

*One for All and All for One, None for Many and Many for None:
Understanding Solidarity in the Common European Asylum System*

Thesis submitted in accordance with the requirements of the University of Liverpool
for the degree of Doctor in Philosophy by Harriet Lucy Gray.

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ABSTRACT

One for All and All for One, None for Many and Many for None: Understanding Solidarity in the Common European Asylum System

Harriet Gray

The European Union's asylum law and policy has been founded on the principle of solidarity between the Member States. The Treaty of Lisbon cemented this principle in the primary law of the EU at Article 80 of the Treaty on the Functioning of the European Union and its priority has been re-emphasised in reactions to Europe's 'refugee crisis'. Solidarity is offered as an intuitively simple and constructive solution to the challenges facing the Common European Asylum System (CEAS). Yet it remains unclear what exactly this entails, as a definition of solidarity is conspicuously absent despite the central role it plays. This absence of a shared understanding makes it very difficult to engage meaningfully with legal or political calls for solidarity and to evaluate or critique the CEAS based on solidarity.

This thesis critically investigates the meaning of solidarity in the context of the Common European Asylum System. The first part finds that solidarity conveys numerous different meanings and is used to express these variably at different times, established by drawing on three sources: first, the normative and theoretical underpinnings of the idea of solidarity; second, the development of solidarity in and by the European Union; and third, solidarity or burden-sharing in refugee law and practice through international and regional configurations. This flexibility is used to interpret solidarity in the CEAS in the second part: first to interrogate the contents of the 'solidarity toolbox' of practical, financial and legal mechanisms expressing the principle; and second to reflect on its role in shaping the CEAS and in managing the relationships between the EU, the Member States, and persons in need of international protection. From this, it is argued that solidarity does not necessarily entail any specific policy choices, rather, diverse policy options might equally claim to be based on the principle of solidarity. This enables the principle of solidarity to act as a point of agreement for actors with diverse interests and visions for asylum policy, but prevents solidarity guiding CEAS law and policymaking beyond this superficial agreement.

Solidarity is a deceptively simple and alluring foundation and problem-solving tool for the CEAS. Its flexibility allows it to offer a veneer of unity to the CEAS, accommodating diverse, even conflicting, visions. On the other hand, this flexibility also means that it is a largely empty vessel and severely limited in its practical ability to guide law and policy planning in the CEAS.

TABLE OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AIDA	Asylum Information Database
AMIF	Asylum, Migration and Integration Fund
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
CPA	Comprehensive Plan of Action for Indochinese Refugees
EASO	European Asylum Support Office
ECB	European Central Bank
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECRE	European Council for Refugees and Exiles
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EHIC	European Health Insurance Card
EMU	Economic and Monetary Union
ESM	European Stability Mechanism
EU	European Union
EUSF	European Union Solidarity Fund
GDP	Gross Domestic Product
JHA	Justice and Home Affairs
NGO	Non-Governmental Organisation
OECD	Organisation of Economic Co-operation and Development
OJ	Official Journal of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance
UK	United Kingdom
UN	United Nations
UNHCR	(Office of) the United Nations High Commissioner for Refugees, the UN Refugee Agency

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Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland and the Kingdom of Sweden, 2012

EUROPEAN UNION

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NATIONAL

Australia

Migration Act 1958

Migration Amendment (Excision from Migration Amendment Zone) Act 2001

United Kingdom

Immigration Act 2016, s.67

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For my grandad, Roy Windmill,
who always inspires me to learn more.

INTRODUCTION: “EVERYBODY SPEAKS ABOUT SOLIDARITY... BUT THEY ALL HAVE THEIR OWN DICTIONARY”¹

The principle of solidarity has influenced the asylum policy of the European Union (EU) from its beginnings and has been a core value of the Common European Asylum System (CEAS) for as long as it has been referred to as such. Since the Treaty of Lisbon, this central status has been formalised at Article 80 of the Treaty on the Functioning of the European Union (TFEU). There have been frequent and repeated references to solidarity across institutions and policy instruments throughout the last two decades, and its emphasis has been nowhere more obvious than in the responses to the recent refugee crisis in Europe.² Solidarity is offered as an intuitively simple and constructive solution to the challenges facing the CEAS, including that the demands of asylum fall more heavily on some Member States than others and a continuing critique of inadequate, or inadequately implemented, protection standards.

Despite the expectation and significance put upon it, the EU has not produced a definition of solidarity, either authoritatively or as guidance, leaving observers to follow their intuitions and ordinary uses of the word. This absence of a shared understanding makes it very difficult to engage meaningfully with legal or political calls for solidarity or to evaluate and critique the CEAS based on solidarity. This has become particularly clear through the intensified public attention paid to the CEAS through 2015 and 2016 and is particularly regrettable since ‘solidarity’ has become a foundational principle of the CEAS, most clearly through Article 80 TFEU.

This thesis pursues the absence of a definition for solidarity, finding that solidarity in the context of the CEAS may convey numerous different meanings and is used to express these variably at different times.

¹ Charlemagne, “A walk down solidarity street”, *The Economist* (London, 13 June 2015), 40.

² The phrase, ‘refugee crisis’, is used here despite acknowledgement of its problematic implications and contested nature. For full discussion of this issue, see below text accompanying notes 23-29.

It argues that solidarity is a flexible principle and that this flexibility defines both its successes and limitations as a foundation for law and policymaking the CEAS.

This introductory chapter gives context, explaining the nature, purpose and relevance of the research. The first section shows the importance placed on the principle of solidarity in public discussion of the CEAS generated by the refugee crisis. It presents the principal features of the European refugee crisis of 2015-2016, highlighting the prominent role given to the principle of solidarity in the proposed response. This emphasis on solidarity makes the crisis, and reactions to it, an illuminating frame in which to view the overarching research question posed here, what does the principle of solidarity mean in, and for, the CEAS? The second part (sections two and three) provides the historical context for this emphasis on the principle of solidarity. It outlines the development of EU competence for asylum and the creation of the CEAS, and gives a brief account of the constituent parts of the CEAS as it stands. This account marks out the most significant references to solidarity along the way, demonstrating the enduring importance of this principle. Section four demonstrates that the idea of solidarity is expected to respond to the key challenges facing the CEAS. The final section of this chapter examines the existing work on the CEAS and solidarity to establish what is already known about the principle in the CEAS. It argues that the question of its definition is far from answered and proposes this thesis' contribution to doing so.

1. SOLIDARITY AND THE REFUGEE CRISIS

Solidarity is a popular idea in the life and culture of Europe. In the context of the well-documented and widely-reported refugee crisis of 2015-2016, Europe built its response around solidarity as it is commonly understood.

In Austria, a minute's silence for refugees reached the top of the music download charts in August 2015, reflecting the public's support for refugees and dissatisfaction with their treatment.³ The artist who created the track, Raoul Haspel, explained that he wanted to create a vehicle for the expression of these

³ <http://www.independent.co.uk/arts-entertainment/music/features/protest-artist-raoul-haspel-on-getting-one-minute-of-silence-to-top-the-charts-in-austria-i-had-to-10469203.html> [accessed 20/01/16]; <http://www.bbc.co.uk/news/world-europe-34022065> [accessed 20/01/16].

feelings, particularly after the release of an Amnesty International report criticising the conditions at the Traiskirchen centre for asylum processing near Vienna.⁴ On the website for the piece, the track and the support shown through it by Austrians is described as an expression of solidarity.⁵

Elsewhere in Europe, other groups have used social movements to show this same ‘solidarity’ with refugees, for example ‘Refugees Welcome’ demonstrations at train stations,⁶ football matches⁷ and in other public spaces.⁸ The response to the refugee crisis is a very revealing context in which to see solidarity, since it has offered some of the most utopian interpretations built on the sympathetic reactions of Europeans that peaked on the publication photograph of a drowned Syrian child, Aylan Kurdi.⁹

On the other hand, the language of ‘solidarity’ was also adopted by far-right factions and their leaders across Europe, who called for unity in support of their position, preferring to exclude refugees and asylum seekers, particularly Muslims, from their countries.¹⁰

Solidarity has been woven through diverse types of reaction to the refugee crisis, and has been at the forefront of the minds of great numbers of European citizens. Media, politicians, and NGOs also voiced the need to respect this principle, even if they were divided as to what ‘solidarity’ required. This is

⁴ *Ibid.* Amnesty International Austria, *Quo Vadis Austria? Die Situation in Traiskirchen darf nicht die Zukunft der Flüchtlings-betreuung in Österreich werden* (14 August 2015), <https://www.amnesty.at/de/traiskirchen-bericht/> [accessed 20/01/16].

⁵ “... einem unüberhörbar lauten Zeichen der Solidarität & Menschlichkeit geworden ist”, <http://www.raoulhaspel.com/schweigeminute> [accessed 21/01/16].

⁶ <http://www.theguardian.com/world/2015/sep/03/germany-refugees-munich-central-station> [accessed 08/02/16]; <http://tracks.unhcr.org/2015/10/a-warm-austrian-welcome-for-refugees/> [accessed 08/02/16].

⁷ <http://www.telegraph.co.uk/sport/football/11834636/German-football-fans-welcome-refugees-and-invite-hundreds-to-watch-match.html> [accessed 08/02/16]; <http://www.telegraph.co.uk/sport/football/teams/arsenal/11860835/Arsenal-fans-unveil-Refugees-Welcome-banner-at-the-Emirates.html> [accessed 08/02/16].

⁸ <https://cityofsanctuary.org/2015/09/13/amazing-show-of-solidarity-with-refugees-welcome-demonstrations-across-europe/> [accessed 08/02/16]; <http://www.theguardian.com/world/2015/sep/01/vienna-stages-protest-welcoming-refugees> [accessed 08/02/16]; <http://www.theguardian.com/world/2015/sep/12/refugees-welcome-uk-marchers-un-warns-war-syria-million-displaced> [accessed 08/02/16].

⁹ <http://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic- plight-of-refugees> [accessed 08/02/16]; <http://www.euronews.com/2015/09/03/aylan-kurdi-the-boy-whose-picture-broke-the-world-s-heart/> [accessed 08/02/16].

¹⁰ I Pogány, “A Tale of Two Europes: East and West”, *Social Europe* (22 January 2016) <https://www.socialeurope.eu/2016/01/a-tale-of-two-europes/> [accessed 06/02/16]; Editorial, “Resistant to migrants, Poland debates the meaning of “solidarity””, *The Economist* (15th September 2015) <http://www.economist.com/node/21664726/print> [accessed 22/09/15].

articulated by an unnamed ‘Eurocrat’ quoted in *The Economist* as saying: “Everybody speaks about solidarity... But they all have their own dictionary”.¹¹

In September 2015, the European Council on Refugees and Exiles (ECRE) prioritised ‘solidarity’ in its memorandum to the Council.¹² It contrasted the “overwhelming solidarity shown by EU citizens and NGOs” and Germany’s “remarkable expression of solidarity” in admitting applicants who had travelled through Hungary on the one hand, with the “solidarity” crisis gripping the EU and the other Member States on the other.¹³ It argued that “robust solidarity measures” are required in response to the increased number of arrivals.¹⁴ This repeats calls for solidarity issued by ECRE in August 2015.¹⁵ Although specific policy suggestions are made, such as opening legal travel routes for asylum seekers, ECRE’s promotion of ‘solidarity’ seems to go beyond individual measures, instead permeating the very character of the desired EU response. Amnesty International also emphasised the need for solidarity in their response to the refugee crisis, stating, “Fear and fences won’t protect us – solidarity and compassion will”.¹⁶

Solidarity was also embedded in national and Union institutional responses. Amongst national politicians, Angela Merkel, Chancellor of Germany, was particularly prominent in calling for solidarity,¹⁷ but was joined by Matteo Renzi, Prime Minister of Italy,¹⁸ and the Czech Senate.¹⁹ The EU, Member States, and transit countries along their borders took the opportunity of a joint meeting to declare: “We are facing a common challenge. As partners, we need to respond collectively with

¹¹ Above note 1.

¹² ECRE, *ECRE Memorandum to the Extraordinary Justice and Home Affairs Council Meeting of 14 September 2015* (Brussels, 9 September 2015) <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1180-ecre-to-jha-council-all-eu-member-states-must-show-solidarity-and-act-immediately.html> [accessed 20/01/16].

¹³ *Ibid.*, 1.

¹⁴ *Ibid.*

¹⁵ ECRE, *ECRE urgently calls on the EU and Member States for more robust solidarity as the refugee crisis in Greece deepens* (Brussels, 27 August 2015) <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1158-ecre-urgently-calls-on-the-eu-and-member-states-for-more-robust-solidarity-as-the-refugee-crisis-in-greece-deepens.html> [accessed 20/01/16].

¹⁶ <https://www.amnesty.org/en/latest/campaigns/2015/09/world-refugee-crisis-needs-eu-solutions/> [accessed 15/02/16]

¹⁷ AP English Worldstream, *Merkel presses EU partners to share refugee burden* (Berlin, 18 June 2015).

¹⁸ <http://news.yahoo.com/italys-renzi-slams-eu-leaders-over-migrant-quotas-230652065.html> [accessed 15/02/16]; <http://dw.com/p/1FnZh> [accessed 15/02/16].

¹⁹ Council, *Communication from the Czech Senate to the General Secretariat of the Council*, Document 14615/15 (Brussels, 26 November 2015).

solidarity”.²⁰ Jean-Claude Juncker, President of the Commission used his 2015 ‘State of the Union’ speech to the European Parliament titled, *Time for Honesty, Unity and Solidarity*, to reaffirm that ‘solidarity’ was the Commission’s preferred response to the refugee crisis.²¹ At the international level, Ban Ki Moon, Secretary General of the UN, reminded the EU to show ‘global solidarity’ and remember that the international nature of migration.²²

The EU’s institutional response, including co-operation between the Member States through such institutions, was, expressly, a manifestation of these actors’ solidarity. This response has sparked most public and academic analysis of solidarity in the EU’s asylum policy. In this sense, the refugee crisis is a concentrated and illuminating example of the broader issues surrounding the principle of solidarity in the CEAS and is worth considering here at greater length, to which the next section turns.

2. THE REFUGEE CRISIS AND THE EU’S SOLIDARITY RESPONSE

The movement of a great many more refugees to Europe in 2015 and 2016 than has been observed in previous years offered an unrivalled opportunity to observe the nature of the principle of solidarity in the CEAS. Although the recent nature of these events makes it difficult to speak comprehensively about them, no other refugee movement has received similar attention from the media, public and politicians since the creation of the CEAS. This section attempts to outline the occurrences that have come to be referred to cumulatively as the ‘European refugee crisis’ and demonstrates the prominent role given to the principle of solidarity in response to it.

These movements have widely been referred to by national and EU politicians, media, and other commentators as a ‘refugee crisis’. The scale of movement has been described as ‘unprecedented’,²³

²⁰ High Level Conference on the Eastern Mediterranean/Western Balkans Route, *Declaration* (Luxembourg, 8 October 2015), paragraph 4, <http://data.consilium.europa.eu/doc/document/ST-12876-2015-INIT/en/pdf> [accessed 25/01/16].

²¹ Jean-Claude Juncker, President of the European Commission, *State of the Union 2015: Time for Honesty, unity and Solidarity* (Strasbourg, 9 September 2015) http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm [accessed 20/01/16]. Provision for such speech is made in Framework Agreement on relations between the European Parliament and the European Commission, OJ [2010] L304/47, Annex IV Article 5, which states that it should outline the priorities of the Commission for the coming year.

²² <http://uk.reuters.com/article/uk-europe-migrants-un-idUKKCN0S90L720151015> [accessed 15/02/16].

²³ Human Rights Watch, *Europe’s Refugee Crisis, An Agenda for Action* (16 November 2015), available at <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action> [accessed 26/01/16].

whilst others have drawn comparisons with the mass movement of refugees within Europe after the Second World War.²⁴ This terminology is not without criticism and the framing of the crisis is political. Some have argued that use of the word, ‘crisis’ overstates the peril or danger of the situation for the EU or its Member States and that whilst larger than before, the number of arrivals was very small compared to the total population of the EU or compared to the number of refugees hosted by the rest of the world.²⁵ Others have sought to distinguish the nature of the ‘crisis’, agreeing that the deaths in the Mediterranean and the insufficient reception facilities in some Member States that left many without food and accommodation amount to a humanitarian crisis.²⁶ Similarly the subtitle of the annual report of ECRE’s Asylum Information Database (AIDA) for 2014/15 refers to, “Europe’s solidarity crisis”, suggesting that the ‘crisis’ is to be found in the response of the EU and its Member States, not in the arrival of refugees.²⁷ Others still have objected to the characterisation as a ‘refugee’ crisis, arguing that, until the status of the people moving has been determined, ‘migrant crisis’ would be more appropriate. On the other hand, it has been reported that the vast majority of arrivals originated from places known to produce refugees,²⁸ and it has been argued that the term ‘migrant’ is misleading or pejorative in this context because it obscures the forced nature of the migration or casts unwarranted doubt on the veracity of refugees’ claims.²⁹ Whilst acknowledging that this phrase is less than ideal, this thesis will use the terminology of ‘refugee crisis’ as it has become the conventional shorthand for referring to these events and will thus permit clarity and brevity.

²⁴ http://www.huffingtonpost.com/entry/alexander-betts-refugees-wwii_us_55f30f7ce4b077ca094edaec [accessed 27/01/16].

²⁵ F Grandi, UN High Commissioner for Refugees, comments at first press conference (7 January 2016), video of speech available at <https://www.youtube.com/watch?v=w14yrXssp74&feature=youtu.be> [accessed 15/02/16], press release available at <http://www.unhcr.org/568e82ff6.html> [accessed 15/02/16]. See also <http://www.theguardian.com/world/2015/oct/27/istanbul-has-more-syrian-refugees-than-all-of-europe-says-david-miliband> [accessed 15/02/16].

²⁶ <https://www.amnesty.org/en/latest/news/2015/06/greece-humanitarian-crisis-mounts-as-refugee-support-system-pushed-to-breaking-point/> [accessed 14/02/16].

²⁷ AIDA, *Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis*, Annual Report 2014/2015, available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf [accessed 25/01/16]. This interpretation is also adopted by Don Flynn of the Migrants’ Rights Network, *The refugee crisis: A crisis of policy rather than refugees*, <http://www.migrantsrights.org.uk/blog/2016/02/refugee-crisis-crisis-policy-rather-refugees> [accessed 01/02/16].

²⁸ UNHCR reported that 84% of arrivals were from Syria, Afghanistan, Iraq, Eritrea or Somalia, UNCHR, *Global Trends, Forced Displacement in 2015*, (Geneva: UNHCR, 2016), 32 available at [accessed 28/09/2017]

²⁹ <http://www.unhcr.org/55df0e556.html> [accessed 28/09/2017].

2.1. AN OVERVIEW OF EVENTS

In 2015, unexpected numbers of people arrived in the EU seeking international protection. The EASO reports that 1 349 638 asylum applications were submitted to the Member States plus Switzerland and Norway in 2015, more than twice as many as in 2014.³⁰ The UNHCR observed that more than one million people arrived in Europe by sea in 2015.³¹ Most of those arriving were Syrian, either directly leaving their home country and ongoing civil war or leaving a neighbouring country in which they had first sought refuge but where remaining became untenable due to, for example, a lack of integration opportunities or insufficient aid in camps in Lebanon and Jordan or risk of further violence in Iraq.³² They were joined by large numbers of Iraqis as well as Eritreans who, again, comprised those directly leaving the totalitarian regime in their home country and those who had stayed shortly in Libya but moved on after conditions deteriorated there.³³

The vast majority arrived through irregular channels: on foot in the east of the EU travelling through the Balkans; by crossing the Mediterranean in unseaworthy boats; or even swimming.³⁴ These are divided into ‘routes’ for monitoring and operational purposes by Frontex,³⁵ the EU agency for coordinating border management.³⁶

³⁰ EASO, *Latest Asylum Trends – 2015 overview*, page 1, available at <https://easo.europa.eu/analysis-statistics/> [accessed 06/02/16].

³¹ The UNHCR reports that a total number of 1 015 078 migrants and refugees arrived in the EU by sea in 2015, http://data.unhcr.org/mediterranean/regional.php#_ga=1.57059626.1482626355.1441881813 [accessed 06/02/16].

³² *Ibid*, 3; UNHCR, *Europe Refugees and Migrants emergency Response, Nationality of Arrivals to Italy, Greece and Spain, January-December 2015* (26 January 2016) available at <http://data.unhcr.org/mediterranean/documents.php?page=1&view=grid&Type%5B%5D=3&Country%5B%5D=105> [accessed 06/02/16].

³³ It is reported that 3% of the Eritrean population has left the country to seek safety elsewhere, <http://www.theguardian.com/world/2015/jul/22/eritrea-migrants-child-soldier-fled-what-is-going> [accessed 24/01/16].

³⁴ <http://www.independent.co.uk/news/world/europe/syrian-refugee-ameer-meht-swims-for-7-hours-to-start-new-life-in-europe-a6781276.html> [accessed 15/02/16].

³⁵ Other routes, which are not discussed in detail as they have not featured heavily in recent movements, include: the Western African Route, from West Africa to the Spanish Canary Islands; the Western Mediterranean Router, from North Africa (Morocco and Algeria) to southern Spain including Ceuta and Melilla; and the Eastern Borders Route, from Russia, Ukraine, Moldova and Belarus into the eastern EU Member States from Finland to Romania, <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> [accessed 25/01/16].

³⁶ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ [2004] L349/1.

The Central Mediterranean Route leaves North Africa, most frequently through Libya, and arrives in at the southern borders of the EU in Italy (frequently on its most southerly island, Lampedusa) and in Malta.³⁷ This route relies heavily on people smugglers, who provide travellers with a boat, more often than not one that is entirely unsuitable for the journey and severely overcrowded, and instructions for putting in a distress call once they have left Libyan territorial waters in exchange for a hefty fee.³⁸ This is a long-standing route to the EU that has been used repeatedly save for short period from 2009 when Italy signed a bilateral returns agreement with Libya, which endured until Colonel Gaddafi was deposed in 2011. The increasing number of people travelling and dying on this route prompted a large search-and-rescue operation by the Italian coastguard in 2013, *Mare Nostrum*. As this became financially unsustainable,³⁹ Italy asked for assistance from the other Member States, which responded with the Frontex operation, ‘Triton’. It initially ran between November 2014 and January 2015,⁴⁰ but was extended and given extra resources from May 2015.⁴¹ This operation was tasked with a more limited role of border maintenance and rescuing those in distress rather than the more active, search-and-rescue remit of *Mare Nostrum*.⁴²

Some believe that the replacement of the Italian operation with its pared-down, European cousin resulted in an increased number of deaths of those using the Central Mediterranean Route.⁴³ Others argued that the existence of a search-and-rescue operation would encourage more people to risk taking

³⁷ <http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/> [accessed 24/01/16].

³⁸ <http://www.telegraph.co.uk/news/worldnews/europe/italy/11553193/Dirty-business-of-people-smuggling-Italian-police-release-wiretaps-from-trafficking-network.html> [accessed 14/02/16]; <http://www.telegraph.co.uk/news/worldnews/europe/italy/11540547/Trafficking-gangs-tip-off-Italian-officials-so-that-rescue-services-can-pick-up-people-smuggling-boats.html> [accessed 14/02/16]; <http://www.bbc.co.uk/news/world-europe-34455141> [accessed 14/02/16].

³⁹ Italian Interior Minister, Angelino Alfano is reported as explaining that €114million had been spent on *Mare Nostrum* in a year and that this figure would be reduced to zero in October 2014, <http://www.reuters.com/article/us-italy-migrants-eu-idUSKBN0IK22220141031> [accessed 26/01/16].

⁴⁰ <http://frontex.europa.eu/operations/archive-of-operations/NkKUdU> [accessed 27/01/16].

⁴¹ <http://frontex.europa.eu/news/frontex-expands-its-joint-operation-triton-udpbHP> [accessed 08/02/16].

⁴² European Commission, Memo, *Frontex Joint Operation ‘Triton’ – Concerted efforts to manage migration in the Central Mediterranean* (Brussels, 7th October 2014), available at http://europa.eu/rapid/press-release_MEMO-14-566_en.htm [accessed 08/06/16].

⁴³ <https://www.amnesty.org/en/latest/campaigns/2015/09/world-refugee-crisis-needs-eu-solutions/> [accessed 15/02/16]; <https://www.amnesty.org/en/latest/campaigns/2015/04/7-questions-you-might-have-about-refugees-and-migrants-drowning-in-the-mediterranean/> [accessed 15/02/16].

the dangerous journey.⁴⁴ This position is exemplified by the answer given by Baroness Anelay, a minister of the UK Foreign and Commonwealth Office, to a question in the House of Lords. When asked what the UK would contribute to the rescue operation in the Mediterranean, she responded that there would be no contribution, on the basis that such operations “create an unintended “pull factor”, encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths”.⁴⁵ This position was maintained in May 2015 by the (then) UK Home Secretary, Theresa May.⁴⁶ There remains frequent news of deaths in the Mediterranean of those trying to reach Europe by this route.⁴⁷

In April 2015, as the number of deaths in the Mediterranean rose again, ‘Operation Sophia’ was initiated, adding another layer to EU presence at sea that extended beyond border control and rescue.⁴⁸ This was a military operation conducted under the auspices of the European Naval Force for the Mediterranean (EUNAVFOR MED), which is coordinated by the European Union External Action Service. Operation Sophia was to be conducted in three ‘phases’ in accordance with a mandate granted by Council Decision to disrupt human smuggling networks operating across the Mediterranean and to contribute the reduction of loss of life at sea.⁴⁹ The first phase comprised surveillance and assessment of smuggling networks and began in June 2015.⁵⁰ Phase two commenced in October of the same year, extending the operation’s remit to search and redirection of vessels in European waters and on the high seas.⁵¹ This second phase was authorised by Resolution of the UN Security Council,⁵² as required by

⁴⁴ Reported at <http://www.bbc.co.uk/news/uk-29799473> [accessed 26/01/16]; <http://www.telegraph.co.uk/news/politics/11192208/Drown-an-immigrant-to-save-an-immigrant-why-is-the-Government-borrowing-policy-from-the-BNP.html> [accessed 26/01/16].

⁴⁵ HL Deb 15 October 2014, vol 756, col WA41.

⁴⁶ T May, “EU is putting migrants at risk”, *The Times* (London, 13 May 2015) 30.

⁴⁷ The International Organization for Migration (IOM) reports through its ‘Missing Migrants’ project that 2 892 people died crossing via the Central Mediterranean Route in 2015, <http://missingmigrants.iom.int/mediterranean> [accessed 27/01/16], a further 177 are reported dead or missing in the Mediterranean across all sea routes in January 2016, <http://migration.iom.int/europe/> [accessed 27/01/16]. See also <http://www.sos-europe-amnesty.eu/latest-mediterranean-shipwreck-underscores-urgent-need-for-safe-legal-routes-to-europe-news/> [accessed 15/02/16].

⁴⁸ http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/index_en.htm [accessed 27/01/16].

⁴⁹ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ [2015] L122/31.

⁵⁰ *Ibid*, Article 2(2)(a).

⁵¹ *Ibid*, Article 2(2)(b).

⁵² United Nations Security Council Resolution 2240/2015 of 9 October 2015, paragraphs 7-10.

the Decision.⁵³ Phase three, yet to be brought into effect at the time of writing, would permit the destruction of vessels and the apprehension of smugglers, including in Libyan territorial waters with the permission of Libya or the Security Council.⁵⁴ Any operation in Libyan waters was expressly excluded in the Security Council resolution on phase two.⁵⁵ Operation Sophia shall end twelve months after it reached full operational capacity,⁵⁶ that is, on the 27th July 2016.⁵⁷

The tragedy in the Mediterranean in April 2015 also prompted the Commission's ten point action plan, which proposed an emergency response, including full enforcement of existing CEAS obligations and increasing presence in the Mediterranean, including the interception and destruction of smuggling vessels.⁵⁸ This was supported by a special meeting of the European Council held to discuss this proposal, which adopted a joint statement that pledged to strengthen EU presence at sea, to fight traffickers, to prevent illegal migration flows and to reinforce internal solidarity and responsibility.⁵⁹

The European Parliament echoed the call for solidarity as an emergency response: "Reiterates the need for the EU to base its response to the latest tragedies in the Mediterranean on solidarity and fair sharing of responsibility, as stated in Article 80 [TFEU]".⁶⁰

The Eastern Mediterranean Route describes the journey taken from Turkey into the EU via Bulgaria, Greece or Cyprus.⁶¹ This is another long-established route that relies on people smugglers, though this time based in Turkey. To prevent the use of this route, the EU agreed a re-admission agreement with Turkey in November 2015, under which migrants who had travelled through Turkey could be returned there in exchange for visa liberalisation for Turkish nationals in the EU Member States.⁶² This

⁵³ Above note 49, Article 2(2)(b)(ii).

⁵⁴ *Ibid*, Article 2(2)(c).

⁵⁵ Above note 52, paragraph 11.

⁵⁶ Above note 49, Article 13.

⁵⁷ European Union External Action Service, *Press Release 01/15* (28/07/2015), available at http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/press-releases/20150728_en.htm [accessed 29/01/16].

⁵⁸ European Commission, *Press Release*, available at http://europa.eu/rapid/press-release_IP-15-4813_en.htm [accessed 01/02/16].

⁵⁹ <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> [accessed 01/02/16], paragraph 2.

⁶⁰ European Parliament, *European Parliament resolution of 23 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies* (2015/2660(RSP)), paragraph 3.

⁶¹ <http://frontex.europa.eu/trends-and-routes/eastern-mediterranean-route/> [accessed 25/01/16].

⁶² European Commission, *EU-Turkey joint action plan (agreed ad referenda)*, (Brussels, 15 October 2015), available at [http://europa.eu/rapid/press-release MEMO-15-5860_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm) [accessed 14/02/16]; adopted by

agreement provides that Turkey can be designated a ‘safe country’, which is to be supported financially by the EU.⁶³

The Western Balkan Route describes the movement of those who entered the EU in the east: arriving principally in Hungary from the Balkans, often having previously entered the EU through the Eastern Mediterranean Route before moving onwards to Macedonia, Bosnia and Herzegovina, Montenegro, Albania and Serbia.⁶⁴ From Hungary, the majority moved onwards to Western Europe,⁶⁵ with many favouring Germany as their ultimate destination.⁶⁶ Frontex also uses this route to describe the first entry to the EU of people from the Balkan states.⁶⁷ Use of this route rapidly increased in the summer of 2015,⁶⁸ which was attributed by some to the declarations by Germany and Sweden that they would offer protection to any Syrians arriving on their territory, regardless of their route, effectively suspending the Dublin system.⁶⁹ The argument followed that this encouraged people to enter the EU and cross numerous Member States on their way to Sweden or Germany. Member States reacted to increased numbers using this route in 2015 by reinforcing physical borders at the edge of the EU by constructing fences and enhancing border surveillance. This was observed at the borders between Greece and Macedonia, Bulgaria and Turkey, and Hungary and Serbia.⁷⁰ Within the EU, a number of internal border were also reinstated with emergency exceptions to the Schengen *acquis* in France, Germany and

Meeting of Heads of State or Government with Turkey, *EU-Turkey statement* (Brussels, 29 November 2015) available at <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/> [accessed 14/02/16], paragraph 7.

⁶³ European Commission, *Press Release, EU-Turkey Cooperation: Commission Member State agreement on Refugee Facility for Turkey* (Brussels, 3 February 2016) available at http://europa.eu/rapid/press-release_IP-16-225_en.htm?locale=en [accessed 14/02/16].

⁶⁴ <http://frontex.europa.eu/trends-and-routes/western-balkan-route/> [accessed 24/01/16].

⁶⁵ http://www.huffingtonpost.com/entry/europe-refugee-crisis_us_55f2dfa3e4b063ecbfa3f377?m6idlsor [accessed 27/01/16]; <http://www.telegraph.co.uk/news/worldnews/europe/11843189/EU-refugee-crisis-Migrants-in-Bicske-station-Hungary-siege-continues-overnight-live.html> [accessed 26/01/16].

⁶⁶ This was shown most symbolically by the chanting of ‘Germany’ by those en route, <http://www.theguardian.com/world/video/2015/sep/01/migrants-stranded-in-hungary-train-station-chant-germany-germany-video> [accessed 26/01/16].

⁶⁷ Above note 64.

⁶⁸ Frontex, *FRAN Quarterly, Quarter 2 April-June 2015* (Warsaw, September 2015), 8; Frontex, *FRAN Quarterly, Quarter 3 July-September 2015* (Warsaw, January 2016), 8.

⁶⁹ <http://www.independent.co.uk/news/world/europe/germany-opens-its-gates-berlin-says-all-syrian-asylum-seekers-are-welcome-to-remain-as-britain-is-10470062.html> [accessed 26/01/16]; <http://www.ft.com/cms/s/2/69455aec-7b4d-11e5-a1fe-567b37f80b64.html#axzz3yMKt8i4N> [accessed 26/01/16]; <http://www.bbc.co.uk/news/world-europe-24637144> [accessed 26/01/16].

⁷⁰ <http://www.theguardian.com/world/2015/oct/31/austria-fence-slovenia-wire-europe-refugees> [accessed 14/02/16].

Austria.⁷¹ Sweden also closed its open border with Denmark.⁷² Two of these developments, namely the suspension of the Dublin system and the reinstatement of internal borders within the Schengen area have led some to perceive the arrival of refugees in such numbers as an existential threat to internal free movement and the common market of the EU.⁷³

2.2. RESPONDING WITH SOLIDARITY

The Commission's *European Agenda on Migration*, published on 13 May 2015, sought to extend these plans beyond an immediate, emergency reaction.⁷⁴ Its introduction repeats the need for solidarity: "We need to... work together in an effective way, in accordance with the principles of solidarity and shared responsibility".⁷⁵ Solidarity is also connected with particular policy initiatives, namely the Member States' contribution of resources for rescue at sea,⁷⁶ Frontex operations⁷⁷ and assisting 'frontline' Member States through relocation of people in clear need of international protection.⁷⁸ The Commission's proposals for implementation were issued in three tranches, on 27 May, 9 September and 15 December 2015.⁷⁹ The first, described as bringing the "firm commitment to solidarity amongst Member States" into action,⁸⁰ included a proposal for a mechanism relocating those in need of protection;⁸¹ recommendations for a resettlement programme;⁸² guidelines on fingerprinting arrivals for registration with EURODAC, which included the use of coercion where deemed necessary;⁸³ a plan

⁷¹ <https://www.rt.com/news/329215-austria-borders-migrants-schengen/> [accessed 14/02/16]; <http://www.independent.co.uk/news/world/europe/refugee-crisis-six-countries-in-schengen-now-have-border-checks-in-place-a6796296.html> [accessed 14/02/16].

⁷² <http://www.thetimes.co.uk/tto/news/world/europe/article4656236.ece> [accessed 14/02/16]; <http://www.bbc.co.uk/news/world-europe-35218921> [accessed 14/02/16].

⁷³ <http://www.theguardian.com/politics/2016/jan/20/plan-to-change-rule-for-refugees-raises-stakes-in-uk-eu-referendum> [accessed 14/02/16].

⁷⁴ European Commission, *A European Agenda on Migration*, COM(2015) 240 final.

⁷⁵ *Ibid.*, 1.

⁷⁶ *Ibid.*, 3.

⁷⁷ *Ibid.*, 11.

⁷⁸ *Ibid.*, 4.

⁷⁹ May, http://europa.eu/rapid/press-release_IP-15-5039_en.htm; September, http://europa.eu/rapid/press-release_IP-15-5596_en.htm; December, http://europa.eu/rapid/press-release_IP-15-6327_en.htm?locale=EN [each accessed 02/02/16].

⁸⁰ *Ibid.*, May.

⁸¹ European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, COM(2015) 286 final.

⁸² European Commission, *Commission Recommendation of 8.6.2015 on a European resettlement scheme*, C(2015) 3560 final.

⁸³ European Commission, *Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints*, SWD(2015) 150 final, paragraph 7.

against migrant smuggling;⁸⁴ and a consultation on a new Blue Card Directive.⁸⁵ The second reiterated the need for solidarity, and was accompanied a comment from the President of the Commission, Jean-Claude Juncker, claiming “If ever European solidarity needed to manifest itself, it is on the question of the refugee crisis”.⁸⁶ It announced a second temporary relocation measure, with a further 120 000 places;⁸⁷ a permanent relocation mechanism to be used to face future migratory pressures;⁸⁸ a common European list of safe countries of origin to expedite some status determination procedures;⁸⁹ more effective returns through the issue of a ‘Returns Handbook’ and an action plan on returns;⁹⁰ a communication on the public procurement rules relating to refugee support;⁹¹ an announcement of increased focus on external aspects;⁹² and a ‘Trust Fund for Africa’, intended to address root causes of migration.⁹³ This second stage marked the beginning of a turn away from internal policy of the EU and Member States towards the external, a focus that dominated the third stage of proposals. It included plans for a European Border and Coast Guard;⁹⁴ a travel document for returning third country

⁸⁴ European Commission, *EU Action Plan against migrant smuggling (2015-2020)*, COM(2015) 285 final.

⁸⁵ http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2015/consulting_0029_en.htm [accessed 02/02/16].

⁸⁶ Above note 79, September.

⁸⁷ European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary*, COM(2015) 451 final.

⁸⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 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*, COM(2015) 450 final.

⁸⁹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, COM(2015) 452 final.

⁹⁰ European Commission, *Commission Recommendation of 1.10.2015 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks*, C(2015) 6250 final; European Commission, *EU Action Plan on return*, COM(2015) 453 final.

⁹¹ European Commission, *Communication from the Commission to the European Parliament and the Council on Public Procurement rules in connection with the current asylum crisis*, COM(2015) 454 final.

⁹² European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, *Addressing the Refugee Crisis: The Role of EU External Action*, JOIN(2015) 40 final.

⁹³ European Commission, *Commission Decision of 20.10.2015 on the establishment of a European Union Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa*, C(2015) 7293 final.

⁹⁴ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Boarder and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) 836/2007 and Council Decision 2005/267/EC*, COM(2015) 671 final.

nationals;⁹⁵ an exemption for Sweden from the relocation decisions;⁹⁶ and a humanitarian admission scheme with Turkey.⁹⁷

Throughout this period, the Council showed its support for the Commission's commitment to solidarity by adopting its measures, the central element of which was the relocation Decisions, both of which remember Article 80 TFEU,⁹⁸ and include express declarations of solidarity.⁹⁹

Transfers undertaken in the course of implementing these Decisions are supported by the payment of a lump sum of €6 000 per person to the receiving Member State,¹⁰⁰ which is described in the preamble as a way of "implementing the principle of solidarity".¹⁰¹ The legislative procedures for the adoption of the proposed Regulations are ongoing. The proposed Regulation institutionalising the relocation Decisions will be negotiated "as soon as possible",¹⁰² despite the sensible suggestion that it might wait to incorporate lessons learnt from the implementation of the Decisions.¹⁰³ Already the European Economic and Social Committee has offered its opinion on the proposed Regulation, in which it argues that exceptional refugee movements require "more Europe, more democracy and more solidarity",¹⁰⁴ and comments that the proposed mechanism "is a concrete example of cooperation based on solidarity".¹⁰⁵ There is similar progress with the proposed safe country of origin Regulation.¹⁰⁶

⁹⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals*, COM(2015) 668 final.

⁹⁶ European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Sweden in accordance with Article 9 of Council Decision (EU) 2015/1523 and Article 9 of Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, COM(2015) 677 final.

⁹⁷ European Commission, *Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey*, C(2015) 9490.

⁹⁸ Council Decision (EU) 2015/1523 of 14th September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L239/146, at Recital 2; Council Decision (EU) 2015/1601 of 22nd September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L248/80, at Recital 2.

⁹⁹ Council Decision (EU) 2015/1601, *ibid*, Recital 16, emphasis added.

¹⁰⁰ Above note 98, both Article 10.

¹⁰¹ Above note 99, Recital 30.

¹⁰² Council, Presidency Note of 1st December 2015, 14513/15, paragraph 7.

¹⁰³ *Ibid*, 3.

¹⁰⁴ European Economic and Social Committee, *Opinion on A European Agenda on Migration: Second implementation package*, SOC/526, 2.1.

¹⁰⁵ *Ibid*, paragraph 2.9.

¹⁰⁶ European Economic and Social Committee, *Opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, REX/457.

This section has demonstrated beyond doubt the centrality of the principle of solidarity to the EU response to the refugee crisis, though it is not immediately clear how such diverse responses are built around a central, singular principle. This prominence and lack of clarity together suggest a need to understand better the principle, both for the sake of understanding the EU's response to the refugee crisis and for the CEAS more broadly. The refugee crisis might have been the beginning of intense attention on the principle of solidarity in the EU's asylum policy, but the idea of solidarity has been present in the CEAS since its inception. The next section traces the development of the CEAS around the principle of solidarity to demonstrate the central, foundational importance in the EU's asylum policy.

3. SOLIDARITY IN THE LONGER HISTORY OF THE CEAS.

Although the history of EU involvement in asylum and refugee protection is relatively short, it is worth setting out its milestones as a starting point. This presents the opportunity to demonstrate that the principle of solidarity has played a role from the very beginning. The EU's competence for asylum is grouped together with those for immigration from third countries and border checks,¹⁰⁷ a trio which is closely related with state sovereignty and was therefore traditionally administered at the national level. However, these competences have been increasingly shared with the EU, as will be charted in this section. This is followed with a tour around the CEAS and the EU's asylum competences as they stand.

3.1. HISTORY OF EU'S ASYLUM COMPETENCE AND ITS EXERCISE

Internal free movement has always been a central component of the Union's, and its predecessors', economic policy, and essential to the creation of a common, internal market.¹⁰⁸ To this end, Germany, France and the Benelux countries agreed to remove internal borders between their territory under the Schengen Agreement in 1985.¹⁰⁹ As more Member States joined the Agreement, it became clear that further provisions were required to achieve an area without borders, so the Convention on Implementing

¹⁰⁷ Articles 77-80 TFEU.

¹⁰⁸ K. Mortelmans, "The Common Market, the Internal Market and the Single Market: What's in a Market?" (1998) 35 *CML Rev* 101-136, 107.

¹⁰⁹ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen, Luxembourg 14 June 1985, OJ [2000] L239/13.

the Schengen Agreement was added in 1990.¹¹⁰ Although originally formed by intergovernmental agreements outside the Treaties, the Schengen *acquis* was adopted with reference to the (then) European Community with the stated aim of achieving the internal market of the Single European Act.¹¹¹ In 1997, the Schengen *acquis* was incorporated under the Treaty of Amsterdam. All new Member States must now adopt the Schengen *acquis*.¹¹² The United Kingdom and Ireland have not adopted Schengen's borderless regime but may request to opt-in to existing provisions,¹¹³ or out of new provisions building on the *acquis*.¹¹⁴ Denmark is not bound by Area of Freedom, Security and Justice (AFSJ) measures unless it specifically requests to be included.¹¹⁵

Following Schengen's logic, the removal of internal border controls required the strengthening of the external borders with third countries by means of 'flanking measures'.¹¹⁶ The checks and controls formerly conducted by each Member State at its own borders became concentrated at the external borders of the Schengen area, meaning that it was performed by only some. As a result, border control became a matter of shared concern between the Member States. At this stage in European integration, the maintenance of public security despite the removal of internal borders was a principal concern.¹¹⁷ From this perspective it became necessary to elevate immigration and asylum matters to the European level from the national level which had previously monopolised power in this sphere: who enters the Member States became a shared concern in a Europe without internal borders. International protection remained a matter between the individual and his or her host state, so the question of how to preserve this without internal borders to bind the individual to the state featured high on the agenda.¹¹⁸

¹¹⁰ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Schengen, Luxembourg 19 June 1990, OJ [2000] L239/13.

¹¹¹ Ingrid Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002), 36.

¹¹² Protocol 19 on the Schengen *Acquis* Integrated into the Framework of the European Union, Article 8.

¹¹³ *Ibid.*, Article 4.

¹¹⁴ *Ibid.*, Article 5.

¹¹⁵ *Ibid.*, Article 8; Protocol 22 on the Position of Denmark, Articles 1 and 4(1) and Annex Article 4.

¹¹⁶ *Ibid.*

¹¹⁷ Above note 111, 28.

¹¹⁸ A Hurwitz, "The 1990 Dublin Convention: A Comprehensive Assessment" (1999) 11(4) *IJRL* 646, 648; A Nicol, "From Dublin Convention to Dublin Regulation: A Progressive Move?" in A Baldaccini, E Guild and H Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, (Oxford: Hart Publishing, 2007) 265, 269.

Despite its origins, Guild describes this logic as “inimical” to the internal market, suggesting that regulation of asylum seekers is a remaining exception to territorial integration. She argues that this creates two pressures: first the increasing restriction of the area in which asylum seekers may move in order to not interfere with the movement of those permitted to do so; and second, the search for mechanisms to prevent entry to, and hasten removal from, the internal market.¹¹⁹ Lavenex also highlights the role that the origins of EU asylum policy have lent it a tendency towards control and internal security and away from humanitarian concerns.¹²⁰

Intergovernmental negotiations were taken on by working groups on migration, composed of the Interior Ministers of the then Member States, developed from the Vienna Group, which was first established in 1978 to combat terrorism in from Eastern to Western Europe.¹²¹ The Ad Hoc Group on Immigration was added to this structure in 1986.¹²² Even at this early stage, the idea of solidarity was a significant consideration: the Vienna Group (Immigration)’s ‘Working Party on a Solidarity Structure’ first met in March 1993.¹²³

The priorities of the early negotiations of the Group were set out in the Palma Document, which listed measures to be implemented by the end of 1992. Drawn up by the Coordinators Group on the Free Movement of Persons, it was adopted by the European Council in its Madrid Conclusions in June 1989.¹²⁴ Measures relating to the grant of asylum and refugee status were considered an “ad-extra” facet of free movement, relating to controls to be carried out at the external frontiers for the benefit of all Member States,¹²⁵ meaning that their implementation was deemed “essential”.¹²⁶ Specifically, the essential measures should determine which state is responsible for examining an application for asylum

¹¹⁹ E. Guild, “The Europeanisation of Europe’s Asylum Policy” (2006) 18 *IJRL* 630-651, 637.

¹²⁰ S. Lavenex, *The Europeanisation of Refugee Policies: Between human rights and internal security* (Aldershot: Ashgate, 2001), 4.

¹²¹ R Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (Chicago: University of Chicago Press, 2011), 111.

¹²² D Joly, “The Porous Dam: European Harmonization On Asylum In The Nineties” (1994) 6(2) *IJRL* 159, 163.

¹²³ *Ibid.*

¹²⁴ European Council, Presidency Conclusions, Madrid 26-27 June 1989, 6, available at http://www.european-council.europa.eu/media/848998/1989_june - madrid_eng .pdf, [accessed 04/09/2014]. Full text of the Palma Document is available in T. Bunyan (ed.), *Key Texts on Justice and Home Affairs in the European Union: Volume I (1976-1993) From Trevi to Maastricht* (London: Statewatch, 1997), 12-16.

¹²⁵ *Ibid.*, 3.B.

¹²⁶ *Ibid.*, Annex I II.A.3(7).

and enshrine this in a Convention; foster agreement of the conditions to be placed on the movement of asylum seekers within the borderless area; create a simplified asylum procedure, according to national legislation, for unfounded applications; and confirm acceptance of identical international agreements on asylum.¹²⁷ A number of desirable measures were also listed, namely: diplomatic and consular cooperation; a data bank for dates and places of applications for asylum; possible approximation of criteria for granting asylum; Community funding programmes for training officials.¹²⁸

The Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (better known as the Dublin Convention after the location of its agreement) was adopted in 1990.¹²⁹ This Convention sought to end the phenomenon of ‘refugees in orbit’, or the submission of duplicate or subsequent asylum applications in different Member States by an individual.¹³⁰ This was to be achieved by using responsibility criteria to identify a single Member State responsible for the application to which the applicant should be returned if he or she lodges another elsewhere.¹³¹ In hierarchical order, these responsibility criteria were the presence of a family member in a Member State, the possession of a valid residence permit or visa for a Member State, irregular entry to a Member State, waiver of visa requirement by a Member State, or Member State where application is lodged.¹³² This arrangement provided the desired support for the Schengen area by providing a mechanism whereby asylum seekers could be attributed and returned to the Member State responsible without checks at the internal borders.¹³³ Other intergovernmental agreements, known as the London Resolutions 1992, addressed the harmonisation of Member States’ rules on manifestly unfounded application for asylum and the definition of host third country.¹³⁴

¹²⁷ *Ibid*, Annex I VI.A.1-5.

¹²⁸ *Ibid*, Annex I VI.B.1-4.

¹²⁹ Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member State of the European Communities, OJ [1997] C254/1.

¹³⁰ *Ibid*, preamble.

¹³¹ *Ibid*, Article 3.

¹³² *Ibid*, Articles 4-8.

¹³³ H Battjes, *European Asylum Law and International Law*, (Leiden: Martinus Nijhoff, 2006), 387.

¹³⁴ *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*, available at <http://www.refworld.org/docid/3f86bbcc4.html> [accessed 15/02/16]; *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries*, available at <http://www.refworld.org/docid/3f86c3094.html> [accessed 15/02/16]. For a full history of the intergovernmental stage, see above note 122.

The Treaty of Amsterdam of 1997 brought asylum matters into the central, Community pillar as part of the Area of Freedom Security and Justice, thereby extending Community legislative power and judicial supervision to this field.¹³⁵ At the Tampere Council in 1999, Member States declared for the first time their formal commitment to developing a shared, uniform asylum policy to be known as the Common European Asylum System, including a commitment to the principle of solidarity: “The aim is an open and secure European Union... able to respond to humanitarian needs on the basis of solidarity”.¹³⁶ In the context of specific policy measures, the Conclusions also associated solidarity with temporary protection.¹³⁷

This led to the adoption of the first item of Community legislation under the CEAS – the temporary protection Directive, which established a procedure whereby the Member States could implement a planned, collective response in the event of a mass influx to the Union of persons in need of protection.¹³⁸ This was to be activated as needed by Council Decision, though is unused to-date. Its adoption demonstrated the Member States’ desire to move away from the individual, national responses that had proved slow and uncoordinated on the arrival of refugees from Kosovo in 1999.¹³⁹ This was followed, between 2003 and 2005, by harmonisation measures outlining minimum standards¹⁴⁰ for refugee status determination procedures,¹⁴¹ status qualification requirements¹⁴² and asylum reception

¹³⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ [1997] C340/1, Article 15. See Sandra Lavenex, “Justice and Home Affairs: Institutional Change and Policy Continuity” in Helen Wallace, Mark A. Pollack and Alasdair R. Young (eds.), *Policy Making in the European Union* (7th edn., Oxford: OUP, 2015) 367-387, 370-371.

¹³⁶ European Council, Presidency Conclusions, Tampere 15-16 October 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm [accessed 26/09/2014], point 14. See also 13.

¹³⁷ *Ibid*, 16.

¹³⁸ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ [2001] L212/12. The existence of a mass influx and resulting necessity to operate the provisions of the Directive are to be determined by Council Decision on the proposal of the Commission, Article 5(1). The Commission is to examine any requests from Member States that it make such a proposal, Article 5(1).

¹³⁹ Above note 111, 172.

¹⁴⁰ Costello suggests that these measures might exceed the legislative competence where mandatory or exhaustive conditions are made, as the Treaties provided only for minimum standards, C Costello “The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection” (2005) 7 *EJML* 35-70, 54 and 65.

¹⁴¹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ [2005] L326/13.

¹⁴² 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 [2004] L304/12.

conditions.¹⁴³ The Dublin II Regulation replaced the Dublin Convention in 2003, offering a similar arrangement but in the form of Community legislation.¹⁴⁴ Finally the Member States provided for shared funds to be used to assist in meeting the costs of refugee protection, costs that would otherwise be borne exclusively at the national level. The European Refugee Fund operated first alone and subsequently as part of a framework of four funds intended to offer assistance with migration, integration and removals.¹⁴⁵

To strengthen the AFSJ and to build on the developments made in the five years since the Tampere Conclusions,¹⁴⁶ the European Council adopted the Hague Programme which,¹⁴⁷ *inter alia*, heralded a ‘second phase’ of the CEAS.¹⁴⁸ This second phase, the Hague Programme instructed, should continue to use “solidarity and the fair-sharing of responsibility” as its basis.¹⁴⁹ Since the Hague Programme, the commitment to solidarity has been maintained in subsequent policies. The next multi-annual framework, the Stockholm programme listed among its priorities “A Europe of Responsibility, Solidarity and Partnership in Migration and Asylum Matters”, in which the principle is given great prominence.¹⁵⁰ ‘Solidarity’ also persists in the *European Pact on Immigration and Asylum*, adopted by

¹⁴³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ [2003] L31/18.

¹⁴⁴ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ [2003] L50/1.

¹⁴⁵ Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ and repealing Council Decision 2004/904/EC, OJ [2007] L144/1, Article 1; Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’, OJ [2007] L144/22; Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’, OJ [2007] L144/45; Council Decision No 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third country nationals for the period 2007 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’, OJ [2007] L168/18.

¹⁴⁶ Council, ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’, OJ [2005] C53/1, I, pages 1-2.

¹⁴⁷ European Council, *Presidency Conclusions* (Brussels, 4/5 November 2005), paragraph 15.

¹⁴⁸ *Ibid*, III 1.2-1.3, pages 3-4.

¹⁴⁹ *Ibid*, III 1.2, page 3.

¹⁵⁰ European Council, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’, [2010] OJ C115/1, 27-33.

the European Council in 2008,¹⁵¹ and throughout the Commission's 2011 *Agenda for better responsibility sharing and more mutual trust*.¹⁵²

3.2. THE SCOPE OF THE CONTEMPORARY CEAS

The EU's ability to act in the area of asylum is limited to the competences conferred to it by the Member States.¹⁵³ All matters of asylum not mentioned, including most importantly the power to grant protection statuses, remain with the Member States. The competences conferred for asylum are shared between the EU and its Member States,¹⁵⁴ meaning that the Member States may also act on conferred competences to the extent that the EU has not acted or has ceased to act.¹⁵⁵

Since the Treaty of Lisbon, which took effect in 2009, the EU derives its competence to adopt measures relating to asylum from Article 78 TFEU. Article 78(1) instructs that a common policy on asylum should be developed and that it should be developed in accordance with the Member States' relevant international obligations, in particular the Geneva Convention relating to the Status of Refugees 1951 and its New York Protocol of 1967, to which all Member States are signatory. This sub-section also requires that the CEAS respects the principle of *non-refoulement*, which instructs that a person should not be returned through any manner whatsoever to a country where he or she is not safe. This is the fundamental asylum norm and is derived from a number of sources. The Geneva Convention prohibits return where a person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.¹⁵⁶ The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) has been interpreted to

¹⁵¹ European Council, Brussels European Council 15 and 16 October 2016, *Presidency Conclusions* (14368/08), 8. Reference to 'solidarity' in the text of the Pact, Council, *European Pact on Immigration and Asylum* (Brussels, 24 September 2008), 4 and 12.

¹⁵² European Commission, *An EU agenda for better responsibility sharing and more mutual trust*, COM(2011) 835 final.

¹⁵³ Article 5 TEU.

¹⁵⁴ Article 4(2)(j) TFEU.

¹⁵⁵ Article 2(2) TFEU.

¹⁵⁶ Geneva Convention relating to the Status of Refugees, Article 33.

contain a positive obligation not to return a person to a country where he or she faces treatment contrary to Article 3 ECHR.¹⁵⁷ *Non-refoulement* is also said to be a norm of customary international law.¹⁵⁸

Article 78(2) articulates the content of the legislative competences and instructs that measures enacted to achieve them should follow the ordinary legislative procedure.¹⁵⁹ These comprise:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

Article 78(3) contains a further competence to adopt temporary measures in the event of an emergency characterised by a sudden inflow of third country nationals. Such measures should be adopted according to a non-legislative procedure, under which the Council may adopt measures proposed by the Commission, only needing to consult the Parliament.¹⁶⁰

The Treaty of Lisbon also added Article 80 to the TFEU, concretising the principle of solidarity as the foundation of the CEAS. Although rightly seen as a consolidation and affirmation of the preceding

¹⁵⁷ European Court of Human Rights (Dec.), *T.I. v UK*, Appeal No. 43844/98, 7 March 2000.

¹⁵⁸ Phil C. W. Chan, "Protection of Refugees and Internally Displaced Persons: Non-Refoulement under Customary International Law?" (2006) 10(3) *International Journal of Human Rights* 231, 236.

¹⁵⁹ That is, proposed by the Commission and approved by a majority of the European Parliament and a qualified majority in the Council, Article 294 TFEU.

¹⁶⁰ Articles 78(3) and 289(2) TFEU.

commitments to solidarity in the CEAS, the addition of this provision to the Treaty arguably increases the need to understand the term better. It reads:

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.

The ‘second phase’ of the CEAS follows a very similar structure to the first. The recast Regulation for allocating responsibility for applicants for international protection between the Member States is now ‘Dublin III’.¹⁶¹ The three harmonising Directives are revised but remain separated to cover reception conditions, qualification and procedures.¹⁶² Their titles were changed, abandoning the express references to ‘minimum standards’, yet the text of each expresses that more favourable provisions may be adopted by the Member States still.¹⁶³ The final period of the European Refugee Fund ended in 2013, and was replaced in 2014 with the Asylum, Migration and Integration Fund (AMIF).¹⁶⁴ The temporary protection Directive remains unchanged.¹⁶⁵ The only real innovation is the European Asylum Support Office (EASO), which was established to provide practical support to the Member States, for example by compiling country guidance reports, coordinating and providing training for national officials and by offering operational support to pressured asylum systems (short of status determination).¹⁶⁶

¹⁶¹ Regulation (EU) No 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, OJ [2013] L180/31.

¹⁶² 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 (recast), OJ [2013] L180/96; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast), OJ [2011] L337/9; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ [2013] L180/60.

¹⁶³ *Ibid*, recast reception conditions Directive, Recital 26; recast qualification Directive, Recital 14; recast procedures Directive, Recital 14.

¹⁶⁴ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/200/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ [2014] L150/168.

¹⁶⁵ Above note 138.

¹⁶⁶ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ [2010] L132/11, Article 2.

Solidarity is the central and foundational principle of the CEAS and has been since the EU's first foray into asylum policy. Through the addition of Article 80 TFEU and the prominence of the principle in the response to the refugee crisis, its importance in the CEAS has only grown. As a core element of the EU's asylum policy, it has been put to work to address the challenges facing the CEAS.

4. SOLIDARITY AS THE ANSWER TO THE CEAS'S PROBLEMS

The CEAS can count a number of successes among its achievements over the past two decades. First, many observers acknowledge that its harmonised legal standards provide a relatively high standard for the protection of refugees through its minimum procedural and substantive requirements for the determination of applications for international protection in the Member States by third country nationals.¹⁶⁷ Achieving a high standard of international protection is consistently reasserted as a primary aim of the CEAS.¹⁶⁸ Second, the EASO has become a useful centre for practical advice and support for the Member States in administering their national asylum systems,¹⁶⁹ so much so that recent plans to strengthen its role within the CEAS as a new European Agency for Asylum have received support.¹⁷⁰ Third, the EU has also made increasingly large sums available to fund its programmes. Earlier versions of the European Refugee Fund were criticised for offering insubstantial sums to influence Member State

¹⁶⁷ Eiko Thielemann and Mogens Hobolth, "Trading numbers vs rights? Accounting for liberal and restrictive dynamics in the evolution of asylum and refugee policies" (2016) 42(4) *Journal of Ethnic and Migration Studies* 643-664, 660; Etienne Piguet, "The 'Migration Crisis' in Europe: A Geohistorical Interpretation", *Refugee Law Initiative Blog* (School of Advance Study, University of London, 1 August 2017), <https://rli.blogs.sas.ac.uk/2017/08/01/the-migration-crisis-in-europe-a-geohistorical-interpretation/> [accessed 01/09/2017].

¹⁶⁸ See above notes 136, 146 and 150.

¹⁶⁹ See chapter four, section 1.3.

¹⁷⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Agency for Asylum and repealing Regulation (EU) No 439/2010*, COM(2016) 271 final. European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' (COM(2016) 270 final — 2016/0133(COD)) on the 'Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' (COM(2016) 271 final — 2016/0131(COD)) and on the 'Proposal for a regulation of the European Parliament and of the Council on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 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], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast)' (COM(2016) 272 final — 2016/0132(COD))*, OJ [2017] C34/144, 3.7.

behaviour, but the amount available has been dramatically increased under the AMIF.¹⁷¹ Similarly, the budget of the EASO was identified as a limiting factor on its effectiveness, so under the proposal for the new Asylum Agency, the budget would be substantially increased.¹⁷²

Nevertheless, the shortcomings of the CEAS have, perhaps naturally, received more attention. First is the continuing critique that protection standards in the CEAS are insufficient to guarantee adequate standards of refugee protection.¹⁷³ Despite the reflections of some observers that the standards in the CEAS are relatively high, this is within a context of a global refugee regime that provides limited rights to refugees. Moreover, there is a significant gap between the standards as set out in law and their implementation in practice.¹⁷⁴ Restrictions on access to protection would also fall under this heading: there is a notable disparity between the position of those who are able to access the asylum systems of the Member States and those who are unable to do so despite their protection needs, for example through the requirement to be present in the territory of the Member States in the context of border control measures taken to prevent access to this territory. The CEAS proposes to raise protection standards in the Member States through gradually ratcheting them up in its harmonised legal standards, which chapter four argues is a manifestation of ‘legal solidarity’.¹⁷⁵ In addition, the EASO is mandated to spread best practice in various aspects of asylum and refugee protection.¹⁷⁶

The second challenge is the uneven distribution of responsibility for asylum between the Member States, despite the express aim of the CEAS to establish a “fair-sharing of responsibility” between the

¹⁷¹ Eiko R. Thieleman, “Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund” (2005) 43(4) *JCMS* 807-824.

¹⁷² Above note 170.

¹⁷³ S W Allard, “Casualties of Disharmony: The Exclusion of Asylum Seekers under the Auspices of the Common European Asylum System”, [2010] 24(1) *Emory International Law Review* 295-330; F. Maiani and V. Vevsted, “Distribution of Applications for International Protection and Protected Persons” in Directorate General for Internal Policies, Policy Department C: Citizens’ Right and Constitutional Affairs, “Setting up a Common European Asylum Systems: Report on the application of existing instruments and proposals for the new system” (Brussels: European Parliament, 2010); J Handoll, “Directive 2003/9 on Reception Conditions of Asylum Seekers: Ensuring ‘Mere Subsistence’ or a ‘Dignified Standard of Living’?” in A Baldaccini, E Guild and H Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, (Oxford: Hart Publishing 2007) 195-228.

¹⁷⁴ EASO, *Annual Report on the Situation of Asylum in the European Union 2015* (EASO, 2016), 56-59, available at https://www.easo.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf [accessed 09/07/17]. See further: chapter four, section 3.2.

¹⁷⁵ Chapter four, section 3.2. and 3.3.

¹⁷⁶ Above note 166, Article 3.

Member States of Article 80 TFEU. In both absolute and relative terms, some Member States are responsible for more asylum applications than others, and inconsistent recognition rates between them mean that consequent responsibility for refugees is further distorted.¹⁷⁷ The idea of fair-sharing is often closely related to the principle of solidarity, and many invocations of the latter also refer to the former (though a core argument of this thesis is that solidarity does not necessarily entail an even distribution of responsibilities between the Member States). In the Stockholm programme,¹⁷⁸ and in the programme for the Polish, Danish and Cypriot Council Presidencies (2011-2012),¹⁷⁹ the linked ideas of solidarity and fair-sharing of responsibility are particularly tied to assistance for Member States under pressure. The European Parliament's Committee on Civil Liberties, Justice and Home Affairs explained that the fair-sharing is necessary to realise high standards of protection and solid decision-making,¹⁸⁰ and criticises the Dublin system for its failure to provide this.¹⁸¹

The third challenge of the CEAS is organising the interactions of the Member States' twenty-eight national asylum systems in a way that reflects qualities of good administration. Whilst the EU might not be able to directly influence some of these, for example fairness as substantive justice or cost-effectiveness, it has faced criticism of the efficiency of its systems. For example, in an analysis conducted by Migration Policy Institute Europe, transfers of applicants between the Member States were at rates that seemed to 'cancel each other out': in 2013, Germany sent 1 380 transfer requests to Sweden, and in return Sweden sent 947 transfer requests to Germany; France sent 355 to Belgium and received 562 back in return.¹⁸² To put the significance of these numbers in context, the UNHCR reports that 484 560 applications for international protection were submitted to the Member States in 2013.¹⁸³

¹⁷⁷ K Hailbronner, "Asylum Law in the Context of a European Migration Policy" in N Walker (ed), *Europe's Area of Freedom, Security and Justice*, (New York: Oxford University Press, 2004) 41-88, 45-47; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust*, COM(2011) 835 final, 14-16.

¹⁷⁸ Above note 150, 32.

¹⁷⁹ Council of the European Union, *18-month Programme of the Council (1 July 2011 – 31 December 2012)*, 17 June 2011 (11447/11), 82, point 238.

¹⁸⁰ Committee on Civil Liberties, Justice and Home Affairs, European Parliament, *Report on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI))*, para 6.

¹⁸¹ *Ibid.*, para 33.

¹⁸² Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System* (Brussels: Migration Policy Institute Europe, 2010), 13.

¹⁸³ UNHCR, *Asylum Trends 2013: Levels and Trends in Industrialized Countries* (Geneva, UNHCR: 2014), 8.

Agreeing, arranging and executing these transfers does not seem a good use of resources if they are to achieve nothing more than ensuring that the Member States responsible determine their respective applications when in a majority of cases the applicant will have no more connection with that Member State than any other, and possibly less if she or he has moved to join friends or non-qualifying family members.

Fourth, the relations between the Member States' asylum systems through the CEAS with third states' protection regimes creates an imbalance of responsibility, raising questions of global justice. It is well established that developing states host the majority of the world's refugees, estimated at 84% in 2016,¹⁸⁴ but this is exacerbated by provisions of the CEAS that encourage the Member States to shift responsibility for refugee protection to third states through the operation of safe third country provisions. Before applying the hierarchy of responsibility criteria under Dublin, the Member States are asked to consider whether a third country outside of the Dublin system might be asked to accept the return of the applicant instead, so that no Member State is responsible.¹⁸⁵ Frontex operations seek to push control of migration away from the Member States to neighbouring countries, and increasingly further afield into Africa, for example through the proposal to set up a migrant transit centre in Niger where would-be migrants to Europe would be discouraged from travelling further, and instead to travel back to their home states in West Africa.¹⁸⁶ The EU-Turkey Agreement attempted to limit the number of refugees crossing into the Member States through a well-publicised policy of returning them immediately to Turkey.¹⁸⁷ Although solidarity between the Member States can exacerbate these problems by encouraging the Member States to band together against external interests in a spirit reminiscent of 'Fortress Europe', the principle of solidarity has also been used as the foundation for arguments that relations with third countries should be fairer.

¹⁸⁴ UNHCR, *Global Trends, Forced Displacement in 2016* (Geneva: UNHCR, 2017), 2.

¹⁸⁵ Above note 161, Article 3(3).

¹⁸⁶ Phillippe De Bruycker and Evangelia (Lilian) Tsourdi, "Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension", Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill Nijhoff, 2016), 473-538, 529-535.

¹⁸⁷ Above notes 62-63.

None of these problems facing the CEAS are new, indeed some appear to resist various efforts to address them by EU policymakers. Solidarity in various guises has been proposed as a way of responding to each, increasingly so in the second half of the development of the CEAS. If solidarity is to be useful in this way, it is important to understand more about what it entails.

5. TOWARDS UNDERSTANDING SOLIDARITY IN THE CEAS:

PARAMETERS OF THIS THESIS

Solidarity is a core value of the CEAS. It has been present since the beginning of EU asylum policy and referenced as a foundational principle. The EU and the Member States affirmed their commitment to the principle by adding it to the Treaties under the Treaty of Lisbon. It has been pointed to as a way of responding to the central challenges facing the CEAS and was fervently relied upon in reaction to the refugee crisis. No clear image of what the principle of solidarity entails has emerged despite this increasing reliance on, and centralisation of, the principle in the CEAS. This thesis addresses this lack of clarity, offering an account of the nature of solidarity in the CEAS. It looks at the substance of the principle and examines the different types of CEAS solidarity – practical, legal and financial. Reflecting on the flexibility and diversity found through this analysis, the central argument of the thesis is that, despite its intuitively positive and simplistic appeal, the principle's inherent flexibility means that it contains conflicts of meaning that bar it from pointing to distinct law and policy choices in the CEAS, be that reactions to crises or responses to ongoing problems. This final section offers a brief map to how this thesis is established across the following chapters.

5.1. A NOTE ON METHODOLOGY

This section contains a preliminary note of the methodological approach followed in this thesis and the motivations for this decision.

The doctrinal approach attempts to decipher the legal duties and restrictions placed on the EU and the Member States in conducting and constructing their common asylum policy, by the principle of solidarity, either by dictating how the competences in Article 78 TFEU should be read, or by offering a stand-alone legal basis. Karageorgiou takes this route in establishing a definition of solidarity for the

purpose of her argument.¹⁸⁸ This method is also adopted by Maiani, who couples a literal reading of Article 80 TFEU itself with an assessment in light of other principles of EU law, most notably the principle of sincere cooperation of Article 4(3) TFEU.¹⁸⁹ This approach to understanding the principle of solidarity offers potential legal arguments of the type that might be put before the Court should this question be addressed.

On the one occasion that the Court was asked to consider the meaning of solidarity in Article 80 TFEU, so that it may answer a question about the interpretation of Article 3(2) of the Dublin II Regulation, the Court declined.¹⁹⁰ The Court responded to the question by referring only to the Regulation, meaning that no consideration of the principle of solidarity was necessary, to the extent that it did not even mention Article 80 TFEU.¹⁹¹ Whilst this is undoubtedly an example of properly restrained judicial decision-making, it leaves observers both none-the-wiser as to the meaning of solidarity in this context and doubting the appetite of the Court to interrogate such a vague and politically-sensitive principle. This thesis follows the Court's (implied) approach in viewing the principle of solidarity as containing a deeply political element that it not well captured by doctrinal legal analysis alone.

The approach adopted in this thesis instead is socio-legal,¹⁹² relying on diverse sources in order to understand solidarity in, and as a product of, its context: solidarity as imbued with meaning from its surroundings. Cottrell argues that this allows us to see the “ultimate value and significance” of the law.¹⁹³ This is particularly appropriate in the context of the EU, as Snyder explains: “European Community law represents more evidently perhaps than most other subjects an intricate web of politics, economics and law... which virtually calls out to be understood by... an interdisciplinary, contextual or critical approach”.¹⁹⁴ The same could be said of migration or asylum law, given the political

¹⁸⁸ *Ibid.*

¹⁸⁹ Francesco Maiani, “Solidarity Across Migration Policies: Borders, Asylum and Migration”, presented at *The Meaning of Solidarity for Refugee Protection in the EU*, (Queen Mary University of London, 27 April 2015).

¹⁹⁰ Case C-528/11 *Zuheyra Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, EU:C:2013:342.

¹⁹¹ *Ibid.*, [33]-[39].

¹⁹² F Cownie and A Bradney, “Socio-Legal Studies: A challenge to the doctrinal approach”, in D Watkins and M Burton (eds.), *Research Methods in Law* (Abingdon: Routledge, 2013), 34, 35.

¹⁹³ R. Cottrell, *Law's Community: Legal Theory in Sociological Perspective*, (Oxford: Clarendon Press, 1995), 296.

¹⁹⁴ F Snyder, *New Directions in European Community Law* (London: Wiednefeld and Nicolson, 1990), 167, as cited in J Hunt and J Shaw, “Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European

sensitivity of the matter, amplifying the call for a socio-legal approach to this research which examines an intersection of EU and asylum law.¹⁹⁵ This research is a desk-based study. To this end, use is made of secondary empirical data collected by the EU's Eurostat and by NGOs together with the literature of social scientists, including political scientists and economists, as well as more traditional legal sources.

5.2. POSITIONING THIS RESEARCH WITHIN THE EXISTING LITERATURE

Much of the work published on the CEAS concerns itself with the internal logic of the rules and motivations, judging the CEAS against its own standards.¹⁹⁶ There have also been studies that test the underlying premises of the CEAS empirically, such as Thielemann's study of the motivations for seeking a particular destination questioning the assumption that the rules concerning refugee protection and procedure have much influence in this decision.¹⁹⁷ Others still have addressed the CEAS in light of wider tenets of EU law and the Single Market, including Guild's influential article on *The Europeanisation of Europe's Asylum Policy*.¹⁹⁸ Looking to other legal orders, there is also a substantial literature evaluating the CEAS in the context of public international law, including international human rights obligations, particularly but not exclusively the European Convention on Human Rights (ECHR),

Integration", in D Phinnemore and A Warleigh-Lack (eds.), *Reflections of European Integration* (Oxford: OUP, 2010).

¹⁹⁵ C J Harvey, "European Regulation of Asylum: Constructing a Model of Regional Solidarity?" (1998) 4 *European Public Law* 561, 563.

¹⁹⁶ For example, S W Allard, "Casualties of Disharmony: The Exclusion of Asylum Seekers under the Auspices of the Common European Asylum System", [2010] 24(1) *Emory International Law Review* 295-330; J Handoll, "Directive 2003/9 on Reception Conditions of Asylum Seekers: Ensuring 'Mere Subsistence' or a 'Dignified Standard of Living'?" in A Baldaccini, E Guild and H Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, (Oxford: Hart Publishing 2007) 195-228; A Nicol, above note 118; E R Thielemann, "Between Interests and Norms: Explaining Burden-Sharing in the European Union", (2003) 16(3) *JRS* 253-273.

¹⁹⁷ E Thielemann, "Why European Policy Harmonization Undermines Refugee Burden-Sharing" (2004) 6(1) *EJML* 47-65. See also A Böcker and T Havinga, 'Asylum Applications in the European Union: Patterns and Trends and the Effects of Policy Measures', (1998) 11(3) *JRS* 245-266.

¹⁹⁸ E Guild, "The Europeanisation of Europe's Asylum Policy" (2006) 18 *IJRL* 630-651.

and the Geneva Convention.¹⁹⁹ There has also been work on the impact of the CEAS on non-EU states.²⁰⁰

There seems to be less work that, instead of focussing on the ‘vertical’ relationships between states and refugees or refugees and the EU, interrogates the ‘horizontal’ relationship between Member States in providing refugee protection, which is the focus of this thesis. There is a corpus of work from the early 2000s examining the idea of burden-sharing in the EU, for example by Byrne or Noll, which, although instructive, is no longer up to date, most notably in that it precedes the addition of Article 80 TFEU.²⁰¹ Otherwise, such work focuses on the international level, particularly on the relationships between states in the global North and South. It is informative, and is considered in detail in chapter three of this thesis, but, as that chapter will argue, it is not immediately transposable to the relationship between the Member States of the EU, which differs due to extensive European integration and the express provision for solidarity in the CEAS. This thesis seeks to add to this literature concerned with the relationship between states in providing refugee protection through the channel of the principle of solidarity.

Before the refugee crisis, the principle of solidarity in the CEAS had been subject to little research. Most mentions of solidarity in the CEAS are fleeting and presuppose a definition of which the reader is aware, a habit shared with, and perhaps derived from, the institutions of the EU.²⁰² By way of example, Langford refers frequently to solidarity in her article on the response of the CEAS to people

¹⁹⁹ A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: OUP, 2009), especially chapter 3; Battjes, above note 133; M-T Gil-Bazo, “The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited” (2006) 18 *IJRL* 571-600; Costello, above note 140; H Battjes, “A Balance between Fairness and Efficiency? The Directive in International Protection and the Dublin Regulation” (2002) 4 *EJML* 159-192. Violeta Moreno Lax, “Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers’ Sanctions with the EU Member States’ Obligations to Provide International Protection to Refugees” (2008) 10(3) *EJML* 315-364.

²⁰⁰ A Betts, “Towards a Mediterranean Solution? Implications for the Region of Origin” (2006) 18 *IJRL* 652.

²⁰¹ R Byrne, “Harmonization and Burden Redistribution in the Two Europes” (2003) 16(3) *JRS* 336-358; G Noll, *Negotiating Asylum, the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (The Hague: Martinus Nijhoff 2000); G Noll, ‘Protection in a spirit of solidarity?’ in R Byrne, G Noll and J Vested-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague: Kluwer Law International, 2002) 305. See further, E Thielemann (ed.), Special Issue on European Burden-Sharing and Forced Migration (2003) 16(3) *JRS* 225-358.

²⁰² European Commission, *Communication on enhanced intra-EU solidarity in the field of asylum, An EU agenda for better responsibility-sharing and more mutual trust*, COM(2011)835 final; Council, *Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows* (Brussels, 9 March 2012).

arriving in Europe from the Arab Spring in 2011, yet the meaning of solidarity is not interrogated.²⁰³ This leads to statements such as: “The misalignment of asylum policies in the EU, and the failure of the current CEAS to remedy it, poses a major obstacle to greater solidarity between member states”,²⁰⁴ or: “Clearly, a showing of true solidarity between northern and southern member states in handling the refugee crisis is yet to be seen”.²⁰⁵ Goldner Lang does articulate her understanding of solidarity: “Generally speaking, the underlying idea of solidarity is to provide a common and fundamental rights compliant mechanism which is able to respond to all the migratory and asylum-related pressures in all EU Member States, also at times of global crisis and increased migratory flows”.²⁰⁶ However, there is no indication of what this is based on, surprisingly given her recognition that, “The Treaty provides no specification to help determine what constitutes [solidarity and fair sharing of responsibility]. Their goals or the benchmarks to measure their fulfilment are undefined”.²⁰⁷ The exceptions, that is, those works that address the question of the meaning of solidarity in the CEAS, warrant detailed consideration.

First, after the introduction of Article 80 TFEU under the Treaty of Lisbon, the European Parliament published a study on its implementation in 2011, which had been commissioned by the Committee of Civil Liberties, Justice and Home Affairs.²⁰⁸ Together with legal and policy analysis, this study reported on interviews conducted with representatives of a selection of Member States²⁰⁹ and officials of EU institutions and other organisations,²¹⁰ providing a useful source of information on their interpretations of the principle of solidarity. For example, the interviews suggest that the Member States recognise a

²⁰³ L M Langford, “The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU Solidarity” (2013) 26(1) *Harvard Human Rights Journal* 217-264.

²⁰⁴ *Ibid*, 238.

²⁰⁵ *Ibid*, 248.

²⁰⁶ I Goldner Lang, “Is There Solidarity on Asylum and Migration in the EU?” (2013) 9 *Croatian Yearbook of European Law and Policy* 1, 3.

²⁰⁷ *Ibid*, 9.

²⁰⁸ Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, *The Implementation of Article 80 TFEU, on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration* (Brussels: European Parliament, 2011).

²⁰⁹ Belgium, Finland, Italy, Latvia, Malta, Poland, The Netherlands, Sweden and the United Kingdom were selected to give a representation of the diverse opinions held by the Member State on solidarity, *ibid*, 79-80.

²¹⁰ Interviewees were selected from the European Commission, the LIBE Committee of the European Parliament, Frontex, the UNHCR, IOM and ECRE, *ibid*, 80.

divide between legal, literal interpretations of Article 80 TFEU on one hand and political and policy interpretations on the other,²¹¹ and that the absence of a clear definition of solidarity has caused difficulties in implementing it.²¹² In conclusion, it states: “There seems to be little agreement on the meaning of solidarity”.²¹³

The next attempt to understand the principle of solidarity is by Mitsilegas, from 2014.²¹⁴ He argues that the present use of ‘solidarity’ in the CEAS is state-centric, securitised and exclusionary; highlighting that it operates ‘between the Member States’, is used to reflect a crisis mentality and emergency response, and that these combine to demand exclusion.²¹⁵ For Mitsilegas, this is problematic because it privileges the interests of the Member States above those of asylum seekers subject to the system, including their fundamental rights, rendering them “an afterthought”.²¹⁶ This demotion of concerns relating to fundamental rights also creates the risk that the CEAS may fall foul of EU constitutional and human rights law.²¹⁷ Whilst his conclusion – that solidarity should be re-envisaged to pay greater mind to the interests of asylum seekers²¹⁸ – implies that multiple conceptions of solidarity are possible within the existing framework, this thesis argues that alternative understandings are already visible in the CEAS so that whilst solidarity may be state-centric, securitised and exclusionary, it is used in different ways too.

As demonstrated above, interest in solidarity rapidly increased during the course of the refugee crisis. The first published academic work reacting to this was Karageorgiou’s article of 2016.²¹⁹ Although consideration is given to the meaning of solidarity, this is part of building the overall argument, rather than an end in itself, so the discussion is limited to only a few paragraphs. It should also be noted that a workshop at Queen Mary, University of London was dedicated to the question of the meaning of

²¹¹ *Ibid.*

²¹² *Ibid.*, 81.

²¹³ *Ibid.*, 99.

²¹⁴ V Mitsilegas, “Solidarity and Trust in the Common European Asylum System” (2014) 2(2) *Comparative Migration Studies* 181-202.

²¹⁵ *Ibid.*, 186-187.

²¹⁶ *Ibid.*, 198.

²¹⁷ *Ibid.*, 199.

²¹⁸ *Ibid.*

²¹⁹ E Karageorgiou, “Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees” (2016) *European Politics and Society*.

solidarity in April 2015,²²⁰ at which many early-phase research ideas were discussed, the publication of which is anticipated.

5.3. STRUCTURE OF THE THESIS

The thesis responds to the research question: what does solidarity mean in the CEAS, which is structured into two parts. The first, comprised of chapters one to three, establishes the variety of meaning attached to the term, ‘solidarity’, in contexts that inform its use in the CEAS, namely in European social, political and philosophical thinking, in EU law and in refugee law. The second part, chapters four and five, takes the flexibility and diversity of meaning established in the first part and uses it as a way of reading solidarity in the CEAS. Chapter four offers an original analysis of the CEAS ‘solidarity toolbox’, the measures used in the EU to express solidarity in its asylum policy, according to the elements drawn from part one; and chapter five reflects on the role that the flexibility of solidarity plays in the CEAS, arguing that it both draws the relevant actors together by accommodating their differing views and prevents the principle offering any firm policy guidance since it renders the principle inherently internally conflicted.

Chapter one explores out the variety of meaning that is expressed by the term ‘solidarity’ in a broad sense, through its origins in social, political and philosophical thought. To contextualise these definitions, examples are given of how this might be expressed in asylum policy. This chapter argues that ‘solidarity’ does not express a singular idea but can express a variety of meaning at once. It serves to highlight the richness of the possibility of meaning to which solidarity in the CEAS might refer. Article 80 TFEU might express any, all and none of the definitions explored in this chapter.

Chapter two analyses the EU as a context for solidarity, addressing a number of expressions of solidarity across a variety of policy areas: as a shield protecting national social programmes from the demands of competition law; as a description of the extension of equal treatment to free-moving Union citizens; through the Structural and Cohesion Funds; as the bailouts of Member States affected by the Eurozone

²²⁰ *The Meaning of Solidarity for Refugee Protection in the EU*, (Queen Mary University of London, 27 April 2015).

crisis; and as responses to emergencies through Article 222 TFEU and the European Union Solidarity Fund. This chapter argues that understanding solidarity in the CEAS requires an understanding of its wider operation in the EU. Its analysis does not reveal a consistent or coherent account of European Union solidarity that might be easily applied in the CEAS, but shows the workings of a variety of EU solidarities that are used to inform our thinking on solidarity in the context of asylum.

By considering global and regional models of sharing refugee protection between states, chapter three argues that consensus on solidarity in refugee law does not extend beyond the agreement that there should be ‘sharing’, of some description. The chapter analyses a selection of such measures to examine a variety of approaches to this sharing: those that allocate different protection roles to different states and those that divide the total amount of refugee protection between states, but under which each state provides all aspects of protection for the refugees for which it is responsible; those under which states volunteer for their roles, or the extent of their share of protection, and those under which protection roles are allocated between states according to some measure of their capacity or with some other yardstick of ‘fairness’.

These three chapters form the first part of the thesis, establishing the diversity of meaning that informs the analysis of the second part and offering a foundation on which to build the original contribution of the thesis. Chapter four addresses the mechanisms of solidarity in the CEAS, which together constitute the ‘solidarity toolbox’. These mechanisms, which the chapter argues can be understood as severally expressing practical, financial and legal solidarities, are interrogated with an analytical framework for distilling the solidarity expressed by each constructed from the previous three chapters. It asks: who are the actors and addressees of solidarity? What is the solidarity; is it supportive, complementing the choices of the Member States, or coercive, directing the choices of the Member State? How is the solidarity achieved, through supranational integration or parallel, national-level action by the Member States? And, why is the action that expresses solidarity being taken; is it through the voluntary choices of the relevant actors or through legal obligation? This analysis builds a detailed picture of the nature of the solidarity in the CEAS – it is a flexible value that does not dictate any specific policy choices, rather, it can be used to describe diverse mechanisms.

Chapter five interrogates the role of this flexible solidarity in the CEAS, arguing that it enables the idea of solidarity to play a constructive, useful role in bringing the actors of EU asylum policy together, and at the same time, limits the utility of solidarity as a tool of CEAS law and policymaking by preventing it from offering any detailed guidance. The inherent flexibility of the principle of solidarity means that it can act as a badge of unity between divided actors, accommodating their differing views, but also means that it contains irreconcilable conflicts of meaning. This chapter explores three such conflicts: first, that solidarity evokes a supportive, constructive, humanitarian image but is far more commonly used in the CEAS to describe coercive measures; second that the most fervent declarations of solidarity respond to crisis situations, but that tangible action rarely results from them; and third that the most successful CEAS solidarity mechanisms are those that maintain the space for idiosyncratic national asylum policy for the Member States, which is valued as an expression of national sovereignty and national identity.

In sum, the contribution of this thesis is an account of the principle of solidarity in the CEAS. It argues that despite an intuitively simple appearance as a force for 'good' in the CEAS, the principle of solidarity is almost infinitely diverse in its meaning and application through legal and policy mechanisms. This flexibility enables it to bring actors with different interests and preferences together as foundation for the CEAS, but prevents it offering any concrete directions for EU asylum policy.

CHAPTER ONE: THE MULTIPLE MEANINGS OF SOLIDARITY

An etymological inquiry reveals that the French ‘*solidarité*’ is the root of the equivalent term in twenty-one of the EU’s twenty-three official languages, including English,¹ yet this common origin may imply greater conceptual unity than exists in reality. As we might expect for a widely used, broad term such as ‘solidarity’, it can mean different things in different contexts, but even within the specific, singular context of the CEAS, there is no established definition, nor common terms of reference, for understanding solidarity. To engage meaningfully with references to the term in the CEAS, it is necessary to understand the wider collection of concepts to which solidarity can refer and its underlying collection of disparate values and priorities. This chapter explores understandings of solidarity from social, political and economic theory in order to unpack some of the assumed meaning conveyed by using the word. The theoretical ideas identified in this chapter are explored in the specific contexts of EU law and refugee law in chapters two and three respectively.

Fiegle argues that employing a conceptual, rather than a linguistic, history reveals persisting differences between these apparently very similar words.² His analysis traces the development of the social-political concept of solidarity in France and Germany, finding that their different religious traditions have given rise to distinct meanings of solidarity.³ Williams, a leading proponent of this methodological approach, explains its value as follows:

[T]he variations and confusions of meaning are not just faults in a system, or errors of feedback, or deficiencies of education. They are in many cases, in my terms, historical and contemporary

¹ For example, French is listed as the origin for the word in German (*solidarität*), <http://www.bpb.de/nachschlagen/lexika/politiklexikon/18209/solidaritaet> [accessed 10/03/14]; Hungarian (*szolidaritás*), <http://idegen-szavak.hu/szolidarit%C3%A1s> [accessed 10/03/14]; and Romanian (*solidaritate*), <http://dexonline.ro/definitie/solidaritate> [accessed 10/03/14].

² T. Fiegle, “*Solidarité* and *Solidarität*: The Concept of Solidarity in France and Germany in the Nineteenth Century” in N. Karagiannis (ed.), *European Solidarity* (Liverpool: University of Liverpool Press, 2007) 48-58, 48 and 54.

³ *Ibid*, 57.

substance. Indeed they have often, as variations, to be insisted upon, just because they embody different experiences and readings of experience, and this will continue to be true, in active relationships and conflicts, over and above the clarifying exercises of scholars or committees. What can really be contributed is not resolution but perhaps, at times, just that extra edge of consciousness.⁴

This chapter takes its cue from this approach, and is premised on the idea that a more comprehensive understanding of a term can be developed if its origins, context and historical or traditional associations are taken into account. Expressly, this approach does not seek a unified or singular definition of solidarity, only an articulation of the variations of meaning attributable to the principle of solidarity together with suggestions of how each understanding might look in the context of the CEAS. This format exhibits the variety of meaning contained within the term ‘solidarity’ in order to explore the ideas that references to solidarity in the CEAS convey. It uses theoretical definitions to explore the richness of meaning attributed to the term in a legal, social and political sense. To contextualise this analysis, examples are given of how this is expressed in asylum policy, with particular reference to examples of each usage in CEAS legal and policy documents where such exists.

Part one explores two different explanations for the source of solidarity. This first possibility is that solidarity is a phenomenon that arises naturally from the interactions between people within a society; it is inherent in social existence. To illustrate this approach, the first section considers Durkheim’s mechanical and organic solidarities, both of which describe a solidarity that is inherent in the interaction between people, but whereas the former rests on the similarity between members, the latter arises between different, but interdependent members. In contrast, the second possibility is that solidarity exists as a result of an active decision taken by a group of actors to work together in such a way, creating an alliance. The motivations for such a decision may be moral or humanitarian, but the second section concentrates on an argument that has been made repeatedly in favour of international cooperation in providing refugee protection: that it is more efficient in an economic sense for states to share

⁴ Raymond Williams, *Keywords, A vocabulary of culture and society* (Revised Edition, New York: Oxford University Press, 1985), 24.

responsibility for refugee protection. This is presented from the perspectives of public goods theory and the mathematical ‘game’, the Prisoners’ Dilemma.⁵

Part two shifts focus to another area in which solidarity is subject to differing interpretations, regarding the addressees of solidarity. The first section considers as alternatives universalist solidarity, which extend to all regardless of membership, and particularist solidarity, which operates within the bounds of a defined group. Whilst the former has been more commonly associated with refugee protection, and has been used to justify the need for the asylum, the latter might be more readily applied to the solidarity of Article 80 TFEU, which operates expressly between the Member States of the EU. This gives us the first glimpse of a recurring tension of solidarity in the CEAS, namely its intuitive universalist associations in the refugee context and its particularist articulation in Article 80 TFEU. The second section confronts the issue of the addressees of solidarity from another angle by questioning the extent to which ideas of solidarity that operate between people might be translated to a way of understanding the interactions between states.

Many of the ideas explored in this chapter might be used to reflect upon the relationships between the Member States overall in the EU equally as well as in the specific context of the CEAS. Indeed, it might be difficult to distinguish any solidarity arising from the nature of cooperation between the Member States in the CEAS from that which arises from the wider project of European integration.

This chapter does not argue that any of these ideas has been, or should be, used to design a meaning for solidarity in the CEAS. Its analysis highlights a variety of factors that might be contained in references to solidarity, including: privilege for group members; exclusion; opposition to an external enemy or threat; an inherent social dynamic; and relations between people and/or states. This chapter is intended to support the central thesis that there is no fixed meaning that is necessarily conveyed by references to the principle of solidarity. This chapter argues that the variety it demonstrates, particularly where contradictory or incoherent, indicates that there is not a fixed definition or understanding of the term ‘solidarity’ in general and therefore references to solidarity in the CEAS are not to a fixed value or

⁵ William Poundstone, *Prisoners’ Dilemma* (New York: Anchor Books, 1993).

sentiment of general understanding. Instead, solidarity in the Article 80 TFEU context might refer to any, all and none of the definitions explored herein.

1. FOUNDATIONS FOR SOLIDARITY

In a discussion of different understandings and conceptions of solidarity it seems natural to begin by considering the ways in which solidarity might arise or become established. In this respect, the contrast can be drawn most starkly between passive and active origins of solidarity. In other words, does solidarity naturally arise as a matter of course in certain circumstances, inherent in the nature of certain interactions? Or, on the other hand, is solidarity created, an active decision taken to behave in a manner that is solidaristic? This section addresses each of these possibilities in turn, demonstrating that each has been offered as the foundation for solidarity. This part raises a number of conceptually coherent and distinctive interpretations of the foundations of solidarity that offer alternate ways of thinking about solidarity in the CEAS.

1.1. INHERENT IN INTERACTION

The first interpretation is that solidarity is a phenomenon that arises from the association of people within a society. In this sense, solidarity is an inherent aspect of interactions within a group. Durkheim argues that (social) solidarity is the basis of societies and that it arises from the nature of relationships between people, either through their likeness or their interdependence.⁶ Accordingly, he distinguishes two types of solidarity – mechanical and organic. This section outlines both, exploring their more general reflections on the nature of solidarity in the specific context of the CEAS.⁷ Together, these alternative explanations of inherent solidarity convey the potential for various meanings even within ‘categories’ of solidarities and provide a basis for discussing the possible origins of solidarity in the CEAS.

⁶ Émile Durkheim, *The Division of Labour in Society* (George Simpson tr., Illinois: The Free Press of Glencoe, 1960 [1893]).

⁷ Both of these interpretations require us to understand the EU as a ‘society’ for the Member States. Such an interpretation is supported, indeed advocated, by the International Society school of international relations (see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn, New York: Columbia University Press, 2012 [1977])) but is contested by others. The validity of uncritically transferring human concepts to the relationships between states is addressed below in section 2.2.2.

1.1.1. MECHANICAL SOLIDARITY

Mechanical solidarity is named to express likeness or homogeneity through analogy with inorganic compounds in which each molecule acts in the same way and has no individual action of its own.⁸ To avoid any confusion, it is important to note: “The term does not signify that it is produced by mechanical or artificial means”.⁹ Durkheim argues that each person’s conscience is made of two parts: the first is the personal states, characteristics that make up personality and individuality; the second is those states which regard the other, are common to all, and constitutive of society.¹⁰ The totality of the second part, that is, the “beliefs and sentiments common to average citizens of the same society”, forms what Durkheim terms the “*collective or common conscience*”.¹¹ It goes beyond something that exists isolated in each person (‘general’) and creates a total and unifying connection (‘common’).¹² This is because, Durkheim argues, similar sentiments attract each other and the strength of this attraction increases with the intensity of the sentiments.¹³ This is the bond of mechanical solidarity, summarised as follows by Durkheim:

In these conditions, not only are all members of the group individually attracted to one another because they resemble one another, but also because they are joined to the society that they form by their union. Not only do citizens love each other and seek each other out in preference to strangers, but they love their country.¹⁴

This solidarity connects each individual with society in a ‘general’ sense and accounts for the ‘common’, cohesive nature of society. It means that movements born out of the collective states of conscience will be the same in every individual and will produce the same results, meaning that society moves cohesively: “[E]ach time that they are in play, wills move spontaneously and together in the same sense”.¹⁵

⁸ As will be explained later (section 1.1.2.), this is drawn in comparison to the operation of organic bodies.

⁹ Above note 6, 130.

¹⁰ *Ibid*, 105.

¹¹ *Ibid*, 79, emphasis in original.

¹² *Ibid*, 102.

¹³ *Ibid*, 102.

¹⁴ *Ibid*, 105.

¹⁵ *Ibid*, 108.

Durkheim describes an inversely proportional relationship between individual consciousness and common consciousness: “Solidarity which comes from likeness is at its maximum when the collective conscience completely envelops our whole conscience and coincides at all points with it. But, at that moment, our individuality is nil”.¹⁶ Durkheim suggests that this type of solidarity is much more common in ‘primitive’ or traditional societies, because “the more primitive societies are, the more resemblances there are among the individuals who compose them”.¹⁷ This characteristic of mechanical solidarity is elaborated upon by Stjernø, who explains that where individuals share culture, history and living conditions, mechanical solidarity is strong “because people *are* alike and because they *think* alike”.¹⁸ Equally, then, as societies become more diverse, including through the division of labour, mechanical solidarity weakens.

Whilst this account of solidarity is concerned with the very nature of society – how it is created and what binds people to it – it is developed in the context of a discussion of the nature of crime and punishment, which Durkheim argues arise from the transgression of the common conscience.¹⁹ He argues that the extent of mechanical solidarity within a society can be measured by the degree to which penal law occupies a society’s juridical system.²⁰ For present purposes, Durkheim’s analysis of the nature of solidarity is the most interesting part of his work, rather than its criminal law context. Suffice to say that, for Durkheim, penal law is derived from, and employed for the maintenance of, this form of solidarity. This need not exclude the application of this conception of solidarity in other contexts.

Perhaps the similarities between the Member States are sufficient to give rise to such solidarity bonds. These similarities might be those set out as core values in Article 2 TEU (although the inclusion of solidarity in this list may render its particular suggestion somewhat tautological) or the minimum requirements that must be met by candidate countries before full membership of the EU can be attained. The development of Union citizenship as the ‘fundamental status’ of the citizens of the Member States

¹⁶ *Ibid*, 130.

¹⁷ *Ibid*, 133.

¹⁸ Steinar Stjernø, *Solidarity in Europe, The History of an Idea* (Cambridge: CUP, 2005), 33, emphasis in original.

¹⁹ Above note 6, 80-81.

²⁰ *Ibid*, 109.

also indicates the erasure of national differences in favour of universal conditions across the EU as part of the “ever closer union between the peoples of Europe” and attempts to forge a European demos.²¹

Nevertheless, the distinct cultural and historical traditions of the Member States are also recognised: “[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced”.²² The potential for conflict between these differences and the pursuit of solidarity is recognised in the Preamble to the Treaties: “DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”. So too the EU's failure to establish a European demos, despite its best efforts to do so,²³ is well attested.²⁴ Moreover, the differences between the Member States are starker than ever following the refugee crisis, both in the specifics of asylum policy and also in the broader reflections this casts on the core values of the Member States.

Durkheim's organic solidarity offers an alternative account of solidarity that arises inherently from the interactions within a society, but does not require similarity. Instead, it is based on the interdependence of society members.

1.1.2. ORGANIC SOLIDARITY

The second of Durkheim's solidarities is organic. It is so named, as with mechanical, following an illustrative analogy. Durkheim compares society, and the solidarity that creates it, to the body, stating: “[I]n effect, each organ has its own physiognomy, its autonomy. And, moreover, the unity of the organism is more great as the individuation of the parts is more marked”.²⁵ As this suggests, organic

²¹ This is notwithstanding the criticisms of these efforts for failing to capture the underlying values and entitlements of citizenship in respect of EU citizens and the exclusion of refugees and asylum seekers in Europe from its remit.

²² Article 3(3) TEU.

²³ The contrast here between the concerted and active efforts of the EU to establish a European demos and the self-evolving, or naturally-flowing characteristics of Durkheimian solidarity perhaps also points to weak fit between the ideas.

²⁴ G. Majone, “Europe's ‘Democratic Deficit’: A Question of Standards” (1998) 4(1) *ELJ* 5-28; G. Delanty, “European Citizenship: A Critical Assessment”, (2007) 11(1) *Citizenship Studies* 63-72; P. Magnette, “How can one be European? Reflections on the Pillars of European Civic Identity” (2007) 13(5) *ELJ* 664-679; R. Bellamy, “Evaluating Union citizenship: belonging, rights and participation within the EU” (2008) 12(6) *Citizenship Studies* 597-611; K. Nicolaïdis, “European Democracy and Its Crisis” (2013) 51(2) *JCMS* 351-369.

²⁵ Above note 6, 131.

solidarity is based on interdependence and reliance between individuals: their difference, rather than their similarity.

Durkheim describes a situation of ‘real rights’ (akin to proprietary rights in English law) which allows individuals to own and deal with ‘things’,²⁶ which he terms, “a solidarity of things”.²⁷ This does not give rise to a relationship between individuals, only between individuals and things, which if it exists alone, “will resemble an immense constellation where each star moves in orbit without concern for the movements of neighboring stars”.²⁸ The solidarity of things is described, therefore, as negative solidarity, as it separates the parts of society and puts them “outside one another” and “mark[s] cleanly the barriers which separates them”.²⁹ Yet for Durkheim, such a situation is only possible where there is also a ‘positive’ solidarity, “of which it is at once the resultant and the condition”.³⁰ It is only on the basis of this positive solidarity that we might explain the willingness of individuals to recognise the rights of others, whereby curtailing their own rights or freedom.³¹ Agreement to do this, Durkheim explains, arises from organic solidarity: “In reality, for men to recognize and mutually guarantee rights, they must, first of all, love each other, they must, for some reason, depend on each other and on the same society of which they are a part”.³²

This dependence, Durkheim argues, is derived from the division of social labour.³³ Whilst he acknowledges the ‘economic hand’ in the division of labour, he is keen not to limit his meaning in this way, stating that it goes beyond economics, “for it consists in the establishment of a social and moral order *sui generis*”.³⁴ Durkheim’s organic solidarity exists in a modern society in which there is “a high degree of occupational specialisation and social differentiation”, in which there is greater variance in things like culture and living conditions.³⁵

²⁶ *Ibid*, 115-116.

²⁷ *Ibid*, 115.

²⁸ *Ibid*, 117.

²⁹ *Ibid*, 119.

³⁰ *Ibid*, 120.

³¹ *Ibid*.

³² *Ibid*, 121.

³³ *Ibid*, 125-126.

³⁴ *Ibid*, 61.

³⁵ Above note 18, 34.

This offers a quite different explanation of society to that of mechanical solidarity. Instead of binding the individual to the society directly, organic solidarity explains that the individual is bound to the society through dependence, as she or he relies on its constituent parts.³⁶ Consequently, the society created by each type of solidarity is different. Mechanical solidarity refers to a society built on common conscience, whereas organic solidarity is the unification of definite relations built on different and specialised functions.³⁷ In Durkheim's words, it is summarised thus:

The first is possible only in so far as the individual personality is absorbed into the collective personality; the second is possible only if each one has a sphere of actions which is peculiar to him; that is, a personality. It is necessary, then, that the collective conscience leave open a part of the individual conscience in order that the special functions may be established there, functions which it cannot regulate. The more this region is extended, the stronger is the cohesion which results from this solidarity.³⁸

This might be a useful way of thinking about solidarity in the EU. The Member States are reliant on each other in achieving their objectives, something akin to a division of labour exists between them. Unlike with mechanical solidarity, it is not necessary to show that each of the Member States (equivalent to 'individuals' in Durkheim's description) prioritises the same values or operates in the same way. This might be seen in the specific context of the CEAS and other policies rationalised as measures compensating for the removal of the internal borders between the Member States. Each Member State is dependent on the border control efforts of the others, as entry to one part of the Schengen area allows entry to the whole. As outlined in the introductory chapter, this interdependence resulting from the removal of internal borders in pursuit of the Single Market is used to justify EU involvement in asylum policy, particularly through the Dublin system.³⁹

³⁶ Above note 6, 129.

³⁷ Durkheim suggests that in reality the two types are found together in one society, but they need to be distinguished in order to understand his two separate types of solidarity, *ibid.*

³⁸ *Ibid.*, 131.

³⁹ See introductory chapter, section 1.1.

In discussing solidarity in the CEAS, the Commission stated: “the asylum systems of all Member States are interdependent”,⁴⁰ which is also expressed as the need for the Member States to have mutual trust in each other’s national asylum systems. The Dublin system may be the best example of this.⁴¹ When functioning as intended,⁴² this system should provide cohesion between the Member States by declaring which of them is responsible for each application for asylum and providing for the enforcement of this with a system of returning applicants to the Member State responsible. This is the cohesion that Durkheim predicts will result from organic solidarity.⁴³ The interdependence at the heart of the Dublin system is the reliance of each Member State on the others (mutual trust) that each will maintain the minimum agreed standards for status determination procedures and reception conditions, ensuring, most importantly, that such conditions do not fall below commonly agreed fundamental rights standards. If these standards are not met, returns to the Member States responsible are legally prohibited,⁴⁴ so the Dublin system breaks down and can no longer operate, and the cohesion that Dublin’s operation fosters is compromised. Mutual trust is required to allow the Member States to confidently return applicants for international protection, without having to check the protection standards on offer before each return, for the Dublin system to operate efficiently.

This section has outlined visions of solidarity that arise from the nature of association between individuals and, assuming that the Member States can be understood to act in the same way as individuals,⁴⁵ this offers us two ways of thinking about the foundations of solidarity in the CEAS, beginning to demonstrate the variety of meaning expressed by the term. Durkheim offers a social theory of solidarity, based on his observations of the interactions and relationships of individuals within a

⁴⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust*, COM(2011) 835 final, 2.

⁴¹ Regulation (EU) No 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, OJ [2013] L180/31.

⁴² Problems in the actual functioning of the Dublin system are explored in chapter four, section 3.1.

⁴³ Above note 6, 131.

⁴⁴ Joined Cases C-411/10 and C-493/10 *N.S. and Others v Secretary of State for the Home Department and Others*, EU:C:2011:865; European Court of Human Rights (Dec.), *M.S.S. v Belgium and Greece*, Appeal No. 30696/09, 21 January 2011.

⁴⁵ Above note 7.

society. The next section addresses an alternative rationale for the foundation of solidarity, the active decision to work together in a union or alliance, and in doing so, shifts focus to economic theory which offers a perspective on the decisions made by (rational) actors about how to use their limited resources.

1.2. BURDEN-SHARING ALLIANCES

A group of states may take the decision to work together to share responsibility for providing refugee protection and to meet the total costs through their collective contributions. There might be different reasons behind this decision. First, a moral argument that unaffected states should share responsibility for refugee protection with states that are more affected because it is the ‘right’ thing to do. Such arguments were drawn on to argue for assistance for Italy, Greece and countries along the Western Balkan Route during the refugee crisis.⁴⁶ Alternatively, the incentive might be economic efficiency, that the costs associated with providing refugee protection are lower when it is produced by the joint efforts of states. This argument is most well developed in the refugee studies literature through public goods theory. This analysis is based on realist, self-interested interpretations of state behaviour, which maps well onto the rational, self-interested actor imagined in classic economics. This section concentrates on the latter because it offers an interesting account of the potential basis for an active decision for states to work together to provide refugee protection with a developed theoretical underpinning. The proponents of this argument believe that it is more influential on state behaviour than its moral counterpart, but here it is only favoured as offering a stark contrast to solidarity that inherently derives from societal interactions – a calculated decision to work together is an alternative explanation for the foundation of solidarity in the CEAS. This contributes to the purpose of this chapter, namely to explore a variety of theoretical and philosophical foundations of the principle of solidarity so that we might understand its application in the CEAS better.

⁴⁶ See introductory chapter, section 2. and chapter five, section 1.

1.2.1. PUBLIC GOODS THEORY AND REFUGEE BURDEN-SHARING

Public goods theory has been used to explain why states would enter into burden-sharing or solidarity arrangements in relation to refugee protection.⁴⁷ Public goods are those which are characterised by ‘non-excludability’ and ‘non-rivalry’.⁴⁸ This means that once the good is provided, no-one can be excluded from its benefits, regardless of whether they have contributed to its provision or not, and that there is no additional cost associated with providing the benefit to others.⁴⁹ The nature of public goods invites the questions of who should pay, how payments should be divided between the group, and how the burden should be shared.⁵⁰

It has been argued that providing refugee protection is a public good, given that everyone benefits from the existence of competent provision for those who are in need of protection but cannot avail themselves of the protection of the state of which they are citizens or habitual residents.⁵¹ Betts criticises such an imprecise articulation of the public benefits assumed to arise from the provision of refugee protection and is keen to articulate them more clearly.⁵² He suggests, on the one hand, that refugee protection can be conceptualised as an altruistic public good, grounded in the fulfilment of moral and normative obligations, and, on the other, as a security public good, derived from the exclusion of asylum seekers and the resultant avoidance of the perceived cost of hosting them.⁵³ These different goods plainly suggest different policy imperatives, demonstrating that different visions of solidarity might be equally justified on this foundation.

⁴⁷ The term used to describe cooperation in much of the work analysed in this section is ‘burden-sharing’, which is an accepted term that allows commenters to communicate in the same language. However, many authors prefer terms such as ‘responsibility sharing’ or ‘solidarity’, to which ‘burden-sharing’ is deemed equivalent, (G. Noll, “Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field” (2003) 16(3) *JRS* 236-252, 236 and 238-239) particularly in the CEAS, below note 49, 360.

⁴⁸ A. Betts, “Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory” (2003) 16(3) *JRS* 274-296, 275.

⁴⁹ Eiko R. Thielemann and T. Dewan, “The Myth of Free-Riding: Refugee Protection and Implicit Burden-Sharing” (2006) 29(2) *West European Politics* 351-369, 352.

⁵⁰ Above note 48, 275.

⁵¹ Astri Suhrke, “Burden Sharing During Refugee Emergencies: The Logic of Collective versus National Action” (1998) 11 *JRS* 396-415.

⁵² Above note 48, 276.

⁵³ *Ibid*, 276-277.

The decision to enter into an arrangement to share the cost of providing a public good is typically presented as the result of a cost-benefit analysis.⁵⁴ This suggests that actors will work together when the benefits derived from doing so out-weigh the costs, or, in other words, to do so is in their self-interest. Suhrke explains some of the benefits for states of working together to provide refugee protection in comparison to separate, individual arrangements by each state. One advantage arises through comparison with an insurance scheme.⁵⁵ By contributing to protection arrangements in times of less pressure, individual states can be confident of assistance in return should they face greater pressure at some point in the future. In addition, such a scheme offers a “reasonable guarantee that the institution of asylum will be kept intact since states are more likely to offer protection if they can share the burden”.⁵⁶ She argues that organised sharing offers the economic benefits of lower transaction costs, shared costs and increased efficiency.⁵⁷

Schuck reiterates this thinking under his proposed market system for sharing responsibility for refugees by applying a cost-benefit analysis to predict states’ reactions to his proposals:

Subscribing states would presumably have the same mixed motives to comply as they do in the case of other treaty obligations. These motives balance a desire to sustain a scheme of international cooperation to which they have agreed and that they believe furthers their national interest, and a desire to win or retain the approbation of actual or potential trading partners and politico-military allies, against the desire to free ride and retain their autonomy.⁵⁸

Schuck argues that states are motivated by their perceptions of their self-interest, rather than altruism,⁵⁹ and insists states will only enter into agreements that they determine to be within their self-interest.⁶⁰ Schuck anticipates similar benefits might appeal to this self-interest as those envisaged by Suhrke. For

⁵⁴ This is the most common approach to law and economics, see: R. H. Coase, “The Problem of Social Cost”, (1960) 3 *Journal of Law and Economics* 1-44; A. M. Polinsky, *An Introduction to Law and Economics* (3rd edn., New York: Aspen Publishers 2003).

⁵⁵ Above note 51, 398.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Peter H. Schuck, “Refugee Burden-Sharing: A Modest Proposal”, (1997) 22 *Yale Journal of International Law* 243-297, 292-293.

⁵⁹ *Ibid.*, 275 and 283.

⁶⁰ *Ibid.*, 283.

example, Schuck also compares the incentive to cooperate in providing refugee protection to the incentives for an insurance policy.⁶¹ Indeed, he argues that as more countries become potential host countries for refugees this incentive becomes stronger, or that refugee crisis insurance increasingly seems a “good buy”.⁶² He also suggests similar economic benefits of his proposed regime: reduced transaction costs⁶³ and the reduction of overall costs.⁶⁴

Such concerns for efficiency are visible in the design of the Dublin system, which restricts refugee status determination to one Member State in order to avoid the (economic and human) costs of repeat examinations of the same application, also referred to as the phenomenon of ‘refugees in orbit’ or ‘asylum shopping’.⁶⁵ To this end, the Preamble to the original Dublin Convention states:

AWARE of the need, in pursuit of this objective, to take measures... to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum.⁶⁶

The biggest obstacle to collective provision of a public good is ‘free-riding’. In the case of collective provision of a public good, free-riding is the avoidance of contribution by some parties safe in knowledge that they cannot be excluded from enjoying the public good since its provision is indivisible.⁶⁷ A free-riding state may decline to provide its share of refugee protection, knowing that another state will offer that protection instead, meaning that international protection is still provided to those who need it (the public good), but it is now attained at no cost to the free-riding state. Schuck

⁶¹ *Ibid*, 249-250.

⁶² *Ibid*, 250 and 274. Similarly, Thielemann suggests that as international travel becomes more readily accessible, and the world grows smaller, “‘refugee crisis insurance’ might well be a ‘good buy’”, Eiko R. Thielemann, “Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund” (2005) 43(4) *JCMS* 807-824, 818. See further on insurance logic Noll, above note 47, 241.

⁶³ Above note 58, 284.

⁶⁴ *Ibid*, 285.

⁶⁵ Above note 41, Article 3(1).

⁶⁶ Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member State of the European Communities, OJ [1997] C254/1, preamble.

⁶⁷ Above note 51, 400.

suggests that, for most states, “free-riding appears to be the rational strategy”, and can only be constrained by the pressure of advocates for refugees and ‘carrots and sticks’ applied by other states.⁶⁸

On the other hand Thielemann and Dewan cast doubt on the presence of free-riding within the international regime with reference to the relative figures of refugee reception across fifteen OECD countries between 1994 and 2002, referring to both spontaneous arrivals and resettlement.⁶⁹ This is reinforced by Thielemann and Armstrong’s analysis of the distribution of responsibility for asylum seekers in the EU under Dublin.⁷⁰ The obstacle of free-riding is perceived as a challenge to a cooperative refugee regime, but not one that cannot be overcome: “The same problem appears in many areas where states nevertheless manage to co-operate”.⁷¹ It might be argued that the threat of free-riding is reduced further in the EU because it is by far more developed as a legal order than the international community at large and has much stronger, far reaching and legally-binding enforcement mechanisms at its disposal.

Betts argues that pure public goods theory is an imperfect explanation of the incentive for states to share responsibility for providing refugee protection, suggesting that a ‘joint-products’ model, in which private or excludable benefits are also accounted for, is a better explanation.⁷² This model would explain the voluntary contributions of some states to refugee protection that seem to go beyond their ‘fair share’. Betts illustrates this position with a statistical analysis of the correlation between GDP and contributions to refugee protection proportionate to GDP.⁷³ This would offer another ‘solution’ to the problem of free-riding given that it is much less likely outside a pure public goods framework, as demonstrated by Betts’ analysis.⁷⁴ Thielemann and Dewan suggest that by taking a wider view of the provision of international public goods, to include international security and contributions to peacekeeping, for

⁶⁸ Above note 58, 253.

⁶⁹ Above note 49, 355.

⁷⁰ E. Thielemann and C. Armstrong, “Understanding European asylum cooperation under the Schengen/Dublin system: a public goods framework” (2013) 22(2) *European Security* 148-164, 152.

⁷¹ Above note 51, 400. Although Suhrke argues that there may be extra difficulties in relation to free-riding in the refugee context compared to defences or security, these seem to be dismissed on the basis that the analogy is not perfect in any event, 400-402.

⁷² Above note 48, 286.

⁷³ *Ibid*, 280-285.

⁷⁴ *Ibid*, 286.

example, individually states may contribute more to one good and less to another.⁷⁵ This creates an overall balance of efforts, even if in one sphere, such as refugee protection, there appears to be an imbalance.

Through applying public goods theory to solidarity in refugee protection, states are understood to take a pragmatic decision, based on weighing the costs against the benefits, that it is in their interests to work together. The next section addresses Noll's application of the Prisoner's Dilemma to this same question. Whilst offering an alternative explanation for the benefits of working cooperatively to that of Suhrke or Schuck, Noll also understands states as applying a cost-benefit analysis to determine their proclivity for sharing responsibility for providing refugee protection.

1.2.2. THE PRISONERS' DILEMMA AND REFUGEE BURDEN-SHARING

Another perspective is contributed by Noll, who applies game theory, specifically the Prisoners' Dilemma, to the question of providing refugee protection.⁷⁶ Noll advances this approach to translate real-life decision making into a limited number of abstract 'games', to reduce complexity and indicate optimal decisions.⁷⁷ Specifically in the context of sharing responsibility for refugees, the application of game theory is interpretive, revealing the underlying structure of the situation.⁷⁸ The Prisoners' Dilemma operates thus: two prisoners are held separately and interviewed in relation to an offence for which there is insufficient evidence to charge either of them. Both know that if neither confesses, they will each be convicted of a minor offence for which there is evidence, carrying a prison sentence of one year.⁷⁹ If one confesses, he shall give evidence against the other and be released, and the other will be charged with a serious offence and imprisoned for ten years.⁸⁰ If both confess, they will both be convicted of the serious offence.⁸¹ The result of this scenario is explained by Noll: "If the prisoners are able to communicate, they will eventually agree on keeping silent. However, there is a strong temptation

⁷⁵ Above note 49, 354, following M. A. Boyer, "Trading Public Goods in the Western Alliance System" (1989) 33(4) *Journal of Conflict Resolution* 700-729. See further note 70, 158.

⁷⁶ G. Noll, "Prisoners' Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union" (1997) 40 *German Yearbook of International Law* 405-437.

⁷⁷ *Ibid.*, 424.

⁷⁸ *Ibid.*, 425.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

for each prisoner to break such an agreement”.⁸² This demonstrates that the costs are lower for parties contributing to a collective arrangement where this commitment is mutually upheld, but the benefit is lost if either party tries to game the system for their own, exclusive benefit. Suhrke summarises it thus: “the moral of the story is that the development of trust regarding reciprocity would enhance the common good by encouraging states to enter into sharing schemes for asylum seekers”.⁸³ Noll agrees with this conclusion if a long-term view is adopted by participating states.⁸⁴

Suhrke identifies a number of limitations to the application of the Prisoners’ Dilemma to the issue of sharing responsibility for providing refugee protection. First, as a matter of procedure, the prisoners’ communication is restricted to the prosecutor, preventing any communication with each other, whereas states would be able to communicate with each other readily,⁸⁵ meaning that the same pressures would not apply. Second, it assumes “fundamental interdependence” between the prisoners, the existence of which might be questioned between sovereign states in the international legal order.⁸⁶ However, this is perhaps more easily demonstrated in the context of the EU and the CEAS.⁸⁷ Third, Suhrke argues that “states are rarely ‘in prison’ in refugee matters”, instead suggesting two “escapes”.⁸⁸ First, where several states are likely to be major refugee-receiving countries, these states can escape the dilemma by repelling, interdicting or otherwise resorting to *refoulement*.⁸⁹ Second, where spontaneous distribution of refugees between states tends to identify one receiving area, only very few states are ‘in prison’ and the others have little incentive to assist them.⁹⁰ Each of these problems challenges the explanatory power of the Prisoners’ Dilemma in relation to the incentive behind ‘burden-sharing’ or alliance solidarity. However, it offers another example of the theory that solidarity arises between states after their application of a ‘cost-benefit’ analysis and deciding that it is in their collective self-interest to share responsibility for providing refugee protection.

⁸² *Ibid.*

⁸³ Above note 51, 402.

⁸⁴ Above note 76, 430.

⁸⁵ Above note 51, 402.

⁸⁶ *Ibid.*, 403.

⁸⁷ See above section 1.1.2.

⁸⁸ Above note 51, 403.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

Taken together, the public goods theory and Prisoners' Dilemma arguments support the proposition that states, as rational actors (in the economic sense), may choose to pool the costs of providing the public good of refugee protection, including the costs of reception and application processing. However, the question of whether states are rational economic actors remains, and it should be noted that a cost-benefit approach that excludes this question has been challenged and criticised.⁹¹ Noll, for example, recognises that actors are often not rational in his assessment of the utility of game theory.⁹²

If the theoretical underpinning of this solidarity is an imperfect mirror of reality, it has not prevented states, in practice, coming together to provide a public or common good through the formation of alliances. Acharya and Dewitt liken efforts towards burden-sharing in refugee protection to an alliance, and highlight some perceived similarities between a military alliance and the defensive approach sometimes directed towards refugees,⁹³ perhaps reminiscent of references to 'Fortress Europe'. This alliance mentality is identified by Suhrke as an alternative rationale for the decision of states to work together in refugee protection,⁹⁴ though here both are offered as examples of an active decision to work in solidarity in contrast with Durkheim's spontaneously-arising solidarities.

Acharya and Dewitt explain that harmonising law and policy and sharing information are the archetypal methods of alliance solidarity,⁹⁵ both of which are key features of the CEAS.⁹⁶ Harmonisation of the legal standards applicable to asylum seekers and refugees in the CEAS is intended to make the conditions the same in every Member State so that movement between them is eliminated, which is intended to reduce the uneven distribution of asylum seekers between Member States.⁹⁷ Similar logic fuelled the 'race to the bottom' in the protection standards of the Member States in the late 1990s amidst

⁹¹ Questions are asked of the accuracy of the assumption of rational actors by Donald Green and Ian P. Shapiro, *The Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (London: Yale University Press, 1994) and Daniel L. McFadden, "The New Science of Pleasure", *NBER Working Paper Series, Working Paper 18687* (National Bureau of Economics, January 2013) available at <http://www.nber.org/papers/w18687> [accessed 07/04/16].

⁹² Above note 47, 238.

⁹³ Amitav Acharya and David B. Dewitt, "Fiscal Burden-Sharing" in J. C. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff, 1997) 111-147, 124.

⁹⁴ Above note 51, 399.

⁹⁵ Above note 93, 128.

⁹⁶ See chapter four, sections 1.3. and 3.

⁹⁷ K. Hailbronner, "Asylum Law in the Context of a European Migration Policy" in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, (New York: Oxford University Press 2004) 41-88, 70 and 74.

fears of being the ‘soft touch’ amongst stricter neighbours.⁹⁸ Information sharing is the core business of the European Asylum Support Office (EASO), which is frequently referred to as a crucial representation of solidarity in the CEAS. For example, making maximum use of the EASO is listed as the first among the Commission’s 2011 plans for improving the CEAS⁹⁹ and is also emphasised in a report of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) on enhanced intra-EU solidarity.¹⁰⁰ Pollet, Senior Legal and Policy Officer of ECRE, described solidarity as being “in the DNA” of the EASO.¹⁰¹ Whilst the presence of such features in the CEAS is not conclusive of an alliance approach to solidarity, it might indicate aspects of its logic or sentiments.

The collective provision of the public good of refugee protection is therefore offered as an alternative rationale for the foundation of solidarity in the CEAS. There are different interpretations as to how or whether this may come about, together with some examples of how it might be applied within the CEAS. The rationale of solidarity as an active choice, rather than an inherent social phenomenon, begins to demonstrate the variety of ideas that might be referred to as ‘solidarity’, and shows that its core meaning is contested.

Beyond this variety, a number of factors emerge as central to understanding solidarity. First, this section demonstrates that solidarity can be understood in social and economic terms, and, even outside of the EU’s cleavage along this line, that these are presented as conflicting and alternative understandings of solidarity. For Durkheim, solidarity is an inherently social phenomenon, arising from the interaction of people in the societies that they form. Even when explaining that the interdependence between actors necessary for mechanical solidarity to arise can be created by the division of labour, Durkheim is careful to underline that this should be understood in its broadest, social sense rather than a stricter, economic

⁹⁸ *Ibid*; Dirk Vanheule, Joanne van Selm and Christina Boswell for Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, *The Implementation of Article 80 TFEU, on the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States in the field of border checks, asylum and immigration* (Brussels: European Parliament, 2011), 40.

⁹⁹ Above note 40, 2-4.

¹⁰⁰ Committee on Civil Liberties, Justice and Home Affairs, European Parliament, *Report on enhanced intra-EU solidarity in the field of asylum* (2012/2032(INI)), 6-8.

¹⁰¹ Kris Pollet, “The Role of Intra-EU Solidarity in Tools in the Reformed CEAS”, Academy of European Law, Annual Conference on EU Asylum Law 2013 (28-29 October 2013).

one.¹⁰² Similarly, Sawyer entirely rejects the pragmatic, economic idea of alliance, or ‘burden-sharing’ solidarity:

Certainly the notion of solidarity is strongly linked to that of collectivism insofar as it involves an individual recognizing a shared interest with a wider group of people. However, acts of solidarity cannot be understood from a perspective of rational choice theory as purely instrumental, strategic alliances between groups of politically atomized individuals who seek to further their own cause or pursue their own goal within the context of other such individuals.¹⁰³

Nevertheless, the interdependence between the national asylum systems of the Member States is created by the removal of the internal borders between them through the Schengen *acquis* in pursuit of the core economic aims of the EU through the creation of a single market.¹⁰⁴ Moreover, the rational choice to enter into a burden-sharing scheme or solidaristic alliance is usually explained as a distinctly economic decision, that is, that it is more economically efficient for states to work together to provide refugee protection if a cost-benefit analysis is applied. Schuck’s market-based proposal takes this idea one step further by actively encouraging states to approach their refugee protection responsibilities in this way.¹⁰⁵

The second theme in thinking about solidarity that this section highlights is the contrast between solidarity as a collection of individual, separate actors working together on the one hand and solidarity as a subsuming whole, that acts ‘as one’. Alliance solidarity represents the former. By joining together to provide refugee protection, states do not erode their individuality, they merely combine or share resources. Durkheim, on the other hand, recognises a continuum of individuality and collectivity, between the ends of which, he argues, different societies will find a different balance between individual personality and assimilation into a group consciousness.¹⁰⁶

¹⁰² Above notes 33-35.

¹⁰³ Lena Sawyer (with Paul Jones), “Voices of Migrants: Solidarity and Resistance” in Gerard Delanty, Ruth Wodak and Paul Jones (eds.), *Identity, Belonging and Migration* (Liverpool: Liverpool University Press, 2008), 241-260, 246

¹⁰⁴ Above notes 39-40.

¹⁰⁵ Above notes 58-64.

¹⁰⁶ Above note 43.

Third is the distinction between voluntary solidarity, which the actors choose to show of their own free-will, and mandatory solidarity, which is imposed in some way, including by legal obligation. The models of alliance solidarity agree that states are free to act as they choose, that they may participate or not in burden-sharing, and the extent of any participation. Rather, these models are concerned with the motivation prompting the exercise of this choice in one way or another. Schuck and Suhrke argue that states are motivated by economically-rational self-interest and might, therefore, be incentivised accordingly.¹⁰⁷ Schuck is particularly dismissive of the possibility that altruism might instead motivate state actions,¹⁰⁸ but Betts argues that private benefits (such as the satisfaction of one's altruism) also motivate state action in collectively providing refugee protection.¹⁰⁹ On the other hand, Thielemann *et al.* perceive the risk of free-riding to be the biggest obstacle for a burden-sharing arrangement to overcome,¹¹⁰ which is more easily overcome in the EU given its power to impose legally binding and enforceable obligations on the Member States.

Finally comes the issue of the actors of solidarity: does it exist between states, between people, does it move from states to people, or some combination of these? Durkheim's solidarities are envisaged between people, but might be 'translated' so as to describe the relationships between a group of states. In contrast, burden-sharing, alliance solidarity is discussed primarily in statist terms and is less concerned with the solidarity shown towards persons in need of protection. This question as to who is involved in solidarity is explored in more detail in the following section.

2. LEVELS OF SOLIDARITY

The second part of this chapter addresses a different facet of solidarity, namely the 'level' of solidarity, or the question of to whom is solidarity addressed? For example, Sangiovanni argues that solidarity in the EU operates at three levels: national solidarity, relating to the obligations between citizens of a Member State; Member State solidarity, indicating obligations between Member States; and

¹⁰⁷ Above notes 54-64.

¹⁰⁸ Above note 59.

¹⁰⁹ Above note 72-73.

¹¹⁰ Above notes 67-71.

transnational solidarity, defining obligations between EU citizens as such.¹¹¹ The representation of such levels across different areas of EU law is evidenced in chapter two, which addresses different manifestations of solidarity in the EU, but it is expressly stated in Article 80 TFEU that the solidarity envisaged for the CEAS operates “between the Member States”. This section explores the issues raised in identifying the addressees of solidarity and its transfer from its dominant context and most common meaning as between people to its use to describe arrangements between states to share responsibility for refugee protection. Two points emerge as particularly relevant in this regard.

First is the potential confusion between particularist and universalist solidarities. There are disagreements as to whether solidarity bonds are limited to groups with shared values, place or aspirations – such as members of a national community and citizens of a country – or whether solidarity is an unbounded quality based on common humanity that extends beyond borders. These opposing views might be expressed as particularist (or communitarian) solidarity and universalist (sometimes called cosmopolitan or, confusingly, solidarist) solidarity.¹¹² Second is the difficulty in translating sentiments or relationships conventionally existing between people to the inter-state level. In certain contexts, the idea of the state seems to stand-in to represent the collective actions of the citizens, either in their interactions with each other, for example through the provision of welfare support through taxation, or towards citizens of other states, such as through providing refugee protection. In distinctly international settings, such as negotiations to form a burden-sharing agreement, the level of representation seems further removed, and states instead seem to operate as distinct, singular entities capable of showing solidarity to one another.

2.1. ‘ONE LOVE’ OR ‘TAKING CARE OF OUR OWN’

This section seeks to explore how universalist and particularist solidarities have been applied in relation to responsibilities owed to refugees and how this tension is expressed in the CEAS. First, it turns to

¹¹¹ A. Sangiovanni, “Solidarity in the European Union” (2013) 33(2) *Oxford Journal of Legal Studies* 213-241, 217.

¹¹² G. Noll, *Negotiating Asylum, the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (The Hague: Martinus Nijhoff, 2000), especially chapters 2 and 13. See also below note 114; Linda Bosniak, “The Rights of the Person: a Constitutional Agenda Drawn from the US Experience” in Marie-Benedicte Dembour and Tobias Kelly (eds.), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Abingdon: Routledge, 2011).

universalist solidarity based on Kant’s cosmopolitan ‘right to hospitality’ and Arendt’s ‘right to have rights’, which are widely used to explain the existence of refugee protection and strongly suggest solidarity bonds with persons in need of protection. Between states, this would mean solidarity should extend across this international community, not just between the Member States of the EU, contrary to the suggestions of Article 80 TFEU. Second, the section addresses particularist solidarity, which evokes the wording of Article 80 and resonates with the idea of alliance solidarity: particularist solidarity operates between a closed group of actors. It can be understood as strengthening the group and as inherently exclusionary towards those outside the group.

2.1.1. UNIVERSALIST SOLIDARITY

Solidarity that extends to all, regardless of their membership of the group, has been used to explain the origins of the institution of international asylum and the moral imperative on states to provide protection to those who need it. Specifically, the duties owed to refugees have been justified with universalist arguments such as Kant’s cosmopolitan right to hospitality¹¹³ and on Arendt’s ‘right to have rights’,¹¹⁴ broadly speaking that, at least morally, some rights should be available to everyone regardless of whether they are members of the national community of the host state.¹¹⁵ This section explores these arguments.

Arendt highlights the paradox between the declared universalism of human rights and the necessity of a connection to a nation-state for the realisation of these rights,¹¹⁶ which amplifies the precariousness of those who are excluded, including refugees. To this effect, Benhabib states: “Refugees, minorities, stateless and displaced persons are special categories of human beings created through the actions of the nation-state” by removing or excluding such persons from their protection.¹¹⁷ Thus, states, for Arendt, are an unsuitable guarantor of rights: “the right to have rights, or the right to belong to humanity,

¹¹³ S. Lavenex, *The Europeanisation of Refugee Policies: Between Human Rights and International Security* (Aldershot: Ashgate, 2001), 16.

¹¹⁴ S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: CUP, 2004), chapters 1 and 2.

¹¹⁵ For a more general articulation of the nature of universalist ideas (therein termed ‘Moral Universalism’) see: T. Pogge, *World Poverty and Human Rights* (2nd edn., Cambridge: Polity Press, 2008), chapter 4.

¹¹⁶ *Ibid.*, 50; Linda Morris, *Asylum, Welfare and the Cosmopolitan Ideal: A Sociology of Rights* (Abingdon: Routledge, 2010), 1-2.

¹¹⁷ Above note 114, 54.

should be guaranteed by humanity itself”.¹¹⁸ If one’s own state is incapable or unwilling to provide protection, and thus creates the precarious position in which refugees find themselves, then other states *should* be willing to provide such protection on the basis of the supposed universality of human rights. Following this view, refugees “are a common concern for all of humanity which requires both cooperation and solidarity amongst states and individuals”.¹¹⁹

Kant’s cosmopolitan right to hospitality, or temporary sojourn, addresses this idea even more directly.¹²⁰ Despite the potentially altruistic connotations of a reference to ‘hospitality’, it is clear that Kant does not associate this hospitality with generosity or kindness, it is a right which belongs to all human beings as such.¹²¹ This right does not extend to permanent residence,¹²² but entails, “a claim to temporary residency which cannot be refused, if such refusal would involve the destruction... of the other”.¹²³ Benhabib argues that it is unclear exactly what Kant’s justification for this right is, as he refers to the limited space of the surface of the Earth and its common possession by all people, but ultimately seems to shy away from this explanation for fear of offering justification for imperialism.¹²⁴ Alternatively, it might be based in the capacity of all human beings to associate, recognising the common humanity in each other.¹²⁵ This principle readily translates into the legal obligation of *non-refoulement* on states,¹²⁶ but can also be understood as morally compelling individual people to offer support and sanctuary to those who seek it, as indicated by Grahl-Madsen:

But international solidarity does not merely entail cooperation between states. Common people have a heart. They react instinctively when they learn that fellow human beings are in need and it is within their power to help... And genuine concern has one unmistakable trademark: it

¹¹⁸ Above note 114, 55, quoting H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and Jovanovich, 1968 [1951]), 296-297. See further: Morris, above note 116, 7-9 and 15-17.

¹¹⁹ Above note 113, 16.

¹²⁰ I. Kant, “Perpetual Peace: A Philosophical Sketch” (H. B. Nisbet tr., [1795]), in H. Reiss (ed.), *Kant: Political Writings* (2nd edn., Cambridge: CUP, 1994), 93-130.

¹²¹ Above note 114, 26. A more altruistic or charitable understanding solidarity can be found in Catholicism. Stjernø argues that the Catholic concept of solidarity has two sources: the idea of community between all human beings; and concern for those suffering in poverty (in the Third World), based on the equal worth of every human being in the eyes of God, above note 18, 62-75.

¹²² Above note 114, 27-28.

¹²³ *Ibid.*, 29.

¹²⁴ *Ibid.*, 29-31.

¹²⁵ *Ibid.*, 28-29.

¹²⁶ *Ibid.*, 35. See also: Seyla Benhabib, “Disaggregation of Citizenship Rights” (2005) 11(1) *Parallax* 10-18, 12.

does not stop, it cannot stop at frontiers or at ethnic, religious or other differences. It is the human being and his need that count, not his membership of this or that group.¹²⁷

Carr notes the range of activities that might be considered representative of human universalist solidarity, including groups assisting asylum seekers in Calais trying to cross the border into the UK, others supporting undocumented migrant children in Melilla, and the ‘Glasgow girls’, school children who protested dawn deportation raids on their classmates.¹²⁸ According to these individuals, Carr reports, their solidarity is based variously on “affirming the human”,¹²⁹ apolitical respect for basic human rights,¹³⁰ and beliefs that it is unjust that our place of birth determines our ability to cross international borders.¹³¹ Such actions are taken in resistance to the state and are at times illegal, dubbed ‘crimes of solidarity’.¹³² They are based on humanity and empathy, which is asserted to be the foundation of the institution of asylum:

The spirit of justice, basic human solidarity, as well as compassion toward victims – the idea that the unfairly pursued foreigner was able to be welcomed and not be returned to the hands of his or her torturers – are at the origin of the right to asylum. These beliefs were established in spite of the tenets of international law which places the state well above the individual.¹³³

This highlights a tension contained within the principle of solidarity in the CEAS that derives from its broader underlying ideas. It might be readily assumed that this human solidarity extended to refugees is what is meant by references to solidarity in the CEAS. Yet this contrasts starkly with the limitation contained in Article 80 TFEU, restricting the operation of solidarity to between the Member States.¹³⁴

¹²⁷ Atle Grahl-Madsen, “International Solidarity and the Protection of Refugees” in International Institute of Humanitarian Law, *Congress on International Solidarity and Humanitarian Actions, organized under the auspices of the International Red Cross and the United Nations High Commissioner for Refugees* (San Remo: International Institute for Humanitarian Law, 1980) 259-263, 261-262.

¹²⁸ M. Carr, *Fortress Europe: Dispatches from a Gated Continent* (New York: The New Press, 2012), 187-194.

¹²⁹ *Ibid*, 187.

¹³⁰ *Ibid*, 193.

¹³¹ *Ibid*, 195.

¹³² Liz Fekete, “Europe: Crimes of Solidarity” (2009) 50(4) *Race and Class* 83-97; Jennifer Allsopp, “Contesting *Fraternité*: Vulnerable Migrants and the Politics of Protection in Contemporary France”, *Refugee Studies Centre Working Paper Series No. 82* (July 2012), 14, available at <http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp82-contesting-fraternite-2012.pdf> [accessed 26/08/17].

¹³³ A. Prujiner, “Preface” to B. Mulamba Mbuyi, *Refugees and International Law* (Ontario: Carswell, 1993), v.

¹³⁴ This issue is returned to in chapter five, section 2.1.

Universalist conceptions of solidarity are not without a role at the inter-national level. Indeed, they have been used as the normative basis for advocating ‘burden sharing’ of refugee protection at the global level. Poul Hartling, former UN High Commissioner for Refugees, stated in 1980: “International solidarity has indeed acted as the mainspring for all action taken by my office in favour of refugees”,¹³⁵ suggesting the willingness of the international community to meet the ever-expanding budgetary needs of the UNHCR as an example of this solidarity.

In the EU, too, there have been some suggestions that solidarity should extend beyond the Member States to include non-members. For example, solidarity with third states was mentioned in the LIBE Committee Report of 2012¹³⁶ and envisioned in the conclusions of a meeting of the Heads of State and Government of all those countries along the Western Balkan Route in 2015.¹³⁷ This might be interpreted to mean either that states recognise the humanity of non-citizens and so offer asylum when it is required, or to mean that states recognise the sovereign equality of other states¹³⁸ and seek to share responsibility for refugees as a result.

Nevertheless, the wording of Article 80 TFEU expressly states that the solidarity it envisages is ‘between the Member States’; that is, not with third states. The strictly limited sphere of this solidarity means that universalist thinking cannot apply: some connection present between them as Member States of the EU singles them out as the specific partners in solidarity over other, non-member states. This is particularist solidarity, the subject of the next section.

2.1.2. PARTICULARIST SOLIDARITY

Particularist solidarity is that which exists within a bounded society. This might be interpreted in two ways: first, positively, that attention and favour is given to those included by virtue of a stronger internal

¹³⁵ Poul Hartling, “International Solidarity and the Protection of Refugees” in International Institute of Humanitarian Law, *Congress on International Solidarity and Humanitarian Actions, organized under the auspices of the International Red Cross and the United Nations High Commissioner for Refugees* (San Remo: International Institute for Humanitarian Law, 1980) 237-243, 238.

¹³⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, COM(2008) 360 final, 9-11.

¹³⁷ High Level Conference on the Eastern Mediterranean/Western Balkans Route, *Declaration* (Luxembourg, 8 October 2015), paragraph 4, <http://data.consilium.europa.eu/doc/document/ST-12876-2015-INIT/en/pdf> [accessed 25/01/16].

¹³⁸ J. D. B. Miller, *The World of States, Connected Essays* (London: Croom Helm, 1981), 19.

connection than that which extends to outsiders; or second, negatively, that the group is defined on the basis of who is excluded. Walt suggests that the latter, exclusionary or defensive aspect, “external threats”, is a more important “cause” of alliances than the former, “ideological solidarity”.¹³⁹ It might be more accurate to describe a particularist solidarity as existing somewhere between these two options according to the degree to which it emphasises the bond between insiders on the one hand and the difference to outsiders on the other.¹⁴⁰

Gibney explains that this view of solidarity (he uses the term ‘partialist’) arises from the pursuit of self-determination.¹⁴¹ The right of a state to determine who is, and who is not, permitted to enter its territory is “derived from the moral claims of distinct peoples or nations to self-determination”, which originates in the right of people to give public expression to their shared culture.¹⁴² Citizens of a state, therefore, share cultural traditions and understandings, creating a political community in which the common good can be pursued: “It offers the largest feasible site for a politics of the common good – a politics that transcends the diverse and idiosyncratic conceptions of the good that characterise liberal politics and looks to the good of the citizen community as a whole”.¹⁴³ The realisation of the common good of the group rests on the ability of that group to limit participation to those who are sufficiently similar, or have a shared culture. This might offer an explanation for the bounded nature of solidarity within the CEAS: if the objectives of the CEAS are to be achieved, solidarity should be limited to the Member States. Non-members are excluded not through distain or malice, but through necessity, for the common good of the members. Indeed, both Gibney and Bosniak suggest that most accounts of particularist

¹³⁹ S. M. Walt, *The Origins of Alliances* (Ithaca; London: Cornell University Press, 1987), 266.

¹⁴⁰ Solidarity between migrants is a good example of how this distinction is slightly fuzzy at the borders because whilst it is an identifiable group with clear membership, it also rests on what Sawyer describes as the myth of an ‘essential’ migrant experience, or that all migrants have something in common, despite the huge diversity that exists in this group, above note 103, 243.

¹⁴¹ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: CUP, 2004), 24.

¹⁴² *Ibid.* Ultimately, Gibney indicates that he is not compelled by this argument, suggesting that its proponents paint an “inadequate picture of the modern state”, but that this does not rob the partialist position of any ethical force, 35-36.

¹⁴³ *Ibid.*, 26.

solidarity are entirely silent on the position of outsiders,¹⁴⁴ with Bosniak suggesting that this is almost to the extent that outsiders do not exist.¹⁴⁵

This understanding of solidarity is also suggested by Weber.¹⁴⁶ Stjernø argues that despite only using the word, ‘solidarity’, “sporadically”, the concept is integrated in Weber’s consideration of *Vergemeinschaftung* (actions based on considerations of material advantage or utility) and *Vergesellschaftung* (actions based on community).¹⁴⁷ This division recalls contrasts between economic and social solidarities. Most of the time, elements of both are intertwined as human beings have both material and ideal interests.¹⁴⁸ Stjernø highlights Weber’s acknowledgement that these interwoven aspects underlying solidarity relationships necessarily entail exclusion of the other – a desire to “monopol[ise] material and ideal goods and opportunities” to the exclusion of those outside the group.¹⁴⁹ Thus the basis for Weberian solidarity is the realisation of a group’s interests through a combination of economic calculation and social interest in the group.¹⁵⁰

Alliance solidarity characterises the other side of solidarity within a bounded group. Acharya and Dewitt comment that, “by definition, alliances are exclusionary in scope and essentially defensive in posture”.¹⁵¹ The term is associated with notions of the military and defence, suggesting an agreement to work cooperatively against an external threat or security risk. This approach is adopted in the asylum context by Keeley and Stanton Russell,¹⁵² who characterise growing numbers of asylum applications as a security threat to receiving countries in the West, and understand collective or cooperative international responses to refugees in this light:

¹⁴⁴ *Ibid.*, 27.

¹⁴⁵ L. Bosniak, *The Citizen and the Alien, Dilemmas of Contemporary Membership* (Princeton, Princeton University Press, 2006), 2, “Just about everyone else tends to *presume* the boundaries, or, more often, they presume away any world outside the nation altogether”, emphasis in original.

¹⁴⁶ M. Weber (ed), *Economy and Society. An Outline of Interpretive Sociology* (Berkeley: University of California Press, 1978 (1922)), cited in Stjernø, above note 18, 37.

¹⁴⁷ Above note 18, 37.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, 38.

¹⁵⁰ *Ibid.*, 41.

¹⁵¹ Above note 93, 126.

¹⁵² C. B. Keely and S. Stanton Russell, “Responses of Industrialized Countries to Asylum Seekers” (1994) 47(2) *Journal of International Affairs* 399-417.

Beyond upholding human rights values, such collective programs, as well as state adherence to their obligations under international conventions, also have addressed a collective threat to the stability and operation of the nation-state system.¹⁵³

There is a considerable literature on the securitisation of asylum, explaining the positioning of asylum seekers or other migrants as a threat to the societies to which they arrive. For example, Tsoukala explores some of the reasons for this positioning of migrants or other outsiders as enemies.¹⁵⁴ She explains that the creation of such a threat allows security services to justify themselves, and highlights the dual motivation for the demonisation of migrants by the media, that is, furthering a political ideology and the maximisation of commercial interests by increasing sales with popular, and populist, anti-migrant features.¹⁵⁵ Bigo supports this interpretation, arguing that this construction of migrants allows authorities to position themselves as protecting security and as being in control, even if they can no longer control flows of capital or information.¹⁵⁶ This might also be interpreted as a reassertion of the importance of the individual state in a world in which the divisions between states is increasingly blurred. Most interestingly, for the present attempt to understand the nature of solidarity, Tsoukala refers to the dynamic whereby positing outsiders as “social enemies” strengthens the bonds between ‘insiders’, identifying them through this contrast and establishing community between them.¹⁵⁷ This would suggest that the identification or creation of an outside enemy serves to strengthen solidarity *within* the bounded society.

The limits defined in Article 80 TFEU, which refers to solidarity between the Member States only, express an exclusionary solidarity between a closed group. This interpretation is supported by Mitsilegas, who describes solidarity in the CEAS as exclusionary. However, he argues that this

¹⁵³ *Ibid*, 413.

¹⁵⁴ A. Tsoukala, “Looking at Migrants as Enemies”, in D. Bigo and E. Guild (eds.), *Controlling Frontiers* (Aldershot: Ashgate, 2005), 161-192.

¹⁵⁵ *Ibid*, 168.

¹⁵⁶ D. Bigo, “Criminalisation of “Migrants”: The Side Effect of the Will to Control to Frontiers and Sovereign Illusion” in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Lieden: Martinus Nijhoff, 2004), 61-91, 64.

¹⁵⁷ Above note 154, 169.

exclusion is not preserved for other states,¹⁵⁸ rather, he argues that the exclusionary nature of this solidarity tends to exclude those seeking international protection.¹⁵⁹

This second difficulty arising from the strong association of ‘solidarity’ with universalist sentiments between human beings is considered in the next section: to what extent can states be said to exhibit the same solidarity traits as human beings?

2.2. SOLIDARITY BETWEEN PEOPLE AND BETWEEN STATES

Whilst failing to capture the totality of solidarity in the CEAS, Article 80 TFEU is clear that the solidarity it envisages operates between the Member States. However, many of the models of solidarity discussed in this chapter understand solidarity as between people. If we are to use these models to understand Member State solidarity in the CEAS, a degree of ‘translation’ is required, through which the EU Member States become the individuals between whom solidarity is established. This creates a potential difficulty in understanding solidarity, for in the course of this ‘translation’, states must be anthropomorphised and deemed capable of the same bonds and feelings as human beings.¹⁶⁰ This raises two questions that this section seeks to explore. First, can states be ‘individuals’ in solidarity? An affirmative response requires a unity of opinion and motivation from an institution made up of many groups, factions and individuals. This is compounded at EU level by the Union’s diverse decision making processes dispersed through numerous institutions, each constituted of different representatives of Member States, Union citizens and officials unaligned to any particular Member State.¹⁶¹ Can one voice of the nation be distilled from this? As Putnam argues, a state’s “central decision-makers” are likely to disagree on which options are most favourable to the national interest in nearly all important issues, suggesting that, even if the legislature is arbitrarily ignored, the executive can hardly be expected

¹⁵⁸ V. Mitsilegas, “Solidarity and Trust in the Common European Asylum System” (2014) 2(2) *Comparative Migration Studies* 181-202, 186.

¹⁵⁹ *Ibid*, 188.

¹⁶⁰ An example in political theory of ‘solidarity’ being used to express a relationship between organisations or states, rather than between individuals, is in the writings of Mao Zedong. Stjernø reports that Mao uses the word ‘unity’ to describe the relationship between the people and the party, reserving ‘solidarity’ the relationship between the Chinese Communist party and other ‘workers’ parties’ around the world, above note 18, 56.

¹⁶¹ R. Barents, “The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation” (1993) 30 *CML Rev* 85, 92.

to be unified.¹⁶² Second, if we can understand states as sufficiently coherent to constitute individuals, are state-individuals capable of the same kinds of solidarity as human-individuals? Or are there certain human qualities to some understandings of solidarity that states are incapable of replicating? This section does not seek to provide concrete answers to these questions, rather it seeks to raise them as pertinent issues to be explored if we seek to understand solidarity in the CEAS better.

2.2.1. STATES AS INDIVIDUALS?

States are assumed to be singular sovereign actors,¹⁶³ or “integrated units”.¹⁶⁴ It is on this basis that states are endowed with legal personality in international law and are treated as the primary actors at the international level.¹⁶⁵ On this basis, relations between states might be likened to relations between individual people. Burton suggests that this is a “carry-over” from feudalism, meaning that this traditional assumption may have decreased relevance beyond a period of history during which “relatively isolated States co-existed” and were headed by one, absolute ruler.¹⁶⁶ This point is echoed by Rummel, who considers the position of states as international actors.¹⁶⁷ He lists the characteristics usually attributed to states and notes that each is a legal fiction: “They are responsible for official actions in their name; they can enter into treaties and make war; they have rights; they have defined territories and people”.¹⁶⁸ States themselves do not act, people act on their behalf, albeit in a way guided by the notion of state.¹⁶⁹ Rummel illustrates the point with the following example:

Thus, a violent clash between several thousand men on Damansky (or Chenpao) Island on the River Ussuri in March 15, 1969, becomes understandable as a border clash between Soviet and Chinese frontier guards--as a manifestation of the *Sino-Soviet conflict*.¹⁷⁰

¹⁶² R. D. Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games” (1988) 42(3) *International Organization* 427-460, 432.

¹⁶³ Above note 138, 16-17.

¹⁶⁴ J. W. Burton, *Systems, States, Diplomacy and Rules* (Cambridge: CUP, 1968), 28.

¹⁶⁵ This is not a legal question, plainly the law is willing to treat legal (non-natural) persons similarly to natural persons.

¹⁶⁶ Above note 164.

¹⁶⁷ Rudolph J. Rummel, *Understanding Conflict and War: Volume 4, War, Peace and Power* (London: Sage Publications, 1979), 56.

¹⁶⁸ *Ibid.* See similarly: Benhabib, above note 126, 16.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

For Rummel, attributions to the state are a useful shorthand for the actions of individuals who act on behalf of the citizens that make up the state and a “necessary fiction” for understanding developed society.¹⁷¹ Whilst we may recognise the shortcomings of expressing relations between states, it may offer a useful, or even necessary, vehicle for communicating the collective relations between the members of separate states. In this sense, solidarity between the Member States ultimately represents solidarity between the people of each Member State, though this remains divided into national groupings, rather than a transnational solidarity that might be indicated, for example, by European citizenship.¹⁷²

Waltz seems similarly untroubled by the question of the unified voice of the state, not because it is a shorthand, but because, he argues, there ceases to be a state without unity of position.¹⁷³ He explains his view thus:

In the name of the state a policy is formulated and presented to other countries as though it were... the general will of the state. Dissenters within the state are carried along by two considerations: their inability to bring force to bear to change the decision; their conviction, based on perceived interest and customary loyalty, that in the long run it is to their advantage to go along with the national decision and work in the prescribed and accepted ways for its change.¹⁷⁴

This offers another possible explanation for the unity of statehood, that the international state system is predicated on the existence of unified states that manage the existence of diverse opinion internally. These singular states can relate to each other externally on the basis of solidarity. This explanation may be less convincing within the context of the EU compared to less integrated, more traditional international relations. The efforts of the EU to open itself to greater direct involvement of citizens and

¹⁷¹ *Ibid*, quoting E. H. Carr, *The Twenty Years' Crisis, 1919-1939* (New York: Harper and Row, 1964), 148-149.

¹⁷² Solidarity in this sense is explored in chapter two, section 1.2.

¹⁷³ K. N. Waltz, *Man, the State and War, A Theoretical Analysis* (New York: Columbia University Press, 2001 [1959]), 178-179.

¹⁷⁴ *Ibid*, 178.

civil society in decision-making and policy-building may be slow and incomplete,¹⁷⁵ but such routes do exist and Union citizens have an express right to participate in the democratic life of the Union.¹⁷⁶ Examples of this include: the direct election of Members of the European Parliament together with an increased role for the European Parliament in the legislative process through extension of the ordinary legislative procedure under the Treaty of Lisbon;¹⁷⁷ the citizens' initiative, whereby citizens may ask the Commission to consider a legislative proposal if one million signatures can be collected from across at least a quarter of Member States;¹⁷⁸ the enlarged role for national parliaments;¹⁷⁹ and increased consultation of citizens and civil society in the preparation of legislation.¹⁸⁰ Whilst it might be argued that these constitute no more than additional "prescribed and accepted ways" to change policy, they do not target the national decision but the decision-making process to which the national decision contributes. It is thus unclear whether Union citizens are included in solidarity between the Member States, either because the Member States are no more than representatives of their citizens, or because citizens have some opportunity to contribute the same decision-making. Nevertheless, it is inescapable that Article 80 TFEU refers to solidarity between the Member States, not between the Member States and Union citizens directly or as represented by EU institutions.

It seems accepted custom to refer to states as individuals, particularly in the context of international law and international relations, though we can acknowledge that this does not mean that a state's constituents are all in agreement with its official, and supposedly unified, position. In the more specific context of the EU, the position of individual citizens is different from that under general international law – EU citizens are directly addressed legal subjects with direct political rights and interests, rather than being exclusively represented by their states.¹⁸¹ Adopting the 'shorthand' of states as individuals

¹⁷⁵ S. Kröger and D. Friedrich, "Democratic Representation in the EU: Two Kinds of Subjectivity" (2013) 20(2) *Journal of European Public Policy* 171-189; R. Bellamy and S. Kröger, "Domesticating the Democratic Deficit? The Role of National Parliaments and Parties in the EU's System of Governance" (2014) 67 *Parliamentary Affairs* 437-457.

¹⁷⁶ Article 10(3) TEU.

¹⁷⁷ Article 14(3) TEU.

¹⁷⁸ Article 11(4) TEU; Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, OJ [2011] L65/1.

¹⁷⁹ Article 12 TEU; Protocol (No. 1) on the role of national parliaments in the European Union annexed to the TFEU and the TEU.

¹⁸⁰ Article 11(1)-(2) TEU.

¹⁸¹ Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1, 12.

allows clear transposition of solidarity ideas developed in the context of human interaction to inter-state relationships. The following section questions the extent to which this transposition is a legitimate exercise.

2.2.2. STATES AS HUMANS?

Assuming a unitary state that can ‘stand in’ for an individual for the purpose of applying ideas of solidarity, a question remains as to whether this unitary state is capable of the same solidarity as a person. In other words, can theories or explanations of solidarity predicated on human interaction be transposed directly to state level, simply substituting states for people?

The UNHCR seems to see no conflict in this position. In its 2012 assessment of *The State of the World’s Refugees*, the UNHCR pays tribute to the “solidarity shown by ordinary citizens towards refugees... [which] ranges from small gestures of human kindness to organized support activities conducted by civil society groups”.¹⁸² The UNHCR suggests that this solidarity between individuals should be replicated by states, assuming that the nature of solidarity is the same at different levels.¹⁸³ Carr is less convinced. He contrasts the actions taken by individuals to support refugees and asylum seekers in resistance to the state, sometimes amounting to illegality, with the approach of the EU and its Member States, commenting that the latter is clearly a “different kind of solidarity”.¹⁸⁴ Along similar lines, Sawyer understands solidarity as resistance to illegitimate power in her examination of migrants’ strategies for responding to discrimination.¹⁸⁵

Using the term, ‘solidarity’, alludes to these human sentiments of which states are not easily capable, indeed, these elements might even be defined in opposition to states. This section does not seek to suggest that ‘solidarity’ cannot be used to describe the interactions or relationships between states, only to highlight the shades of meaning that the term implies as a starting point for understanding solidarity in the CEAS.

¹⁸² UNHCR, *The State of the World’s Refugees, In Search of Solidarity* (Oxford: OUP, 2012), 213.

¹⁸³ *Ibid.*

¹⁸⁴ Above note 128, 187.

¹⁸⁵ Above note 103, 241.

No resolution is suggested for the problems identified in this section, though it is hoped that their articulation demonstrates both the complexities within the principle of solidarity and some of the issues to be taken into account in understanding solidarity in the CEAS. Specifically, two key themes in understanding solidarity are highlighted by this analysis.

First, this section identifies as crucial the question of ‘who’ are the actors and beneficiaries of solidarity? It is clear the most common understanding of solidarity is as a relationship between people. Universalist solidarity extends to all regardless of membership and has been presented as the foundation of refugee protection. It might be intuitive, therefore, to understand references to solidarity in EU asylum policy as conveying this essence of protection, and as describing something shown towards persons in need of international protection. The question of who shows this solidarity is also open. On the one hand, a legalised institution of asylum such as that of the CEAS could suggest that it is the Member States or the institutions of the EU that shows solidarity to refugees by granting or ensuring their protection. Arendt’s solidarity in particular seems to acknowledge the need for a state as the guarantor of the rights of all human beings as such.¹⁸⁶ On the other, solidarity shown towards persons in need of protection can also emanate from other people. Whilst the state might be described as a representative of its people in offering refugee protection, the distinction between human and state solidarity is most poignant when acts of human solidarity with refugees are shown despite, or in conflict with, the state.¹⁸⁷ So too for particularist solidarity, which might describe human actors and beneficiaries of solidarity based on, for example, common citizenship or membership of a trade union, or an alliance between a defined group of states. The wording of Article 80 TFEU, that solidarity is ‘between the Member States’ is insufficient to dislodge the strong human connotations of the term. Understanding the identity of those who show and enjoy solidarity in the CEAS is key to developing a clearer picture of the principle, but this section shows that there may be multiple configurations.

The second theme that this section raises is the boundaries of solidarity, the limits that define who is included or excluded from the scope of solidarity. The distinction is drawn primarily between

¹⁸⁶ Above note 119.

¹⁸⁷ Above notes 132, 184 and 185.

particularist and universalist approaches and there are disagreements between the EU institutions as to the proper extent of CEAS solidarity, that is, whether it should be limited to Member States as suggested in Article 80 TFEU, whether it might extend to neighbouring states working with Member States,¹⁸⁸ or whether it extends to a wider pool of third states.¹⁸⁹ These three options reveal, however, that the question of the boundaries of solidarity is not simply limited to a decision between universalist and particularist manifestations. Instead, if extending solidarity to all persons and states everywhere is considered too broad a scope, defining the boundaries of the group between whom particularist solidarity operates is difficult and could be reopened at any point as new challenges are made as to who should be included or excluded. To draw a fixed boundary, questions as to the basis of belonging must be faced, recalling this issues raised in the first part of the chapter relating to the foundations of solidarity. Do members of a group need to feel alike for solidarity to arise? If so, how alike and in what way? If solidarity does not naturally exist, can it be imposed, for example by law?

The final section draws together the aspects of solidarity identified through this chapters' analysis of social, political, economic and philosophical reflections on the principle of solidarity.

3. CONCLUSIONS

'Solidarity' is widely understood as the political and social foundation of the welfare state as well as popular organisations such as trade unions,¹⁹⁰ rooted in a long history of European thinking, particularly but not exclusively from Germany.¹⁹¹ This solidarity operates between a limited number of people who have some shared characteristic, often citizenship of the same state or membership of the same socio-economic class, on which their solidarity rests. This is suggested by Stjernø, who attempts to summarise meanings attributed to solidarity across schools of political, sociological and religious thought:

[Solidarity] means the preparedness to share resources with others, through personal contributions to those who are struggling and through taxation and redistribution organised by

¹⁸⁸ Above note 137.

¹⁸⁹ Above note 136.

¹⁹⁰ Above note 18, 50, citing E. Bernstein, *Die Arbeiterbewegung* (Frankfurt am Main: Literarische Anstalt Rütten & Loening, 1910).

¹⁹¹ Above note 18.

the state. Thus solidarity means a readiness for collective action and a will to institutionalise it through the establishment of rights and citizenship.¹⁹²

Yet it is clear that solidarity expands far beyond these confines. Durkheim offers two explanations as to why such solidarity might arise, according to the nature of the society in question. Mechanical solidarity arises between in a society of similar individuals, whereas organic solidarity arises between different, interdependent individuals. Alliance solidarity is another explanation for cooperation between states, which has been used to justify cooperation between states to contribute to the total refugee protection on offer through ‘burden-sharing’.

Universalist applications of solidarity have been more traditionally associated with solidarity shown towards refugees and asylum seekers, and often seems to be the sentiment attached to solidarity by those arguing in favour of better refugee protection or a more extensive welcome to newcomers to Europe.¹⁹³ On the other hand, Article 80 TFEU differs from this in two ways, instructing that solidarity is limited in its extent to states, not people, and further that this is restricted to Member States, not all states. If this is the case, it is necessary to ‘translate’ classic understandings of solidarity to apply to the Member State level as if states were people or to acknowledge an alternative meaning of solidarity that is custom-built for states.

This shows that there are multiple possible meanings of the principle of solidarity in Article 80 TFEU and so it cannot be assumed that all mentions of solidarity in the CEAS are referring to the same. Despite assumptions that we all know what we mean when talking of solidarity, it is clear that we may be talking past each other. This chapter reveals solidarity to be a principle that means different things to different people at different times. Solidarity in the CEAS might refer to any, all and none of these.

This analysis does not propose that any of the conceptions of solidarity discussed are what is intended by Article 80 TFEU as the solidarity on which the CEAS is based. Neither is the intention to ‘adopt’ any of them as model for solidarity in the CEAS, nor to endorse any of the various political and

¹⁹² Above note 18, 326.

¹⁹³ See introductory chapter, section 2.2.2.

philosophical perspectives as preferable or correct. Instead, it identifies five factors that impact on our understanding of the principle of solidarity. First is the issue of the actors of solidarity. Is solidarity between people? Between states? Or between states and people? Second, there is a conflict of interpretations of the nature of solidarity, that is, whether it is inherently social or whether it might be put to economic ends or subject to economic thinking. Third, solidarity might alternatively describe the combined efforts of a group of separate individuals or the assimilation of those individuals to create a unified whole. Fourth, it can be voluntary, where the actors choose to act in solidarity, or mandatory, where the actors are obliged to show solidarity. Fifth is the issue of defining the boundaries of the scope solidarity, who is included and who is excluded.

These five factors form the first contributions to a matrix of the aspects of solidarity that shape our understanding of its manifestation in the CEAS. Many of the factors identified impact on the wider project of European integrations through the European Union, which necessarily carry through to the more specific context of the CEAS. The following chapter, therefore, explores expressions of Union solidarity, analysing the broader, theoretical aspects of solidarity identified here in the real-life context of the CEAS, the EU. On top of the context of European integration, however, solidarity in the CEAS is laden with additional baggage that derives from solidarity as a core element of international refugee law. Chapter three, therefore, examines solidarity in this sphere to create a fuller picture of solidarity in EU asylum law and policy. The analysis conducted in these two chapters develops the five elements of the solidarity matrix identified here and adds four additional factors. This matrix is used to develop the analysis in chapters four and five of the nature and function of solidarity in the CEAS.

CHAPTER TWO: THE EUROPEAN UNION AS A CONTEXT FOR SOLIDARITY.

The EU does not confine the principle of solidarity to the sphere of asylum; quite the opposite, it has played a central role throughout the development of the EU. From the beginning, the principle of solidarity has been a present and continuing value shaping, and shaped by, the EU. The Schuman Declaration of 1950, acknowledged as the ‘birth’ of the EU,¹ announced:

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany.²

Solidarity was further entrenched into primary law under the Treaty of Lisbon: compared with only eight times before Lisbon,³ the word ‘solidarity’ now appears eighteen times across the TFEU and the TEU, and across a number of policy areas. This chapter examines multiple facets of solidarity in the EU so that solidarity in the specific context of its asylum policy can be understood in its Union context. This context is crucial to developing a comprehensive understanding of CEAS solidarity if we are to understand it not only as a value that finds expression as an aspect of refugee law, but also as reflection of, and influence on, the EU’s constitutional architecture. This chapter reflects on solidarity in the context of supranational relations through EU integration and the following chapter, in contrast, turns to solidarity as manifested in intergovernmental relations in international refugee law. Together, these two chapters examine how the theoretical ideas of solidarity identified in chapter one manifest in reality. From these practical and theoretical solidarities, the first part of the thesis builds a matrix of factors that must be taken into account to understand solidarity in the CEAS.

¹ Europa.eu, https://europa.eu/european-union/about-eu/history/founding-fathers_en#box_9 [accessed 20/02/17].

² J. Monnet and R. Schuman, speech of 9 May 1950, Paris, full text available at http://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en [accessed 20/02/17].

³ Consolidated Versions of the Treaty of European Union and of the Treaty establishing the European Community, OJ [2006] C321 E/1.

The meanings of solidarity expressed in the EU and analysed herein are tied to the idiosyncratic nature and circumstances of the EU, so the solidarity of the CEAS and Article 80 TFEU must also be understood in its context as an expression of the relationship between Member States within a wider political and legal project. Expressions of solidarity in the context of the EU's asylum policy are, therefore, not independent exercises of state cooperation to provide refugee protection. Instead, they are deeply embedded in the broader relationships between the Member States and the historical development of the European Union as a space in which the Member States can express solidarity. That is to say, the invocation of the principle of solidarity in other areas of EU cooperation, politics and law has an impact on the way that the principle is understood in the context of the CEAS and Article 80 TFEU. This chapter provides the necessary context for the central ambition of the thesis, namely the interrogation of the principle of solidarity in the CEAS.

As a starting point, it is established that solidarity means different things in different policy settings within the EU: there is not one principle of solidarity in EU law that is referred to by every use of the term. To illustrate this – and to respond to the question that naturally follows as to what these different meanings of solidarity are – the chapter analyses references to solidarity across policy areas. This analysis draws out the precise nature of each conception of solidarity, taking into account the addressees of solidarity, the legal dynamics, and relevant historical and political developments. This articulation of the substantive nature of 'solidarity' in each case enables this chapter to develop the solidarity matrix started by chapter one.

In particular, this chapter argues that the idea of 'solidarity' is used to manage the relationship between EU and Member State power in areas of political controversy. These tensions are often presented in political and public discourse as 'sovereignty issues' in which the EU and the Member States wrestle for 'control'. Such tensions arise across different EU competence areas, including: free movement of people and access to national welfare provisions; the European Stability Mechanism and the broader policy of 'bail-outs' in the Eurozone; and civil protection and disaster relief. To be clear, this is not to suggest that solidarity means the same thing substantively in each of these areas, indeed the analysis that this chapter advances would suggest the contrary. Rather, this chapter argues that the idea of

solidarity is referred to in order to manage sovereignty concerns in this way across a number of policy areas. In chapter five, this thesis argues that ‘solidarity’ is asked to perform this function in the CEAS too.

Any such sharp distinction between the EU and its Member States should naturally be approached cautiously. This presentation of their opposition is not an empirical claim or an attempt to describe the actual relationship between the many human and institutional actors that together constitute ‘the EU and its Member States’. Nevertheless, the juxtaposition of ‘the EU’ against ‘the Member States’ has caused, and continues to cause, significant political problems at the national and supranational levels. Therefore, this distinction is a real cause of tension to be addressed, regardless of whether the description is an accurate reflection of the way in which the EU works. This chapter argues that the principle of solidarity is a way in which this tension is addressed.

It is worth setting out some terminology used in the proceeding analysis as a preliminary point. First, in respect of the addressees of solidarity, this chapter shall follow Sangiovanni’s ‘levels’ of solidarity.⁴ Sangiovanni argues that solidarity in the EU operates at three levels: national solidarity, relating to the obligations between citizens within a Member State; Member State solidarity, obligations between Member States as such; and transnational solidarity, defining obligations between all EU citizens.⁵ These terms will be adopted in the following discussion to signify the different levels at which solidarity might operate as they offer a useful way of distinguishing.

Second is a note on the types or categories of solidarity used to structure the analysis. Each section addresses a separate conception of solidarity and illustrates this with examples from across policy areas. However, these categories are intended to be illustrative of different meanings of solidarity rather than strictly mutually exclusive types. Similarly, the examples referred to are selected as those most clearly demonstrating the solidarity under discussion but this is not to suggest that they are conceptually ‘pure’.

⁴ A. Sangiovanni, “Solidarity in the European Union” (2013) 33(2) *Oxford Journal of Legal Studies* 213-241.

⁵ *Ibid.*, 217.

Citizens' solidarity refers to the solidarity between people as expressed through the welfare state. As established in chapter one, solidarity between citizens is the most intuitive context attached to the term, and this is also true in the EU, where the Court has provided substantial definition to 'solidarity' in the context of competition law and in relation to equal treatment for moving Union citizens. This chapter, therefore, analyses solidarity between citizens first, at both national and transnational levels.

Second, this chapter addresses redistributive solidarity, which entails a similar dynamic – the reallocation of resources between members – but operates at the Member State level. This follows more closely the solidarity envisaged for the CEAS under Article 80 TFEU, which expressly names the Member States as the addressees of solidarity. To this end, we examine redistribution under the Social and Cohesion Funds, which most clearly echoes the solidarity of a social welfare scheme between citizens, and the European Stability Mechanism and the Eurozone crisis bail-outs, which were expressly described as products of solidarity.

Third, and finally, the chapter turns its attention to emergency solidarity. This type of solidarity is that in which the language of solidarity is most express, demonstrating that there is a strong connection made in the EU between the concepts of solidarity and crisis. For example, both the 'Solidarity Clause' at Article 222 TFEU and the European Union Solidarity Fund respond to emergencies, the former for natural and manmade disasters and terrorist attacks, and the latter for disaster relief following, for example, extreme flooding.

There are other policy areas regarding which the Treaties refer to solidarity, principally the Common Foreign and Security Policy (CFSP) and energy security in Article 194(1) TFEU. The Treaties make numerous references to solidarity in relation to CFSP, specifically the need for the Member States to demonstrate their 'mutual solidarity' or 'mutual political solidarity' in external action.⁶ This solidarity is an expression of how the Member States relate to each other regarding their interactions with the outside world. Whilst the CEAS does have an external aspect to which solidarity in the CFSP may be

⁶ Articles 21(1), 24(2)-(3), 31(1) and 32 TEU.

useful for understanding, the main emphasis here is on the internal relationships of solidarity in the CEAS, regarding which the CFSP is less useful.

Solidarity regarding energy security policy is not considered at length here for two reasons. First, there is very limited literature available on the operation of solidarity in this context. Second, the literature that is available suggests that it combines ideas of emergency solidarity and external solidarity, as it evokes the idea of a collective front between the Member States in the event of an aggressive Russian energy policy,⁷ meaning that its analysis would add little extra to our understanding of various types of solidarity in the EU.

1. SOLIDARITY BETWEEN CITIZENS

Solidarity between citizens is the most prominent understanding attached to the principle in the EU and the Member States. This section observes the legal and political expression of citizens' solidarity in the EU in two different examples: the protection of national citizens' solidarity, or social solidarity within a Member State, within EU competition law; and the emergence of transnational or supranational citizens' solidarity tied to European Citizenship and its right to equal treatment. Each of these examples attests to the multi-faceted nature of solidarity and the difficulty in capturing this principle and expressing it in law, including the mismatch between law and political reality. Solidarity between citizens has a long-standing basis in European political and social thought and this section illustrates that EU law acknowledges, supports and perpetuates this as a dominant interpretation of the term, 'solidarity', as demonstrated in chapter one. Stjernø offers a summary of this in the form of a definition drawn from his study of this thought that is a useful reflection of what the Court understands solidarity to be: "[Solidarity] means the preparedness to share resources with others, through personal contributions to those who are struggling and through taxation and redistribution organised by the state".⁸

⁷ Annamária Orbán and Zoltán Szántó, "Intra-European energy solidarity at the core of the European integration process: future possibilities and current constraints" in Marion Ellison (ed.), *Reinventing Social Solidarity Across Europe* (Bristol: Policy Press, 2012), 99-120; Umut Turksen and Jacek Wojcik, "The European Union and Russian Energy Trade – Thickening of Legality and Solidarity" [2012] 1 *International Energy Law Review* 21-36; Frank Umbach, "Global energy security and the implications for the EU" (2010) 38 *Energy Policy* 1229-1240.

⁸ Steinar Stjernø, *Solidarity in Europe, The History of an Idea* (Cambridge: CUP, 2005), 326.

Both of these expressions of solidarity between citizens have been given legal effect by the Court in its interpretation and application of Union law, rather than finding their legal authority in the Treaties. Another expression of solidarity between citizens that is expressly envisaged in the Treaties is ‘intergenerational solidarity’, which was added to the Union’s primary law by the Treaty of Lisbon at Article 3(3) TEU, which instructs that the Union “shall promote... solidarity between generations”. Its inclusion among the aims of the EU suggest that it is aspirational and not intended to be legally binding, in comparison to the more practical TFEU where Article 80 and CEAS solidarity finds its home. Intergenerational solidarity has, therefore, been more associated with soft-law instruments and policies. The idea of ‘intergenerational solidarity’ offers a vehicle for policies seeking to address the effects of an ageing European population,⁹ which is perhaps best expressed in the words of the European Parliament: “Regards justice and solidarity between the generations as synonymous and defines justice between the generations as an even, reasonable, conscious intergenerational sharing of advantages and burdens”.¹⁰ Sánchez and Hatton-Yeo summarise that “for these European institutions, IS [intergenerational solidarity] is not an end in itself but a means, indeed a priority for dealing with the impact of an ageing population”.¹¹

This has manifested in the form of the ‘European Year for Active Ageing and Solidarity between Generations’ in 2012.¹² This initiative was intended to “facilitate the creation of an active ageing culture in Europe based on a society for all ages”, through, *inter alia*, raising awareness of active ageing, combating age discrimination and promoting debate and information exchange between stakeholders at all levels, including the Member States.¹³ Although it is not expressly offered as a definition, this initiative seems to understand intergenerational solidarity as, “highlight[ing] the contribution that older

⁹ European Commission, *Commission Communication, The demographic future of Europe – from challenge to opportunity*, COM (2006) 571 final, 8.

¹⁰ European Parliament resolution of 11 November 2010 on the demographic challenge and solidarity between generations (2010/2027(INI)), OJ [2012] C74 E/19, para 1.

¹¹ M. Sánchez and A. Hatton-Yeo, “Active Ageing and Intergenerational Solidarity in Europe: A Conceptual Reappraisal from a Critical Perspective” (2012) 10(3) *Journal of Intergenerational Relationships* 276-293, 283.

¹² Decision No. 940/2011/EU of the European Parliament and of the Council of 14 September 2011 on the European Year for Active Ageing and Solidarity between the Generations (2012), OJ [2011] L246/5.

¹³ *Ibid*, Article 2. Active Ageing is a policy promoted by the World Health Organisation and adopted by the EU that entails “optimising opportunities for health, participation and security in order to enhance quality of life as people age”, *ibid*, Recital 9.

people make to society and... cooperation and understanding between generations... get[ting] younger and older people to work together”.¹⁴

Intergenerational solidarity is to be facilitated by the Member States but quite clearly exists as a phenomenon between groups of people. As such, it is a more specific facet of solidarity between citizens that lacks the legal enforcement of the types addressed in this section. This reflects the competence of the EU to act legislatively and under the supervision of the Court in relation to the free movement and the lack of this competence in purely social situations covered by intergenerational solidarity.

1.1 THE PROTECTION OF NATIONAL SOLIDARITY IN EU COMPETITION LAW

Solidarity between national citizens within each Member State exists outside of EU law, yet the Court has recognised the potential for this to be adversely affected by the operation of competition law. The definition of this solidarity is not derived from the Treaties, but has been used by the Court as a means of excluding the Member States’ national welfare systems from the application of internal market and competition law in, for example, *Poucet and Pistre*.¹⁵ This is described by Barnard as using the principle of solidarity “defensively”.¹⁶ It rests on the interpretation of national welfare provisions as an expression of solidarity between the nationals of a Member State rather than as commercial or economic activity. This is reflected in the words of Spaventa: “[E]xpressions of solidarity are by definition not ‘economic’”.¹⁷ Further, O’Leary explains that “solidarity proved a useful shorthand” for Member States attempting to limit entitlement to certain benefits, referring to “the special bond of nationality, a distinction between their own nationals and nationals of other Member States”.¹⁸ This section analyses the social solidarity case law to identify the factors that the Court finds indicative of social solidarity, demonstrating that, in this context, it has a clear idea of what will and will not constitute solidarity.

¹⁴ *Ibid*, Recital 19.

¹⁵ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* EU:C:1993:63.

¹⁶ C. Barnard, “EU Citizenship and the Principle of Solidarity” in E. Spaventa and M. Dougan (eds.), *Social Welfare and EU Law* (Oxford: Hart Publishing, 2005) 157-180, 161.

¹⁷ E. Spaventa, *Free Movement of Persons in the European Union: Barriers to Movement in their Constitutional Context* (The Netherlands: Kluwer Law International, 2007), 10.

¹⁸ S. O’Leary, “Solidarity and Citizenship Rights in the European Union” in G. de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford: OUP, 2005) 39-87, 58.

The joined cases of *Poucet and Pistre* concerned contributions to social insurance schemes which were challenged on the grounds that the compulsory nature of these schemes breached competition law through the abuse of a dominant position.¹⁹ The Court held that the schemes pursued a social objective and embodied the principle of solidarity.²⁰ The Court stated: “Solidarity entails the redistribution of income between those who are better off and those who, the view of their resources and state of health, would be deprived of the necessary social cover”.²¹ It held that necessary components of a social solidarity scheme include compulsory contribution,²² non-profit administration and a distribution of benefits that is entirely disconnected from contributions.²³ The activity of the scheme was deemed entirely social and not economic, thus the managing organisation was not an undertaking and not subject to competition law.²⁴

Albany International concerned the compatibility of compulsory sectoral pension schemes in the Netherlands with competition rules.²⁵ In this case, unlike in *Poucet and Pistre*, the Court held that the non-profit nature and solidaristic aspects of the pension fund could not exclude it from being considered an undertaking, as it was engaged in economic activity in competition with private insurance companies.²⁶ Although competition rules were engaged, it was held that the high level of solidarity exhibited by the Fund and the fact that it fulfilled a social function permitted its designation as the exclusive provider of supplementary pensions within the sector.²⁷ A high level of solidarity resulted particularly:

[F]rom the fact that contributions do not reflect the risk, from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity for work, the discharge

¹⁹ Above note 15.

²⁰ *Ibid*, [8].

²¹ *Ibid*, [10].

²² *Ibid*, [13].

²³ *Ibid*, [18].

²⁴ *Ibid*, [19].

²⁵ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:430.

²⁶ *Ibid*, [83]-[85].

²⁷ *Ibid*, [109]-[111].

by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value.²⁸

The *Federation Française des Sociétés d'Assurance* case offers a useful contrast.²⁹ This case again concerned the compatibility of a social insurance policy, this time relating to old-age, with competition law. The Court concluded that the “extremely limited” exhibition of solidarity under this particular scheme was insufficient to negate its economic nature, and therefore that the organisation was an undertaking for the purposes of competition law.³⁰ It then considered whether the scheme’s exclusivity might be justified due to the limit on the scheme’s competitiveness resulting from its social aim,³¹ as was seen in *Albany International*. Some minimal elements of solidarity were acknowledged – that the organisation was non-profit-making and that no questionnaire or medical file was requested prior to registration.³² But the Court also highlighted a number of features indicative of economic activity, namely that the scheme was optional, that it operated by capitalisation and that entitlements were dependent on contributions.³³

This case aptly highlights Davies’ insistence that whether an organisation is for-profit is irrelevant to determining whether or not it is conducting economic activity: “[T]here may be many legal forms... that are incompatible with making profit as such, but entirely compatible with income-maximisation and market-orientated behaviour”.³⁴ This underlines the difficulty of drawing up a ‘checklist’ of solidarity criteria, pointing towards a more complex idea that is not readily translated into a legal test.

Sodemare concerned the provision of residential healthcare, paid for by welfare provisions in non-profit care homes in the Lombardy region of Italy.³⁵ The appellant argued that the restriction of subsidisation

²⁸ *Ibid*, [109].

²⁹ Case C-244/94 *Federation Française des Sociétés d'Assurance* EU:C:1995:392.

³⁰ *Ibid*, [19].

³¹ *Ibid*, [20].

³² *Ibid*, [11] and [9] respectively.

³³ *Ibid*, [17]-[18].

³⁴ G. Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer Law International, 2003), 174.

³⁵ Case C-70/95 *Sodemare* EU:C:1997:301.

to non-profit homes restricted the freedom of establishment of commercial homes. Advocate General Fennelly explained the legal position as follows:

Social solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group by another. Rules closely connected with financing such schemes are more likely to escape the reach of the Treaty provisions on establishment and services. Thus pursuit of social objectives on the basis of solidarity may lead Member States to withdraw all or part of the operations of social security schemes from access by private economic operators... [but] to the extent that Member States co-opt private economic operators into their social security systems, or contract out provision of certain benefits to such operators, or subsidize the activities of a social character of such operators, they must, in principle, observe the Treaty rules on, *inter alia*, freedom of establishment.³⁶

Although these words were not expressly adopted by the Court, the judgment reflects this position. The Court established that the restriction in question was based on social solidarity as it provided as a matter of priority for those lacking family income, those totally or partially unable to live independently or those at risk of being marginalised.³⁷ Further, the degree of subsidisation provided to the home for their healthcare was determined in relation to the family income of the patient.³⁸ The Court ruled that the limitation did not disadvantage profit-making care homes from other Member States compared to Italian profit-making care homes (and that this was the appropriate parallel to draw), and so upheld the restriction.³⁹

Hervey sees the Court's articulation of this solidarity as an acknowledgement of the threat of social and welfare dumping in the face of regulatory competition that could be induced by the operation of internal market law, and welcomes the use of solidarity as 'buttress' against this phenomenon.⁴⁰ Nevertheless, she questions the stark contrast that this jurisprudence draws between social solidarity and economic

³⁶ Case C-70/95 *Sodemare*, Opinion of Advocate General Fennelly EU:C:1997:55, [29]-[30].

³⁷ Above note 35, [29].

³⁸ *Ibid.*

³⁹ *Ibid.*, [33]-[34].

⁴⁰ Tamara Hervey, "Social Solidarity: A Buttress Against Internal Market Law?" in Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000) 31-47, 42.

activity, and the insistence by the Court that one precludes the other. This binary approach, setting economic, commercial and profit-making against social, solidaristic and non-profit, masks any economic motives that may lie behind social policy. Hervey gives the example of the economic benefits of maintaining the good health of the workforce.⁴¹ This analysis supports the interpretation of the Court's use of 'solidarity' as a short-hand for non-economic activity or as an antonym for 'economics'. To be clear, 'economics' in this sense is the liberal economics that underpins the EU,⁴² since other economic models might directly incorporate redistribution as a central component.

In sum, the operation of a compulsory scheme administered not-for-profit for the benefit of those who are worst off, without reference to contribution is considered by the Court to be an expression of solidarity within the social welfare policy of a Member State and therefore not an economic activity. This approach confines solidarity to a legalised definition, which attempts to cleanse these judicial decisions of their political connotations. It presents solidarity and economics as alternatives and opposites that might be distinguished by applying a checklist of factors. This dichotomy of the social and the economic reflects the second point of the solidarity matrix that chapter one starts to develop, that is, whether solidarity expresses social or economic thinking and approaches. In chapter one, it is argued that solidarity might express either: for some solidarity is an inherently social phenomenon inimical to economic thinking; and for others solidarity can be the product of the active decision of rational actors to work together in their collective economic interest. In this practical context, the Court evidently prefers the former approach.

In creating this binary distinction between solidarity and economics, the Court manages the competing demands of the market and the social, which is a continuing political tension within the EU. It refers to a particularist solidarity,⁴³ through which the individual citizen is related to the collective citizenry through shared ties of nationality and long established similarities – be that language, history, culture, shared political vision – expressing the idea of 'belonging'. The closed welfare state is a classic expression of this solidarity between citizens. In articulating this solidarity and classifying it as separate

⁴¹ *Ibid*, 44.

⁴² H Buch-Hansen and A Wigger, *The Politics of European Competition Regulation* (Abingdon: Routledge, 2011).

⁴³ See chapter one, section 2.1.2.

to economics and the market, the Court steps in to preserve the classic idea of solidarity in an acceptable way despite the EU's default preference for openness and free movement.

Yet by positioning solidarity as a distinctly national phenomenon, in line with the retention of social and welfare competences at the national level, this distinction also serves as a demarcation between the national (solidarity) and the supranational (the market, the EU's *raison d'être*). In using the idea of solidarity to protect national social welfare arrangements, the Court mediates between the national and the supranational. Solidarity in the Court's competition case law, in this way, is another articulation of the third point of the solidarity matrix developed in chapter one, that solidarity entails a decision between maintain individuality and pursuing the collective whole. This section demonstrates the application of this factor in a practical context, where solidarity is used to maintain the individual members of the group as separate entities.

Solidarity between citizens in this context is a distinctly social phenomenon that maintains the differences between the Member States, protecting them from the exercise of supranational market forces. The next section addresses a potential challenge to this state of affairs, namely the existence of a transnational or supranational solidarity between citizens.

1.2. TRANSNATIONAL SOLIDARITY BETWEEN EU CITIZENS

The development of EU citizenship introduced a cross-border dimension to social solidarity.⁴⁴ Transnational citizens' solidarity entails the extension of welfare provisions beyond their traditional boundary of the territory of the Member States, allowing EU citizens to take their welfare entitlements with them when moving and permitting nationals of other Member States to receive welfare support from their hosts. This blurring the traditional boundaries of national welfare states within the EU leads to the question, as posed by Ferrera, whether there are "new forms of post-state, post-national solidarities, possibly anchored to the EU level"?⁴⁵ Although this concept has also been described as

⁴⁴ Article 20 TFEU.

⁴⁵ Maurizio Ferrera, "Towards an 'Open' Social Citizenship? The New Boundaries of Welfare in the European Union" in Gráinne de Búrca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford: OUP, 2005) 11-38, 12.

supranational solidarity, this chapter prefers the term ‘transnational’, following Sangiovanni,⁴⁶ to reflect the interpretation of these developments as an extension of a previously national solidarity across borders rather than the implementation of EU-level welfare provision. This chapter observes that this transnational solidarity only entails a willingness to allow Union citizens to enter the national sphere of solidarity of the host state, rather than any elevation of solidarity from the national to the supranational level, and that the Court has a clear picture of what this solidarity between citizens entails.

The starting point of this development is the free movement of workers, a central element of the economic Union. Article 45 TFEU provides a basic right to free movement for workers and confirms that this entails the abolition of discrimination on the grounds of nationality in employment, remuneration and other conditions of work and employment. Aside from its neat formulation: “that comparable situations must not be treated differently and that different situations must not be treated in the same way”,⁴⁷ the Court has established a two-part test for discrimination. First, it asks whether the measure in question tends to advantage or disadvantage a particular group; and second, it asks whether this is sufficiently justified, that is to say, serving a legitimate goal, based on legitimate and objective criteria, and proportionate.⁴⁸ The Court has also set about demolishing non-discriminatory barriers to free movement,⁴⁹ on the basis that these also inhibit the establishment of the internal market.

These provisions for workers were latterly extended to all Union citizens⁵⁰ and their family members.⁵¹ Article 20(2)(a) TFEU provides that Union citizens have the right to freely move and reside within the territory of the Member States and Article 18 TFEU provides that there will be no discrimination on the grounds of nationality. At first glance, this loosens the connection between free movement and its economic foundations: if economically inactive people can move too, then such provisions cannot be

⁴⁶ Above note 4.

⁴⁷ Case C-148/02 *Garcia Avello* EU:C:2003:539, [31].

⁴⁸ Case 152/73 *Sotgiu v Deutsche Bundespost* EU:C:1974:13; Case C-237/94 *O’Flynn v Adjudication Officer* EU:C:1996:206.

⁴⁹ Case C-55/94 *Gebhard* EU:C:1995:411; Case C-415/93 *Bosman* EU:C:1995:463; see above note 17, chapter 3.

⁵⁰ A Union citizen is anyone who is a citizen of a Member State according to that state’s own nationality rules, Article 20 TFEU.

⁵¹ Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ [2004] L158/77, Article 24(1).

rationalised solely on the basis of liberalising a factor of production. This is, ostensibly, where transnational solidarity comes in. However, free movement based solely on citizenship is strictly limited. Economically inactive Union citizens wishing to reside in a host Member State for more than three months must have sufficient means to support themselves and their family members and comprehensive sickness insurance until they obtain permanent residence.⁵² Access to stronger residence rights and greater access to welfare is staggered according to the degree of connection that the Union citizen can demonstrate with the host Member State. Barnard argues that this incremental may be justified on the basis of ‘solidarity’,⁵³ if we interpret solidarity as a national phenomenon. The social welfare of the host state is not extended to the moving worker or citizen because of European solidarity, it is because she or he has entered the sphere of the host state’s national solidarity.

This interpretation of solidarity as operating at the national level is also visible in Dougan and Spaventa’s analysis of the matter.⁵⁴ In examining the emergence of “new and peculiarly supranational models of solidarity”,⁵⁵ they identify a “mismatch between the Community’s potential welfare aspirations, and its actual competence to fulfil them”.⁵⁶ First, the EU cannot act as a federal state as it lacks the necessary taxation and spending powers. Second, the limits of Union competence for social policy prevent substantial coordination of the Member States’ welfare laws through harmonisation,⁵⁷ a problem similarly lacking in relation to the Open Method of Coordination.⁵⁸ This leads Dougan and Spaventa to the conclusion that it is “difficult to identify a truly effective vehicle by which the Community might articulate any genuinely supranational framework of social solidarity”.⁵⁹ One model

⁵² *Ibid*, Article 7(1)(b).

⁵³ Above note 16, 166. See further Stefano Giubboni, “Free Movement of Persons and European Solidarity” (2007) 13(3) *ELJ* 360-379, 362.

⁵⁴ M. Dougan and E. Spaventa, “Wish You Weren’t Here... New Models of Social Solidarity in the European Union” in E. Spaventa and M. Dougan (eds.), *Social Welfare and EU Law* (Oxford: Hart Publishing, 2005) 181-218. See also Michael Dougan, “The constitutional dimension to the case law on Union citizenship” (2006) 31(5) *ELRev* 613-641, 622.

⁵⁵ *Ibid*, 183.

⁵⁶ *Ibid*, 191.

⁵⁷ *Ibid*, 187-188. Examples cited of limited success of welfare harmonisation include the common principles for legal aid in cross-border disputes in Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ [2003] L26/41 and provision for the equal treatment of men and women in respect to social security benefits in Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ [1979] L6/24.

⁵⁸ Above note 54, 189.

⁵⁹ *Ibid*.

that is legally possible is assimilation, or equal treatment, in a host state for those who have moved. Dougan and Spaventa argue, however, that assimilation creates a tension because, whilst giving the impression of supranational solidarity, the cost is actually incurred at the national level.⁶⁰ Their proposed remedy for this problem is a carefully balanced test limiting the circumstances under which a mover will be assimilated so as not to over-stretch the necessary feelings of solidarity,⁶¹ community and membership, and the financial viability of a system of social welfare within a state.⁶²

The solidarity described here, whilst displaying perhaps a greater flexibility towards EU migrants, is still very much nationally orientated. O'Brien reaches a similar conclusion when discussing the 'real link' test used by the Court to establish the necessity of equal treatment:

The real link does not create a "core of transnational solidarity". It provides not an alternative to, but an adaptation of, national solidarity, enabling it to weather the free movement storm, by enshrining the premise that migrants are not in an automatically comparable situation to nationals and must somehow earn equal treatment.⁶³

The Court has described this extension of the host state's national solidarity to EU migrants as a show of "financial solidarity". In *Grzelczyk*, the Court held that "a certain degree of financial solidarity" was demanded by the Directives on residence rights (since replaced by the citizenship Directive).⁶⁴ The Recital relied on by the Court has existed since early provisions for non-discrimination in free movement and is reproduced in the newer Directive. It states: "Persons exercising their right of residence should not... become an unreasonable burden on the social assistance system of the host Member State",⁶⁵ and is now reproduced in Article 14 of the Directive. The implication is clearly that persons *may* become a *reasonable* burden without out-staying their welcome. This financial solidarity

⁶⁰ *Ibid.*

⁶¹ Dougan and Spaventa consider two possibilities: the objective justification approach, whereby all EU migrants are entitled to equal treatment unless a derogation can be justified; and the comparability approach, which asks first whether the migrant is in a comparable situation to a national or long-term resident before considering any justifications (*ibid.*, 183-184).

⁶² Above note 54, 210.

⁶³ C. O'Brien, "Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity" (2008) 33(5) *ELRev* 643-665, 649.

⁶⁴ Case C-184/99 *Grzelczyk* EU:C:2001:458, [44].

⁶⁵ Above note 51, Recital 10.

is “between nationals of a host Member State and nationals of other Member States” and arises particularly where “the difficulties which a beneficiary of the right of residence encounters are temporary”.⁶⁶

This idea is also referred to in *Bidar*, in which a French student was denied a subsidised student loan in the United Kingdom on the grounds that he had failed to meet the settlement requirement attached to it.⁶⁷ This settlement requirement was challenged on the basis of the applicant’s right to equal treatment. The Court commented that the Member States could be expected to show “a certain degree of financial solidarity” through the organisation and application of their social welfare systems. However, they would not be expected to provide support where this amounts to “an unreasonable burden which could have consequences for the overall level of assistance which may be granted by the state”.⁶⁸

In more recent cases, the Court seems to have retreated somewhat from the emphasis on equal treatment for moving Union citizens, instead accepting increasingly restrictive limitations on their access to social welfare and that the nationality of a Union citizen will inevitably impact on this access.⁶⁹ In *Dano*, the Court’s emphasis shifted from Union citizenship as the fundamental status for people from Member States, entitling them to equal treatment rights as set out in the Citizenship Directive,⁷⁰ to the requirement on economically inactive, moving EU citizens to have sufficient resources to support themselves.⁷¹ In doing so, the Court reframed the citizenship Directive as a source of legitimate limitations that the Member States can place on access to their social welfare systems.⁷² In *Alimanovic*, the Court accepted the Member States’ assertion that the accumulation of claims for social welfare by

⁶⁶ *Ibid.*

⁶⁷ Case C-209/03 *Bidar* EU:C:2005:169. Although the student had been resident in the UK for the required period, this had been as a full-time student, a residence status excluded from calculations of settlement.

⁶⁸ *Ibid.*, [56].

⁶⁹ Case C-140/12 *Brey*, EU:C:2013:565; Case C-333/13 *Dano*, EU:C:2014:2358; Case C-67/14 *Alimanovic*, EU:C:2015:597; Case C-299/14 *García-Nieto*, EU:C:2016:114; Case C-308/14 *Commission v UK*, EU:C:2016:436.

⁷⁰ *Dano*, *ibid.*, [77]. See Daniel Thym, “When Union citizens turn into illegal migrants: the *Dano* case” (2015) 40(2) *ELRev* 249-262.

⁷¹ *Dano*, *ibid.*, [73]-[76]. This builds on the decision in *Brey*, which held that restrictions on their access to welfare were permitted (to prevent the moving citizen becoming an unreasonable burden on the host state), [44], providing that such restrictions are proportionate, [45] and [72].

⁷² *Dano*, *ibid.*, [76].

non-national Union citizens will constitute an unreasonable burden on those systems, obviating the previous need (for example from *Grzelczyk*⁷³) for the Member State to make an individual assessment of whether the applicant herself represents an unreasonable burden.⁷⁴ In *Commission v UK*, the Court “mangle[d]” its analysis of the proportionality of the restriction on access to the child benefit payment at issue,⁷⁵ resulting in permitting the application of this restriction even though it is, arguably, directly discriminatory on the grounds of nationality.⁷⁶

Care should be taken to avoid casting the case law preceding this development as a utopia based on open welfare states accessible to all Union citizens equally; indeed, Dougan has described the limits of this openness as amounting to no more than “a charitable fund for distressed gentfolk to help them overcome temporary financial embarrassments”.⁷⁷ Nevertheless, these developments represent a contraction in the accessibility of the welfare systems of other Member States to Union citizens. It responds to a trend of welfare chauvinism in European politics that is commonly associated with the UK and its negotiations with the EU prior to the membership referendum, but that is shared by others.⁷⁸ Indeed, the cases discussed were brought against various Member States, including the UK, Austria and Germany. As Thym reminds us, “That is not to say that judges bow to political pressure, but they will have considered potential implications of judicial choices at a time when eurosceptical political parties are on rise across the continent, not only in the UK”.⁷⁹ For present purposes, this chapter is not concerned with the question of whether this is a beneficial development in the law on Union citizens,

⁷³ Above note 64, also *Brey*, above note 69, [64].

⁷⁴ O’Brien explains that the Court in *Alimanovic* limits the abandonment of an individualised assessment to facts such as those at hand where the circumstances are described by the Directive 2004/38, Charlotte O’Brien, “The ECJ sacrifices EU citizenship in vain: *Commission v United Kingdom*” (2017) 54 *CML Rev* 209-243, 235. Because of its justification in this way, it seems plausible that this might be extended to other circumstances envisioned by the Directive.

⁷⁵ *Ibid*, 218.

⁷⁶ *Ibid*, 224-227.

⁷⁷ Michael Dougan, “The constitutional dimension to the case law on Union citizenship” (2006) 31(5) *ELRev* 613-641, 622.

⁷⁸ Above note 74, 240, citing a joint letter from Mikl-Leitner (Minister of the Interior, Austria), Friedrich (Minister of the Interior, Germany), Teeven (Minister for Immigration, Netherlands) and May (Home Secretary, UK) to the EU Council Presidency and to Commissioners Reding, Malmström and Andor, April 2013, available at http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf; Stefano Giubboni, “Free Movement of Persons and European Solidarity Revisited” (2015) 7 *Perspectives on Federalism* 1-18, 7-8. Verschuere points out that such feelings are not grounded in evidence as to how EU citizens access welfare in other Member States, but fears of ‘benefit tourism’ persist, H Verschuere, “Free Movement or Benefit Tourism: The Unreasonable Burden of Brey” (2014) 16(2) *EJML* 147-179, 148-149.

⁷⁹ Thym, above note 70, 253.

rather it confines its analysis to two points pertaining to what this development shows about how solidarity is understood in this context.

First, this development lays to rest any burgeoning aspirations for imagining a transnational solidarity in which all Union citizens are equally welcomed and supported by the Member State in which they live, expressed *inter alia* through the ability to access that state's welfare system, regardless of nationality. Giubboni is disappointed to reach a similar conclusion, describing his analysis of the developments through *Brey*, *Dano* and *Alimanovic* as a "melancholic eulogy on free movement of persons and European solidarity".⁸⁰ He forecasts that continuing developments in this vein would signal "the final and inglorious sinking of any misplaced hope of transnational solidarity".⁸¹ The analysis of the older case law above suggests that this interpretation may well have been a little 'misplaced' but, nevertheless, this newer strand of case law moves even further from such a position. Thym comments that *Dano* represents a reorientation of the Court's perspective back towards market citizenship, which focuses on economically active citizens, rather than on a solidaristic Union citizenship for all.⁸²

Second, references to solidarity have disappeared from the judgements, suggesting that the Court has a clear vision of what solidarity means in this context, and that this is not demonstrated in more recent developments in the regulation of access to social welfare. The Court understands solidarity as a social phenomenon that acts to redistribute wealth between members, traditionally at the national level between citizens.⁸³ Whilst the exact nature of this redistribution may not be strictly defined in the case law, it is drawn from a strong tradition of European sociological and political thought, as explored in chapter one and summarised in the definition provided by Stjernø.⁸⁴

By insisting that the Member States show "a degree of financial solidarity" with moving EU citizens according to the extent of the link that they establish with the host society,⁸⁵ the Court demanded that

⁸⁰ Giubboni, above note 78, 15.

⁸¹ *Ibid.*

⁸² Thym, above note 70, 261.

⁸³ Despite analysing different 'models' of expressing this solidarity (i.e. solidarity that extends to different groups of people), Giubboni also presents the same, singular understanding of the underlying value, Stefano Giubboni, "Free Movement of Persons and European Solidarity" (2007) 13(3) *ELJ* 360-379, 362.

⁸⁴ Above note 8.

⁸⁵ Above note 64.

this solidarity was opened to non-nationals. This is the Court requesting that solidarity in its traditional sense is extended transnationally on the basis that Union citizenship should become the fundamental status of the people of the Member States and that their solidarity bonds too should move from the national to supranational level. This newer strand of case law marks a break in this development and with this change, references in the judgments to solidarity have disappeared. The more recent decisions offer the Court's revised view of the correct interpretation of the rights of moving EU citizens, but this interpretation is not an expression of solidarity as it does not follow the paradigm of social redistribution between equal members.

A final example illustrating this chapter's argument that transnational solidarity is characterised by the careful negotiation of opening the Member States' national solidarity to non-national Union citizens relates to the provision of cross-border healthcare. Through the European health insurance card (EHIC),⁸⁶ temporary visitors, such as tourists or those on business trips, may use the host Member State's health system and arrangements are made for the reimbursement of the associated costs.⁸⁷ This arrangement demonstrates that the Member States have long been willing to extend the products of national social solidarity beyond their own residents in light of increased integration. Its importance as an illustration of integration is conveyed by Leibfried, who describes the EHIC as: "the health-policy equivalent of the euro".⁸⁸

This does not mean that all Union citizens are entitled to healthcare in any Member State. The Directive detailing patients' rights in cross-border healthcare does state that 'solidarity' should be one of the principles taken into account when administering treatment to patients ordinarily cared for in another

⁸⁶ The EHIC replaces its forerunners, the E 111 and E 111 B forms, under Decision No 191 of 18 June 2003 concerning the replacement of forms E 111 and E 111 B by the European health insurance card (2003/753/EC), OJ [2003] L276/19.

⁸⁷ This originates in Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, last consolidated version published OJ [1997] L28/1, which has since been replaced and is now found in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ [2004] L166/1, Article 19 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, OJ [2009] L284/1, Article 25.

⁸⁸ Stephan Leibfried, "Social Policy: Left to the Judges and the Markets?" in Helen Wallace, Mark A. Pollack and Alasdair R. Young (eds.), *Policy Making in the European Union* (7th edn., Oxford: OUP, 2015) 263-292, 283.

Member State.⁸⁹ Yet it also emphasises the need to strike a balance between the protection of national social welfare systems and the internal market, referring to the free movement of goods, services and patients.⁹⁰ It provides that patients travelling to another Member State for the purpose of receiving healthcare may require authorisation from their home provider so that it can manage its budgets.⁹¹ This is limited by the fact that such authorisation may only be required if necessary and proportionate, and not used as a means of arbitrary discrimination or an unjustified obstacle to free movement.⁹² The extension of national solidarity to non-national EU citizens, then, is available but limited: Member States are forbidden to engage in restrictions that arbitrarily inhibit free movement but are permitted to establish a degree of protection for the national bounds of healthcare.

To summarise, the EU's approach to social solidarity appears to remain tied to the national level. This traditional boundary of solidaristic feeling between people has developed a degree of flexibility to admit moving Union citizens, but this is balanced with an eye to the risks of trying to stretch it 'too far'. From this, together with the analysis of the Court's understanding of national-level solidarity as articulated in its competition case law, we can draw out five reflections on the nature of solidarity between citizens in the EU, developing the factors contributing to matrix of solidarity identified in chapter one and adding two new points.

Relating to the first factor, namely the distinction between solidarity as acting between people and as acting between states, this section clearly refers to solidarity between citizens of the Member States, and the definitions of solidarity referred to in the case law refer to the redistribution of resources between citizens. By taking this factor from chapter one and looking at it in this practical context, this section shows that the distinction cannot be drawn quite so cleanly. The role of the state is essential to the Court's understanding of this redistribution: this solidarity between citizens is not a private matter, it is the solidarity that they express through the welfare state. For the beneficiary of this solidarity, the other citizens are represented as a whole in the actions of the state. This might happen at the national

⁸⁹ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ [2011] L88/45, Article 4(1).

⁹⁰ *Ibid*, Article 7(7).

⁹¹ *Ibid*, Article 8(1).

⁹² *Ibid*.

level, as described by the Court in the competition case law, or at the transnational level, whereby the citizens of a Member State show their solidarity with non-national Union citizens by opening their state's national welfare provisions to them. Solidarity here is for the benefit of citizens, shown by states as the representatives of their citizens.

The second point correlates to that third aspect of the matrix, that solidarity mediates between the alternatives of creating one, single actor and collective action of a group of individuals. The use of the idea of solidarity to determine access to national welfare provision by EU law makes it easier for EU citizens to exercise their free movement rights. This is an achievement of integration within the EU and is framed as a core benefit of the EU to its citizens and economies. But some Member States, or pressures within those member states see it as a challenge to their national sovereignty – the inability to limit the applicability of its welfare provisions to only its own nationals, or 'welfare chauvinism', but instead it has to share with the nationals of other Member States. It is framed as a dispute of sovereignty in which the EU is pitted against the Member States, or in other words, the supranational against the national. This tension is managed with reference to the idea of 'solidarity'. From this perspective, the Member States seek to confine solidarity to national bounds for their political preference for national-level social welfare provision *and* to protect their individual, national sphere of decision-making from being subsumed into a single, European polity.

The third relates to the boundaries of solidarity. As identified in chapter one, in the fifth element of the matrix, abstract references to solidarity entail different visions of its scope, or who is included. Both solidarity between national citizens as imagined in the competition case law the 'transnational' citizens' solidarity in the context of free movement exists at the national level. It exists principally between the citizens of a single Member State, based on what O'Leary describes as the "special bonds of nationality".⁹³ It extends to non-citizens only when they have established a sufficient connection to become 'insiders' of the national sphere of solidarity. By demanding that a moving Union citizen establish a 'real link' with the host Member State, she is asked to demonstrate that she is accepted into the sphere of national solidarity. This reasserts the dominance of the national-level requirement based

⁹³ Above note 18.

on national-level political settlement that its welfare provisions only apply to those deemed to be ‘in’ the national sphere, not ‘outsiders’. This test, then, rests on a notion of belonging: we show solidarity to those who belong. This a particularist sentiment in solidarity between citizens, but is an insufficiently precise basis for a legalised solidarity.

Where the Court seeks to introduce legalised concepts of solidarity in its case law, it must be much more specific about the boundaries of that solidarity, it must be able to determine who is legally entitled to solidarity and who is not. Legal iterations of solidarity require the definition of these boundaries, which might be left more vague if we only seek to refer to solidarity as an abstract notion. Through the citizenship Directive and the case law from which it was built, the idea of solidarity is used to push the bounds of national social welfare to include non-national EU citizens and secures more favourable treatment for EU nationals in comparison to third country nationals.

Yet the effort required to extend this national phenomenon to non-nationals suggests that the Court is trying to use legalised ideas of solidarity and Union citizenship to ‘force’ these ideas where they are not naturally arising. This is also suggested by the resurgence of national boundaries in the more recent case law and the Court’s retraction of the language of solidarity. The idea of national-level solidarity between citizens has been used to criticise and, potentially, to defeat transnational solidarity. This analysis, therefore, demonstrates that legal articulations of solidarity between citizens require clear definitions of the boundaries of that solidarity. However, it also demonstrates that the drawing of such boundaries can be politically contentious and that conflicting ideas of solidarity may be used to criticise the extent of the boundaries drawn.

This leads to the fourth observation on solidarity of this section, namely that the idea of solidarity is politicised, and may be used as a way of advancing political agendas. For example, tying the definition of solidarity between citizens to the national level reflects the dominating political consensus in the Member States. Sangiovanni is quite dismissive of the necessity of organising social welfare at the supranational level and argues that a post-national, federalised EU is not required for the purpose of

social justice between Union citizens, rather, that national boundaries remain a more appropriate limit.⁹⁴ This is supported by Davies, who notes that the Member States' welfare provisions are commonly a source of national pride and that replacing them with "a European wide market mechanism, even if regulated, is fairly high on a list of politically suicidal policies".⁹⁵ Similarly, the Court's efforts to promote EU citizenship as the 'fundamental status' of the people of the EU, fostering with it a transnational solidarity between citizens suggest a political preference for closer integration, also expressed through references to solidarity. This section adds the idea solidarity as a politicised term as the sixth factor to the solidarity matrix.

Finally, this section reveals another aspect that might be added as the seventh factor of the matrix. In their roles facilitating solidarity between citizens in the EU, the Member States show themselves to be willing to make declarations of solidarity that entail little direct cost on their part and less willing to show solidarity where they have to bear costs. The most obvious example of this is the Member States reluctance to extend the benefits of their national welfare provisions to non-national EU citizens and their consequent pursuit of greater restrictions on such access.⁹⁶ It is also clear in the balance struck on access to healthcare. Where access is for temporary visitors, for business and tourism, the Member States are willing to provide emergency care as a symbolic gesture of their solidarity with limited cost.⁹⁷ For ongoing treatment that would typically be provided in the patient's home country, the Member States are permitted to require permission before the patient can move for treatment, allowing the Member States to protect their national spending on healthcare.⁹⁸ Similarly, the Member States are willing to take part in schemes promoted under the banner of intergenerational solidarity, such as the Year of Active Ageing, which is comprehensively funded from the EU budget.⁹⁹

This section has explored different facets of what might be collectively referred to as citizens' solidarity, demonstrating that solidarity in this sense is regarded as a national-level phenomenon that is navigated

⁹⁴ A. Sangiovanni, "Solidarity in the European Union: Problems and Prospects" in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: OUP, 2012) 384-411.

⁹⁵ Above note 34, 172.

⁹⁶ Above notes 78-79.

⁹⁷ Above notes 86-87.

⁹⁸ Above notes 89-92.

⁹⁹ Above note 12, Article 8.

carefully by EU law. Such references to solidarity seek to manage the relationship between EU-level and national-level interests. Solidarity in the EU is primarily understood in this way, as a relationship between people: usually nationals within a Member States, extended to include EU citizens of other Member States who have developed a sufficient connection with a host Member State through exercise of their free movement rights, and perhaps to all EU citizens across Member States. This reflects the development of the idea in European social and political theory, as explored in chapter one. Solidarity between citizens is most strongly read in to EU law by the Court of Justice, which has been the principal driver of the development of the expressions of solidarity discussed in this section. The following section, by way of contrast, turns its attention to EU-level solidarity between the Member States.

2. REDISTRIBUTION OF RESOURCES AT MEMBER-STATE LEVEL

Redistributive schemes overseeing the subsidisation of one group by another are considered a quintessential expression of solidarity. Instead of redistributing resources between citizens under an insurance scheme or through government taxation and spending as in the previous section, redistributive solidarity here refers to transfers between the Member States. Instead of citizens, the actors and addressees of this solidarity are the Member States. Solidarity between Member States, in which the states are individual actors like people in the context of solidarity between citizens, recalls the wording of Article 80 TFEU, making it a useful type of solidarity to consider in greater detail.

If the comparison between states and citizens is carried through, the EU plays a facilitating role in relation to this solidarity as the state or social insurance scheme does between citizens. Redistributive solidarity is, therefore, an expression of Sangiovanni's 'member state' solidarity.¹⁰⁰ This solidarity is expressed in several funds through which the Member States share out financial resources. Detailed consideration will be limited to the Structural and Cohesion Funds and the European Stability Mechanism, as the purpose here is merely to demonstrate the operation of this type of solidarity, not to provide a comprehensive or comparative analysis of the different funds of the EU.¹⁰¹ Broadly speaking,

¹⁰⁰ Above note 4.

¹⁰¹ It is worth noting there is a European Union Solidarity Fund (Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ [2002] L311/3); but the solidarity it refers

such schemes seek to balance financial and economic benefits and burdens between the Member States. This analysis interrogates the legal and political context within which these schemes operate in order to offer an account of this second EU solidarity.

2.1. THE STRUCTURAL AND COHESION FUNDS

The Structural and Cohesion Funds are part of the EU's regional policy and comprise a number of different budgetary pockets relating to regional development, cohesion, agriculture, fisheries and the European Social Fund.¹⁰² The Funds are intended to “reduc[e] disparities between the levels of development of the various regions and the backwardness of the least favoured regions”.¹⁰³ The Regulation governing the operation of the Funds explains that this development is to be achieved “by strengthening growth, competitiveness, employment and social inclusion and by protecting and improving the quality of the environment”.¹⁰⁴ The Funds are not described in their founding instruments as displays of solidarity between the Member States, but their inherently redistributive nature that mirrors social solidarity schemes, suggests that they might nevertheless be considered as such.¹⁰⁵ Indeed, Bache states that the Cohesion policy seeks to represent a “widely recognized expression of solidarity between richer and poorer parts of the EU”.¹⁰⁶

The Funds are targeted to three objectives: convergence; regional competitiveness and employment; and territorial cooperation.¹⁰⁷ The convergence objective is the priority of the Funds and seeks to expedite the development of regions that are deemed to be ‘left, or lagging, behind’ the majority by improving the conditions for growth and employment and investing in physical and human capital.¹⁰⁸ Eligible regions for Structural Funds are identified as those regions with a GDP that is less than 75% of

to is emergency solidarity, addressed below in section 3.2., rather than a peculiarity of redistribution, so it is not necessary to give this fund any special attention here.

¹⁰² Title XI TFEU.

¹⁰³ Article 174 TFEU.

¹⁰⁴ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ [2006] L210/25, last amended version 2013, Article 3(1).

¹⁰⁵ For example, Pascal Petit, “Building faith in a common currency: can the eurozone get beyond the Common Market logic?” (2012) 36 *Cambridge Journal of Economics* 271-281, 275.

¹⁰⁶ Ian Bache, “Cohesion Policy: A New Direction for New Times?” in Helen Wallace, Mark A. Pollack and Alasdair R. Young (eds.), *Policy Making in the European Union* (7th edn., Oxford: OUP, 2015) 243-262, 260.

¹⁰⁷ Above note 104, Article 3(2)(a)-(c).

¹⁰⁸ *Ibid*, Article 3(2)(a).

the average GDP of the EU and those regions with GDP less than 90% of the EU average are eligible for the Cohesion Fund.¹⁰⁹ The regional competitiveness objective targets areas that do not fall within the first objective, but nevertheless have high levels of unemployment. It works in much the same way as the first objective, but also seeks to anticipate the opening of new markets, encourage entrepreneurship and develop inclusive job markets.¹¹⁰ Finally, the territorial cohesion objective promotes cross-border cooperation through local and regional projects and through sharing experience at an appropriate territorial level.¹¹¹ For a region to be eligible for territorial cohesion support it should have: a shared border internal to the EU, certain external land borders, or a maritime border separated as a general rule by 150 kilometres.¹¹²

Awards under the Structural and Cohesion Funds are determined at two levels. First, the Council sets the total figure to be allowed for the Funds from the EU's general budget and decides how this is to be divided between different objectives.¹¹³ Second, the Commission determines the allocation of this budget between the regions of the EU. These awards are to be made according to the guiding principles of complementarity (with national actions), consistency (with Union policies priorities and activities), coordination (between funds) and compliance (with the Treaties and secondary legislation).¹¹⁴ Projects benefiting from an award from the Funds are managed within the Member State at regional level.¹¹⁵

Political science and economics literature shows that the declared objectives and criteria of the Funds alone do not fully explain allocation and highlights the influential impact of political factors.¹¹⁶

¹⁰⁹ *Ibid*, Article 5(1)-(2).

¹¹⁰ *Ibid*, Article 3(2)(b).

¹¹¹ *Ibid*, Article 3(2)(c).

¹¹² *Ibid*, Article 7(1).

¹¹³ *Ibid*, Articles 18-24.

¹¹⁴ *Ibid*, Article 9.

¹¹⁵ The equivalence of different regions across Member States is determined with reference to the NUTS (nomenclature commune des unités territoriales statistiques), Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS), OJ [2003] L154/1.

¹¹⁶ A. Kemmerling and T. Bodenstein, "Partisan Politics in Regional Redistribution: Do Parties Affect the Distribution of EU Structural Funds across Regions?" (2006) 7(3) *European Union Politics* 373-392; F. Bouvet and S. Dall'Erba, "European Regional Structural Funds: How Large is the Influence of Politics on the Allocation Process?" (2010) 48(3) *JCMS* 501-528; T. Bodenstein and A. Kemmerling, "Ripples in a Rising Tide: Why Some EU Regions Receive More Structural Funds than Others" (2012) 16 *European Integration Online Papers*, article 1, 5, available at <http://eiop.or.at/eiop/texte/2012-001a.htm>; L. M. Dellmuth, "The Cash Divide: The Allocation of European Regional Grants" (2011) 18(7) *Journal of European Public Policy* 1016-1033, 1019.

Bodenstein and Kemmerling find that lobbying and regional-level bargaining influence the allocation of the Funds.¹¹⁷ Positing the Commission as a bureaucratic entity, Dellmuth suggests that it seeks to reaffirm its own importance and influence in determining the grants to be made and so favours regions which have previously dealt with money from the Funds successfully.¹¹⁸ These political interferences have been described as a conflict between ‘policy’ and ‘politics’ whereby European leaders have been keen to see that there is ‘something for everyone’ to please their domestic electorates rather an allocation more closely following need.¹¹⁹

This development aligns with a shift in the recipients of the Funds. McCann and Otega-Argilés demonstrate that in the funding period 2000-2006, the major recipients of funding were poorer areas in the EU-15 Member States, which changed after the accession of new Member States from 2004.¹²⁰ In the funding period 2007-2013, the newer EU-12 Member States received 52% of cohesion funding despite representing only 21% of the EU population.¹²¹ Thus a broadening of membership, meaning an increase in the number of addressees of solidarity, saw an increase in the desire for Member States to demonstrate individual gains in the form of receipts from the fund. This suggests that with increased diversity of the group, the Member States became less willing to share resources and subsidise each other. This is notwithstanding the overall aims of the Funds to reduce disparities between regions because, as McCann and Otega-Argilés argue: “A Single Market in which the winners are always the same regions, and the losers are always the same regions, is incompatible with the objectives of the EU treaties”.¹²²

The solidarity manifested in the Structural and Cohesion Funds feeds into our matrix of solidarity. First, it offers a new perspective on the second aspect: so far, solidarity has been expressed as either distinctly social or economic, whereas the aims of the Funds combine these aspects. For example, social inclusion

¹¹⁷ Bodenstein and Kemmerling (2012), *ibid*, 19.

¹¹⁸ Dellmuth, above note 116, 1021-1023.

¹¹⁹ I. Vaidere, “The Impact of Regional and Cohesion Policy of the Economic Development of the EU” (2011) 5 *European Integration Studies* 165-171, 168; A. Staab, *European Union Explained: Institutions, Actors, Global Impact* (Bloomington, IN: Indiana University Press, 2008), 99.

¹²⁰ Philip McCann and Raquel Otega-Argilés, “Redesigning and Reforming European Regional Policy: The Reasons, the Logic and the Outcomes” (2013) 36(3) *International Regional Science Review* 424-445, 428.

¹²¹ *Ibid*.

¹²² *Ibid*.

and improving access to employment on the one hand and strengthening regional competitiveness and economic growth on the other.¹²³ Most importantly, many of these objectives serve social and economic aims at the same time: improving skills and access to employment may benefit the people enrolled in the scheme and the societies that they live in, but also contributes to broader economic productivity. Solidarity then, is neither distinctly social or economic, and can be both at the same time.

The Structural and Cohesion Funds represent a legal manifestation of solidarity between the Member States', demonstrating their willingness to share resources with each other in their collective interests, bearing close resemblance to themes identified in relation to citizens' solidarity. As such, its analysis offers reflections on the fifth and sixth points of the solidarity matrix, namely the scope of solidarity and the politicisation of the principle. Regarding the fifth, political analyses of allocations under the Funds demonstrate the limits of the scope of solidarity: whilst on paper solidarity is extended to those regions most in need of assistance amongst all the Member States, this analysis highlights that, in practice, the Member States are less willing to share resources as the size and diversity of the group expands.¹²⁴ This suggests that the Member States are less willing to share their collective resources with those they deem to be less similar. This recalls the limits placed on the extension of national solidarity between citizens to those Union citizens deemed sufficiently similar or sufficiently integrated to belong in the national sphere.

Finally, the redistribution of resources under the Funds shows the politicisation of the principle of the solidarity. As the scope of solidarity expands following the accession of new Member States, the solidarity that the Funds expresses is redefined from assistance for those most in need to 'something for everyone' to suit the political needs of the participating Member States.¹²⁵

The next section considers redistributive solidarity between the Member States in the example of the European Stability Mechanism in order to explore these aspects of solidarity in another context that has been more expressly described as an expression of solidarity between the Member States.

¹²³ Above notes 103-112.

¹²⁴ Above note 120.

¹²⁵ Above note 116.

2.2. RESPONSE TO THE EUROZONE CRISIS AND THE EUROPEAN STABILITY MECHANISM

The provision of assistance to those Member States struggling under the financial crisis was described as a show of solidarity. The Eurozone crisis originated in the global financial crisis of 2007-2008, which was triggered by the collapse of the US market of subprime loans.¹²⁶ This crisis spread internationally, including to the EU, through the freezing of inter-bank markets and business loans, known as the ‘credit crunch’. The ‘credit crunch’ resulted in a banking crisis, including the collapse of Lehman Brothers in September 2008. The banking crisis affected European banks, exposing EU failures in financial market regulation and supervision. Although short-term measures helped to stabilise European banks initially, the contraction of global trade and credit shortages led to severe recession. All Member States were affected, but those with larger macroeconomic imbalances were worst affected and amassed significant budget deficits. Greece, Portugal, Ireland and Spain were all running budget deficits at around 10% in early 2010, which led to financial markets losing their confidence in the abilities of these countries to honour national debts. This led to significant increases in the cost of borrowing for these Member States, which reinforced the loss of market confidence, trapping these Member States in a self-perpetuating circle, which could only be broken by the provision of financial assistance. The provision of financial assistance by the EU and its Member States was referred to as an act of solidarity.

In the preface to the Commission’s plan for economic recovery, the call for a response based upon Member State solidarity is both express¹²⁷ and evident in its tone: “We sink or swim together”.¹²⁸

¹²⁶ The explanation of the crisis contained in this paragraph is taken from Dermot Hodson, “Policy-Making under Economic and Monetary Union: Crisis, Change, and Continuity” in Helen Wallace, Mark A. Pollack and Alasdair R. Young (eds.), *Policy Making in the European Union* (7th edn., Oxford: OUP, 2015) 166-195, 176, citing Robert J. Shiller, *The Subprime Solution: How Today’s Global Financial Crisis Happened, and What to Do about It* (New Jersey: Princeton University Press, 2008); J. Crotty, “Structural Causes of the Global Financial Crisis” (2009) 33(4) *Cambridge Journal of Economics* 563-580; M. Obstfeld and K. Rogoff, “Global Imbalances and the Financial Crisis: Products of Common Causes”, *Proceedings* (Federal Reserve Bank of San Francisco, 2009) 131-172; L. Quaglia, R. Eastwood and P. Holmes, “The Financial Turmoil and EU Policy Co-operation in 2008” (2009) 47(1) *JCMS* 63-87; European Commission, “European Economic Forecast: Spring 2013”, [2013] 2 *European Economy*. See further Vivien A. Schmidt, “The European Union’s Eurozone Crisis and What (not) to Do About It” (2010) 17(1) *Brown Journal of World Affairs* 199-213.

¹²⁷ European Commission, *Communication from the Commission to the European Council, A European Economic Recovery Plan* COM(2008) 800 final, 3.

¹²⁸ *Ibid.*, 2.

Similarly, Morgan argues that, in this context, “solidarity is a call for Europeans to fulfil their duties to... the Greeks in the form of bail-outs, debt relief, or some other material benefits”.¹²⁹ The idea of solidarity was referred to prominently throughout the response to this crisis by politicians and commentators,¹³⁰ including Schmidt, who argued: “There needs to be political will to pursue deeper economic solidarity”.¹³¹ The European Stability Mechanism (ESM) builds on the response to the Eurozone financial crisis, learning from policy ideas tested in that response. This section discusses the development of the ESM from the reaction to the Eurozone crisis in order to demonstrate the importance of solidarity in this mechanism, and proceeds to examine the debates surrounding this solidarity, including the competing visions of solidarity proffered in the recovery from the crisis.

Initially, the response to the crisis was governed by a Memorandum of Understanding on cross-border financial stability between the financial institutions of the Member States.¹³² This Memorandum provides for close cross-border cooperation in the normal times to prepare for potential crises as well as for the actions to be taken in their event. Although the Memorandum is quite clear that private measures will always be preferable to the use of public money,¹³³ there is potential for burden-sharing across the public purses of the Member States in response to systemic crises.¹³⁴ It envisages that such burden-sharing would be based on objective criteria, for example, the shares of deposits, assets, revenue flows and the payment system of the relevant bank and other directly affected institutions.¹³⁵ In the event of the need to use public resources, the Finance Ministry of the home country of the failing institution “will coordinate the process of deciding on whether, to what extent and how public funds

¹²⁹ Glyn Morgan, “Greece and the Limits of European Solidarity”, (2015) 8 *Phenomenology and Mind* 50-65, 53.

¹³⁰ Joseph Stiglitz, “A principled Europe would not leave Greece to bleed”, *The Guardian*, 25 January 2010, available at <https://www.theguardian.com/commentisfree/2010/jan/25/principled-europe-not-let-greece-bleed> [accessed 15/05/2017]; EUBusiness, “Eurozone solidarity means “loss of sovereignty”: Van Rompuy”, 17 November 2011, available at <http://www.eubusiness.com/news-eu/finance-economy.dk9> [accessed 15/05/2017]; Michael Goldfarb, “Euro crisis: The meaning of ‘solidarity’ in the eurozone”, *BBC Magazine*, 5 June 2012, available at <http://www.bbc.co.uk/news/magazine-18281576> [accessed 15/05/2017].

¹³¹ Schmidt, above note 126, 210. See similarly, above note 105.

¹³² Memorandum of Understanding on Cooperation between the Financial Supervisory Authorities, Central Banks and Finance Ministries of the European Union on Cross-Border Financial Stability of 1 June 2008, available at <https://www.ecb.europa.eu/pub/pdf/other/mou-financialstability2008en.pdf> [accessed 11/05/2014].

¹³³ *Ibid*, Introduction (7) and Article 2.1.2.

¹³⁴ *Ibid*, Article 2.1.3-4.

¹³⁵ *Ibid*, Annex I para 17.

will be used”, though these decisions will be made with the relevant Finance Ministries in other countries.¹³⁶

Goodhart and Schoenmaker consider the possibility of such burden-sharing in their paper of 2006, predating its realisation.¹³⁷ They argue that taxpayers’ money will be used only if to do so is efficient: that is, when the costs of recapitalisation are less than the social benefits to be gained, namely by avoiding a wider crisis.¹³⁸ When a public solution is efficient, they argue that this should be shared in a way that represents “an appropriate division of labour” between the bank’s home and host countries due to the intensity of cross-border externalities from banking failures in the EU.¹³⁹ They consider two mechanisms for achieving this: a general fund to which all Member States contribute according to a fixed key, proportionate to their size; or alternatively, sharing the burden specifically between those countries directly involved according to a key based on the geographic spread of the business of the bank.¹⁴⁰ The first enables the sharing of the cost over a number of countries and also over time, but rests on a high level of solidarity to which countries are rarely keen to commit: some countries will pay in to the fund but will not receive anything out.¹⁴¹ There are also risks of moral hazard and free-riding.¹⁴² Under the second model, which Goodhart and Schoenmaker prefer, there are no international transfers, so that the countries financing the recapitalisation are the same ones experiencing the benefit.¹⁴³ However, this mechanism is also at risk of the free-rider problem and countries trying to limit their

¹³⁶ *Ibid*, Annex I para 33.

¹³⁷ C. Goodhart and D. Schoenmaker, “Burden Sharing in a Banking Crisis in Europe” [2006] 2 *Sveriges Riksbank Economic Review* 34-57.

¹³⁸ *Ibid*, 35 and 39.

¹³⁹ *Ibid*, 34-35. See further D. Schoenmaker and S. Oosterloo, “Financial Supervision in an Integrating Europe: Measuring Cross-Border Externalities” (2005) 8 *International Finance* 1-27.

¹⁴⁰ Above note 137, 41. To assess the geographic spread, Goodhart and Schoenmaker recommend the use of Sullivan’s Transnationality Index which measures the geographic segmentation of international firms. It comprises an unweighted average of i) foreign assets to total assets, ii) foreign income to total income and iii) foreign employment to total employment. See D. Sullivan, “Measuring the Degree of Internationalization of a Firm” (1994) 25 *Journal of International Business Studies* 325-342.

¹⁴¹ Above note 137, 43-44.

¹⁴² *Ibid*, 44. See further Xavier Freixas, “Crisis management in Europe” in Jereon J M Kremers, Dirk Schoenmaker and Peter J Weirts (eds.), *Financial Supervision in Europe* (Cheltenham: Edward Elgar, 2003) 102-128, 105.

¹⁴³ Above note 137, 45.

liability for recapitalisation by “gaming on the key”.¹⁴⁴ It may also pose difficulties if a significant part of the failing bank’s business is outside of the EU.¹⁴⁵

The solidarity that Goodhart and Schoenmaker envisage here is redistributive. It entails transferring resources from those with more to those with less, echoing the policy decision of the Structural and Cohesion Funds in relation to the Member States, but also the decisions made as to the allocation of welfare or social security payments. The challenges in reaching these policy decisions, whether between citizens or between states, are those associated with the provision of public goods that were discussed in chapter one.¹⁴⁶

Redistributive solidarity between the Member States is more similar to the classic solidarity that between citizens of a state, or members of a community: members pay in their contributions and if they are in financial trouble, or they are the poorest or least developed, they receive money out. By limiting its benefits to members, it is exclusionary towards non-members.

A key feature of both of Goodhart and Schoenmaker’s models is that they require coordination in advance of crisis. The EU’s Memorandum envisages an *ex-post* agreement on burden sharing.¹⁴⁷ Goodhart and Schoenmaker reject this approach on the basis that it will not provide sufficient recapitalisation: “We feel reasonably certain that it would not be possible to bargain internationally over burden sharing after the event... It would not work”.¹⁴⁸ Successor arrangements to the Memorandum address this unworkability by attempting to set out arrangements for burden-sharing in advance.

A temporary European financial stabilisation mechanism (EFSM) was created within the Union in immediate response to the Eurozone sovereign debt crisis.¹⁴⁹ It was based on Article 122(2) TFEU, which provides that Union financial assistance may be extended to a Member State where it “is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional

¹⁴⁴ *Ibid*, 46.

¹⁴⁵ *Ibid*, 47.

¹⁴⁶ Chapter one, section 1.2.1.

¹⁴⁷ MoU, above note 132, Annex I para 34

¹⁴⁸ Above note 137, 51. This is supported by an econometric analysis coming to the same conclusion, Freixas, above note 142.

¹⁴⁹ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ [2010] L118/1.

occurrences outside of its control”. It established a funding programme for the Commission to provide emergency loans to Member States in financial distress. The EFSM was supplemented by the European financial stability facility (EFSF) in June 2010, which was created outside the Treaties to provide similar bonds to the EFSM and other debt instruments to Member States in severe difficulty.¹⁵⁰ This secondary measure added a degree of flexibility that made up for the uncertain legal footing of the EFSM and created an additional short-term fix while the Member States negotiated a longer-term response.¹⁵¹

The EFSF was replaced in 2012 by the European Stability Mechanism (ESM),¹⁵² which is governed by intergovernmental treaties outside of the EU, agreed between the Member States of the Euro area, namely the European Stability Mechanism Treaty of 2 February 2012¹⁵³ and the Treaty on Stability, Coordination and Governance of 2 March 2012 (TSCG).¹⁵⁴ The ESM Treaty states in its Preamble that these treaties are “complementary in fostering fiscal responsibility and solidarity within the economic and monetary union”.¹⁵⁵ The TSCG Preamble states that the objective is to bring these agreements within the EU Treaties as soon as possible.¹⁵⁶ This ambition is also indicated by the reliance on EU institutions, for example the invitation to the Commission to report on compliance of Member States

¹⁵⁰ EFSF Framework Agreement between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland and the European Financial Stability Facility, available at <https://www.esm.europa.eu/content/efsf-framework-agreement> [accessed 20/09/17]. Although it continues to finance its agreement with Greece made before the creation of the permanent European Stability Mechanism (see below), the EFSF was replaced as of 1 July 2013.

¹⁵¹ Hodson, above note 126, 183.

¹⁵² The EFSF does continue to operate to manage the loans made under it, but it cannot create any further loans, <https://www.esm.europa.eu/efsf-overview> [accessed 03/05/17].

¹⁵³ Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, 2012, T/ESM 2012/en available at <https://www.esm.europa.eu/legal-documents/esm-treaty> [accessed 20/09/17]. Latvia joined the ESM on 13 March 2014.

¹⁵⁴ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland and the Kingdom of Sweden, 2012, T/SCG/en available at <http://www.consilium.europa.eu/en/history/20120301-tscg-euro-summit/> [accessed 20/09/2017].

¹⁵⁵ Above note 153, Recital 5.

¹⁵⁶ Above note 154, Preamble, page 2.

with the provisions of the TSCG and the possibility of referring non-compliance to the Court, which may issue binding decisions including sanctions.¹⁵⁷

The ESM Treaty allows for the transfer of money from the mechanism's reserves to a Member State where the financial stability of the Euro is at risk. The capital stock of the ESM, €701 935 300 000,¹⁵⁸ is comprised of subscriptions of the signatory Member States according to a contribution key set out in Annex I to the ESM Treaty.¹⁵⁹ This key is based on the subscription key for the European Central Bank (ECB), which is calculated based on the Member State's share of the Union's population and GDP equally weighted.¹⁶⁰ This pre-determined key of contributions to the capital stock together with the fact that some contributing states may never be recipients of assistance represent what Goodhart and Schoenmaker describe as a high level of solidarity, following their first model.¹⁶¹

Members of the ESM “irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock”.¹⁶² This commitment seeks to strike a balance between the necessity of a bail-out and the risk of moral hazard. Fiscal stimulus packages, or ‘bail-outs’ have been the method of choice for dealing with the most recent financial crisis, however, facilitating this within the EU has been difficult due to limitations imposed by the TFEU in Articles 123(1) and 125(1).

First, Article 123(1) TFEU prohibits the ECB or any central bank of the Member States (national central banks) from offering overdraft or credit facilities to, or purchasing debt instruments from, any “Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings by the Member States”. Second, Article 125(1) TFEU, the so-called ‘no bail-out clause’, instructs that neither the Union nor any Member State shall be liable for the commitments of the central governments, regional, local or other public

¹⁵⁷ *Ibid*, Article 8(1).

¹⁵⁸ Above note 153, Article 8(1); increased from €700 000 million on the accession of Latvia. This figure is reviewable every five years, Article 10(1).

¹⁵⁹ *Ibid*, Article 11. The precise contributions to be made according to the key are outlined in Annex II to the ESM Treaty.

¹⁶⁰ *Ibid*, Article 11(1); Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Article 29(1).

¹⁶¹ Above note 137.

¹⁶² Above note 153, Article 8(4).

authorities, other bodies governed by public law, or public undertakings of any (other) Member State. These provisions are intended to encourage the Member States to pursue sound economic policies¹⁶³ and budgetary discipline¹⁶⁴ free from the moral hazard that may arise given the prospect of the Union or the other Member States acting as guarantor or surety.

The compatibility of the stability measures taken with these provisions was considered by the Court in *Pringle*.¹⁶⁵ It was held that any assistance provided must be carefully restricted in order to maintain the objectives of Articles 123(1) and 125(1) TFEU, but that some forms of assistance, if so restricted, must be possible given the provision for *ad-hoc* assistance in Article 122(1) TFEU.¹⁶⁶ The Court determined that in order to balance the two objectives – providing fiscal stimulus and encouraging sound budgetary policy – that financial assistance must only be provided under the ESM where it is necessary for safeguarding the stability of the Euro area as a whole and subject to strict conditions.¹⁶⁷ These limitations appear in the ESM Treaty as the principles of its operations at Article 12(1):

If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.¹⁶⁸

The case of *Pringle* demonstrated that these financial redistributions were taking place at the edge of the EU's competences and that they represent a clash between what is legally possible within the EU framework and what some Member States deem to be political necessary for their collective good. The response addresses this tension in two ways. First, the action is brought outside the Treaties for now, which gives a bit more space for a politically agreeable settlement, but the clear intention is that this

¹⁶³ As guided by the principles set out at Article 199(3) TFEU, “stable prices, sound public finances and monetary conditions and a sustainable balance of payments”.

¹⁶⁴ Above note 154, Title III Fiscal Compact.

¹⁶⁵ Case C-370/12 *Pringle* EU:C:2012:756.

¹⁶⁶ *Ibid*, [131]-[136].

¹⁶⁷ *Ibid*, [136].

¹⁶⁸ Similar provisions also appear at Article 3 of the ESM Treaty, above note 153.

mechanism is to be brought within the Union framework eventually. Second, the idea of solidarity is deployed to balance the competing demands: it emphasises the importance of collective action, that is, some sort of financial package for the troubled Member State; but on the other hand, it limits this assistance to that which is required for the collective benefit.

Under the ESM, solidarity between the Member States is not to solve an individual problem, only a collective problem. For the Member States not using the Euro, the ESM represents potential expense without the opportunity of potential benefit, which might explain their reluctance to bring the mechanism within the EU Treaties as applicable to all. Solidarity under the ESM, it seems, is quite different from social solidarity. The commitment involved on the part of each Member State is carefully weighed against the benefits that might individually be gained: it is an investment in collective good rather than altruistic assistance to a needy individual. The purpose of the mechanism is not to assist a Member State facing financial difficulties, it is to ensure the stability of the Eurozone as a whole and the collective prosperity of the Eurozone. Morgan argues that this, ‘something for everyone’ approach holds the best promise for solidarity that extends beyond the national sphere to other Member States.¹⁶⁹ Similarly, Tsoukala concludes that this solidarity is “far from the notions of solidarity coming from the traditions of European welfare states,” but that it is not out-of-step with other approaches to redistribution within the EU.¹⁷⁰

This is one side of the story of solidarity as a response to the Eurozone crisis that is based on a reading of the need for assistance in some Member States being the ‘fault’ of the governments and economies of those Member States. Since the effects of the crisis fell most severely on the Member States with macroeconomic imbalances,¹⁷¹ the blame also fell at the door of those same Member States for creating, or failing to correct, those imbalances. Tsoukala explains that this narrative developed in line with the fable of the grasshopper and the ants.¹⁷² The northern, particularly German, ants worked hard ‘all summer long’ to maintain a balanced budget while Greek grasshoppers had a wastefully extravagant

¹⁶⁹ Above note 129, 64.

¹⁷⁰ Philomila Tsoukala, “Narratives of the European Crisis and the Future of (Social) Europe” (2013) 48(2) *Texas International Law Journal* 241-267, 264.

¹⁷¹ Above note 126.

¹⁷² Above note 170, 244-247

welfare system, avoided tax and retired early.¹⁷³ From this perspective, it is easy to understand that the EU's solidarity response was not about assisting the Member State in difficulty because that difficulty was understood to be self-inflicted. Instead, solidarity was directed towards maintenance of the currency as a whole because of a "twist" in the tale – "in the euro zone's case the grasshoppers' deaths threatened the demise of the ants as well,"¹⁷⁴ – due to their shared currency.

There is another side to solidarity in the context of the Eurozone crisis, which is based on an alternative narrative of the origins of the crisis. Tsoukala explains that the macroeconomic imbalances that worsened the effects of the crisis for some Member States might also be attributed to structural issues created by the shared currency, or: "that the very design of the euro was to blame for the current situation".¹⁷⁵ There are numerous explanations of these structural problems. First, the Eurozone is not an optimum currency area because prices and labour supply cannot easily adjust across the region, so external shocks create uneven pressures of inflation and unemployment.¹⁷⁶ Alternatively, the inclusion of weaker economies in the shared currency means that the currency is devalued in comparison to what it would have been without their inclusion, and this lower value gives the stronger economies within the Union a competitive advantage.¹⁷⁷ In other words, countries like Germany gain a trade advantage because their currency is weaker than it would be had it been pegged to its economy alone. The knock-on effect of this is that those weaker economies that cause this effect are put at a permanent trade disadvantage through the opposite effect: their currency is stronger than it would be if it were tied to their economies alone. Tsoukala summarises thus: "it is a mathematical impossibility and a matter of simple arithmetic that if Germany seeks to become a major exporter of its goods to other euro zone countries, some of these countries will, by necessity, need to have a trade deficit with Germany".¹⁷⁸ To illustrate further, Tsoukala points to a useful metaphor employed in *The Economist*: "Germany, which retained 66% of the possession in last night's Euro 2012 football match, is wondering why Greece

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*, 244.

¹⁷⁵ *Ibid.*, 247.

¹⁷⁶ *Ibid.*, 247-248, citing Hendrik Van Den Berg, *International Finance and Open-Economy Macroeconomics: Theory, History and Policy* (London: World Scientific Publishing, 2010), 645-652.

¹⁷⁷ *Ibid.*, 249-250

¹⁷⁸ *Ibid.*, 250.

couldn't just do the same".¹⁷⁹ If either of these explanations, or another similarly based on structural issues, is preferred to that which simply paints Greece and the others as wasteful, a solidarity that does not intend to help the particular country in need is less readily explicable.

Morgan refers to two visions of solidarity that might fit better with this narrative, namely "justice-based solidarity" and "remedial solidarity".¹⁸⁰ Both offer visions of solidarity that respond to assisting the individual Member State in need, which for the purposes of his article is Greece.¹⁸¹ For Morgan, justice-based solidarity is based on "morality"¹⁸² and "ethical concerns",¹⁸³ and might be summarised as the duty to help others who are in need. However, Morgan doubts the strength of such a solidarity between the Member States in this context, regardless of whether the duties are characterised as general duties to humanity or specific duties between the Member States of the Eurozone. First, if these duties arise out of general duties to humanity then Morgan argues that there are more pressing needs around the world than in Greece.¹⁸⁴ Second, if they arise from specific duties between the Member States when one reaches certain levels of poverty or distress, then it should be remembered that Greece is not the poorest member of the Eurozone.¹⁸⁵ Nevertheless, some European citizens' called for an approach to solidarity with Greece and the others based on alleviating suffering.¹⁸⁶

On the other hand, Morgan is more convinced by remedial solidarity, by which he means a duty to put right harm that one has caused.¹⁸⁷ Under this interpretation, the purpose of solidarity is still to assist the individual Member State in need, but it arises from the need to correct what one has put wrong, rather

¹⁷⁹ *Ibid.*, 250, footnote 40, citing The Economist, "Euro Competitiveness: Fallacy Football", *Free Exchange Blog* (Hong Kong, 23 June 2012) available at <http://www.economist.com/blogs/freeexchange/2012/06/euro-competitiveness> [accessed 15/05/2017].

¹⁸⁰ Above note 129, 51.

¹⁸¹ Hodson supports this emphasis by identifying Greece as the Member State hit hardest by the effects of the crisis and resulting bail-outs and austerity, above note 126, 178.

¹⁸² Above note 129, 51.

¹⁸³ *Ibid.*, 52.

¹⁸⁴ *Ibid.*, 54.

¹⁸⁵ *Ibid.*, 55.

¹⁸⁶ Above note 105, 279. See further: Open Letter, "The Greek people have chosen hope," (The Guardian, 26 January 2015), available at https://www.theguardian.com/world/2015/jan/26/people-of-greece-have-chosen-hope?CMP=share_btn_fb [accessed 16/05/2017]; Sarah Leonard, "How Greece Put an Anti-Austerity, Anti-Capitalist Party in Power" (The Nation, 18 February 2015), available at <https://www.thenation.com/article/how-greece-put-anti-austerity-anti-capitalist-party-power/> [accessed 16/05/2017]; Mar Garcia Sanz and Ska Keller, "Europe's Survival Depends on Solidarity," (Green European Journal, Volume 11, 1 September 2015) available at <https://www.greeneuropeanjournal.eu/europes-survival-depends-on-solidarity/> [accessed 16/05/2017].

¹⁸⁷ Above note 129, 51.

than a charitable impulse to help the needy. Morgan identifies three sources of harm caused by the EU and the other Member States that could give rise to such a duty in respect of Greece, namely: structural weaknesses in the EMU (such as those identified by Tsoukala);¹⁸⁸ harm caused by the bail-out of 2010, which the Greek government argued was more assistance to its creditor French and German banks than public finances;¹⁸⁹ and harm caused by the excessive austerity measures required as condition of receiving financial assistance.¹⁹⁰

The purpose of introducing these alternative visions of solidarity is not to establish which is ‘correct’ or which offers ‘the solution’. Rather, the purpose is to identify that whilst many different actors could agree that ‘solidarity’ was needed in responding to the Eurozone crisis, this was not based on a shared understanding of what this solidarity entailed. The divergent interpretations of this solidarity come from different understandings of the nature and origins of the Eurozone crisis, which are based on different approaches to political economy. It reveals the political nature of solidarity and its flexibility to multiple political ends.

This section also offers reflections on three other aspects of the solidarity matrix, and adds one additional factor. First, solidarity, in this context, is a vehicle of economics. In contrast to the description of solidarity as ‘inherently uneconomic’ in its use in the Court’s competition case law, solidarity is used in to describe financial transfers between states to respond to economic crisis and to repair harm to the Member States’ economies, regardless of which explanation we prefer as to the origin of this harm.

¹⁸⁸ *Ibid*, 57.

¹⁸⁹ *Ibid*, 58. Morgan suggests, that since most of the money provided under the first bail-out was to be paid in interest to private banks in France and Germany that would otherwise be at risk, the bail-out was really a cover for a bail-out of private financial institutions with public money, which would have been embarrassing for the Member States to admit outright. He summarises (58): “The Greeks were used.” Tsoukala reports that 86% of the 2010 bail-out to Greece was assigned to servicing debts, above note 170, 253.

¹⁹⁰ Above note 129, 59-60. Morgan notes that economists disagree as to whether austerity measures caused harm in Greece, noting in particular the argument that the bail-outs allowed Greece to implement these changes more slowly than if it had been left to bankruptcy, but seems to conclude that these measures did cause “economic depression and social misery”, 59, citing A. Sen, “The economic consequences of austerity” (The New Statesman, 24 June 2015) and Y. Varoufakis, “Greece, Germany and the Eurozone” (Social Europe, 11 June 2015).

Second, in relation to the fourth point, the ESM is an example of compulsory solidarity, through which the Member States undertake the obligation to pay in to the capital fund of the ESM so that money is available in the event of a Member State needing support.¹⁹¹

Third, this mechanism illuminates the importance of the boundaries and scope of solidarity, the fifth matrix factor. This redistributive solidarity is particularist, as it operates amongst a fixed group, though this group might be constituted in different ways. Goodhart and Schoenmaker distinguish two potential boundaries for solidarity in sharing responsibility for banking crises: one that limits sharing to those states that host a portion of the bank's business, and another that would see solidarity extend to all Member States.¹⁹² The ESM operates outside the EU legal order between the Member States that use the Euro. It would seem that the shared currency gives these states a feeling of sufficient similarity on which to base their solidarity.

The final characteristic of the solidarity expressed here is a factor to be added as point eight of the matrix: the association of solidarity with crisis and responding to emergencies. The ESM is instituted as a response to an economic crisis of such magnitude that it threatens the stability of the Eurozone. Such a crisis would imperil the financial stability of the Eurozone Member States and their national economies. The scale of this threat is used to justify the recourse to solidarity: it is an exceptional measure that, when enacted inside the EU, is precariously based on emergency competences.¹⁹³

This solidarity is, therefore, not only a way of understanding the redistribution of resources between the Member States, but also as a response to an emergency or crisis situation. In this sense, it overlaps with some of the measures analysed in the following section, which concentrates more directly on solidarity as a response to an emergency situation.

3. EMERGENCY SOLIDARITY

Appeals to solidarity are often made in the wake of some crisis or emergency, suggesting the need for collective action or the support of the affected states by others. Solidarity in this sense is represented by

¹⁹¹ Above note 162.

¹⁹² Above notes 144-145.

¹⁹³ Above notes 165-167.

the contributions made to alleviate suffering in a time of economic or social crisis.¹⁹⁴ Barnard, in a discussion of solidarity in the abandoned Constitutional Treaty, understands solidarity between the Member States solely in terms of what is referred to here as emergency solidarity: the response to some disaster.¹⁹⁵

EU references to ‘solidarity’ are often responses to crises, for example the European Council’s Declaration on Combating Terrorism after the Madrid bombings in 2004 advocates solidarity as the appropriate response to such events and terrorism more widely.¹⁹⁶ In articulating this solidarity there are alternative definitions preferred by different Member States, which this section demonstrates through its analysis of the two most prominent manifestations of emergency solidarity in the EU: the ‘Solidarity Clause’, or Article 222 TFEU, and the European Union Solidarity Fund.

3.1. THE SOLIDARITY CLAUSE

The Treaty of Lisbon introduced the ‘Solidarity Clause’ at Article 222 TFEU. This provision originated in the abandoned Constitutional Treaty as an expression of collective support for a Member State’s national measures should it experience a terrorist attack. Its enactment responded to the attacks of September 11th and bombings in London and Madrid. Article 222(1) provides:

The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States.

These instruments are charged with preventing terrorism in the territory of the Member States, protecting democratic institutions and civilian populations from terrorist attack and, at the request of the receiving Member State, assist it in its territory in the event of a terrorist attack or natural or man-made disaster. This evokes a sense that the Union and the Member States will come together in a time

¹⁹⁴ Y. Borgmann-Prebil and M. Ross, “Promoting European Solidarity: Between Rhetoric and Reality?” in M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford: OUP, 2010) 1-22, 2.

¹⁹⁵ Above note 16, 158.

¹⁹⁶ European Council, *Declaration on Combating Terrorism* (Brussels, 25 March 2004), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/DECL-25.3.pdf> [accessed 09/09/2014]

of need, whilst leaving the exact nature of the assistance open. Konstadinides suggests that this derives from the reservations of some Member States about committing military means.¹⁹⁷

The ambiguity is compounded by Declaration 37 on Article 222 TFEU, which states, "... none of the provisions of Article 222 is intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation towards [the Member State in need]".¹⁹⁸ Myrdal and Rhinard optimistically comment that this addition does not negate the "legal obligation to act jointly and assist" other Member States,¹⁹⁹ yet the Declaration seems to rob Article 222 of any compelling substance: Konstadinides describes Article 222 as a "paper tiger".²⁰⁰ This is supported by the assessment of Hagström Frisell that the significance of Article 222 as a tool for crisis management will be determined by its implementation,²⁰¹ and by Boin and Rhinard's criticism: "the EU is being asked to coordinate action, but with only a partial "tool box" of competences".²⁰²

Council Decision 2014/415 governs the implementation of Article 222, but it adds little meaning to the solidarity in this context.²⁰³ Instead, it focusses on the procedure to be followed in the event of a crisis.²⁰⁴ It is remarkable, given that the document concerns the implementation of the 'Solidarity Clause', that the principle of solidarity is not mentioned. The Commission's proposal for the Decision contained a provision suggesting that the Member States might "build the means of effective solidarity" in pursuance of "preparedness",²⁰⁵ but this was removed from the enacted Decision. Instead, the

¹⁹⁷ T. Konstadinides, "Civil Protection Cooperation in EU Law: Is There Room of Solidarity to Wriggle Past?" (2013) 19(2) *ELJ* 267-285, 270-271.

¹⁹⁸ Declaration No. 37 on Article 222 of the Treaty on the Functioning of the European Union, Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, OJ [2008] C115/337.

¹⁹⁹ S. Myrdal and M. Rhinard, "The European Union's Solidarity Clause: Empty Letter or Effective Tool?" *Utrikespolitiska Institutet Occasional Papers No. 2* (The Swedish Institute of International Affairs, 2012), 5, available at www.ui.se.

²⁰⁰ Above note 197, 282.

²⁰¹ E. Hagström Frisell, "The EU Policy-Making Process and Crisis Management" in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies* (Berlin: Springer Berlin Heidelberg, 2009) 17-35, 24.

²⁰² Arjen Boin and Mark Rhinard, "Managing Transboundary Crises: What Role for the European Union?" (2008) 10 *International Studies Review* 1-26, 19.

²⁰³ Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause (2014/415/EU), OJ [2014] L192/53.

²⁰⁴ *Ibid.*

²⁰⁵ European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, *Joint Proposal for a Council Decision on the arrangements for the implementation by the Union of the Solidarity Clause*, Brussels, 21.12.2012, JOIN(2012) 39 final, Article 9.

Decision's Preamble contains a number of reassurances to the Member States, for example, that they will not be obliged to disclose any information when they would deem doing so contrary to their own essential national security and that the solidarity clause has no defence implications.²⁰⁶ These provisions clarify to the Member States that their responsibilities under the Solidarity Clause do not impact on their freedom to act in an areas closely related to state sovereignty, namely national security and defence.

This analysis of Article 222 TFEU shows that solidarity in the EU can include a collective response to an emergency or crisis in the territory of one Member State, or emergency solidarity, but it remains to be seen how, or indeed whether, this plays out in practice. Konstantinides argues that this emergency solidarity “needs to be meticulously aligned to the principle of loyalty” in Article 4(3) TEU to motivate Member States to engage genuinely,²⁰⁷ which might be particularly necessary given the huge flexibility afforded to them under Declaration 37. Whilst this might be true if one is trying to create concrete legal obligations, it is not clear that this is the intention behind Article 222 TFEU.

Emergency solidarity in Article 222 is about responding collectively to a crisis, but it is also about managing the Member States' concerns about what this commitment entails from each of them individually. Under this interpretation, the flexibility written in to the solidarity obligation is inherent and necessary to the creation of solidarity, even if it is interpreted as the most significant obstacle to solidarity producing meaningful effect. Beyond the quite limited obligation to do ‘something’, Article 222 TFEU expresses a voluntary and altruistic solidarity.

Article 222 TFEU encourages the Member States to take action to support each other in a time of crisis by stating in primary law that they are expected to do so. The use of the term, ‘solidarity’ adds to this encouragement by mobilising the normative associations of the word. Yet the provision does not dictate what form this assistance should take, inviting the Member States to determine for themselves their preferred way to express solidarity.²⁰⁸ This solidarity is therefore voluntary: the Member States can

²⁰⁶ Above note 203, Recitals 17 and 13 respectively.

²⁰⁷ Above note 197, 282.

²⁰⁸ Theodore Konstantinides and Anastasia Karatzia, “The Mutual Solidarity Clause and the New Scope of EU External Competences” in A. Biondi, E. Dagilyte and E. Kucuk (eds.), *The Different Faces of Solidarity in*

choose to give the provision as much or as little import as they see fit, since even the smallest gesture would, strictly speaking, satisfy any legal obligation it entails. Article 222 TFEU relies on the Member States taking up its encouragement and deciding to express solidarity, rather than creating any obligation. As Boin and Rhinard argue: “National leaders are keen to profess the importance of cooperation in crisis management, but their apparent enthusiasm sometimes stalls when the actual policy process begins”.²⁰⁹ Article 222 TFEU, therefore, is necessarily open as to the action that might be taken to express solidarity.

The reason for this is political. The EU has very limited competence in relation to crisis relief, including limited ability to provide necessary operational resources,²¹⁰ meaning that the EU institutions can only act to encourage the Member States to use their competence and resources to act. This is because the Member States are reluctant to confer too much power to act in this sphere to the EU-level.²¹¹ Any extension of the EU’s capacity usually comes from the aftermath of a crisis and is dependent on, and reacting to, it,²¹² for example the European Union Solidarity Fund discussed below. Åhman and Nilsson also emphasise the political choice in favour of national-level flexibility in responding to crises, stating:

Civil protection is a politically sensitive area, where issues regarding sovereignty play a central role. Choices sometimes need to be made between sovereignty and solidarity (or between national and supranational authority). This is one of the main factors shaping cooperation in the area of civil protection.²¹³

This sensitivity derives from the nature of a crisis, which Boin and Rhinard explain to be “a threat to core values or life-sustaining systems” that directs attention to those that must make critical decisions

European Union Law: The Implications of the Lisbon Treaty and the Economic Crisis (Cheltenham: Edward Elgar Publishing, forthcoming: 2017).

²⁰⁹ Above note 202, 11.

²¹⁰ Article 6(f) TFEU provides that the EU competence for civil protection is limited to action to support, coordinate and supplement the actions of the Member States. Boin and Rhinard argue that the EU’s principal protective capacity is found in its agencies, *ibid*, 14.

²¹¹ *Ibid*, 11.

²¹² *Ibid*.

²¹³ Teresa Åhman and Claes Nilsson, “The Community Mechanism for Civil Protection and the European Union Solidarity Fund” in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies* (Berlin: Springer, 2009) 83-107, 83-84.

under stressful conditions.²¹⁴ This means that, for polity leaders, a crisis is understood as a challenge to the legitimacy of the polity affected, particularly so for governments of states for whom a principal duty is to protect “public order, health and safety”.²¹⁵ Thus in the sphere of civil crisis response, the EU acts as a point of coordination for an essentially intergovernmental process – the Member States deciding how they would like to help each other in the event of an emergency – and by using the idea of solidarity, it tries to encourage the intergovernmental process in a cooperative direction. This allows the Member States to reassert their legitimacy and protective function. Supranational, Union-level action is limited to sharing training, data and a central point of contact in the event of a crisis under the Civil Protection Mechanism.²¹⁶

The solidarity of Article 222 TFEU is, by definition, a response to an emergency and therefore contributes to understanding the eighth point on the matrix, the association between solidarity and crisis. The analysis highlights a distinction that can be drawn in relation to measures of emergency solidarity, namely when the action takes place relative to the crisis. Under the Commission’s proposed Decision, ‘preparedness’ was to be the hallmark of solidarity under Article 222 TFEU,²¹⁷ suggesting that solidarity was envisioned as the collective efforts before a crisis situation emerges. This contrasts with the positioning of solidarity as a *response* to the Eurozone crisis. Nevertheless, the failure of this understanding to survive into the adopted version of the Decision suggests a lack of support for this type of emergency solidarity.

Despite the suggested creation of an obligation to act in the wording of Article 222 TFEU, the solidarity it refers to is distinctly voluntary. The provision encourages the Member States to act collectively, but leaves to their national discretion the decision as to how each will act. This flexibility is guaranteed in Declaration 37, so even if Article 222 TFEU creates an obligation to do ‘something’, there are no limits on what will count as ‘something’. As Konstandinides and Karatzia argue, this may mean that sending

²¹⁴ Above note 202, 3.

²¹⁵ *Ibid*, citing Yehezkel Dror, *Policymaking Under Adversity* (New Brunswick, NJ: Transaction, 1986).

²¹⁶ Council Decision 2001/792/EC of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions, OJ [2001] L297/7. See *ibid*, 86-89.

²¹⁷ Above note 205.

well-wishes or remembering those affected in prayer could constitute ‘something’ for these purposes,²¹⁸ effectively robbing Article 222 TFEU of any compulsive power over the Member States and rendering its solidarity distinctively voluntary. This serves as a model of expressions of solidarity in the CEAS too: a seemingly determined commitment to solidarity that gives rise to concrete obligations to act (for example to relocate persons in need of international protection) is left open to national interpretation such that it allows those Member States that do not want to participate to contribute almost nothing (for example by pledging no relocation places). The example of Article 222 TFEU, then, adds another useful perspective of the fourth matrix point, the distinction between voluntary and obligatory solidarity.

This also offers a reflection on the third matrix point, the careful balance drawn through the use of the principle of solidarity between collective, unified action by a group with the desire of individual actors (in this case, the Member States) to maintain their own discretion over their actions. The voluntary nature of Article 222 TFEU’s solidarity derives from the Member States’ desire to maintain space at the national level to determine the appropriate response to an emergency situation for themselves, free of obligations imposed by collective agreements. The shape of solidarity in this context reflects the political preferences of the actors of solidarity, namely that the national level is the most appropriate place to crisis relief.²¹⁹

The following section considers the expression of emergency solidarity in another mechanism that more clearly articulates the rights of a Member State in need of assistance in contrast to the flexible solidarity articulated through Article 222 TFEU.

3.2. THE EUROPEAN UNION SOLIDARITY FUND

The European Union Solidarity Fund (EUSF) is another product of emergency solidarity, and expressly announces itself as such. This section analyses solidarity as expressed by this fund, arguing that Member States perceive its provisions as an expression of both practical and symbolic solidarity but that this is

²¹⁸ Above note 208.

²¹⁹ Above notes 213-215.

limited in two ways, first an embedded conflict as to the ideal form of practical solidarity and second its limited scope.

The EUSF was created following severe flooding in Central Europe in 2002 for the immediate assistance of Germany, Austria, the Czech Republic and France.²²⁰ On an ongoing basis, most recently updated in 2014, the fund provides financial support in the event of a natural disaster in the EU.²²¹ Specifically, a single cash grant may be made to one or more Member States following “a major natural disaster with serious repercussions on the living conditions, the natural environment or the economy”.²²² The mechanism has clear activation criteria: a disaster may be considered major when its resulting damage is estimated at €3 billion in 2011 prices or more than 0.6% of the Member State’s Gross National Income.²²³ In 2014, the Regulation governing the fund was amended so that it could also be employed to respond to a “regional natural disaster” within a Member States where the damage caused amounts to more than 1.5% of that region’s Gross Domestic Product.²²⁴

In a review conducted by the Court of Auditors, the fund was found generally to meet its objectives to be flexible and efficient but the review noted the need for improvement in speed of response.²²⁵ The review surveyed the Member States that had applied for assistance from the fund, all of whom answered that they were either satisfied or very satisfied with the Fund.²²⁶ Among the reasons cited for this was that, “the Fund’s contribution was a signal of the EU solidarity with the population of the regions affected in view of the scale of the disasters”.²²⁷ This suggests that the fund offers a tangible and practical benefit for Member States facing an emergency situation and that this benefit is interpreted as an expression of solidarity. This identifies two types of solidarity expressed by the fund: first the practical assistance conveyed, that is, the money provided; and second, a symbolic solidarity conveying

²²⁰ Above note 213, 95.

²²¹ Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ [2002] L311/3, as amended by Regulation (EU) No 661/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ [2014] L189/143.

²²² *Ibid*, Article 2(1).

²²³ *Ibid*, Article 2(2).

²²⁴ *Ibid*, Article 2(3).

²²⁵ Court of Auditors Special Report No 3/2008, *The European Union Solidarity Fund: how rapid, efficient and flexible is it?*, OJ [2008] C153/1, 12.

²²⁶ *Ibid*, 11, graph 3.

²²⁷ *Ibid*, 11.

support for the affected Member States by the rest. The latter is interpreted as the motivation for the former, but it is also widely referred to in supportive speeches that respond to crises.²²⁸

This would mark out the solidarity expressed EUSF as different from that expressed by Article 222 TFEU. In the presence of a guaranteed tangible benefit, supportive statements are well received, rather than interpreted as empty and lacking substance. Yet this analysis is superficial, judging the fund on its own terms. A more holistic analysis identifies two problems with the fund that impact on the interpretation of the emergency solidarity that it expresses.

First, Åhman and Nilsson highlight a disagreement between the Member States as to the optimum scope and purpose of this expression of solidarity.²²⁹ They report that northern Member States tend to understand the EU's role to be to encourage the improvement of national capacities to respond to crises and to drive improvement of preventative and preparatory measures.²³⁰ Southern Member States, on the other hand, reportedly favour improving collective capacity and the establishment of common, EU-level crisis management resources.²³¹ This conflict saw the Council extinguish proposals for major reform of the fund put forward by the Parliament and the Commission to extend it by reducing the qualification threshold and widening the scope of situations that would render a Member State eligible for assistance.²³² This disagreement echoes concerns about the trade-off between sovereignty (as national-level control) and solidarity (as Union-level control) in the context of Article 222 TFEU.

Second, the fund has been criticised on a number of bases. Hochrainer *et al.* examine the fund in relation to in relation to legitimacy, viability and efficiency, and conclude that it comes up short in relation to each.²³³ It is not useful to concentrate here on their analysis of legitimacy because, whilst Hochrainer *et al.* measure this by the degree to which the fund shows solidarity, they view solidarity in its

²²⁸ Above note 196.

²²⁹ Above note 213, 103.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the European Union Solidarity Fund* COM(2005) 108 final; European Parliament, *legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing the European Union Solidarity Fund* (COM(2005)0108), OJ [2006] C297 E/331. See above note 213, 99-100.

²³³ Stefan Hochrainer, Joanne Linnerooth-Bayer and Reinhard Mechler, "The European Union Solidarity Fund: Its legitimacy, viability and efficiency" (2010) 15 *Mitigation and Adaptation Strategies for Global Change* 797-810.

redistributive sense as under Cohesion Policy, namely payments from richer Member States to poorer Member States to balance out the effects of economic integration.²³⁴ This analysis would pertain more to the discussion of redistributive solidarity in the previous section of this chapter, of which Hochrainer *et al.* view the solidarity fund as quicker-acting example.²³⁵

Rather, their analysis of the fund's viability and efficiency are more interesting here. Hochrainer *et al.* use statistical modelling to estimate the probability of requests to the fund exceeding its total balance, noting that although on its terms the fund is not required to provide assistance once its capital has been distributed in any particular year, it may be politically very difficult to refuse assistance in the event of several European crises.²³⁶ Their analysis predicts that, as a most-likely minimum, the fund will be depleted once in every twelve years and, in a very optimistic scenario, once in twenty years, with three caveats.²³⁷ First, this analysis is only based on the risk of flooding, which accounts for about 70% of disbursements under the fund, meaning that depletion could be 30% more frequent.²³⁸ Second, the analysis assumes that the floods operate discretely within single Member States, which has not historically been the case, and floods affecting multiple Member States would increase the chance of depletion of the fund.²³⁹ Third, there is evidence that climate change will increase the frequency of disastrous weather events.²⁴⁰ The fund was not designed to offer unlimited support, but Hochrainer *et al.* argue that this likely inability to meet its demand renders the fund insufficient to meet its aims. This would, again, show the limits of the Member States' commitment to shared emergency capabilities and a preference for voluntary or *ad-hoc* measures to express emergency solidarity.

Finally, Hochrainer *et al.* analyse the efficiency of the EUSF in terms of the distribution of the liability for the risk of damage in the event of a crisis between public and private resources, or in other words,

²³⁴ *Ibid.*, 801.

²³⁵ *Ibid.* Hochrainer *et al.* conclude that the EUSF is not a good example of redistributive solidarity as it seems to favour wealthier Member States, such as Austria, despite its relatively greater capacity to cope with crises without assistance, *ibid.*, 801-803.

²³⁶ *Ibid.*, 803.

²³⁷ *Ibid.*, 804.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

between the state's public purse and its private insurance.²⁴¹ Their analysis explains that there is little incentive for governments to buy private insurance for state assets (roads, infrastructure, etc. that may be damaged in the event of natural disaster) because the price can be much higher than expected losses and the price of the losses can be distributed amongst tax payers as they arise at low cost to each person.²⁴² The effect of this, Hochrainer *et al.* argue, is that the burden of risk is placed on citizens, with that burden proving heaviest for those on the lowest incomes and in the poorest Member States.²⁴³ The fund exacerbates this by encouraging risky behaviours by the Member States.²⁴⁴ They argue that greater efficiency could be achieved "by reorienting all or part of the Fund from a post-disaster response and aid instrument to a pre-disaster, risk-based solidarity instrument".²⁴⁵ Through fairer distribution of the risk, such a mechanism would avoid the burden falling on those least able to pay. However, such an approach would require much greater integration of resources than presently exists, which would limit the available sphere for independent national-level action by the Member States. This conflict is acknowledged by Boin and Rhinard:

Following a major crisis, or when confronted with the complexities of new threats, leaders often declare "solidarity" and express a desire to take strong collective action. Yet they rarely follow through by empowering the EU to take action through the provision of strong legal bases on which to act.²⁴⁶

There are two principal ways in which this analysis of the EUSF contributes to the solidarity matrix and thus to the development of our understanding of the constituent factors of the principle of solidarity. First is the timing of the solidarity, relating to the eighth matrix point. Hinted in relation to solidarity as 'preparedness' under Article 222 TFEU, the Member States disagree as to when the idea of solidarity requires them to act relative to the emergency situation to which the EUSF responds.²⁴⁷ Should the funding be reserved for preventative and preparatory measures, enabling the Member States to respond

²⁴¹ *Ibid.*, 805-806.

²⁴² *Ibid.*, 806.

²⁴³ *Ibid.*, 805.

²⁴⁴ *Ibid.*, 808.

²⁴⁵ *Ibid.*, 806.

²⁴⁶ Above note 202, 19.

²⁴⁷ Above notes 230-231.

to crises better when they arise in future? Or should the funding be used to support responses to crises? In constructing a solidarity measure that responds to this issue, the prospect is raised of unintended, and unwanted, repercussions of solidarity. Hochrainer *et al.* warn that where the EUSF is used to respond to a crisis, this may encourage the Member States to engage in risky behaviour, such as failure to undertake adequate planning.²⁴⁸ This recalls the warnings of the risk of moral hazard in the Eurozone bailouts articulated in Article 125(1) TFEU.

Second, solidarity under the EUSF speaks to the third matrix point, that is, the trade-off between maintaining a sphere for individual action and the ability of the group to take collective action. There is disagreement between the Member States as to which of these should be prioritised under the EUSF, with some preferring to enhance the ability of Member States to respond at the national-level to crises and others preferring to establish EU-level responses with shared resources.²⁴⁹ In this context, solidarity is used to support arguments for centralisation and supranationalism on the one hand and arguments for the retention of de-centralised, national-level capacity on the other.

In summary, both the Solidarity Clause and the EUSF demonstrate that there is a strong association between solidarity and crises in the EU. Closer analysis of these measures does not reveal a unified idea of ‘emergency solidarity’, but adds to our understanding of solidarity as based on a number of factors that vary between measures. The invocation of ‘solidarity’ has been used to support arguments for centralisation and Union-level responses, but the EUSF demonstrates the limits to which the Member States are willing to support this. Emergency solidarity in the EU also highlights a tension between national-level or intergovernmental action, described as a preference for sovereignty, and Union-level supranational action.

4. CONCLUSIONS

‘Solidarity’ is a prominent feature of the EU, and is used to express a variety of different meaning across, and within, policy areas. This chapter maps and interrogates its use in order to establish how the

²⁴⁸ Above note 244.

²⁴⁹ Above notes 230-231.

term is used in the EU as a specific context for solidarity. This section draws together the observations made of the nature of solidarity in various guises to contribute to the ambition of the first part of the thesis, namely building a picture of solidarity.

Solidarity between citizens is the instinctive meaning attached to the principle of solidarity in the EU, and is most developed in case law, through which the Court maintains a clear understanding of what ‘solidarity’ entails. In the competition case law, the Court expressly highlights factors that mark a scheme out as an expression of solidarity. These include: the redistribution of income through a compulsory scheme in which benefits are not connected to contributions;²⁵⁰ that contributions do not reflecting risk;²⁵¹ and the absence of a medical examination being required before acceptance to the scheme.²⁵² In contrast, the scheme in *Federation Française* is found by the Court not to be an expression of solidarity because it is optional and the benefits offered reflect contributions.²⁵³ A summary is offered in *Sodemare*, that solidarity is the “inherently uncommercial act of involuntary subsidisation of one social group by another”.²⁵⁴ Solidarity is for a closed group and is the opposite to (liberal) economics.

In its equal treatment and free movement of people case law, the Court is less explicit about the factors that contribute to its understanding of solidarity. Nevertheless, it arguably applies the same principles when calling for an extension of national solidarity to moving Union citizens.²⁵⁵ The Court acknowledges national social welfare provision as well-established examples of national social solidarity. These frequently conform to the same parameters identified by the Court in its competition case law, though it does not expressly measure these welfare provisions are not expressly measured against them. As an expression of transnational social solidarity, the Court asks the Member States to make the bounds of national solidarity a little more flexible so as to include arriving EU citizens where they can establish a sufficient connection to warrant inclusion. As the case law has developed, the Court has rowed back on its request for flexibility,²⁵⁶ but the Court’s attachment to this understanding of

²⁵⁰ Above note 19.

²⁵¹ Above note 25.

²⁵² *Ibid.*

²⁵³ Above note 29.

²⁵⁴ Above note 35.

²⁵⁵ Above notes 64 and 67.

²⁵⁶ Above note 69.

solidarity remains, as shown by the fact that the new approach is not described in solidaristic terms. A long-standing example of this solidarity between citizens is the willingness of the Member States to open healthcare systems to nationals of other Member States, though this is carefully balanced with a political preference for national level organisation.

A similar understanding of solidarity is expressed in the redistribution of resources between the Member States, which is more similar to the wording of Article 80 TFEU. Instead of the subsidisation of one social group by another, under the Structural and Cohesion Funds a less economically developed area is subsidised by one that is more economically developed. In the words of the Article 174 TFEU, the purpose of the Funds is: “[R]educing disparities between the levels of development of the various regions and the backwardness of the least favoured regions”. However, these Funds are not only interesting because they mirror an understanding of solidarity that originates between citizens at the inter-state level. It is also interesting to observe the conflicts of opinion as to the nature of the redistributions.²⁵⁷ Expressly, the Funds exist for the benefit of the least economically developed areas, yet the available literature suggests that this is not always reflected in their operation, with some more economically developed areas advocating a distribution that provides ‘something for everyone’.²⁵⁸ Both of these approaches could be justified on the basis of solidarity.

Redistribution between the Member States using the Euro in response to the Eurozone financial and banking crisis similarly accommodates different visions of solidarity. On the one hand, according to the dominant narrative of the crisis, solidarity (in the form of financial assistance) was provided to the Member States in need, but strictly only where this was necessary for the collective good. Under the ESM, assistance is expressly reserved to situations in which it is indispensable to safeguard the stability of the Eurozone as a whole.²⁵⁹ On the other hand, other explanations of solidarity follow from an alternative narrative of the crisis that blames inherent macroeconomic imbalances in the Eurozone

²⁵⁷ Of course, these debates also take place in the context of the Member States’ welfare systems, but it is more useful to examine their nature in at the inter-state level in the EU when trying to construct a picture of solidarity in the EU.

²⁵⁸ Above notes 116, 119 and 120.

²⁵⁹ Above note 168.

rather than economic mismanagement by certain states.²⁶⁰ This solidarity understands the necessity for financial assistance as arising from the wrongs caused by the design and operation of the Eurozone.²⁶¹ This alternative explanation for inter-state redistributive solidarity highlights that flexibility and openness of the principle of solidarity. There is not one, ‘correct’ way of understanding solidarity, only a multitude of meaning.

The most express references to solidarity in the EU relate to responses to emergencies. This solidarity is not redistributive, for the benefit of one or all, but instead emphasises collective action in a time of crisis. Article 222 TFEU, the so-called ‘solidarity clause’, conveys an ambiguous and flexible solidarity. It contains an obligation for the Member States to act jointly, but makes no demands as to the nature of that action, leaving it open to the Member States’ interpretations. Article 222 TFEU’s solidarity is voluntary and altruistic: the assistance is at the discretion of the donor state.

On its face, the EUSF offers a much more tangible and defined expression of solidarity. It expresses a practical solidarity through the provision of financial assistance and a symbolic solidarity through the choice to describe it in this way. Digging a little deeper, the Member States disagree as to the best way to develop this solidarity between improving preparation at the national level and creating supranational response capacities.²⁶²

Thus this chapter has demonstrated that there is not a single or unified definition attributable to the word, ‘solidarity’, within the European Union. Instead there are a number of different, and potentially conflicting, understandings. Through identifying these and demonstrating the impact of a supranational context on the articulation of the theoretical aspects of solidarity, this chapter adds to the picture of solidarity built in chapter one. It fleshes out the five points of the solidarity matrix that chapter one identifies and adds three more.

The first factor is whether solidarity is between people or between states. Chapter one shows that the most common association of the word is with solidarity between people, which, when applied to the

²⁶⁰ Above note 170.

²⁶¹ Above note 129.

²⁶² Above note 213, 103.

context of asylum, would intuitively suggest showing solidarity towards persons in need of protection. This chapter demonstrates that this predominantly human understanding of solidarity is expressed in the EU. The Court refers directly to this type of solidarity, at the national level in the competition case law and stretching it transnationally in the context of free movement of persons. This is not to say that the Member States are absent from these expressions of solidarity, rather they play a key role in facilitating redistributive solidarity between citizens. In this role, the Member States represent their citizens in order to coordinate solidarity within a large group of people. The EU also understands solidarity directly between the Member States, however, as demonstrated through the Social and Cohesion Funds, the ESM, the Solidarity Clause, and the EUSF.

The second factor asks whether solidarity is necessarily a social phenomenon, or whether it can also express economic arrangements? Chapter one demonstrated that both approaches are possible interpretations of the term, and this factor is illustrated particularly well in the context of the EU in its divisions into the social and the economic. Unsurprisingly, then, this chapter expands on this point. It demonstrates that the EU can understand solidarity as social, indeed in the competition case law, solidarity is defined as expressing a purely social bond and as antithetical to economics. It also shows the use of solidarity to describe the redistribution of wealth between the Member States as part of the economic plan to right dangerous imbalances in the Eurozone. More interestingly, and building new depth to this matrix point, this chapter shows that this distinction cannot always be so sharply drawn and, rather, that solidarity might simultaneously respond to social and economic aims. Solidarity is neither completely social nor economic, and can be both at the same time.

The third factor focuses on the relationship between actors in expressing solidarity: whether it subsumes the individual actors into a 'whole', or whether it maintains their status as separate entities. In the context of solidarity between the Member States in the EU, these might be likened to the ideas of supranationalism and intergovernmentalism. This is a key element of expressions of solidarity in the EU. The Member States have a preference for expressions of solidarity through which they can maintain their individual, national space to determine the extent of their involvement, particularly where the policy area is one in which there is political sensitivity to retaining 'sovereignty'. This is seen in relation

to responsibility for public safety and security in Article 222 TFEU and in the EUSF. This can be posed as a tension between sovereignty and solidarity as inherently conflicting ideas. ‘Sovereignty’, and the political desire to ‘protect’ it, in this sense is described by Boin and Rhinard:²⁶³

Member states used to make delegation choices based on functional grounds, using... technical arguments to depoliticize issues and conceal the tension inherent in the particular choice. Nowadays, following growing public attention to EU issues, the perception that member state governments are “giving away sovereignty” can come with a high political price at home... National politicians have become more risk-averse under the glare of scrutiny, being careful to draw “red lines” during negotiations and to project a heroic image of guarding national sovereignty. Issues seen as core to the responsibility of the nation-state – such as security and crisis management – generate high degrees of public attention and thus dampen the willingness of leaders to delegate responsibility to the EU.

In policy spheres that are sensitive in this way, the idea of solidarity can act to encourage collective action at the EU-level (be it intergovernmental or supranational) without setting fixed demands as to the type of action required. This chapter does not view ‘solidarity’ and ‘sovereignty’ as opposites, rather it argues that the idea of solidarity is used to manage tension at the meeting point between Member State and Union action, particularly in policy areas that are more politically sensitive. ‘Solidarity’ is attributed with a variety of meaning in the EU, expressly including action by the Member States for example in relation to the availability of national welfare provisions to Union citizens from other Member States. Therefore, it is not convincing to conclude that ‘solidarity’ is a shorthand for Union-level action. Nevertheless, it is clear that the idea is used in many different policy spheres to manage the political tension relating to the preferred level of policymaking and legal regulation.

The fourth element is closely related to the third. It distinguishes between solidarity through which the actors participate voluntarily and that through which they act according to obligation. Chapter one shows that either approach might be described as solidarity in theory, and this chapter shows this to be

²⁶³ Above note 202, 16.

borne out in practice. Through the ESM, the Member States create obligations to contribute to collective fund through which they can demonstrate solidarity when it is needed, and the Social and Cohesion Funds operate similarly. In solidarity between citizens at the national-level as described in the competition case law, compulsory contributions are seen as a hallmark of solidarity. On the other hand, the Member States are keen to preserve their discretion to act as they see fit by creating voluntary solidarity mechanisms, which is seen particularly in relation to emergency solidarity.

The fifth factor is the scope of solidarity: who is included? Chapter one distinguishes between universalist and particularist solidarities, which extend respectively to all or to a fixed group. With regard to the latter, chapter one questions whether the members of the group need to feel alike in some way to share solidarity, or whether they can collectively decide to create solidarity between themselves. This factor is picked up in this chapter as particularly important for understanding solidarity in the EU, most notably in the context of extending national solidarity to moving, non-national Union citizens. The request to admit such persons into the sphere of national solidarity was previously balanced closely by the Court, limited to those who could demonstrate a ‘real link’ with the host state. This was based on the need to avoid stretching the bounds of ‘too far’, which would happen if the host state was asked to show solidarity with someone who had not demonstrated that they ‘belonged’ in the host state. This suggests a need for a feeling of similarity between the actors of solidarity in practice.

This example also supports the conclusion that this need to articulate the boundaries of solidarity becomes particularly acute where solidarity is articulated in legal mechanisms. Where solidarity exists as an intangible notion and is employed in rhetoric, the need to articulate its scope is less pronounced than when it is manifested in a legally constituted mechanism. Through the juridification of solidarity, the importance of the scope and boundaries as an element of solidarity become more important.

The challenge presented by the need to determine the scope of solidarity is also manifested in solidarity between states. The political science and economics literature on the Social and Cohesion Funds describes a shift in the redistributive principle that the Funds embody that corresponds with the

accession of more Member States from 2004.²⁶⁴ As the group of Member States became more diverse, the original Member States became less willing to share their resources, suggesting the salience of similarity in solidarity.

These five factors, first identified in chapter one, are developed in this chapter to add more detail to the emerging picture of solidarity as captured by this matrix of factors. In addition, this chapter contributes three more factors that become clear from its analysis in a practical context. The sixth is the politicisation of the term ‘solidarity’, that is, its use to express a variety of political agendas. In the context of free movement of persons and their access to the welfare system of the host state, the idea of solidarity is used in different ways to advance different preferences for the boundaries of those systems. In its references to solidarity, the Court encourages the Member States to widen access to their national welfare provisions, asking them to show solidarity with moving citizens by allowing them to make use of this provision as far as is ‘reasonable’. On the other hand, defining solidarity as a national phenomenon, based on a peculiar bond between citizens of a states, expresses a political preference for retaining national restrictions on the welfare state. Similarly, in relation to the Eurozone crisis, the understanding of solidarity that the bailouts express varies according to the describer’s preferred theory of economics and political-economic sympathies.

The second new factor highlighted in this chapter, the seventh of the matrix is that states seem to readily commit to expressions of solidarity where there is little cost, such as references to solidarity in a symbolic or rhetorical way, or where the cost is borne elsewhere, such as from money already committed to the EU budget. Where the costs are more significant, the Member States are keen to tread more carefully. For example, under the EHIC scheme, the Member States are willing to meet the short-term and emergency healthcare costs of tourists and other temporary visitors from other Member States, but this does not extend to unlimited equal access to healthcare in all Member States.

The eighth factor is the close association between the ideas of solidarity and crisis in the EU. Those measures expressly labelled as expressions of solidarity by including the word in their title refer to

²⁶⁴ Above notes 116, 119 and 120.

responses to crises, as explored in section three. Yet even in the absence of such a designation, solidarity is still associated with responding to crises, including the Eurozone financial crisis. If we look a little deeper into this aspect of solidarity, it becomes apparent that emergency solidarity might be expressed by diverse mechanisms, including those which help individual members to prepare to respond to crises facing them, or, alternatively, measures that pool collective resources that may be deployed wherever a crisis arises.

This chapter contributes to the picture being built of solidarity through the matrix of factors identified in the first part of the thesis. The next chapter will direct its attention to solidarity and burden-sharing in the context of refugee protection beyond the EU, in other international and regional arrangements. Its examination of solidarity in this context contributes the final layer to this matrix of factors, which are used to analyse solidarity in the CEAS in the second part of the thesis.

CHAPTER THREE: SOLIDARITY IN REFUGEE LAW: INTERNATIONAL AND REGIONAL BURDEN-SHARING

The Geneva Convention relating to the Status of Refugees 1951 provides that each state is responsible for all aspects of protection for those refugees who reach the state's territory.¹ Each state has an obligation of *non-refoulement* under both the Convention and customary international law.² This is the fundamental norm of asylum law: the obligation of a state to provide protection to persons who cannot avail themselves of the protection of their home state.³ The primary relationship envisioned by asylum, then, is the relationship between the host state and the person in need of protection.

This results in responsibilities falling disproportionately on states that are most easily accessed by people fleeing persecution, namely those countries closest to refugees' countries of origin.⁴ This largely means developing states in the global South.⁵ Other states are encouraged, but not obliged, to assist these receiving states in providing refugee protection in a spirit of solidarity. The importance of such assistance is highlighted by Goodwin-Gill, who argues that leaving refugee protection to one or few states so that demand vastly exceeds their capacity may lead them "to think that *refoulement*... was their only way out, but they would not be the only ones at fault if they did".⁶ However, states in the global North do not have to contribute to the cost of protection in the South, it is as voluntary as "a matter of charity",⁷ and as such cannot be relied on by those states with a large share of protection responsibilities

¹ Geneva Convention relating to the Status of Refugees 1951 (Refugee Convention), subsequent references to the Refugee Convention include the New York Protocol Relating to the Status of Refugees 1967 which removed the temporal and geographic limits present in 1951.

² *Ibid.*, Article 33; Phil C. W. Chan, "Protection of Refugees and Internally Displaced Persons: Non-Refoulement under Customary International Law?" (2006) 10(3) *International Journal of Human Rights* 231, 236.

³ Gina Clayton, *Textbook on Immigration and Asylum Law* (7th edn., Oxford: OUP, 2016), 439-440.

⁴ The Refugee Council reports that 75% of the world's refugees live in Africa and Asia, <http://www.refugeecouncil.org.uk/tellitlikeitis> [accessed 05/08/2013]. See also UNHCR, *Global Trends 2013*, (Geneva: UNHCR, 2014), 11-17, available at http://www.unhcr.org/5399a14f9.html#_ga=1.78181908.1495792015.1398776283, [accessed 03/12/14].

⁵ The UNHCR reports that in 2016, 84% of the world's refugees were hosted in developing countries, UNHCR, *Global Trends, Forced Displacement in 2016* (Geneva: UNHCR, 2017), 2.

⁶ G. S. Goodwin-Gill, "Asylum: the Law and Politics of Change" (1995) 7 *IJRL* 1, 5.

⁷ J. C. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Orientated Protection", (1997) 10 *Harvard Human Rights Journal* 115, 141.

through geographical proximity. Solidarity mechanisms react to this, attempting to create assistance obligations between states to offer a truly international response to refugee movements.

Refugee law requires states to take responsibility for refugees individually who present themselves, but it has long recognised the importance of collective action and cooperation to achieve this. The earliest example might be the implementation and recognition of the refugee travel document, the so-called Nansen Passport, in 1921 under the first League of Nations High Commissioner for Refugees, Fridtjof Nansen.⁸ This agreement showed international willing to recognise each other's decisions as to refugee status so that refugees may travel between them on the equivalent of a passport.⁹

It should be noted that the term, 'solidarity', is rarely used in the international, intergovernmental context, the more common reference being to 'burden sharing'. This is true of the Preamble to the Refugee Convention in 1951, which declares that "international co-operation" is required to reach a "satisfactory solution", given that "the grant of asylum may place unduly heavy burdens on certain countries".¹⁰ This terminology might be considered unnecessarily pejorative towards refugees – describing them as a burden to be borne in the least inconvenient way possible – and this is reflected in a shift in favour of 'responsibility sharing'. This latter formulation has been used by the EU, including in Article 80 TFEU, which asks for "fair sharing of responsibility". Regardless of whether burdens or responsibilities are shared, it is clear that 'sharing' is the essence of solidarity in international refugee law,¹¹ although there has been no common approach to this sharing.

A number of regional sharing arrangements, applying similar principles, have also arisen. This chapter considers the approaches taken to solidarity in other regions and at the international level and reflects on their merits and problems. Although the CEAS is the most integrated and developed regional arrangement, it is not the only one. This chapter considers the regional arrangement in the Pacific,

⁸ Poul Hartling, "International Solidarity and the Protection of Refugees" in International Institute of Humanitarian Law, *Congress on International Solidarity and Humanitarian Actions, organised under the auspices of the International Red Cross and the United Nations High Commissioner for Refugees*, (San Remo: International Institute for Humanitarian Law, 1980), 238.

⁹ Refugees are largely unable or unwilling to travel on the passport of their home state, from which they have fled.

¹⁰ Above note 1, Preamble.

¹¹ Indeed, Noll considers 'international solidarity' to be synonymous with burden- or responsibility-sharing, G. Noll, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague: Martinus Nijhoff, 2000), 264.

spearheaded by Australia, and an agreement between Canada and the USA concerning applications for international protection made at their shared land border. These will be considered alongside the global and international burden-sharing schemes to understand solidarity in refugee law, and reflect on the impact of this on our understanding of solidarity in the CEAS. We find no uniform approach, but this chapter offers insight on the particularities of solidarity in the asylum context, contributing to the matrix of solidarity.

The concept of solidarity between states under international refugee law has developed to become complex and problematic. There has been no common international approach, and no clear understanding of what the principle of solidarity requires emerges. Through consideration of the various approaches of the international community, it can be concluded that solidarity mechanisms essentially require that all or many states share responsibility for primary protection, resettlement, financial assistance, and technical and logistical support, in order that all of these requirements need not be met by only one or a small number of states. To achieve this, two questions must be answered: first, how to allocate these roles between participating states; and, second, how to distribute the total amount of responsibility? Or, in other words, qualitative and quantitative distribution of protection responsibilities.

This chapter is structured following these two questions. The allocation of roles is addressed first, by outlining two alternative approaches – differentiated or similar protection roles. ‘Differentiated roles’ refers to systems that allocate that different protection roles to different states, whereas with ‘similar roles’, each state assumes all the protection roles for refugees (so roles are the same), who are divided numerically between states. This raises the political issues of equal or exploitative relationships between states and the legal uncertainty connected to ‘protection elsewhere’ regimes that underpins them both. The second part reviews the distribution of the quantity of responsibilities. Again, two distinct alternatives are explored: the voluntary assumption of responsibility, under which states choose the extent of their own responsibilities; or the fair-sharing of responsibility, which imposes an allocation upon states according to some measure of ‘fairness’. Finally, the second part addresses a third model of solidarity that attempts to combine these two approaches – Schuck’s *Modest Proposal* of 1997. Each of these will be analysed in light of solidarity between states and standards of refugee protection. This

chapter concludes that there are a number of problems facing solidarity at international and regional levels, meaning that these mechanisms are not suitable for direct transposition to the CEAS, yet these debates can inform our understanding of what solidarity in the CEAS.

This is not to suggest that no other issues are negotiated in forming an international solidarity mechanisms. These two have been selected as the most fundamental and as the most prominent when transferring this concept to the EU level. For example, a significant question at the international level is the ideal scope of a solidarity arrangement: should it be limited to sharing refugee protection, or should it be extended to cover wider issues such as security and development?¹² Before the CEAS, some Member States were keen to have wider considerations taken into account when discussing responsibility-sharing for refugee protection. For example, the UK and France wanted their military expenditure during the Kosovo crisis to be included when determining the responsibilities of European states towards its refugees, and Germany was initially reluctant to contribute funds for rebuilding Bosnia post-war, considering that it had made its contribution by offering temporary protection to approximately 350 000 Bosnians.¹³ However, the CEAS has developed to consider responsibility-sharing for refugee protection independently of other issues, an approach recently reaffirmed in a report to the European Parliament by its Committee on Civil Liberties, Justice and Home Affairs: “The Rapporteur wants to stress that asylum and migration flows have respective specificities that can under no circumstances be neglected or amalgamated”.¹⁴

1. ALLOCATING PROTECTION ROLES

There are two different approaches to allocating protection roles in international and regional solidarity mechanisms: to divide different aspects of protection between states, so, for example, some pay for refugee protection and others host refugees on their territory; or to share the total amount of protection between states, with each undertaking all aspects of protection. Commonly, different roles are allocated

¹² Amitav Acharya and David B. Dewitt, “Fiscal Burden-Sharing” in James C. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff 1997) 111, 131-136. See further on Convention Plus, text accompanying notes 49-50 below.

¹³ S. F. Martin, A. I. Schoenholtz and D. Fischer “The Impact of Asylum on Receiving Countries” in G. J. Borjas and J. Crisp (eds.), *Poverty, International Migration and Asylum* (New York: Palgrave Macmillan 2005), 113.

¹⁴ Committee on Civil Liberties, Justice and Home Affairs, European Parliament, *Report on enhanced intra-EU solidarity in the field of asylum* (2012/2032(INI)), 15.

to different states according to their individual interests or preferences. This is widely seen to be an effective way of facing divergent political interests in a way that is conducive to providing the most refugee protection, as set out in part one. However, as the second part demonstrates, this approach privileges the interests of more powerful states, compromising equality between states. Alternatively, states might undertake similar protection roles, sharing the quantity, rather than the elements, of protection, which would seem to avoid this. The EU's Dublin system¹⁵ is closer to the second approach and is formally set out as such, though in practice it exhibits aspects of the first. It is explored in part three. Regardless of which approach is favoured, both suffer legal uncertainty as each is rooted in the same foundation in international law governing 'protection elsewhere' schemes, as set out in part four.

1.1. OPTION 1: DIFFERENTIATED PROTECTION ROLES

The first way that an agreement to share refugee protection between states might be organised is by separating out different aspects of providing this protection and allocating these roles between a larger group of states. This avoids the responsibility for providing protection being concentrated as the sole responsibility of those states closest to the country of origin.

Hathaway's model of shared protection is one example of a solidarity mechanism based on differentiated protection roles. It promotes "common but differentiated responsibility",¹⁶ in preference to the present "atomised" and individualised responsibility and its deficiencies. Primarily, it envisages temporary protection in the region of origin and reserves the permanent immigration usually associated with asylum in the North as a course of last resort in exceptional cases.¹⁷ Relieved of any usual duty to offer physical protection to refugees, the model expects wealthy Northern states to fund the protection offered by states in the region of origin. Different responsibilities within the protection regime are

¹⁵ Regulation (EU) No 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, OJ [2013] L180/31.

¹⁶ *Ibid*, 145.

¹⁷ For example, where the situation in the country of origin cannot be resolved during the period of temporary protection, or in especially vulnerable cases, such as unaccompanied minors or victims of serious physical or sexual abuse.

allocated to different categories of states – countries of origin, countries of first asylum, transit countries and permanent asylum countries.

Hathaway and Neve argue that this model would improve refugee protection and expand protection capacity through the provision of guaranteed Northern finance, and that this guarantee would be obtained through the cessation of all but exceptional instances of physical refugee reception in the North.¹⁸ This model considers differentiated state roles to be a fundamental element of international cooperation for refugee protection, or solidarity. Fearing that refugee protection would become ‘out of sight and out of mind’ for states in the North, Anker, Fitzpatrick and Shacknove have expressed scepticism towards this idea. They argue that if refugee protection is confined to the South, over time Northern states are likely to forget their obligations to provide financial assistance and “cherry-pick” the parts of Hathaway’s model that allow them to diminish their own status determination procedures and reception facilities.¹⁹

Hathaway and Neve model cooperation around an “inner core” of close cooperation between neighbouring states, and an “outer core” to support it.²⁰ The inner core is envisioned as comprising those states receiving the largest numbers of asylum seekers, states in the region of origin, a protection idea that first “came into vogue” following the increase in non-European asylum seekers in the 1970s and 1980s.²¹ Byrne and Shacknove highlight issues of global justice in summarising the risks associated with this approach: that it “may allow affluent States to shirk their proper role in global burden sharing, especially where their own past colonial and present economic and foreign policies contribute significantly to forced migration”.²² Such risks are acknowledged by Hathaway and Neve in their justification for the second part of their proposal, the outer core:

¹⁸ Above note 7, 145-147.

¹⁹ D. Anker, J. Fitzpatrick and A. Shacknove, “Crisis and Cure: A Reply to Hathaway/Neve and Schuck”, (1998) 11 *Harvard Human Rights Journal* 295, 305.

²⁰ Above note 7, 190-194.

²¹ Rosemary Byrne and Andrew Shacknove, “The Safe Country Notion in European Asylum Law” (1996) 9 *Harvard Human Rights Journal* 185-228, 213.

²² *Ibid*, 213.

It is clearly unreasonable to propose a system of collectivized responsibility toward refugees that amounts to no more than a proposal for already overburdened countries to share each other's burdens.²³

States forming an outer core are willing to support the inner core despite not being immediately affected. Their proposal posits that states would be induced to participate in the outer core since it offers a morally preferable alternative to current deflection policies and because of any interests the state has in the inner core, such as important trade or security relationships or, more generally, cultural and religious connections.²⁴

Elucidating this point elsewhere, Hathaway argues with Castillo that this model of differentiated roles is also desirable from a protection perspective, since it addresses the “more brutal” measures taken by Northern states to keep “as many refugees as possible as far away as possible from their territories”.²⁵ They suggest that refugee protection should be temporary for five years in order to limit the period of limbo between a grant of temporary protection and permanent resettlement and a durable solution. The stress and instability of this period for persons in need of protection is currently exacerbated by the incentive for Southern states to detain refugees in camps and the efforts of Northern states to limit access to their territory and to implement increasingly restrictive asylum procedures.²⁶ Hathaway presents differentiated roles as a means of removing these tendencies and thus as an element of solidarity that improves refugee protection.

Another example of a solidarity mechanism based on differentiated state responsibilities, though this time from state practice, is the Australian ‘Pacific Solution’. This regional scheme of burden sharing was introduced by an amendment to the Australian Migration Act 1958,²⁷ permitting the designation of certain areas of Australian sovereign territory as ‘excised off-shore places’.²⁸ This allowed the

²³ Above note 7, 192.

²⁴ *Ibid*, 192-193.

²⁵ Manuel Angel Castillo and James C. Hathaway, “Temporary Protection”, in James C. Hathaway (ed.), *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff, 1997), 1-21, 5.

²⁶ *Ibid*, 19.

²⁷ Migration Amendment (Excision from Migration Amendment Zone) Act 2001, amending Migration Act 1958

²⁸ *Ibid*, Schedule 1(1).

designation of any application for entry to Australia, including as a refugee, made in such places as invalid,²⁹ thereby permitting the removal of such applicants to ‘designated countries’ in the Pacific region. Kneebone and Pickering observe that this preserves and reflects Australia’s historic preference for offering resettlement to screened, off-shore refugees rather than processing spontaneous arrivals.³⁰ Only Nauru and Papua New Guinea were willing to become designated countries for removal,³¹ and have received financial assistance from Australia in return.³²

Bø describes such designation of restricted zones as “legal invention”³³ and criticises this practice:

National governments behave as if these practices were in accordance with international law, behaviour which might be described as provocative. Lawyers in the government administration try to find loopholes in the legislation or ‘invent’ new rules which they present as legally binding, to diminish the responsibility of the nation state towards refugees. This is justified by the government by a very general reference to the political aim of limiting the number of immigrants and asylum seekers.³⁴

If this is true of the Australian government, the Pacific Solution displays an interpretation of solidarity as burden-shifting by a more powerful state, employing questionable legal tools to achieve exclusionary political ends.

The Comprehensive Plan of Action (CPA) for Indo-Chinese Refugees³⁵ is another, more international, example of cooperation based on differentiated state roles subject to these objections. Countries of

²⁹ *Ibid*, Section 1.

³⁰ S. Kneebone and S. Pickering, “Australia, Indonesia and the Pacific Plan” in S. Kneebone and F. Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Books, 2007) 167-187, 169-173.

³¹ Statement of Principles and First Administrative Agreement, 10 September 2001; and Memorandum of Understanding of 11 October 2001 respectively. Kneebone and Pickering, *ibid*, 174, suggest that Indonesia may have been Australia’s preferred partner for this venture but that it refused on the grounds that “It was not prepared to be ‘bought out’ by its wealthier southern neighbour and add to its woes”.

³² S. Taylor, “The Pacific Solution or a Pacific Nightmare?: The Difference between Burden Shifting and Responsibility Sharing” (2005) 6(1) *Asian-Pacific Law and Policy Journal* 1, 21-24 and 29.

³³ B. P. Bø, “The ‘triple role’ of government in asylum and refugee politics”, in P. Muus (ed.), *Exclusion and Inclusion of Refugees in Contemporary Europe* (Utrecht: European Research Centre on Migration and Ethnic Relations, 1997) 40, 46.

³⁴ *Ibid*, 47.

³⁵ Office of the United Nations High Commissioner of Refugees: International Conference on Indo-Chinese Refugees. Report of the Secretary-General. U.N. GAOR 44th Sess., U.N. Doc. A/44/523 (1989).

origin agreed to accept back those who had been ‘screened-out’ by the status determination procedure.³⁶ First countries of asylum agreed to permit access to their territory to refugees leaving Vietnam, and to undertake refugee status determination. Third states (particularly the USA and other Western states) undertook to offer resettlement places and to make financial contributions to fund these arrangements (particularly Japan). These are described as the ‘three pillars’ of protection by Towle, who argues that the CPA was a sound model of burden-sharing because the concerned states were bound together through “interdependent and mutually reinforcing commitments”.³⁷ These ‘three pillars’ illustrate the roles to be shared by a solidarity mechanism using the differentiated approach.

The success of this initiative as a solidarity measure was proclaimed at the closure of the final refugee camp in Malaysia by the first head of the UNHCR Steering Group responsible for facilitating the CPA, Sergio de Mello:

The CPA has been a model for multi-lateral cooperation, built on the principles of international solidarity, burden-sharing and proper acceptance of responsibilities. Its purposes were to end the ongoing tragedy on the high seas and to preserve asylum while reducing incentives for a mass outflow. It has been successful.³⁸

Despite this success, it has been argued that dividing protection roles between states facilitates that exploitation of the less powerful by the more powerful states, a challenge addressed in the next section.

1.2. COMPROMISING THE EQUALITY OF STATES?

This criticism arises in response to the pragmatic intention to disassociate asylum and migration by dividing protection roles in an attempt to secure the support of Northern states committed to limiting migration to woo domestic electorates. In defending this approach, Castillo and Hathaway argue that to

³⁶ Towle highlights this acceptance of a degree of responsibility by the country of origin as particularly important, but unusual, in the success of a burden-sharing arrangement, R. Towle, “Process and Critique of the Indo-Chinese Comprehensive Plan of Action: An Instrument of Burden-Sharing” (2006) 18 *IJRL* 537, 562.

³⁷ *Ibid*, 561-562.

³⁸ UNHCR Press Release, ‘UNHCR and Malaysia Close Camp for Vietnamese Boat-people’, 25 June 2001, <http://www.unhcr.org/3ae6b81838.html>.

maintain this ‘linkage’, illustratively described by Betts and Durieux as the “asylum-migration nexus”,³⁹ provides a disincentive for Northern states to participate in a solidarity arrangement.

To do this, Hathaway’s model suggests that permanent resettlement should be within the state of temporary protection where possible, coupled with the option of voluntary return to the state of origin.⁴⁰ This is presented as the most desirable option for the individual since it allows continued residence in the place where she or he has been living for the previous five years, avoiding another relocation and integration period.⁴¹ This is undeniably a benefit, but this proposal must be seen in light of its other intention: to disassociate refugee protection and migration to the North.

Advocates of this approach usually frame this disassociation in relation to the legitimate interest a state has in immigration control.⁴² However, this framing only operates from the perspective of Northern states, either neglecting or disregarding this same interest for Southern states. It would seem that Southern states are expected to forgo this legitimate interest in return for financial assistance in providing refugee protection.

This model, therefore, is problematic in that it preserves inequality amongst states,⁴³ favouring the interests and free choice of wealthy states and traditional hegemonic powers over the interests of the states that bear the majority of the responsibility for refugee protection. Cooperation through differentiated roles achieves solidarity through mutual support between states and sharing of responsibilities, but in doing so seems to privilege the interests of powerful states in a pragmatic bid to find some solution, even if this requires overlooking objections to it by less powerful parties.

³⁹ A. Betts and J.-F. Durieux, “Convention Plus as a Norm-Setting Exercise” (2007) 20 *JRS* 509, 513.

⁴⁰ Voluntary return is widely agreed to be the most desirable option for refugees, and is strongly and consistently advocated by the UNHCR, though it is also recognised that often this will not be a safe option, and thus continued settlement outside of the country of origin must also be available. Points 2-3 of Goal 5, UNHCR, *Agenda for Protection* (3rd edition, October 2003), 75-77, available at <http://www.unhcr.org/3e637b194.html>, [accessed 03/10/2013].

⁴¹ Above note 25, 19.

⁴² Kay Hailbronner, “The Concept of Safe Third Country and Expedient Asylum Procedures: A Western European Perspective” (1993) 5 *IJRL* 31, 32-3; Kay Hailbronner, “Asylum Law in the Context of a European Migration Policy” in Neil Walker (ed.), *Europe’s Area of Freedom, Security and Justice*, (New York: Oxford University Press, 2004) 41, 42.

⁴³ The sovereign equality of all states was reaffirmed by the International Court of Justice in *Nicaragua v United States*, Judgement of 27 June 1986, ICJ Reports for 1986, paragraph 202.

The same charge has been levelled at manifestations of this in practice. Taylor describes the Pacific Plan as an exploitation of an asymmetric power relationship that mirrors colonial practices. She argues that, given its power in relation to Nauru and Papua New Guinea, Australia “was able to take into account all economic, political and social costs and benefits to Australia... in arriving at the price it was willing to pay”.⁴⁴ Australia’s need to work with its poorest and more acquiescent neighbours is also recognised by Kneebone and Pickering.⁴⁵

Similarly, more powerful countries were able to exercise their preferences under the CPA. The USA was able to undertake its desired role of resettlement, focussing on its priorities of prisoners of re-education camps and the children of US servicemen: of a total of 400 000 departures during this period, 140 000 former prisoners and 40 000 Asian-Americans went to the US.⁴⁶ Japan was able to send a financial contribution and to avoid receiving any refugees, either as a first country of asylum or through resettlement, maintaining its preferred distance from refugee protection.⁴⁷ However, less powerful countries in the region were required to offer temporary protection and status determination. Kneebone and Rawlings-Sanaei acknowledge: “There are indicators that [the CPA] involved selective burden-sharing, which favoured the interests of the Western states, rather than any sense of genuine sharing”.⁴⁸

The Convention Plus initiative failed to reach consensus on burden-sharing agreements for this reason. The initiative, which ran from June 2003 to November 2005, was a forum for international negotiations facilitated by the UNHCR attempting to build on “issue linkages” to encourage states to make commitments to burden sharing for refugee protection.⁴⁹ This approach sought to combine questions of responsibility for refugee protection with broader migration concerns and questions of security and development to build a normative framework for international cooperation exceeding traditional humanitarian and moral appeals. Convention Plus is widely considered a failure, having reached few

⁴⁴ Above note 32, 32.

⁴⁵ Above note 30, 175 and 178.

⁴⁶ W C Robinson, “The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck” (2004) 17(3) *JRS* 319, 325-326.

⁴⁷ Above note 36, 538.

⁴⁸ S. Kneebone and F. Rawlings-Sanaei, “Introduction: Regionalism as a Response to a Global Challenge” in S. Kneebone and F. Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Books, 2007) 1-24, 14.

⁴⁹ Above note 39, 522.

substantive agreements.⁵⁰ This failure is due, at least in part, to concerns raised by states of the global South that Northern states would be absolved from their duties to refugees by paying to avoid them and that this is unfair. Concerns to this effect were also raised by Southern states during the 48th Session of the Executive Committee of the UNHCR in 1997 which was on the theme of burden-sharing.⁵¹ They were keen that Northern states were not to be absolved from their duties owed to refugees by paying to avoid them.

Aside from any philosophical or moral objections that might be made in respect of this unequal treatment, there is some evidence that it has an adverse effect of refugee protection. Gibney argues that approaches based on containment of refugees in the region of origin have only a limited capacity to provide adequate and sustainable refugee protection.⁵² Reports from first countries of asylum under the CPA indicate poor standards of protection that “amounted to little more than detention pending departure”.⁵³ There were also concerns as to the accuracy and consistency of status determination procedures.⁵⁴ With the limits to mechanisms with differentiated roles explored here in mind, the following section considers a potential alternative to differentiated protection roles, namely sharing the total amount of protection to be provided by states.

1.3. OPTION 2: SHARING TOTAL PROTECTION

The other means for distributing roles is that each state undertakes a share of status determination, physical protection and the resulting costs. It has been argued that through sharing physical reception of refugees, costs are shared more fully since there are some costs that are hard to quantify, such as those associated with social integration.⁵⁵ Further, it prevents the questionable policies adopted by many

⁵⁰ *Ibid*, 510-511, though Betts and Durieux argue that it highlighted a potential new role for the UNHCR in norm-creation, *ibid*.

⁵¹ Above note 11, 281.

⁵² Matthew J. Gibney, “Forced Migration, Engineered Regionalism and Justice between States” in Susan Kneebone and Felicity Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Books, 2007) 57-77, 65.

⁵³ Above note 46, 323.

⁵⁴ W C Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (London: Zed Books 1998), 208, referring to comments of Nguyen Dinh Thang, director of the Boat People SOS Committee in Washington, DC.

⁵⁵ E. Thielemann, “Editorial Introduction to Special Issue on European Burden-Sharing and Forced Migration” (2003) 16 *JRS* 225, 227-228.

Western states intended to deny to refugees access to their territories. Importantly it also avoids the main objection to solidarity mechanisms operating through differentiated roles: it maintains the equality of all participating states and gives equal weight to their interests, preventing more powerful states using their stronger bargaining position to further only their own interests.

This approach has been attempted in regional practice, for example the Canada-US Agreement⁵⁶ creates a formally equal role between the two participating states. The Agreement allocates responsibility for determining the asylum application of a third country national at the shared land border to the country of last presence,⁵⁷ unless an exception applies.⁵⁸ An exception will apply where the applicant: (i) has a family member in the receiving county;⁵⁹ (ii) is an unaccompanied minor;⁶⁰ (iii) has a valid visa or admission document for entry to the receiving country;⁶¹ or (iv) does not require a visa to enter the receiving country but does require a visa to enter the country of last presence.⁶² Further, Article 6 of the Agreement permits either country to assume responsibility for an application where it deems this to be within its public interest. The Dublin system in the EU operates in a similar way,⁶³ allocating responsibility to a single Member State according to a hierarchy of criteria contained in its Chapter III.⁶⁴

This responsibility entails both refugee status determination and, should the applicant be found to qualify, refugee protection.⁶⁵ Under the Canada-US Agreement, responsibility is also for all the costs

⁵⁶ Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, available at <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp> [accessed 19/06/2013], signed 5 December 2002, entered into force 29 December 2004.

⁵⁷ *Ibid*, Article 4(1). Defined as, “that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry,” *Ibid*, Article 1(1)(a).

⁵⁸ *Ibid*, Article 4(2).

⁵⁹ *Ibid*, Article 4(2)(a) and (b). Listed as, “the spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces and nephews,” *ibid*, Article 1(1)(b).

⁶⁰ *Ibid*, Article 4(2)(c). Defined as “an unmarried refugee status claimant who has not yet reached his or her eighteenth birthday and does not have a parent or legal guardian in either Canada or the United States,” *ibid*, Article 1(1)(c).

⁶¹ *Ibid*, Article 4(2)(d)(i).

⁶² *Ibid*, Article 4(2)(d)(ii).

⁶³ References herein to ‘Dublin’ are to the provisions of the Dublin III Regulation, which replaced the Dublin II Regulation from 1 January 2014 (Above note 15, Article 49). However, some criticism referred to was established in relation to Dublin II. Such criticism remains relevant since the provisions considered here have not materially changed under Dublin III, other than now applying to beneficiaries of and applicants for subsidiary protection status as well as refugee status.

⁶⁴ Above note 15, Article 3(1). See chapter four, section 3.1.

⁶⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a

inherent in these two aspects of protection, whilst in the EU, it is intended that some of the financial costs are mitigated by the resources allocated to Member States under the Asylum, Migration and Integration Fund.⁶⁶ However, the sums of money involved represent only a fraction of states' total asylum costs,⁶⁷ and thus the responsible Member State under Dublin might also be understood as bearing the financial costs of protection.

Adopting a model to share responsibilities, rather than divide roles between states, may have been an effort to avoid further entrenching inequalities between states as encouraged under the latter approach. In the EU, Member States are committed to equality,⁶⁸ with differences in decision making power arranged formally through the Treaties, for example through the weighted voting in the Council.⁶⁹ This commitment is honoured through allocating the same role in protection to each Member State under Dublin.

In practice, however, each Member State does not undertake the same role in protection. By aligning responsibility with point of entry to Union territory, the Dublin system concentrates responsibility for refugee protection in the Member States with external borders, particularly in the Mediterranean⁷⁰ but also more recently in Bulgaria. This has attracted the criticism of realising 'burden-shifting' rather than 'burden-sharing'.⁷¹ The effect is that Dublin operates to allocate different responsibilities between the

uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ [2011] L337/9, Article 13 for refugee status and Article 18 for subsidiary protection status.

⁶⁶ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/200/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ [2014] L150/168.

⁶⁷ Directorate General for Internal Policies, Policy Department C: Citizens' Right and Constitutional Affairs, "What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?" (Brussels: European Parliament 2010) PE 419.620, 121.

⁶⁸ Article 4(2) TEU.

⁶⁹ Articles 16(3)-(5) TEU, Article 238 TFEU, Article 3(3) of Protocol (36) on Transitional Provisions.

⁷⁰ F. Maiani and V. Vevsted, "Distribution of Applications for International Protection and Protected Persons" in Directorate General for Internal Policies, Policy Department C: Citizens' Right and Constitutional Affairs, "Setting up a Common European Asylum Systems: Report on the application of existing instruments and proposals for the new system" (Brussels: European Parliament, 2010) 115, 155.

⁷¹ E. R. Thielemann, "Between Interests and Norms: Explaining Burden-Sharing in the European Union", (2003) 16(3) *JRS* 253, 267; C. Costello "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection" (2005) 7 *EJML* 35, 49.

Member States, reflecting the ability of the most powerful states to safeguard and privilege their own interests under a veil of sharing and solidarity.

Of the two options for allocating protection responsibilities, differentiated roles is more common in state practice and is supported in the literature, particularly by Hathaway. However, this approach inhibits equality between states, favouring the interests of more powerful states. On the other hand, there is also some support for, and evidence of, allocating states a share of all protection roles in the Canada-US Agreement, an approach which should mitigate these problems. In the EU, the Dublin system sits somewhere between these two approaches, formally offering similar responsibilities to each Member State, but to an extent operating to differentiate states responsibilities, rendering Member States with external borders predominantly responsible for physical reception.

Regardless of whether allocated roles are differentiated or similar, or whether there are aspects of both, the question of allocation is problematic in another fundamental way. The following section sets out the uncertainty surrounding the legal foundation of allocating responsibilities between states, which applies equally to differentiated and similar roles.

1.4. LEGAL UNCERTAINTY – FINDING PROTECTION ELSEWHERE

Sharing refugee protection usually entails moving people from one host country to another. This might be through allocating responsibility for initial decision making to one state, necessitating the removal of spontaneous arrivals to that state from others, or through resettlement or relocation of refugees or asylum seekers. These practices fall within the broader category of ‘protection elsewhere’ policies, including, safe countries of origin, first countries of asylum, safe third countries and overseas processing, amongst others. For present purposes, their interesting commonality is the idea that the state in which the individual is currently situated or claiming asylum may transfer the individual to another state for the purposes of status determination and protection as part of an agreement to share responsibility for refugee protection between states.

The need for certain safeguards in relation to such transfers has been recognised, but the required and desirable extent of these safeguards is contested. The first legal uncertainty to be considered exists

between conflicting interpretations of the standard of protection required by international law. Second, and more fundamentally, the legal legitimacy of any form of protection elsewhere has been also called into question.

Legomsky offers a list of minimum standards for protection elsewhere as dictated by existing international law and an accompanying list of aspirational standards of best practice.⁷² He sees these safeguards as “just one element in a comprehensive framework” that also reduces the number of cases in which the issue of return arises and limits adverse effects on returnees where return is necessary.⁷³ Between the two lists he argues, for example, that the receiving country need not have ratified the Refugee Convention, as it is not legally required and may discourage states from ratifying it, but that ratification is preferable.⁷⁴ On the other hand, the express consent of the receiving state to admit the individual to its territory and to allow access to a fair determination procedure is considered a basic legal requirement. This is because generalised or implied consent leaves room for disputes in individual case, which may lead to *refoulement*.⁷⁵

Recommendations for safeguards were also constructed by the Fourth Colloquium on Challenges in International Refugee Law, convened by Hathaway, known as the Michigan Guidelines on Protection Elsewhere.⁷⁶ These Guidelines advocate similar safeguards to Legomsky in some respects, for example the need for a “meaningful legal and factual opportunity [for the transferred person] to make his or her claim to protection” in the receiving country.⁷⁷ However, there are also crucial differences. Legomsky argues for full respect of the rights of the person being transferred, both as an asylum seeker under the Refugee Convention, and more broadly as a human being under international human rights instruments such as the Convention Against Torture, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁷⁸ As such, he includes specific

⁷² S. H. Legomsky, “Secondary Asylum Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection” (2003) 15 *IJRL* 567, 673-676.

⁷³ *Ibid*, 598.

⁷⁴ *Ibid*, 658-661 and 676.

⁷⁵ *Ibid*, 630-633 and 673.

⁷⁶ J. C. Hathaway, “The Michigan Guidelines on Protection Elsewhere, adopted January 3, 2007” (2007) 28 *Michigan Journal of International Law* 207-222.

⁷⁷ *Ibid*, 211.

⁷⁸ Above note 72, 646-649, 653, 674.

rights provisions absent in the Michigan Guidelines, for example prohibiting a transfer where this would prevent family unity.⁷⁹ The Michigan Guidelines focus much more on the rights conferred by the Refugee Convention, particularly *non-refoulement*.⁸⁰ The Guidelines also offer more procedural guidance, demanding that the sending state readmits any transferred person whose rights under the Refugee Convention are breached by the receiving state.⁸¹

Foster considers the legitimacy of protection elsewhere policies according to the Refugee Convention, concluding that it neither expressly excludes nor permits them.⁸² Although acknowledging that the adoption of safeguards may be seen to condone efforts by states to circumvent their international legal obligations, she argues that the absence of such safeguards may lead states to conclude that the operation of protection elsewhere policies occurs outside of the legal framework of the Refugee Convention.⁸³ This would risk leaving the transfer of people in need of international protection without any regulation that takes account of the specific nature of such transfers in the refugee context.

Such safeguards and guidelines might, therefore, offer a degree of protection for refugee rights and international legal standards relating to refugees. However, it seems that the primary intention behind the Michigan Guidelines formulation is to find a footing upon which protection elsewhere policies can take place: the Guidelines identify the minimum acceptable standards in law and therefore tacitly encourage states not to exceed this standard. Legomsky attempts to mitigate this by offering an additional list of aspirational standards for transfers, but argues that this problem naturally arises from the need for international cooperation in refugee protection.⁸⁴ This suggests a more fundamental problem underlying protection elsewhere policies, including solidarity mechanisms.

Despite some consensus that moving refugees or asylum seekers between states is permitted under international law where safeguards are in place (even if the proper extent of these safeguards is not

⁷⁹ *Ibid*, 674-675.

⁸⁰ Above note 76, 213.

⁸¹ *Ibid*, 217.

⁸² M. Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" (2007) 28 *Michigan Journal of International Law* 223, 237.

⁸³ *Ibid*, 229.

⁸⁴ Above note 72, 572-573.

agreed), concerns as to the fundamental validity of such transfers have also been voiced. Some scholars remain staunchly critical of protection elsewhere policies, observing that legally guaranteed standards of protection do not always materialise and so maintaining that a transfer will not obviate the responsibility of the sending state.⁸⁵ This presents a difficulty if the concept of protection elsewhere is to underlie responsibility-sharing and solidarity: if transferring an asylum seeker does not remove the sending state's responsibility for her or him, then it offers a rather unsteady basis for dispersing protection responsibilities between states. Gil-Bazo highlights states' positive obligations arising from individual rights to argue that even where a receiving country is deemed safe, a sending state's responsibility towards the person is engaged.⁸⁶ In transferring the person to another state, the sending state does not fully transfer or share responsibility, for it retains legal responsibility for protecting the person's rights.

This argument has been supported by judgments of the European Court of Human Rights. In *Soering*,⁸⁷ it was held that the removal of a person to a state where she or he faced treatment in breach of Article 3 ECHR (prohibition of torture and inhuman or degrading treatment or punishment) would render the sending state liable for breach of Article 3 too. Therefore, in *M.S.S.*,⁸⁸ it was held that Belgium had violated Article 3 ECHR by knowingly returning an asylum seeker to Greece where conditions were insufficient to meet the standard required by that Article, NGOs having widely reported that such was the case.⁸⁹ It was held in *T.I.*⁹⁰ that liability also arises in the event of chain *refoulement*: the first removing state remains liable if the receiving state makes a subsequent removal to another state where the person suffers treatment in breach of Article 3 ECHR.⁹¹ These cases demonstrate that the transferring state will remain legally responsible for the protection of an individual's rights even where

⁸⁵ C. Costello "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection" (2005) 7 *EJML* 35, 47-52.

⁸⁶ M.-T. Gil-Bazo, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited" (2006) 18 *IJRL* 571, 599.

⁸⁷ European Court of Human Rights (Dec.), *Soering v United Kingdom*, Appeal No. 14038/88, 7 July 1989.

⁸⁸ European Court of Human Rights (Dec.), *M.S.S. v Belgium and Greece*, Appeal No. 30696/09, 21 January 2011.

⁸⁹ *Ibid*, [366]-[368].

⁹⁰ European Court of Human Rights (Dec.), *T.I. v United Kingdom*, Appeal No. 43844/98, 7 March 2000.

⁹¹ *Ibid*, 15.

safeguards are in place. This is so even within an arrangement based on protection standards satisfying the Michigan Guidelines or the standards set out by Legomsky.⁹²

Battjes argues that reading *T.I.* as excluding a presumption of safety, or requiring a substantive determination of safety before each transfer, is too strict.⁹³ Instead, he suggests that the decision regards a presumption of safety within an arrangement such as Dublin as valid providing that the person to be transferred has an opportunity to rebut the presumption.⁹⁴ Whilst this understanding may leave the terms of a solidarity arrangement intact, it remains true in practice that failures to meet protection standards will undermine the operation of protection elsewhere policies. The facts of *M.S.S.* show that grounds for rebutting a presumption of safety may, and do, arise,⁹⁵ dislodging the foundations of protection elsewhere policies.

Without the ability to guarantee sufficient protection elsewhere, arrangements to allocate shared responsibilities are legally uncertain, and protection elsewhere seems an imperfect basis for a solidarity mechanism. This continuing tension between individual rights and making the system work demonstrates the conflict at the root of mechanisms based on transferring people between states.

Solidarity mechanisms share responsibility for protection roles either as a class, by allocating differentiated roles, or by sharing persons between states to share the total of protection. The former is more popular and appeals to state self-interest, but this same appeal opens the door to the risk of exploitation of less powerful states by more powerful ones. The latter offers a way around this, but seems to be less popular outside of the EU, which contains more formal provision for equality between Member States. Whichever of these is preferred, the movement of persons between states, which is inherent to both, faces two challenges to its legal certainty: first, the extent of any limitations on transfers; and second, more fundamentally, whether states can transfer responsibility between them

⁹² This problem is explored in the context of the CEAS in chapter four, section 3.2.

⁹³ H. Battjes, "A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation" (2002) 4 *EJML* 159, 187.

⁹⁴ *Ibid*, 188-189.

⁹⁵ This example of Greece is particularly pertinent given that Dublin had rendered Greece responsible for a large proportion of Europe's asylum seekers. Being so 'over-burdened' arguable led to the breakdown of the Greek asylum system, and was worsened by the effects of the financial crisis, see above notes 70-71. This might raise questions about the interaction of different aspects of solidarity, which is considered in the context of the CEAS in chapter four.

simply by transferring the person. This legal certainty challenge has not prevented the creation of solidarity mechanisms, but impacts on their application.

This section builds on three of the points of the solidarity matrix developed in the preceding chapters. First, in relation to the fourth point on the matrix, state participation in burden-sharing arrangements for refugee protection in the intergovernmental context operates on a strictly voluntary basis. The criticism made by Anker *et al.* of Hathaway's model on this point – that it risks states 'cherry-picking' that parts of the model that suits them best and disregarding the others – might be applied more broadly to these models.⁹⁶ Indeed, many of the models discussed in this section are designed expressly to capitalise on states' desire to align their asylum policies to their national political preferences as a voluntary system permits. The use of states' idiosyncratic preferences to allocate different protection roles is credited the success of the CPA, through which the USA provide the majority of resettlement places for refugees for whom it felt responsible.⁹⁷

The second refers to bearing the costs of responsibility sharing or solidarity, in relation to the seventh factor. It was observed in chapter two that states are far more willing to make commitments to solidarity when the costs are born elsewhere, usually by the EU or when the commitment is symbolic and entails no cost. This section elaborates on this, observing that states are keen to avoid financial costs but noticing that states may be more willing to bear these financial costs if it permits them to avoid the costs of providing physical refugee protection in their territory. This suggests that where solidarity operates in the asylum context, there may be a hierarchy of costs that states wish to avoid: all costs where possible; but, if this is not possible, states would prefer to avoid responsibility for the costs of providing physical protection and to pay other states to provide it on their behalf.⁹⁸ This is certainly true under the Pacific Plan, under which Australia has paid other states to provide asylum to those directly arriving and seeking refuge in Australia.⁹⁹

⁹⁶ Above note 19.

⁹⁷ Above note 46.

⁹⁸ Above note 18.

⁹⁹ Above note 44.

This illustrates the third contribution of this section, which relates to the politicisation of solidarity, the sixth matrix point. The voluntary nature of burden-sharing in the intergovernmental context shows the politicisation of the principle of solidarity more nakedly than in the context of the EU. Here, states' efforts to reduce their responsibility for the costs associated with refugee protection by exploiting their geopolitical power are dressed in the language of sharing and solidarity. This shows how the positively-perceived language of solidarity can be co-opted to cover other, less palatable political objectives. To give a specific example, mechanisms based on severing the 'asylum-migration nexus' are described as efforts to share responsibility for refugee protection between states,¹⁰⁰ but reflect populist preferences in Western states that would rather not see persons in need of protection in their territory.

The next section moves on to the second question posed by this chapter: how do international mechanisms for sharing responsibility for refugee protection distribute responsibilities between states?

2. DISTRIBUTION OF RESPONSIBILITIES

This section addresses the issue of quantitative distribution: how to share the total amount of refugee protection between states to give effect to the principle of solidarity? Through study of the literature and instances of solidarity in practice, two alternative methods emerge: voluntary assumption of responsibilities and distribution of responsibilities according to a fixed key or quotas. This section will consider these two approaches and their respective advantages and disadvantages in order to demonstrate that 'solidarity' does not dictate the use of one or the other. Finally, Schuck's model of responsibility-sharing based on tradeable quotas is considered as a potential compromise between the two approaches, but one that still has its benefits and weaknesses.

2.1. VOLUNTARY ASSUMPTION OF RESPONSIBILITY

States like to choose the extent of their own obligations in sharing responsibility for refugee protection. Under this first model, the choice to assume extra responsibility to show solidarity is entirely voluntary and self-imposed. This is perhaps so popular because it allows for pragmatic and *Realpolitik* considerations to prevail, facilitating alignment of refugee protection policy with the state's broader

¹⁰⁰ Above note 39.

political aims. It invites states to weigh the costs and benefits of offering protection according to their subjective preferences. However, the voluntary assumption of responsibilities has proved problematic in respect of standards of refugee protection and the principle of solidarity as sharing.

Solidarity as expressed through the UNHCR is based on states' voluntary contributions. As cited by Noll and Hurwitz, the contributions to, and expenditures of, the UNHCR's fund may be considered an example of "sharing money" solidarity.¹⁰¹ In the absence of any obligation to contribute, this mechanism may be understood as an example of allocation by the voluntary assumption of responsibilities. A similar approach is taken to the "sharing people" under the UNHCR's resettlement programme, through which states undertake to accept a self-designated number of refugees for permanent resettlement.¹⁰² This physical resettlement has been the cornerstone of the UNHCR's work since its inception, for example to Western Europe and the United States from the 1956 Hungarian Revolution, continuing the work of its predecessor, the International Refugee Organization.¹⁰³ As Noll highlights,¹⁰⁴ it should be remembered that the UNHCR is a body primarily concerned with facilitating and overseeing refugee protection, and only involved with solidarity between states insofar as this coincides with its principal functions. The CPA and the Pacific Solution are further examples of solidarity mechanism based on the voluntary assumption of responsibility.

There are problems in relation to both refugee protection and solidarity associated with arrangements such as these that arise from the voluntary nature of the undertakings of responsibility. Voluntary assumption under the UNHCR's resettlement programme has resulted in a distinct lack of resettlement places: the UNHCR estimates that there are currently 800 000 people in need of resettlement with only 80 000 places offered annually.¹⁰⁵ Hurwitz comments that "resettlement will always be a solution which only a very small minority of refugees will benefit from".¹⁰⁶ There is also a small but remaining risk

¹⁰¹ Above note 11, 272; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: OUP, 2009), 146-7.

¹⁰² Above note 11, 274; Hurwitz, *ibid*, 150.

¹⁰³ Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: OUP, 2001), 37-43.

¹⁰⁴ Above note 11, 273.

¹⁰⁵ UNHCR, *Progress Report on Resettlement*. Executive Committee of the High Commissioner's Programme, 54th Meeting of the Standing Committee (2012), paragraphs 3-4, available at <http://www.unhcr.org/5006a6aa9.html> [accessed 24/09/13].

¹⁰⁶ Hurwitz, above note 101, 152.

that more vulnerable refugees will be passed over in favour those who are more likely to be economically productive in the receiving state. This occurred immediately after the Second World War when, despite the offer of approximately 1.3 million resettlement places by the international community, a ‘hard core’ of cases remained in European camps, including 400 000 elderly and disabled people.¹⁰⁷ Thus the voluntary assumption of responsibility can result in a lack of refugee protection.

Further, protection offered by states’ voluntary contributions is not a stable or reliable commitment. This is because states are only likely to offer protection to refugees where this suits their political objectives. This was illustrated by the large numbers of resettlement places offered by the United States under the CPA¹⁰⁸ and also to refugees fleeing the Soviet Union during the Cold War.¹⁰⁹ This generosity coincided with the American stance against communism and, in the case of the CPA, a sense of duty arising from its role in the Vietnam War.¹¹⁰ Equally, the USA initially refused to make financial contributions to the UNHCR following its disappointment when the American candidate for Commissioner was not appointed.¹¹¹ Another example of this problem may be seen in Tanzania’s swift closure of its borders to refugees in 1994, due in part to a change in political will and foreign policy.¹¹² This was despite Tanzania’s record of generous responses to refugees including an ‘open-door’ policy.¹¹³

The voluntary assumption of responsibilities is also problematic in respect of solidarity as sharing. First, there are uneven contributions. For example, only a small number of states have offered places for the

¹⁰⁷ Above note 103, 40. It is worth noting that recent appeals for resettlement, for example of Syrians, have requested resettlement for the ‘most vulnerable’ refugees, UNHCR, *Finding Solutions for Syrian Refugees* (Geneva: UNHCR, 2014), available at http://unhcr.org.uk/fileadmin/user_upload/docs/Fact_sheet_on_resettlement-humanitarian_admissions_Syrian_refugees.pdf?j=11002&e=indianschona@yahoo.co.uk&l=462_HTML&u=742172&mid=6192421&jb=0&utm_source=UKmonthly-e-news-Jan2014&utm_medium=email&utm_term=003D000001Q7NWdIAN&utm_content=button1_appeal&utm_campaign, accessed [03/12/14]. However, questions of who is most vulnerable and how to identify them also raise their own difficulties.

¹⁰⁸ Astri Suhrke, “Burden Sharing During Refugee Emergencies: The Logic of Collective versus National Action” (1998) 11 *JRS* 396-415, 405.

¹⁰⁹ Above note 103, 61.

¹¹⁰ Above note 108, 405.

¹¹¹ Above note 103, 52.

¹¹² B. Rutinwa, “The Tanzanian Government’s Response to the Rwandan Emergency”, (1996) 9(3) *JRS* 291, 299.

¹¹³ *Ibid.*, 295.

UNHCR's resettlement programme: Hurwitz lists only ten "traditional" resettlement countries,¹¹⁴ and despite expansion in 2012, this remains at only 25 receiving states.¹¹⁵ This has also been the case in respect of refugees from the recent and ongoing conflict in Syria. A small number of neighbouring states have offered protection to the vast majority of people fleeing Syria but offers for resettlement have been few and slow to materialise. Between April 2011 and July 2014, just under 125 000 Syrians claimed asylum in Europe (not including Turkey) and slightly less than 32 000 resettlement places were offered, figures dwarfed by the combined number protected in Jordan, Iraq, Lebanon, Turkey and Egypt in the same period: 2.9 million.¹¹⁶ The UN High Commissioner for Refugees, António Guterres, called in October 2014 for a greater commitment to international burden-sharing so that more Syrians might find protection outside of Syria's neighbours.¹¹⁷

Second, states receive a disproportionately high number of refugees will also receive financial support inconsistently: funds donated to the UNHCR may be, and usually are, earmarked for specific uses,¹¹⁸ meaning that some areas go without sufficient funding. Loescher, Betts and Milner comment that this ability allows donor states to "control the evolution and direction of [the] UNHCR's work through the tight control of the organization's resources",¹¹⁹ consequently tailoring it to "states' interests rather than refugees' needs".¹²⁰

That voluntarily assumed responsibilities are aligned with broader political interests is demonstrated by the Canada-US Agreement of 2002 under which the two participants agreed to take responsibility for a

¹¹⁴ Hurwitz above note 101, 151; Australia, Canada, Denmark, Finland, the Netherlands, New Zealand, Norway, Sweden, Switzerland and the US.

¹¹⁵ UNHCR, *Resettlement Handbook*, (July 2011), 66, available at <http://www.unhcr.org/4a2ccf4c6.html>, [accessed 03/10/2013].

¹¹⁶ UNHCR, *Syrian Refugees in Europe: What Can Europe Do to Ensure Protection and Solidarity?* (UNHCR, 11 July 2014), available at <http://www.refworld.org/docid/53b69f574.html> [accessed 24/11/14].

¹¹⁷ Remarks by António Guterres, United Nations High Commissioner for Refugees at Conference on the Syrian Refugee Situation – Supporting Stability in the Region (Berlin, 28 October 2014), available at <http://www.unhcr.org/544fb4189.html> [accessed 24/11/14].

¹¹⁸ The UNHCR reports that in 2009 57% of donations were tightly earmarked and 25% lightly earmarked, leaving only 18% of donated funds unrestricted, UNHCR, *Earmarking Patterns in 2009*, (Geneva: UNHCR June 2010) available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=48a983302&query=earmarking> [accessed 30/10/2013].

¹¹⁹ G. Loescher, A. Betts and J. Milner, *The United Nations High Commissioner for Refugees (UNHCR): The politics and practice of refugee protection into the twenty-first century*, (Abingdon: Routledge, 2008), 73.

¹²⁰ *Ibid*, 93.

class, rather than a number, of applicants. The Agreement allocates responsibility for refugee status determination of those applications made at their shared land border by third country nationals.¹²¹ This follows a similar approach to the EU's Dublin system, which the Agreement cites as an example of "similar cooperation" that it seeks to follow.¹²² This Agreement is intended as an expression of regional cooperation and solidarity, as emphasised in its Preamble:

[R]ecalling both countries' traditions of assistance to refugees and displaced persons abroad, consistent with the principles of international solidarity that underpin the international refugee protection system, and committed to the notion that cooperation and burden sharing with respect to refugee status claimants can be enhanced.

Before the Agreement, far many more applications for asylum were made to Canada at the shared border than to the US. Legomsky reports figures showing that approximately 200 applications were made annually to the US at the Canada-US border from Canada, compared to 15 000 applications to Canada from people travelling through the US.¹²³ This would suggest that the US would expect to take responsibility for a far greater number of applications under the Agreement than Canada.¹²⁴

In line with this prediction, many more applications were made to Canada that were subject to the Agreement than were made to the US. In the first year of the Agreement's operation, the only year for which full numbers are available, Canada reported 303 applications made at the border that were determined to be ineligible and returned to the US under the Agreement (9% of applications to which the Agreement applies).¹²⁵ A further 3 254 applications to Canada were made at the border that were determined by the Canadian authorities, having met the terms of an exception.¹²⁶ On the other hand, the US stated that the Agreement "has had relatively little impact" on applications at ports of entry at the land border, with only 39 applications deemed to be subject to the Agreement.¹²⁷ Of these 39

¹²¹ Above note 56.

¹²² *Partnership for Protection; Year One Review*, (November 2006), 1.1, available at <http://www.cic.gc.ca/english/department/laws-policy/partnership/index.asp> [last accessed 20/06/2013].

¹²³ B. Frelick, "North America Considers Agreement to Deflect Asylum Seekers", 7 *Bender's Immigration Bulletin* 1404, 1406 (15 November 2002) cited in Legomsky, above note 72, 582.

¹²⁴ Above note 72, 583.

¹²⁵ Above note 122, 4.3.1, "General Scope".

¹²⁶ *Ibid.* For further information on the grounds for exception, see above section 1.3.

¹²⁷ *Ibid.*, 5.3/5.C.

applications, the terms of an exception were met in 23 of cases, resulting in the return of 16 applicants, or 40%, to Canada.¹²⁸

It is clear that the Agreement did not entail a substantial redistribution of responsibility between Canada and the US as predicted. This seems to be largely due to the operation of the exceptions and their implementation by the Canadian authorities. Instead, the Agreement exemplifies the appeal of a voluntary arrangement between states that allows for state participation that matches national interests, thereby appealing to state pragmatism and *Realpolitik*. Indeed, Crépeau and Legomsky argue that Canada's principal aim in forming this agreement was to satisfy US security concerns in order to keep their shared border open for trade given that it is responsible for 70% of all Canadian foreign trade.¹²⁹ However, it also demonstrates that where responsibilities are voluntarily assumed it is unlikely that the result will be proportional or equitable. Nevertheless, the states involved are satisfied with this as an expression of their solidarity. In contrast, an allocation based on the fair-sharing of responsibilities according to some measure of capacity is more commonly thought to capture the essence of the principle of solidarity.

2.2. COMPULSORY ALLOCATION OF RESPONSIBILITY

A compulsory allocation of responsibility follows a fixed key or quotas for each state. This usually seeks to establish a 'fair' share of responsibility for refugee protection between states, usually based on some measure on the capacity to provide this protection. The benefit of this approach is that allocating an equitable share of the responsibility to each state seems to go to the heart of the principle of solidarity. It has also been argued that this approach offers an insurance-like incentive to states to participate in a solidarity mechanism. The principal difficulty facing this approach is reaching an agreement between participating states as to what an equitable share of the responsibility is: there is legitimate disagreement as to what is 'fair'.

¹²⁸ *Ibid*; all of the 23 were expected on family grounds

¹²⁹ F. Crépeau and S. H. Legomsky, "North American Responses: A Comparative Study of U.S. and Canadian Refugee Policy" in S. Kneebone and F. Rawlings-Sanaei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Books, 2007) 138-166, 153.

The idea of fair-sharing has been present within the principle of solidarity since its beginnings in the Refugee Convention. The Preamble to the Convention explains that the purpose of “international cooperation” in refugee protection is the alleviation of “unduly heavy burdens [falling] on certain countries”.¹³⁰ This understanding of the fair-sharing as equalising states’ responsibilities and as a necessary part of solidarity continues, as presented by Noll:

The logic of burden-sharing rests on the axiom that an equitable distribution of costs and responsibilities in protection will generate not only a maximum of fairness among states, but also a maximum of openness vis-à-vis protection seekers.¹³¹

This element of solidarity is also presented by Schuck, who argues that a burden-sharing norm should “express a principle of fairness,” which he suggests requires the satisfaction of three criteria: consent, broad participation, and proportionality.¹³² It is fairness in the sense of proportionality that corresponds to the present discussion. Schuck states that the principle of proportionality “demands that a state’s share of the burden be limited to its burden-bearing capacity relative to that of all other states in the international community.”¹³³ This argument is similar to the position adopted by the European Parliament resulting from its study of the Dublin system within the EU,¹³⁴ which concludes that an agreement as to the fair share of responsibility to be allocated to each Member State, and the factors that will be taken into account in calculating this, are a “precondition for achieving meaningful responsibility-sharing”.¹³⁵ This suggests that the principle of solidarity entails the fair-sharing of responsibility understood as proportionality between state responsibilities.

In exploring the ‘logic’ of burden-sharing in contrast to individualised state responses, Suhrke argues: “arrangements that distribute refugees or asylum seekers according to principles of need and equity suggest benefits to all sides”.¹³⁶ These concepts of ‘need’ and ‘equity’ seem to go to the heart of an

¹³⁰ Preamble to the Geneva Convention relating to the Status of Refugees 1951.

¹³¹ Above note 11, 265.

¹³² P. H. Schuck, “Refugee Burden-Sharing: A Modest Proposal”, (1997) 22 *Yale Journal of International Law* 243-297, 276.

¹³³ *Ibid*, 277.

¹³⁴ Above note 67.

¹³⁵ *Ibid*, 146.

¹³⁶ Above note 108, 398.

understanding of ‘fair-sharing’. Further, this argument posits that fairly allocating responsibilities offers states an incentive to participate in a solidarity arrangement: the reassurance that periods of high demand for protection will not have to be met by the state alone. In return, a state undertakes to offer assistance to other states in times of high demand. This is likened to the incentive offered to enter into an insurance policy.¹³⁷

However, the question of calculating a fair allocation for each state is both fundamental and controversial. Schuck concludes that national wealth should be the sole criterion.¹³⁸ Kritzman-Amir takes a much wider view, advocating the use of multiple factors such as Gross National Product, average life expectancy and land reserves to determine a state’s “absorption capacity”.¹³⁹ In addition, she argues that the existence of any “special solidarity bonds” such as former colonial connections should be taken into account, whilst recognising the practical difficulties inherent in measuring this.¹⁴⁰ Establishing such bonds as the basis of solidarity is potentially limiting, in that it might easily be reversed to exclude the need to assist – in the absence of ‘special solidarity bonds’ there is no reason to share responsibility.¹⁴¹

A European Parliament study demonstrates that the use of different indicators, and attaching different weightings between these indicators, significantly alters the calculation of a state’s fair share, highlighting that this is a politically sensitive decision.¹⁴² For example, one calculation keeps constant the information relating to each Member State but varies the ‘measure of flow’ to compare current reception rate with suggested reception capacity for each Member State.¹⁴³ This figure indicates the level of redistribution necessary to achieve a fair-sharing of responsibility. The two measures of flow are the number of asylum applications and alternatively the number of refugees. Changing the measure of flow alters the position of a number of Member States. For example, the Czech Republic, Spain, Slovakia and Cyprus move from a position where they are receiving over their capacities if asylum

¹³⁷ *Ibid.* See further: chapter one, section 1.2.1.

¹³⁸ Above note 132, 279-282.

¹³⁹ T. Kritzman-Amir, “Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law”, (2009) 34(2) *Brooklyn Journal of International Law* 355, 372.

¹⁴⁰ *Ibid.*, 373.

¹⁴¹ The use by states of asylum policy to express national identity in exclusionary and inclusive ways is explored in chapter five, section 2.3.

¹⁴² Above note 67.

¹⁴³ *Ibid.*, 68-69.

applications are considered, to under their capacities if the number of refugees is considered. Equally, Denmark moves from a position where it is receiving very slightly under its capacity based on the number of asylum applications, to receiving over its capacity when looking at the number of refugees. The degree to which some states are considered over or under their capacities is also changed. For example, Malta and Poland come closer to their suggested capacities when the number of refugees is considered rather than the number of asylum applications, and Germany receives a share further in excess of its capacity when refugees rather than asylum applications, are considered.

These variations are only one example of a number of models based on different variables that the study explores, but they demonstrate well that the choice of indicators used to calculate capacity is political. This practical difficulty does not prevent a vision of the principle of solidarity that includes an element of fair-sharing or proportionality, but it is an issue that will require intricate negotiation during the conclusion of a solidarity arrangement. Anker, Fitzpatrick and Shacknove share a more pessimistic outlook, reminding readers of “states’ resistance to meaningful and binding burden-sharing obligations, particularly those that are forward looking”,¹⁴⁴ and blaming not this structure, but the lack of political will, for the failures in the current refugee regime.¹⁴⁵

Thus the principle of solidarity is widely understood as contingent upon the fair-sharing of responsibility, and this is seen as offering an incentive for states to participate within a solidarity arrangement if at a much lesser degree than under voluntary assumptions of responsibility. A reluctance to surrender this element of choice and the difficulty in defining a ‘fair’ share means that this approach has not been followed at the international level. In the EU, the second crisis relocation Decision did contain a fixed distribution key and was the first of its kind.¹⁴⁶ The final part of this section turns to a mid-way model as an alternative to these two extremes.

¹⁴⁴ Above note 19, 300.

¹⁴⁵ *Ibid*, 308.

¹⁴⁶ See chapter four, section 1.2.

2.3. SCHUCK'S MODEST PROPOSAL: A THIRD WAY?

Schuck presents a solidarity model which appears to combine these two approaches:¹⁴⁷ first it assigns each state a fair protection quota according to national wealth;¹⁴⁸ then it allows voluntary, bilateral trading of these quotas between states, including states external to the sharing arrangement.¹⁴⁹ This would create a market for responsibility quotas operating on the basis that: “The transferor state would be purchasing a discharge of its obligation from the transferee”.¹⁵⁰ Payment may be made with money, but might also take the form of other valuable resources such as commodities, credit, development assistance, weapons, or political support.¹⁵¹ Schuck prefers these bilateral transactions to a centrally administered fund for protection, such as the fund administered by the UNHCR, because a central fund limits the resources that can be exchanged to money, and incurs higher administration costs.¹⁵² Anker, Fitzpatrick and Shacknove argue that these transfers are likely to divert funds previously spent on refugee protection to other ends and note that higher circulation of weapons may, counter-intuitively, result in rising numbers of refugees in need of protection.¹⁵³

Schuck argues that although states will only enter into exchanges if to do so is mutually beneficial, the initial commitment to a quota would result in greater refugee protection than at present, even in the absence of any exchanges.¹⁵⁴ However, in light of the current popularity among wealthy states of ‘Western funded protection in the region of origin’, displayed through the Convention Plus initiative and advocated by Hathaway, it is likely that these same states would seek to enter into quota transactions.¹⁵⁵ There is thus a risk that those with greater resources, “the largest stock of carrots and sticks” in the words of Schuck,¹⁵⁶ will use their more powerful position to the detriment of less powerful

¹⁴⁷ Above note 132.

¹⁴⁸ *Ibid.*, 279-282.

¹⁴⁹ *Ibid.*, 282-288. Gibney (above note 52 at 70) reminds readers of the importance of these two stages, claiming that many objections to Schuck's model are based on a failure to comprehend that the market is a response to the question of where, rather than whether, protection will be provided.

¹⁵⁰ Above note 132, 283.

¹⁵¹ *Ibid.*, 284. Schuck notes that the exchange of weapons would necessarily be limited by non-proliferation requirements.

¹⁵² *Ibid.*

¹⁵³ Above note 19, 302.

¹⁵⁴ Above note 132, 284.

¹⁵⁵ See above section 2.2.1.

¹⁵⁶ Above note 132, 290.

actors.¹⁵⁷ Schuck advocates a free market for the exchange of quotas, meaning that it is for parties to safeguard their own interests from exploitation.

Schuck recognises the influence and “leverage” that more powerful states have over countries of first asylum.¹⁵⁸ However, rather than suggesting any safeguard against exploitation, he suggests that this imbalance of power “may bear additional fruit” if used “skilfully and forcefully” to encourage more states to take part in the arrangement.¹⁵⁹ He argues that although this use of “influence” does occur under current arrangements, the proposed arrangement “can only improve the chances that such influence would be effectively deployed”.¹⁶⁰

Anker, Fitzpatrick and Shacknove express legal and moral concerns in a formal response to Schuck’s proposal.¹⁶¹ Prominent among these is the concern that political frameworks protect asylum seekers less well than legal ones: “asylum-seekers would be largely removed from the realm of law and consigned to the realm of political bargaining”.¹⁶² This would leave individuals vulnerable to *refoulement* or poor reception conditions unless all sides of the bargain are upheld.¹⁶³ If such were the case, and Anker, Fitzpatrick and Shacknove consider it likely,¹⁶⁴ refugees would now additionally lack legal redress in addition to the other problems they face under the present system.¹⁶⁵

Gibney rejects trade-based schemes, including Schuck’s, as demeaning and humiliating to refugees.¹⁶⁶ He argues that such arrangements attach a negative value to refugees that exceeds that which is implied by current measures seeking to exclude asylum seekers: “It is as if refugees are now not only being rejected by states, but, to add insult to injury, they are also being provided with a monetary measure of how unwanted they are”.¹⁶⁷ This is compounded by the likelihood that this monetary value will be determined by refugees’ personal characteristics. Gibney suggests, for example, that the US may accept

¹⁵⁷ See above section 1.2.

¹⁵⁸ Above note 132, 276.

¹⁵⁹ *Ibid*, 276.

¹⁶⁰ *Ibid*.

¹⁶¹ Above note 19.

¹⁶² *Ibid*, 305.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*, 301.

¹⁶⁵ *Ibid*, 305.

¹⁶⁶ Above note 52, 72-74.

¹⁶⁷ *Ibid*, 73.

its quota of Cuban refugees but pay to avoid hosting Haitians in line with its broader political sympathies.¹⁶⁸ Schuck argues that when looking to buy or sell quotas of refugees, states should have as much information about individuals as possible made available to them, including social class, level of education, ethnicity, age and family status.¹⁶⁹ A system that determines the worth of an individual on the basis of such characteristics seems distasteful at best.

This intermediate model, therefore, starts at a position of equity between states, but encourages exploitation of a stronger bargaining position through market exchanges, compromising refugee protection and raising moral difficulties.

In summary, this section demonstrates that the allocation of responsibilities fairly is considered an aspect of solidarity in the literature discussing international cooperation in international refugee law, as well as in the Preamble to the Refugee Convention. Whilst it would seem that the voluntary assumption of responsibilities has been the basis of practice, and market-based alternatives have been proposed, these models are problematic in relation to refugee protection.

The main contribution of this section relates to the fourth matrix point, which distinguishes between voluntary and compulsory solidarity. From the analysis of measures in this section, it is clear that solidarity does not necessarily entail either of these approaches, rather, either might be considered an expression of solidarity. States prefer measures based on the voluntary assumption of responsibility, which allow them to express their subjective preferences, and such measures are more easily captured through intergovernmentally constituted mechanisms.¹⁷⁰ However, such arrangements are likely to lead to a lack of refugee protection.¹⁷¹ On the other hand, a compulsory allocation can create binding obligations to meet the total of required protection but is far less popular in state practice.¹⁷² This is highlighted as a core challenge to be met in articulation of solidarity in the context of asylum, including within the CEAS.

¹⁶⁸ *Ibid*, 73.

¹⁶⁹ Above note 132, 286.

¹⁷⁰ Above notes 106 and 119.

¹⁷¹ Above notes 103 and 116.

¹⁷² Above notes 142-143.

A brief second contribution is the disagreement between Schuck and Gibney regarding the second matrix point: whether solidarity is a social phenomenon or capable of economic expression too. Schuck's proposal to marketise responsibility for refugee protection through tradeable quotas seeks to apply an economic approach in the belief that this will produce an optimum distribution of responsibilities between states, reflecting their preferences and ensuring that protection demands are met.¹⁷³ In contrast, Gibney rejects this approach on the basis that it is unacceptable to apply economic mechanisms in this way because the 'product' is human beings.¹⁷⁴ This demonstrates that this disagreement as to the nature of solidarity extends into the refuge context.

3. CONCLUSIONS

This chapter has examined different models of solidarity at the international and regional level that all work around the idea of 'sharing'. Whilst this analysis has highlighted a number of different options, it has also shown that none is perfect. Instead, each has advantages and disadvantages which might be preferred according to different objectives. The aims and priorities of the actors within the solidarity model will determine the precise nature of it. It is clear that all of these policy configurations might fall under the banner of 'solidarity' as 'burden-sharing' in refugee law.

Part one discusses international and regional mechanisms for sharing responsibility for refugee protection between states divided into two models: mechanisms that split protection roles between participating states and those that ask each state to undertake all parts of refugee protection and instead sharing between them the total amount of protection. In state practice, the former is certainly more popular. Hathaway's proposed model of differentiated protection also divides protection roles between states. This popularity, and the model's advocacy in the literature, is attributed to its adaptability to the interests of participating states. A model that gives states different roles in an international system of refugee protection allows for the alignment of these roles with the states' individual political preferences. The problem that this model seems unable to overcome is that it invites more powerful states to assert their interests and preferences ahead of those of less powerful states. A model that divides

¹⁷³ Above notes 147-149 and 154.

¹⁷⁴ Above note 167.

the total of protection, rather than its constituent roles avoids this, as all participating states are involved in the protection of refugees on their own territory and there is no ‘picking and choosing’ the preferred elements of protection. Perhaps as a result, this method seems to be less popular in practice. However, regardless of which of these models is preferred, there is a legal uncertainty underlining both equally, which arises in the context of any mechanism that seeks to move persons in need of protection between states, also known as protection elsewhere policies. This uncertainty derives from human rights law, or more specifically, the positive obligation on states not to return a person to a state where she or he is at risk of serious harm or to a state that might send that person to a third state where such a risk exists.¹⁷⁵ The fundamental legal legitimacy of such transfers has been questioned,¹⁷⁶ but even among those who accept them there is disagreement as to the requirements that must be met to satisfy the legal safeguards.¹⁷⁷ This operates as a legal limit on the discretion of states in forming agreements to share responsibility for refugee protection.

Part two examines a different element of solidarity mechanisms in refugee law, namely how responsibilities are distributed between states, whether these are separated protection roles or a share of the total protection. First, roles might be assumed voluntarily, which again allows states to align their refugee protection policies with their individual political values and interests. This is the dominant approach under international refugee law, but is observed to obtain insufficient contributions to international protection, either through financial pledges or resettlement places. On the other hand, a solidarity mechanism can operate according to a fixed distribution key that dictates the mandatory allocation of responsibilities between participating states. When proposed, such imposed responsibility quotas are usually predicated on some measure of each states capacity to contribute to international protection and are thus described as representing a ‘fair sharing’ of responsibility between states. The question of determining each state’s capacity and so its fair share is, inevitably, contested and difficult to agree between states.¹⁷⁸ Schuck’s model seeks to address the difficulties faced by each by combining

¹⁷⁵ See text accompanying notes 87-91.

¹⁷⁶ Above note 86.

¹⁷⁷ Above notes 72, 76 and 82.

¹⁷⁸ See, for example, above notes 139 and 132.

the two approaches: first, every state is to be allocated a quota of responsibility that is based on GDP; and second, states are permitted to trade these quotas as they see fit so as to allow states to align the protection that they carry out with their wider interests.¹⁷⁹

This chapter demonstrates the variety of different policy options that might be considered as representing solidarity in international refugee law. Together with chapters one and two, it roundly demonstrates that solidarity is a flexible term with no definite meaning. Beyond this initial observation, however, this chapter informs our understanding of some of the specific difficulties in designing and negotiating solidarity mechanisms in the context of refugee protection. First among these is the legal limitations on protection elsewhere policies that protect the fundamental rights of the persons subject to them but also restrict the scope of the policies that states might otherwise agree. Second, this chapter highlights the importance afforded to states' preferences and interests in determining the shape of a solidarity mechanism in relation to refugee protection and demonstrates that, at the international level, there are rather limited prospects of success for a mechanism that does not allow states to customise their roles in providing refugee protection to suit their broader interests.

This chapter concludes the first part of the thesis, which has sought to explore the variety of meaning attached to the principle of solidarity in the overlapping contexts that constitute the CEAS, namely: the history of the meanings of the term in European social, political and philosophical thought in chapter one; solidarity as a widely-used term in European Union law in chapter two; and solidarity in refugee law in chapter three. Together, these chapters identify a matrix of factors that contribute to understanding solidarity, which are used as points of reference for the analysis of solidarity in the context of the CEAS in the next two chapters. First, chapter four examines the measures that constitute the CEAS's 'solidarity toolbox' and the various aspects of solidarity that they express, then chapter five reflects on the implications of the flexibility with which solidarity is interpreted in the CEAS for EU law and policymaking in the sphere of asylum. To summarise, the matrix points are as follows:

¹⁷⁹ Above note 132.

1. Who are the actors of solidarity? Is solidarity a phenomenon that exists between people, between states, or that moves between states and people?
2. Does the principle of solidarity have social or economic aims? How do the nature of its aims impact on our understanding of the dynamics of solidarity?
3. Does solidarity operate between a group of separate, individual entities (be they people or states), or does it entail their joining together and erasing individuality?
4. Is solidarity voluntary, based on the actors' free will? Or does it derive from an obligation to act in a particular way?
5. Who is included in, and excluded from, the scope of solidarity? Is solidarity universalist or particularist? If the latter, how is membership of the group defined?
6. What political preferences and agendas lie behind the use of the word, 'solidarity'? How do these shape its use in different contexts and relationships?
7. What are the costs involved in solidarity, and who is responsible for paying them?
8. When is solidarity referred to? Does it respond to a crisis? Or is it ongoing and continuous?

CHAPTER FOUR: EXAMINING THE CONTENTS OF THE COMMON EUROPEAN ASYLUM SYSTEM'S 'SOLIDARITY TOOLBOX'.

In its 2011 paper on the future of solidarity in the CEAS, the Commission referred to a 'solidarity toolbox', from which it could choose different measures that would suit different circumstances.¹ The Commission's list includes practical cooperation and technical assistance, enhancing the European Refugee Fund, and improving mutual trust, showing that its approach to solidarity is multifaceted, and not limited to the immediately obvious options based on redistribution.² Neither is the list intended to be exhaustive: "Each [tool] can be improved and new components can be established to provide a flexible toolbox responding to different solidarity needs".³ It seems an apt metaphor to borrow to frame this chapter. Where the Commission's toolbox contains a handful of policies that it believes will help to advance the principle of solidarity in the CEAS for that time, this chapter selects a cross-section of CEAS legal and policy measures that show elements of solidarity when viewed through the matrix of factors identified in the previous chapters. The chapter conducts a legal analysis of these measures to understand the type of solidarity that each conveys. This introductory section explains how these mechanisms were identified and the analytical framework that this chapter applies to them.

I divide the CEAS mechanisms into three groups according to the way that they express solidarity: practical, financial, and legal. These groups are built from the observations made in chapters two and three of various solidarity mechanisms. Practical solidarity is the most common type expressed in refugee law, as observed in chapter three. It comprises the tangible actions taken by one to assist another state in fulfilling its obligations towards refugees. This might be through moving persons in need of

¹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust*, COM(2011) 835 final, 2.

² *Ibid.*, 2, 5 and 10.

³ *Ibid.*, 2.

protection between states or through direct assistance, through providing resources such as interpreters, case workers, or material provision – shelter, food or clothing for refugees. Practical support is also understood as an expression of solidarity through Article 222 TFEU, the solidarity clause.⁴

Section one of this chapter explores practical solidarity in the CEAS through three mechanisms. First, the temporary protection Directive, which was adopted expressly as a vehicle of solidarity, demonstrated through sharing responsibility for persons in need of protection arriving as part of a mass influx.⁵ Second, the relocation Decisions adopted in 2015 in response to the materialisation of a refugee crisis highlight an alternative approach to practical solidarity through redistributing persons in need of international protection.⁶ This contrast with to the temporary protection Directive means that it offers a useful counterpart in the analysis of practical solidarity. Third, this section considers the European Asylum Support Office (EASO) because it has been described by EU institutions as central to solidarity in the CEAS⁷ and it offers a vision of practical solidarity that does not involve moving persons in need of international protection.⁸

Financial solidarity emerges as another common type of solidarity in chapters two and three. The EU frequently expresses solidarity through financial arrangements, including through providing access to national welfare systems for non-national Union citizens and through the redistribution of money between regions in the Structural and Cohesion Funds.⁹ The EU Member States also express financial solidarity through the European Stability Mechanism and Eurozone bail-outs.¹⁰ Paying for refugee status determination and international protection is one of the core requirements of the international

⁴ See chapter two, section 3.1.

⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ [2001] L212/12.

⁶ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L239/146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L248/80.

⁷ Above note 1, 2-4; Committee on Civil Liberties, Justice and Home Affairs, European Parliament, *Report on enhanced intra-EU solidarity in the field of asylum* (2012/2032(INI)), 6-8.

⁸ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ [2010] L132/11.

⁹ See chapter two, section 1.2. and 2.1.

¹⁰ *Ibid*, section 2.2.

refugee regime.¹¹ In international models for sharing responsibility for refugees, financial compensation for protection work is envisaged by models proposed by Schuck (through trade of allocated protection quotas) and by Hathaway and Neve (global North pays for refugee protection provided in the global South).¹² In the CEAS, financial solidarity is expressed through the Asylum, Migration and Integration Fund (AMIF),¹³ which is the subject of section two.

Legal solidarity understands solidarity as legal integration and is the least obvious of the three groups of measures. It does not immediately jump out from chapter three, as the CEAS is more closely integrated than any other international or regional system of refugee law. It is, however, visible in other spheres of EU solidarity, for example the legislation coordinating the national welfare systems of the Member States.¹⁴ This chapter argues that the CEAS expresses legal solidarity through a shared legal framework that operates to guide and coordinate the Member State's national asylum systems.

This is based on two pillars that function differently but interdependently. First, the Dublin system coordinates the separate, national asylum systems of the Member States by allocating applications for international protection between them according to a hierarchy of responsibility criteria.¹⁵ It instructs that the other Member States can rely on negative decisions in those applications to create a system in which an application for international protection is heard by only one Member State.¹⁶ Second, three harmonising Directives create a set of legally binding, common criteria for qualification for international protection,¹⁷ the procedures for determining such qualification,¹⁸ and the standards of

¹¹ See chapter three, section 1.

¹² *Ibid*, sections 1.1. and 2.3.

¹³ Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ [2014] L150/168.

¹⁴ See chapter two, section 1.2.

¹⁵ Regulation (EU) No 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, OJ [2013] L180/31.

¹⁶ *Ibid*, Article 3(1).

¹⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast), OJ [2011] L337/9.

¹⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ [2013] L180/60.

reception conditions for applicants while that determination takes place.¹⁹ These Directives seek to create similar asylum conditions in every national system to discourage applicants from moving between them, which undermines Dublin's allocation of responsibility. They also serve to reinforce the mutual trust of the Member States in each other's asylum systems so that they can confidently recognise each other's negative decisions. Section three analyses each of these two pillars, arguing that together they express a legal solidarity. The final part of section 3 analyses its constitutional aspects to argue that these measures convey legal solidarity as legal integration.

This chapter's three groups of solidarity resemble Noll's classic formulation of "sharing norms... sharing money... sharing people" as three different types of cooperation for protecting refugees.²⁰ Although they build on Noll's classification, the groups employed in this chapter are preferred for three reasons. First, by listing 'sharing people' as one type of solidarity, the fact that all three types of solidarity concern the negotiations between states in relation to people is obscured. It problematically implies that 'sharing money' and 'sharing norms' are not about people, contrary to the foundation of solidarity in asylum law and policy: the provision of international protection to people who need it. Second, changes in the institutional framework for asylum in the EU since Noll outlined this trio in 2002 are not adequately captured by it. This is most obvious in relation to the EASO, which, although described by the EU as a prominent feature of solidarity in the CEAS,²¹ does not comfortably fit into any of the three categories as it shares technical assistance and expertise rather than norms, money, or people. Finally, the development of the CEAS is increasingly driven by crisis response through which practical and technical assistance between the Member States has become more prominent.

Each measure addressed in this chapter is analysed using a framework that highlights the inherent conflicts of meaning that exist within the principle of solidarity to comment on how each measure differently resolves these conflicts. These questions are drawn from the most salient issues of the

¹⁹ 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 (recast), OJ [2013] L180/96.

²⁰ Gregor Noll, 'Protection in a spirit of solidarity?' in Rosemary Byrne, Gregor Noll and Jens Vested-Hansen (eds.), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Hague: Kluwer Law International, 2002) 305-324, 309.

²¹ Above note 7.

solidarity matrix that represent particular sticking points in understanding solidarity. The analysis is based on five questions that open up the discussion of solidarity in the measures of the CEAS.

The first is: who does the solidarity address? ‘Solidarity’ in its everyday use is a sentiment expressed between, and certainly towards, people, as established in chapter one,²² and is imagined in this sense in popular rhetoric.²³ A consistent critique of low protection standards, and correspondingly of a low standard of solidarity with applicants for, and beneficiaries of, international protection, is levelled at the CEAS.²⁴ On the other hand, Article 80 TFEU expressly states that solidarity is between the Member States. The analysis shows that most CEAS solidarity measures focus on the relationships between the Member States, considering the impact of persons in need of international protection to a much more limited extent. This highlights a conflict between the usual, public understanding of the boundaries of solidarity as applied to asylum policy and the way in which it is used in the CEAS.

Second, considers the ‘what’ of solidarity: the way in which solidarity engages with its addressees. Is the measure coercive; does it instruct, or restrict, the way in which the addressee should act? Or is it supportive; does it provide some added value for the addressee? Looking at the measures through this lens, I argue that the latter is preferred by the Member States and has the benefit of satisfying the requirements of the principle of subsidiarity.²⁵ Restrictive or coercive solidarity limits the sphere of action available to the Member States and risks treating persons in need of international protection as any other logistical problem and ignoring that they are human with needs, preferences, and agency.

²² Chapter one, section 2.

²³ See introductory chapter, sections 1. and 2.2.

²⁴ S W Allard, “Casualties of Disharmony: The Exclusion of Asylum Seekers under the Auspices of the Common European Asylum System”, [2010] 24(1) *Emory International Law Review* 295-330; F. Maiani and V. Vevsted, “Distribution of Applications for International Protection and Protected Persons” in Directorate General for Internal Policies, Policy Department C: Citizens’ Right and Constitutional Affairs, “Setting up a Common European Asylum Systems: Report on the application of existing instruments and proposals for the new system” (Brussels: European Parliament, 2010); J Handoll, “Directive 2003/9 on Reception Conditions of Asylum Seekers: Ensuring ‘Mere Subsistence’ or a ‘Dignified Standard of Living’?” in A Baldaccini, E Guild and H Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, (Oxford: Hart Publishing 2007) 195-228.

²⁵ Subsidiarity instructs that decisions should be taken as close to the affected parties as possible, so the EU should only legislate where to do so offers benefits that cannot be achieved at the local, regional or national level, Article 5(3) TEU.

Third, the analysis asks: how is the solidarity achieved? This question is targeted at the vision of the CEAS as a protection system. Is solidarity about creating one, supranational, European asylum system? Or is solidarity about managing the relationships between separate, parallel, national asylum systems? Through the solidarity matrix developed in the first part of the thesis, this emerges as a key question that shapes expressions of solidarity and is thus an essential factor in understanding solidarity in the context of the EU's asylum policy. Presently, the CEAS functions on the latter basis, but proposed reforms indicate a preference for the former, particularly in the Commission's advocacy for closer legal solidarity. The Member State's preference for maintaining their national space to shape their asylum policies is a central element of solidarity in the CEAS.

The fourth question is the 'why' of solidarity: what motivates the solidarity that the measure expresses? This question is a recurring issue in discussing solidarity in in chapters one, two and three. The solidarity expressed in each of the measures sits somewhere different along a scale between that which is voluntary or altruistic at one end, and that which is an obligation at the other end. For example, solidarity that is not compulsory but is incentivised by financing from the AMIF will sit somewhere in the middle of the scale, being neither a legal obligation nor something that the Member States has decided to do entirely of its own volition. The distinction between these two extremes was posed in chapter three as the voluntary assumption of responsibility and mandatory allocations in showing solidarity through relocating or resettling refugees by voluntary pledges and distribution keys.²⁶ This chapter's analysis through this lens is wider, taking in those same aspects in the CEAS as well as looking at measures that do not move people between states. The more successful measures are those that allow the Member States to define the limit of their actions voluntarily.

The fifth question is: when does the solidarity happen? Is solidarity an emergency response, responding at a specific time to a crisis? Or is solidarity an ongoing part of the CEAS, happening in 'normal' times too? The findings of chapters two and three show that solidarity can be used to describe both scenarios, and that is reflected in the CEAS too. This is significant because in the immediate pressure of the refugee

²⁶ Chapter three, section 2.

crisis, solidarity can appear to apply most to the response, but the analysis through this question shows that solidarity also has a continuous or ongoing role in the CEAS.

Each section that follows takes a measure of the ‘solidarity toolbox’ and examines it through these five questions to build a nuanced picture of solidarity in the CEAS. These measures are grouped according to types of solidarity: first showing practical solidarity, next financial solidarity, and then legal solidarity.

1. PRACTICAL SOLIDARITY

The first type of solidarity measure in the CEAS conveys practical solidarity, which might be characterised, for example, by the physical relocation of people in need of protection between Member States, humanitarian assistance in an emergency or in the context of inadequate national protection standards, or by technical assistance in conducting protection status determination. Chapter three demonstrates that such practical assistance is the most common understanding attached to the principle of solidarity in the refugee context and, specifically, this is understood as dividing responsibility for physical reception of persons in need of protection between states. Key CEAS measures that express this solidarity are the temporary protection Directive, the emergency relocation Decisions of 2015. An alternative vision of this solidarity is expressed through the European Asylum Support Office, which is also addressed to provide a sufficiently broad account of practical solidarity.

1.1. THE TEMPORARY PROTECTION DIRECTIVE

The Directive contains an emergency mechanism to be activated by the Council in the event of a mass influx of persons in need of international protection to the territory of the EU.²⁷ It is referred to as the temporary protection Directive as a shorthand for its longer, formal title. In the Commission’s proposal for the Directive, it was described as a “practical expression of Member State solidarity”,²⁸ and in *N.S.*,

²⁷ Above note 5.

²⁸ European Commission, *Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, COM(2000) 303 final, OJ [2000] C311/251, para 5.1(6).

the Court acknowledge the Directive as an example of the solidarity referred to in Article 80 TFEU.²⁹ The Directive was the first piece of legislation adopted following the conferral of asylum competences to the EU under the Treaty of Amsterdam and so stands as a window into the understanding of practical solidarity at the beginning of the CEAS.

The objective of the temporary protection Directive is to provide a plan that enables the EU to respond swiftly and appropriately when faced with a large number of persons in need of protection, in an attempt to learn lessons from the disorganised response to the refugee movements from Kosovo in the 1990s.³⁰ The plan it contains, however, has never been used despite potential opportunities, and, indeed vociferous call, to do so, such as during the Arab Spring in 2011 or the refugee crisis of 2015 and 2016.³¹ In spite, and because of, this, the temporary protection Directive is a useful mechanism to study to understand practical solidarity. On the one hand its mechanism shows a clear vision of solidarity in the minds of the legislators as well as the extent of the commitments that the Member States were willing to make in pursuit of this. On the other, the failure to make use of its provisions is also informative in relation to understanding solidarity in practice.

The temporary protection mechanism must be activated by a Council Decision adopted by a qualified majority,³² following a proposal from the Commission, which might act on its own initiative or at the request of a Member State.³³ This Decision must take account of three points.³⁴ First, the scale of expected movement must be sufficiently large to warrant designation as a ‘mass influx’. The Commission has indicated that such movement must be a “of a comparable scale” to that from Kosovo in 1999.³⁵ Second is the “advisability” of activating the mechanism, particularly taking into account the adequacy of emergency aid in the area of arrival. With little to guide this part of the Decision, it seems

²⁹ Joined Cases C-411/10 *NS* and C-493/10 *ME and Others*, EU:C:2011:865, [93].

³⁰ Above note 5, Recital 6.

³¹ Ineli-Ciger argues for the use of the temporary protection Directive in response to the refugee crisis, Meltem Ineli-Ciger, “Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe” (2016) 18 *EJML* 1-33.

³² Above note 5, Article 5(1).

³³ *Ibid*, Article 5(1) and (2).

³⁴ *Ibid*, Article 5(4).

³⁵ Above note 1, page 9, paragraph 3.4.

likely that the political circumstances would dominate its consideration.³⁶ Finally, information from the Member States and the Office of the UN High Commissioner for Refugees (UNHCR) should be taken into account. These criteria offer a framework for making the decision, but leave plenty of room for manoeuvre according to political considerations, particularly as to what will constitute a sufficiently large influx³⁷ and whether the use of the mechanism is advisable. This shows, in the context of the ‘when’ of solidarity, that the temporary protection Directive is expressly envisioned as a response to an emergency, only to be activated in exceptional circumstances. The Member States are expected to take care of their own responsibilities in ‘normal’ times and the redistribution provided for in this mechanism is limited to the occurrence of a ‘mass influx’.

If activated, the mechanism operates according to the provisions of Chapter VI, entitled ‘Solidarity’. It provides for the relocation of persons in need of temporary protection³⁸ to other Member States in order that their spare reception capacity is used to relieve the over-burdened point of arrival.³⁹ To achieve this, each Member State is asked to indicate its capacity “in figures or in general terms”.⁴⁰ These transfers are subject to ‘double voluntariness’, meaning that both the receiving Member State and the individuals to be transferred must consent to the move.⁴¹ This provides practical solidarity to the Member State in need of assistance to the extent that the other Member States are willing to assist.

Relocation under the temporary protection Directive is for the benefit of the Member States affected by the mass influx, easing the pressure it creates on them, not for the benefit of those in need of international protection. The mechanism is designed to use spare reception capacity in other Member

³⁶ Ingrid Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002), 182.

³⁷ The discussion of the Directive at the time of the Arab Spring makes clear that this threshold is high, and was deemed not to be met on that occasion, Answer to Question No E-004591/11, E-004779/11, answer given by Cecilia Malmström on behalf of the Commission of 12/07/2011.

³⁸ Relocated persons are granted an exceptional temporary protection status, rather than a standard protection status under the national asylum system (as would have existed at the time of passing the Directive) or refugee status or subsidiary protection status under the qualification Directive now. This compromise was reached during the negotiation of the Directive, in an atmosphere that was generally keen to limit access to asylum systems, in order that emergency provision could be established (above note 36, 64-69). Nevertheless, access to asylum systems cannot be fully excluded according to the Member States’ international obligations under the Geneva Convention relating to the Status of Refugees 1951 (Above note 5, Article 17). This also accords with Article 17 of the Charter of Fundamental Rights, which provides a right to seek asylum.

³⁹ Above note 5, Article 26.

⁴⁰ *Ibid*, Article 25(1).

⁴¹ *Ibid*, Article 26.

States to respond to overwhelming demand at the point of entry. The requirement of the consent of the person to be transferred should offer a safe-guard and prevent transfers under the mechanism where such would be to the disadvantage of the person concerned. However, this would depend on the availability of adequate information for the person to assess the benefits of the proposed transfer. In response to the first question, then, the temporary protection Directive conveys a solidarity that is for the benefit of the Member States but contains a protective provision to prevent harm to persons in need of protection.

Regarding the second question, the solidarity provided to the Member States affected by a mass influx through the temporary protection Directive is supportive in that it contributes something beyond the capacity of the affected Member State alone.

To the question of ‘how’ solidarity is conveyed, this analysis demonstrates the temporary protection Directive’s mechanism to be voluntary. The Member States elect voluntarily to activate its terms through their representatives in the Council, restricted only by the possibility of being an out-voted minority. Should an activating Decision be adopted, the Member States are asked to define their own reception capacities, which allows each Member State to restrict or expand its offer according to its preferences. This flexibility is enhanced by the provision that such capacities might be conveyed in figures, or merely in general terms.⁴² Finally, the receiving Member State can veto individual transfers through the requirement of ‘double voluntariness’.⁴³

The voluntary nature of this solidarity mechanism allows significant space for discretion at the national level for each Member State to determine its preferred commitments. The Directive is predicated on separate asylum systems operating at the national level that, in the event of an emergency, might exceptionally share spare capacity in those systems with other Member States.

The Directive also outlines the content of temporary protection should it be granted, to create similar conditions across the Member States. This includes provisions for access to employment,⁴⁴ education,⁴⁵

⁴² Above note 40.

⁴³ Above note 41.

⁴⁴ Above note 5, Article 12.

⁴⁵ *Ibid*, Article 14.

suitable accommodation,⁴⁶ social welfare and healthcare for those with insufficient means,⁴⁷ family unity,⁴⁸ and special protection for minors.⁴⁹ In addition, those granted temporary protection cannot be excluded from applying for refugee status through the Member State's standard asylum system.⁵⁰ The provisions of the Directive were to be supported by the European Refugee Fund,⁵¹ as it then was, and this commitment is maintained under the current AMIF.⁵² The identification of this support is in Chapter VI, so it should also be considered an expression of solidarity, though falling in the 'financial solidarity' bracket and as supplementary to the Directive's principal, practical solidarity. The creation of an alternative, less onerous protection status for persons subject to the temporary protection Directive in this way also benefits the Member States. It reduces the extent, and therefore expense, of the protection obligations of the Member States for those outside of the Member States' formal asylum system, though it is not clear where the equilibrium between these separate protection regimes would sit in practice.

Although the analysis of this mechanism is limited through the lack of any example of its implementation, the very fact that it has not been used is also telling of how solidarity is understood in this Directive. The mechanism anticipates a crisis of such scale that it becomes a shared, cross-border issue for the Member States, and responding in a way that shares responsibility is highlighted in the preamble to the Directive as both an expression of solidarity⁵³ and a contribution to the achievement of the shared goal of creating an area of freedom, security and justice (AFSJ).⁵⁴ Member States that neither share a land border with, nor are a short stretch of water from, third countries are unlikely to be affected by an 'influx' of directly-arriving persons seeking protection. Amongst these Member States are some of those with the largest populations, such as Germany, the UK, France and Poland and thus large shares of the votes within the Council.⁵⁵ These states have little to gain, but great expense to be incurred, following activation of the Directive meaning that they are unlikely to vote in favour unless there is

⁴⁶ *Ibid*, Article 13(1).

⁴⁷ *Ibid*, Article 13(2).

⁴⁸ *Ibid*, Article 15.

⁴⁹ *Ibid*, Article 16.

⁵⁰ Above note 38.

⁵¹ Above note 5, Article 24.

⁵² See above note 132.

⁵³ Above note 5, Recital 7.

⁵⁴ *Ibid*, Recital 1.

⁵⁵ Article 16(4) TEU.

some sense that the crisis is shared. In other words, those with more to lose from triggering the mechanism of the temporary protection Directive will always outweigh those who stand to gain. This derives from the voluntary nature of the mechanism, but is a fundamental weakness in its design and perhaps represents an era in which there was greater optimism, and naiveté, about the extent to which the Member States would be willing to share responsibility for refugee crises.

In the event of the arrival of large numbers of persons seeking protection in many Member States, and significant public support for sharing responsibility between Member States in 2015, the Council still declined to implement the temporary protection Directive, preferring to create a new mechanism based on Article 78(3) TFEU. This mechanism too relocates persons in need of protection between the Member States, but it offers an additional contribution to understanding practical solidarity in the CEAS, both through a different approach to determining the extent of the Member States' obligations and through offering some evidence of its operation in practice.

1.2. THE RELOCATION DECISIONS

In September 2015, the Council adopted two provisional measures for relocating applicants for international protection from Italy and Greece in response to the refugee crisis, comprising 40 000 places under the first⁵⁶ and an additional 120 000 places under the second.⁵⁷ Both aimed to reduce the pressure on the Greek and Italian asylum systems that resulted from a large number of applicants for international protection arriving in the EU through 2015 and run for a limited period of two years.⁵⁸ This pressure was exacerbated by the Dublin system, which rendered these Member States responsible for the majority of these applications as first point of irregular entry. The Decisions demonstrate practical solidarity with Italy and Greece by reducing the number of applicants for whom these Member States would have to process applications. This section explores this mechanism as an expression of practical solidarity.

⁵⁶ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L239/146.

⁵⁷ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L248/80.

⁵⁸ Above note 56, Article 13(2); *ibid*, Article 13(2).

The relocation mechanism is the same in each Decision. An applicant must have lodged an asylum application in Italy or Greece or one of these Member States must otherwise be deemed responsible for the application under the Dublin Regulation.⁵⁹ In addition, the applicant must be a national, or former habitual resident if the applicant is stateless, of a country from which asylum applications are generally successful. This is quantified as a 75% or higher success rate at first instance of asylum applications from that country on average across the Member States according to Eurostat data.⁶⁰ For the third quarter of 2015, eligible applicants were Syrians, Eritreans and Iraqis.⁶¹ This requirement is intended to achieve the relocation of those clearly in need of international protection without using relocation spaces up on those who will not be granted protection in the receiving Member State.⁶² No provision in the Decisions requires the consent of the applicant concerned for the relocation to take place.

As under the temporary protection Directive, the relocation of persons in need of protection from Italy and Greece under the Decisions is for the benefit of these Member States: they are the addressees of this expression of solidarity. The degree of protection provided to persons to be relocated guaranteed in the temporary protection Directive, however, is absent from the Decisions, which do not require the consent of the person affected. This indicates a shift even further towards the interests of the Member States away from those of the applicants for international protection subject to this mechanism. This expression of solidarity is intended to support Italy and Greece by relieving responsibility for applications for international protection that would otherwise fall on these states under the Dublin system. Indeed, these Decisions are expressly described as exceptions to Dublin.⁶³

⁵⁹ Above note 56, Article 3(1); above note 57, Article 3(1). Allocation of responsibility under Dublin is addressed below in section 3.

⁶⁰ Above note 56, Article 3(2); above note 57, Article 3(2).

⁶¹ Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report?1500607745#cite_note-5 [accessed 16/12/15]. Eurostat, <http://ec.europa.eu/eurostat/documents/6049358/7005580/Rates+of+Recognition+-+EU28+Q1+2016.pdf/707db02a-d30b-477e-b017-70f655d523c3> [accessed 08/07/16]. According to these data, applicants from Central African Republic, Saudi Arabia and Dominica would also be eligible with recognition rates of greater than 75%, though each represented a very small number of applicants across the Member States at 305, 20 and 5 respectively. Laos, Bahrain and the Seychelles also show a greater than 75% recognition rate, but this is on the basis that no Member State received an application from a national of these countries. The Commission confirmed in its *First Report on Relocation and Resettlement* that there is no minimum number of applicants from a country required for its nationals to qualify for relocation, COM(2016) 165 final, 7.

⁶² Above note 56, Recital 20.

⁶³ Above note 56, Recital 18; above note 57, Recital 23.

The difference between the Decisions lies in the way in which each reallocates those applications to the other Member States. The first Decision provides for the relocation of 40 000 applicants for international protection from Italy and Greece to other Member States, comprising 24 000 from Italy and 16 000 from Greece.⁶⁴ The distribution of relocation places was determined by the voluntary pledges of the Member States' representatives at a Council meeting on 20 July 2015. At this meeting, a total of 32 256 relocation places were pledged and it was agreed that the shortfall of the 40 000 target would be arranged by the end of 2015.⁶⁵ Under this Decision, solidarity is voluntary. Whilst the Member States are encouraged to make pledges by the use of the language of solidarity, it is open to them to offer as many, or as few, places as they deem to fit with their individual political preferences.

The second Decision creates 120 000 further relocation places,⁶⁶ with 15 600 from Italy, 50 400 from Greece and the remaining 54 000 as spare capacity to be deployed as necessary in subsequent months, either as additional places from Italy and Greece or from other Member States if a further Decision is adopted.⁶⁷ Perhaps due to the failure to meet a much lower target by voluntary pledges, the second Decision allocates each Member State a quota of relocation places with a distribution key. This key calculates the number to be allocated to each receiving Member States according to their capacities, which are measured through weighted positive consideration of population (weighted at 40%) and GDP (40%), less consideration of average numbers of spontaneous asylum applications per million inhabitants (10%) and unemployment rates (10%).⁶⁸

Under this Decision, solidarity is mandatory. Each Member State's liability is dictated to it according to an objective and compulsory distribution key. These objective criteria are agreed as indicators of fairness by the Member States to measure their reception capacities, rather than requiring each to

⁶⁴ Above note 56, Article 4.

⁶⁵ Justice and Home Affairs Council, Outcomes of 3405th meeting in Brussels on 20 July 2015 (11097/15, Brussels, 20 July 2015), 3-4. The first report on implementation indicated that there had been no update of the pledged numbers by March 2016, above note 61.

⁶⁶ Above note 57, Article 4(1).

⁶⁷ Above note 56, Article 4(2). The Commission had originally intended that this latter figure be relocated from Hungary, but the Hungarian national authorities declined to participate, European Commission, *Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary*, COM(2015) 451 final, 22.

⁶⁸ Above note 56, Annex I for Italy and Annex II for Greece.

subjectively interpret its own reception capacity as under the first Decision and the temporary protection Directive. This is the first time that this approach to sharing responsibility for physical protection of applicants for international protection has been approved by the Member States, despite it being proposed as early as 1994.⁶⁹ The mandatory aspects of the second Decision recall redistribution in the welfare state, or through redistributive solidarity elsewhere in the EU.⁷⁰

The solidarity of these Decisions is expressly a response to a crisis, characterised by the Member States coming together in the hour of need of a few to provide practical assistance. This is reinforced by their legal basis, Article 78(3) TFEU, which is limited to “an emergency characterised by a sudden inflow of third country nationals”. It is also evident in the Preambles to the Decisions, which state that solidarity is demanded by, and responds to, the increased pressure on Italy and Greece. For example:

Due to the ongoing instability and conflicts in the immediate neighbourhood of Italy and Greece, it is very likely that a significant and increased pressure will continue to be put on their migration and asylum systems, with a significant portion of the migrants who may be in need of international protection. *This demonstrates the critical need to show solidarity towards Italy and Greece...*⁷¹

Elsewhere in the Preambles, the Mediterranean is identified as an area in crisis and the need for solidarity flows from the identification of this emergency: “The recent crisis situation in the Mediterranean prompted the Union institutions to immediately acknowledge the exceptional migratory flows in that region and call for concrete measures of solidarity towards frontline Member States”.⁷² Moreover, this solidarity responds to a problem that is perceived to be shared by the Member States despite acutely affecting few. The arrival of a large number of persons seeking protection in any part of the Schengen area is of interest to all as the removal of internal borders allows their free movement on a scale to which Dublin cannot respond.

⁶⁹ Council Presidency, *Draft Council Resolution on burden-sharing with regard to the admission and residence of refugees* (7773/94, Brussels, 1 July 1994).

⁷⁰ See chapter two, section 2.

⁷¹ Above note 56, Recital 13, emphasis added; repeated in Recital 16, above note 57.

⁷² Above note 56, Recital 3; above note 57, Recital 2.

The second part of the analysis of these Decisions turns to their operation in practice, which is noticeably different from how they are envisioned on paper. This suggests a gap between the idealised solidarity in principle and its implementation. First, very few of the planned relocations have gone ahead: there were 232 in the first three months, 1 500 after eight months and 3 056 after ten.⁷³ Whilst undoubtedly there are practical difficulties, not least in registering new arrivals in Greece and Italy, it seems that EU efforts to mitigate this have been unsuccessful. The formation of ‘hotspots’ where applicants could be registered and screened for the possibility of relocation by national authorities and extra staff coordinated through FRONTEX and the EASO have been, at best, a little slow getting started and there is a reported lack of facilities and accommodation together with poor determination procedures.⁷⁴ The implementation reports indicate that it is unlikely that these Decisions will be implemented before the deadline in September 2017.⁷⁵ These failures and confusions suggest that the practical solidarity might be easier to commit to paper than to put into effect.

The second problem facing the relocation mechanism is the political objection of some Member States, targeted particularly at the second Decision as it compels Member States to take responsibility for persons in need of protection. A number of Central and Eastern European Member States registered their objections to quota-based or mandatory relocation, insisting that such schemes should remain voluntary.⁷⁶ This is echoed in statements by the Visegrad Group (Poland, Hungary, Slovakia and the Czech Republic): “[A]ny proposal leading to introduction of mandatory and permanent quota for solidarity measures would be unacceptable”.⁷⁷ Further, Slovakia and Hungary have lodged challenges

⁷³ Commission Press Release of 17/12/2015, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf [accessed 18/12/15]; Commission Press Release of 18/05/2016, available at http://europa.eu/rapid/press-release_IP-16-1763_en.htm [accessed 20/05/2016]; Commission Press Release of 13/07/2016, available at http://europa.eu/rapid/press-release_IP-16-2435_en.htm [accessed 06/09/2016].

⁷⁴ European Commission, *First Report on Relocation and Resettlement*, COM(2016) 165 final, 2; C. Costello, ‘It need not be like this’ (2016) 51 *Free Movement Review* 12-14, 13; <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1285-italy-a-worrying-trend-is-developing-in-the-hotspots.html> [accessed 08/01/16].

⁷⁵ Above note 58.

⁷⁶ Justice and Home Affairs Council, Minutes of 3405th meeting in Brussels on 20 July 2015 (11088/15, Brussels, 22 September 2015), 7-8 and 10.

⁷⁷ Visegrad Group, *Joint Statement of the Heads of Government of the Visegrad Group Countries* (Prague, 4 September 2015), available at <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-150904> [accessed 31/08/2016].

to this Decision with the Court.⁷⁸ A similar disinclination to participate is evident in the pledges of places for the first Decision, of which none came from Hungary.⁷⁹ The flexibility of voluntary solidarity is favoured in this context as it allows Member States to adjust their solidarity contributions to reflect their broader political positions.

The rejection of an obligation to host migrants, particularly Muslims, ties into wider currents of Islamophobia and xenophobia present in sections of public discourse from grassroots to political leaders in these Member States.⁸⁰ However, commitment to the principle of solidarity itself is reaffirmed. This is visible in the response of the Czech Senate to the proposed Regulation offering a permanent footing for this mechanism,⁸¹ which roundly rejected the measure whilst affirming its commitment to the principle of solidarity.⁸² Similarly, the Visegrad Group states: “We do not deny the spirit of solidarity but we firmly argue the contradictory effects and pull factors of a possible mandatory redistribution scheme for asylum seekers”.⁸³ Whilst this dissent was insufficient to prevent the adoption of the second Decision by a qualified majority in the Council,⁸⁴ it has contributed to difficulties in implementation. The Commission has commenced infringement proceedings against Poland, Hungary for their failures to implement one, or both, of these Decisions.⁸⁵

⁷⁸ Case C-643/15 *Slovak Republic v Council*, lodged 2nd December 2015; Case C-647/15 *Hungary v Council*, lodged 3rd December 2015.

⁷⁹ Justice and Home Affairs Council, Outcomes of 3405th meeting in Brussels on 20 July 2015 (11097/15, Brussels, 20 July 2015).

⁸⁰ István Pogány, “A Tale of Two Europes: East and West”, *Social Europe* 22 January 2016, available at <https://www.socialeurope.eu/2016/01/a-tale-of-two-europes/> [accessed 17/05/16]; Jacques Rupnik, “The Other Europe”, *Eurozine* 11 September 2015, available at <http://www.eurozine.com/articles/2015-09-11-rupnik-en.html> [accessed 17/05/16]; Natalia Ojewska, “A ‘witch-hunt’ for Poland’s barely visible refugees”, *Al Jazeera* 3 December 2015, <http://www.aljazeera.com/indepth/features/2015/12/witch-hunt-poland-barely-visible-refugees-151201111826928.html> available at [accessed 31/08/16]. This is not to suggest that such sentiment is absent in other Member States.

⁸¹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 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*, COM(2015) 450 final.

⁸² Resolution of the Senate of the Parliament of the Czech Republic, 22 October 2015, Document ST 13468 2015 INIT.

⁸³ Visegrad Group, *Joint Statement of the Heads of Government of the Visegrad Group Countries* (Bratislava, 19 June 2015), available at <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the> [accessed 31/08/2016].

⁸⁴ See <https://euobserver.com/migration/130374>; and <http://www.euractiv.com/sections/global-europe/eu-backs-refugee-plan-teeth-east-european-opposition-317859> [accessed 07/01/16].

⁸⁵ Formal notices sent for failure to implement both Decisions sent to Poland (infringement number 2017/2094) and the Czech Republic (infringement number 2017/2092) and for failure to implement Council Decision

At the time of their formation, the relocation Decisions made strong statements of the need for practical solidarity and offered an ambitious solution, especially so the second Decision by establishing mandatory quotas. In practice, the low number of transfers that have actually taken place in comparison to those provided for by the Decisions and the harsh criticism of the Decisions by the Visegrad Group indicate together a lack of collective commitment to implementing the relocation process. These difficulties arise in the context of Member States' particular sensitivities towards admitting applicants for international protection to their territories and the safeguards that need to be put in place to protect the fundamental rights of the people subject to relocation. It is therefore instructive to consider a third example of practical solidarity that does not face these challenges as have the previous two.

1.3. THE EUROPEAN ASYLUM SUPPORT OFFICE

The third example of practical solidarity to be explored is the European Asylum Support Office (EASO), an agency established in 2010.⁸⁶ It operates independently of the other EU institutions as a regulatory agency with legal personality,⁸⁷ dealing with practical and operational aspects of the CEAS that are ill-suited to the direct control of any other Union institution.⁸⁸ Comte describes the establishment of the EASO as “a breakthrough in the European spirit”.⁸⁹

The EASO has three objectives. First, the activities of the EASO are intended to improve the implementation of the CEAS.⁹⁰ It does this by collating and exchanging information about the Member States' asylum systems through databases,⁹¹ and by producing an annual report on the situation of

2015/1601 to Hungary (infringement number 2017/2093). See European Commission, *Relocation: Commission launches infringement proceedings against the Czech Republic, Hungary and Poland*, Press Release (IP/17/1607, Brussels, 14 June 2017), available at http://europa.eu/rapid/press-release_IP-17-1607_en.htm [accessed 14/07/17].

⁸⁶ Above note 8.

⁸⁷ *Ibid*, Article 40(1)-(2).

⁸⁸ Strengthening powers within the, as then was, Directorate-General for Justice, Freedom and Security and strengthening existing networks such as EURASIL (a working group for asylum practitioners) were considered undesirable options by the feasibility study and impact assessment, European Commission, *Commission Staff Working Document, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, Impact Assessment*, SEC(2009) 153; Feasibility Study on the establishment of structural support for the practical co-operation activities in the field of asylum, final report, EPEC, April 2009.

⁸⁹ F. Comte, “A New Agency is Born in the European Union: The European Asylum Support Office” (2010) 12 *EJML* 373-405, 404.

⁹⁰ Above note 8, Article 1.

⁹¹ *Ibid*, Article 11.

asylum in the EU and other technical implementation reports.⁹² Second, the EASO aims to facilitate practical cooperation between the Member States.⁹³ This is achieved through the coordination of best practices,⁹⁴ compilation of reports on countries of origin,⁹⁵ supporting relocation,⁹⁶ support for training of decision-makers,⁹⁷ and support for the external aspects of EU asylum policy.⁹⁸ Third, it aims to improve the coordination of operational support for Member States under particular pressure.⁹⁹ This might take the form of gathering and analysing information¹⁰⁰ and supporting the actions of the Member States (specifically, actions which are outside the powers of the EASO).¹⁰¹ Under each of these objectives, the EASO is tasked with providing technical, practical support for the Member States in the execution of their national asylum systems. The EASO's support is intended to enhance the convergence of these asylum systems, contributing to the same aims as legal solidarity.¹⁰²

Each objective strictly limits the EASO to supporting and coordination roles. It is to play no role in the determination of applications for international protection, which remains tied to the national level. The result of is that some of the instructions in the Regulation are so vague that it is difficult to identify exactly what the EASO can do, for example in Article 10. This provision defines the assistance that the EASO might give to a Member State which is facing particular pressure on its asylum procedures and reception condition,¹⁰³ at the request of that Member State. One of the ways in which the EASO can assist is by “coordinating... action to help Member States subject to particular pressure to facilitate an initial analysis of asylum applications under examination by the competent national authorities”.¹⁰⁴ This provision clarifies that the final or main asylum determination should be conducted by the Member State, but it is less clear about what the EASO will do.

⁹² *Ibid*, Article 12.

⁹³ *Ibid*, Article 1.

⁹⁴ *Ibid*, Article 3.

⁹⁵ *Ibid*, Article 4.

⁹⁶ *Ibid*, Article 5.

⁹⁷ *Ibid*, Article 6.

⁹⁸ *Ibid*, Article 7.

⁹⁹ *Ibid*, Article 1.

¹⁰⁰ *Ibid*, Article 9.

¹⁰¹ *Ibid*, Article 10.

¹⁰² *Ibid*, Recital 5.

¹⁰³ There is no definition in the Regulation of ‘particular pressure’.

¹⁰⁴ Above note 8, Article 10(a).

As well these undefined support actions of Article 10, the EASO is instructed to offer assistance to Member States whose asylum systems are facing particular pressure through its asylum support teams.¹⁰⁵ These teams will only be deployed at the request of such a Member State¹⁰⁶ and following an assessment of the support needed by the Executive Director of the EASO.¹⁰⁷ Deployment must be in accordance with an operating plan, which shall include the objectives and methods to be used, a forecast of the duration of the deployment, details of the geographical area covered, special instructions for the team and details of the composition of the team.¹⁰⁸ The teams, comprised of experts made available by other Member States,¹⁰⁹ should provide technical assistance:

The asylum support teams shall provide expertise... in particular in relation to interpreting services, information on countries of origin and knowledge of the handling and management of asylum cases within the framework of the actions to support Member States referred to in Article 10.¹¹⁰

This illustrates a vision of practical solidarity that, rather than being based on the relocation of applicants for international protection to other Member States, relocates the asylum experts of other Member States to those under pressure. Just as under measures that relocate applicants, this relocation of experts operates under the tight control of the Member States. Article 16 states unequivocally that, “The home Member State shall retain its autonomy as regards the selection of the number and the profiles of the experts... and the duration of their deployment”.¹¹¹

In sum, practical solidarity from the EASO is manifested in technical and expert assistance, particularly for Member States in which the asylum system is experiencing pressure. The receiving Member State must request assistance from the EASO and the sending Member State defines what assistance is sent

¹⁰⁵ *Ibid*, Chapter 3.

¹⁰⁶ *Ibid*, Article 13(1).

¹⁰⁷ *Ibid*, Article 17.

¹⁰⁸ *Ibid*, Article 18.

¹⁰⁹ *Ibid*, Article 15.

¹¹⁰ *Ibid*, Article 14.

¹¹¹ *Ibid*, Article 16(1).

and for how long. The option for the Member States to make as much use of the EASO as they wish shows it to be an expression of voluntary solidarity.

With regards to the question of ‘who’ solidarity addresses, the EASO is for the benefit of the Member States. It is designed to help them to improve their asylum systems and support the operation of these systems should they become overwhelmed. Solidarity is supportive: the EASO makes available a variety of reports, instruments, data and technical support for the Member States to use as they wish. With regards to the third question – how is solidarity achieved? – the operation of the EASO is strictly limited to actions that do not impinge on the Member States’ national power to grant asylum. It is a supranational agency, but it does not assimilate the Member States’ national operations, rather it offers an additional layer of support. The EASO is a standing body that operates continuously, so it is not strictly an emergency response. That said, the powers of the EASO are most far-reaching in its capacity to support Member States experiencing emergency situations.

The next section moves on to discuss another type of solidarity, namely, financial. Whilst similar to practical solidarity in that it provides something tangible to pass between the Member States, it is given special attention as the only type of solidarity expressly referred to in Article 80 TFEU.

2. FINANCIAL SOLIDARITY: THE ASYLUM, MIGRATION AND INTEGRATION FUND

The second category of solidarity measure in the CEAS is financial solidarity, or sharing financial resources. As was seen in chapter two, the pooling and redistribution of resources is strongly associated with the idea of solidarity in the EU, both between citizens and between the Member States. This is underlined in the CEAS by Article 80 TFEU, which states that solidarity policies should “includ[e] the financial implications”. Whilst this makes clear that solidarity is not limited to financial solidarity, this is the only type of solidarity expressly envisaged by Article 80 and it is, therefore, imperative to include

it in this analysis. It is currently manifested in the CEAS through the Asylum, Migration and Integration Fund (AMIF).¹¹²

The preamble to the AMIF's governing Regulation shows that the EU institutions and Member States see it as an important expression of solidarity, and it is explicitly described as such: "The Fund should express solidarity through financial assistance to Member States".¹¹³ Further, solidarity is one of the four "common specific objectives" of the Fund: "to enhance solidarity and responsibility-sharing between the Member States, in particular towards those most affected by migration and asylum flows, including through practical cooperation".¹¹⁴ Similarly, the Regulation containing the general provisions relating to AFSJ funds states: "Union funding to support the development of the area of freedom, security and justice should bring added value for the Union and constitute a tangible sign of the solidarity and responsibility-sharing which are indispensable in responding to the common challenges".¹¹⁵

2.1. FUNDS FOR THE MEMBER STATES

Disbursements under the AMIF are administered in two 'pillars'.¹¹⁶ First, 87.7% of the Fund is distributed amongst the Member States. The majority of this (76.3% of the Fund) is allocated to the Member States to finance their national programmes.¹¹⁷ At least 20% of this allocation is to be used to "strengthen and develop all aspects of the Common European Asylum System, including its external dimension,"¹¹⁸ in accordance with objective (a): "[T]o strengthen and develop all aspects of the Common European Asylum System, including its external dimension".¹¹⁹ The remainder is available to support other migration projects.¹²⁰ Within the asylum bracket, the money may be used by the Member

¹¹² Above note 13. The AMIF is not solely concerned with supporting asylum in the EU and in the Member States, it also includes measure on returns, integration and legal migration, but its analysis herein will concentrate on the asylum measures.

¹¹³ *Ibid*, Recital 7.

¹¹⁴ *Ibid*, Article 3(2)(d).

¹¹⁵ Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, OJ [2014] L150/112, Recital 3.

¹¹⁶ Above note 13, Recital 5.

¹¹⁷ *Ibid*, Article 15(1)(a). National programmes must pursue the objectives listed at Article 19.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*, Article 3(2)(a)

¹²⁰ In accordance with the objectives stated at Articles (2) and 19.

States to support reception and asylum conditions,¹²¹ to enhance their capacities to develop, monitor and evaluate their asylum systems,¹²² and for resettlement and humanitarian admission programmes.¹²³

The sums allocated to each Member State are listed in Annex 1,¹²⁴ and consist of a minimum figure for each Member State of €5 million and an additional amount calculated from the average amounts received under previous funding arrangements from 2011, 2012 and 2013.¹²⁵ The European Council concluded in 2013 that “particular emphasis should be given to insular societies who face disproportional migration challenges”,¹²⁶ so the minimum amounts granted to Cyprus and Malta were increased to €10 million each.¹²⁷ This reflects the difficulties faced by small, homogenous societies in integrating newcomers compared to larger, more diverse populations in other Member States.

The additional amount is by far the larger part of the total received by each Member State. To understand how this is calculated, we must look to the previous funding arrangements. Under the European Refugee Fund for 2008-2013 (ERF), each Member State received a fixed amount: €300 000 for most Member States, increased to €500 000 for those Member States that acceded to the Union in 2004 and later.¹²⁸ A lump sum of €4 000 was paid to Member States per person resettled.¹²⁹ The remainder of the ERF’s resources was divided between the Member States in proportion to the numbers of people admitted in the preceding three years, weighted for different statuses.¹³⁰ First, 30% followed the number of people with refugee status, subsidiary protection status and stateless persons.¹³¹ The remaining 70% followed

¹²¹ *Ibid.*, Article 5.

¹²² *Ibid.*, Article 6.

¹²³ *Ibid.*, Article 7.

¹²⁴ Reproduced in the Appendix, page 272.

¹²⁵ *Ibid.*, Recital 37. The previous funds observed are the European Refugee Fund, the European Fund for the integration of third-country nationals and the European Returns Fund, respectively: Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ and repealing Council Decision 2004/904/EC, OJ [2007] L144/1; Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007-2013 as part of the General programme ‘Solidarity and Management of Migration Flows’, OJ [2007] L168/18; Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’, OJ [2007] L144/45.

¹²⁶ Above note 13, Recital 37.

¹²⁷ *Ibid.*, Annex I.

¹²⁸ European Refugee Fund Decision, above note 125, Article 13(1).

¹²⁹ *Ibid.*, Article 13(3).

¹³⁰ *Ibid.*, Article 13(2).

¹³¹ *Ibid.*, Article 13(2)(a), according to the definitions at Article 6(a), (b) and (e).

the number of applicants for international protection and those enjoying temporary protection in accordance with the temporary protection Directive,¹³² although since the mechanism of that Directive has never been activated this latter category can be disregarded. The integration and returns funds were also distributed according to the number of migrants to the Member State.¹³³ Thus the additional amount under the AMIF for each Member State is based on a measure of its share of responsibility for migration, including international protection. The Member States that receive the largest shares are, in descending order, the UK, Italy, France, Greece, Spain and Germany.¹³⁴ Together, these six Member States receive 69.9% of this part of the Fund. The AMIF redistributes resources between the Member States supranationally, but through administering the majority of its funds to national programmes, it does not erase the distinctions between the Member States' national asylum systems, indeed, it reinforces them. The second part of the money for Member States, representing 11.5% of the Fund, is allocated to finance 'specific actions' as well as lump sum grants to support resettlement and relocation.¹³⁵ These measures offer guaranteed support for every Member State whilst incentivising certain policy choices. The specific actions are listed at Annex II to the Regulation and include the following that relate to asylum:

1. Establishment and development in the Union of transit and processing centres for refugees, in particular to support resettlement operations in cooperation with the UNHCR.
2. New approaches, in cooperation with the UNHCR, concerning access to asylum procedures targeting main countries of transit, such as protection programmes for particular groups or certain procedures for examination of applications for asylum.
- ...
4. Joint initiatives aimed at the identification and implementation of new approaches concerning the procedures at first encounter and standards of protection and of assistance for unaccompanied minors.

¹³² *Ibid*, Article 13(2)(b), according to the definitions at Article 6(c) and (d).

¹³³ Above note 125, Council Decision 2007/435, Article 12 and Decision No. 575/2007, Article 14.

¹³⁴ Above note 13, Annex I. These figures are reproduced in the Appendix, page 272.

¹³⁵ Above note 13, Article 15(1)(b) and (2).

The specific actions highlight areas in which cooperation between the Member States may bring additional benefits beyond those that the Member State could achieve separately. This provision presents the idea of solidarity as increased cooperation between the Member States. The provision of funds under these headings promotes common projects and innovation at the EU level. This aspect of the AMIF provides incentives to the Member States to act jointly at the EU level, encouraging an element of supranationalisation of asylum policy.

The AMIF also encourages more resettlement of refugees from third countries in the Member States under the Union Resettlement Programme. Article 17 provides for a lump sum grant of €6 000 per person resettled,¹³⁶ which is increased to €10 000 if the person is vulnerable or falls within one of the prioritised groups.¹³⁷ Vulnerable persons are defined as: women and children at risk; unaccompanied minors; persons having medical needs that can be addressed only through resettlement; and persons in need of emergency resettlement for legal or physical protection needs, including victims of violence or torture.¹³⁸ Resettlement priorities are aligned with the recommendations of the UNHCR¹³⁹ as listed in Annex III of the Regulation:¹⁴⁰ those falling under the Regional Protection Programmes in Eastern Europe, the Horn of Africa and North Africa; refugees in Eastern Africa and the Great Lakes region; Iraqi refugees in Syria, Lebanon, Jordan and Turkey; and Syrian refugees in the region.

Similarly, lump sum grants are available to support the transfer of beneficiaries of international protection from another Member State under Article 18, referred to elsewhere in the CEAS as relocation. Again, €6 000 is awarded per transferred person.¹⁴¹ These grants for relocation are picked out in particular as supporting solidarity. Recital 44 to the AMIF Regulation states:

To enhance solidarity and better share the responsibility between the Member States, in particular towards those most affected by asylum flows, a similar mechanism based on financial incentives [to that supporting refugee resettlement from third countries] should also be

¹³⁶ *Ibid*, Article 17(1).

¹³⁷ *Ibid*, Article 17(2).

¹³⁸ *Ibid*, Article 17(5).

¹³⁹ *Ibid*, Article 17(3)(b) and (c).

¹⁴⁰ *Ibid*, Article 17(3)(a).

¹⁴¹ *Ibid*, Article 18(1).

established for the transfer of beneficiaries of international protection from one Member State to another. Such a mechanism should reduce the pressure on Member States receiving higher numbers of asylum seekers and beneficiaries of international protection, either in absolute or proportionate terms.¹⁴²

In this example, the payments of small grants is an expression of financial solidarity that operates in tandem with practical solidarity manifested in the internal relocation of refugees, whereby the payment to incentivises such relocation. Article 18(4) of the Regulation grants the power to the Commission to adopt delegated acts to adjust these grants to reflect inflation, relevant developments in relocation practice and to optimise the use of the lump sums as a financial incentive for relocation. This power is described expressly as enabling the Commission “[t]o effectively pursue the objectives of solidarity and responsibility sharing between Member States referred to in Article 80 TFEU”.¹⁴³ It portrays an image of solidarity as practical actions between the Member States supported financially at the EU level.

Each of the financial pockets discussed in this section are for the benefit of the Member States; they are the addressees of this aspect of financial solidarity. This solidarity increases their ability to meet the costs associated with providing refugee status determination and protection, and those associated with improving the quality of this provision. To a lesser extent, it also encourages the Member States to adopt particular policies, such as resettlement, under their national discretion by attaching funding to them. This solidarity is supportive as it adds to the Member States’ ability to meet their protection responsibilities. The more-closely earmarked funds encourage the Member States to act in certain ways, but cannot amount to a coercion of their will since the sums involved are relatively small. This solidarity is an ongoing redistribution, rather than an occasional, emergency response, though it does support emergency solidarity with grants to support relocation of persons in need of protection between the Member States.

¹⁴² *Ibid*, Recital 44.

¹⁴³ *Ibid*, Article 18(4).

2.2. FUNDS FOR EU-LEVEL PROJECTS

The second part of the AMIF reserves €385 million, or 12.2%, to enable Union-level actions distinct of those taken by the Member States. The supported Union actions are emergency assistance, the European Migration Network, and technical assistance from the Commission.¹⁴⁴ At least 30% of this pot is to be used for the European Migration Network and Union actions.¹⁴⁵ The money for the European Migration Network are awarded to its national contact points and under public contracts by the Commission.¹⁴⁶ The funds for the other functions are administered by the Commission.¹⁴⁷

Under this pillar, the availability of emergency money is highlighted as showing solidarity above the others. Recital 46 states:

It is important for enhanced solidarity that the Fund provides, in coordination and synergy with humanitarian assistance managed by the Commission where appropriate, additional support to address emergency situations of heavy migratory pressure in Member States or third countries, or in the event of mass influx of displaced persons, pursuant to Council Directive 2001/55/EC, through emergency assistance. Emergency assistance should also include support to ad hoc humanitarian admission programmes aimed at allowing temporary stay on the territory of a Member State in the event of an urgent humanitarian crisis in third countries...

This reinforces the strong connection between the idea of solidarity and emergency responses to crises. The Recital names the activation of the temporary protection Directive as a circumstance that would give rise to a need for emergency assistance, as is provided by that Directive itself.¹⁴⁸ However it is clear from the open wording of the Recital that emergency assistance is not contingent on the operation of that Directive, instead it is cited as an example of the type of situation in which emergency assistance may be required and should be provided.¹⁴⁹ This provision contains a flexibility as to the addressees of

¹⁴⁴ *Ibid.*, Article 14(6)(b).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, Article 22(3). The purpose of the Network is to provide reliable information about migration and asylum, Council Decision of 14 May 2008 establishing a European Migration Network (2008/381/EC), OJ [2008] L131/7.

¹⁴⁷ Above note 112, Articles 20, 21 and 23.

¹⁴⁸ Above note 27, Article 24.

¹⁴⁹ Following the quoted portion, the Recital also contains a proviso on the provision of emergency assistance that humanitarian and temporary admission programmes should not undermine the operation of long-term, durable

solidarity, which might be the Member States in helping them to respond to heavy migratory pressures or persons in need of protection through humanitarian interventions.

The funds allocated to Union projects represent an element of supranational solidarity in addition to the majority of action funded by the AMIF that follows the separate, national asylum systems of the Member States. The AMIF awards the lion's share of its resources to the Member States to support the provision of their national asylum and reception systems in accordance with a measure of the migratory pressure that each faces. A much smaller proportion is reserved for EU-level projects, of which emergency assistance to the Member States is mostly strongly emphasised.

3. LEGAL SOLIDARITY

Legal solidarity is perhaps the least intuitive form of solidarity in the CEAS, characterised by the sharing of a legal framework for asylum between the Member States rather than sharing physical resources. The first section considers the Dublin system. The second part considers the three CEAS Directives for harmonising the legal standards for asylum and refugee protection. The third part of this section turns to the constitutional issues raised by legal solidarity arguing that legal solidarity, as expressed through Dublin and the harmonised legal standards, is tied to legal integration in the CEAS.

3.1. THE DUBLIN SYSTEM

The Dublin system has long been described as the 'cornerstone' of the CEAS and remains its most well-known and legally complex measure.¹⁵⁰ The present version of the Dublin system consists of a Regulation for allocating responsibility for an asylum application to a Member State (Dublin III),¹⁵¹ including a legal power to enforce this allocation by moving applicants between Member States, and the EURODAC database, which supplies the necessary information to support the allocation mechanism.¹⁵²

refugee protection through resettlement and supports this by prohibiting Member States from claiming support under both headings.

¹⁵⁰ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ [2010] C115/1, 32.

¹⁵¹ Above note 15.

¹⁵² 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 for the effective application of Regulation (EU) No

Dublin allocates responsibility for an asylum application according to a hierarchy of criteria contained in its Chapter III.¹⁵³ Primary responsibility falls to any Member State in which the applicant has a family member who is a refugee¹⁵⁴ or who has lodged an as-yet undetermined asylum application.¹⁵⁵ In the absence of a family member, responsibility will fall to any Member State that issued the applicant with a valid residence permit,¹⁵⁶ or valid visa.¹⁵⁷ Specifically, responsibility will lie with the state that issued the permit or visa with the longest duration, or latest expiry date in the case of equal duration.¹⁵⁸ Next, responsibility will fall to the Member State into which the applicant irregularly entered, providing the application is lodged within twelve months of entry.¹⁵⁹ If the application is lodged after the twelve month period, then responsibility falls to the Member State in which the applicant has resided for more than five months.¹⁶⁰ The hierarchy then allocates responsibility to the state where an application was lodged when that Member State has waived a visa requirement.¹⁶¹ If the application is lodged in an international transit area, then the Member State in which the airport is located is responsible.¹⁶² Where these criteria fail to identify a responsible Member State, the application will be allocated to the state in which it was first lodged.¹⁶³

604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ [2013] L180/1.

¹⁵³ Above note 15, Article 3(1).

¹⁵⁴ *Ibid*, Article 9.

¹⁵⁵ *Ibid*, Article 10.

¹⁵⁶ *Ibid*, Article 12(1).

¹⁵⁷ *Ibid*, Article 12(2).

¹⁵⁸ *Ibid*, Article 12(3).

¹⁵⁹ *Ibid*, Article 13(1); the EURODAC database records personal information and finger prints of entrants to assist with determining length of stay and point of entry, 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 for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

¹⁶⁰ Above note 15, Article 13(2).

¹⁶¹ *Ibid*, Article 14.

¹⁶² *Ibid*, Article 15.

¹⁶³ *Ibid*, Article 3(2).

The procedure for determining the Member State responsible according to these criteria begins when a person applies for international protection in a Member State.¹⁶⁴ If the Member State to which the application is submitted believes that another Member State is responsible, it can issue a ‘take charge’ request to that Member State.¹⁶⁵ The Member State receiving this request should reply to accept or contest responsibility within two months;¹⁶⁶ failure to act within this time limit is deemed tantamount to accepting responsibility for the application.¹⁶⁷ Should the applicant move on to a different Member State,¹⁶⁸ this Member State can issue a ‘take back’ request to the Member State responsible.¹⁶⁹ When a take charge or take back request is accepted, the applicant is informed¹⁷⁰ and transferred as soon as possible within six months.¹⁷¹ This is a particularly coercive measure for the persons subject to its operation.

The following sections analyse, in turn, the idiosyncratic nature of the solidarity expressed under the Dublin system, the role Dublin plays in the supporting borderless free movement in the Schengen area, and the proposals to move beyond ‘Dublin solidarity’ in its next reform by introducing a redistributive element.

3.1.1. DUBLIN SOLIDARITY AS KEEPING ONE’S HOUSE IN ORDER

In outlining its vision of solidarity in the CEAS in 2011, the Commission stated: “The need to keep one’s house in order to avoid impacts on other Member States is a key aspect of solidarity”.¹⁷² This stands out in stark contrast with many of the understandings of solidarity explored in its theoretical and normative senses as explored in chapter one, as well as in practical mechanisms of refugee law in chapter three. The conventional rejection of this idea as an understanding of solidarity is epitomised in an analysis by Garlick, who regards it as so antithetical to solidarity that it creates, in her view, a paradox:

¹⁶⁴ *Ibid*, Article 20(1).

¹⁶⁵ *Ibid*, Article 21.

¹⁶⁶ *Ibid*, Article 22(2).

¹⁶⁷ *Ibid*, Article 22(7).

¹⁶⁸ *Ibid*, Article 18(1)(b)-(d).

¹⁶⁹ *Ibid*, Articles 23-25.

¹⁷⁰ *Ibid*, Article 26.

¹⁷¹ *Ibid*, Article 29.

¹⁷² Above note 1, 2.

There is a clear, if unacknowledged, paradox inherent in this formulation: if a Member States [sic] has a fully-functioning and robust system, well able to cope with fluctuating arrivals, it is likely not to need solidarity in the form of support from other Member States.¹⁷³

On its own terms this appears to be a reasonable conclusion, but if we start to interrogate the idea of solidarity to which Garlick refers, it necessarily entails some form of action by other Member States to relieve pressure. Her solidarity involves the Member States sharing the responsibilities that fall on each other, or ‘burden-sharing’, rather than each Member State meeting its own responsibilities. Indeed, for Garlick, each Member State meeting its own responsibilities is not only *not* solidarity, it obviates any *need* for solidarity. This is one interpretation of solidarity, but not the one expressed through the Dublin system. The term is used in the CEAS to refer to both of these and others.

Solidarity as each Member State taking charge of its own responsibilities to avoid ‘spill-over’ effects on the others chimes with other visions of solidarity in the EU. In relation to the ESM and the Eurozone crisis bail-outs, the narrative of solidarity proffered by the EU institutions was of the need to protect the Eurozone as a whole and to maintain the established system of monetary union.¹⁷⁴ This was supported by closer regulation of the public finances of each member of the Eurozone through the six-pack,¹⁷⁵ the European Semester,¹⁷⁶ and the two-pack.¹⁷⁷ Such measures set expected standards to which each

¹⁷³ Madeline Garlick, ‘The Dublin System, Solidarity and Individual Rights’ in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill Nijhoff, 2016), 159-194, 186.

¹⁷⁴ See chapter two, section 2.2.

¹⁷⁵ Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ [2011] L306/1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ [2011] L306/8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ [2011] L306/12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ [2011] L306/25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ [2011] L306/33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ [2011] L306/41. These measures were reinforced by the Treaty on Stability, Coordination, and Governance 2012, also known as the Fiscal Compact.

¹⁷⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Annual Growth Survey: advancing the EU’s comprehensive response to the crisis*, COM(2011) 11 final.

¹⁷⁷ Regulation (EU) No 472/2013 of the European Parliament and of the Council of the 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ [2013] L140/1; Regulation (EU) No 473/2013 of the European Parliament and of the Council of the 21 May 2013 on common provisions for

Member State must conform in order to preserve the European Monetary Union and the Euro as products of European integration and, more broadly, to safeguard economic security in the Member States.

In the Dublin system, we can observe a similar dynamic. It intends to create a system in which an application for international protection will only be heard by one Member State. Applicants cannot move between the Member States to apply in whichever state they believe will look most favourably on the application, to be closer to family, friends or community ties,¹⁷⁸ or for whatever other reason an applicant might have to want to make the application in a particular place.¹⁷⁹ This limit on the choice of host state for applicants for international protection, and their movement to this state, was previously enforced through border controls between the Member States. Following the removal of internal border checks under the Schengen *acquis*, the Dublin system has played this role.¹⁸⁰ It allocates responsibility according to a hierarchy of criteria.

The system relies on every Member State establishing a standard of international protection within its borders that meets, as a minimum, fundamental rights standards.¹⁸¹ This is assumed to be true in every

monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ [2013] L140/11.

¹⁷⁸ Dublin does provide for a limited degree of family reunification in Articles 9-11, above note 15. ‘Family members’ for these purposes are defined at Article 2(g):

‘family members’ means, insofar as the family already existed in the country of origin, the following members of the applicant’s family who are present on the territory of the Member States:

— the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

— the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,

— when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,

— when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present.

¹⁷⁹ For empirical data on the motivations of refugee movements, see Heaven Crawley, Franck Düvell, Katherine Jones, Simon McMahon and Nando Sigona, ‘Destination Europe? Understanding the dynamics and drivers of Mediterranean migration in 2015’, *MEDMIG Final Report* (November 2016), available at <http://www.medmig.info/wp-content/uploads/2016/12/research-brief-destination-europe.pdf> [accessed 29/06/2017]; Eiko Thielemann, “Why European Policy Harmonization Undermines Refugee Burden-Sharing” (2004) 6(1) *EJML* 47-65.

¹⁸⁰ The first iteration was in the Dublin Convention 1990, Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member State of the European Communities, OJ [1997] C254/1.

¹⁸¹ See chapter three, section 1.4. on the role of fundamental rights in protection elsewhere policies.

Member State as each is bound by the ECHR and the Charter. If the asylum process or reception conditions for applicants in a Member State falls below these standards, so that it constitutes a breach of the applicant's fundamental rights under the ECHR or the Charter, then the Dublin system breaks down. The allocation of responsibility according to the hierarchy of criteria cannot be enforced in this situation because the Member State returning an applicant to the Member State responsible would also breach its fundamental rights obligations by sending the person to a place where his or her fundamental rights will be violated.¹⁸² From the system's point of view, this frustrates the principle of one application to one Member State, because the applicant moves to another Member State that will not breach her or his fundamental rights and has the application determined there. Thus there are minimum, fundamental rights standards that each Member State must uphold for the maintenance of the system as a whole.

This reasoning logically follows from the Commission's expression of solidarity as the Member States each keeping their house in order, and from the legal shape of the Dublin system as adopted by the Council and Parliament. It is also the express reasoning of the Court's judgment in *N.S.*, which balances the need to safeguard the functioning of the Dublin system with the legal requirement to protect fundamental rights.¹⁸³ To maintain the system, which is its primary concern, the Court holds that Dublin returns should only be suspended for violations of fundamental rights where the sending Member State *cannot be unaware* of systemic deficiencies in the asylum system or reception conditions of the receiving Member State.¹⁸⁴ The Court reiterated this reasoning in *Abdullahi*.¹⁸⁵ This extremely high threshold has been criticised by the UK Supreme Court in *EM (Eritrea)* and the European Court of Human Rights in *Tarakhel v Switzerland* for tipping the balance too far in favour of the maintaining the Dublin system at the expense of protecting the fundamental rights of applicants for international protection.¹⁸⁶ The *N.S.* test has since been amended to reflect these criticisms,¹⁸⁷ including that the threat in the receiving Member State need not be derived from systemic deficiencies, but the reasoning in the

¹⁸² *Soering v UK* (1989) 11 EHRR 439.

¹⁸³ Joined Cases C-411/10 *NS* and C-493/10 *ME and Others*, EU:C:2011:865.

¹⁸⁴ *Ibid.*, [85]-[86].

¹⁸⁵ Case C-394/12 *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813, [60].

¹⁸⁶ *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12, [2]-[3]; *Tarakhel v Switzerland* (Application no. 29217/12), Judgment of 4 November 2014, [104]-[105].

¹⁸⁷ Case C-155/15 *George Karim v Migrationsverket*, EU:C:2016:410, [22].

judgment serves as an important reminder of the importance of maintaining the Dublin system in the eyes of the EU institutions.

A careful distinction should be drawn in this context between national asylum systems' failing to uphold fundamental rights their failing conform to the minimum standards set out in the harmonising Directives.¹⁸⁸ Dublin returns require mutual trust between the Member States in each other's national asylum systems, and the rationale of harmonisation is to reinforce this mutual trust. Harmonisation creates a set of common standards across the EU so that an applicant follows a similar and equivalent status determination procedure whichever Member State conducts it, and that he or she will have similar living conditions while that process takes place. If a Member State's asylum system falls below the standards set out in the harmonisation Directives, this will not prevent Dublin returns.¹⁸⁹ The applicant returned under those circumstances can seek a remedy in the national courts of the Member States responsible for this deficiency and the Commission has been pursuing infringement measures against Member States for failing to uphold these standards.¹⁹⁰ To prevent a Dublin return, the asylum system of the receiving Member State must go beyond this to breach fundamental rights standards. Whilst in this latter situation, the applicant is still able to pursue a remedy for the breach of his or her fundamental rights at the national level, it is the sending Member State's positive obligation to not return someone to a situation in which these rights are breached that prevents the transfer. No such similar positive obligation arises from the harmonisation Directives.

Solidarity as keeping one's house in order in the context of the Dublin system, then, means that each Member State has a responsibility to maintain a national asylum system that conforms with fundamental rights standards so that Dublin returns may take place and the efficacy of the system is maintained. Where national asylum systems function to these standards that there is no 'spill over' of asylum responsibilities from the Member State deemed responsible by Dublin to neighbouring Member States.

¹⁸⁸ Considered below at section 3.2.

¹⁸⁹ Above note 183, [85].

¹⁹⁰ See below text accompanying notes 329-336.

Dublin solidarity is the undertaking by each Member State of its asylum responsibilities without causing extra ‘work’ for the other Member States.

This solidarity is also expressed through Dublin’s Early Warning Mechanism (EWM), added by the Dublin III Regulation.¹⁹¹ This is explained in Recital 22:

... Such a process would allow the Union to promote preventive measures at an early stage and pay the appropriate political attention to such situations. Solidarity, which is a pivotal element in the CEAS, goes hand in hand with mutual trust. By enhancing such trust, the process for early warning, preparedness and management of asylum crises could improve the steering of concrete measures of genuine and practical solidarity towards Member States, in order to assist the affected Member States in general and the applicants in particular...

This reveals that the purpose of the EWM is to maintain the operation of the Dublin system by strengthening any ‘weak links’ in the returns chain. Though it has not yet been used, it would help the Member States to maintain mutual trust in each other’s asylum systems, which is necessary for ‘keeping one’s house in order’ solidarity: “Solidarity... goes hand in hand with mutual trust”.¹⁹² This Recital presents the EWM as scaffolding for mutual trust.

The EWM is to be used when a Member State faces pressures on its asylum system such that there is a risk that it will fail to uphold the minimum fundamental rights standards, whereby preventing Dublin returns.¹⁹³ On noticing such a risk, the Member State in question or the Commission acting with the EASO, can instigate the EWM.¹⁹⁴ Once activated, the EWM provides for the creation of a series of action plans prepared by the Member State to address the identified risks, with support from the EASO if the Member State in question so desires.¹⁹⁵ These action plans, and updates on their implementation, are presented to the Council and the Commission, and the Commission is to transmit the key aspects of such to the Parliament to establish accountability.¹⁹⁶ The purpose of these plans is to maintain the

¹⁹¹ Above note 15, Article 33.

¹⁹² *Ibid*, Recital 22.

¹⁹³ *Ibid*, Article 33(1).

¹⁹⁴ *Ibid*, Article 33(2)-(3)

¹⁹⁵ *Ibid*, Article 33(1) and (3).

¹⁹⁶ *Ibid*, Article 33(2)-(4).

integrity of the national asylum system by ensuring that it does not fall below those minimum standards or, if it does, that it reinstates them as quickly as possible.

The pressure on the national asylum system is not relieved by redistribution of applicants to other Member States, rather, Union resources can be made available to assist the Member State in addressing a national-level problem. This type of solidarity in the face of an emergency falls squarely within the broad interpretation of emergency solidarity employed elsewhere in the EU, and has been expressly articulated as a proposal for reform of the European Union Solidarity Fund in the suggestion that the Fund's resources should be used to improve national-level capacity for dealing with disasters.¹⁹⁷

Under the Dublin system, solidarity is something facilitated at the EU level through the articulation of minimum standards, the creation of a system for allocating responsibility and through enforcing this system. But it is performed by the Member States. Member States show solidarity to each other through upholding the standards for processing applications for international protection agreed between themselves in the EU. This follows the allocation of competences for asylum: the EU has competence to set standards and the Member States retain the competence for establishing and operating asylum systems in accordance with those standards.¹⁹⁸

This section presents an argument as to the nature of solidarity under the Dublin system as described by the institutions of the EU. It is an account of how solidarity is perceived by the EU and its Member States through Dublin, namely the need for every Member State to undertake its national responsibilities in accordance with EU standards so as not to impact on others. However, there are two unresolved matters to which the analysis will now turn. First, why is the Dublin system so important that such lengths (minimum reading of fundamental rights; disregard of the personal choices and agency of those seeking international protection; coercive enforcement measures) are deemed appropriate and necessary? Second is the persistent and vociferous challenge of the Dublin system for failing to show solidarity by various commentators.

¹⁹⁷ See chapter 2, section 3.2.

¹⁹⁸ Article 78(2) TFEU.

3.1.2. THE IMPORTANCE OF DUBLIN BEYOND THE CEAS: SCHENGEN AND THE INTERNAL MARKET

The Dublin system is a product of the Schengen *acquis*, and recognises that asylum is still principally the subject of national-level authority. In 1990, when the Dublin Convention was first agreed intergovernmentally, outside the Treaties,¹⁹⁹ the EU had no competence to act on asylum matters and there was no intention for Dublin to interfere with that *status quo*. It wanted to create a way to hold asylum seekers in a particular Member State under conditions that allow free movement for Union citizens.²⁰⁰ The mechanism allocated responsibility to the Member State that had played the greatest part in the arrival of the applicant in the territory of the EU, most often as the Member State into which the applicant first irregularly entered.²⁰¹ This meant that each Member State would retain responsibility for ‘its’ asylum seekers, shielding national asylum systems from any potential impact of removing internal border controls. Concerns about this arose particularly among Member States that saw themselves as ‘destination’ states for asylum seekers or wished to maintain higher standards of refugee protection than other Member States. They feared that these policy choices would lead to an increase in asylum applications to them once internal borders were removed.²⁰² The negativity attached to this prospect is conveyed in the phrase coined to describe it – ‘asylum shopping’ – in which the asylum seeker is imagined to be cynically and selfishly pursuing his or her interests regardless of the impact on the public finances of the Member States. The need to prevent ‘asylum shopping’ was also supported with an argument based on efficiency: that it is not a good use of resources to assess the same application over and over again in different Member States.²⁰³ Thus the Dublin system originated as a way of excluding national asylum systems from the impact of EU integration, and it is consequentially sensible that its understanding of solidarity is characterised by the isolation of asylum systems and responsibilities within each Member State.

¹⁹⁹ Above note 180.

²⁰⁰ E. Guild, “The Europeanisation of Europe’s Asylum Policy” (2006) 18 *IJRL* 630-651.

²⁰¹ Article 6 of the Convention, maintained at Article 13 in the Dublin III Regulation.

²⁰² K Hailbronner, “Asylum Law in the Context of a European Migration Policy” in N Walker (ed), *Europe’s Area of Freedom, Security and Justice*, (New York: Oxford University Press, 2004) 41-88, 70.

²⁰³ *Ibid.*, 74-77.

Given this context, we can see that Dublin is less an instrument of EU refugee protection and more a measure that paves the way for the Schengen area, free movement within the internal market and the traditional EU project of economic integration. As a result of this, maintenance of the Dublin system is necessary to protect the functioning of these vital aspects of the EU, rather than for any essential role that it plays in asylum determination and protection. ‘Solidarity’ is put to the task of upholding the Dublin system and, consequentially, internal free movement.

This role was re-emphasised during the refugee crisis in 2015 and 2016. A number of Member States closed internal EU borders in the Schengen area by reinstating document checks to prevent the movement of large numbers of people across the continent, including Greece, Bulgaria and Hungary.²⁰⁴ Whilst the Schengen Borders Code permits this in emergency circumstances – where there is a serious threat to public order or internal security – it must be temporary and limited to measures that are strictly necessary to respond to the serious threat.²⁰⁵ The Commission has been keen to emphasise the need for these restrictions on free movement to be ended as soon as possible.²⁰⁶ To encourage Member States to do so, the Commission also stepped up pressure on Greece to complete reforms to its asylum system so that Dublin returns to Greece could be reinstated after their suspension in 2013.²⁰⁷ This was seen as particularly important as Greece was the first point of entry to the Union for many and so would likely be the Member State responsible for determining the applications for international protection under Dublin.

To summarise, solidarity in the Dublin system is embodied in a responsibility on each Member State to maintain a national system that conforms to agreed asylum standards such that each responds effectively to the asylum applications for which it is responsible, and does not cause any work for other Member States by failing to do so. This solidarity is focussed on upholding the functioning and integrity of

²⁰⁴ <http://www.theguardian.com/world/2015/oct/31/austria-fence-slovenia-wire-europe-refugees> [accessed 14/02/16].

²⁰⁵ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ [2016] L77/1, Article 25(1). See further Articles 25-28.

²⁰⁶ European Commission, *Commission Recommendation of 10.2.2016 addressed to the Hellenic Republic of the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013*, C(2016) 871 final.

²⁰⁷ *Ibid.*

Dublin as a system to avoid problems within asylum policy, but also to prevent knock-on implications for free movement and the internal market.

3.1.3. DUBLIN IV AND INTRODUCING REDISTRIBUTIVE SOLIDARITY

The final part responds to the persistent criticism of the Dublin system for failing to show sufficient solidarity and the consequent proposed ‘solidarity’ reforms under Dublin IV. The criticism derives from applying a fixed understanding of the meaning of solidarity – either express or implied – to the Dublin system and observing that it comes up short.²⁰⁸ These understandings, based on the intuitive connotations of the term fail to capture the flexibility with which solidarity is applied in the CEAS. Thus it is not that the Dublin system does not convey any solidarity, rather, that it conveys its own, idiosyncratic notion of solidarity that falls short of our common understandings of the meaning of the term. The proposed reforms would bring solidarity under Dublin closer in line with more instinctive understandings of solidarity.

At the time of writing, a proposal to reform the Dublin system, known as Dublin IV, is working its way through the EU’s legislative process.²⁰⁹ The Commission advanced this proposal for reform after arguing that the refugee crisis has revealed “structural weaknesses and shortcomings in the design and implementation of the European asylum system, and of the Dublin rules in particular”.²¹⁰ It argues that there are three principal weaknesses and outlines corresponding reforms.

First, it is argued in the proposal the present Dublin system concentrates responsibility for asylum in only a few Member States, leading to “strain” on their systems and encouraging them to disregard EU rules.²¹¹ To respond to this, the Commission proposes the addition of a ‘corrective allocation mechanism’ that would support Member States deemed responsible for a disproportionately high

²⁰⁸ For example in C. J. Harvey, “The European regulation of asylum: constructing a model of regional solidarity” (1998) 4 *European Public Law* 561-592; R. Byrne, “Harmonization and Burden Redistribution in the Two Europes” (2003) 16(3) *JRS* 336-358; L. M. Langford, “The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unravelling of EU Solidarity” (2013) 26 *Harvard Human Rights Journal* 217-264; Garlick, above note 173.

²⁰⁹ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, COM(2016) 270 final.

²¹⁰ *Ibid*, 3.

²¹¹ *Ibid*.

number of applicants for international protection through their relocation between Member States.²¹²

This is the most significant departure from the interpretation of solidarity expressed in previous iterations of the Dublin mechanism. It would introduce an element of redistribution according to capacity that was hitherto absent from the Dublin system and it would shift the solidarity represented in Dublin away from Member States addressing their own responsibilities towards sharing responsibilities between them. It would also replace the EWM, which has not been used and is described in the proposal as too complicated and unnecessary as its function is fulfilled separately by the EASO.²¹³

Second, the proposal argues that the rules for determining responsibility are disputable and complex, resulting in lengthy procedures.²¹⁴ To address this, the proposal would adjust the processes for the practical determination of responsibility between the Member States, by removing cessation of responsibility clauses²¹⁵ and by reducing the time limits attached to arranging transfers, including sending requests, receiving replies and carrying out transfers.²¹⁶

Third, the proposal argues that the absence of any express obligations for the applicant for international protection to follow, or consequences for failing to cooperate, in Dublin III means that it is “prone to abuse by the applicants”.²¹⁷ In response, the proposal would introduce express obligations to apply for asylum in the first Member State that the applicant enters and to remain in the Member State responsible,²¹⁸ to which “proportionate procedural and material consequences” for breach would be attached.²¹⁹ The consequences are outlined in the proposed Article 5, including transferring the applicant to an accelerated procedure, denial of access to reception conditions,²²⁰ and disregard of

²¹² *Ibid*, 4.

²¹³ *Ibid*, 11.

²¹⁴ *Ibid*, 3 and 9-11.

²¹⁵ Article 13(1) of Dublin III (above note 15) provides that responsibility based on irregular entry will cease twelve months after the date of irregular entry and would be removed under Article 15 of Dublin IV (*ibid*). Article 19 of Dublin III provides for the cessation of responsibility despite the hierarchy of criteria under certain circumstances. Dublin IV would remove these provisions, *ibid*, 52.

²¹⁶ Above note 209, 4. The qualification Directive does oblige applicants for international protection to comply with the Member State responsible’s asylum procedures, see below note 293.

²¹⁷ *Ibid*, 3.

²¹⁸ *Ibid*, Article 4.

²¹⁹ *Ibid*, 4.

²²⁰ Article 5(3) would deny the applicant access to the provisions of Articles 14-19 of the Reception Conditions Directive (below note 295) except for emergency healthcare. This includes primary and secondary education for minors, access to the labour market, vocational training, material conditions that guarantee subsistence and protect physical and mental health, and necessary healthcare. In his blog post on the proposal, Hruschka raises compelling

evidence submitted after deadlines. It is not clear how this fits with the aim of reducing disproportionate numbers of applications to a small number of Member States, since the Member States on the geographical edges of the Union that share borders with third countries are more likely to be the Member State of first entry. More likely, this reform is not part of move towards improving the process or balancing responsibilities between the Member States, rather it is aimed at increasing the coercive control of the Member States and/or the EU over applicants for international protection. It attempts to shift blame for disorganised and inadequate asylum systems across the continent from the Member States and the Union to the people attempting to seek protection under those systems by introducing express culpability for moving.

Thus, the reforms that Dublin IV would see introduced are tweaks to the practical part of the transfer of responsibility for an applicant, express obligations to comply with the Dublin system and hence express individual culpability for moving between Member States, and a corrective mechanism for disbursing responsibility between Member States in a time of disproportionate pressure. The reform does not propose to fundamentally alter the framework of the Dublin mechanism nor its hierarchy of responsibility criteria,²²¹ rather it introduces a second layer in determining the Member State responsible to ‘rebalance’ the efforts of the Member States in providing protection.

This proposed second layer would operate as follows. First, a new information system will be created with which every new application for asylum will be registered and designated a unique reference number.²²² Once the Member State responsible for that application under the hierarchy of criteria has been determined, it will be recorded together with the application number.²²³ The information system would also record the number of persons effectively resettled in each Member State.²²⁴ This system will therefore be able to identify a number of people for whom each Member State is responsible at any

concerns about the compatibility of these ‘consequences’ with the Member States’ human rights and constitutional obligation, Constantin Hruschka, “Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission”, *EU Immigration and Asylum Law and Policy* (Odysseus Academic Network, 17 May 2016), available at <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/> [accessed 04/07/2017].

²²¹ Above note 209, 14.

²²² *Ibid.*, 18 and Article 22.

²²³ *Ibid.*

²²⁴ *Ibid.*

given time. These numbers will be converted into percentages, expressing the contribution of each Member State to the total of protection that is being provided across the EU as a whole.²²⁵

Second, these percentages will be compared to reference percentages from a responsibility key, calculated from each Member State's GDP and population, weighted equally.²²⁶ These comparisons will take place on an ongoing basis for the preceding year, allowing the system to identify immediately when a Member State has exceeded 150% of its reference percentage.²²⁷ This is the indication of disproportionate pressure on a Member State's asylum system that will trigger the operation of the corrective allocation mechanism.²²⁸

Once the mechanism is triggered in this way, no further applications will be allocated under Dublin to the Member State in question.²²⁹ Instead, those applications will be allocated to Member States whose percentages are below their reference percentages.²³⁰ This will continue as long as the Member State facing pressure remains at or exceeding 150% of its reference percentage.²³¹ The proposal introduces this mechanism as an expression of solidarity: "the new Dublin scheme will be based on a European reference system from the start of its implementation with an automatically triggered corrective solidarity mechanism as soon as a Member State carries a disproportionate burden".²³² However, as the explanation of the mechanism progresses, the description shifts, favouring phrases such as burden-sharing, balancing the efforts between the Member States, and sharing responsibility.

After the introduction to the proposal, the term, 'solidarity', only reappears to describe an exception to this arrangement under the heading, "Financial Solidarity".²³³ This provides for a Member State, if it wishes, to opt out of responsibility for applicants for international protection who would be allocated to it under the corrective allocation mechanism. This opt-out is limited to a twelve-month period and is conditional on the non-participating Member State making a "solidarity contribution" of €250 000 per

²²⁵ *Ibid*, 18 and Article 22(1)(e).

²²⁶ *Ibid*, 18 and Article 35.

²²⁷ *Ibid*, 18.

²²⁸ *Ibid*, Article 34.

²²⁹ *Ibid*, 18-19.

²³⁰ *Ibid*, 18 and Article 36.

²³¹ *Ibid*, 19.

²³² *Ibid*, 4.

²³³ *Ibid*, 19 and Article 37.

applicant whose protection the Member State is avoiding.²³⁴ This figure is remarkably high given that the amount granted under the AMIF to encourage a Member State to receive a relocated applicant is €6 000.²³⁵

This proposed reform of the Dublin system would change the type of solidarity that it expresses. It would represent a step away from the idiosyncratic, ‘Dublin’ solidarity of ‘keeping one’s house in order’ and towards a more traditional conception of solidarity through redistribution. It would be more in line with solidarity as sharing responsibility between states in international refugee law.²³⁶ It also combines legal solidarity with practical solidarity – a legal framework for allocating responsibility for asylum between the Member States that integrates a mechanism for dividing tangible protection roles between the Member States. So far, such responsibility mechanisms in the CEAS have been politically unpopular, having only been adopted once, exceptionally, under the second relocation Decision.²³⁷ This would suggest that, in the absence of an intervening political shift, it is unlikely that this proposal will be adopted.

The Dublin system has been consistently described as the ‘cornerstone’ of the CEAS, but since the mid-2000s it has existed in parallel with a series of harmonisation measures to create common asylum conditions across the Member States. These measures are addressed in the next section as the second half of legal solidarity in the CEAS.

3.2. LEGAL HARMONISATION OF PROTECTION STANDARDS

The ‘first phase’ of harmonisation consisted of three Directives adopted between 2003 and 2005 following the Tampere Programme.²³⁸ They addressed asylum determination procedures,²³⁹ reception

²³⁴ *Ibid.*

²³⁵ See above note 141.

²³⁶ See chapter two, section 1.

²³⁷ See above section 1.2.

²³⁸ European Council, Presidency Conclusions, Tampere 15-16 October 1999, point 14, available at http://www.europarl.europa.eu/summits/tam_en.htm [accessed 10/07/17].

²³⁹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ [2005] L326/13.

conditions,²⁴⁰ and the qualification requirements and protection conferred by refugee status.²⁴¹ By 2008, a ‘second phase’ was hailed as part of what has become an ongoing process of improving standards and eliminating disparities between the Member States’ asylum systems.²⁴² It was completed in 2013, following the same tryptic as the first.²⁴³ The analysis in this section addresses the trio collectively as an expression of legal solidarity in the CEAS.

The qualification Directive declares the substantive requirements that an applicant must meet to qualify for international protection in the form of refugee status or subsidiary protection status, and the rights that those statuses confer once granted.²⁴⁴ Its requirements for refugee status are based on the Geneva Convention relating to the Status of Refugees 1951.²⁴⁵ Accordingly, it sets out a definition of ‘refugee’ that is materially different from the Convention’s definition in only one respect: it expressly excludes the nationals of the Member States.²⁴⁶ The Directive contains a second common status for international protection, subsidiary protection status, for those who do not qualify for refugee status but are still in

²⁴⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ [2003] L31/18.

²⁴¹ 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 [2004] L304/12.

²⁴² Council of the European Union, *European Pact on Immigration and Asylum*, Brussels, 24 September 2008 13440/08, 11, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013440%202008%20INIT> [accessed 20/02/15], adopted on 15-16 October 2008, see Council of the European Union, *Brussels European Council 15 and 16 October 2008 Presidency Conclusions*, Brussels, 16 October 2008 14368/08 at 8, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/103441.pdf [accessed 20/02/15].

²⁴³ In 2016, the Commission proposed a ‘third phase’, which would continue the tripartite framework, but would be contained in two Regulations and a Directive. The implications of this change are explored below in section 3.3.

²⁴⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast), OJ [2011] L337/9.

²⁴⁵ Reaffirmed at Article 78(1) TFEU. All EU Member States have ratified the Refugee Convention.

²⁴⁶ Above note 244, Article 2(d) defines a refugee as:

[A] third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

Article 12 contains exclusion criteria similar to those contained in the Geneva Convention at Articles 1D and 1F. The Geneva Convention, at Article 1A(2) defines a refugee as a person who:

[O]wing to well-founded fear of being persecuted 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.

need of international protection. A person will qualify for this when, if returned to his or her country of origin or former habitual residence, he or she, “would face a real risk of suffering serious harm as defined in Article 15... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.²⁴⁷ The Directive contains provisions governing exclusion from,²⁴⁸ cessation of,²⁴⁹ and revocation or refusal to review each of these statuses.²⁵⁰

Following the format of the Geneva Convention, the Directive also details the content of these protection statuses. The EU standard differs from the international standard by guaranteeing more entitlements and by extending these to beneficiaries of non-refugee international protection too, largely to the same extent as for refugees.²⁵¹ These provisions govern access to employment,²⁵² education,²⁵³ procedures for recognising qualifications,²⁵⁴ social welfare,²⁵⁵ healthcare,²⁵⁶ accommodation,²⁵⁷ free movement within the Member State of protection,²⁵⁸ and integration facilities.²⁵⁹ Beneficiaries of international protection are entitled to legal protection from *refoulement*,²⁶⁰ information about their rights and obligations,²⁶¹ a residence document,²⁶² and a travel document.²⁶³ Additionally, there are provisions for maintaining family unity²⁶⁴ and special assistance for unaccompanied minors.²⁶⁵

The Directive also goes beyond the Geneva Convention by providing definitions to clarify how the Member States should interpret some elements of the status definitions. For subsidiary protection, a

²⁴⁷ Above note 244, Article 2(f).

²⁴⁸ *Ibid*, Article 12 for refugee status and Article 17 for subsidiary protection status.

²⁴⁹ *Ibid*, Article 11 for refugee status and Article 16 for subsidiary protection status.

²⁵⁰ *Ibid*, Article 14 for refugee status and Article 19 for subsidiary protection status.

²⁵¹ *Ibid*, Article 20(2). ECRE argues in favour of removing any differences in the content of protection under the statuses, Asylum Information Database, *Refugee right subsiding? Europe's two-tier protection regime and its effects on the rights of beneficiaries* (Belgium: ECRE, 2017) available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_refugee_rights_subsiding.pdf [accessed 09/07/17].

²⁵² Above note 244, Article 26.

²⁵³ *Ibid*, Article 27.

²⁵⁴ *Ibid*, Article 28.

²⁵⁵ *Ibid*, Article 29.

²⁵⁶ *Ibid*, Article 30.

²⁵⁷ *Ibid*, Article 32.

²⁵⁸ *Ibid*, Article 33.

²⁵⁹ *Ibid*, Article 34.

²⁶⁰ *Ibid*, Article 21.

²⁶¹ *Ibid*, Article 22.

²⁶² *Ibid*, Article 24.

²⁶³ *Ibid*, Article 25.

²⁶⁴ *Ibid*, Article 23.

²⁶⁵ *Ibid*, Article 31.

definition is set out for ‘serious harm’.²⁶⁶ For refugee status, the Directive defines acts that will constitute persecution²⁶⁷ and what should be considered a qualifying reason for persecution.²⁶⁸ The Directive also sets out common positions in relation to some aspects that were significant points of difference between the Member States’ asylum systems in the past: the validity of applications made *sur place*,²⁶⁹ qualifying actors of persecution²⁷⁰ and protection,²⁷¹ and the possibility of protection in the country of origin outside the applicant’s home area of region.²⁷²

The asylum procedures Directive provides harmonised rules on the procedures that should be available to applicants for international protection, including appeals.²⁷³ Procedures at first instance are outlined in Chapter III, including provisions for the examination of applications,²⁷⁴ unfounded applications,²⁷⁵ inadmissible applications,²⁷⁶ and the applicability and definition of ‘protection elsewhere’ principles – first country of asylum,²⁷⁷ safe country of origin,²⁷⁸ safe third country,²⁷⁹ and European safe third country.²⁸⁰ Procedures are outlined for subsequent applications,²⁸¹ applications made at borders,²⁸² the withdrawal of international protection,²⁸³ and for appeals.²⁸⁴ In addition, the Directive provides a series of general procedural guidelines that should govern particular aspects of the Member States’ asylum procedures such as examination,²⁸⁵ decisions,²⁸⁶ the personal interview,²⁸⁷ medical examinations,²⁸⁸ and

²⁶⁶ *Ibid*, Article 15.

²⁶⁷ *Ibid*, Article 9.

²⁶⁸ *Ibid*, Article 10.

²⁶⁹ Above note 244, Article 5.

²⁷⁰ *Ibid*, Article 6.

²⁷¹ *Ibid*, Article 7.

²⁷² *Ibid*, Article 8.

²⁷³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ [2013] L180/60.

²⁷⁴ Above note 273, Article 31.

²⁷⁵ *Ibid*, Article 32.

²⁷⁶ *Ibid*, Articles 33-34.

²⁷⁷ *Ibid*, Article 35.

²⁷⁸ *Ibid*, Articles 36-37 and Annex I.

²⁷⁹ *Ibid*, Article 38.

²⁸⁰ *Ibid*, Article 39.

²⁸¹ *Ibid*, Articles 40-42.

²⁸² *Ibid*, Article 43.

²⁸³ *Ibid*, Articles 44-45.

²⁸⁴ *Ibid*, Article 46.

²⁸⁵ *Ibid*, Article 10.

²⁸⁶ *Ibid*, Article 11.

²⁸⁷ *Ibid*, Articles 15-17.

²⁸⁸ *Ibid*, Article 18.

withdrawal or deemed withdrawal of an application.²⁸⁹ The Directive provides rights to applicants: access to procedures,²⁹⁰ the right to remain during the examination of the application,²⁹¹ the right to a personal interview,²⁹² and rights to information, interpreters and legal assistance and representation.²⁹³ It also outlines their obligations, principally to cooperate with the procedures.²⁹⁴

Finally, the reception conditions Directive dictates the minimum living standards with which the Member States should provide applicants for international protection while their applications are determined.²⁹⁵ Under its provisions, applicants for international protection should have access to material reception conditions that guarantee subsistence,²⁹⁶ to healthcare,²⁹⁷ to education for minors,²⁹⁸ to employment within nine months of submitting their applications if they are still without a decision,²⁹⁹ and to support for costs associated with appeals.³⁰⁰ There are also special provisions for particularly vulnerable applicants,³⁰¹ including minors,³⁰² unaccompanied minors,³⁰³ and victims of torture and violence.³⁰⁴ There are obligations for the Member States to inform applicants of their rights and obligations under the Directive,³⁰⁵ to provide applicants with a document identifying them as such,³⁰⁶ and to take appropriate measures to maintain family unity.³⁰⁷ The Directive also defines the circumstances in which applicants may be detained, guarantees for applicants in detention, and the conditions of detention facilities.³⁰⁸ To support the Member States in adopting common reception

²⁸⁹ *Ibid*, Articles 27 and 28 respectively.

²⁹⁰ *Ibid*, Articles 6-8.

²⁹¹ *Ibid*, Article 9.

²⁹² *Ibid*, Article 14.

²⁹³ *Ibid*, Articles 12 and 19-23.

²⁹⁴ *Ibid*, Article 13.

²⁹⁵ 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 (recast), OJ [2013] L180/96, Article 3.

²⁹⁶ *Ibid*, Article 17, in accordance with Article 18.

²⁹⁷ *Ibid*, Article 19.

²⁹⁸ *Ibid*, Article 14.

²⁹⁹ *Ibid*, Article 15.

³⁰⁰ *Ibid*, Article 26.

³⁰¹ *Ibid*, Articles 21-22.

³⁰² *Ibid*, Article 23.

³⁰³ *Ibid*, Article 24.

³⁰⁴ *Ibid*, Article 25.

³⁰⁵ *Ibid*, Article 5.

³⁰⁶ *Ibid*, Article 6.

³⁰⁷ *Ibid*, Article 12.

³⁰⁸ *Ibid*, Articles 8-11.

standards, the EASO has published guidance on the interpretation and implementation of this Directive.³⁰⁹

The purpose of harmonisation in CEAS is to create similar protection standards in all the Member States' national asylum systems. In the first phase, this was expressed as achieving minimum EU standards below which the Member States were not permitted to fall, but could improve upon if they so desired. This policy to ensure minimum standards followed from the removal of internal borders between Member States within the Schengen area. As with Dublin, this driver for legal solidarity imagined asylum seekers as comparing the national systems of potential host states and seeking protection in the one that presents the most generous offer.³¹⁰ This image prompted the Member States to lower their standards of protection in a 'race to the bottom' to avoid becoming the destination of choice. Minimum standards were introduced to halt this race following much the same logic as minimum product safety standards adopted for the internal market.

More recently, fears that remaining differences between the Member States' national systems continue to encourage 'asylum shopping' has led to a shift in the narrative away from minimum standards in favour of common, or universal standards. The Commission reasons that this will continue whilst any gap remains between the EU harmonised standards and the Member States' national standards, and can only be prevented by full harmonisation. This is reflected in changes to the asylum competences under the Treaty of Lisbon from Article 68 of the EU Treaty to Article 78(2) TFEU. The proposed shift to Regulations under the 'third phase' would further reinforce this.³¹¹

³⁰⁹ EASO, *EASO guidance on reception conditions: operational standards and indicators* (EASO, September 2016), available at <https://www.easo.europa.eu/sites/default/files/EASO%20Guidance%20on%20reception%20conditions%20-%20operational%20standards%20and%20indicators%5B3%5D.pdf> [accessed 10/07/17].

³¹⁰ European Commission, *Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open coordination method, First Report by the Commission on the application of Communication COM(2000) 755 final of 22 November 2000*, COM(2001) 710 final, 7, see further: Kay Hailbronner, "Asylum Law in the Context of a European Migration Policy" in Neil Walker (ed.), *Europe's Area of Freedom, Security and Justice* (New York: Oxford University Press 2004) 41-88, 53-54 and 70.

³¹¹ Above note 243.

3.2.1. HARMONISATION AND MUTUAL RECOGNITION: TWIN PILLARS OF LEGAL SOLIDARITY

Harmonisation also pursues the aim of ensuring adequate protection standards across the EU to allow for mutual trust between the Member States in each other's national systems. This is necessary as a complement to the Dublin system: to guarantee that applications for international protection are only determined once, Dublin requires mutual recognition of negative decisions.³¹² If an applicant who had already been declined protection in one Member State could try again in another, the purpose of the Dublin system would be undermined. The harmonisation of the procedural and substantive law governing a Member State's decision as to whether to grant international protection provides a basis for the mutual trust of such decisions. This is clear from the Stockholm Programme, which states that applicants should receive the same procedures and protection regardless of which Member State is responsible.³¹³

The application of mutual recognition as a governance tool in the AFSJ has been controversial, with some arguing that it is not suitable for use outside its original, internal market context.³¹⁴ Mutual recognition was first introduced in the *Cassis de Dijon* case³¹⁵ and was adopted as a way of avoiding the need to harmonise product standards whilst still enabling equal trading opportunities across the internal market.³¹⁶ The rationale behind this rule is that the requirement of meeting multiple sets of standards constitutes a barrier to free movement because it is more costly to manufacture products to comply with multiple sets of standards than to comply with only one. If a manufacturer wants to sell

³¹² Above note 151, Article 3(1).

³¹³ European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ [2010] C115/1, 32.

³¹⁴ V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009), 118; S. Peers, "Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?", (2004) 41 *CML Rev* 5-36, 23-25. Others accept the transfer of the mechanism subject to safeguards such as support from Eurojust or the requirement of secondary legislation rather than deriving from the primary law of the fundamental freedoms in the internal market, see respectively J. Sievers, "Managing Diversity: The European Arrest Warrant and the Potential of Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs", Paper presented at the EUSA Tenth Biennial International Conference Montréal, Canada, 17 – 19 May 2007, available at <http://aei.pitt.edu/8036/>; 8; and M. Möstl, "Preconditions and Limits of Mutual Recognition" (2010) 47 *CML Rev* 405-436, 410.

³¹⁵ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* EU:C:1979:42.

³¹⁶ J. Pelkmans, "The New Approach to Technical Harmonisation and Standardisation" (1987) 25(3) *JCMS* 249-269.

products in another Member State, he or she would face higher costs than a local producer, making imported goods more expensive.³¹⁷ Following market logic, this means that trade will stay local rather than spreading to form an EU internal market.³¹⁸ Mutual recognition avoids this by instructing:

Any product imported from another Member State must in principle be admitted to the territory of the importing Member State if it has been lawfully produced, that is, conforms to the rules and processes of manufacture that are customarily or traditionally accepted in the exporting country, and is marketed in the territory of the latter.³¹⁹

In the internal market, mutual recognition was introduced to avoid the need for harmonisation of endless product requirements.³²⁰ However, the economic motivations behind mutual recognition in the internal market are not present in the AFSJ. Instead, mutual recognition is of state-authority decisions and harmonisation is of the procedures and circumstances of this decision-making. This harmonisation aims to create mutual trust in the decisions taken by the Member States' authorities, such as through the CEAS harmonisation directives and the Dublin system.³²¹ The use of mutual recognition in the AFSJ expands state control over the subjects of the system, rather than extending the rights of those subjects, which is secured by harmonisation. To exercise these powers confidently, the Member State must trust

³¹⁷ See G. Davies, "Is Mutual Recognition an Alternative to Harmonization? Lessons on Trade and Tolerance of Diversity from the EU" in L. Bartels and F. Ortino (eds.) *Regional Trade Agreements and the WTO* (Oxford: OUP, 2006) 265-280.

³¹⁸ Opinion of Mr Advocate General Léger in Case C-470/93 *Verin gegen Unwesen in Handel und Gewerbe Köln v Mars GmbH* EU:C:1995:87, [15].

³¹⁹ European Commission, *Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')*, OJ [1980] C256/2.

³²⁰ Dougan reminds us that this is not the same as saying that harmonisation is the 'opposite' to mutual recognition, as it is far more likely to set out only minimum standards, which Member States may raise in their national legislation, maintaining diverse legal regulation, Michael Dougan, "Minimum Harmonization and the Internal Market" (2000) 37 *CML Rev* 853-885.

³²¹ A similar arrangement exists in judicial cooperation in criminal matters, namely the support of the European Arrest Warrant (Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between the Member States (2002/584/JHA), OJ [2002] L190/1) by harmonising Directives for criminal law: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ [2010] L280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ [2012] L142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with consular authorities while deprived of liberty, OJ [2013] L294/1.

that the decision has been reached according to adequate substantive and procedural standards. Mutual trust is supported by harmonisation.

The Court has been keen to emphasise that harmonising measures are not a precondition or requirement for mutual recognition and are solely to enhance mutual trust.³²² Nevertheless, it has been argued that a higher degree of mutual trust is required for mutual recognition in the AFSJ than in the internal market. This would suggest that some harmonisation is necessary despite the Court's position. For example, Möstl argues: "mutual trust is not something that can be simply proclaimed or taken for granted, but it must be grounded on reliable procedures (individual assessment or general approximation) ensuring that a sufficient degree of equivalence really exists".³²³ This is supported by Fichera, who describes minimum harmonisation as a method of approximation, and argues that this is necessary to achieve mutual recognition; that the two share a "means/ends relationship".³²⁴

Harmonisation, then, helps to create the necessary conditions for the development of mutual trust in the Member States' national asylum systems so that there can be mutual recognition of negative asylum decisions as necessary under the Dublin system. The symbiotic relationship between harmonisation and the Dublin system create legal solidarity in the CEAS. The main challenge to this solidarity is its operation in practice. For harmonisation, this means the problems of implementation.

3.2.2. CHALLENGES TO UNIVERSALITY: IMPLEMENTATION BARRIERS

The harmonising Directives are not implemented universally by the Member States. First, this follows the AFSJ opt-outs. Denmark, the UK and Ireland occupy a different position to the rest of the Member States in relation to the adoption of, *inter alia*, the CEAS measures. Denmark is excused from participation in all Justice and Home Affairs measures by a Protocol to the Treaties.³²⁵ Its opt-out is applied to all CEAS measures, as is noted in the Preambles to the harmonisation measures.³²⁶ The

³²² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* EU:C:2007:261, [52], [57] and [59].

³²³ Möstl, above note 314, 419.

³²⁴ M. Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?", (2009) 15(1) *ELJ* 70-97, 77. See similarly Sievers, above note 314, 31.

³²⁵ Articles 1-2, Protocol (No. 22) on the Position of Denmark annexed to the TFEU and the TEU.

³²⁶ Above note 273, Recital 59; above note 244, Recital 51; above note 295, Recital 34.

position of the UK and Ireland is not so absolute. Neither Member State is bound by AFSJ measures without notifying the Council Presidency of its desire to participate.³²⁷

Second, there is a gap between the legal standards as set out in the Directives and their implementation at national level in the Member States that are bound by them. The EASO describes this implementation gap as one of the significant challenges facing the CEAS in its Annual Report for 2015.³²⁸ This can be observed in Commission's numerous infringement decisions against the Member States. Since January 2014, the Commission has been pursuing the full implementation of the second phase of harmonisation Directives in accordance with Article 258 TFEU. First, the Commission issued formal notices to twelve Member States on 27 January 2014 in relation to the qualification Directive.³²⁹ Lithuania was added to this list on 29 January 2015.³³⁰ On the 23 September 2015, the Commission issued thirty-seven formal notices in relation to nineteen of the Member States in regards to the procedures Directive and the reception conditions Directive,³³¹ as well as a reasoned opinion for Spain on the qualification Directive.³³² These were followed by reasoned opinions for Greece and Malta on 10 December 2015,³³³

³²⁷ Articles 1-3, Protocol (No. 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the TFEU and the TEU. The decision on participation is operated jointly due to their special arrangement of free movement outside of the Schengen area, the Common Travel Area. It remains to be seen how the position of the UK and Ireland will be affected by the exit of the UK from the EU.

³²⁸ EASO, *Annual Report on the Situation of Asylum in the European Union 2015* (EASO, 2016), 56-59, available at https://www.easo.europa.eu/sites/default/files/public/EN_%20Annual%20Report%202015_1.pdf [accessed 09/07/17].

³²⁹ Bulgaria, infringement number 2014/0026; Finland, infringement number 2014/0095; Cyprus, infringement number 2014/0037; Italy, infringement number 2014/0135; Hungary, infringement number 2014/0116; France, infringement number 2014/0105; Portugal, infringement number 2014/0183; Poland, infringement number 2014/0176; Malta, infringement number 2014/0163; Spain, infringement number 2014/0085; Slovenia, infringement number 2014/0208; and Romania, infringement number 2014/0193.

³³⁰ Infringement number 2015/0070.

³³¹ Austria, infringement number 2015/0351; Belgium, infringement numbers 2015/0355 and 2015/0356; Bulgaria, infringement numbers 2015/0363 and 2015/0364; Cyprus, infringement numbers 2015/0371 and 2015/0372; Estonia, infringement numbers 2015/0396 and 2015/0397; Czech Republic, infringement numbers 2015/0379 and 2015/0380; France, infringement numbers 2015/0424 and 2015/0425; Germany, infringement numbers 2015/0386 and 2015/0387; Hungary, infringement numbers 2015/0432 and 2015/0433; Greece, infringement numbers 2015/0402 and 2015/0403; Lithuania, infringement numbers 2015/0442 and 2015/0443; Latvia, infringement numbers 2015/0454 and 2015/0455; Luxembourg, infringement numbers 2015/0447 and 2015/0448; Malta, infringement numbers 2015/0459 and 2015/0460; Poland, infringement numbers 2015/0469 and 2015/0470; Romania, infringement numbers 2015/0479 and 2015/0480; Slovenia, infringement numbers 2015/0493 and 2015/0494; Spain, infringement numbers 2015/0413 and 2015/0414; and Sweden, infringement numbers 2015/0486 and 2015/0487. See European Commission, *More responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work*, Press Release (IP/15/5699, Brussels, 23 September 2015), Annex, available at http://europa.eu/rapid/press-release_IP-15-5699_en.htm [accessed 09/07/17].

³³² Infringement number 2014/0085.

³³³ Greece, infringement numbers 2015/0402 and 2015/0403; and Malta, infringement numbers 2015/0459 and 2015/0460. See European Commission, *Implementing the Common European Asylum System: Commission*

and for Germany, Estonia and Slovenia on 10 February 2016.³³⁴ These infringement proceedings demonstrate incomplete transposition of the harmonisation Directives, and that differences remain between national asylum systems, at least between those Member States that have transposed the legislation and those that have not.

In addition, the Commission has picked out two particular cases of concern in Greece and Hungary. Greece has been challenged for poor application of the asylum procedures and reception conditions Directives in ongoing problems with the Greek asylum system, first noted in 2009.³³⁵ Hungary was issued with a formal notice regarding incorrect implementation of the asylum procedures Directive on 10 December 2015 and an additional formal notice about its incorrect implementation of the asylum and migration *acquis* more broadly on 17 May 2017.³³⁶ Problems with the Hungarian asylum system have become especially acute following reforms to national asylum law in recent years that move further away from CEAS and accepted fundamental rights standards.³³⁷

The differences in the application of asylum legislation in Member States is also frequently measured by comparing recognition rates of groups of refugees, based on the nationality of the applicant. This is a somewhat crude metric, based on the premise that applicants from the same country of origin are likely to share similarly meritorious claims for protection regardless of host state. However, it does give a useful indication of the *effect* of inconsistent implementation of EU asylum standards. For example,

escalates 8 infringement proceedings, Press Release (IP/15/6276, Brussels, 10 December 2015) available at http://europa.eu/rapid/press-release_IP-15-6276_en.htm [accessed 09/07/17]. The other cases relate to the Eurodac Regulation, above note 152.

³³⁴ Germany, infringement numbers 2015/0386 and 2015/0387; Estonia, infringement number 2015/0396; and Slovenia, infringement number 2015/0493. See European Commission, *Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings*, Press Release (IP/16/270, Brussels, 10 February 2016), available at http://europa.eu/rapid/press-release_IP-16-270_en.htm [accessed 09/07/17]. The other five cases relate to Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ [2011] L132/1. Directive 2003/109 addresses the rights of third country nationals resident long-term in the Member States.

³³⁵ Infringement number 2009/4104.

³³⁶ Infringement number 2015/2201. See European Commission, *Commission opens infringement procedure against Hungary concerning its asylum law*, Press Release (IP/15/6228, Brussels, 10 December 2015) available at http://europa.eu/rapid/press-release_IP-15-6228_en.htm?locale=en [accessed 09/07/17]; European Commission, *Commission follows up on infringement procedure against Hungary concerning its asylum law*, Press Release (IP/17/1285, Brussels, 17 May 2017), available at http://europa.eu/rapid/press-release_IP-17-1285_en.htm?locale=en [accessed 09/07/17].

³³⁷ *Ibid.* See further Julija Sardelić, “From Temporary Protection to transit Migration: Responses to Refugee Crisis along the Western Balkan Route”, *EUI Working Papers RSCAS 2017/35* (San Domenico de Fiesole: European University Institute, 2017).

Neumayer reports that in 1999, almost all asylum applications from Iraqis were accepted in the UK, compared to 83% in Denmark, 59% in France, 43% in Germany, 28% in Austria and 10% in the Netherlands.³³⁸ More modern, post-harmonisation statistics indicate that such variation remains. For Somali applicants in 2013, recognition rates varied between 96% in Italy and 90% in the Netherlands to 53% in Germany, 38% in Sweden and 17% in France.³³⁹ Although more closely aligned, notable differences also existed for applicants from Syria, with Italy and Greece recognising 51% and 60% respectively whilst Bulgaria and Malta both recognised 100%, closely followed by Germany at 99%.³⁴⁰ This persisted in 2014, with successful application rates Syrian nationals at 100% in Sweden, 94% in Germany, 88% in the Czech Republic and 64% in Italy.³⁴¹ For Eritrean nationals in 2014, success rates were 100% in Spain, 91% in the Netherlands, 81% in Belgium, 48% in Greece and 26% in France.³⁴²

The rationale for substantive and procedural harmonisation in the CEAS is that it creates similar asylum conditions in every Member State, which limits secondary movements. This contributes to legal solidarity, fostering greater mutual trust between national asylum systems and therefore supporting mutual recognition of negative decisions, which is the basis of the Dublin system. In an inversion of market logic, it should also prevent a ‘race to the bottom’ in asylum standards by setting common minimum standards, by removing the incentive for Member States to compete to create the least favourable standards to become the least attractive destination for applicants for international protection. Harmonisation’s success in achieving these objectives has been limited by incomplete and inconsistent implementation. Nevertheless, the legal solidarity created by the Dublin system and harmonisation together is a core strand of solidarity in the CEAS. To draw out how this type of solidarity might be measured, the following section analyses the constitutional aspects of this legal solidarity.

³³⁸ E. Neumayer, “Asylum Recognition Rates in Western Europe: Their Determinants, Variation and Lack of Convergence” (2005) 49(1) *Journal of Conflict Resolution* 43-66, 48.

³³⁹ Asylum Information Database, *Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System, Annual Report 2013/2014* (Belgium: ECRE, September 2014), 18, available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf [accessed 04/03/15].

³⁴⁰ *Ibid.*, 17.

³⁴¹ Asylum Information Database, *Common Asylum System at a Turning Point: Refugees caught in Europe’s Solidarity Crisis, Annual Report 2014/2015* (Belgium: ECRE, September 2015), 19, available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf [accessed 09/07/17].

³⁴² *Ibid.*, 21.

3.3. CONSTITUTIONAL SOLIDARITY

By addressing the constitutional implications of legal solidarity in the CEAS, this section argues that ‘greater solidarity’ is used by the Commission to mean ‘greater integration’ in asylum policy. This analysis is based on four poignant aspects of legal solidarity that are raised by this. The policy decisions made in respect of each express substantive interpretations of solidarity, but also present a vision of solidarity as an organising principle for the vertical relationship between the EU and its Member States and the horizontal relationships between the Member States. These aspects are the position of the CEAS measures between minimum harmonisation and ‘uniform’ standards, or full harmonisation; the choice to legislate with Directives and Regulations; the ability of certain Member States to ‘opt out’ of aspects of legal solidarity; and the reflections that weaknesses in implementation cast on the nature of legal solidarity.

The competence for harmonisation in the field of asylum is conferred under Article 78(2) TFEU and, as with other AFSJ competences, it is shared with the Member States.³⁴³ This means that legislation may be adopted at both the EU- and Member State-level, but action by the Member State is limited to extent that the EU has not legislated and to the extent that the EU has decided to cease exercising its competence.³⁴⁴ It was held in *Commission v United Kingdom* that in areas of shared competence where the EU had legislated exhaustively, it was not possible for a Member State to enact different standards.³⁴⁵

In some areas of the ASFJ, legislation is expressly limited to minimum harmonisation, such as criminal justice.³⁴⁶ No such limitation is found in Article 78 TFEU. This means in law that entirely uniform, harmonised standards might be enacted for all Member States, but to date it has been limited to minimum harmonisation, despite a policy shift in favour of implementing ‘uniform’ standards. The specific designation of ‘minimum standards’ present in the first phase is absent from the titles of the second phase instruments, but they remain examples of ‘minimum harmonisation’. The second phase

³⁴³ Article 4(2)(j) TFEU.

³⁴⁴ Article 2(2) TFEU.

³⁴⁵ Case 60/86 *Commission v United Kingdom (dim-dip lighting devices)* EU:C:1988:382 [11]-[12].

³⁴⁶ Article 82(2) TFEU.

Directives each expressly confirm that the Member States retain the option to adopt or maintain more favourable standards in their national legislation than are provided for at the EU level.³⁴⁷

As remains clear from the inability or unwilling of some Member States to implement the harmonised standards in their national systems, differences remain between the Member States positions in relation to asylum standards. There is political disagreement as to the ideal standards for the CEAS, which explains the need to legislate for minimum, rather than uniform, positions. This makes it politically necessary to maintain room for the Member States to vary their standards. From the Commission's perspective, however, this undermines legal solidarity as it prevents the realisation of universal standards to prevent secondary movements.

This means that the choice as to the degree of harmonisation, from the Commission's perspective, is an expression of the intensity of solidarity in the CEAS. Minimum harmonisation means high diversity in national asylum systems and a low level of commitment to solidarity. Uniform standards or full harmonisation eliminates diversity between national asylum systems a high level of commitment to solidarity. In this way, legal solidarity is bound together with legal integration.

This view of the constitutional expression of solidarity as integration is also demonstrated in the Commission's proposal to move from harmonisation Directives to two Regulations and a Directive in the third phase.³⁴⁸ Article 288 TFEU explains the difference between these two forms of legislation:

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

³⁴⁷ Recast procedures Directive, Article 5; recast reception Directive, Article 4; recast qualification Directive, Article 3, above notes 273, 295 and 244 respectively.

³⁴⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* COM(2016) 467 final; European Commission, *Proposal for a Regulation 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents* COM(2016) 466 final; European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)* COM(2016) 465 final.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

This shows that whereas Directives preserve the discretion of the Member States as to the implementation of its provisions, this discretion is not available under a Regulation. Thus changing the format of the harmonisation measures to Regulations indicates a shift in favour of more centralised control of the Member States' asylum standards.

Solidarity as similar standards is weakened by the operation of the AFSJ opt-outs of Denmark, the UK and Ireland. The fact of the opt-outs does not undermine this solidarity. If exercised once as an in/out decision, the effect of the opt-outs would be merely to define the group of Member States between which solidarity operates. Rather, it is their inconsistent operation – rendering these Members sometimes in, sometimes out – that is problematic for this vision of solidarity. Legal solidarity operates as a system that is stronger the more completely it is adopted.

Denmark is not party to CEAS measures, as a Member State, but has concluded a bilateral treaty with the EU to participate in the Dublin system on the terms of the Dublin II Regulation.³⁴⁹ The UK and Ireland have opted to participate in the Dublin III Regulation,³⁵⁰ but not the second phase of harmonisation.³⁵¹ The exercise of the opt-outs in this way makes for an uneven application of the CEAS across the Member States, and is therefore an impediment to legal solidarity. As such, the decisions of these Member States to operate their opt-outs in this way could be interpreted as anti-solidaristic. On the same basis, Member States that fail to implement the harmonisation Directives also undermine legal solidarity.

In conclusion, legal solidarity in the CEAS operates according to a view of its constitutional aspects that aligns the principle of solidarity between the Member States with closer legal integration of the

³⁴⁹ Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member States of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention, 10 March 2005, OJ [2006] L66/38.

³⁵⁰ Above note 152, Recital 41.

³⁵¹ Recital 58, recast Procedures Directive; Recital 50, recast Qualification Directive; Recital 33, recast Reception Directive, above notes 273, 244 and 295 respectively.

Member States' approaches to asylum and closer coordination between their asylum systems, whilst maintaining the national autonomy of those systems. Financial solidarity does not emphasise integration in this way, rather its main focus is on supporting the Member States' separate, national systems.

4. CONCLUSIONS

This chapter addresses the principle of solidarity in the CEAS, arguing that, through diverse manifestations in legal, financial and practical forms, it is a flexible principle that accommodates different political and policy approaches, encourages dialogue between those different opinions, and manages the relationships between the actors that hold them.

Legal solidarity is expressed through the Dublin system of allocating applicants to a Member State responsible and through harmonisation. Dublin protects free movement in the borderless, internal market of the Schengen area and harmonisation creates the mutual trust between the Member States required to make it happen. Each Member State expresses solidarity through upholding the common standards and operating its asylum systems such that there is no 'spill over' of responsibility to the other Member States. These mechanisms are predicated on the Member States maintaining their separate, national asylum systems, yet the solidarity they express displays a constitutional preference for closer legal integration. This sits uncomfortably with the Member States' preferences for separate systems, which allow greater priority for sovereign border controls.

Financial solidarity also prioritises the Member States by awarding the majority of its resources to the Member States in proportion to a measure of the migratory pressure that they experience. This is solidarity through the redistribution of resources from those most able to afford it, namely those making the largest contributions to the EU budget, to those Member States in most need, because they host the most applicants for international protection. Of the resources reserved for Union-level spending, most is targeted for emergency assistance.

Practical solidarity is expressed in mechanisms that provide tangible support for the asylum system of one (or few) Member State(s) by the others. This has two prominent features. First, it is usually imagined in the relocation of applicants for international protection between the Member States

according to capacity to receive them. The EASO offers an alternative image of practical solidarity which instead moves agents of the other national asylum systems to the Member State experiencing difficulties. Second, practical solidarity is most commonly evoked in a time of emergency, when the recipient Member State is experiencing particular, or undue, pressure on its asylum system. It therefore tends to be presented as exceptional, required when the 'normal' position of each Member State addressing its own responsibilities becomes untenable.

This chapter offers an account of solidarity in the CEAS founded in its diversity and flexibility as a principle. It addresses both the substantive meanings that solidarity mechanisms for asylum express and their constitutional significance.

CHAPTER FIVE: FLEXIBILITY AS THE DRAW AND DOWNFALL OF SOLIDARITY IN THE CEAS

Solidarity sounds like a good thing. Intuitively, we attach positive connotations to the principle, but just as there are different interpretations of what ‘good’ is, so too there are many different understandings about what we mean by solidarity. This chapter argues that this is how solidarity works in the Common European Asylum System (CEAS) – actors can all agree on a superficial level that they support the principle of solidarity, creating a feeling of unity, but, on closer inspection, this disintegrates due to the conflicts of meaning expressed by such a flexible principle. The principle of solidarity in the CEAS offers a point of agreement between the actors in the CEAS such that they can create a sense of unity on asylum policy, but the same flexibility that makes it possible for them to reach this agreement also means that it contains conflicts of meaning that prevent ‘solidarity’ acting as the problem-solving panacea that the CEAS actors and observers sometimes seem to expect it to be. This chapter builds on the flexibility of solidarity identified to in the preceding ones to establish these claims as to the nature of solidarity across two sections.

First, section one argues that solidarity carries strongly positive connotations for law and policymakers in the CEAS, which is demonstrated in their own words in speeches and policy documents. It is also flexible, meaning that it can accommodate differences of opinion. It therefore operates as a point of agreement for EU policy actors and the Member States alike. By committing to the principle of solidarity, these actors can express unity and common purpose, allowing them to pursue a common asylum policy, even if the underlying political differences remain stark: the principle of solidarity gets the relevant actors around the negotiating table. This is the unifying role of the principle of solidarity.

Section two argues that, once around the negotiating table, challenges arise from the diversity of ideas to which the term, ‘solidarity’, is applied, meaning that the principle cannot produce a coherent vision for policymaking in the CEAS. The flexibility of the principle of solidarity means that it is too wide to provide fixed answers to detailed policy questions. This can be expressed in three challenges to

policymaking in the CEAS that derive from the flexibility of the principle of solidarity. First, solidarity is traditionally understood as a phenomenon that operates between people, rather than between states. In borrowing the idea, the CEAS also seeks to borrow its attached positive and supportive connotations, but CEAS solidarity measures tend to be more successful when they coerce the Member States to act in a defined way, potentially undermining this association. For example, the Member States must implement the legally binding standards of the harmonisation Directives, which has created a system of protection standards that are comparatively higher than in other areas of the world, which is considered one of the successes of the CEAS.¹

Second, the EU and the Member States refer to the idea of solidarity most frequently and emphatically when they connect it to the idea of crisis, but this rhetoric actually prompts very few tangible effects from them, either towards each other or towards persons in need of international protection. Thus it cannot direct the actors towards a clear vision of the CEAS because any fixed position is likely to be advantageous to only a small number of actors acutely affected by the crisis. In contrast, most actors will have more to lose, for example through financial cost or loss of popularity with a domestic electorate, than they would gain through assisting those affected by the crisis, either the Member States or asylum seekers and refugees.

Third, measures that preserve separate, national-level asylum systems are more popular with the Member States and so more likely to be successful, despite the unifying sentiment of ‘solidarity’. I argue that the Member States are firmly attached to their national spaces for determining the scope of the international protection that they will offer because they frame asylum policy decisions as a matter of national sovereignty and tie asylum policy to expressions of national identity. These three challenges demonstrate the limit of the role that the principle of solidarity can play in EU asylum policy by revealing it to be conflicting and uncertain. Solidarity, therefore, is a starting point for the CEAS. It

¹ Eiko Thielemann and Mogens Hobolth, “Trading numbers vs rights? Accounting for liberal and restrictive dynamics in the evolution of asylum and refugee policies” (2016) 42(4) *Journal of Ethnic and Migration Studies* 643-664, 660; Etienne Piguet, “The ‘Migration Crisis’ in Europe: A Geohistorical Interpretation”, *Refugee Law Initiative Blog* (School of Advance Study, University of London, 1 August 2017), <https://rli.blogs.sas.ac.uk/2017/08/01/the-migration-crisis-in-europe-a-geohistorical-interpretation/> [accessed 01/09/2017].

provides a sense of unity and common purpose but cannot offer a roadmap to coherent or successful asylum policy in the EU.

This chapter adds the final part of the argument to support the central thesis of this research that despite its appearance as a universal, positive value at the heart of the CEAS, there is a striking absence of consensus around the meaning of solidarity as applied to the CEAS and, therefore, what solidarity entails in practice. This research demonstrates that solidarity is used flexibly: on the one hand, offering a unifying core principle and, on the other, rendering it a largely empty vessel of little practical value in legal and policy planning.

1. SOLIDARITY AS BRINGING ACTORS TO THE TABLE

Solidarity as an idea has very broad appeal. This is demonstrated in chapter one, which illustrates the depth and breadth of solidarity in social and political thought in Europe, and chapter two, which examines solidarity as a core value in the EU from its origins to its growing prominence across a range of policy areas. In the CEAS, solidarity is an ideal to which all parties can agree, with agreements as to how to put this value into practice relegated to a secondary consideration (with, as observed in chapter four, varying degrees of success). Asylum is a politically controversial policy area, in which actors often prefer quite different approaches following their different interests, agendas, and values. In this context, the word, ‘solidarity’, is a point of agreement, a badge of unity covering underlying divergences of opinion. Chapter four demonstrates the flexibility with which solidarity is interpreted in the CEAS, and this chapter argues that this flexibility means that the principle can accommodate differences of opinion: actors might have very different policy ideas and visions of what solidarity looks like in practice, but since ‘solidarity’ can be used to describe all of these visions, the differences do not prevent the EU and its Member States agreeing that they all want solidarity. This section looks at the statements of these actors to argue that this broad appeal – the agreement that solidarity is a ‘good’ thing for the CEAS – means that it acts as a foundation for EU asylum policy, bringing actors to the negotiating table on the basis of initial agreement.

As presented in the introductory chapter, solidarity has been a core value of the CEAS from its beginning, including in the Commission's early plans for the first phase of harmonisation Directives. Negotiations of these measures in 2000 were framed by the Commission as an answer to "the question of solidarity between the Member States",² which was already on the agenda of the CEAS. The Commission recognised a consensus on the need for solidarity and agreed to promote it through developing the temporary protection Directive and a European Refugee Fund: "the Commission is aware that the demand for solidarity is present today".³ Solidarity here is an initial point of agreement between the Member States and the Commission, and operates as the basis of the formation of legal instruments providing for cooperation between the Member States in relation to asylum.

The strongest early example of the unifying role of the idea of solidarity in the CEAS is the temporary protection Directive.⁴ This Directive was the first legislative measure enacted under the CEAS and was adopted expressly as an expression of the principle of solidarity by a unanimous Council as required then by the asylum competences. Its provisions show the support of the Member States for the principle of solidarity and the agreement that it should guide their behaviour in the event of a refugee crisis. Yet the terms of the Directive leave the details of when its mechanism will be activated and the extent of the Member States' obligations to help each other in hosting persons in need of protection to be determined later, as and when a crisis should arise.⁵ This means that the Directive amounts only to a commitment by the Member States to act in solidarity with each other in future, and the more specific details – on which the differences between the Member States' positions re-emerge – are left for discussion another day.

The principle also played a central role in the formation of the second phase of the CEAS, too. In its 2007 *Green Paper on the future Common European Asylum System*, the Commission stated that "a

² European Commission, *Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and uniform status, valid throughout the Union, for person granted asylum*, COM(2000) 755 final, 10.

³ *Ibid.*

⁴ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ [2001] L212/12. See chapter four, section 1.1.

⁵ *Ibid.*, Articles 4-7 and 25-26.

higher degree of solidarity between EU Member States” was one of its two goals for the second phase of the CEAS.⁶ Having consulted on the basis of this green paper, the following year the Commission presented a *Policy Plan on Asylum*, reflecting the eighty-nine responses gathered⁷ from the Member States’ national governments, their national assemblies, representatives of local and regional governments and civil society and NGOs.⁸ Solidarity remained a firm commitment in the *Policy Plan*, and was included among the requirements for a “genuinely coherent, comprehensive and integrated CEAS”. Expressly, the plan insisted: “the CEAS must... provide for genuine solidarity mechanisms”.⁹ The Commission proposed action under the plan following a “three-pronged strategy”, of which the third prong was “a higher degree of solidarity and responsibility among the Member States”.¹⁰

This centralising of the principle of solidarity was echoed in the European Council’s *European Pact on Immigration and Asylum*, which expressly built on the *Policy Plan on Asylum*.¹¹ The aim of the *Pact* was “to give a new impetus to the definition of a common immigration and asylum policy that will take account of both the collective interest of the European Union and the specific needs of each Member State”. This aim which was to be expressly set about “in a spirit of mutual responsibility and solidarity between the Member States”.¹² Both of these policy documents give a central role to the principle of solidarity to justify a second phase of asylum policy in the CEAS. The use of solidarity by the Commission and the Member States through the European Council as a foundation and motivation for policymaking derives from the fact that it attracts wide agreement.

In 2011 and 2012, the Commission and the Council (Justice and Home Affairs) each published policy documents expressly re-orientating CEAS policy to better reflect the principle of solidarity. Despite

⁶ European Commission, *Green Paper on the future Common European Asylum System*, COM(2007) 301 final, 3. The other goal was a higher standard of protection and greater equality in protection across the EU.

⁷ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Policy Plan on Asylum, An Integrated Approach to Protection Across the EU*, COM(2008) 360 final, 2.

⁸ Response available at https://ec.europa.eu/home-affairs/what-is-new/public-consultation/2007/consulting_0010_en [accessed 02/08/17].

⁹ Above note 7, 3.

¹⁰ *Ibid.*, 4. The other two are better and more harmonised standards and effective and well-supported practical cooperation.

¹¹ European Council, *European Pact on Immigration and Asylum* (13440/08, Brussels, 24 September 2008), page 4, expressly adopted in European Council, *Brussels European Council Presidency Conclusions* (14368/08, Brussels, 16 October 2008), 8

¹² *Ibid.*

having guided CEAS policy from the beginning, the principle of solidarity and the consensus associated with it were used to bolster a new raft of policymaking at a time when the EU's capacity for migration policy was publicly called into question due to its disorganised response to people arriving in southern Member States from North Africa following the Arab Spring.¹³ Both documents start with recognitions of the contemporary challenges faced by the CEAS and affirmations that the principle of solidarity would be the best way to respond to these challenges in the years ahead. The Commission's communication *on enhanced intra-EU solidarity in the field of asylum* set out its 'solidarity toolbox' of flexible measures, referred to in chapter four,¹⁴ flowing from the following declaration:¹⁵

Solidarity has been recognised as an essential component of the Common European Asylum System (CEAS) since the outset, the need to translate solidarity into concrete measures flows from practical realities since the asylum systems of all Member States are interdependent.

Here, the Commission uses the idea of solidarity to recall that the addressed actors are all in agreement about their vision for the CEAS, namely a system based on solidarity. From this strong foundation, the Commission seeks to convince these actors that its policy plans flow naturally from their shared ground – solidarity – and so suggesting that they should all also agree to these policy plans. The repetition of the mantra of solidarity continues in the report on the Commission's plan by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).¹⁶ It "[e]mphasises the central role and

¹³ European Parliament, *EU response to the migration flows in North Africa and the southern Mediterranean, in particular, in Lampedusa – Migration flows arising from instability: scope and role of EU foreign policy (debate)* (Strasbourg, 4 April 2011) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110404+ITEM-019+DOC+XML+V0//EN&language=EN> [accessed 07/08/2017]; Farnesina, Italian Ministry for Foreign Affairs and International Cooperation, *Immigration Emergency: the EU must adopt a refugee distribution plan, says Frattini*, (30 March 2011) available at http://www.esteri.it/MAE/EN/Sala Stampa/ArchivioNotizie/Approfondimenti/2011/03/20110330_emergenza_immigrazione.htm, [accessed 07/08/2017]; UNHCR, *Hundreds of new arrivals in Italy from Libya and Tunisia*, (16 August 2011) available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=4e4a505f9&query=libya>, [accessed 07/08/2017]; BBC News, *Italian coastguard finds 25 bodies on boat at Lampedusa*, (1 August 2011) available at <http://www.bbc.co.uk/news/world-europe-14363905>, [accessed 07/08/2017].

¹⁴ See chapter four, introduction.

¹⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust*, COM(2011) 835 final, 2.

¹⁶ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Report on enhanced intra-EU solidarity in the field of asylum* (2012/2032(INI), 19 July 2012).

horizontal effect of the principle of solidarity and responsibility-sharing in the establishment of a CEAS” and states, “solidarity has been recognised as an essential component and a guiding principle of the CEAS from the outset”.¹⁷

The Justice and Home Affairs Council conclusions of 2012 take the centralisation of solidarity even further, incorporating it as a way of packaging and explaining each of its points and recommendations.¹⁸ The introduction reaffirms the same commitment to solidarity as the Commission and LIBE Committee and “highlight[s] the need for genuine and practical solidarity towards the Member States most affected by asylum and mixed migratory flows resulting in an extraordinary burden on their asylum and migration systems”.¹⁹ The content of the conclusions is then organised in eleven sections, each expressly addressing another embodiment of this solidarity, including many of the expressions discussed in chapter four, such as financial solidarity through the AMIF, solidarity through relocation and solidarity through the temporary protection Directive.²⁰

The use of ‘solidarity’ as a point of agreement between the EU and the Member States reached its zenith in the reactions to the refugee crisis, starting from April 2015. At a special meeting following migrant deaths at sea near Lampedusa that April, the European Council adopted a joint statement pledging to strengthen EU presence at sea, to fight traffickers, to prevent illegal migration flows, and to reinforce internal solidarity and responsibility.²¹ This final commitment would be achieved by: full transposition and implementation of the existing legislative framework of the CEAS; increasing emergency aid to ‘frontline’ Member States and organising emergency relocation; deploying EASO teams to assist with registering and processing arrivals; and setting up a pilot project of voluntary resettlement.²² The call for solidarity as a response to the crisis was echoed in a European Parliament Resolution, which

¹⁷ *Ibid*, 4.

¹⁸ Council of the European Union, Justice and Home Affairs, *Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressure due to mixed migration flows* (7485/12, 8 March 2012).

¹⁹ *Ibid*, 2.

²⁰ *Ibid*, 11-12, corresponding to chapter four, sections 2., 1.2. and 1.1. respectively.

²¹ <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> [accessed 01/02/16], paragraph 2.

²² *Ibid*, paragraphs 3(n)-(q).

“Reiterates the need for the EU to base its response to the latest tragedies in the Mediterranean on solidarity and fair sharing of responsibility, as stated in Article 80 [TFEU]”.²³

The emphasis on solidarity continued in the Commission’s *European Agenda on Migration*, published on 13 May 2015, which sought to extend these plans beyond an immediate, emergency reaction.²⁴ Its introduction repeated the need for solidarity: “We need to... work together in an effective way, in accordance with the principles of solidarity and shared responsibility”.²⁵ The *Agenda* stated that this was to be expressed through concrete measures such as the relocation Decisions,²⁶ which were expressly described as products of solidarity, referring to Article 80 TFEU²⁷ and stating:²⁸

Due to ongoing instability and conflicts in the immediate neighbourhood of Italy and Greece, and the repercussions in migratory flows on other Member States, it is very likely that a significant pressure will continue to be put on their migration and asylum systems, with a significant proportion of the migrants who may be in need of international protection. *This demonstrates the critical need to show solidarity towards Italy and Greece* and to complement the actions taken so far to support them with provisional measures in the area of asylum and migration.

All Member States agreed the need for solidarity in response to the refugee crisis and that this could be expressed through the relocation of applicants for international protection from the ‘frontline’ Member States to others where there was spare capacity to host them, shown in the unanimous adoption of the first Decision. Those Member States that preferred other expressions of solidarity could choose to pledge small numbers of relocation places under this Decision’s voluntary scheme, and so were happy to agree to the formulation of the Decision. Under the second relocation Decision, which allocated

²³ European Parliament, *European Parliament resolution of 23 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies* (2015/2660(RSP)), paragraph 3.

²⁴ European Commission, *A European Agenda on Migration*, COM(2015) 240 final.

²⁵ *Ibid*, 1.

²⁶ Council Decision (EU) 2015/1523 of 14th September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L239/146; Council Decision (EU) 2015/1601 of 22nd September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ [2015] L248/80. See chapter four, section 1.2.

²⁷ *Ibid*, Recital 2 (in both Decisions).

²⁸ *Ibid*, Decision 2015/1601, Recital 16, emphasis added.

responsibility instead according to a mandatory distribution key, the absence of flexibility led to the rejection of the policy entirely by some Member States.²⁹ Thus, in a clear example of the flexibility of the principle and its ability to represent a shared response despite different policy positions, these dissenting Member States reaffirmed their commitment to the idea of solidarity at the same time as rejecting the formulation of the second relocation Decision.³⁰

The collective commitment to solidarity played such a significant role in unifying the EU and the Member States in their responses to the crisis that references to the principle dominated discussions even outside subject-specific statements about the CEAS. On 9 September 2015, the President of the Commission, Jean-Claude Juncker, delivered a ‘State of the Union’ speech to the European Parliament titled, *Time for Honesty, Unity and Solidarity*.³¹ The refugee crisis was a prominent topic, and addressing it was described as the Commission’s “first priority”.³² Juncker invoked the shared heritage of refugee protection in Europe and the moral and practical imperative to continue to provide such protection, wrapping these statements in the language of solidarity to remind the audience of their common stake in this matter. Indeed, his comments on the refugee crisis contained six of the speech’s eight references to solidarity.³³

Such calls for solidarity were not limited to EU institutions and their spokespeople. Member States’ Heads of State and Government expressed a commitment to solidarity in their political declarations at international conferences on the refugee crisis. At a meeting of the EU, Member States, and transit countries along the Eastern Mediterranean and Western Balkan Routes, it was agreed that a mutually desirable solution would rest on solidarity: “We are facing a common challenge. As partners, we need

²⁹ See chapter four, footnotes 81-85.

³⁰ See below notes 38-40.

³¹ Jean-Claude Juncker, President of the European Commission, *State of the Union 2015: Time for Honesty, Unity and Solidarity* (Strasbourg, 9 September 2015) http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm [accessed 20/01/16]. Provision for such speech is made in Framework Agreement on relations between the European Parliament and the European Commission, OJ [2010] L304/47, Annex IV Article 5, which states that it should outline the priorities of the Commission for the coming year.

³² *Ibid.*

³³ One of the other references is to the general need for solidarity in the EU and the other relates to a relief package for farmers affected by changes in the milk market, *ibid.*

to respond collectively with solidarity”.³⁴ Similarly, a *Leaders’ Statement* from a meeting of Heads of State or Government of countries along the Western Balkans Route agreed that “Only a determined, collective cross-border approach in a European spirit, based on solidarity, responsibility, and pragmatic cooperation between national, regional and local authorities can succeed”.³⁵ Despite their different interests and policy preferences, the idea of solidarity was used by these actors to bind themselves together and express their unity.

Among national politicians of the Member States, the Chancellor of Germany, Angela Merkel, was particularly prominent in calling for solidarity. In calling for a more even distribution of asylum seekers between the Member States, she stated that solidarity should be a “matter of course”.³⁶ The Prime Minister of Italy, Matteo Renzi, indicated that solidarity was an essential part of the response and shown in support of his country: “Either give us solidarity or don’t waste our time”.³⁷ There were also advocates of solidarity among the doubters of the EU’s response. The Czech Senate submitted an objection to the adoption of the Commission’s proposed relocation Regulation that affirmed a commitment to solidarity but preferred other means for its implementation.³⁸ This sentiment is conveyed by the Visegrad Group, which stated: “We do not deny the spirit of solidarity but we firmly argue the contradictory effects and pull factors of a possible mandatory redistribution scheme for asylum seekers”.³⁹ Similarly, Sardelić reports remarks from Marko Maučič, the Mayor of Podlehnik, a Slovenian municipality near the Croatian border, affirming his commitment to solidarity at the opening of a new reception centre in

³⁴ High Level Conference on the Eastern Mediterranean/Western Balkans Route, *Declaration* (Luxembourg, 8 October 2015), paragraph 4, available at <http://data.consilium.europa.eu/doc/document/ST-12876-2015-INIT/en/pdf> [accessed 25/01/16].

³⁵ Leaders’ Meeting on refugee flows along the Western Balkans Route, *Leaders’ Statement* (25 October 2015), page 1, http://ec.europa.eu/news/2015/docs/leader_statement_final.pdf [accessed 25/01/16].

³⁶ AP English Worldstream, *Merkel presses EU partners to share refugee burden* (Berlin, 18 June 2015).

³⁷ <http://news.yahoo.com/italys-renzi-slams-eu-leaders-over-migrant-quotas-230652065.html> [accessed 15/02/16]; <http://dw.com/p/1FnZh> [accessed 15/02/16].

³⁸ Council, *Communication from the Czech Senate to the General Secretariat of the Council*, Document 14615/15 (Brussels, 26 November 2015).

³⁹ Visegrad Group, *Joint Statement of the Heads of Government of the Visegrad Group Countries* (Bratislava, 19 June 2015), available at <http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the> [accessed 31/08/2016]. The Visegrad Group members are Poland, Slovakia, Hungary and the Czech Republic.

2015: “We Slovenians are known for our solidarity... Here it is expected that we will provide for these people in those hours they are with us, before they go to their final destinations, which is not Slovenia”.⁴⁰

The overwhelming consensus among the EU and the Member States is that solidarity is needed in EU asylum policy, a sentiment that has intensified in response to the refugee crisis. This consensus is only possible in the context of a flexible and diverse approach to solidarity that can accommodate many different policy choices. Actors can agree that they want solidarity, and display unity through proclaiming such, whilst maintaining very different policy plans, reflecting their various interests and preferences. This divergence undoubtedly remains a stumbling block to reform in the CEAS, but it should not obscure our recognition of the symbolically unifying role that the idea of solidarity plays.

The word, ‘solidarity’, carries positive connotations, has wide political appeal, and can mean so many different things that all the relevant legal and policy actors can agree that they want to promote and commit to this ideal. This agreement in principle offers a unifying foundation on which to plan the development of the CEAS, which is codified in primary law in Article 80 TFEU. Yet the same flexibility that allows the principle of solidarity to act as this point of agreement means that it can only act as a superficial cover to hide underlying differences between the actors’ interests and preferences. Commitment to solidarity cannot guarantee similar commitment to the content of legal and policy measures through which differences of opinion resurface, as demonstrated through the problems in implementing the CEAS explored in chapter four.⁴¹ The next section argues that relevant actors have realised that solidarity is a principle around which they can converge, despite their different policy intentions; however, a number of challenges then present as a consequence of this flexible approach to the principle that prevent it from representing further guidance in realising that common policy. These challenges are, first, that the supportive and humanitarian connotations of solidarity can be lost when it is transferred from its conventional use to describe human relationships to the inter-state context. The second is that the common association between solidarity and responding to crises does not seem to

⁴⁰ Quoted (and translated) in Julija Sardelić, “From Temporary Protection to transit Migration: Responses to Refugee Crisis along the Western Balkan Route”, *EUI Working Papers RSCAS 2017/35* (San Domenico de Fiesole: European University Institute, 2017), 11.

⁴¹ Sections 1.1, 1.2 and 3.2.

lead to much tangible action in the event of a refugee crisis. Third, there is a tension between the implication of collective action and the Member States' desire to maintain their national space to determine asylum policy.

2. SOLIDARITY AS A CHALLENGE TO POLICYMAKING IN THE CEAS.

The problems start to occur once the actors have taken their seats at this table. This is illustrated in chapter four, which shows that there exist fundamental disagreements about specific solidarity measures and that where there is formal agreement, the resulting policy is inconsistently, or simply not, implemented. This section argues that these difficulties are not challenges that can be overcome simply by 'better' design of solidarity mechanisms. Rather, these challenges stem from conflicts of meaning that stem from the flexible interpretation applied to the principle of solidarity due to the diverse meanings accommodated in it.

The first of these conflicts of meaning derives from what chapter four refers to as the 'who' of solidarity, that is, who offers and benefits from solidarity? The word is conventionally used to describe interpersonal relationships, whereas it has been adopted by the CEAS and applied to inter-state, and state-to-person, relationships. The first part of this section argues that this transfer attempts to bring with it solidarity's supportive and humanitarian connotations, but that this is not necessarily reflected in the reality of CEAS measures. The use of the word, therefore, can obfuscate the coercive nature of some of the contents of the CEAS solidarity toolbox.

Part two turns to the question of 'when' solidarity will arise, demonstrating that although solidarity can refer to continuing systems or practices in the CEAS, it is most closely associated with times of crisis or emergency. The conflict of meaning here is that the close association of the ideas of 'solidarity' and 'crisis', and the increased emphasis on solidarity in the rhetoric of the EU and the Member States during a crisis, does not readily lead to action from them. Particularly through the temporary protection Directive (though too in later examples), we see that solidarity is the go-to plan of action prepared in

case of a refugee crisis, yet it is left to gather dust despite EU, national and international politicians wringing their hands over “the biggest refugee crisis since World War Two”.⁴²

Finally, part three addresses the third of the interpretive conflicts of solidarity in the CEAS, namely the gap between the Commission’s presentation of solidarity as necessarily implying closer integration of the Member States’ national asylum systems towards one, European asylum system on the one hand, and the Member States’ preference for maintaining a national space for determining asylum policy on the other. It argues that this preference arises from the Member States connecting the retention of a national asylum system with national sovereignty, protecting the national interest, and projecting national identity. The Member States do not express this as an objection to solidarity, rather as an alternative understanding of it. Thus, solidarity presides over a tension between supranational, collective action by the Member States and the maintenance of national-level discretion. In this sense, solidarity is imagined as a constitutional principle, organising the vertical relationships between the EU and the Member States and the horizontal interactions between the Member States, yet there is no consistent vision of these relationships.

Together, these conflicts of meaning demonstrate the challenges that the principle of solidarity poses to EU asylum law and policymaking, rather, following this analysis, solidarity is shown to add little value as an organising principle in the CEAS.

2.1. ADOPTING SOLIDARITY AND BETRAYING ITS ORIGINS

A recurring theme of the discussions of solidarity in different contexts in the preceding chapters is the need to be clear about the addressees of solidarity in any given usage – who is showing solidarity to whom? Two important issues in this regard are raised in chapter one. First, the difference between particularist solidarity shown to ‘in’ group members and universalist solidarity shown to all, regardless of membership. Second, chapter one asked whether there is a difference between solidarity expressed by human beings and solidarity expressed by states. This is important as humans have emotional and

⁴² UNHCR, “Syria conflict at 5 years: the biggest refugee and displacement crisis of our time demands a huge surge in solidarity” (5 March 2016), available at <http://www.unhcr.org/uk/news/press/2016/3/56e6e3249/syria-conflict-5-years-biggest-refugee-displacement-crisis-time-demands.html> [accessed 28/09/2017].

sentimental capacity that is absent in states (despite the frequent anthropomorphism of the latter). Chapter two looked at various expressions of solidarity in the EU, observing its flexible application to both person-to-person solidarities as captured in competition law and equal treatment for moving EU citizens and Member-State-to-Member-State solidarities through the Eurozone crisis bailouts and Article 222, the solidarity clause. Chapter three showed that solidarity in refugee law is largely understood as an inter-state phenomenon, perhaps expressed more directly (and more commonly, outside of the EU) as ‘burden-sharing’. Chapter four showed that this understanding carries over from international refugee law into the CEAS, in which solidarity is primarily understood as it is expressed in Article 80 TFEU – “between the Member States”.

This section addresses the first barrier to a common understanding of solidarity in the CEAS, building on the analysis developed in chapter four around the question of ‘who?’. First, since the most common understanding of solidarity is as something between people, the use of the principle in the CEAS intuitively suggests solidarity with persons in need of international protection, not between the Member States, when in fact the opposite is true. Second, there is a disconnect between the most intuitive understanding of solidarity as a positive, supportive and constructive interpersonal phenomenon and its transfer to the CEAS that wants to borrow these favourable connotations for its application between the Member States. I argue that, aside from the rhetoric around solidarity examined in section one, its use in the CEAS has been far more successful in the context of coercive measures, meaning that transferring the word to this context has failed to ensure that the positive sentiments attached to it are brought along too. The flexibility of the principle of solidarity means that it can equally describe supportive and coercive actions. Despite the word’s instinctively positive associations, it cannot offer any assistance in distinguishing between these two options in CEAS law and policymaking.

The usual use of ‘solidarity’ is between people. Each of the solidarities in chapter one are founded on the relationships between people. Both of Durkheim’s organic and mechanical solidarities derive from the relationship between people in a society distinguished on the type of interaction that generates solidarity. Mechanical solidarity is based on similarities and organic solidarity is based on

interdependence through a division of labour.⁴³ Economic theories of paying for public goods explain the conditions under which people will join together to pay for something that benefits them all, which is used to explain financial solidarity. Sociological interpretations of particularist and universalist solidarities have been developed with reference to human behaviours within and across societies. Politically, solidarity is used by the Left to explain its cooperative and redistributive principles as expressed through welfare states, social security and trade unions, each of which organises the relationships between their members. Sawyer summaries: “Solidarity is political consciousness that leads to the support of collective action usually directed at bringing about social justice”.⁴⁴ Solidarity has a long and wide history in European social, political and philosophical thought. This history is primarily concerned with the interactions and the relationships between people and so, when the term is used, this is the most intuitive association that we tend to make.

In the context of the CEAS it follows, therefore, that solidarity is suggestive of something expressed towards people, more specifically persons in need of international protections, since they are the objects of the CEAS. It is less immediately obvious who should be showing this solidarity, which might be any or all of the EU institutions, the Member States or EU citizens. In fact, the most convincing action taken under the banner of solidarity in the context of the refugee crisis is by the people of the EU (including other third country nationals), rather than by states or institutions, but that is not necessarily implied by the adoption of the principle of solidarity by the CEAS. This intuitive association is the foundation of a great deal of the criticism targeted at the EU and the Member States regarding solidarity in the CEAS: the CEAS does not show sufficient solidarity with asylum seekers and refugees. Chapter four also illustrates this in recognising that criticisms of low protection standards, of excessive waiting times for relocation under Dublin or other measures, and of the failure to address dangerous travelling routes are framed as a lack of solidarity with those in need of protection.⁴⁵

⁴³ See chapter one, section 1.1.

⁴⁴ Lena Sawyer (with Paul Jones), “Voices of Migrants: Solidarity and Resistance” in Gerard Delanty, Ruth Wodak and Pau Jones (eds), *Identity, Belonging and Migration* (Liverpool: Liverpool University Press, 2008) 241-260, 246.

⁴⁵ Chapter four, sections 1.1. and 1.2.

Yet solidarity with persons in need of international protection is not usually what the EU and the Member States have in mind when applying the principle in the CEAS. Having examined the addressees of solidarity across its different articulations in the CEAS, it is clear that solidarity in the CEAS is envisaged as operating between the Member States far more frequently than it is towards persons in need of protection. This echoes the finding of chapter three that solidarity is understood as an inter-state phenomenon by international refugee law and practice. It also follows the primary law expression of the principle of solidarity in the CEAS in Article 80 TFEU, which provides that solidarity operates “between the Member States”. There exists, therefore, a gap between the intuitive and assumed meaning of solidarity in the CEAS as applying to asylum seekers and refugees, on the one hand and, on the other, its real use as applying to the Member States. This gap requires further consideration and the question re-emerges – can solidarity between people be directly transposed onto relationships between states?⁴⁶ Or, more concretely: can the intuitive understanding of solidarity as a positive and supportive relationship between people be directly transposed to the interactions between the Member States in the CEAS?

Certainly, in borrowing the word, ‘solidarity’, the CEAS seeks to borrow too the positivity associated with it. This positivity is a significant part of its attractive quality as a point of agreement for the Member States and the EU. The principle’s ability to act as a motivational foundation for EU asylum policy, draws on its broad appeal as a widely-agreed-upon ‘good thing’ behind which all actors can unite. This is evident in the examples of the rhetoric around solidarity in the CEAS.

The key point of conflict in the practical application of the principle of solidarity that this section seeks to highlight is that despite the suggestion of positivity and supportiveness conveyed by the use of the term, ‘solidarity’, to describe CEAS policy, this is not necessarily true of CEAS solidarity measures. Using the word solidarity to describe the basis of CEAS measures does not necessarily mean that such measures will be supportive. Indeed, chapter four observes that the most successful CEAS solidarity measures are coercive rather than supportive.

⁴⁶ Chapter one, section 2.2.

First, solidarity from the Member States and EU institutions towards persons in need of international protection is largely lacking, and is willingly compromised by the former in seeking to reach an agreement that suits them. This is shown at the beginning of the CEAS through the creation of a parallel protection regime to the international standard of refugee protection under the temporary protection Directive that is less onerous on the Member States and less generous to those persons recognised to be in need of protection under its terms. Under much more recent measures, the relocation Decisions, this continues to be the case: persons likely to be in need of protection are to be moved between Member States at their convenience without requiring the consent of the person to be moved. The CEAS arranges the interaction of the Member States' national asylum systems to support EU integration; it is not conceived as an expression of solidarity with the people subject to those systems. At any rate, the treatment of people in need of protection under the CEAS does not reflect the supportive and positive associations attached to the term, 'solidarity'.

The translation of solidarity from its interpersonal context to an inter-state setting is perhaps easier by analogy than trying to understand it in the relationship between the Member States and persons in need of protection. In this sense, it is easy to understand redistribution of financial resources under the Structural and Cohesion Funds or the AMIF as conveying the same solidarity and following similar principles as redistribution between citizens in a social security system. Yet even in the context of solidarity between the Member States, the positive connotations of solidarity do not necessarily transfer, which is visible in practical and legal solidarities.

There is a low level of political commitment to practical solidarity mechanisms that redistribute persons in need of protection between the Member States. This is demonstrated by the failure to implement the mechanisms contained in the temporary protection Directive and the relocation Decisions, even in the case of the former and fully for the latter. These measures are ostensibly adopted to show supportive solidarity between the Member States through the use of spare reception capacity of others to ease the load of an over-burdened Member State. The reality of such measures indicates that the Member States are less willing to give tangible effect to their proclamations of supportive solidarity in the abstract.

Practical solidarity is supportive, but it frequently fails to materialise beyond its statement in speeches or from written legislation into tangible effect.

Legal solidarity is the core of the CEAS and its most deeply integrated element. It is expressed through the Dublin system – described frequently as the cornerstone of the CEAS – and the harmonisation of legal standards of asylum. Its solidarity, therefore, is a very substantial part of the picture of CEAS solidarity. Legal solidarity is coercive. Its two parts operate interdependently to lay down a legally binding system, the implementation of which is closely monitored by the Commission as part of efforts to develop increasingly similar conditions in every Member State. Dublin allows the Member States to identify which among them is responsible for an asylum application and to insist that this Member State ‘take back’ the applicant should she or he attempt to move on. This responsibility is allocated by determining which Member State played the most significant part in the arrival of the applicant in the EU. This, combined with the Member States’ desire to limit their responsibility for applicants for international protection, means that the obligation to make available its asylum procedures and provide protection to successful applicants operates as a form of ‘punishment’ for allowing an asylum seeker to arrive in the EU.

The first challenge, then, prevents the principle of solidarity from acting to guide substantive law and policymaking in the CEAS is the gap between what is intuitively suggested by references to ‘solidarity’ and its actual nature in the CEAS. Whilst solidarity suggests a relationship between people, and thus with persons in need of international protection through the CEAS, and whilst solidarity is intuitively understood as a ‘good’ thing, expressing positive, supportive actions, the coercive aspects of the CEAS solidarity measures are more successful than the supportive ones. The flexibility with which solidarity is interpreted means that it is used to describe each of these alternative approaches. The positive connotations are, to some extent, exploited to shroud more coercive policy measures. This presents a challenge that arises from the flexibility of the principle of solidarity in the CEAS that operates as an inherent limit on its ability to guide EU asylum policy.

2.2. SOLIDARITY AND CRISIS: ALL TALK, NO ACTION

Although solidarity in the CEAS is sometimes expressed through ongoing and continuous systems, such as through legal solidarity or the main provisions of the AMIF,⁴⁷ it is most closely tied to the idea of an emergency response and, for states, of all pulling together in the hour of need of one. In the broader sense of a ‘refugee crisis’, the emergency response would also be to assist persons in need of international protection. This corresponds to the fifth part of the analytical framework developed in chapter four: when does solidarity arise? However, this close association between crisis and solidarity does not move far beyond urgent rhetoric in the CEAS. It does not translate readily into actions to support Member States facing the lion’s share of protection demands or persons in need of international protection from the EU or its Member States, despite its claims to do so. This second challenge facing the principle of solidarity, therefore, is that it does not live up to its hype.⁴⁸

References to ‘solidarity’ in the EU that are not placed in the context of any particular policy area (such as competition law or free movement), respond to crises. Both the European Solidarity Fund and the Treaty’s ‘Solidarity Clause’ respond to emergency situations in the Member States such as natural disasters and terrorist attacks.⁴⁹ It is notable that in the context of the ‘Solidarity Clause’, Article 222 TFEU, solidarity is also used flexibly to allow the Member States to define the content of their expressions of solidarity.⁵⁰ References to solidarity in the context of the Eurozone bailouts also arose in the context of crisis, one that threatened the stability of Member States’ economies.⁵¹ The ‘refugee crisis’ in 2015 and 2016 similarly warranted calls for solidarity in response.⁵² On the other hand, the redistributive solidarity of the Structural and Cohesion Funds is not referred to as such in the texts of those measures.⁵³ Put simply, the event of a crisis or emergency in the EU calls for solidarity.

⁴⁷ See chapter four, sections 3. and 2. For examples in other contexts, see chapter two, sections 1.1. and 1.2.

⁴⁸ There is perhaps one exception to this, namely that the idea of solidarity during crisis does motivate action from people to assist their fellow human beings, though this is not something that can be claimed by the CEAS as its success.

⁴⁹ Chapter two, section 3.

⁵⁰ See chapter two, text accompanying notes 207-209.

⁵¹ Chapter two, section 2.2.

⁵² See above, section 1.

⁵³ Chapter two, section 2.1.

In international refugee law, the same association is made between crisis and solidarity. In the ‘insurance logic’ argument for international cooperation between states in protecting refugees, the spectre of a ‘mass influx’ of refugees is used to incentivise states to share responsibility. The argument, presented by Suhrke and Thielemann, amongst others,⁵⁴ is that states unaffected by a mass influx or refugee crisis should assist one that is as an ‘insurance premium’ that will ensure assistance for them in the future should they become the state so affected. Thus the very reason for international cooperation (the expression of solidarity at the international level) is the ongoing ‘threat’ of refugee crises that will affect some states more than others.

Outside of the ‘insurance logic’ argument, in state practice too the idea of solidarity has been closely associated with refugee crises. The Comprehensive Plan of Action for Indo-Chinese Refugees coordinated the initial registration of refugees in first countries of asylum in South-East Asia and their later settlement to countries around the world.⁵⁵ It responded to what was perceived globally to be a refugee crisis of the ‘Boat People’ in South-East Asia, and is widely referred to as the most successful example of burden-sharing of refugees by the international community.⁵⁶ Indeed, so intertwined are the notions of solidarity and crisis, that some have argued that a refugee crisis is *defined* as a movement of people on such a scale that it demands cooperation between states in response; that highlights the limits of unilateral refugee policies.⁵⁷

On the other hand, any proposals for the regularisation of international cooperation in refugee protection outside the altruistic but unilateral policies of some states have been considered rather ‘pie in the sky’. UNHCR resettlement targets are missed by about 90%;⁵⁸ ongoing redistribution according to responsibility quotas do not advance beyond hypotheticals;⁵⁹ and even models ostensibly embedded in

⁵⁴ Astri Suhrke, “Burden Sharing During Refugee Emergencies: The Logic of Collective versus National Action” (1998) 11 *JRS* 396-415, 398; E. Thielemann, “Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund” (2005) 43(4) *JCMS* 807, 818.

⁵⁵ Chapter three, section 1.1.

⁵⁶ *Ibid.*

⁵⁷ Above note 40, 3.

⁵⁸ Chapter three, footnote 105.

⁵⁹ For example, Peter H. Schuck, “Refugee Burden-Sharing: A Modest Proposal”, (1997) 22 *Yale Journal of International Law* 243-297. See chapter three, section 2.3.

‘realism’ and ‘pragmatic compromise’ to attempt to appeal to states’ self-interest do not influence state action.⁶⁰

The idea of solidarity, then, is bound up with the idea of crisis and emergency response in the EU and in refugee law, so it is perhaps unsurprising to see the pairing reiterated in their convergence in the CEAS. The temporary protection Directive was built around the anticipation of a ‘mass influx’ of persons in need of protection to the Member States, and provides a solidarity mechanism to be activated when this occurs. The European Pact on Immigration and Asylum, adopted at the other end of the decade, in 2008, shows the continuation of this thinking. It explains that rapid mobilisation of support programmes in a time of crisis to a Member State faced with “a massive influx of asylum-seekers” will constitute “the demonstration of effective solidarity”.⁶¹ This is the first and primary point in the Pact’s only paragraph on the content of the principle of solidarity in the CEAS. In the event of such a ‘mass influx’ through 2015 and 2016, the relocation Decisions adopted on the basis of Article 78(3) TFEU formed the backbone of the tangible, practical expressions of solidarity in response to this refugee crisis.⁶² The compelling language of solidarity motivated the use of the exceptional, emergency competence that Article 78(3) TFEU contains to adopt provisional measures to assist Italy and Greece.⁶³ The word, ‘solidarity’ is important in forming EU asylum policy, and it is no coincidence that many of the examples used derive from emergency mechanisms and rhetoric: solidarity and crisis are tightly entwined in the CEAS.

Despite this deeply embedded, close association and the impassioned calls for solidarity from all angles in the event of a crisis, little material action is actually taken to assist either the Member States under particular pressure or persons in need of international protections.

The first, and I suggest most significant, example of this is the EU and the Member States’ collective failure to ever use the mechanism provided in the temporary protection Directive despite having the

⁶⁰ J C Hathaway and A Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Orientated Protection”, (1997) 10 *Harvard Human Rights Journal* 115-211. See chapter three, section 1.1.

⁶¹ Above note 11, page 12.

⁶² See chapter four, section 1.2.

⁶³ Above note 26.

opportunity and receiving direct invitation to do so.⁶⁴ It would be easy to underestimate the importance of this, assuming that, since another mechanism was formulated that was also described as an expression of the Member States' solidarity with each other, the choice to overlook an old piece of legislation is immaterial. But that ignores the historical and symbolic significance of the temporary protection Directive in the CEAS. The justification and rationale for the introduction of the temporary Directive was the collective failure of the Member States to adequately respond to refugee crises from Bosnia and Kosovo in the 1990s.⁶⁵ The desire to do better in future motivated its adoption, it represents the best intentions of the Member States to respond together to the arrival of a large number of people in need of international protection. By ignoring its mechanism, the EU and the Member States not only side-step the practical obligations that would arise from its activation, they also evade the weight of these intentions. Mitrovic expresses the frustration of observers at the failure to learn the very lesson it set out to under the temporary protection Directive: "Nowadays, when the EU has elaborate legal, institutional and financial infrastructure it is failing to produce a solution, partially because it is not even considering its very own rules that were made for dealing with such a crisis".⁶⁶

This failure to use the temporary protection mechanism in the event of a crisis is compounded by the failure to implement that action that was agreed, namely the relocation Decisions. As discussed in chapter four, two Decisions providing for the relocation of persons likely to be in need of international protection from Italy and Greece to other Member States were adopted to ease the pressure caused by a large number of arrivals on the asylum systems of these Member States. Together, the Decisions provided for 160 000 relocation places, but the number of relocations that have been implemented does not come close to reaching this target, and the Commission has acknowledged that this target will not be met before the provisions of the Decisions expire in September 2017.⁶⁷

⁶⁴ Meltem Ineli-Ciger, "Time to Activate the Temporary Protection Directive: Why the Directive Can Play a Key Role in Solving the Migration Crisis in Europe" (2016) 18 *EJML* 1-33.

⁶⁵ See chapter four, section 1.1.

⁶⁶ Olga Mitrovic, "Used during the Balkan crises, the EU's Temporary Protection Directive may now be a solution to Europe's refugee emergency", *EUROPP Blog* (The London School of Economics, 22 December 2015) available at <http://blogs.lse.ac.uk/euoppblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/> [accessed 27/07/17], cited in Sardelić above note 40, 9.

⁶⁷ Chapter four, section 1.2.

In the event of what the EU institutions and the Member States agreed to call a refugee crisis,⁶⁸ the rhetoric of solidarity pervaded their discussions of how to react. This might be expected by the close association between crisis and solidarity, yet the measure designed for use in such circumstances was ignored and the preferred response was not implemented on any meaningful scale. This demonstrates another limit on the ability of the principle of solidarity to guide law and policymaking in the CEAS: references to solidarity failed to produce tangible action even in the context of a refugee crisis, a situation with which solidarity is, arguably, most readily associated.

2.3. A SINGULAR, EUROPEAN ASYLUM SYSTEM OR SEPARATE, NATIONAL ASYLUM SYSTEMS

In its most basic terms, solidarity implies an idea of collective or cooperative action, of actors doing something together or for each other. The primary benefit of using the term in the CEAS is its ability to bring actors together, fostering unity between them, so that they can discuss the formulation of a *Common* European Asylum System. The third challenge that a flexible principle of solidarity poses to the formulation of the CEAS is that despite the implication of collective action, CEAS solidarity measures are most successful when they acknowledge and reinforce the existence of separate, national asylum systems in the Member States, coordinating rather than assimilating them.

This reflects the Member States' desire to maintain a national space for asylum, seeing national discretion in this regard as a core expression of state sovereignty and as a projection of national identity that they are unwilling to see subsumed into a Common European Asylum System. In turn this shapes the legal and political limits on CEAS policymaking through the shape of the competences conferred to the EU to act in the sphere of asylum under Article 78 TFEU and the will of the Member States to agree and to implement a CEAS. This third challenge, then, is a conflict of constitutional preferences for the CEAS: on the one hand, solidarity suggests a collective approach, particularly through legal solidarity as identified in chapter four;⁶⁹ on the other hand, the Member States are keen to maintain a national space to exercise their idiosyncratic policy preferences relating to asylum. This is a challenge

⁶⁸ This description is widely criticised by other commentators, see introductory chapter, section 2.

⁶⁹ Chapter four, section 3.3.

the policymaking of the CEAS derived from the flexibility of the principle of solidarity. Solidarity could express either (or neither) of the approaches, indeed its flexibility renders it ambivalent to the constitutional shape of the CEAS.

2.3.1. IMMIGRATION AS A SOVEREIGNTY-SENSITIVE POLICY AREA

Immigration control, of which asylum is a subset, is a policy area in which states carefully guard their national discretion.⁷⁰ The power to determine who will be permitted to enter the national borders is one that has long been associated with national sovereignty, and has been argued to be the essence of it – the ability of a population to define itself within established territorial borders is the essence of statehood, and the ability of the group to determine its membership is an essential part of that.⁷¹ Asylum is an exception to the absoluteness of the state’s otherwise unfettered discretion in relation to immigration.⁷² Under international law, a state cannot return a person to a place where she or he would face a serious risk of harm, including through turning such a person away at the border (*non-refoulement*).⁷³ Following the understanding of human rights norms as a fetter on the sovereignty of states, the norm of *non-refoulement* – the essence of asylum – is also a challenge to state sovereignty, which is compounded by the fact that it operates in the policy field of immigration, the very expression of statehood.

In the EU, the power of Union institutions is confined to those areas of competence conferred by the Member States through the Treaties,⁷⁴ which for asylum, are listed at Article 78(2) TFEU. The critical competence in relation to asylum – the legal ability to confer the right to enter and remain in a state’s territory through the grant of a protection status – is conspicuously absent: it remains within the competences of the Member State. The CEAS informs how the Member States should exercise that

⁷⁰ Gerassimos Fournalos, *Sovereignty and the Ingress of Aliens* (Stockholm: Almqvist and Wiskell International, 1986), 57; Linda Bosniak, “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers’ Convention” in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Lieden: Martinus Nijhoff, 2004) 311-341, 317-320.

⁷¹ Chapter one, section 2.1.2.

⁷² For EU Member States, the free movement of persons is another exception and is subject to a greater degree of supranational control than asylum. This too is politically controversial, as discussed in chapter two, section 1.2.

⁷³ Geneva Convention, Article 33; Qualification Directive, Article 21.

⁷⁴ Article 5 TEU.

competence, but the power to grant asylum remains firmly fixed at the national level. This is because the power to determine who may enter its territory is traditionally considered a core expression of the sovereignty of the nation state.

Any manifestation of solidarity that seeks to remove this space for national discretion is bound to face great difficulty in gathering support from the Member States, which perceive any erosion into this space as an encroachment on national sovereignty and national identity. The CEAS faces multiple challenges in this respect as it is the product of EU integration and the policy sphere of asylum. Whilst some federalists champion the idea of a European state, this idea is rejected by the Member States themselves since this would entail their dissolution. A degree of wariness ensues from this, which keeps a careful eye on the type and depth of integration in the EU, managed by the principle of subsidiarity and the doctrine of conferred powers.⁷⁵ Thus, EU integration is itself an area in which the Member States are careful to defend their national spaces.

The sensitivities of national-level control of migration is highlighted in Bigo's comments on the enhanced emphasis from states on migration control in an increasingly globalised world:

In doing that [states positioning themselves as guardians of national security against threatening migrants] they hope to show that, even if they do not control capital and information flow, at least they can continue to control movement of people. They hope to show that, at least security is “their” thing, their task, that they are responsible in this domain.⁷⁶

This more general comment on states' reactions to international trends can be readily applied to the Member States of the EU. Indeed these comments are more pertinent in the context of EU integration, which provides for the free movement of capital and extensive provisions for formally sharing information, including security data, between the Member States as well as the less formal but no less pervasive sharing of knowledge and expertise through market integration.

⁷⁵ Article 5 TEU.

⁷⁶ Didier Bigo, “Criminalisation of “Migrants”: The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion” in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Lieden: Martinus Nijhoff, 2004), 61-91, 64.

The combination of sovereignty concerns regarding the EU and those regarding asylum in the CEAS creates a policy area that is hypersensitive to infringements of sovereignty and national identity, such that that principle of solidarity cannot simply ignore or override these concerns. Indeed, the most successful CEAS measures, those expressing legal solidarity,⁷⁷ are predicated on the existence of separate national spaces for asylum that run parallel to one another. There is a tension between the presentation of the principle of solidarity as a supranationalising constitutional principle in the CEAS and the Member States' insistence of the maintenance of their national discretion for asylum, which is wrapped up in ideas of sovereignty and national identity.

2.3.2. MEMBER STATE DEFENCE OF THE NATIONAL ASYLUM SPACE

The Member States demonstrate their firm attachment to their national space for asylum, especially as represented in the sovereign discretion to grant international protection statuses, in their rejection of Commission proposals that attempt to trespass into it. The Commission has attempted to pursue collective action between the Member States at the supranational level, but these proposals have been unsuccessful because the Member States perceive them to impinge too far on their sphere of national discretion. This is starkly demonstrated through the proposals for joint processing of asylum claims and for relocating beneficiaries of international protection between the Member States. This section considers the Member States' responses to these proposals to elucidate their attachment to the national space.

The Commission's study on joint processing of asylum applications concludes that any model of 'true' joint processing, that is, processing applications for international protection at the EU level,⁷⁸ is politically unfeasible.⁷⁹ This is not because joint processing was an unpopular policy in the abstract. The possibility for joint processing of asylum claims within⁸⁰ the EU is presented in both the Hague

⁷⁷ See chapter four, section 3.

⁷⁸ H. Urth, M. Heegaard Bausager, H-M. Kuhn and J. Van Selm, *Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU* (European Commission, 13/02/2013, HOME/2011/ERFX/FW/04), 37.

⁷⁹ *Ibid.*, 111.

⁸⁰ In 2003, a proposal from the UK government suggested that asylum claims might be processed jointly outside the territory of the EU to prevent those who are ineligible from traveling here, House of Lords, European Union Committee, *Eleventh Report*, Session 2003-2004, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldselect/lducom/74/7402.htm> [accessed 27/02/15], picked up by the EU in European

and Stockholm Programmes,⁸¹ which prompted the Commission study. Through surveying their official representatives,⁸² it found that a majority of the Member States was in favour of the use of joint processing,⁸³ but that there is no shared understanding as to what joint processing entails, much like the more abstract solidarity principle that it represents.

The first three options presented by the study (A, B and C) are based on a team of supporting case-workers that would be drawn from an EASO pool in the event of crisis (a permanent pool in the case of option C). These case-workers would be tasked with the preparation of a dossier on each asylum application including a recommendation for the determination of the application based on the EU *acquis* and international law. The official determination would be made by the Member State responsible, having made any alterations rendered necessary by its national law deviations. In options A and B, joint processing would be in response to a crisis, whereas under C it would be part of a preventative strategy tied to Dublin III's early warning mechanism.⁸⁴ In addition, option B provided for joint returns of unsuccessful applicants and relocation in other Member States of those awarded a protection status.⁸⁵

Commission, *Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin, "Improving Access to Durable Solutions"*, COM(2004) 410 final, at 5-7. Much of the literature on joint processing concentrates on the unsuitability of this proposal, particularly due to its extra-territorial nature, for example G. Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones" (2003) 5(3) *EJML* 303-341. Noll is keen to note the Danish, and to a lesser extent Dutch, support for this proposal on its release, and comments on the diplomatic skill exercised in avoiding the attribution of blame, which is usually placed solely on the UK, at 305. There has been some more recent indication that the idea of external processing might be revived, <http://www.theguardian.com/world/2015/mar/05/european-commission-third-country-immigrant-processing-centres> [accessed 05/03/15]. External joint processing should be distinguished from the proposal to accept applications made to embassies outside the territory of the EU explored by the European Commission, see *Communication from the Commission to the Council and the European Parliament, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM(2000) 755 final, 9, and G. Noll, J. Fagerlund and F. Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (European Commission, 2002) available at http://ec.europa.eu/dgs/home-affairs/e-library/docs/pdf/asylumstudy_dchr_2002_en_en.pdf [accessed 12/09/17].

⁸¹ Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', OJ [2005] C53/1; European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ [2010] C115/1.

⁸² Primary evidence was gathered through a stakeholder workshop; case studies in nine Member States constituted of interviews of government officials and representatives of NGOs and international organisations; telephone interviews with representatives of the remaining Member States; questionnaires for financial data; and interviews with EU-level officials, above note 78, 11.

⁸³ *Ibid*, 36.

⁸⁴ *Ibid*, 29. On Dublin's early warning mechanism, see chapter four, section 3.1.

⁸⁵ *Ibid*, 29-35.

Each of these options were referred to as, and considered by the Member States to represent, “supported processing”.⁸⁶

The final option, D, was considered by the respondents to represent ‘true’ joint processing, as it would represent a fundamental overhaul of the processing of asylum applications within the EU, removing it from national and transferring it to EU-level decision makers.⁸⁷ All status determinations would be made according to a uniform EU policy by pooled determination resources, which would no longer correspond to the Member State that sent them. Successful applicants would be allocated to a Member State in line with a fixed key of distribution.⁸⁸

Of these models, only A was deemed to be feasible in the short term, though this largely resulted from it requiring little change to the *status quo* and consequently adding little benefit either.⁸⁹ Further, the study concluded that the main benefits offered by option A, namely sharing country of origin information and interpreters, might be achieved without joint processing,⁹⁰ indeed these functions are attended to by the EASO.⁹¹ Most importantly, option D was deemed unfeasible, and only potentially feasible in the long term.⁹² It was the only option that could offer savings through economies of scale, but was politically controversial,⁹³ described by respondents as both “ideal” and a “nightmare scenario”.⁹⁴ The Member States were not willing to cede their discretion as to whether to grant international protection in individual cases to a supranational decision-making body.

Similarly, measures relocating beneficiaries of international protection from the Member State that has determined the beneficiary’s eligibility for international protection to another Member State to provide that protection have also been unpopular with the Member States. The EUREMA programme concerned beneficiaries for international protection, relocating them from Malta due to its limited capacity to

⁸⁶ *Ibid*, 37.

⁸⁷ *Ibid*, 37.

⁸⁸ *Ibid*, 29-35.

⁸⁹ *Ibid*, 111.

⁹⁰ *Ibid*, 107.

⁹¹ See chapter four, section 1.3.

⁹² Above note 78, 111.

⁹³ *Ibid*.

⁹⁴ *Ibid*, 47.

integrate refugees in its small population.⁹⁵ It ran as a pilot and was considered successful on its own terms in its evaluation by the EASO, but only achieved 227 transfers in the first phase.⁹⁶ The evaluation of the pilot concluded that although there were a number of logistical and practical reasons for the number of relocations being small,⁹⁷ a number of these – such as the lack of suitable reception conditions or language classes for relocated refugee – could be attributed to a failure to make adequate resources available, and therefore a lack of political will. This derives from the Member States’ reluctance to proceed with relocation measures that cover beneficiaries of, rather than applicants for, international protection given that the former also entails relying on the refugee status determination procedures of the sending Member State. A positive assessment of eligibility for protection and consequent grant of a protection status entails the grant of permission to enter the legal territory of the Member State, which is a closely guarded national power. Such deference in this jealously guarded power is uncomfortable for the Member States, so further screening is demanded by the receiving Member State before the transfer can take place. Sensitivities around the power to admit persons to their territory have limited the willingness of the Member States to relocate beneficiaries of international protection between them.

Under the Article 78(2) TFEU competences and their predecessors, redistribution of persons in need of international protection has only been achieved in the Dublin system and the temporary protection Directive. The Dublin system applies to applicants for international protection so the Member States retain the power to determine whether to grant international protection, the Dublin system is limited to determining the Member State responsible for protection status determination. The temporary protection Directive also contains provisions to move people in need of protection between Member

⁹⁵ Above note 11, page 12; Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ [2010] L132/11, Article 5; EASO, *Fact Finding Report on Intra-EU Relocation Activities from Malta* (European Asylum Support Office, July 2012).

⁹⁶ *Fact Finding Report, ibid*, 2.

⁹⁷ *Ibid*, 9 and 12.

States, but operates outside the Member States' conventional asylum systems and has never been put into practice.⁹⁸

The most fixed and far-reaching measures for moving applicants for international protection between the Member States are the relocation Decisions introduced in response to the refugee crisis.⁹⁹ These Decisions were not adopted under the standard competences, rather under the exceptional competence contained in Article 78(3) TFEU:

In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

It is limited to provisional measures but is not limited in content in the same way as Article 78(2) TFEU, other than that the measure must garner political agreement. The political attractiveness of these measures is perhaps attributable to the pressure on the EU and its Member States to agree on *something* in the face of a perceived crisis. Having relieved this immediate pressure and responded to public scrutiny by reaching this agreement, their political will did not carry through to implementation of the Decisions.¹⁰⁰

Due to the overlapping sovereignty sensitivities in the CEAS derived from EU integration and immigration control, the Member States keenly guard their national space for asylum policy, manifested in the rejection of proposals that would cross into this space. The fundamental importance of this discretion is underlined in the next section, which demonstrates that the Member States frame its exercise as an expression of individual national identities.

⁹⁸ The temporary protection Directive safeguards access to national asylum systems for its subjects, though, as with Dublin, this maintains the Member State's competence to determine that application for international protection, above note 4, Article 17.

⁹⁹ See chapter four, section 1.2.

¹⁰⁰ See chapter four, section 1.2.

2.3.3. NATIONAL ASYLUM SPACE, NATIONAL SOVEREIGNTY, NATIONAL IDENTITY

Maintaining a national asylum space is the constitutional preference of the Member States because it is framed as a core stand of their state sovereignty. It allows each Member State to make its own political and policy decisions about asylum. Each Member State exercises this discretion following their perception of their national interest and as a projection of national identity (as understood by the governments of the Member States). Help offered to asylum seekers and refugees is on the Member State's own terms, and it is the same for support offered to other Member States. Each of the Member States' national stances on assisting persons in need of international protection and each other can be included under the umbrella of solidarity, as suggested by the comments of the Member States on the principle of solidarity.¹⁰¹

The most iconic example of the use of this national space for idiosyncratic asylum policy is the German decision to grant protection to all Syrians arriving in Germany during the refugee crisis. This policy was enacted despite the protests of other Member States that it was encouraging people to make journeys across the continent.¹⁰² It also showed indifference to the wishes of the other Member States by disregarding the rules of the CEAS to which they had collectively agreed through the EU, most notably the Dublin system. Whilst the Dublin system does allow a Member State to assume responsibility for any asylum applications submitted to it regardless of which Member State is deemed responsible by the hierarchy of criteria,¹⁰³ the scale of Germany's policy meant that it constituted a major disruption to 'business as usual' under Dublin. Nevertheless, Germany, led very vocally and adamantly by its Chancellor, Angela Merkel, persevered with this policy, justifying it by describing it as an expression of German values. It was described as an expression of *Willkommenskultur*,¹⁰⁴ and imagined as a distinctly German phenomenon to which many German citizens felt ideologically

¹⁰¹ Above notes 36-40.

¹⁰² See introductory chapter, section 2.1. Other Member States celebrated Germany's decision to unilaterally assume responsibility for Syrian refugees because it allowed them to reinforce their preferred self-identification as 'transit states', see above note 40.

¹⁰³ Regulation (EU) No 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, OJ [2013] L180/31, Article 17(1).

¹⁰⁴ <https://www.theguardian.com/commentisfree/2015/sep/06/germany-refugee-crisis-syrian> [accessed 27/07/17]

attached. This was proudly expressed through the appearance of welcome parties at train stations to greet refugees arriving from other Member States, prominent ‘Refugees Welcome’ demonstrations at football matches, and through the sustained efforts of civil society to integrate new arrivals.¹⁰⁵

Another example of idiosyncratic policymaking in the national space, although remarkably less hospitable, is Hungary’s refusal to protect Muslim refugees in its territory.¹⁰⁶ The Hungarian government used the expression of a national Christian identity to justify the rejection and poor treatment of Muslims who were in need of protection and Hungary’s refusal to take part in the relocation Decisions.¹⁰⁷ This policy was as strongly championed by the Hungarian Prime Minister, Viktor Orbán, as the German policy was by Merkel. The arrival of Muslims in the country was described as a threat to national identity.¹⁰⁸ A less blatant, but still pernicious, form of this sentiment is present in other Member States too. An Islamophobic reluctance to host Muslim refugees is reframed as the need to protect national security and public safety from risks of terrorism. This is particularly dishonest given that international and Union refugee law expressly excludes persons who genuinely pose such a risk from refugee protection.¹⁰⁹

Notwithstanding the prominence of the examples of Germany and Hungary, perhaps the most profound use of national asylum policy as a projection of the national psyche is found in the UK. Here, all EU

¹⁰⁵ This is not to say that this feeling was universal in Germany, indeed this policy was so unpopular in some quarters that it threatened to derail Merkel’s chancellorship, see: <http://www.dw.com/en/could-migration-derail-merkel-re-election-express/a-39806125> [accessed 12/09/17]; <http://www.theaustralian.com.au/news/world/the-times/europe-migrant-crisis-angela-merkel-faces-heckling-on-refugees/news-story/b5194b60a83aa05133018d071f956610> [accessed 12/09/17].

¹⁰⁶ István Pogány, “A Tale of Two Europes: East and West”, *Social Europe* 22 January 2016, available at <https://www.socialeurope.eu/2016/01/a-tale-of-two-europes/> [accessed 17/05/16]; Jacques Rupnik, “The Other Europe”, *Eurozine* 11 September 2015, available at <http://www.eurozine.com/articles/2015-09-11-rupnik-en.html> [accessed 17/05/16].

¹⁰⁷ Nigel Farage, Leader of the UK Independence Party, also limited his advocacy for Britain resettling refugees to Christian Syrians, see: The Huffington Post, “Nigel Farage Wants to Offer Asylum to Syrians Fleeing War (As Long As They Are Christian)” (UK: Huffington Post, 30/12/13) available at http://www.huffingtonpost.co.uk/2013/08/30/nige-farage-christians-syria-asylum_n_4518532.html [accessed 22/08/17]; The Economist, “Syrian Refugees: The Asylum Question” (The Economist, 01/01/14) available at <http://www.economist.com/node/21592589> accessed [07/01/14].

¹⁰⁸ Jim Brunnsden, ‘Orban: EU’s ‘Christian identity’ under threat from Muslim migrants’, *Financial Times* (30 March 2017), available at <https://www.ft.com/content/7ecde2c2-af12-329a-9133-29a7bee08e31>;

¹⁰⁹ Geneva Convention relating to the Status of Refugees 1951, Article 1F; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast), OJ [2011] L337/9, Article 12. See further: Eleanor Drywood, “Who’s In and Who’s Out: The Court’s Emerging Case Law on the Definition of a Refugee” (2014) 51(4) *CML Rev* 1093-1124.

action is positioned as a threat to British sovereignty and identity, which has been heightened in the politically tense and confused context of Brexit. Accordingly, the UK has declined to participate in many expressly ‘solidaristic’ measures of the CEAS, including the relocation Decisions and the EU’s policy on resettlement. The UK does not intend to show solidarity to other Member States of the EU.

Instead, the British Government prefers a resettlement programme of its own design, which it argues better reflects British values.¹¹⁰ This programme is limited to the ‘most vulnerable’ refugees from the region of origin. This preference is justified around a stereotypical talisman of Britishness – queuing – and the entrenched social norms attached to it, which are exploited to cast moral judgment on certain groups of asylum seekers and to question their worthiness as applicants for protection. To this end, people in need of international protection who have reached Europe are described as ‘queue-jumpers’, and therefore not worthy of assistance, as they have made it out of the region of origin on their own initiative without state help or approval. Instead, the UK policy asserts that assistance should be given to those who have patiently ‘waited their turn’. This image also plays in to the pompous and deluded self-image of the UK as the most desirable destination for all refugees, between whom we must diligently distinguish, blessing only the most worthy among them with the privilege of protection here, rather than viewing the UK simply as one of many relatively safe places to live when one’s home country is not.

The one concession on relocating persons in need of international protection from other Member States – the so-called ‘Dubs Amendment’ – applies only to children.¹¹¹ This policy follows the campaign of its namesake, Lord Dubs, and his recollections of the Kindertransport network that evacuated refugee children from Nazi Germany.¹¹² It draws expressly on British patriotism tied to a romanticised view of British history.

¹¹⁰ BBC News, “UK set to take in ‘hundreds’ of Syrian refugees” (29/01/14) available at <http://www.bbc.co.uk/news/uk-politics-25934659> [accessed 29/01/14].

¹¹¹ Immigration Act 2016, s.67.

¹¹² <https://www.theguardian.com/world/2017/feb/08/dubs-scheme-lone-child-refugees-uk-closed-down> [accessed 28/07/17].

The framing of national space for asylum policy as an expression of national identity and the core function of the state means that the Member States are reluctant to commit to any expressions of solidarity mechanisms that do not preserve this space. The legal limits to the CEAS are defined in the legislative competences conferred on the Union by the Member States, whereas the political limits govern the exercise of those competences, the types of measures adopted based on them, and the implementation of those measures. The sensitivity to Union encroachment on sovereign immigration powers defines these limits in CEAS policymaking.

3. CONCLUSIONS

The foregoing chapters reveal solidarity to be a very flexible idea that can mean different things to different actors. None of these meanings can claim to express solidarity ‘more’ than another: in the absence of a fixed definition, solidarity can mean each of these different ideas equally. This chapter reflects on this flexibility, arguing that it defines both the core benefit of references to the principle in the CEAS and the limits of what such references can achieve.

The benefit of the idea’s flexibility is that it brings together the Member States and the Union’s political and legislative institutions and allows them to work to create the CEAS despite their differing values, interests and perspectives. Solidarity can act as a uniting idea only because it is flexible enough to accommodate these differences of opinion. Since the origins of the CEAS, references to solidarity have bound these actors together and used to encourage common policymaking, as seen particularly in the temporary protection Directive.¹¹³ Through the development of the second phase, commitments to solidarity were reinvigorated in policy plans from the Commission and the European Council,¹¹⁴ which culminated in its codification as the foundation of the CEAS in Article 80 TFEU. Solidarity also played this bridging role in the responses to the refugee crisis, acting as a badge of unity and common purpose despite some quite fundamental disagreements between the Member States as to the best policy responses.

¹¹³ Above note 4.

¹¹⁴ Above notes 7 and 11.

Yet this is also the limit of the utility of the principle of solidarity in the CEAS. The agreement it represents cannot go beyond the superficial because of the conflicts of meaning that arise from the flexible use of the principle to describe a variety of understandings of solidarity. This chapter explores three such conflicts that present particular challenges in the CEAS.

The first is the transfer of the term, ‘solidarity’ from its usual context of inter-personal relationships, to the relationship between the Member States in the CEAS. Intuitive expectations about solidarity in the CEAS might anticipate that it entails a display of support towards persons in need of international protection, yet Article 80 TFEU limits solidarity to ‘between the Member States’. This carries through to most elements of the solidarity toolbox, which govern the relationships between the Member States. In its typical, inter-personal sense, solidarity has supportive and humanitarian connotations, but these are not necessarily reflected once it is transferred to CEAS measures. The use of the word, therefore, can obfuscate the coercive nature of some of the contents of the CEAS solidarity toolbox.

The second conflict of meaning arises from the close association of the ideas of ‘solidarity’ and ‘crisis’, both generally and particularly in the CEAS. This was observed in the rhetoric of the EU and the Member States surrounding the European refugee crisis. Yet these more frequent references to solidarity do not clearly lead to action from these actors, neither under the temporary protection Directive nor the relocation Decisions. We see that solidarity is the plan prepared in case of a refugee crisis, but that very little action materialises in the event.

The third of the conflicts arises from the Member States’ preference for maintaining a national space for determining asylum policy despite the implication of collective or cooperative policies in a *Common European Asylum System*. The chapter argues that this preference arises from the connection made by Member States between the retention of a national asylum system and national sovereignty, framed as necessary to protect the national interest and to project national identity. This is not expressed as an objection to solidarity, rather as an alternative understanding of it, both of which are accommodated by the flexible principle of solidarity.

Together, these conflicts of meaning demonstrate the challenges that the principle of solidarity poses to EU asylum law and policymaking, rather, following this analysis, solidarity is shown to add little value as an organising principle in the CEAS. Flexibility is the root of the successes and limitations of the principle of solidarity in the CEAS.

CONCLUSIONS: SOLIDARITY AND THE COMMON EUROPEAN ASYLUM SYSTEM

I started this research with a question that emerged from previous research on the temporary protection Directive: what does the principle of solidarity mean in the CEAS? The dissertation had looked at the terms of the Directive and tried to understand the reasons why it had not been used in response to the arrival of the ‘mass influx’ that resulted from the Arab Spring in 2011. The part of this analysis that most caught my attention was the provisions on solidarity: the Directive’s core mechanism for redistributing persons in need of protection between the Member States. In the limited time and space of that project, I could only determine that there were different ways of looking at solidarity, so I picked one that seemed to fit with the meaning expressed by the Directive for the purpose of the dissertation, but this was not a satisfying answer. In the context of writing a research proposal for this project, the question seemed a fitting and interesting one to which I should return.

After a frustrating period spent trying to piece together the very different understandings of solidarity that this research had uncovered to produce my own definition, it became clear that it was not possible. At this point, the research was reshaped around exploring the context of these differing definitions and thinking about the role of a diverse principle of solidarity in the CEAS. This was a far more satisfying way of approaching the project for me, making much more space to be critical of what I had come to view as a very slippery principle. Through this, I reached my central thesis: the principle of solidarity is inherently flexible, and needs to be to meet the demands of the various relevant actors, each of whom has different perspectives based on their different interests and political preferences. This flexibility offers the core benefit of referring to the idea of ‘solidarity’ in the CEAS – that it offers a point of unity and agreement by accommodating these diverging actors – but also contains the limit of the utility of such references, namely that this flexibility creates inherent conflicts of meaning which prevent ‘solidarity’ offering any guidance in CEAS law- and policy-making.

On reflecting on the conclusions of this research, it seems that many of the themes and conflicts revealed in the use of the principle of solidarity are visible in the temporary protection Directive once we look at it through this lens. This chapter, therefore, returns to the origins of the research in that Directive in order to draw out and evaluate the conclusions of the thesis, which are presented as a series of themes.

The first theme is the ‘who?’ of solidarity: is solidarity between states or between people? The temporary protection Directive came from the Tampere Conclusions, which connect solidarity to humanitarian action; that is, action taken to alleviate human suffering. As a result, it might be anticipated that the solidarity of the temporary protection Directive would be shown from the Member States towards person in need of protection, but the solidarity mechanism that it contains undoubtedly expresses solidarity between the Member States. The Directive’s stated purpose is to relieve pressure on a Member State that has become home to a mass influx of persons in need of international protection, which is achieved by the other Member States relocating a number of those in need of protection to their own territory.

States can show solidarity to persons in need protection as representatives of their citizens. Chapter one shows universalist solidarity between people has been referred to as the rationale for offering refugee protection: if a person is at risk of harm, she or he should be offered sanctuary and not returned to the place of harm, regardless of not holding citizenship of the host state because she or he is a human being. In this scenario, however, the solidarity is not conveyed directly from the citizens of the host state to persons in need of protection, it is mediated through their state. Asylum has become legalised through modern border control, meaning that it is the state that offers refugee protection on behalf of, and representing, its citizens. Similarly, states play this representative role in solidarity through welfare states. In the case law of the Court explored in chapter two, the state facilitates solidarity between citizens within a state by redistributing resources through taxation and spending.

This is not the nature of solidarity shown by states through the temporary protection Directive, however. Rather than facilitating solidarity between large groups of people, here states are the individual entities between which solidarity passes. By relocating persons in need of protection, the Member States relate directly to each other to assist the one (or few) among them that is particularly affected. In the context

of this solidarity between a group of states, solidarity between people takes place outside the state framework, or even in resistance to the state framework. In moving solidarity from its dominant context between people to between states in the CEAS, it is likely that different types of solidarity are envisaged.

The second theme is the distinction between solidarity as participants joining together to act as one and solidarity as a group of individual actors pulling in the same direction. All supranational action entails a degree of subsuming individual discretion to the collective, but the Member States are particularly sensitive to this in the CEAS. The combination of sensitivities towards EU integration and migration combine in the CEAS to mean that the Member States are keen to retain their national space for discretion in relation to asylum policy. The Member States use this national discretion, described as retaining national sovereignty, as a projection of national identity and of sovereign control.

In the temporary protection Directive, this is very carefully balanced. On the one hand, it contains a very strong, symbolic commitment to collective action in the future event of a mass influx of persons in need of protection. On the other, the Member States retain their national-level discretion in two ways. First, the Council must take an activating Decision, which requires a majority of the Member States to agree to help the one, or few, affected Member States. By ignoring this Directive in the event of the refugee crisis, the Member States demonstrated that they are unlikely to make such a decision. Second, if the decision is adopted, the Member States are asked to indicate their own reception capacity in figures or in general terms. In light of the example of the Member States' voluntary relocation pledges under the first relocation Decision of 2015, the self-definition of reception capacity under the temporary protection Directive would allow Member States to pursue their individual political agendas: higher pledges from Member States that wish to support relocation and lower pledges from those that would rather not. Whilst the term 'solidarity' is used to refer to systems that subsume individual members, it is clear that there is a strong preference in the CEAS on the part of the Member States that they retain their national discretion.

In the context of solidarity between states, this also determines preferences between obligatory and voluntary solidarity, which is the third theme identified in this research. As part of the preference for maintaining their national space for asylum policy, the Member States naturally also prefer to determine

the extent of their commitments under the banner of solidarity for themselves. This is not to say that the Member States are entirely unwilling to enter into binding commitments creating solidarity obligations. Indeed, they do so through the Asylum, Migration and Integration Fund (AMIF).

The fourth theme relates to the boundaries of solidarity: who is included in, or excluded from, its scope? The immediate connotations of solidarity in refugee law suggest a universalist solidarity that is extended to all people by virtue of their humanity, either from other people directly or as represented by their states. So too in the CEAS, the most initially-obvious suggestions are of openness and wide inclusivity. This contrasts starkly with the exclusionary nature of much of the EU's asylum policy, with regards to both persons in need of protection and third states.

In theory, the 'in' group of the CEAS's particularist solidarity is the Member States, as conveyed through the temporary protection Directive and expressly envisaged in Article 80 TFEU. This does not mean, in practice, that solidarity is free-flowing and readily forthcoming between all the Member States. Legal solidarity through harmonisation faces significant barriers at the implementation stage, the Dublin system is widely criticised, and expressions of tangible, practical solidarity in the event of a crisis is lack-lustre. This is aptly summarised in the example of the neglect of the temporary protection Directive.

From discussion of this theme through the solidarity matrix developed in the first part of the thesis, particularly in the supranational context in chapter two, it is clear that defining the boundaries of solidarity is a primary occupation of legal articulations of the principle. In the abstract, as a slogan and rhetorical device, as an idea that brings actors together, solidarity imposes no clear boundaries as to its scope by definition. However, if actors want to express this sentiment in a legal measure, the boundaries of solidarity must be articulated. Where these boundaries are drawn is a matter of political choice, as demonstrated in chapter two's analysis of the bounds of solidarity between citizens in the free movement and equal treatment case law. Who does the group feel to be sufficiently 'belonging' as to be included in the scope of solidarity? In the CEAS, all the Member States should 'belong' (unless they exclude themselves in certain circumstances through AFSJ opt-outs), but this is called into question by

the failure of solidarity to manifest through tangible mechanisms, particularly those requiring the relocation of persons in need of protection.

In failing to put their proclaimed solidarity into practice, including through the temporary protection Directive, the Member States imply that the feelings of belonging and similarity may not extend as far as their proclamations suggest. In relation to the Structural and Cohesion Funds, chapter two noted the argument that as the membership of the EU has grown, the Member States have become less willing to share resources on the basis of assisting one of their number that is in need, instead preferring redistribution that guarantees ‘something for everyone’.¹ In a larger, more diverse group of Member States, it may be that this sentiment carries over to willingness to express solidarity tangibly in the CEAS. This fourth theme, then, is about defining the boundaries of solidarity and answering the question of how similar, and in what ways, must actors be to feel solidarity with one another? This question is particularly pertinent in the context of the present growth in popularity of far-right politics in Europe, representing a rising tide of nationalism and sharp delineation of solidaristic allegiance, often at the expense, and exclusion, of non-national European citizens and third country nationals, particularly asylum seekers and Muslims.

The fifth theme relates to the willingness to bear the costs associated with solidarity. States are more willing to commit to solidarity measures that do not come with costs attached, or those with low costs, and less willing when they have to get their cheque books out. This point could not be better demonstrated than through the temporary protection Directive. The Member States were keen to adopt the measure as a symbolic declaration of solidarity. It created an image of unity and preparedness for crisis, stepping away from previous mismanagement of refugee crises towards a unified stance on asylum policy at the beginning of the CEAS. In the event of a crisis to which this mechanism seems designed to respond, activating the terms of the Directive is barely discussed. On the other hand, when financial and practical support is offered, through the AMIF and the European Asylum Support Office, the Member States are happy to receive it.

¹ Chapter two, footnote 119.

There is an exception to this, illustrated in chapter three, namely that states are more willing to pay if this means that they might avoid responsibility for offering refugee protection on their territories. In this sense, there appears to be a hierarchy of unwanted costs, with physical refugee protection at the top, followed by paying for refugee protection. This is less acceptable within the CEAS than in the intergovernmental, international context and seems to describe more accurately the interaction between the Member States and third states.

The sixth theme is the relationship between solidarity and crisis. The first part of the thesis demonstrates the pervasive connection between these two ideas, and highlights that references to solidarity are particularly common in the context of emergencies or crisis situations. In chapter five, this relationship is explored as an expression of the conflict of meaning attached to the term, ‘solidarity’, when it is used in the CEAS. I argue that despite this strong association of the two ideas, tangible expressions of solidarity in times of crisis do not live up to the importance placed on the principle in the rhetoric of the EU institutions and the Member States. The outstanding example of this is that of the temporary protection Directive, through which a spotlight is turned on the incongruence of emphatic references to the principle and a failure to mobilise tangible manifestations of this solidarity in the event of a crisis.

The seventh theme is the politicisation of solidarity, through which we observe how the flexibility of the principle allows actors to turn it to their political ends. Solidarity carries positive connotations of support, humanitarianism and common purpose, which are used to muster broad support for action taken under its banner. The widespread understanding of solidarity as a ‘good thing’ buys good faith for policies or actions described as expressions of solidarity. On closer inspection, the label of solidarity belies a variety of political objectives such as unity, exclusion, projection of national identity, humanitarianism, xenophobia. The intuitive association of solidarity with the positive among these values is employed by those who use solidarity for less palatable political agendas to mask their aims, some of which might be the antithesis of solidarity as it is commonly understood. In this way, the politicised use of the word, ‘solidarity’, appropriates the support for the idea to propel more divisive political objectives.

This ultimately raises the question as to whether the use of the term ‘solidarity’ to describe cooperation between the Member States in EU asylum policy does harm. If it can be stripped of its usual meaning and understanding, and employed instead to pursue such a variety of political values, including those that stand at odds with the stated aims of providing refugee protection and sharing responsibility for doing so, does using the word ‘solidarity’ damage the CEAS? This is not a question that legal methodology can answer, but it is an important implication of the findings of this research.

These comments demonstrate that the temporary protection Directive is a very revealing example of the broader themes of solidarity in the CEAS. As such it offers an interesting case study for illustrating the operation of the principle of solidarity in EU asylum policy. It shows the unifying power of the idea of solidarity and how this idea can be used to bring the actors of the CEAS together because of its flexibility. It showcases the variety of meaning attached to the principle of solidarity, picking up on the factors of the matrix of solidarity developed through analysis of a broad spectrum of relevant contexts of solidarity. Finally, it shows how the conflict of meaning created by the interaction of these various understandings ultimately frustrates any efforts to use the principle of solidarity to guide specific law and policymaking the CEAS.

APPENDIX: TABLE OF DISBURSEMENTS UNDER THE AMIF

Member State	Amount awarded ¹	Percentage of Total ²
Austria (AT)	€64 533 977	2.70%
Belgium (BE)	€89 250 977	3.73%
Bulgaria (BG)	€10 006 777	0.42%
Cyprus (CY)	€32 308 677	1.35%
Czech Republic (CZ)	€26 185 177	1.09%
Germany (DE)	€208 416 877	8.71%
Estonia (EE)	€10 156 577	0.42%
Spain (ES)	€257 101 877	10.75%
Finland (FI)	€23 488 777	0.98%
France (FR)	€265 565 577	11.10%
Greece (GR)	€259 348 877	10.84%
Croatia (HR)	€17 133 800	0.72%
Hungary (HU)	€23 713 477	0.99%
Ireland (IE)	€19 519 077	0.82%
Italy (IT)	€310 355 777	12.97%
Lithuania (LT)	€9 632 277	0.40%
Luxembourg (LU)	€7 160 577	0.30%
Latvia (LV)	€13 751 777	0.57%
Malta (MT)	€17 178 877	0.72%
Netherlands (NL)	€94 419 077	3.95%
Poland (PL)	€63 410 477	2.65%
Portugal (PT)	€32 776 377	1.37%
Romania (RO)	€21 915 877	0.92%
Sweden (SE)	€118 536 877	4.96%
Slovenia (SI)	€14 725 477	0.62%
Slovakia (SK)	€10 980 477	0.46%
United Kingdom (UK)	€370 425 577	15.47%
	€2 392 000 000	99.98%

¹ Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, OJ [2014] L150/112, Annex I.

² My calculations to two decimal places.

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