the founding tenets of ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights [alongside] pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women[...].’ in Article 2 TEU are exemplary of Brunkhorst’s *globale Rechtsgenossenschaft*. These universal values are shared/shareable on a global scale as much as they are ‘common to the Member States’, and as such they must ‘prevail’ in ‘the process of creating an ever closer Union’.³⁷ The (explicit) recognition that this exercise be principally oriented to ‘deepen the solidarity between their peoples’³⁸ (i.e. those of the Member States) does not *per se* exclude the external (cosmopolitan) dimension of solidarity, as the next sections elaborate.³⁹

³⁴ H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT Press, 2005). See also S. Benhabib, *The Rights of Others* (CUP, 2004); S. Benhabib, *Another Cosmopolitanism* (OUP, 2006).

³⁵ See, e.g., M.T. Kotzur and K. Schmalenbach, ‘Solidarity among Nations’, 52 *Archiv des Völkerrechts* (2014), p. 68; R. Wolfrum, ‘Solidarity’, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP, 2013), p. 401; H.G. Koroma, ‘Solidarity: Evidence of an Emerging International Legal Principle’, in H.P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity — Liber Amicorum Rüdiger Wolfrum* (Brill, 2011), p. 103.

³⁶ A. Sangiovanni, ‘Solidarity in the European Union’, 33 *OJLS* (2013), p.1; F. De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP, 2015).

³⁷ TEU, Article 2 and Preamble. See also TEU, Article 1.

³⁸ TEU, Preamble.

³⁹ Something similar happens with the European Convention of Human Rights, 1950 *CETS* 5 (hereafter: ECHR). The fact that human rights obligations primarily benefit citizens and residents within territorial domain does not impede the extraterritorial protection of aliens abroad, but coming

3. Solidarity as Founding Value, General (Meta-)Principle, and Primary Obligation

The normative capital and legal standing of Article 2 TEU values has been expressly recognised by the Court of Justice (CJEU).⁴⁰ It is in *Kadi* where they were hailed to the top of the pyramid of legal sources, as part of the ‘constitutional principles’ of EU law. They are of such critical importance to the integration project that the EU Treaties ‘in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order’.⁴¹ As a result, they are bound to succeed in case of conflict,⁴² and, like other general principles, they must guide the validity, construction, and application of secondary law.⁴³ Therefore, ‘if the wording of secondary [EU] law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty rather than to the interpretation which leads to its being incompatible with the Treaty’.⁴⁴ And regarding implementation, the CJEU has added that ‘Member States must not only interpret their national law in a manner consistent with [EU] law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with [...] general principles of [EU] law’.⁴⁵

Arguably, EU founding values *qua* general (‘constitutional’) principles are located at even higher a level than ‘ordinary’ EU primary law, as a special breed of constitutional provisions. Hence, in the event of a clash with exogenous (e.g. public international law) norms ‘any derogation from the principles [...] enshrined in Article

within the remit of State jurisdiction. See, generally, M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP, 2011).

⁴⁰ Cf. E. Kucuk, ‘Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?’, 23 *MJECL* (2016), p. 965, p. 975, relying on the Habermasian definition of values as ‘intersubjectively shared preferences’ devoid of legal effect, disregarding the nature of Art 2 TEU and the CJEU’s pronouncements in Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 (hereafter: *Kadi I*); confirmed: Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi* ECLI:EU:C:2013:518.

⁴¹ *Kadi I*, para. 304.

⁴² *Ibid.*, para. 285.

⁴³ On the nature and functions of general principles, see, extensively, U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (Kluwer, 2000); T. Tridimas, *The General Principles of EU Law* (OUP, 2nd edn, 2007); A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart/Beck/Nomos, 2011).

⁴⁴ C-305/05 *Ordre des barreaux* [2007] ECR I-5305, para. 28.

⁴⁵ *Ibid.*

[2 TEU] as a foundation of the Union' is prohibited.⁴⁶ By contrast, market freedoms could exceptionally be derogated from in accordance with today's Article 351 TFEU. Consequently, Article 2 TEU values (within which solidarity is contained), as founding meta-principles of European integration, constitute a frame of reference or 'constitutional paradigm',⁴⁷ which is to govern the lawfulness, interpretation, and operationalization of the entire body of EU law. Solidarity, through this lens, should work 'in much the same way that the principles of equal treatment or non-discrimination' and, thus, 'transform existing legal relationships', 'shaping and directing other core values and legal institutions'.⁴⁸ Once streamlined, solidarity should dictate choice between alternative options and direct preferences towards the most 'solidarity-friendly' among those available. Legal outcomes should hereafter be mediated and penetrated by solidarity (both in internal and external policies).

Although the Court did not deem it necessary in *Kadi* to trace the bases of founding values, whether in the common constitutional traditions of Member States or otherwise, as far as solidarity is concerned, it may be worth noticing that it is expressly mentioned in (some of) the national constitutions, taking on multiple functions. For instance, in Article 2 of the Spanish Constitution, solidarity is referred to as the principle articulating the relationship between the different autonomous regions in which the country's territory is administratively divided, underscoring its inter-territorial or 'horizontal' dimension.⁴⁹ Article 2 of the Italian Constitution, in turn, recognises the 'vertical' facet of solidarity, as applied to the relationship between the individual and the State, calling on governmental authorities to ensure adherence to 'inalienable obligations of political, economic and social solidarity'.⁵⁰ Finally, the French Constitution relies on 'systemic' solidarity as organising rationale of the '*francophonie*'—an entity offering the French Republic and freely adhering overseas territories and former colonies 'new institutions [different from the

⁴⁶ *Kadi I*, para. 303.

⁴⁷ M. Ross, 'Solidarity—A New Constitutional Paradigm for the EU?', in M. Ross and Y. Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP, 2010), p. 23.

⁴⁸ *Ibid.*, at 36.

⁴⁹ Constitución Española, Article 2, BOE-A-1978-31229: 'La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomía de las nacionalidades y regiones que la integran y la *solidaridad* entre todas ellas' (emphasis added), <https://www.boe.es/diario_boe/txt.php?id=BOE-A-1978-31229>.

⁵⁰ Costituzione Italiana, Article 2: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di *solidarietà* politica, economica e sociale' (emphasis added), <<http://www.governo.it/costituzione-italiana/principi-fondamentali/2839>>.

aggregate of its members] founded on the common ideals of liberty, equality and fraternity’,⁵¹ thereby highlighting the institutional, regime-related nature of solidarity.⁵² All these facets—it is posited—are encompassed in the common legal heritage of the EU.⁵³

Examples of this tripartite configuration of solidarity can be found across common policies.⁵⁴ Within the cohesion policy context—one of the most integrated areas where the Union shares competence with the Member States⁵⁵—the Regional Development Fund ‘is intended to help to redress the main regional imbalances in the Union [...]’.⁵⁶ Cohesion funds have a similar mission.⁵⁷ The overarching objective is to ensure the ‘overall harmonious development’ of the Union as a whole.⁵⁸ Solidarity herein translates an inter-state concern for the reduction of (material) disparities, so as to alleviate ‘the backwardness of the least favoured areas’.⁵⁹ But solidarity takes centre-stage from a ‘vertical’, State-individual perspective as well, advancing the wellbeing of the peoples of Europe, ‘foster[ing] social cohesion and social sustainability, and mak[ing] sure that no individual is left behind’.⁶⁰ Finally, the ‘systemic’ dimension of solidarity is also at play, which, on one hand, requires Member States to ‘conduct their economic policies [...] in such a way as [...] to attain [cohesion] objectives’ and, on the other hand, demands that the concrete ‘formulation and implementation of the Union’s policies [...] shall contribute to their

⁵¹ Constitution de la République française, Preamble and Article 87: ‘En vertu de ces principes et de celui de la libre détermination des peuples, la République offre aux territoires d’outre-mer qui manifestent la volonté d’y adhérer des institutions nouvelles fondées sur *l’idéal commun de liberté, d’égalité et de fraternité* et conçues en vue de leur évolution démocratique’ and ‘La République participe au développement de la *solidarité* et de la coopération entre les États et les peuples ayant le français en partage’ (emphasis added): <<http://www.assemblee-nationale.fr/connaissance/constitution.asp>>.

⁵² For a different configuration of the three dimensions, see I. Domurath, ‘The Three Dimensions of Solidarity in the EU Legal Order: Limits of the Judicial and Legal Approach’, 35 *Journal of European Integration* (2013), p. 459.

⁵³ Cf. R. Cotterrell, ‘Images of Europe in Sociolegal Traditions’, in V. Gessner and D. Nelken (eds.), *European Ways of Law* (Hart, 2007) 21.

⁵⁴ TFEU, Articles 174 ff (cohesion); TFEU, Article 222 (terrorism); Article 194 (energy); Article 122 TFEU (economic policy). On the latter, see A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP, 2015); P. Hilpold, ‘Understanding Solidarity within EU Law: An Analysis of the “Islands of Solidarity” with Particular Regard to Monetary Union’, 34 *OYEL* (2015), p. 257. For an overview, see Y. Borgmann-Prebil and M. Ross, ‘Promoting European Solidarity: Between Rhetoric and Reality’, in M. Ross and Y. Borgmann-Prebil, *Promoting Solidarity in the European Union*, p. 1.

⁵⁵ TFEU, Articles 2(2) and 4(2)(c).

⁵⁶ TFEU, Article 176.

⁵⁷ TFEU, Article 177.

⁵⁸ TFEU, Article 174(1).

⁵⁹ TFEU, Article 174(2).

⁶⁰ European Commission, ‘Opportunities, access and solidarity’, COM(2007) 726, and ‘Renewed social agenda’, COM(2008) 412.

achievement’.⁶¹ Ultimately, solidarity works to agglutinate the different facets of the policy and enhance their combined effect, as a sort of ‘framework obligation’ on the Union and its Member States to cooperate in good faith for the attainment of the cohesion goal, introducing a triple duty of conduct, loyalty, and result.

This tridimensional nature of solidarity is also present in the common defence and security policy—typically considered the least integrated policy domain due to its predominantly intergovernmental character. At the horizontal level, Article 42(7) TEU creates the specific obligation on all Member States to aid a fellow Member State that becomes the victim of ‘armed aggression’. The duty is one of conduct, to be pursued ‘by all the means in their power’. The systemic goal is, presumably, to demonstrate amity and commitment to ‘the progressive framing of a common Union defence policy’⁶² that serves ‘to protect the Union’s values’.⁶³ If the aggression takes the form of a terrorist attack, the ‘solidarity clause’ in Article 222 TFEU explicitly requires ‘[t]he Union and its Member States [to] act jointly in a spirit of solidarity’. Thus, the Union ‘shall mobilise all the instruments at its disposal’, whereas the Member States ‘shall assist’ and, to that end, ‘shall coordinate between themselves’ the most adequate response. The vertical dimension of solidarity is present too, in that the action undertaken must be directed to ‘protect democratic institutions and the civilian population’.⁶⁴

So, confirming *Kadi* findings on constitutional value-principles, solidarity emerges as all-pervasive. Although its concrete content may be fluid, contextual, and with varying degrees of thickness, depending on the circumstances, it does permeate the European project in a structural way, whatever the policy area, type of competence, and level of integration concerned. It constitutes both an objective and privileged means towards the achievement of key (federalising) aims. There is a symbiotic relationship between ‘an ever closer Union’ and solidarity—understood as ‘a shared interest [...] in the integrity of [the] common political life form’ embodied in the EU.⁶⁵ ‘More integration’ correspondingly requires ‘more solidarity’.⁶⁶ As a

⁶¹ TFEU, Article 175(1).

⁶² TEU, Article 42(2).

⁶³ TEU, Article 42(5).

⁶⁴ TFEU, Article 222(1)(a), 2nd indent.

⁶⁵ J. Bast, ‘Deepening Supranational Integration: Interstate Solidarity in EU Migration Law’, 22 *EPL* (2016), p. 289, p. 289.

⁶⁶ R. Bieber and F. Maiani, ‘Sans solidarité point d’Union européenne: Regards croisés sur les crises de l’Union économique et monétaire et du Système européen commun d’asile’, *RTDE* (2012), p. 295, p. 298.

dynamic and contextual meta-principle of constitutional rank, it underpins, as the next section illustrates, the construction of the Internal Market, the maintenance of the Euro, as well as the development of the CEAS, requiring joint action and mutual support for the continuous fulfilment of Treaty ambitions.

So defined, solidarity shares links with the principle of sincere cooperation in Article 4(3) TEU, which mandates collective loyalty by the Union and the Member States in the performance of their respective obligations and compels them, ‘in full mutual respect’, to take active steps and/or refrain from noxious conduct that may ‘jeopardise the attainment of the Union’s objectives’.⁶⁷ In a way, Article 4(3) TEU represents the ‘systemic’ facet of solidarity that reflects the mutuality and reciprocal dependence of the Union and the Member States in the realisation of EU integration.⁶⁸ But, solidarity (not only as principle but as cross-cutting EU value) is arguably broader and more fundamental.⁶⁹ As part of Article 2 TEU, it provides both the starting place and final goal to ‘the whole of the Community system’.⁷⁰ Unlike loyalty, it gives rise to (autonomous) obligations, demanding positive action of a special (solidarity-prone) kind that translates it into operational policy.⁷¹ It creates concrete benefits and responsibilities towards the EU common good,⁷² and requires fidelity to collective values, despite individual losses against self-interest.⁷³ Thus configured, solidarity relates to a European public interest, which transcends the sum of the individual (inward-looking, self-serving) preoccupations of each Member

⁶⁷ On loyalty as general principle and manifestation of solidarity, see M. Ross, in M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union*, p. 23.; J. Temple Lang, ‘Article 10 EC – The Most Important “General Principle” of Community Law’, in U. Bernitz, J. Nergelius, and C. Cardner (eds.), *General Principles of EC Law in a Process of Development* (Kluwer, 2008) 77; E. Nefframi, ‘The Duty of Loyalty: Rethinking its Scope through its Application in the Field of External Relations’, 47 *CMLRev* (2010), p. 323.

⁶⁸ B. De Witte, ‘Institutional Principles: A Special Category of General Principles of EC Law’, in Bernitz and Nergelius, *General Principles of European Community Law*, p. 153.

⁶⁹ In this vein, see analysis by D. Thym & E. Tsourdi in this special issue on how solidarity interlocks, but does not overlap, with the principle of loyalty. Cf. M. Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), p. 298-299, for whom loyalty ‘is an enforceable, primarily vertically directed principle, [while] solidarity is rather political’ and has no legal strength.

⁷⁰ Joined Cases 6/69 and 11/69 *Commission v. France* [1969] ECLI:EU:C:1969:68, para. 16.

⁷¹ D. Vanheule, J. Van Selm, and C. Boswell, *The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility*, Study PE 453.167 (European Parliament, 2011). Cf. J. J. Bast 22 *EPL* (2016), p. 289, p. 293, positing that Article 80 TFEU ‘expands the scope of the EU’s competence’.

⁷² Case 39/72 *Commission v. Italy* [1973] ECLI:EU:C:1973:13, para. 20-25.

⁷³ Cf. E. Kucuk, 16 *MJECL* (2009), p. 965, p. 968, embracing the view that ‘it is generally possible to speak of strict solidarity obligations only when they are driven by self-interest’. For similar positions, see A. Sangiovanni, ‘Solidarity in the European Union: Problems and Prospects’, in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of EU Law* (OUP, 2012); and P. Van Parijs, ‘Genuine Solidarity: Coffee Pot or Cappuccino?’, in J. Dreze (ed.), *On the Interaction between Subsidiarity and Interpersonal Solidarity* (Re-Bel Initiative, 2009).

State.⁷⁴ This is why for Member States to embrace their ‘own conception of national interest’⁷⁵ constitutes a ‘failure in duty of solidarity [...] [that] strikes at the *fundamental basis* of the Community legal order’.⁷⁶

4. Article 80 TFEU: ‘Solidarity and Fair Sharing of Responsibility’ in EU Asylum Law

Article 80 TFEU transposes the general value-principle of solidarity *and* fair sharing of responsibility within EU asylum policy.⁷⁷ Both elements of the composite command it entails are interconnected—responsibility sharing being the consequence of solidarity; solidarity constituting the motivating factor for responsibility sharing.⁷⁸ Solidarity in this guise requires ‘appropriate measures’ to ensure compliance with the principle every time (or ‘whenever’) it is necessary. Thus formulated, it not only provides a general framework for political deliberations and policy decisions, as a programmatic guideline of sorts,⁷⁹ but constitutes a central structural imperative, requiring the Union to act to guarantee suitable (solidarity-proof) outcomes.⁸⁰ It is a functional call for joint performance of a collectively defined objective that cannot be achieved by single Member States acting alone. This is why, an understanding of solidarity as a sporadic ‘voluntary’ gesture, ‘com[ing] from the heart’, as Commission President Juncker propounds in relation to ‘the refugee crisis’, is at odds with the wording, the spirit, and the broader logic of Article 80 TFEU.⁸¹

⁷⁴ On the identification of the public interest/common good in supranational polities, like the EU, see J. Lenoble and M. Maesschalck, ‘Reviewing the Theory of Public Interest: The Quest for a Reflexive and Learning-Based Approach to Governance’, in O. De Schutter and J. Lenoble (eds.), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart, 2010) 3; J. Lenoble and M. Maesschalck, *Democracy, Law and Governance* (Ashgate, 2010).

⁷⁵ Case 128/78 *Commission v. UK* [1979] ECLI:EU:C:1979:32, para. 12.

⁷⁶ *Commission v. Italy* [1973], para. 25 (emphasis added).

⁷⁷ Art 80 TFEU. On this provision consecrating a *single* principle, see contributions by E. Tsourdi, and that of F. Maiani to this volume. Cf. European Commission, ‘A European Agenda on Migration’, COM(2015) 240, p. 2; *The Bratislava Roadmap*, 16 Sept. 2016, under II; and Council Conclusions 20-21 Oct. 2016, EUCO 31/16, para. 9, decoupling the two.

⁷⁸ See also G. Morgese, ‘Solidarietà e ripartizione degli oneri in materia di asilo nell’Unione Europea’, in G. Caggiano (ed.), *I Percorsi Giuridici Per L’integrazione* (Giappichelli, 2014), p. 370, p. 373.

⁷⁹ See, e.g., P. De Bruycker, ‘L’espace de liberté, de sécurité et de justice’, in M. Dony and E. Bribosia (eds), *Commentaire de la Constitution de l’Union européenne* (ULB Press, 2004) 279; and D. Thym, ‘Artikle 80’, in Grabitz et al. (eds.), *Das Recht der Europäischen Union* (Beck, 2010).

⁸⁰ Similarly, see I. Goldner Lang, ‘Is There Solidarity on Asylum and Migration in the EU’, 9 *CYELP* (2013), p. 1, and the contribution of E. Tsourdi to this special issue.

⁸¹ State of the Union Address 2016, SPEECH-16-3043, at: <http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm>. See also European Council, ‘European Pact on Immigration and

On a systematic reading of the provision, the immediate intention of Article 80 TFEU solidarity is to deliver fairness ‘between the Member States’ and to procure a ‘balance of efforts’ regarding the reception of protection seekers and grants of asylum.⁸² But the final goal must not be lost of sight. The ultimate aspiration towards which all institutional and material efforts (both single and collective) must converge is the development of ‘a common policy on asylum...with a view to offering appropriate status to any [TCN] requiring international protection’.⁸³ The delivery of fairness to TCNs, in line with fundamental rights (*qua* essential/universal requirements of justice under the cosmopolitan vision of solidarity), is the overarching rationale—as specified in the ‘general provisions’ opening Title V TFEU.⁸⁴ Accordingly, within the CEAS, inter-state solidarity is a-means-to-an-end that must, above all, attend to refugee protection needs.

Article 80 TFEU, combined with Article 78 TFEU, arguably provides a legal basis for action to that effect.⁸⁵ Solidarity modulates the *quality* of that action, as one that must apportion responsibilities in a way that amounts to real ‘sharing’, as opposed to mere ‘allocation’, of protection duties. Considerations of equity and justness ought to be taken into account in such exercise.⁸⁶ The final result must be one that is doubly fair: between Member States *and* towards asylum seekers/refugees. Structurally, this ‘double fairness’ criterion should permeate the CEAS on a permanent, *ex ante* basis. Contrary to the *ad hoc*, emergency-driven, exceptional solidarity logic underpinning Article 78(3) TFEU (and Juncker’s approach), whereby ‘in the event of [...] an emergency situation [...] provisional measures for the benefit of the Member State(s) concerned’ *may* be adopted, the kind of solidarity contained in Article 80 TFEU requires a ‘normalisation’ of solidarity that incorporates it as a

Asylum’, Council doc. 13440/08, p. 9; and European Commission, ‘Policy Plan on Asylum’, COM(2008) 360, para. 5.1.

⁸² The ‘balance of efforts’ wording is found in the former TEC, Article 63(2)(b), preceding TFEU, Article 78.

⁸³ TFEU, Article 78(1).

⁸⁴ TFEU, Articles 67(1) and (2). See also TFEU, Article 79(1) on ‘fair treatment’ of TCNs as guiding principle of EU migration policy. Generally, on the constitutional standing of fundamental rights, see TEU Article 2, 6 and the EU Charter on Fundamental Rights (hereafter: EUCFR).

⁸⁵ In this line, see S. Peers, ‘Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon’, 10 *EJML* (2008), p. 219, p. 236.

⁸⁶ TFEU, Article 78(2)(e) must, as a result, be read in line with the imperatives of TFEU, Article 80, which must, in turn, take account of the final goal of TFEU, Article 78(1), in accordance with TFEU, Article 67(1) and TEU, Article 6(1) parameters.

compulsory, basilar foundation of the common asylum policy, setting aside national self-interest.⁸⁷

This is not to say that on top of the ‘normal’ solidarity-based system to be organised around Article 80 TFEU (‘shall’) imperatives, there should not be ‘additional’ (‘may’) solidarity measures grounded in Article 78(3) TFEU to provide targeted assistance in exceptional conditions.⁸⁸ But reliance on ‘exceptional’ (additional) solidarity in particular circumstances does nothing to undo the obligatory character of Article 80 TFEU as a ‘general’ (structural) rule addressed both to the EU and the Member States in the elaboration of asylum policies and their implementation to facilitate the attainment of Treaty goals. Solidarity, as a structural, functional command, whereby entire policy domains must be (permanently) arranged in a way that guarantees cooperation and sharing of burdens in compliance with fundamental rights has implications both for existing measures, e.g. the Dublin Regulation,⁸⁹ and the instruments to come.

Conditioning solidarity upon Member States (especially those at the EU’s external frontiers) assuming full Dublin charges, disregarding the unfairness in allocation the Regulation imports into the CEAS, insisting on ‘individual responsibility’,⁹⁰ amounts to the consolidation of pre-Lisbon inequities (in part) ‘created’ by a system of distribution that exacerbates imbalance, as Maiani highlights in this volume. This is why, the admission that Dublin ‘was not devised as a burden sharing instrument’ and that ‘its functioning may de facto result in additional burdens’,⁹¹ in contravention to the core content of Article 80 TFEU, should prompt a complete overhaul of the system’s basic assumptions and overall design—instead of

⁸⁷ Both provisions (TFEU Articles 78(3) and 80) cannot mean the same. The principle against redundancy prevents such a reductionist construction of separate obligations. See, e.g., A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, 2008), at 422 ff. This argument is also developed in the contribution of E. Tsourdi in this volume.

⁸⁸ See, e.g., E. Guild, C. Costello, and V. Moreno-Lax, *The Implementation of the 2015 Relocation Decisions*, Study PE 583.132 (European Parliament, 2017) and references therein.

⁸⁹ Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31, (hereafter: Dublin Regulation).

⁹⁰ See, e.g., Council of the European Union, ‘Council Conclusions on a common framework for genuine and practical solidarity’, 8 March 2012, para. 8, at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130731.pdf>. See also European Commission, ‘Enhanced intra-EU solidarity in the field of asylum’, COM(2011) 835.

⁹¹ Policy Plan on Asylum, COM(2008) 360, para. 5.1.2. See also European Commission, ‘Green Paper on the future CEAS’, COM(2007) 301, para. 4.1.

the ‘corrective’ approach proposed by the Commission.⁹² The political elevation of Dublin as the ‘cornerstone’ of the CEAS,⁹³ above the exigencies of primary norms, contravenes the most basic tenets on the hierarchy of sources of EU law—especially in the post-Lisbon context of positivized solidarity.⁹⁴ The ‘first country of entry’ rule, following which asylum claims are to be allocated to the Member State most responsible for the presence of the refugee in the EU (as if geographical fortuity could be determined or controlled), shifts, rather than shares, responsibility. It has no basis in the Refugee Convention—its blame-based rationale may even contravene the principle of non-penalisation for irregular entry enshrined in Article 31-⁹⁵ and its logic disfavours distributive justice. In the optic of Article 80 TFEU, it is both inappropriate and unnecessary. It transgresses the level of discretion allowed in the choice of means to realize the explicit objectives of solidarity and responsibility sharing.

A ‘re-balancing’ approach such as that put forward in the Dublin IV Proposal would be justified, if the initial allocation were even (yet imperfect) or, at least, not manifestly unfair.⁹⁶ But, in so far as responsibility criteria (by design) overburden certain Member States, rendering them unable to cater for the rights of protection seekers, as the Commission avows,⁹⁷ the system should be adjudged unconstitutional.⁹⁸ Instead, what Article 80 TFEU requires is a regime of collective and concerted responsibility that capacitates achievement of the CEAS’ aims.⁹⁹

⁹² Commission Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 (hereafter: Dublin IV Proposal).

⁹³ *Ibid.*, p. 4.

⁹⁴ Art 80 TFEU was apparently codified, precisely, as a reaction to inequalities consolidating in the asylum policy field. See C. Kaurert and S. Leonard, ‘The EU Asylum Policy: Towards a Common Area of Protection and Solidarity?’, in S. Wolff, F. Goudappel, and J.W. de Zwaan (eds), *Freedom Security and Justice after Lisbon and Stockholm* (TMC Asser Press, 2011), p. 79.

⁹⁵ Cf. Explanatory Memorandum, Dublin II Proposal, COM(2001) 447, para. 3.1: ‘[...] each Member State is answerable to all the others for its actions concerning the entry and residence of [TCNs] and must bear the consequences thereof in a spirit of solidarity and fair cooperation’.

⁹⁶ For a critique, see the contribution of F. Maiani in this volume; and E. Guild, C. Costello, and V. Moreno-Lax, *The Implementation of the 2015 Relocation Decisions*, Study PE 583.132 (European Parliament, 2017).

⁹⁷ European Commission, ‘Towards a Reform of the CEAS’, COM(2016) 197, p. 4.

⁹⁸ On the unconstitutionality of Dublin, see E. Kucuk, ‘The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?’ (2016) 22 *ELJ*, p. 448.

⁹⁹ A mechanism of *à la carte* contribution or ‘flexible/effective solidarity’, such as that proposed by the Visegrad countries, would be inappropriate. See Solidarity and responsibility in the CEAS – progress report by the Slovak Presidency, Council doc. 15253/16, 5 Dec. 2016.

Reactive, compensatory solidarity is therefore not enough.¹⁰⁰ Article 80 TFEU calls for a proactive, structural solidarity-based arrangement that optimizes the CEAS' effectiveness.¹⁰¹ Solidarity therein should be apprehended as a tripartite institutional, procedural, and material duty of shared responsibility that is *ab initio* fair.

Such a comprehensive understanding has not yet been pronounced by the CJEU. It had an opportunity, in *Halaf*, to determine whether the so-called 'sovereignty clause' of the Dublin Regulation is to be interpreted in line with the principle of solidarity, but it chose to resolve the case on other bases.¹⁰² In fact, the Court has tackled the solidarity question in piecemeal fashion. In *N.S.*, it recognised the limits of discretion in the establishment of a regime of responsibility allocation like Dublin ('resulting in a disproportionate burden [for Greece] and the inability to cope with the situation in practice')¹⁰³ through a systemic interpretation of Article 78 TFEU, prohibiting intra-EU transfers of asylum seekers to a Member State 'experiencing major operational problems', exposing transferees to treatment 'incompatible with their fundamental rights'.¹⁰⁴ However, it only mentioned Article 80 TFEU in passing.¹⁰⁵ In *GISTI*, the Court then addressed the matter of financial sharing of reception costs.¹⁰⁶ Reasoning on human dignity grounds, it favoured a construction of reception obligations based on physical presence of the claimant in the Member State concerned, regardless of whether it is the 'responsible country' following Dublin rules, concluding that 'the asylum seeker may not [...] be deprived—even for a temporary period [...]—of the protection of the minimum standards laid down by [the CEAS]'.¹⁰⁷

This reading of solidarity, as underpinned by an effective commitment to the protection of fundamental rights, is also present, for instance, in the case law on the intersection between the single market and EU citizenship. Regarding the stay of EU

¹⁰⁰ For an assessment of 'compensatory' measures external to the Dublin Regulation, such as the emergency relocation schemes, EASO assistance, and European funding, see the contribution of E. Tsourdi in this volume and references therein.

¹⁰¹ On solidarity working as an 'optimization command', see E. Karageorgiou, 'The Law and Practice of Solidarity in the CEAS: Article 80 TFEU and its Added Value', *European Policy Analysis* Issue 14 (2016), <http://www.sieps.se/sites/default/files/2016_14epa%20eng%20A4%20korr4%20%28003%29.pdf>, p. 10.

¹⁰² C-528/11 *Halaf* [2013] ECLI:EU:C:2013:342, para. 25 ff.

¹⁰³ Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [2011] ECLI:EU:C:2011:865, para. 87.

¹⁰⁴ *Ibid.*, para. 81 and 94 ff.

¹⁰⁵ *Ibid.*, para. 93.

¹⁰⁶ C-179/11 *Cimade & GISTI* [2012] ECLI:EU:C:2012:594, paras 59-60.

¹⁰⁷ *Ibid.*, para. 56.

nationals in a host Member State, specially those non-economically active, the Court has developed the concept of ‘a certain degree of financial solidarity’ that must be shown towards certain categories of EU residents able to show a meaningful link to it (through prior lawful residence of sufficient length).¹⁰⁸ Although the conditions for such link to be established have become stricter in the post-financial crisis environment,¹⁰⁹ the ‘solidarity obligation’ *per se* still remains.¹¹⁰ This is essential to ensuring that ‘Union citizenship [becomes] the fundamental status of nationals of the Member States’,¹¹¹ presumably so as to ‘deepen the solidarity between [EU] peoples’.¹¹² The justification, borrowing from the Schuman Declaration, is possibly to ‘build concrete achievements which first *create* a de facto solidarity’,¹¹³ as a prelude to the emergence of a (transnational) European community that ‘feels’ like one. Similarly to the financial costs related to the reception of asylum seekers, solidarity hereby involves the sharing of resources with the less endowed (who may not be able to immediately reciprocate) in the quest for ‘an ever closer union among the peoples of Europe’¹¹⁴ (or the constitution of a CEAS in line with fundamental rights, as in the *GISTI* case). This is how the institutional and material elements of solidarity intertwine, through a duty of loyal contribution to a shared, fair result.

Alongside the vertical facet, the systemic dimension of fairness inscribed in the principle of solidarity has also been considered by the CJEU. Systemic fairness—it is submitted—necessitates both of individual and collective allegiance to the CEAS (and the Union) as a whole, so the *common* policy operates effectively and achieves the desired outcome. This is, at least, the understanding espoused in other areas of EU law. For example, solidarity has been relied upon (if tacitly) to guarantee the good functioning of the single market by regulating the overproduction of steel, even at the expense of individual producers, to safeguard the sector as such.¹¹⁵ The same

¹⁰⁸ C-184/99 *Grzelczyk* [2001] ECLI:EU:C:2001:458, para. 44. See also C. Barnard, ‘EU Citizenship and the Principle of Solidarity’, in E. Spaventa and M. Dougan (eds.), *Social Welfare and EU Law* (Hart, 2005) 161.

¹⁰⁹ D. Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’, 52 *CMLRev* (2015), p. 17.

¹¹⁰ This is codified in Art 24 of the EU Citizenship Directive 2004/58/EC, [2004] OJ L 229/35, which C-333/13 *Dano* ECLI:EU:C:2014:2358 and subsequent cases do not deny.

¹¹¹ C-184/99 *Grzelczyk* [2001], para. 31.

¹¹² TEU, Preamble.

¹¹³ The Schuman Declaration of 9 May 1959 (emphasis added), <https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en>.

¹¹⁴ TEU, Preamble.

¹¹⁵ Joined Cases 154, 205, 206, 226-228, 263 and 264/78, 31, 39, 83 and 85/79 *Valsabbia* [1980] ECLI:EU:C:1980:81; Joined Cases 26 and 86/79 *Marcinelle et Monceau* [1988] ECLI:EU:C:1988:199;

philosophy has been employed to justify sugar, milk or wine quotas within the Common Agricultural Policy, ‘to provide a degree of control over production whilst re-orientating it towards the needs of the market’.¹¹⁶ Arguments regarding specific (or even discriminatory) impact on one or the other producer have normally been rejected in the name of the higher (common) interests of the system as a whole; that, even with regard to producers or entire countries playing no part in the surplus,¹¹⁷ or even requiring extra supply to cover a (domestic) production deficit.¹¹⁸ Solidaristic efforts by *all* players (for the benefit of the system itself) have been deemed key in these cases (rejecting any blame-based reasoning *à la* Dublin).

Finally, the horizontal aspect of solidarity has (implicitly) been mobilized too. In relation to the economic crisis, and the no-bailout clause in Article 125 TFEU, the *Pringle* judgment illustrates the point. Therein, the Court concluded to the non-violation of the prohibition via a (solidarity-enhancing) narrow construction, so that EU targeted financial/technical assistance provided for the promotion of sound budgetary policies at domestic level was interpreted to be allowed—with only complete or straightforward bailouts forbidden. Without mentioning solidarity, the principle was nonetheless at work to protect the weakest performers within the European stability scheme to thereby preserve the Eurozone as a whole—the horizontal facet of solidarity being put at the service of the systemic dimension thereof to guarantee the attainment of the higher EU public interest goals.¹¹⁹ Such contextual, multi-polar/multi-functional configuration of (horizontal, vertical, and systemic) solidarity, entailing institutional, material, and procedural facets, is conceivably the same that is inscribed in Article 80 TFEU.

5. The External Dimension: Solidarity as Organising Principle of EU External Relations

Case 276/80 *Ferriera Padana* [1982] ECLI:EU:C:1982:57; Joined Cases 351 and 360/85 *Fabrique de Fer de Charleroi* [1987] ECLI:EU:C:1987:392.

¹¹⁶ Case 250/84 *Eridania* [1986] ECLI:EU:C:1986:22, para. 25 (sugar quotas); Case 179/84 *Bozetti* [1985] ECLI:EU:C:1985:306 (milk quotas); Case 375/96 *Zaninotto* [1998] ECLI:EU:C:1998:517 (wine quotas).

¹¹⁷ Case 203/86 *Spain v. Council* [1988] ECLI:EU:C:1988:420 (milk quotas).

¹¹⁸ C-34/08 *Azienda Agricola* [2009] ECLI:EU:C:2009:304 (milk quotas).

¹¹⁹ C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756. For an explicit reliance on solidarity, see Opinion of AG Kokott in C-370/12 *Pringle* [2012] ECLI:EU:C:2012:675, paras. 142-143. For a similar approach regarding fiscal solidarity, see C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:400.

It has been posited that solidarity within the EU and solidarity with the rest of the globe cannot possibly mean the same; that intra-EU solidarity ‘distinguishes the EU and its members from other parts of the world and international organisations’.¹²⁰ From the federalising perspective of the ‘ever closer Union’ envisaged by the Treaties,¹²¹ taking solidarity as an end in itself, representing a special commitment to the constitution of a community of Member States and EU citizens, this may well be the case. Yet, as discussed above, solidarity has multiple dimensions and its value as an organising principle of EU external relations has been explicitly recognised in Lisbon provisions.

As a result, the largely absent ‘solidarity obligation’ at international (refugee) law indicated at the outset is palliated by the EU-grown requirement of solidarity, which applies not only internally (by virtue of Article 80 TFEU), but also externally (via Articles 3(5) and 21 TEU). What this section advances is that the (independently emerged) EU law obligation of solidarity should govern not only the internal facet of the CEAS, but its external dimension as well. And that, as it ensues from Article 78 TFEU, must be understood to entail a duty of engagement *through* partnership with third countries for the management of forced displacement that complies with the rights of refugees under the 1951 Convention and other relevant treaties.

While it is true that the wording of Article 80 TFEU limits solidarity to dealings ‘between the Member States’, it is not less certain that contribution to (global) solidarity and protection of human rights features as part of the Union’s tasks ‘[i]n its relations with the wider world’.¹²² According to Article 21 TEU, ‘[t]he Union’s action on the international scene *shall* be guided by the principles which have inspired its own creation [including]...*solidarity*’. And as a reminder of this specific command, the TFEU requires that, not just ‘cooperation’, but true ‘partnerships’ with third countries be established ‘for the purposes of managing the inflows of people’ in need of international protection,¹²³ presumably with a view to ‘promot[ing] multilateral solutions to common problems, in particular in the framework of the United Nations’.¹²⁴

¹²⁰ I. Hartwig and K. Nicolaidis, ‘Elusive Solidarity in an Enlarged European Union’, 3 *Eipascope* (2003), p. 19, p. 19.

¹²¹ TEU, Preamble.

¹²² TEU, Article 3(5).

¹²³ TEU, Article 78(2)(g) (emphasis added).

¹²⁴ TEU, Article 21(1), 2nd indent.

Within that framework, the 1951 Convention constitutes an expression of ‘the indivisible, universal values’ on which the EU is founded,¹²⁵ of which (cosmopolitan) solidarity vis-à-vis protection seekers and those hosting the highest numbers of exiles forms part. The Convention itself recognises the ‘international scope’ of refugees’ plight, and enjoins States to find ‘a satisfactory solution’ through the medium of ‘international cooperation’, requiring them to do ‘everything within their power’ for their effective protection, ‘to prevent this problem from becoming a cause of tension between States’ and, at the same time, ‘assure refugees the widest possible exercise of [their] fundamental rights and freedoms’.¹²⁶ Upholding (refugee) rights can thus be framed as a manifestation of solidarity grounded in Brunkhorst’s *globale Rechtsgenossenschaft*, part of the global *bonum commune* represented by the protection of human dignity beyond formalised (national/supra-national) bonds.¹²⁷ As the EU Charter confirms, the ‘[e]njoyment of these rights entails responsibilities [...] with regard to [...] the human community’ as a whole.¹²⁸ So, the call on the Union and its Member States should be taken as one of ‘meaningful’ partnership with third countries for the realization of the (universal) rights of refugees.

This essential tenet should guide internal and external action alike. Arguably, a common intra/extra-EU (value-based) solidarity underpins them both, which, following the principle of uniformity of EU law, should ‘normally be given an autonomous and uniform interpretation throughout the Union [legal order]’.¹²⁹ There is only one overarching principle of solidarity directing asylum policy (positivized in Article 80 TFEU), which (in light of Articles 3(5) and 21 TEU) governs both the internal and external dimensions of the CEAS. The principle of coherence,¹³⁰ according to which the EU ‘shall ensure consistency between the different areas of its external action and between these and its other policies’, to guarantee the ‘effectiveness and continuity of its policies and actions’, supports this conclusion.¹³¹

¹²⁵ EU CFR, Preamble.

¹²⁶ CSR51, Preamble.

¹²⁷ P. Hartling, ‘International Solidarity and the International Protection of Refugees’, *Congress on International Solidarity and Humanitarian Actions Organized* (San Remo, 1980), p. 237; T. Van Boven, ‘International Solidarity and Human Rights’, *Congress on International Solidarity and Humanitarian Actions* (San Remo, 1980), p. 15.

¹²⁸ CFR, Preamble.

¹²⁹ C-66/08 *Kozłowski* [2008] ECLI:EU:C:2008:437, para.42.

¹³⁰ See, extensively, S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law* (OUP, 2008).

¹³¹ TEU, Articles 21(3), 2nd indent, and 13(1). See also TEU, Articles 16(6), 18(4), and 26(2) on the ‘consistency’ duties of the several EU institutions with responsibility for external action.

From a substantive perspective, solidarity as a-means-to-an-end within the CEAS remains subject to the delivery of ‘fairness’ to TCNs already noted, which includes, at minimum, respect for their fundamental rights.¹³² The fundamental rights of asylum seekers and refugees that the EU legal order recognises constitute the common framework of primary law norms shared across the internal-external continuum of the CEAS that the vertical facet of solidarity encapsulates.¹³³ The fact that those in need of protection are non-citizens, coming from abroad, does nothing to diminish the legal strength of commitments in their regard. Post-Lisbon, the Charter ‘shall have the same legal value as the Treaties’.¹³⁴ In fact, it ‘reaffirms...the rights as they result, in particular, from the [...] international obligations common to the Member States’,¹³⁵ including those stemming from the 1951 Convention.¹³⁶ Territoriality/extraterritoriality does not determine *per se* their applicability. Whenever (internal/external) action falls within the remit of EU law, the ‘applicability of the [...] Charter’ is activated, since there cannot be ‘situations [...] which are covered [...] by European Union law without [...] fundamental rights being applicable’.¹³⁷

The 1951 instrument also affects the systemic side of solidarity. In addition to intra-EU loyalty, towards the CEAS (ensuing from the combined reading of Articles 80 TFEU and 4(3) TEU), extra-EU fidelity to the system of international protection of the Refugee Convention is required too, as per Article 78 TFEU. The Treaty makes this clear by expressly subjecting the achievement of the CEAS to ‘the [1951] Geneva Convention...and other relevant treaties’.¹³⁸

Fairness, therefore, in the apportionment of resources and responsibilities within the CEAS, should be achieved not only internally, but also from the viewpoint of the universal regime of refugee protection. Whatever action is adopted at EU level, it should facilitate, rather than impede, the achievement of the global system’s

¹³² TFEU, Article 67(1)-(2).

¹³³ On the extraterritorial reach of refugee rights, see V. Moreno-Lax, *Accessing Asylum in Europe* (OUP, 2017), Part II.

¹³⁴ TEU, Article 6(1).

¹³⁵ CFR, Preamble.

¹³⁶ CFR, Article 18: ‘The right to asylum *shall* be guaranteed with due respect for the rules of the [1951] Geneva Convention [...]’ (emphasis added).

¹³⁷ C-617/10 *Fransson* [2013] ECLI:EU:C:2013:105, para. 21, and Art 51 CFR. For analysis, see V. Moreno-Lax and C. Costello, ‘The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model’, in S. Peers et al. (eds.), *Commentary on the EU Charter of Fundamental Rights* (Hart, 2014), p. 1657.

¹³⁸ TFEU, Article 78(1). See also CFR, Article 18.

intended purpose of ‘a satisfactory solution of a problem [i.e. that of forced migration on a planetary scale] of which the UN has recognized the international scope’.¹³⁹ From this perspective, intra-EU systemic solidarity (towards the CEAS) should be deemed at the service of extra-EU systemic solidarity (towards the Refugee Convention) for the regional and universal regimes to reach their common goal.¹⁴⁰

Consequently, as part of the exercise of EU public interest identification in this context, when devising a responsibility-sharing mechanism in partnership with, or having an impact on, third countries, EU (internal/external) solidarity must play a role. Confronted with a range of choices, due to the (autonomous) EU law requirements flowing from the principle, the legislator should select the one most disposed to foster the chain of (intra-EU/extra-EU) ‘systemic fairness’, in order to ‘ensure fulfilment of the obligations arising out of the Treaties’,¹⁴¹ including ‘accordance with the [1951] Geneva Convention’.¹⁴²

6. The EU-Turkey Deal: Example of External Non-solidarity

The horizontal dimension of EU external solidarity may be the least straightforward, if communitarian/federalising conceptions of the principle provide the starting place of analysis. However, when the overarching interests of the system of international protection are taken as reference point instead, it becomes clear that ‘the CEAS must [...] provide for genuine solidarity mechanisms, both within the EU and with third countries’ and that ‘a higher degree of solidarity and responsibility among the Member States, as well as between the EU and third countries’ is essential to ‘promote refugee protection’ and make the 1951 Convention regime work.¹⁴³

Such ‘external solidarity’, as the European Commission has literally called it, may comprise financial support ‘to enhance protection capacity in third countries’,¹⁴⁴ e.g. via Regional Protection Programmes and similar fund transfer initiatives. But, to be credible, it should also entail ‘that the Union is ready to take a fair share of

¹³⁹ CSR51, Preamble.

¹⁴⁰ On this point, see Vienna Convention on the Law of Treaties, 1155 *UNTS* 331 (hereafter: VCLT), Article 30(2): ‘[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail’.

¹⁴¹ TEU Article 4(3).

¹⁴² TFEU, Article 78(1).

¹⁴³ Policy Plan on Asylum, COM(2008) 360, p. 3-4 and 9.

¹⁴⁴ *Ibid.*, p. 9.

responsibility’ for hosting refugees, e.g. via resettlement programmes and humanitarian admission schemes,¹⁴⁵ as ‘a visible and concrete expression of European solidarity towards the international community’.¹⁴⁶

How should ‘fairness’ be appraised in this context remains debatable. But many would argue that the EU-Turkey deal, based on the unreserved espousal of the STC principle,¹⁴⁷ is utterly unfair. Just like the ‘first country of entry’ rule within Dublin, it shifts, rather than shares, responsibility on the basis of geographical proximity to the country of origin of refugee flows, without considering relevant protection or capacity-related criteria. It embraces a type of (misconstrued) ‘externalisation-based solidarity’ that prevents, rather than facilitates, access to asylum.¹⁴⁸

Indeed, the ‘deal’ requires Turkey to accept the ‘rapid return of all migrants not in need of international protection crossing from Turkey to Greece and to take back all irregular migrants intercepted in Turkish waters’.¹⁴⁹ In exchange, for every Syrian readmitted to Turkey, another Syrian is to be resettled to the EU, prioritizing those who have not previously entered irregularly. In addition, visa facilitation and Turkish accession to the EU should be accelerated, and a transfer of EUR 6 billion from the EU budget should sustain a Refugee Facility there.¹⁵⁰

So far, Turkey has accepted the return of 1,487 and blocked the exit of most migrants since March 2016—with crossings decreasing from a daily rate of nearly 3,500 to just 43—although only 3,565 Syrian refugees have been resettled to

¹⁴⁵ Ibid., p. 11 and para. 5.2.1, 5.2.2 and 5.2.3. For analysis, see V. Moreno-Lax, ‘The External Dimension of the CEAS’, in S. Peers et al. (eds), *EU Immigration and Asylum Law*, Vol. 3 (Brill, 2nd edn, 2015), p. 617.

¹⁴⁶ Towards a Reform of the CEAS, COM(2016) 197, p. 15.

¹⁴⁷ See C-695/15 PPU *Mirza* [2016] ECLI:EU:C:2016:188, paras 54 ff.

¹⁴⁸ V. Mitsilegas, ‘Solidarity and Trust in the Common European Asylum System’, 2 *Comparative Migration Studies* (2014), p.181, p. 189. See also K.M. Greenhill, ‘Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis’, 22 *ELJ* (2016), p. 317; and V. Moreno-Lax and M. Giuffré, ‘The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flows’, in S. Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar, forthcoming).

¹⁴⁹ EU-Turkey Statement.

¹⁵⁰ Note, however, that the General Court considers the ‘Statement’ not to be attributable to the EU, thus disclaiming jurisdiction to adjudicate on its legality. See T-192/16, T-193/16 and T-257/16 *NF, NG and NM v. European Council* [2017] ECLI:EU:T:2017:128. An appeal is pending: C-208/17 P *NF v European Council*. For a critique, see S. Carrera, L. den Hertog, and M. Stefan, ‘It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal’, *CEPS Policy Insights No. 2017-15* (2017) <<https://www.ceps.eu/publications/it-wasn't-me-luxembourg-court-orders-eu-turkey-refugee-deal>>.

Europe.¹⁵¹ The presumption is that Turkey is a STC for returns from Greece, despite it maintaining a geographical limitation to the 1951 Convention, and regardless of its widely documented mistreatment of refugees.¹⁵²

Whether the ‘deal’ constitutes a ‘fair’ distribution of asylum responsibilities between the EU and Turkey, especially considering that Turkey already hosts 3 million Syrian refugees,¹⁵³ depends on how fairness is assessed. On a material understanding of fairness, those sharing duties should do so according to an equitable scheme, considering the total onus to apportion.¹⁵⁴ But, on a procedural reading, fairness would depend on the process through which a ‘deal’ is negotiated. Provided that the decision-making plan allows all parties to have an equal say in the debate, and an equal chance to influence the end result, the final outcome should be considered ‘fair’.¹⁵⁵ Since both Turkey and the EU Member States had similar veto capacities, and comparable bargaining powers relative to their positions as transit and destination countries, one could plausibly conclude to the ‘fairness’ of the EU-Turkey scheme.

Yet, such conceptualisation of (procedural) ‘fairness’ omits the wider implications of the principle of (external) solidarity identified earlier. It pursues a ‘pure’ inter-state perspective, discounting the vertical and systemic facets of solidarity. It endorses a misconception of the principle that (solely) promotes reciprocal self-interest, reifying asylum seekers as ‘burdens’,¹⁵⁶ dispossessing them (if inadvertently) of their entitlements under international and EU law. Contrariwise, a solidarity-based apportionment of asylum duties should be based on a comprehensive understanding of fairness (on horizontal, vertical, and systemic grounds), promoting,

¹⁵¹ European Commission, ‘Fifth progress report on the implementation of the EU-Turkey Statement’, COM(2017) 204, p. 2, p. 5 and p. 8.

¹⁵² PACE Resolution 2109 (2016) on ‘The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016’, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=22738&lang=en>>; Amnesty International, ‘Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal’, 1 April 2016, <<https://www.amnesty.org/en/press-releases/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>>; Human Rights Watch, ‘Turkey: Border Guards Kill and Injure Asylum Seekers’, 10 May 2016, <<https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>>.

¹⁵³ Syrian Regional Refugee Response, Inter-Agency Information Sharing Portal, 16 February 2017 <<https://data.unhcr.org/syrianrefugees/country.php?id=224>>.

¹⁵⁴ On this understanding, see J. Rawls, *A Theory of Justice* (Harvard University Press, rev. edn., 2003), at 53.

¹⁵⁵ On this reading, see J. Habermas, *Between Facts and Norms* (MIT Press, 1996), p. 166-167.

¹⁵⁶ For a contestation of this approach, see V. Türk and M. Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ 28 *IJRL* (2016), p. 656.

rather than undermining, the rights of refugees and the goal of their realization underlying the international (and EU) protection regime.¹⁵⁷

Therefore, in so far as the EU-Turkey deal, instead of creating additional (or, at least, distributing existing) protection space, reduces chances for refugees to find asylum, leading, in the worse cases, to persecution, mistreatment, and chain *refoulement*,¹⁵⁸ it cannot be characterised as an expression of (external) solidarity.

7. Conclusion: An All-Pervading Duty of (Internal/External) Good Faith Cooperation

Solidarity is not univocal and has not been defined in EU law. However, the foregoing has demonstrated that it is all-pervasive and permeates the European project in a structural way, as a founding value, constitutional tenet, and (autonomous) primary law command of good faith engagement with others (internally and externally) in the achievement of EU integration goals.

The implications of the principle are equally comprehensive. From the horizontal perspective, within the asylum policy domain, it arguably entails cooperation in consideration of the needs and capacities of EU and third countries, constituting a ‘partnership’ worthy of the name, ‘for the purpose of managing inflows of people applying for asylum’.¹⁵⁹ The vertical dimension intertwines with the systemic facet of solidarity, in turn requiring relations with the wider world in a manner that produces ‘fair’ outcomes for refugees,¹⁶⁰ fulfilling the primary law obligation to develop a CEAS ‘with a view to offering appropriate status to any [TCN] requiring international protection’, ‘with respect for [their] fundamental rights’.¹⁶¹ Finally, the prevalence of the systemic dimension of solidarity in this framework is due to the structural configuration of solidarity in Article 80 TFEU as a

¹⁵⁷ In this line, EXCOM Conclusion No. 112 (LXVII) 2016, Preamble and para. 1 and 8-10, according to which ‘international solidarity and responsibility’ requires a (genuine) commitment to ‘the protection of human life and dignity as a priority issue’, so that global/regional/inter-regional responsibility-sharing efforts are with a view to ‘resolving...refugee situations’, ensuring ‘protection and assistance [that] realize durable solutions’, ‘in full respect for the rights of affected persons’.

¹⁵⁸ For recent condemnations of Turkey for human rights violations of protection seekers, see *S.A. v. Turkey*, Appl. 74535/10 (ECHR, 15 Dec. 2015); *Ghorbanov v. Turkey*, Appl. 28127/09 (ECHR, 3 Dec. 2013); *Abdolkani and Karimnia v. Turkey*, Appl. 30471/08 (ECHR, 22 Sept. 2009).

¹⁵⁹ TFEU, Article 78(2)(g).

¹⁶⁰ TFEU, Article 67(2).

¹⁶¹ TFEU, Articles 78(1) and 67(1).

means-to-an-end in the construction of a CEAS ‘with due respect for the rules’ of the (‘mother’) global protection system deriving from international refugee law.¹⁶²

The main objective of the article was, thus, to unpack the difference between mere ‘international cooperation’ and ‘solidarity’, both explicitly mentioned in the EU Treaties as guiding principles of the external dimension of the CEAS,¹⁶³ making the case for an understanding of solidarity as a (legally-binding) EU obligation of ‘shared responsibility’, applicable not only between EU Member States *inter se*, but also when action has an (external) impact on the universal regime of international protection. After all, the development of a CEAS ‘*must* be in accordance with the [1951] Geneva Convention [...] and other relevant treaties’.¹⁶⁴ The end goal was to delineate the key implications of solidarity *qua* ‘shared responsibility’ in the three dimensions proposed, to establish the concrete contours of the legal duty stipulated in Article 80 TFEU.

This exercise should have direct consequences in the area of asylum policy, feeding into current debates on the ‘third phase’ of the instruments concerned.¹⁶⁵ It should point to the need for an overhaul of the Dublin rationale and the related self-serving approach currently guiding CEAS external action—resting on STC rules, aleatory geographical proximity to refugee flows, and non-access to asylum in the EU. But, more widely, the above will hopefully also contribute to the normative conceptualization of solidarity and its operationalization as a (meta-)principle of EU law with general reach and (coherent) application across policy fields.

¹⁶² EU CFR, Article 18 and VCLT, Article 30(2).

¹⁶³ TEU, Article 3(5) and TFEU, Article 21.

¹⁶⁴ TFEU, Article 78(1).

¹⁶⁵ On this, see V. Chetail, P. De Bruycker, and F. Maiani (eds), *Reforming the CEAS* (Brill, 2016). See also, E. Guild et al., *Enhancing the CEAS and Alternatives to Dublin*, Study PE 519.234 (European Parliament, 2015).