Title: ENFORCEABILITY OF SOLIDARITY IN THE EUROPEAN UNION

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Abstract

Failure to cooperate and show solidarity in certain areas in the EU has created several problems within the Union. Solidarity is extremely important as the main purpose of the Union is for member states to be able to work together to achieve collective goals. Therefore, if there is a deficit in solidarity, then certain important goals of the Union cannot be accomplished. Along these lines, this thesis explores the concept of solidarity in the European Union. It traces the origins of solidarity and the motivations for solidarity within the Union. It then explores the various treaty provisions which provide for solidarity and cooperation within the Union and how the CJEU has interpreted them. It looks at solidarity in different areas including the area of Asylum, environmental protection, energy procurement, Common Defence & Arms Acquisition etc. Furthermore, it examines member states behavior in terms their compliance with decisions of the Court. Finally, it draws a comparison between solidarity at the Union level and the international level and provides recommendations in the conclusion.

Abbreviations

Common European Asylum System – CEAS

European Union – EU

Organisation for African Unity – OAU.

Organisation of American States – OAS.

Regulation (EU) No 604/2013 of the European Parliament and of The Council – Dublin III Regulations.

EU Legislations and Treaties

Treaties

Treaty on the European Union.

Treaty on the Functioning of the European Union.

Regulations

Regulation (EU) No 604/2013 of the European Parliament and of The Council

International Treaties and Legislations

Climate Change Convention 1992.

Convention for the Protection of the Marine Environment of the Northeast Atlantic (OSPAR, 1998).

Convention for the Regulation of Whaling 1931.

Convention on the International Trade in Endangered Species of Wildlife and Flora 1973.

Danube Fishing Convention 1958.

Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972).

Geneva Convention of 1949.

High Seas Conservation Convention 1958.

International Law Commission, Draft Articles on State Responsibility.

International Whaling Convention, 1946.

Montreal Protocol on substances that Deplete the Ozone Layer 1987.

Oil Pollution Intervention Convention 1958.

Protocol I and II additional to the Geneva Convention in 1977.

Space Liability Convention 1972.

Statute of the International Court of Justice.

The Convention Between France and Great Britain Relative to Fisheries 1867.

The Covenant of the League of Nations.

Vienna Convention 1985.

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Commission v Hungary, [2020] Case C-808/18.

Commission v Ireland, [2005] Case C-494/01.

Commission v Ireland, Case C-459/03 [2006] ECR I-4635.

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Poland v Commission, [2019] Case T-883/16.

PreussenElektra AG v Schhleswag AG, [2001] Case C-379/98.

Slovak Republic & Hungary v Council of the European Union, Cases C-643/15 and C-647/15.

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Asylum (Colombia v Peru) Judgment [1950] ICJ Rep 266, ICGJ 194.

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, International Court of Justice (ICJ), 24, July 1964.

Bering sea Arbitration, (1893).

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), (2018) ICJ 15.

F.R.G v. Poland, 1928 P.C.I.J. (Serie. A) No.17.

Fisheries Jurisdiction case (1974) ICJ Reports 3.

Gabčikovo-Nagymaros Project (Hungary/Slovakia) (Judgment) [1997] ICJ Rep 7.

Hirsi Jamaa and Others v Italy, Application No.27765/09.

Kuwait v Independent Am. Oil Co, 21 I.L.M. 976.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United states of America), Judgment on Jurisdiction and Admissibility, [1984] ICJ Rep 392.

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Mejillones Tourist Service Association and Others with the Environmental Evaluation Service (SEA) of Antofagasta, (2021) Chilean Supreme Court, Case No 6930-2021, Case No71.628-2021.

Methodology

The goal of this thesis is to examine the concept of solidarity and evaluate the efficacy of its enforcement in the European Union. Due to the nature of this task, this thesis will utilise the doctrinal approach in investigating the research question. There are different levels which solidarity can be categorized into, these are (i) national solidarity which is between residents and citizens of a member state, (ii) Member state solidarity which involves principles of solidarity among member states, and (iii) Transnational solidarity which can be found between EU citizens. For the purpose of this research, solidarity will be explored on the second level between member states in the EU, this is because although failure to show solidarity at other levels do have negative effects, these are not as significant as the consequences of member states failing to show solidarity. This is due to the power which states possess, as opposed to individuals.

In investigating the research question, the doctrinal method will be used to pay particular emphasis on the decisions of the Courts. This is because the CJEU with the help of the Commission are the primary enforcers of Union law, and the situation is also similar with the ICJ and other international tribunals playing the role of primary enforcer. Non-judicial methods are usually used after judicial methods have not produced compliance, due to these reasons, this research has chosen to focus mainly on the decisions of the courts and the examination of state behaviors in response to these decisions.

The doctrinal method is also very useful because this thesis will mostly contain analysis of treaties, national legislations and court decisions. The doctrinal method will be used in analysing the different philosophical positions on solidarity and its enforcement. It will be used to first explore the question of why solidarity should be enforceable. In doing this, it will be used to examine solidarity as simply a moral obligation which is unenforceable. This position sees solidarity as an action of conscience and goodwill towards which should be encouraged but should not be coercive. It then looks at the drawbacks of this position in terms of its inability to maintain a significant level of cooperation within a political or economic structure such as the European Union. Attention is then turned to the other position of solidarity as a political and legal obligation. This position is evaluated in line with how it may be able to maintain cooperation within the Union and aid it in achieving some of its key objectives.

After this, the doctrinal method will also be used to ascertain the underlying motivations for solidarity. It will be used to critically analyse the three main positions on this which are that of self-interest, Altruism, and enlightened self-interest. Their strengths and weaknesses will be examined, especially in relation to their ability to either increase and maintain trans-

national cooperation or impede it. Finally, in order to achieve the goal of this thesis, the comparative legal research methodology will be used. This will be useful because in the later chapters of this work, an analysis of solidarity on the international stage will be undertaken. The international stage here refers to the global framework for cooperation provided for by the United Nations which individual states are a part of. It also includes international treaties spanning signatory states from around the globe for cooperation in the achievement of certain goals in particular areas. Therefore, this can be described as a comparison between a regional and global transnational enforcement of solidarity. Here, international treaties, decisions of the ICJ and international tribunals, and the actions of international organisations will be evaluated and then compared to those at the European level (i.e. EU treaties, CJEU decisions, actions of the Commission). The primary areas of comparison between the states in the EU and those on the international stage carried out in this research will be in the areas of refugee protection and environmental protection, and to this end two chapters are dedicated to discussing them in depth (i.e. chapter 4 and 5) before a separate chapter (i.e. chapter 7) is then dedicated to providing a comparison between the efficacy of the enforcement in these two areas both at the EU level and on the international level. In addition to these two specific areas, a more general analysis is provided in two other areas of energy creation and the military actions of states. These areas were chosen for comparison across both levels as these areas such as refugee protection, environmental protection etc, are areas in which states have a lot of resistance to showing solidarity. This comparison will be useful in providing a clearer picture of how solidarity works in trans-national contexts and the efficacy of its compliance measures.

Contribution to the Field of Knowledge

This thesis contributes to this field of knowledge by providing a detailed analysis of the effectiveness of enforcement of solidarity within the EU. It explores the friction between self-interest and cooperation, and between state sovereignty and solidarity. It provides a comprehensive discussion on solidarity from its philosophical foundations all the way to attempts by various EU treaties to specifically incorporate it into certain areas of EU law and how it has been enforced. It also analyses member state actions in key areas of EU law such as Refugee protection/asylum seeking, Energy generation and procurement, Monetary & Finance policies, and Environmental protection. It looks at this in terms of how members states have failed to show solidarity and the effects it has had on Union wide goals. It also supplies a comparative analysis of solidarity on the international stage with that on the European level. This is particularly useful because both are coalitions of states with treaties meant to regulate state behaviour, courts to adjudicate on disputes, and institutions which play a role in compliance. Finally, it reaches a position in on the efficacy of the enforcement measures implemented by EU institutions such as the CJEU and the Commission. This is because although member states comply in many situations, there are other situations where despite rulings from the CJEU, certain member states have still refused to comply with their solidarity obligations. Hence, this thesis delves into some of the reasons for this non-compliance and suggests ways in which the level of compliance can be improved.

CHAPTER DIVISIONS

In order to further explore this question, this thesis will be divided into several chapters with each chapter dealing with and aspect of solidarity as it relates to the Union.

The second chapter will deal with solidarity as a philosophical concept. It explores the origins of the concept, and the underlying conditions which generate solidarity. This is because investigating the social conditions and inherent feelings which generate solidarity provides a foundation for understanding how solidarity functions in different social and political systems. This then provides a framework for understanding of its philosophical underpinnings, evolution within the Union, and how it is likely to work within the social and political conditions currently available in the EU. The chapter goes through the two main school of thought on the foundations of solidarity which are the communitarian which holds that the bonds which create solidarity are formed in societies with a shared common identity and the Universalist view which does not look towards a shared identity for the basis of solidarity but towards shared values such as justice and mutual respect as the basis for a stronger solidarity.

It explores them in more detail, providing arguments for the communitarian position such as that particularistic identities usually trump more universal identities because of the tribal nature of humans, as such identities generate more empathy and cooperation. It also argues that the universalist position is idealistic and does not take into practical difficulties in situations, as the sharing of social risks has only been effectively achieved at the level of the state. In addition, the communitarian position posits that moral values cannot provide a sufficiently strong level of solidarity because morals are relative, therefore solidarity among different cultures will be unworkable. The universalist position provides opposite points such as that cultural and ethnic identities have been created artificially through social engineering such as those of powerful kings and politicians of the past such as Charlemagne for the Franks, Otto von Bismarck and the creation of the German Federation etc.

Therefore, there it should not be impossible for a sense of solidarity to be created among the member states of the EU through conscious implementation of policies specifically designed to create and improve solidarity. The chapter then switches to the issue of the motivations for solidarity such as altruism and self-interest. It goes into the various theories of state formations such as the kinship theory, social contract theory, divine right theory, and analyzes the underlying reasons for their formation, as the motivations for the formation of society is important because the European Union is a form of society. The analysis carried out indicates that self-interest is a significant factor in creating solidarity. Nevertheless, it also discovers that altruism and self-interests are not mutually exclusive, as they sometimes operate together. This is because people do not always act based on only one motivating factor, but usually act due to a combination of factors working together to inform their choice of action.

It also goes through the works of Emile Durkheim on organic and mechanical solidarity where organic refers to solidarity based on the interdependence of different people and groups who have to rely on each other to meet each other's needs and mechanical solidarity refers to solidarity based on the homogeneity or sameness of a group which motivates them to work together. His position is that organic solidarity is superior to mechanical solidarity. He holds that mechanical solidarity is one that exists in the more primitive state of human society such as in tribal or clan based societies. But when human societies grow and become more complex, the basis of solidarity moves from sameness to distinction, as people begin to rely more and more on others who are dissimilar to them. This is then related to the EU which is a union of states with different ethnic groups, languages, histories, and tradition. Hence, the organic form of is the form of solidarity which best suited to the EU due to its complexity and diversity.

The chapter finally examines a couple of instances of member state cooperation and creation of laws, and determines that although these were motivated by self-interest, it was not the only factor at play, as commitment to certain values such as justice, fairness, and human rights was also a motivating factor. It then finally goes into the creation of the common asylum system and the differences in the conception of solidarity held by different member states and how the CJEU was called upon to clarify certain portions of the TFEU which relate to solidarity. A few crucial cases are then discussed, these include the case of Commission v Italy where the court held that a failure to show solidarity imperils the very foundations of the Community's legal order.[1] Finally the case of Slovak Republic and Hungary v Council of the European Union is then analyzed and discussed due to its significance on the matter of the legal enforceability of solidarity in the Union. This case determined that once solidarity has been adopted into measures, then it is no longer optional but can be enforced legally.[2] This chapter lays the philosophical origins and underlying motivations for solidarity, and the third chapter picks up from this point in analyzing solidarity in the Union.

Chapter three explores the workings of solidarity amongst member states within the Union in certain keys areas like Energy creation and supply, Refugee acceptance, Common defense policy, and Fiscal policies. It will examine the actions and policies of member states, and highlight challenges to solidarity on the national level. The first area explored is the area of fiscal policies, it analyses certain social and financial catastrophes which required member states to create coordinated financial policies to assist each other with their financial recovery. It goes through the global financial crisis in 2008 and consequences it had on

[1] Case 39/72 [1973] ECR101.
[2] Joined cases C-643/15 and C-647/15, Slovak Republic & Hungary v Council of the European Union, Court of Justice of the European, 6th September 2017.

member states. It explored the failure of some member states to show solidarity with others in the creation of the European Financial Stability Facility which was to provide financial bailouts to severely affected member states. It explained that these financial loans were coupled with severe measures which were almost seen as a punishment to those member states. Some of these measures also had the effect of turning the receiving states into vassals of the creditors, as any default or delay in payments would result in the loss of control of some public bodies which then fall under the control of the creditors. It also looked at the member states response to the Covid19 pandemic both in terms of medical cooperation and political responses. It analyzed the initial problem of slow reaction and the hesitance of some states to pull resources together to tackle the problem medical and economic effects of the pandemic.

After this, the area of energy procurement and generation. It notices that there is the problem of national independence in this area where states follow different energy policies to the detriment of other member states. It looks at the Nord Stream II project and the over reliance of certain member states on Russian gas which enables Russia to be able to hold the union hostage by cutting of the supply of gas if their monetary demands are not met. This reliance on Russian gas is still ongoing despite Union objectives to reduce this reliance. It also examined a lack of solidarity by the Commission in respect to their decision to allow Germany's grant of a monopoly of gas supply to a Russian company and the Court's decision and use of the vague term energy solidarity. The next area it goes into is that of common defense and the problems of allowing certain member states to opt out of participating.

This problem would appear to stem from Article 42 TEU which allows certain member states which already have common security arrangements with NATO the ability to decline some of

their duties under the Common Security and Defense Policy (CSDP) when it conflicts with their NATO responsibilities. It also explains the different positions which explain the reasons for member states failure to show solidarity such as the balance of power, and looming military threats etc. As geopolitical realities will always have an effect on the level of cooperation between states in matters of common defense. It finally looks at the role of the courts in clarifying some of the vagueness of the laws on procurement of weapons and harmonization of defense policies. The next part of the chapter then does a comparison between some of the failure of the CEAS and the failure of states on the international stage to protect refugees.

Chapter four examines solidarity on the international stage in terms of its evolution, processes, and challenges, especially in relation to enforcement. The main issue this chapter will deal with is the friction between state sovereignty on hand and solidarity with other nations on the other hand. It explores the origins of both solidarity and state sovereignty on the international stage. It goes through the writings of Christian Wolff, Emer Vattel, up until the creation of the United Nations and the signing of the Geneva Convention. It explores the various schools of thought on whether solidarity in international relations should carry with it extralegal obligations. It then delves into the issue of refugee protection on the international stage. It goes through examples of state compliance with international refugee laws, it looks at compliance both from first world countries and third world countries. It then does the opposite and looks at instances of non-compliance from both categories of states.

It also examined the measures used by states to avoid meeting their responsibilities under the Convention to determine their legitimacy. It examined the creation of safe zones, high seas interception, and violations of non-refoulement when refugees were returned to countries in which they face persecution or death. It analyzed them and highlighted that some

of these measures, while complying with the letter of the law actually violates the spirit and purpose of these laws. The next issue discussed are some of the reasons for non-compliance. It provides arguments for and against for each position and comes to a broader view of international law which provides a combination of both schools of thought. It also provides a third position based on the nature of international law which provides a different point of view for the underlying reasons for non-compliance of states. The issue of judicial challenge to the measures taken by states to avoid their responsibilities is examined. It goes through a few key cases such as the case of *Sale, Amuur* etc. and how the courts have plugged in some of the gaps in the legislations and helped set certain constraints on the actions of states. It finally issues of providing a solution to the present situation of non-compliance. It suggests several solutions, some for the long-term while others are for the short-term.

Chapter five builds on chapter 4 and focuses on other areas of solidarity apart from asylum seeking. It goes through solidarity in the area of international environmental law. It will examine international environmental treaties which nations have created to help prevent environmental pollution and degradation of the environment. This chapter also looks at how in addition to the ICJ, international tribunals, as well as international organizations have played a part in enforcing solidity in this area.

The Sixth chapter will examine the issue of enforcement on the Union level. It will examine the decisions of the CJEU in relation to the enforcement of solidarity. It will look at how the courts have through their decisions fostered solidarity, clarified the position of solidarity, and filled in lacunas in the law. It will also explore the role of certain EU institutions like the commission in ensuring that member states comply with EU laws on solidarity. It will go through the landmark cases where the CJEU has provided decisions on solidarity and analyze

the Commission's proposals and decisions. These would then be evaluated as to how to promote or impede solidarity.

The seventh chapter will then compare enforcement of solidarity in the Union with that on the international stage. It will compare the decisions of the ICJ, Tribunals and the role of international organisations, with the decisions of the CJEU and the Commission. It will explore the issue of state liability and how this legitimates the use of coercive measures. Based on this analysis, it will explore possible solutions to the problem of lack of solidarity in the Union. It will look at possible ways of generating solidarity and other alternatives to financial sanctions (as financial sanctions do not always bring compliance). It will look at these in terms of their consequences to the long-term survival and smooth functioning of the Union. It will provide a conclusion and tie up all the main points discussed in the previous chapters and reach a conclusion as to whether solidarity should be a legal precept, and the possible effects this could have on the Union.

CHAPTER 1 (POSITIONS ON THE ENFORCEMENT OF SOLIDARITY)

1.1 INTRODUCTION

The concept of Solidarity is an all-pervading theme in the European project. It could even be said that it is the very foundation of the European Union, as without it no aspect of the union would be capable of functioning. It is a concept which is woven through various treaties and sectors of the EU and intended to be a guiding principle for the member states. However, the

problem with this is that Solidarity is an amorphous concept which makes it very difficult to define. In such a case, the established tools of social science would not find it easy to properly establish the borders of this concept, as trying to analyze such a fluid concept is as trying to catch smoke by closing one's fist. Solidarity can be defined as a union of interest or purposes or sympathies among members of a group, but this is just one definition which covers certain aspects of it but is not exhaustive, as solidarity also includes the underlying feelings which allow for. A better definition was given by Lawrence Wilde as "as a feeling of sympathy shared by subjects within and between groups, impelling supportive action and pursuing social inclusion".[3] This difficulty in ascertaining the scope of solidarity has been visible in the way it has been incorporated in EU treaties and the decisions of the Court of Justice, and also in the disagreements between member states as to the levels of commitment and cooperation which solidarity entails.

Beginning with the Treaties, the concept of solidarity has over the years been incorporated into the treaties on various areas of the EU ranging from asylum seeking, energy procurement, to common defense and security etc. For example Article 3 (3) TEU mentions the promotion of solidarity between member states in creating economic, social and territorial cohesion amongst other things.[4] This imperative for promoting solidarity between member states can be seen in Article 47 TEU which provides for a common security and defense policy, especially section 7 which tries to ensure that if a member state suffers armed aggression on its territory, other member states would have an obligation to come to the aid of the affected state with every means available to them.[5] In the area of energy procurement and supply,

[3] Lawrence Wilde, Global Solidarity, (Edinburgh University Press, 2013), p.1.
[4] Treaty on the European Union, Art 3(3).
[5] Treaty on the European Union, Art 47.

solidarity has also be made part of the legislation as Article 122 (1) TFEU allows for the Council on proposal from the Commission to enact measures if difficulties arise in the supply of certain products particularly in the area of energy, and these measures are to be decided on in a spirit of solidarity between the member states.

Nevertheless, this is not just limited to emergency situations, but solidarity in this area is part of the Union's long term objectives of reaching a sustainable and secure energy supply as provided in Article 194 (1) TEU which states that these goals are to be achieved in a spirit of solidarity.[6] Also, in the area of asylum, the promotion of solidarity has also been incorporated into the treaties. Article 67 TFEU states that the Union shall ensure the absence of internal borders and create a common asylum policy for the control of its external borders based on solidarity between member states.[7] In addition to this, Article 80 TFEU states that Union policies in this area and their implementation are to be governed by the principle of solidarity and fair sharing or responsibility.

There have also been disagreements on whether it should be considered merely as a moral value or as a binding legal precept. These disagreements had to be settled by the Court which has interpreted the treaties in a way that grants solidarity legal effect when certain conditions are met. As can be seen from the different mentions of solidarity in the various treaty provisions, they are not particularly clear as to their meaning and scope. For example, the term in "in a spirit of solidarity" stated in Article 194 TFEU is not very clear as to its implications and can be interpreted as merely working with a feeling of togetherness without necessitating any specific level of commitment and cooperation. These different uses of solidarity within

[6] Treaty on the European Union, Art 194(1).
[7] Treaty on the Functioning of the European Union, Art 67.

the treaties contribute towards its ambiguity as it could be interpreted in some instances to not be intended to impose political or legal ramifications.

These uses of solidarity by the treaties have led to disagreements among member states on not just the meaning of solidarity in different sectors, but also on whether it should merely been interpreted as a moral value and not as a binding precept with legal effect and as stated in the preceding paragraph, these disagreements on interpretations have over the years been decided on by the CJEU in several cases such as *Slovak Republic and Hungary v Council of the European*,[8] *Poland v Commission*,[9] *Insinooritoimisto InsTiimi.*[10] In these cases, the Court has attempted to fill in the gap created by the treaties by providing clarifications on what solidarity entails and the kind of actions and policies which go against it. It has also tried to provide certain criteria which when present would give solidarity legal effect and allow it to be relied upon by Union institutions and member states. These decisions by the Court were reached by the Court interpreting the treaties in a teleological manner and taking a certain view of solidarity in terms of its meaning and scope. Therefore, it is important to examine these decisions and criteria provided by the CJEU in order to determine whether solidarity should be a legal precept or not. Before delving into these issues in subsequent chapters, this chapter will provide an overview of the already existing literature in this area and provide a context for the research question this thesis will investigate. This will be achieved by detailing the arguments and positions of various authors in this area and linking them together to supply a clear background and foundation for the research question.

[8] Joined Cases C-643/15 and C-647/15, *Slovak Republic & Hungary v Council of The European Union*, Court of Justice of the European Union, 6th September 2017.
[9] Case T-883/16 *Poland v Commission* [2019].
[10] Case C-615/10 *Insinooritoimisto InsTiimi* [2012] 00000.

1.2 DIFFERENT POSITIONS ON SOLIDARITY

Solidarity can be divided into three tiers in relation to the EU. These are "national solidarity" which has to do with the citizens and residents of a state, "member state solidarity" which involves principles of solidarity between member states, and "transnational solidarity" which is between European citizens and residents [i.e. across borders].[11] However, for the purposes of the research question, this thesis will tackle solidarity at the member state level. This is because states are the principal defaulters in relation to solidarity, as they have the duty of transposing secondary legislation based on treaties, and their decision to either cooperate with other states or not will usually have a greater impact on the functioning of the Union as compared to the other levels. Therefore, exploring solidarity at the level of states is very important. In regard to the nature and limits of solidarity, Andrea Sangiovanni posits that reciprocity is the basis of solidarity within the Union, to be more specific he provides "reciprocity-based internationalism" as a model for understanding Union solidarity.[12]

He lays out his arguments from the starting point of what theory of global or international justice applies to the EU. He first goes through the globalist cosmopolitan position which holds the equal moral worth of persons regardless of place of birth, sex, race etc. Those who subscribe to this view would want solidaristic obligations to be global in reach and not dependent on the presence of any social interaction.[13] Following this view, the EU would serve as an instrument for expanding solidaristic obligations and would serve this ideal when it serves as a model for other regions on how to expand solidaristic obligations and would

[11] Andrea Sangiovanni, `Solidarity in the European Union', (2013), Oxford Journal of Legal Studies, pp1-29, 5.
[12] Ibid.
[13] Ibid, p6.

undermine it when it puts the interests of Europeans above that of those less well off in other regions of the globe.[14]

The next position discussed is the statist cosmopolitan which is contrasted to a globalist cosmopolitan. Although these two positions overlap on certain things such as the equal respect and consideration of persons, the main difference between them is that this position holds human rights and perhaps a general duty for poverty alleviation as the limit for social justice, as it contends that more demanding principles of social justice can only arise among those who share in preserving and imposing a comprehensive system of societal norms which are backed by coercion as in a particular State.[15] This situation will not be applicable to the International community, as there is no worldwide comprehensive social system. However, it will be applicable to the EU where there exists a more integrated social, political and financial system. Sangiovanni proposes a model of reciprocity-based internationalism which explains that the types of social interaction which gives rise to social justice is one where there is mutual creation of goods which consequently produces a right to a share of the benefits of the goods generated and an obligation to bear some of the burdens created.[16] This model does provide a good foundation for understanding solidarity among member states, as member states have historically been willing to surrender certain parts of their sovereignty with each subsequent treaty to the Union because it has been able to secure a range of collective goods such as the single market (which facilitates free movement of goods, workers, capital, removal of tariffs etc.), a stable legal system, creation of peace and internal stability etc. All of these which provide benefits either directly or indirectly to the member

[14] Ibid, p7.
[15] See Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Phil & Pub Aff 113, Mathias Risse, 'What to say about the State' (2006) 32 Social Theory & Practice 671.
[16] Andrea Sangiovanni, `Solidarity in the European Union', (2013), Oxford Journal of Legal Studies, pp1-29, 8.

states. Therefore, any financial or social cost incurred by member states are deemed to be part of the necessary give and take of creating a collectively beneficial system.

Although Sangiovanni's model of reciprocity does provide a sufficient explanation for understanding solidarity within the Union in areas such as Energy creation & procurement, common defense etc, it however does not provide the same in certain specific areas like in the area of asylum. Reciprocity in this case is not the driving factor as member states deem the granting of asylum to be a burden not a benefit. Solidarity in this area generally falls into two dimensions, namely the internal dimension which focuses on burden sharing among the member states, and the external dimension which is about providing safety and protection to displaced persons seeking asylum. Of the two dimensions, only the internal one can be said to involve reciprocity, as member states agree to take in asylees in order to lessen the burden on other member states, and this can be viewed from the position of member states as merely a mechanism to lighten a burden. A burden which some would like to avoid or shift onto others as evidenced by the lack of cooperation during the refugee crisis. Therefore, reciprocity here is linked to self-interest, enlightened self-interest to be more specific, as any burden or cost incurred is measured against benefits to be gained either in the present or in the future, and in this area, some member states view the costs as outweighing the benefits.

Having explained reciprocity based on enlightened self-interest as a motivating factor for showing solidarity, other perspectives which provide possible motivations and grounds for solidarity will also be examined. The other perspectives are altruism, and (enforceable) moral obligation. The altruistic position is of the view that by virtue of being citizens of a country which keeps its responsibility of providing security and protecting the rights of its citizens, they should be compelled by morals to extend a helping hand to citizens of other nations who

may not be in a position to sufficiently help themselves. This duty to provide help is a moral one which means it is discretionary and not compulsory. As a person may decide against providing help when this will endanger their own life. Applying this position from the individual level to that of the state, it could be said that states should provide help, but should not be compelled to do so. Defenders of this view propose that states will more readily cooperate and provide support when doing so will not impose a high cost on the state.[17]

The second position on enforceable moral obligation holds that cooperating and showing solidarity should be a legal obligation which states should uphold. This position is the converse of the altruistic one. How is it opposite? One might ask, it is the opposite because it actually proposes that failures to show solidarity in this area should be penalized. Hence, it goes in a different direction to that of altruism (The good Samaritan approach) which contends to make providing help only optional. It incorporates an element of realism, as it holds that in spite of the fact that states are the primary defaulters when it comes to showing inter-state solidarity, it also acknowledges that state power is also the primary instrument for remedying breaches and guaranteeing cooperation. It along these lines proposes that the international system should not be one where solidarity and state sovereignty are at odds but should actually be complementary. Under this framework the obligation of safeguarding the rights of citizens falls to the state which they are from. But if the home state is unable to protect these rights (e.g., in the event of financial collapse like in 2008, or in the event of a pandemic like in 2020), then a different state or other better place states which are able to show provide help should have an obligation to show solidarity with the affected states. The vision of solidarity between states proposed here is like an interconnected web of states which fill in for the shortcomings

[17] Mathew Gibney. The Ethics and Politics of Asylum, Liberal Democracy and the Response to Refugees, (Cambridge University Press, 2004) pp.229-261.

of other states. This substitute protection provided for by non-defaulting states therefore provides a surrogate protection or safety net but does not take over the primary duties of the defaulting states.[18]

Now it is important to note that in a perfect system, there would be a collaboration of states in showing solidarity by equitably contributing their fair share or abstaining from actions which may negatively affect other member states, with each state pulling their own weight instead of shifting the burden to other willing states. However, this is not the case currently as the norm is that most states are not always ready to show solidarity but prefer to dodge their responsibilities especially when they do not believe it provides them with any practical benefits. This view of solidarity by non-compliant states is the opposite of the complying states which see it as a moral duty which enables the aforementioned group to avoid their duties. It should also be noted that membership of these two categories is not static, as some states which comply at one point may become non-compliant at some other point. This problem of non-compliance by states raises the issue of coercion, as any system of solidarity which does not use coercion will simply allow non-complying states to continue non-complying.

Having stated that any system which lacks coercion may inevitably allow non-compliance. However, if the system does makes use of coercion, there is likely to be a disadvantage that it will dis-incentivize other states from participating in this system due to fears of being on the receiving end of these coercive measures. In order to find a way around this issue, some have put forth different ideas on alternatives to coercion in specific areas such as asylum

[18] David Owen. "In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibility for Refugees." In Migration in Political Theory, Oxford University Press (2016) pp269-190, 275.

seeking which could motivate states to participate such as a 'joint creation model' (this is further explored in chapter 5 on enforcement) in which states benefit according to their contribution, or as an iterated game wherein states create long term interests in cooperation.[19] Despite these suggestions of alternatives to coercion, the success of any international system of solidarity and cooperation is not very high. This is due to the problem of national sovereignty which is a problem which not only plagues the international community, but also the EU (This issue is discussed further in chapters 4 and 5). David Owen put it best by saying that in world with rogue states, burdened regimes, and selfish states, states which provide show support are bound to take on more than what they would have if others cooperated.[20]

Nonetheless, Baubock Argues that the non-compliance of other states does not absolve them of their duty, but in the absence of global enforcement mechanisms, states which are willing to cooperate and show solidarity have a duty to create the largest feasible `coalition of the willing' by committing to contribute their fair share of resources in order to maximize the number of states which receive help.[21] He further proposes that the European Union should be an ideal example of a coalition of the willing, as states that are ready to comply with their duties do not have to worry about which states are or are not complying. This is because they are part of a permanent coalition, they subscribe to the principles of sincere cooperation,[22] and the principle of solidarity and fair sharing of responsibilities.[23] In a nutshell, the Union has

[19] Alexander Betts, 'Public Goods Theory and the Provision of Refugee Protection: in the Joint-Production Model in Burden Sharing Theory', Journal of Refugee Studies 16 (3):274-296.
[20] David Owen. `In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibility for Refugees.' In Migration in Political Theory, Oxford University Press (2016) pp269-190, 286.
[21] Rainer Baubock, `Refugee Protection and Burden-sharing in the European Union', (2017) 56(1), Journal of Common Market Studies, p19.
[22] Treaty on the European Union, Art. 4(3).
[23] Treaty on the Functioning of the European Union, Art. 80.

sufficient integration which should in theory ensure compliance. However, in reality this has not been the case as member states have at times shirked their duties when it comes to cooperation and with the withdrawal of the UK from the EU, this coalition is by no means permanent. In the area of asylum, he identifies three key areas which create problems. The first issue he identifies is the issue of country of first entry contained in the Dublin III regulation, the next issue he discusses is the lack of shared norms on asylum procedures among member states which create unequal standards and contribute to asylum shopping. The third issue is that of open internal borders, as states at the external border lacked the capacity and incentive to comply with the Dublin regulation and thus allowed asylees to simply pass through their territories towards other states. The issues enumerated by Baubock only apply to the area of asylum seeking, but there are also other problems which hinder solidarity in other areas such as the use of vague terminology when drafting the treaties. An example of this is Article 194 TFEU which states that Union policy in the area of energy shall aim `In a Spirit of Solidarity' between member states to achieve a functioning energy market, security of energy supply etc.[24] The vagueness of the term spirit of solidarity has provided certain member states in a way to avoid showing solidarity (This is discussed in detail in Chapter 3 and touched upon in Chapter 5). Another problem is that of dual loyalties which arise due to certain member states also being members of other organizations (e.g. NATO) which then creates conflicts in certain areas such as that of Common Defense.

At this point, member states have become aware of the multi-faceted problems plaguing solidarity in the Union and have made repeated pledges to tackle these challenges by showing more solidarity. However, they have failed at achieving this aim, as there are large

[24] Article 194(1) TFEU.

discrepancies between their formal declarations and their real life actions and attitudes. This then raises the question of why a sufficient level of solidarity has been so far unattainable on this level. When considering the reasons for this, one major pre-condition for solidarity to work, which is reciprocity is not always present. As previously stated in this chapter, in certain cases, showing solidarity may not provide a certain member state any gain, and may sometimes put them at a financial disadvantage. Hence, reciprocity based justification for solidarity does not always apply. For example, in the area of asylum seeking, member states cannot really be said to be in solidarity with asylees, as member states which take in asylum seekers have little to nothing to gain from such an endeavor (in the short-term at least) but actually have a lot to lose both financially and socially. Another example would be in the area of energy creation and procurement where a particular member state may choose to enter into an energy deal with a non-member state (e.g. Russia) if it provides them with a financial gain regardless of if it may have a negative impact on the finances of another member state. Hence such actions by member states in relation to Refugee protection cannot really be referred to as solidarity but appear more as a sort of goodwill or charity, while in relation to energy procurement it can simply be classed as pure self-interest.

Now, while better placed member states do ignore the plight of the member states which are at a disadvantage. They nevertheless seem to be of the position that in certain areas such asylum seeking traditional methods (e.g. border control, return of illegal immigrants) are more cost efficient than the creation of a broader system of solidarity which may have the effect of attracting further migration. Or in the area of creating a functioning energy market, making a deal with Russia for cheap gas will be more cost effective on their part. Hence obligations to show solidarity which flow from the treaties are simply ignored by the member states who stand to gain from ignoring them. Furthermore, in his analyses of the problems

Baubock makes certain assumptions which cannot be said to be completely accurate about the EU. He supposes that the member states are part of a permanent coalition of states. But this is not entirely true, as although the EU is a coalition of states, it is by no means permanent. This was evident in the 2016 referendum held in the United Kingdom in which a majority voted for the withdrawal of the United Kingdom from the European Union. This therefore illustrates a very crucial point which is that although the member states need the EU in order to enhance various aspects of their society (e.g. financial, power, and monetary), the Union has a greater need for the member states, without which it cannot survive. This was best stated by Sangiovanni with the following

"Without its member states, the EU would lose the capacity to govern and regulate those delegated areas within its jurisdiction. This is because the EU, on its own, does not have the financial, legal, administrative or sociological means to provide and guarantee the goods and services necessary to sustain and reproduce a stable market and legal system, indeed, to sustain (on its own) any kind of society at all. It depends on the institutional resources of its member states. But the converse is not, by comparison, true: without the EU, member states would forgo a range of benefits, but they would not lose the capacity to govern".[25]

This then leads to the central issue of solidarity and political obligation and the consequent effects it might have on the Union. Providing protection to asylees have been seen by many as an example of solidarity, but as earlier mentioned in this work, this seems doubtful as there does not seem to be any self-interest or reciprocity involved, but may be best described as a form of altruism. However, altruistic acts are in many cases (e.g. that of the Good Samaritan)

[25] Andrea Sangiovanni, `Solidarity in the European Union', (2013), Oxford Journal of Legal Studies, pp1-29, 17.

supererogatory, which means that they do not go beyond the requirements of moral duties.[26] Whereas many actions carried out in political life are considered to be non-supererogatory as morality does not provide an option of not fulfilling them. This comes from the awareness that as members of a political community, an obligation of fairness and cooperation is owed to one another in order to uphold each other's rights and safeguard the political community. Hence these duties become non-discretionary and are enforceable.[27] But one could argue that a failure to enforce such moral values would not lead to any loosening of bonds in a society. This then brings the question back to the issue of enforcement of moral values. For if solidarity is a moral value and hence part of the moral structure of the European Union, should it be enforceable? There are a couple of positions on the issue of enforcement of morality in society. The classical view is that the law exists not just to secure the opportunity for men to lead a moral life, but to ensure that they do. According to this view, not only can the law be used to punish men for doing what is morally wrong for them to do, but it should be used as an instrument to promote moral virtue which is the end goal of a society complex enough to have developed a legal system.

This position is tied to a view of morality as an absolutely true and correct set of principles which are not man-made but are either awaiting man's discovery by use of his reason or are waiting for its disclosure by revelation (i.e., in theology).[28] Another position which is in opposition to the classical view is one is which Herbert Lionel Hart calls the disintegration

[26] Juri Viehoff and Kalypso Nicolaidas, `Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity and Choice', (2015) p.286, <https://www.researchgate.net/publication/318274672_Social_justice_in_the_european_union_the_puzzles_of_solidarity_reciprocity_and_choice> accessed 5th August 2021.
[27] Ibid.
[28] H.L.A Hart, `Social Solidarity and the Enforcement of Morality', p.1 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3552&context=uclrev accessed 6th October 2021.

thesis. This position is more of an inversion of the classical thesis, as in this position, society is not the instrument of a moral life, instead, morality is placed as the glue of society which binds men together and without which they would not be able to coexist.

This position favors a more relativist view of morality, where the quality of the morality is not as important as its cohesive power, as Devlin put it "what is important is not the quality of the creed but the strength of belief in it. The enemy of society is not error but indifference".[29] Hence, morality here is a tool to keep society together and prevent its disintegration. Morality here can be defined to include a shared idea on politics, ethics, rights and a fundamental agreement of what is right and wrong. These commonly recognized views act as the cords which hold people in society together and it is claimed that it can be observed in history that the loosening of these moral bonds are usually the first signs of the collapse of society.[30] Therefore, society is justified in enforcing this recognized morality on those within its ranks which do not share it, in order to preserve its own existence.

This position is however criticized by Herbert Hart who argues that the necessity of a common morality for the existence of society lacks empirical evidence and that the legitimacy of this position depends heavily on the meaning given to the term's "society", "existence" or "continued existence" of society. He states that the words society and the continued existence of society are usually used in reference to the continuation of a community living by some specific shared moral code, or more precisely, it refers to a form of social life individuated by a certain moral, social, political, and economic institutions.[31] He points out

[29] P. Devlin, The Enforcement of Morals, (Oxford University Press, 1965), p.114.
[30] Ibid, p.13.
[31] H.L.A Hart, `Social Solidarity and the Enforcement of Morality', p.3 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3552&context=uclrev accessed 6th October 2021.

that based on this meaning given to society and its continued existence, feudal England and post-feudal England should be classed as different societies which would destroy the argument that the loosening of moral views leads to the disintegration of societies or communities. This is because English society same as other societies around Europe changed their moral views on feudalism but did not disintegrate.

Hence, in his opinion, the correct view of society in this case in would be to say that the same English society was once feudal but is no longer feudal. This therefore provides a different meaning of society and a different criterion for its continued existence. Consequently, the disintegration of society position can only be defended if society ceasing to exist does not refer to the actual society itself but to a radical change in its common morality. They would then argue that the justification for using the law to preserve the common morality is that when a group of people have developed a common form of life complex enough to have a common morality, then they have a right to preserve it. This then leads to another issue of the rights of the majority to protect their existing moral structure from change, as not everyone in a society will share the same moral values. Proponents of this position would rightly propose that the stability of any social system is dependent on a degree of integration of a common set of values and these values are common because they are adhered to by the majority. Hence, the majority have the right to prevent radical changes which may destroy their social order.

Applying these positions to the EU, should the law be used as a vehicle to promote solidarity which is a moral value and also used to punish member states for their failure to comply with it? In this case, can the failure to show solidarity especially in different areas of Union law be deemed to be a challenge to the social order of the EU, and can the majority use the law as a

mechanism for ensuring compliance against the unwilling minority? First, we will have to determine if in a society, people should have a legal duty to perform acts for the benefit of others or perhaps rescue others in perilous situations. Generally speaking, in many nations, such obligations are not imposed on people by law. For example, a person walking by a shallow pool of water in which a baby is drowning can refuse to save the baby even though saving the baby will cause no more than a wet foot.

He could do this and walk away without facing any criminal or civil consequences.[32] Some justify this position on a belief that the law should not enforce morality. However, this claim is misguided, as all law is based on some form of moral structure. Morality here means the distinction between right and wrong. This opinion that the law should not impose a duty to perform acts for the benefit of others comes from a supposition that omissions to act do not have the same moral status as actions. Consider the following example, if Peter breaks Paul's leg, Peter does something morally worse than if perhaps he fails to prevent John from breaking Paul's leg. Many except extreme utilitarian's would accept that based on the above scenario, there is a moral distinction between both.

Nevertheless, it is easily acceptable to say that although they are not moral equivalents, preventing easily avoidable serious harms as in the example of the baby is preferable to allowing them to occur, and that people have a moral duty to do this, albeit not a legal one. Having said this, it should be noted that there is not always such a clear line of distinction between actions and omissions in terms of their legal consequences. This is because the laws of most states impose an obligation on people to carry out certain actions either due to their

[32] Kent Greenwalt, `Legal Enforcement of Morality', 85J.Crim.L & Criminology 710 (1994), part II, p.5 available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6826&context=jclc accessed October 22nd 2021.

position in relation to someone or their membership of a society. For instance, those who have a special relationship to care for others will be penalized if they fail to prevent easily avoidable harm from befalling them. Hence, with the example of the drowning baby, a parent walking by who did nothing to rescue the baby will be penalized for their failure to act. Also, by virtue of being part of a society, the laws of many legal systems also impose duties to act on individuals. These usually involve carrying out acts for the benefit of the society, such as a duty to pay taxes, to submit to jury service where applicable, to testify in court etc. Few would argue that a state does not have a responsibility to impose such duties on its citizens who fall within these categories to act either to prevent harm or to contribute towards the stability and functioning of the society.

The act of imposing positive duties on individual members of a society by a state (i.e. at a micro level) as discussed above can be applied to states within a political, economic, and legal union like the EU or a federation (i.e. Macro level). This is because similar to individuals in a state who have positive duties imposed upon them for the functioning of the state, the member states of the Union are all signatories to the treaties which set out goals which the Union aims to achieve. Applying these positions from the individual level to the level of states, it could be argued that the EU could legitimately penalize member states who fail to show solidarity especially in relation to other member states. This would be based on the grounds that the member states are part of a society (in this case that would be the EU) or collective, therefore positive duties can be imposed on them for the functioning and stability of the Union. But those in opposition to this could propose that using the law to impose positive duties in this regard based on the preservation and stability of the EU is not legitimate. As based on the critiques of the classical position by Herbert Hart, the moral values of society are not static and change over time without the deterioration and collapse of society.

Nonetheless, this counter argument to enforcement does not properly fit the political situation of the EU. This is because the EU is the first of its kind in terms of a union of states which possesses more powers and institutions than a normal confederacy, but lesser than a federation.

In addition, the EU has not existed for millennia, or centuries as is the case with many European countries, and its continued existence is not guaranteed, as there is a possibility (as withdrawal of the United Kingdom has shown) that member states may pullout of the Union. Furthermore, if certain values of the Union are left to the discretion of the member states to pick and choose which norms to comply with, it would defeat the purpose of the union and curtail long term planning and attainment of political, fiscal, and even social objectives. Also, it could be said that the very nature of law is to be coercive. This is because the purpose of law is to synchronize private interests with public interests and every legal system contains enforcement institutions for occasions where there is a refusal to do this.

When there is resistance to the law, then coercion in the forms of sanctions become a vital tool for accomplishing compliance.[33] Nevertheless, the laws have to be deemed to be legitimate for the use of coercive measures by institutions to be justified. Without this legitimacy, an arrest will simply be kidnap accompanied by false imprisonment, the seizure of a debtor's property will merely be theft, and the imposition of financial sanctions will simply be extortion. Since EU legislations are created through democratically legitimate processes, and the institutions are created through the treaties which were signed by member states, the laws therefore have legitimacy and should be able to command obedience with sanctions as the consequence for non-compliance.

[33] Grant Lamond, `Coercion and The Nature of the Law', Legal Theory, Vol.7 (2001), p.43.

Concerning particular areas such as dealing with the asylees which are already within the Union, since the Union is committed to upholding fundamental human rights and the principle of non-refoulement which prohibits states from transferring or removing individuals from their jurisdiction when there are sufficient grounds for believing that person would be in risk of harm. Therefore, asylees taken in by member states have to be distributed in a manner that does not overwhelm particular member states (especially those at the external borders). It is at this level that solidarity among member states arises in this regard and the question of whether it should be enforceable or not becomes critical.

Having already discussed both the internal dimension of solidarity which calls for "Burden Sharing" among the member states and the external dimension which involves mitigating the consequences of financial, environmental, and disease based (E.g., Covid19) disasters,[34] the current level of solidarity within the Union and that of the global stage can be can instructive. As on one side solidarity within the Union does fall well short of the kind of solidarity obtainable within a nation state or a federation, as it is much less characterized by the same kind of sense of obligation (e.g. no common taxation system) or a sense of community. But on the other hand, the amount of solidarity present within the EU far outweighs the one found in the international community (e.g. the presence of EU Citizenship). Due to its supranational nature wherein, it falls in between the level of the state and the international community, it thus provides an interesting and unique opportunity to explore what the possibility and effects of making solidarity enforceable would be.

[34] Christiane Heimann and Others, ` Challenging the Nation-State from within: The Emergence of Transmunicipal Solidarity in the Course of the EU Refugee Controversy', (ISSN: 2183–2803), (2019), p.208.

Regarding this, there are certain schools of thoughts which hold differing positions on when solidarity should be enforceable, and if it is to be enforceable, under what circumstances should it be. One of these I shall call the "Social Unionist" which stress the importance of the social conditions in which solidarity emerges. It holds that when not driven by self-interest, solidarity mainly emerges when certain social conditions are present, such as a certain degree of shared identity and close ties among members of society. Esin Kucuk proposes that understanding these pre-existing conditions helps prevent a reliance on a conjectural understanding of solidarity. Therefore, any decision imposing solidarity obligations should be informed by the fact that the strength of the driving forces of solidarity will differ based on the kind of society in which they operate, and which will consequently define the limits of solidarity.[35] In their opinion, the danger resulting from imposing obligations where there is not a strong sense of solidarity could render the desired outcome of further integration unachievable.

The counter argument to this position provided by Rawls suggests that those who are governed by an effective sense of justice will want to live on terms characterized by those principles of justice, including when cooperating with others.[36] In other words, regarding the EU, that line of reasoning would suggest that rather than relying on existing social bonds such as fellow feelings, and relationships of mutual benefit, justice should actually be the motivating factor to create such bonds once certain (institutional) interactions are present.[37] Hence in this view, solidarity should not be reduced to an ex-ante emotional attachment, but

[35] Esin Kucuk, `Solidarity in EU Law, An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 Maastricht journal of European and Comparative law, p.981.
[36] John Rawls, A Theory of Justice, (Harvard University Press, 1971) chapter IX. https://www.consiglio.regione.campania.it/cms/CM_PORTALE_CRC/servlet/Docs?dir=docs_biblio&file=BiblioContenuto_3641.pdf accessed 5th August 2021.
[37] Juri Viehoff and Kalypso Nicolaidas, `Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity and Choice', (2015) p.287.

could be an ex-post effect from pondering how to maintain and manage present social and political interdependence.[38] They also point to historical facts that in a lot of cases, the existing bonds of solidarity in nation states have been deepened or outright created through intentional efforts of political and social engineering.

Another line of reasoning which favors the enforceability of solidarity is one where solidarity is deemed to be a founding value.[39] It is posited under this view that the normative standing of the values contained in Article 2 TEU have been raised to the top of the pyramid of legal sources, as part of the `constitutional principles' of EU law in the case of Kadi.[40] They are deemed to be such because they are of such prime importance to the integration process of Europe that the Treaties do not allow any challenge to the principles which are foundational to the Union.[41] On this basis, they are to take precedence in situations where they appear to be in conflict with other EU norms.[42] Consequently, since Solidarity and respect for human dignity are part of the values found in Article 2 TEU, they are therefore accorded the status of founding values which can form the bases of which secondary legislations maybe be enacted to give legal effect to them.

In support of this view, Moreno-Lax proposes that in the area of asylum seeking, the reading of Article 80 TFEU reveals the intention of delivering fairness between member states and ensuring a balance of efforts in relation to accepting and providing protection for asylees. However, the ultimate goal is the creation of a common policy on asylum which should achieve the critical objective of the adequate reception and protection of third country

[38] Ibid.
[39] Violeta Moreno-Lax, `Solidarity's reach: Meanings, Dimensions and Implications for EU (external) Asylum Policy', (2017) Vol.24 (5), Maastricht Journal of European and Comparative Law, p.746.
[40] Joined Cases C-402/05 P and C-415/05 P Kadi (Kadi I), para. 304.
[41] Ibid.
[42] Ibid, para. 285.

nationals (TCNs) fleeing persecution, in line with fundamental human rights. In her view, inter-state solidarity takes second stage, as it is simply a means to an end, the end of which is the EU complying with another one of its foundational values of respecting human rights. Given that Article 80 has transposed the foundational value of solidarity which includes the sharing of responsibility into the area of asylum, she therefore suggests that Article 80 coupled with Article 78 arguable provide a basis for enacting legally enforceable measures to achieve this goal.[43] This reasoning can also be extended to other areas of Union law which require cooperation such as Article 194 TFEU on energy creation, and Article 42 TEU which deals with Common defense, as once the foundational value of solidarity has been transposed into law, it should have legal effect.

If solidarity is to be coercive, this then raises yet another issue of whether coercive cooperation can be classified as solidarity. In such a case, would decisions be made by a majority, or do they have to be unanimous, and if they are reached based on the majority and not by unanimity, can the member states in the minority who have been made to comply with the decisions of the majority through coercive measures be said to be in solidarity with the other member states. On this issue, it could be argued that cooperation does not necessarily imply the presence of solidarity, as one may be in cooperation with someone else to achieve goals that may be detrimental to the other. This may result purely out of self-interest or a malevolent intent. Hence it could be said that cooperation on its own is not enough to conclude that solidarity is present, but that it should be coupled by certain beliefs such as trust, loyalty, shared goals or ends. In the case of compulsion, it could then be said that if

[43] Violeta Moreno-Lax, `Solidarity's reach: Meanings, Dimensions and Implications for EU (external) Asylum Policy', (2017) Vol.24 (5), Maastricht Journal of European and Comparative Law, pp.751,752.

certain member states have to be compelled in order to ensure that they cooperate, it would indicate they do not share the same goals and objectives with the other member states.

Hence, it would then be argued that solidarity should not be coerced but should be voluntary. In support of the above view that solidarity should be voluntary is the Visegrad Group (Czech Republic, Poland, Hungary, and Slovakia) which proposed a `flexible Solidarity' in the area of refugee protection at the Bratislava summit in September 2016 as a possible solution to the deadlock.[44] The joint statement by the heads of state proposed a migration policy in which the distribution mechanism would be voluntary and would enable member states to decide on specific forms of contributions which takes into account their experience and potential. It also proposed that in the event of severe circumstances when certain member states may be overwhelmed, the European Council should be in charge of making decisions, which means that the proposal would opt for an intergovernmental unanimous decision.

However, as evidenced by the deadlock on this issue since 2016, the quest for a unanimous decision has not still been achieved. This illustrates that the prevailing sentiment towards solidarity in the Union is one which is against it being voluntary and a justification for this is that it could be said that a community where each of the members identify with each other to the point where self-interest becomes indistinguishable from the common interest is extremely idealistic and unrealistic. This is because there will always exist a level of disagreement and divergence on some objectives in every group. The example of a homogenous nation state can be given to buttress this position, as even in such states, compulsory measures are used and they do not necessarily indicate that there is a lack of

[44] Joint Statement of the Heads of Governments of the V4 Countries Bratislava, 16 September 2016, <https://www.vlada.cz/assets/media-centrum/aktualne/Bratislava-V4-Joint-Statement-final-15h30.pdf> accessed 5th August 2020.

solidarity. Under this view, it is proposed that solidarity could possess an element of compulsion, and that the presence of compulsion does not negate solidarity.

Having analyzed both positions of whether solidarity should be enforceable and if it is enforceable can it still be classed as solidarity, it is important to state that whether solidarity is to be backed by legally enforceable measures or whether it is to be made optional does not get rid of some already present issues in certain areas like asylum seeking. For example, one of such issues is the problem of how to distribute the asylees already present in Europe in a fair and humane way, as whichever conclusion is reached, a possible solution based on the conclusion reached must be presented. Therefore, the next issue is how the Union should deal with relocation of asylees within its borders, and also the control of migration flow though their external policy (aka outsourcing). In regard to burden sharing of asylees, the Union would need an EU wide distribution system which can ensure a just outcome. One major reason for this is to avoid "free-riding" by some member states who would prefer to keep their contributions as low as they possibly can, as there are still ample opportunities for states to influence the conditions of admission though determining things like the length or quality of asylum procedure or acceptance rate etc.[45] For example, if one member state decides to have a restrictive asylum policy, it then leads to higher numbers of asylum claims in another member state. Inversely, if certain member states increase benefits level for asylees, it would have the effect of reducing applications elsewhere. Therefore, without a common EU distribution system, the asylum process has the potential to spiral into a

[45] Martin Altemeyer-Bartscher and others, `On the Distribution of Refugees in the EU', (2016), Number 4 Intereconomics Vol 51, pp.220-228.

downward competition, with member states reducing acceptance rates and quality of reception in order to drive down asylum claims made to them.[46]

It is easy to say that the current system of burden sharing leads to unjust results, but its harder to decide on what a fair system would look like, and what criteria should be used. On this issue there are a couple of positions, one of which is the distribution of asylees according to the relative capacity of refugee integration of each member state, and this capacity is measured in terms of wealth and population.[47] Another position is that certain states also have special responsibilities for refugee acceptance due to their involvement in creating the situations that created the refugees, for example supporting rebels in an armed conflict or repressive regimes.[48] Taking into account the choice of the asylees when determining where they are to be relocated is also another criteria that can or should be considered. Some reasons proposed for this are that they are people with particular ties and needs, and it would be best to place them where they can be able to rebuild a meaningful social world.[49] This involves relocating them to states where their skills are likely to be used and valued, and also to areas where they may have ethnic ties.

Another outlook on managing asylum claims has to do with managing migration flows in which the flow of asylees is channeled towards other states outside of the Union in the short term for vetting before they are moved to safe third countries on a long-term basis. This is because the reception of asylum seekers in large numbers as happened during the refugee crisis in 2014 and 2015 carries a cost, both in the short and medium term. Costs such as

[46] Ibid.
[47] Joseph Carens, The Ethics of Immigration, Oxford University Press (2013) pp.214-215.
[48] David Miller, Strangers in Our Midst. The Political Philosophy of Immigration. (2016) Cambridge, MA: Harvard University Press, p.90.
[49] Matthew Gidney, `Refugees and justice between states' (2015) 14 (4), European Journal of Political Theory, pp.459-460.

accommodation and general care and integration into the labor market, and these costs will rise according to the number of refugees taken. And speaking of the labor market, its ability to absorb new workers is also limited, as is the availability of other necessary components such as housing, medical care, language courses etc. Therefore, special attention needs to be placed on entering into agreements with states outside the Union which could lessen the burden of refugees on the Union. When entering into such agreements, the human rights of the asylees should be extremely important to the Union to ensure compliance with international refugee law.

This is because the purpose of international refugee law is to ensure that asylees are able to find safe third countries where they can continue their lives without the fear of violence and human rights abuses. Therefore, the EU must ensure that the states which they enter into such agreements with should not be well known violators of human rights, and that they have adequate facilities to deal with the reception and integration of the asylum seekers. To this end, financial assistance can be provided, but measures should also be taken to make sure that the funds are used for the welfare of the asylees and not diverted for other purposes. Due to this method of outsourcing having a greater potential for human rights abuses, the EU should also undertake ongoing assessments of the country's treatment of the asylees in addition to examining the history regarding human rights compliance. This can be done through the use of intermittent on the ground visits to the sites where the asylees can be spoken to and their living conditions assessed.

1.3 CONCLUSION

In conclusion, Solidarity as a principle in the EU has gone through many stages and has evolved from a rather vague underlying concept at the formation of the European Coal and Steel Community (ECSC) to an explicitly named principle in certain treaty provisions Article 80 TFEU. Nevertheless, its full scope and legal implications are still not completely known. Consequently, an attempt has been made in this work to explore its scope and legal implications both at the EU level and among the member states, especially in relation to its enforcement. The issue of the effectiveness of enforcement of solidarity is critical, as the future of cooperation and consequently European integration could rest on the outcome of the methods used to encourage and enforce solidarity. This is because solidarity in many areas is a politically charged topic which could have not only financial but political implications for the Union. Of the two routes discussed so far (i.e. whether solidarity should be enforceable or not), the author leans towards the position of solidarity having a coercive element to it and this is in line with the position of the CJEU which will be discussed in the subsequent chapters.

Some of the reasons for this stance includes the fact that it is impossible to achieve a perfect commune in which all members are of a single mind. However, the coercion meant here is not to be understood in the general sense of legal implementation which usually goes along the lines of the following. First the legislator appraises the state of affairs to decide if it is optimal (or moral, or just), If it is not, then something has to be done about it, and that something usually comes in the form of legislations which carry coercive sanctions in order to ensure compliance from uncooperative elements. Dale A. Nance calls this the "It ain't right – there ought to be a law" approach.[50] The approach favored by the author is a pragmatic approach which would go in the direction of identifying the issue, then deciding if it would be

[50] Dale A. Nance, `Legal Theory and the Pivotal Role of the Concept of Coercion', (1985) Vol 57, number 1, University of Colorado Law Review, p.2.

morally permissible and pragmatically prudent to make use of coercive measures to change things, taking into account the character or kind of problems involved and the probability of improving the situation by the intended measures.[51]

This kind of pragmatism has been lacking in the different areas of EU law making process which was illustrated in the commission's proposal to reform Dublin in a way that would make relocation of asylees automatic if a member state is faced with disproportionate numbers of asylum seekers and would require a 250,000 Euro per applicant `Solidarity contribution' if a member state decides not to accept the allocation of asylum applicants from another member state under pressure.[52] The `Solidarity contribution' appeared more like a punishment for non-agreeable member states and was subsequently not accepted. Hence, as much as solidarity needs to be backed by concrete measures to ensure compliance, there also has to be a certain level of pragmatism when considering what measures are to be taken in order to increase its probability of success.

CHAPTER 2 (PHILOSOPHICAL FOUNDATIONS OF SOLIDARITY)

2.1 SOLIDARITY AS A PHILOSOPHICAL CONCEPT

[51] Ibid, p.3.

[52] 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 stateless person (recast), COM(2016) 270 final. See also the Council decision on the case for Greece and Italy under the Relocation Scheme (Council Decision (EU) 2015/1601).

European integration has been a major aim of the European Union, and its progress has been furthered by the various institutions of the EU. It is a process of political, legal, and economic integration of the countries and regions of Europe. This process was commenced due to political reasons; the most important of these political reasons was to avoid or to ensure that the disastrous wars (World War 1 and World War 2) which had ravaged Europe would not occur again. The end of the Second World War left Europe divided between the communist, Soviet dominated, eastern bloc, and the largely democratic western nations. There were fears over what direction a rebuilt Germany would take, and in the west thoughts of a federal European union re-emerged, hoping to bind Germany into pan-European democratic institutions to the extent that it, and any other allied European nation, wouldn't be able to start a new war and would resist the expansion of the communist east.

In order to achieve this aim, a sense of solidarity had to be fostered. It set about doing this by aiming to promote trade and interdependency between states through the European Coal and Steel Community which evolved into the European Economic Community and finally into the European Union. However, this process of furthering integration through solidarity has not been without its own difficulties especially in the area of asylum. This was clearly evidenced during the refugee crisis of 2015 where more than a million refugees poured into Europe, with some 850,000 entering Greece, and some 200,000 entering Italy. This situation involved member states refusing to take in their fair share of asylees which highlighted the flaws in the various directives and regulations which were meant to regulate the reception and allocation of refugees among the member states.

Consequently, it could be said that these problems have arisen due to a lack of solidarity or more precisely due to differences in the understanding in relation to its normative meaning

and legal implications between the different member states. This has resulted in a Common European Asylum System (CEAS) fraught with many difficulties both for the asylum seekers and the member states. This illustrates that developing a proper understanding of the scope of solidarity especially in relation to refugee law is more important than ever. Along these lines, this thesis will discuss whether solidarity in refugee law should be merely a philosophical concept or a legal precept. This chapter will primarily be concerned with exploring the various theories for the underlying motivations for solidarity, tracing the evolution of the concept and its introduction into the legal system of the European Union.

The origins of solidarity are as old as human societies, as every society requires a level of co-operation and support in order to function. Generally speaking, there are two main schools of thought regarding the scope and foundations of solidarity, which are the communitarian/nationalist position and the Universalist/cosmopolitan position.[53] The communitarian position proposes that the bonds of mutual support and care which define a solidaristic community are formed in particular societies which share a strong common identity.[54] Whereas Cosmopolitanism can be understood as a philosophy which provides universal principles for the unity of humanity.[55] The Universalists position holds that cooperative endeavors can only be sustained over long periods of time if they are done under just conditions of mutual respect, as such it holds "values" as opposed to a "common identity" as the basis for a stronger form of solidarity.[56]

[53] J.M. Schwartz, `From Domestic to Global Solidarity: The Dialectic of the Particular and Universal in the Building of Social Solidarity', (2007) 38 Journal of Social Philosophy, p. 131.
[54] Ibid.
[55] Frank Ejby Paulsen, `Anacharsis Cloots and the Birth of Modern Cosmopolitanism', (2014), p.94.
[56] Ibid.

The cosmopolitan position can be traced as far back as the 5th century Greek stoics and cynics. For example, in Plato's Protagoras the sophist Hippias addresses the Athenians and foreigners as:

> *"Gentlemen present … I regard you all as kinsmen, familiars, and fellow-citizens – by nature and not by convention; for like is by nature akin to like, while convention, which is a tyrant over human beings, forces many things contrary to nature"*.[57]

In this statement there can be seen a difference being made between specific political ties and more universal ties of humanity. These cosmopolitan sentiments were first given a clear expression by the Greek Cynic Diogenes of Sinope who when asked where he was from would reply that he was a citizen of the world.[58] By identifying himself as a citizen of the world and not Sinope, he was indicating that he did not owe Sinope a special duty but that he belonged to the world. These cosmopolitan views were taken up by the later stoics who posited that humans are all part of the same species living in a world society governed by natural law and pursuing a goal of harmony.[59] However, there was some considerable difference between the way the stoics and cynics each viewed cosmopolitanism. The main difference was that while both saw themselves as part of a general human society, the stoics did not view owing allegiance to their respective states as going against their position on being a world citizen. Instead, they were proud citizens of their states and participated in its politics in addition to owing obligations to the cosmos.

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[57] Plato's Protagoras, (337c7–d3).
[58] Diogenes Laertius, Lives of Eminent Philosophers Book VI, https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Diogenes_Laertius/Lives_of_the_Eminent_Philosophers/6/Diogenes*.html accessed 25th February 2021.
[59] Derek Heater, World Citizenship and Government: Cosmopolitan Ideas in the History of Western Political Thought, (New York: St Martin's 1996), p30.

This was also carried forward in early Christianity where the stoic recognition of two polis was taken to produce two obligations. For the stoics the citizen had two duties, one to the polis and the other to the cosmos, both of which had the same purpose of making the lives of citizens better. The Christian view was that there was the terrestrial polis or authority which the citizen belonged to, but there was also the heavenly kingdom which the citizen may become a part of which was separate from the polis (render unto Caesar what belongs to Caesar, and God the things which belong to God). These concepts were canonized by Augustine of Hippo in his book City of God. In his view only those who love God can be a citizen of the superior city of God, and all those who do not are only part of the second inferior earthly city which although universal is characterized by people who only have love for themselves.[60] However, unlike the stoics which were of the position that both spheres had the same purpose and that this purpose could be achieved through participating in state politics. In the Christian view, although the local polis has divine authority hence the citizens of God are to obey their laws,[61] politics is nevertheless removed from the job of creating good lives of righteousness and justice. This task is placed at the city of God which is open to people of all nations to become citizens.[62]

Modern cosmopolitanism came to the forefront in the eighteenth century with philosophers such as Emmanuel Kant who in his works *Perpetual Peace, Idea for a Universal History* helped lay some of the groundwork for cosmopolitanism in its current form. Drawing from the stoic philosophers of old he believed states should be organized in a representative republican fashion as was the best means of ensuring that rational thought thrives which could

[60] Augustine of Hippo, City of God, Civitas Dei XIX, (Cambridge University Press 1998).
[61] Romans 13:1,4,7.
[62] Ephesians 2:20.

consequently produce peace world peace.[63] He surmised that in a republican setup, it would be difficult to unite in one person or body both the legislative function and the executive function. Most important of all, since in a republican system the consent of the people would be required in order to make a declaration of war, it would be more natural that they would be very careful before making such a decision. As they would bear the brunt of the consequences such as paying from their own pockets to finance the war, potential loss of their own lives etc.[64] Kant also proposed several guidelines which would increase solidarity and reduce the likelihood of wars. For example, he posited that there should be a disbanding of standing armies, treaties should not be made with a view of resuming hostilities at a future date, and that there should be a law of nations founded upon a federation of free states.

Some other Cosmopolitan writers of the same period went a step further and proposed an overhaul of the then political landscape. Prominent among them was Baron de Cloots who proposed the abolition of states in lieu of creating a single global state which would encompass the world, in essence a universal republic.[65] This view differs from that of Kant who envisioned more of a confederation of states which create an international order which would be able to protect even the rights of smaller/weaker states. Kant does not rule out the possibility of such, as the ideal would be for such a system to expand into a world republic. However, due to the fact that under the law of nations the states do not want it and reject in

[63] Emmanuel Kant, 'Towards Perpetual peace', (1795), http://fs2.american.edu/dfagel/www/Class%20Readings/Kant/Immanuel%20Kant,%20_Perpetual%20Peace_.pdf accessed 25th February 2021.
[64] Ibid
[65] Anacharsis Cloots, La Republique Universelle ou Adresse aux tyrannicides, (1792), (Munchen: Kraus reprint 1980).

practice what is correct in theory, he had to settle for an alliance of states as an alternative for a world republic, even though such an alliance would always be in peril of dissolution.[66]

This League of Nations envisioned by Emmanuel Kant has been very influential in the creation of several regional and international state alliances which the European Union is a good example of. The EU started out as an alliance of nations which over time transitioned into a supranational body, and was originally formed with an end to war and the creation of lasting peace as its priority. This fits in with Kant's criticisms of the particularist position, as he stated that because states do not have a court or tribunal to present their grievances in, war becomes the only avenue for settling a dispute. Since in war victory is decided by might and not right, thereby leading to treaties which only amount to temporary truces and the states creating a new pretext in order to resume hostilities. All of these actions cannot be deemed to be wrong as each state is the judge of its own matter and there is not an overarching law or system to which they should comply with and can be judged against.[67]

In contrast to the political cosmopolitans, there are those who hold a moral form of solidarity without necessarily advocating for political solidarity. This view of cosmopolitanism centers more on the role and interests of the individual rather than those of states. This is in contrast to theorists such as Emmanuel Kant, Baron De Cloots, John Rawls etc. which focus more on the role of the states. Their argument is that these authors do not focus directly on the moral duties of individuals which actually make up the state, instead opting to focus on the moral duties of the state which only indirectly involves the moral duties of individuals. A counter argument to this position is that the political is inextricably linked with the personal, as the

[66] N11
[67] N11

state is the conduit of individuals in their pursuit of safety, security of property, and justice. Hence the focus on the states is not to the detriment of the individual, but is actually a means increasing solidarity among individuals.

In opposition to the Cosmopolitan position is the Particularist/Communitarian position. One of the foremost proponents of the communitarian position Michael Sandel in his book (Liberalism and the Limits of Justice) states that for people "bound by a sense of community, community describes not a relationship they choose but an attachment they discover".[68] This epitomizes the communitarian position which places an emphasis on the exclusionary side of democratic sovereignty, as the communitarian theorists' argue that in other to construct a "we", particular groups must define themselves against an "other".[69] The national ideal is that foreign policy should promote the interests of a particular group of people bound together by a common nationality.[70] In the light of this, it would be accepted that a government should prioritize the improvement of the living standards of its poor citizens through income redistribution, than improving the welfare of the poor in other states even if its domestic poor are better off than poor foreigners, or that the state may restrict immigration in order to protect internal political stability and cohesion.[71]

Similarly, Rorty argues against the position that the idea of a shared human nature can provide a strong basis for the idea of solidarity. He posits that our moral obligation to others stems from a common identity which binds us to them, and that an appeal to specific identity will always be more effective than an appeal to our common humanity.[72] He gives the

[68] Michael Sandel, Liberalism and the Limits of Justice (2nd Edition, Cambridge University Press 1981)
[69] Ibid.
[70] Henry Sidgwick, The Elements of Politics (London: Macmillan, 4th ed, 1919), p.309.
[71] Charles R Beitz, `Cosmopolitan Ideals and National Sentiment', Journal of Philosophy, Vol. 80, No. 10, Part 1.
[72] Richard Rorty, Contingency, Irony, and Solidarity, (Cambridge University Press 1996), p. 192

example that if one has the intention of evoking feelings of sympathy for the predicament of young black city dwellers in the US, it would be more morally and politically persuasive to refer to them as fellow Americans rather than as our fellow humans.[73] This helps illustrate the particularist position that particularist attachments will most likely win over Universalists ones.

Another point made the particularist side is that the way conceptions of "good" are formed, justified, transmitted, and enforced vary from society to society. They are shaped by the historic, religious, and political forces that have shaped these different communities, therefore their outlooks on politics, culture, and society at large might differ significantly. Hence, attempting to create a liberal universal moral structure or standard which would be the basis for political solidarity amongst states is going to be fraught with many difficulties if not nigh impossible. John Rawls suggests that since this liberal outlook may not be compatible with certain societies, there should be a sort of minimum standard that states should have in order to be tolerated on the international stage. He provides these to be non-aggression towards other states, a decent and well-ordered society, with a common good conception of justice, a reasonable consultation hierarchy, and should uphold human rights.[74] An obvious problem with this proposition is that the very definition of "good", "decent", and even "justice" are not universal and what will be characterized as good and just in Chinese culture for instance may not necessarily be classed as good in an African or western society. In addition, even such basic thresholds such as non-aggression against other states, and protection of human rights have proved unworkable in practice even in the 21st century, as evidenced by Russia's military annexation of the Crimea from Ukraine in 2014 and the

[73] Ibid, p.191.
[74] John Rawls, Law of Peoples: with, the idea of public reason revisited, (Harvard University Press, 1999).

treatment of Uighur Muslims in china.[75] This has been used to reinforce the particularist position that solidarity among different cultures is unworkable.

Critics of the communitarian position argue that it denies the universal impulse of democracy's commitment to the equal moral worth of persons, as the impulse for cooperation, care, and empathy often cuts across racial, class, and ethnic lines, as was evidenced during the Second World War where native Germans secretly helped in the rescue of several victims of Nazism. They did this not because of any particularist attachment, but because of morals and a sense of human decency.[76] Hence, the Universalist notion is one that cultivates broader notions of solidarity, as it does not hold ethnic or cultural identity as a limit for "fellow feeling". In truth, it holds no inherent limits to "fellow feeling", as it points to the historical ever expanding feelings of solidarity from the family to the tribe, and from the tribe to fellow citizens of the nation, as evidence that the limits of solidarity can be expanded further to include those of different nationalities.

Finally, another major criticism of the Universalist position is that it is too idealistic and does not take practical difficulties into account. Schwartz argues that it overlooks that fact that the sharing of social risks to an effective level has so far only been achieved at the national level (with a less than optimal standard reached at a regional level within the EU), as transnational movements for human rights, the environment etc., have had little to modest success on the international stage,[77] as evidenced by the international community responding generously in the case of a natural disaster but doing little to nothing in the case of human rights violations.

[75] https://www.nytimes.com/interactive/2019/11/16/world/asia/china-xinjiang-documents.html accessed 15th June 2020.
[76] Norman Geras, Solidarity in the Conversation of Humankind: The Ungroundable Liberalism of Richard Rorty (London: New Left Books, 1995), chap. 1.
[77] J.M. Schwartz, `From Domestic to Global Solidarity: The Dialectic of the Particular and Universal in the Building of Social Solidarity', (2007) 38, Journal of Social Philosophy, p. 131.

In a nutshell, he states that the Universalist position underestimates the difficulty of transforming a transnational "ought" into a regional, let alone international "is".[78]

2.2 UNDERLYING MOTIVATIONS OF SOLIDARITY

There are two basic motivations for solidarity, the first being self-interest while the second is Altruism. This is because whenever people collaborate or work together, it is usually for mutual gain, which is motivated by self-interest. This position is based on the view that pursuing self-interest is part of human nature.[79] Consequently, individuals or groups are more likely to cooperate when there are mutual benefits to be gained, or when there are negative consequences to be avoided. This can be observed in trade unions and insurance schemes where members pull together in other to assist themselves because they either have common interests in the first instance or face a similar risk in the second instance.[80] However, there are instances where people work together for the benefit of others without any benefit for themselves. These instances are thus motivated by altruism, as the individuals stand to gain nothing for their efforts, but do it from the kindness of their heart.

When trying to ascertain the motivations for solidarity, it is proper to begin with the various theories on the formation of states. This is because the creation of a state involves co-operation, a certain level of trust, and a willingness to set aside freedoms in pursuit of higher or more important goals. All of which are part of the various ingredients that help define what solidarity means. The main theories of the formation of states are by Divine origin, by Kinship,

[78] Ibid.
[79] An evolutionary perspective, see R. Dawkins, *The Selfish Gene* (30th Anniversary Edition, Oxford University Press, 2006).
[80] Esin Kucuk, `Solidarity in EU Law, An Elusive Political Statement or a Legal Principle with Substance?'(2016) 23, Maastricht journal of European and Comparative law, p. 970.

by Force, by a social contract. Nevertheless, for the purpose of exploring the motivations for solidarity, all but the theory of force will be explored as they have provided better explanations of the development of the state and because the theory of creation by force does not involve co-operation or working together between groups of individuals.

The divine origin theory of the formation the state is the oldest theory available. It traces back about six thousand years to the first civilization of the Sumerians. The Sumerian kings list opens by stating that kingship descended from the heavens and goes on to give a successive list of their kings.[81] This theory holds that the state came into being by an act of God and the king who rules over the people is appointed by God and is his agent on earth, therefore all are to obey the king as he is God's agent. Any disobedience to the king is a disobedience against God, and the king is not accountable to the people but is only accountable to the God who set him up as king. This theory was very widespread in ancient times, from the Sumerians to the ancient Egyptians, and can also be found in the bible in the story of the kings of Israel (Saul, David, Solomon) who were appointed by God to rule Israel. It can also found in the New Testament where Paul tells the Roman Christians to be subject to, and obey the roman authorities as the authorities that be are ordained by God and that whoever resists their authority resists the ordinance of God.[82]

This theory was also the dominant theory of the formation of the state in Europe until the period of the renaissance, as many European monarchs claimed to rule by divine right. This led to a conflict with the church (i.e. the pope), as both the church and the princes both claimed the favor of God to rule. With success of the reformation and the beginning of the

[81] https://etcsl.orinst.ox.ac.uk/section2/tr211.htm accessed 25th February 2021.
[82] Romans 13:1.

enlightenment, the power of religion began to wane and so did the theory of the divine origin of the state, and other theories with a better explanatory power began to be proposed. Some of the main criticisms of this theory include its undemocratic nature, its contradiction of scientific and historical realities etc. However, for the purpose of analyzing its effects on solidarity, only its effect on collaboration and cooperation will be discussed. The divine theory of the origin of the state has its strong points and can be a very strong incentive for people to work together when they believe that they are carrying out God's work and that God is on their side. In such situations people are more likely to cooperate more often and even make personal sacrifices without wanting anything in return. However, the problem lies in a situation where the people do not have the same religion or believe in the same things. In such situations trying to get them to work together will be very difficult if there is no other motivating factor, and could lead to conflict and the breakdown of the state.

The next theory is that of kinship. This theory posits that the first group that man is born into is that of the family and since the formation of the state involves cooperation and obedience, these are to be first found within the family unit. In essence the state begins as an amalgamation of families which then grows into clans, which in turn grows into tribes, and these are all bound by blood ties which serve as the basis for unity. Such societies may either turn out to be patriarchal or matriarchal. In a patriarchal setting, the father exercised control of the family and those within his family had to obey his decisions. As related families banded together into clans, the headship would fall to the eldest male (e.g. the Roman Pater Familias) who had authority over the extended family. It could either be an autocratic system or one of

first among equals. As clans came together to form tribes, the oldest of the family heads formed councils of elders or chiefs and exercised decision making power over the tribe.[83]

In the case of a matriarchal society, the mothers held control over the family and with the expansion of the family into clans and tribes, the oldest female or females held sway of the communities and made decisions which all had to obey. This theory of the origin of the state provides a plausible and very realistic motivation for cooperation and solidarity between people. This is because the family is a group of people who are genetically related, and is usually the first place in which a person experiences the bonding process and a feeling of belonging. As such, blood ties are better able to provide a platform for cooperation and solidarity wherein members of the society would be more likely to put the interests of others before their own. Nevertheless, this method of society building is likely to fall short in creating solidarity and cooperation between people who are not related by blood. This is because the world and Europe in particular is populated with groups who are not related to each other by blood, (Germans, Greeks, Italians etc.) hence this basis of solidarity can only be used on the smaller scale of tribes or maybe a nation state, but it cannot be the basis for cooperation on a larger scale for regional unions like the EU or global Unions like the UN.

The social contract theory postulates that before the creation of society humans lived in a state of nature. In this state, there was no government or law to rule over them, and every man was free to do as he pleased. In Hobbes's view, the natural condition of man is one in which everyone is in a state of war with everyone for natural resources and even for each other's bodies (i.e. slavery). Therefore, as long as man remains in this state, there cannot

[83] Henry Sumner Maine, Ancient Law, (Cambridge University Press, 2013) Chap V.

really be any true security of person or property.[84] In order to escape this state of nature wherein there is no security, men agree to respect each other's property and lives and to subject themselves to a an authority in relation to arbitration and punishment, thereby transferring their right of judgment and action which they previously had in the state of nature to this authority. This authority could be a single person (i.e. a monarch) or a group of people which would be responsible for providing security of life and property and all men would have to obey.

John Locke also proposed a different version of the social contract theory which had a more favorable view of the state of nature. In his view, the state of nature was not as bad as Thomas Hobbes had envisioned it. It was one of relative peace, and reason but without a collective authority which all had to follow.[85] It was reasonably good but did not have complete security of lives and property. In order to improve this, the people come together to form society through a social contract, and then transfer power to the government or to the monarch. However, unlike in Hobbes's theory where the Monarch was not part of the contract and the subjects had to obey without rebellion, in Locke's social contract theory the monarch was part of the social contract. Consequently, the monarch also had responsibilities under this contract which were primarily about the protection of lives, properties, and the dispensation of justice. This meant that the transfer of power to the monarch was not absolute but was conditional, as where the monarch failed to fulfill his part of the contract, the people could rebel and depose him.[86]

[84] Thomas Hobbes, Leviathan Chap XIV, http://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2H_4_0119 accessed 25th February 2021.
[85] John Locke, Second Treatise of Government, Chap VII, https://english.hku.hk/staff/kjohnson/PDF/LockeJohnSECONDTREATISE1690.pdf accessed 25th February 2021.
[86] Ibid.

The final view on the social contract theory is that of Rousseau. In his theory, the state of nature is also not as dim as Hobbes's, and he has an opposite view of civilized society and the forms of government as compared to both Hobbes and Locke. The state of nature in Rousseau's is one of peace, freedom, and happiness. Man is generally innocent and is neither virtuous nor vicious.[87] Nevertheless, as individuals realize that in certain situations collaboration would be more beneficial to both parties, this then leads to the creation of loose associations and living together in close proximity. This then is the creation of society. In Rousseau's view, this is the beginning of the corruption of man, as he begins to live with a wife and family in close proximity to other families, and with the creation of private property, this produces competition, envy, vanity etc.[88] which leads to disagreements, disputes, theft, and even violence. It is at this stage that man enters into a contract or agreement on the rules and laws which everyone is to obey and live by

This is in contrast to the state of nature where man was solitary and independent and was only concerned with his own well-being. This was a sort of pre-moral state where man had not yet discovered reason, had not yet known the feeling of love, nor had he developed wit or cunning.[89] This view of the state of nature differs radically from Hobbes's view which has the state of nature as a lawless, chaotic place where life was a living hell for men, and from which he must escape from by surrendering his freedoms. As he famously put it, in the state of nature life was solitary, brutish, and short, as everyone was in a state of war with everyone.[90] For Rousseau this was the opposite, as the state of nature was better whereas

[87] Jean Jacques Rousseau, A Dissertation on the Origin and Foundation of the Inequality of Mankind, (Middleton, RI BN Publishing) p113.
[88] Ibid p118-123.
[89] Ibid p117.
[90] Thomas Hobbes, Leviathan Chap XII, http://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2H_4_0119 accessed 25th February 2021.

once man creates society, he enters into an artificial construct which corrupts and brings out the worst in him. In his view the state of nature was the state of peace and tranquility while society is the state of competition and war.

In determining whether self-interest or altruism is the motivating factor for the creation of society, some theories of state formation tend to fall in one camp while others tend to fall in the other camp. For instance, when analyzing the social contract theory, it could be said that what induces cooperation amongst people is of fear of the state of nature (in the case of Hobbes and Locke). As in the state of nature there is no guarantee of protection of person and property, this forces individuals in their need to find such protection to come to an understanding and create rules and enforcement mechanisms to ensure their protection. This indicates that self-interest is the motivating factor in the social contract theory as it is the protection of their own lives and property and not that of their neighbors (even though the neighbor's life and property are protected as a consequence) which is the prime motivation for cooperation.

When analyzing the divine origin theory, it appears that it leans more to the side of altruism, as the people work together, and obey the king's law and even make personal sacrifices out of altruism, as they do not stand to gain anything from it. However, it could be argued that is done out of obligation and not necessarily out of altruism, as they feel that they must obey the will of God. In addition to this, it could also be argued in a third direction that it may not be out of altruism nor obligation, but could still be out of self-interest. This may not be obvious at first, as one may look for more tangible results (like the preservation of lives and properties in the case of the social contract theory) in order to determine that a set of people are acting in self-interest. Nevertheless, since the goal is to discover the motivations for solidarity,

tangible benefits cannot be the sole indicators of self-interest, as a person may also obtain some material benefit while acting out of altruism. In such situations, the benefits obtained are merely incidental and are not the motivating factor for the act. In the case of the divine origin theory, it could be argued that the motivating factor for cooperation is a desire to gain the favor of God in order to get into heaven or whatever version of the afterlife which that particular culture holds to. If they are obeying and cooperating due to this reason (i.e. securing a good place for themselves in the hereafter), it cannot be said that it is done due to altruism, but rather due to self-interest.

Regarding the kinship theory of state formation, it could be said that on an individual level is it perhaps altruism which provides the basis of cooperation, as each individual puts the needs of the group before his own. However, it could be argued that this may not really be a case of altruism, but is rather a case of self-interest. This is because those in such blood related societies see each other as an extension of their person, and the welfare and survival of members of their group is a survival of their bloodline or ancestry which is personal to them. This is similar to how parents will take care of and make sacrifices for their children because the survival of their children is a survival of their genes. Therefore, cooperation under such circumstances cannot be said to be driven by altruism, as there is a biological benefit for blood related participants. Hence it will be more accurate to say that even this theory of state formation is motivated by self-interest.

Having considered whether altruism or self-interest is the prime motivator for solidarity, it is also important to state that it may not necessarily be an either or situation where only one of the aforementioned is in operation, but they could both be present at the same time. In considering this, this work will turn next to the writings of Emile Durkheim, and it will be

proper to begin with his foundational work in The Division of Labour in Society. In this book, Durkheim attempts to provide an understanding of the social realities that fuel or produce solidarity and cooperation in a society. Durkheim opposes the utilitarian position which offers a more individualistic perspective of the motivations for solidarity and instead favors a collectivist approach. On this position, he stands against the ideas of Hobbes and Locke.

He divides solidarity into two kinds the first of which is mechanical solidarity while the second he termed organic solidarity.[91] Mechanical solidarity refers to the connection between likeness/sameness and cohesion. This homogeneity of the members of such society creates a *"collective conscience"* which compels them to cooperate and show solidarity with one another. Where any disparity in terms of resources arises or when others within the group face certain difficulties, other members within the group feel a moral compulsion to ease or relieve these problems.[92] Whereas organic solidarity involves social integration of a diverse kind. In this form of solidarity, the emphasis is on the interdependence of diverse individuals relying on each other in a division of labor to meet each other's needs. In this system, they are not compelled to work together due to sameness but do so because they see the value of working together with others who are different to meet various needs. This creates dependencies which over time leads to the view that they are part or components of a larger whole.

Durkheim links mechanical solidarity with primitive and tribal societies where the lives of the members are significantly similar. Due to this high similarity, the individual consciences of the members will be very much alike and will collectively form what Durkheim terms the

[91] Emile Durkheim, On The Division of Labor in Society, (New York: Macmillan 1893) p228.
[92] Ibid

conscience collective. This similitude drives the members to show charity and assistance to other less fortunate members, and in like manner actions by members of the group which are deemed to be against the conscience collective are frowned upon and sometimes harshly punished. Mechanical solidarity is therefore a collective attribute and does not have a lot to do with individual motivations but happens instinctively.[93] In such a system, the members function almost as cogs in a machine, hence generating the label of mechanical solidarity. Durkheim proposes organic solidarity as a better alternative to mechanical solidarity, he posits that as societies develop passed tribal societies and become much larger and metropolitan in nature, reliance on mechanical solidarity will wane. This is because such societies are based upon differences, hence the individuals in them will have to rely on those who do not share their similarities.

This fits in well with the modern society, especially in the EU where there is free movement of people, and member states have to cooperate with one another. In the EU, reliance on mechanical solidarity is untenable as each member state usually has a substantial amount of other EU citizen's resident and working within its borders. Therefore, another form of solidarity has to be found which enables different groups to be able to work together. Concerning his proposal of organic solidarity, it is important to first explore the foundations he proposes for solidarity in general. He states that solidarity is based on morality and that morals are a product of social interactions and evolve with the changing structures of societies. He clearly expressed these ideas in the following words

[93] Peter Thijssen, `From Mechanical to Organic Solidarity, and Back: With Honneth beyond Durkheim', (2012) European Journal of Social theory,

"Everything which is a source of solidarity is moral, everything which forces man to take account of other men is moral, everything which forces him to regulate his conduct through something other than the striving of his ego is moral, and morality is as solid as these ties are numerous and strong"[94].

Hence his work attempts to answer three critical questions which are (i) what is the basis of group formation which gives rise to moral rules? (ii) What units of social organization make up moral communities on this basis? (iii) What ethical system regulates these relationships?[95] To these questions, he provides division of labor as the answer to the first, occupational associations for the second, and professional ethics for the third. These solutions are based on his observation that as societies expand and become more complex, individuals usually have to rely on others (Doctors, Mason's, farmers etc.) who are not part of one's kin or tribe, and these interactions and interdependencies over time lead to solidarity. Nevertheless, since Durkheim identifies attachments to groups as one of the elements of morality in his book Moral Education,[96] and had previously discussed in his division of labor about how the individual relies on the collective for all the makes him truly human. He therefore suggested occupational groups as the units of social organization based on division of labor.

He envisioned a role for them which included providing social, economic and political support for its members. The occupational groups were to take over the functions of the traditional institutions such as the church, the local community etc. in providing mutual support. He drew inspiration for this from the guilds which had existed in the Roman Empire. These guilds had gathered the members of their particular trade into a corporate body, and had several

[94]Emile Durkheim, On The Division of Labor in Society, (New York: Macmillan 1893) p398.
[95] C.P. Wolf, `The Durkheim Thesis: Occupational Groups and Moral Integration', Journal of Scientific Study of Religion Vol.9, No.1(1970) p20.
[96] Emile Durkheim, Moral Education, (1925) p122.

functions outside of business, to the point where members of the guild were actually buried together instead of with their blood relatives. In summary, it served almost as a second family and a quasi-religious group for the members.

Regarding the ethical system which would regulate these relationships, Durkheim in his book Professional ethics and Civic Morals rejects charity as the ethical basis for his organic solidarity, as this is usually generated by similitude. Instead, he proposes justice as the moral foundation for his organic solidarity. On this, he stands against Kant who proposes charity as the general duty of man because egotism is irrational.[97] He criticizes Kant by stating that it does not have to be one or the other, but is actually neither. He also criticizes Marx and socialism, likening it to a sort of compulsory fraternity and the elevation of charity to the fundamental principle of social legislation.[98] He argues that apart from charity being unsuitable for societies based on differentiation (Because charity is generated by similitude), it is not ideal because it helps maintain the very conditions which made it necessary to begin with. He suggests that instead of promoting charity, a society should provide access to justice and structure itself in a way where there is always a greater correlation between the merits of its citizens and their standard of living, with the end goal of reducing human suffering.[99]

The end goal of reducing human suffering leads to another solution proposed by Durkheim on the issue of what the foundation of the ethical system which would regulate these relationships should be. In his opinion, the respect of the worth and dignity of the human individual should take center stage and should provide the basis for organic solidarity. He termed this concept the “the cult of the human person”. He postulated that with the advance

[97] Professional ethics and Civic Morals, [1893] 1933, p412.
[98] Emile Durkheim, Socialism and Saint-Simon [1928] (Yellow Springs: Antioch Press 1958) p53.
[99] N42 p82.

of science and the waning of religious beliefs, people would need a new set of beliefs that would provide a moral code and unite them in a fraternal spirit of community just like religions do. In suggesting this, he differentiated between the human individual and the human person. In his view, the individual is you, me, or any other member of society taken in isolation, whereas the cult of the human person is not based on an isolated individual but is oriented towards the human person as an abstract idea.[100] Hence, it is collectivist as it covers humanity in general and would serve as a secular religion in which everyone can and should be a part of.

It has been argued that the mechanism for arousing sentiments of solidarity in both mechanical and organic solidarity are both the same in spite of what Durkheim actually argues for. For example he proposes that habit is the mechanism for mechanical solidarity, but Parsons argues that habit does not generate moral obligation to another, but highlights that it would be fairer to say that association is a better option of the two regarding the creation of moral obligations.[101] This is in view of the fact the just because a person is in the habit of doing something, it does not necessarily mean that he has an obligation to keep doing it. However, groups and associations usually come with rules, benefits, and obligations. Hence, once someone is a part of an association, he has access to the benefits it provides, but also has obligations which he would have to fulfill. Durkheim himself acknowledges the importance of attachments to groups in his later work on Moral Education. In the case of

[100] `Durkheim's study of the Individual in Society and the Society in the Individual', Moral Solidarity and the new Social Science (Sagepub Publications) p30. https://us.sagepub.com/sites/default/files/upm-assets/60298_book_item_60298.pdf

[101] Talcott Parsons, The Structure of Social Action: A study in Social theory with special reference to a group of recent European writers, (New York: McGraw-Hill 1937) p321.

mechanical solidarity these groups would be clans, tribes, or a nation, whereas for organic solidarity Durkheim suggested occupational groups as an alternative.[102]

Relating these to the European Union, it could be said that from the supranational nature of the European Union, it is quite obvious that the form of solidarity intended during the formation of the EU is the Universalist model, because the EU is a transnational organization, the solidarity intended was always intended to transcend national limits. A line of reasoning that could be used to argue against this is that although the EU does transcend national boundaries, it still encompasses societies which are predominantly European and Christian, therefore, it can still be said that the form of solidarity here is based on particularism. However, it could be argued that although the EU encompasses predominantly white Christian societies, these societies are still of different ethnicities and different denominations of Christianity which were often very hostile to each other. In addition, the Union also accepts and grants EU citizenship to those from non-European and non-Christian societies. Based on this, it could still be posited that the solidarity in the EU is based on the Universal model.

This conclusion (i.e. that the EU operates on a Universal model) can also be supported by a careful examination of solidarity within the EU which reveals that what spurs cooperation among the member states appears to be a combination of both altruism and self-interest. The moral aspect of it can be traced right from the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which the member states were signatories, to Article 6 of the Treaty of Lisbon which states that the Union is founded upon the principles of liberty, democracy, respect for human rights and fundamental freedoms, and that the Union shall respect fundamental rights, as guaranteed by the ECHR.

[102] Emile Durkheim, Moral Education, (1925) p122.

This therefore provides for the external scrutiny of the EU by the European Court of Human Rights (ECtHR) for possible violations of ECHR 1950. The aforementioned provisions clearly illustrate the commitment of the member states to the EU's founding moral principles of the equal moral worth of all persons.

Regarding the self-interest of the member states, this can be deduced from a number of places. The first can be observed through various sectors where the treaties call for solidarity among member states. For example, Article 24(3) of the Treaty of the European Union (TEU) requires solidarity on the part of member states in support of the Union's Common Foreign and Security Policy (CFSP). It states that member states are to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. It lays out guidelines for the reaching of decisions regarding it, and also imposes obligations of member states to refrain from pursuing individual policies which may run counter to the Union's Interests. The goal of the CFSP is to provide the member states with a unified foreign policy which would amplify their influence and bargaining power on the international stage, which individual member states acting alone would be unable to match. The underlying reason for solidarity in the area of CFSP is very similar to that of the Common Security and Defense Policy (CSDP) Area covered by Article 42 TEU.

Similar to the CSFP, Article 42 TEU provides for the gradual formation of a security and defense policy, and member states are to make both civilian and military capabilities available to the Union for its implementation. The primary goal of this area is to ensure the protection of any member state in the event of military aggression by a foreign power. This is clearly spelled out in section 7 of the same Article which states that if any member state is a victim of armed aggression, the other member states are to support that member state by all means

in their power. Another area is that of immigration and asylum seeking where Article 78 TFEU provides for the creation of a CEAS, and that the policies in this area and their implementation are to be governed by solidarity. The reason for this is that with the abolition of internal borders, member states implementing different polices on immigration would jeopardize internal cohesion and may result in some member states reverting back to internal borders. Consequently, a Europe without internal borders requires uniform policies and measures.

The Third can be gleaned from the creation of the union itself which started from the European Coal and Steel Community ('ECSC') which evolved into the European Economic Community ('EEC') and then into the European Union. This is because the primary motivation for the creation of these organizations was to improve the financial situation of the members, as cooperation would lead to better economic returns, and also to avoid or to ensure that the disastrous wars (World War 1 and World War 2) which had ravaged Europe would not occur again.

A final example can be seen in relation to healthcare where the rise of anti-microbial resistance (AMR) exposed the citizens of rich countries to vulnerabilities which had not been present since to rise of the antibiotic era.[103] They highlighted that citizens of wealthy states which had access to antibiotics where also at risk of AMR's in a similar way to those in poorer countries in which contraction of these diseases meant a higher death toll. The responses to this called for greater cooperation among countries and for the rich countries to shoulder more of the financial costs for the overall benefit of all. The primary motivation for solidarity here was self-interest, as the main reason for cooperation was the protection of the interests

[103] Littmann J & Viens A.M.`The ethical significance of antimicrobial resistance'. Public Health Ethics (2015), 8(3), p209-224.

of the wealthy nations.[104] This was on display in the emphasis placed by the British Government on shared vulnerabilities and the need for more collaborative efforts between wealthy and poor countries in relation to tackling AMR's in a report it issued. This illustrates that although protection of the health of their citizens was the primary motivation, altruism still played a part, as the O'Neill report indicated a willingness to shoulder some financial costs which would benefit the less wealthy countries which faced the same threat.[105]

Having gone through the underlying reasons which generate solidarity, it could be said that the current structure and setup of the EU indicates that the moral basis of solidarity in the Union is in line with Durkheim's suggestion of justice and the cult of the human person. Concerning justice, this can be gleaned from its legal system and structure which values and places justice and access to justice at the center of the whole process. Right from the process of drafting and amending of treaties at intergovernmental conferences, to the enforcement procedures of Article 258-260, and even the CJEU's creation of principles such as supremacy of EU law, Direct effect, Indirect effect, and State liability in order to enable individuals to directly rely on EU provisions. From all of these, it can be observed that upholding and creating a better access to justice has been the driving force.

Regarding the "the cult of the human person", this part of Durkheim's suggestion can be observed in the fact that all member states of the union are signatories to the ECHR, and Union itself is currently in negotiations for accession of the ECHR, which will enable individuals to apply to the European Court of Human Rights for review of the acts of EU institutions. This illustrates idea of the Equal moral worth of person's plays a crucial role in generating solidarity

[104] Peter G.N. West-Oram,`From self-interest to solidarity: One path towards delivering refugee health', Migration, Health and Ethics (2018) section 5.
[105] The review of antimicrobial resistance chaired by Jim O'Neill. (2014) Antimicrobial resistance: Tackling a crisis for the health and wealth of nations. London UK: Her Majesty's Government, and The Welcome Trust.

within the Union. However, it should still be kept in mind that despite the moral underpinnings of solidarity, self-interest still plays a significant role in member state compliance and cooperation, as they realize that whether in relation to foreign policy, defense, immigration, etc. their individual interests are best served by working together and supporting each other. Consequently, it could be said that solidarity within the EU is multifaceted, and the explanation which provides the best foundation for understanding the ideological basis for solidarity within the EU is one of both moral aspirations and self-interest motivations, with the latter playing a slightly more prominent role.

2.3 SOLIDARITY IN EU ASYLUM LAW & THE CREATION OF A COMMON EUROPEAN ASYLUM SYSTEM

In the area of asylum, the many difficulties of creating and sustaining solidarity have been very visible over the years starting from the Geneva Convention down to the treaty of Lisbon. The foundation of the EU asylum policies is the Geneva Convention which was signed by a 145 countries and formed the basis for the international laws which regulate the area of asylum seeking. It defined the term refugee and listed the rights which were to be afforded to them and also the legal responsibility of their protection by states.[106] It is both a status and right based instrument and is supported by three fundamental principles of non-discrimination, non-penalization and non-refoulement. The first principles provides that the convention be applied without discrimination on the basis of age, sex, disability etc. The next principle provides that subject to specific exceptions, refuges should not be penalized for

[106] See Article 1, 2, and 3 of the 1967 protocols of the Geneva Convention relating to the status of refugees.

illegal entry as refugees are usually forced to flee their countries hence forcing them to break immigration rules.

The last is the principle of non-refoulement which constitutes the cornerstone of international refugee protection and is enshrined in Article 33 of the 1951 Convention. It is absolute and has no derogations or reservations, it stipulates that refugees not be sent to a territory where they fear threats to life or freedom.[107] It applies to both recognized refugees and also to those who have not yet had their status recognized. Although the Geneva Convention forms the foundation of the EU's asylum policies, the cooperation of European states for the abolition of internal borders and the creation of external EU borders does not start from the Geneva Convention, but starts with the Schengen Convention in 1985 which started with five states (Belgium, Germany, France, Luxembourg, and the Netherlands) but has now been extended to include 26 other members states of the EU.[108]

With the removal of internal borders and the creation of external borders, the need for cooperation for the management of the external border, visa policies and granting of asylum became paramount. The first step towards achieving better cooperation in this regard were made by introducing political elements (e.g. citizenship, common foreign and internal affairs policy) to the previously European Economic Community though the Treaty on European Union – Maastricht Treaty.[109] It established the European Union and introduced some new features such as co-decision procedure, and new forms of intergovernmental cooperation in

[107] See the 1967 protocols of the Geneva Convention <https://www.unhcr.org/uk/3b66c2aa10> accessed 26th February 2020.
[108] The Schengen acquis - 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 [2000] L 239.
[109] See Treaty on the European Union https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf> accessed 6th October 2019.

many areas, but provided no jurisdiction for the Court of Justice of the European Union (CJEU) on asylum matters.

The level of cooperation provided for by the Maastricht Treaty was deemed to be insufficient and plans to create a Common European Asylum System (CEAS) which would replace the previous intergovernmental cooperation and serve as the asylum system for the EU as a whole were set in motion. These plans came to fruition in the Treaty of Amsterdam which came into force in May 1999. Under this treaty, the CJEU was granted jurisdiction in certain instances, the EU institutions were given new powers to draft legislation regarding asylum. It also provided a five year transitional period with a joint right of initiative between the Commission and the member states, and decision by unanimity in the Council after consultation with Parliament. The European Council met at Tampere in October of the same year and drew up a list of points of action with clear deadlines in order to achieve the main goals of the Treaty especially in relation to free movement, immigration, asylum, and Police & Justice cooperation. It was envisaged that the harmonization process would be carried out in two phases or stages.

The initial stage would involve the adoption of minimum standards across all member states which would inevitably lead to a common procedure further down the line. The result of this (i.e. the Tampere programme) was the first phase of the CEAS from 1999 to 2004.[110] Some features of the first stage of the CEAS were new mechanisms for determining which member state was responsible for considering an application for asylum, setting of minimum standards for asylum, further solidifying financial solidarity (which was done by the creation of the

[110] See Tampere program https://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf> accessed 7th October 2019.

European Refugee Fund), legislations for family reunification of refugees, and temporary protection in the event of a mass influx of displaced persons.[111] After the completion of the initial stage, The Hague Programme in 2004 called for a commencement of the second phase of the harmonization process. It was projected to commence in 2010 after the coming into force of the Lisbon treaty.[112]

The Lisbon treaty of 2009 (which was revised and renamed Treaty on the Function of the European Union (TFEU)) brought about new changes to the asylum system in order to further the process of creating a CEAS. It stated that "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement".[113] To this end, the Parliament and the Council were to enact measures to achieve:

- A uniform status of asylum,
- A uniform status of subsidiary protection,
- A common system of temporary protection,
- Common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status,
- Criteria and mechanisms for determining which Member State is responsible for considering an application,
- Standards concerning reception conditions,

[111] Ibid
[112] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, (2005/C 53/01).
[113] Treaty on the Functioning of the European Union, Art 78, [2012] C 326/01.

- Partnership and cooperation with third countries.

The legislations enacted to achieve these goals were the Asylum Procedures Directive, Reception Conditions Directive, Qualification Directive, Dublin III Regulation, and the Eurodac Regulation. The treaty also introduced co-decision as the standard method of decision making on asylum matters, thereby significantly changing the decision making process.[114] Furthermore, it also significantly improved the CJEU's judicial oversight by enabling preliminary rulings to be sought at any court in a member state, instead of only at courts of final instance, as had been the case previously.[115] Finally Article 80 TFEU provides that Union policies in this area and their implementation are to be governed by the principle solidarity and fair sharing of responsibility, including its financial implications. Although a solidarity clause was included into this chapter of the Treaty, it is by no means the first instance in which a treaty makes reference to it as a guiding principle for the member states, as this principle has been cited in many other sectors, as discussed previously.

Nevertheless, the inclusion of the solidarity clause in the treaty raises the questions as to its scope and whether it was intended to have legal effect. These questions were mirrored during the drafting stages of the treaty, where there were many suggestions made towards the solidarity clause. Some of the suggestions included limiting it to just financial solidarity,[116] removing the phrase "including its financial implications" due to fears that it might provide a legal basis for calling for national financing of Community actions in these areas,[117] questioning the applicability of solidarity in the area of immigration and suggesting its

[114] Treaty on the Functioning of the European Union, Art 294, [2012] C 326/01.
[115] Treaty on the Functioning of the European Union, Art 267, [2012] C 326/01.
[116] Suggestion for amendment of Article 13 by Dominique de Villepin.
[117] Suggestion for amendment of Article 13 by Lena Hjelm-Wallén et al

limitation to border checks and asylum etc.[118] These reveal the different opinions on the implications of solidarity in matters of immigration, and mark it out as a controversial issue not only due to its possible legal effect, but also because of probable financial and political effects. In order to ascertain the legal scope of solidarity, an examination of the EU legislative framework and cases brought before the CJEU's and the decisions reached will be made.

The opinions of the EU institutions and those of some member states regarding what solidarity entails have been at odds for quite some time. As one side sees it as a foundational principle which can be given legal effect while the others deem it to be no more than a non-binding moral value which provides a source or framework for policies. As previously stated, the Lisbon treaty included solidarity as one of its goals, but without a concrete definition of what it is, it therefore left enough room for the varying opinions and interpretations held by the Institutions and member states. Now, considering the interpretation of the court, the first decision of the court to explicitly touch upon solidarity was in the case of *Commission v Italy*. The member state infringed upon the Commission's decision by failing to enforce EU dairy regulations and instead set up its own system for dealing with dairy products.[119]

Here, the court stressed the relationship between solidarity and community obligations, insisting that national interests cannot be used as a justification for breaking Community rules. It also stated that:

> *"This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the fundamental basis of the Community legal order. It appears therefore that, in deliberately refusing to give*

[118] Suggestion for amendment of Article 13 by Poul Schlüter.
[119] Case 39/72 [1973] ECR101.

effect on its territory to one of the systems provided for by Regulations Nos 1975/69 and 2195/69, the Italian Republic has failed in a conspicuous manner to fulfil the obligations which it has assumed by virtue of its adherence to the European Economic Community".[120]

Despite this reference of the court to solidarity being at the heart of Community legal order, it was not still clear if the principle itself or through consequent legislations could be legally enforceable. This uncertainty came to a head in *Slovak Republic and Hungary v Council of the European Union*,[121] where the decision of the Council on the compulsory relocation of migrants was challenged. The backdrop to this case was the spike in the arrivals of refugees fleeing the armed conflict in Syria. This unexpected influx of refugees highlighted some of the main flaws of the Dublin Regulation which contains the criteria for establishing responsibility for granting asylum among member states. In summary, aside from unaccompanied minors, and for the purpose of family reunification which would then warrant a transfer of asylees, the first country of entry and registration would have the responsibility of handling the claim.[122]

This system places those member states at the external borders at a severe disadvantage as they will most likely be the first countries of entry for asylees, and also takes no account of the agency of asylees and non-compliance by member states. These particular issues were exposed in some member states such as Greece and Italy where asylees refused to be fingerprinted by Greek or Italian officials, as it would destroy their chances of being able to stay in other preferred destination countries (Asylum shopping). This attitude was also

[120] Case 39/72 [1973] ECR 101 para 25.
[121] Joined cases C-643/15 and C-647/15, Slovak Republic & Hungary v Council of the European Union, Court of Justice of the European, 6th September 2017.
[122] Dublin III Regulation, Art. 1, 3(1), 12.

reciprocated by the Greek and Italian officials who showed little to no desire to force the migrants to be registered, as it would increase the chances of them becoming another country's responsibility. This inevitably led to some member states reinstating border controls within the EU, thereby putting the Schengen acquis in jeopardy.

In response to this, the EU institutions adopted legal measures (e.g. Emergency relocation, Hotspot approach) based on Article 78 TFEU and Article 80 TFEU in order to show solidarity with the member states overwhelmed by asylees. However, this was met with resistance by the Visegrad group of countries (Hungary, Poland, Czech Republic, Romania, and Slovakia) when participation in the emergency relocation scheme was made compulsory for the member states. However, only Hungary and Slovakia mounted a legal challenge contesting the Commissions relocation decisions. There were a couple of arguments put forward by the applicants, but the relevant arguments relating to solidarity were on proportionality and voluntariness. Concerning proportionality, they argued that the Commission's decision was unnecessary to achieve the intended objectives, as the same objectives could have been actualized through the use of other measures (e.g. Temporary Protection Directive, assistance from Frontex in the form of "rapid intervention") which would have taken in the context of already existing instruments.

The Court dismissed this argument, and found that the council was giving effect to the principle of solidarity and fair sharing of responsibility based on Article 80 TFEU when it adopted the decision in question.[123] Therefore, the principle of solidarity once adapted into concrete measures through the process of adoption can be legally binding upon member states. In addition, the court also stated that the other measures suggested by the applicants

[123] Paras. 252, 329.

are of a complimentary nature and cannot on their own achieve the goal of alleviating the situation of the beneficiary states. Furthermore, the decision of the Court to give binding legal effect to the principle of solidarity, and also its willingness to deal with the issue of voluntariness indicates that solidarity can be made to be coercive once it has been adapted into measures, as the applicants had tried to argue that commitments in EU migration policy should be carried out "in a spirit of solidarity" which is more of a value than a general principle of Community law.[124]

2.4 CONCLUDING REMARKS

Finally, having examined the philosophical origins of solidarity, underlying motivations for it, and its role in forming the CEAS, it quickly becomes clear that it is a difficult term to properly define due its subjectivity and broad scope of meaning. Nevertheless, it is of critical importance to the functioning of the EU, as a certain level of cooperation and togetherness is needed in order for anything to be accomplished. Therefore, this work has laid out a non-exhaustive framework in which to analyze solidarity (i.e. whether in relation to self-interest, or altruism or a combination of both) which would be useful in subsequent chapters when ascertaining the motivations behind the actions of member states in different areas of solidarity.

CHAPTER 3 (SOLIDARITY IN WITHIN THE EU)

3.1 INTRODUCTION

[124] Para, 231

Having already discussed the philosophical foundations of solidarity and its evolution within the Union in the previous chapter, this chapter will proceed to explore how solidarity functions within the EU and provide a detailed analyses of how it functions in several important fields. Solidarity within the Union has been divided into several levels and areas by many academic commentators. For example Sangiovanni divides solidarity into three levels namely (I) national solidarity which is between residents and citizens of a member state, (ii) Member state solidarity which involves principles of solidarity among member states, and (iii) Transnational solidarity which can be found between EU citizens.[125] While others such as Irina Ciornei and Malcolm G. Ross divide solidarity into the Micro, Meso, and Macro level.[126] These are all legitimate stratifications of solidarity in the EU, but are not exhaustive and all encompassing. As there are still other levels of solidarity which have developed over the years which reveal that there are levels of solidarity which fall outside these stratifications such as in the case of trans-municipal solidarity and cooperation across the Union.[127]

Having listed some of the levels at which solidarity will be examined, it is also important to list and introduce some of the areas of solidarity which this chapter will explore. This is because if solidarity within the Union is to be examined, then the specific levels and areas which will be analyzed need to be clearly stated and described. The main level of solidarity which will be examined in this chapter is that of national solidarity between member states. This chapter will also explore four areas of solidarity which include fiscal solidarity (willingness to support the indebted European countries financially), solidarity in the area of energy creation and supply, refugee solidarity, and finally solidarity in the area of common foreign

[125] Andrea Sangiovanni, `Solidarity in the European Union', (2013), Oxford Journal of Legal Studies, pp1-29, 5.
[126] Irina Ciornei and Malcolm G. Ross, `Solidarity in Europe: From Crisis to Policy', Acta Polit 56, 209-2019 (2020).
[127] Christiane Heimann and Others, `Challenging the Nation-State from Within: The Emergence of the Transmunicipal Solidarity in the Course of the EU Refugee Controversy'.

and security policy. It will discuss the relevant treaty provisions which allow for fiscal solidarity, it will also examine some of the actions and policies of the member states to ascertain if they are done in a spirit of solidarity. In addition, it will highlight common challenges to solidarity and touch upon some of the measures taken to deal with these problems.

This analysis will be done in order to highlight some of the issues plaguing solidarity in the EU and help move one step closer to answering the question of this thesis on whether solidarity should be considered a foundational principle which can be given legal effect or should merely be treated as a non-binding moral value.

3.2 FISCAL SOLIDARITY WITHIN THE UNION

Concerning fiscal solidarity, this can be inferred from Article 3(3) of the TEU which provide that it shall be the job of the Union to create an internal market, and to promote economic, social and territorial cohesion, and solidarity among member states.[128] Over the years, these have mostly been covered by the structural funds and cohesion funds, in which the Union redistributes funds to its economically weakest members. This is evidenced in the European Commission report which revealed that Economic, Social and territorial cohesion took up about 34 percent of the EU budget between 2014 and 2020.[129] Nevertheless, there have been other instances of fiscal solidarity between member states which have not proceeded without some amount of friction and problems. For example, the global financial crisis (GFC) which hit

[128] Treaty on European Union, Article 3(3).
[129] European Commission. 2018. EU Budget 2014-2020. https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/funding-programmes_en accessed 3rd December 2020.

many nations in the world in the late 2000s also seriously affected many member states. The GFC was caused by the then financial system which filled with several incentives for important personnel in financial institutions such as insurance companies, banks, hedge and equity funds etc. to take disproportionate and excessive risks when the markets was profitable.

For instance, the growth of mortgage securitization provided fee incomes to a chain of participants ranging from the banks and mortgage brokers who sold the loans, to the investment bankers who packaged the loans into securities, to the banks and specialist institutions who serviced the securities and lastly the ratings agencies who provided their seal of approval to the transaction. Because the fees did not have to be returned even if the securities suffered major losses later on, all the participants had strong incentives to increase the flow of loans through the system whether or not they were sound.[130] These coupled with light regulations on commercial banks and even lighter regulations of hedge and private equity funds, and government expenses contributed to the economic collapse which also contributed to the European sovereign debt crisis where several member states were unable to repay their loans.[131] Some of the member states in the Union most affected by it included Greece, Spain, and Ireland etc. focusing on Greece, it was revealed in 2009 that its government had seriously underreported its budget deficit, an act which was in violation of EU policy. This rise in sovereign debt and the risk of defaults reduced the trust lenders had in these countries, thereby making them require higher interest rates. This consequently made it more difficult for these countries to finance their deficit, and by the end of 2010 the

[130] James Crotty, Structural causes of the global financial crisis: a critical assessment of the `new financial architecture', *Cambridge Journal of Economics*, Volume 33, Issue 4, July 2009, pp 563-580, section 2. See also Valerie De Bruyckere and Others, `Bank/Sovereign Risk Spillovers in the European debt Crisis', Journal of Banking & Finance, Vol 37, issue 12, December 2013, pp 4793-4809.
[131] Ibid.

sovereign debt of Greece, Portugal, and Ireland had been reduced to junk status by international credit rating agencies.

This led to several member states voting to create the European Financial Stability Facility (EFSF) to provide assistance to the member states affected by the crisis.[132] Bailout assistance measures which were introduced in these member states with the intention of boosting the economy and providing financial stability. For example the socialist PASOK government of Greece negotiated a very large loan of a 110 billion Euros of which Germany provided the largest sum of 22 billion.[133] However, these bailouts did not come alone but were accompanied by conditions of implementing austerity measures such as cancelling all non-essential government funded projects in order to decrease government spending, and also the introduction of higher taxes. One could argue that these steps taken by the member states and the loans provided show a high level of solidarity between member states. However, these were not received very well by the citizens of the debtor countries, as the austerity measures resulted in public protests and riots. In Portugal and Greece, the public sphere was paralyzed public protests and general strikes because of the austerity measures implemented in public sector employment.[134] This was reciprocated in some donor countries which responded with less solidarity. For example the Slovakian parliament in 2011 refused to increase the countries guarantees for the EFSF,[135] and Finland also followed suit by making

[132] https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stability-facility-efsf_en#:~:text=The%20European%20Financial%20Stability%20Facility,debt%20instruments%20on%20capital%20markets. Accessed 3rd December 2020.

[133] https://www.cfr.org/timeline/greeces-debt-crisis-timeline#:~:text=Finance%20ministers%20approve%20a%20second,to%20120.5%20percent%20by%202020. Accessed 3rd December 2020.

[134] Rudig and others, `Who protests in Greece? Mass opposition to austerity', British Journal of Political Science, 44(3).pp487-513.

[135] Nicholas Kulish and Stephen Castle, Slovakia Rejects Euro Bailout, The New York Times 11th October 2011. https://www.nytimes.com/2011/10/12/world/europe/slovak-leader-vows-to-resign-if-bailout-vote-fails.html accessed 4th December 2020.

public announcements that its solidarity with the affected member states would be subject to certain extra conditions. These conditions included receiving collateral from Spain and Greece worth 770 million Euros and 900 million Euros respectively for its share in the bailouts provided.[136]

The conditions which came with the bailouts and the responses to them indicated that there were different expectations and demands between the donors and recipients which placed further strains on cooperation and solidarity in this area. Nevertheless, it could be argued that this does not negate solidarity on the part of the donor states, as they were willing to come to the aid of their fellow member states which is a sign of solidarity regardless of the austerity and collateral negotiations which came with them. This is because the austerity measures were not included in bad faith but were put in place to establish fiscal policies which would ensure that affected member states would be able to repay the loans received. In addition another argument which could be made for the donor states (Finland in particular) is that although they have a duty to act in solidarity with other member states, they also have a duty to their national constituencies which elected them. Therefore, they also have a duty to ensure that if they are to use taxpayers money to finance loans to other member states, such loans should be secured in some way and to a certain extent. On the side of the receiving member states, it could be argued that the measures imposed were too draconian as they included cuts to important government expenditures such as old-age pensions, healthcare,

[136] Speigel Interview with Finland's Finance Minister Jutta Urpilainen on 24th July 2012. https://www.spiegel.de/international/europe/finnish-finance-minister-defends-debt-agreements-with-spain-and-greece-a-846096.html accessed 4th December 2020.

and included other things such as loss of state control of certain public bodies which would have to report directly to the creditors.[137]

Another situation which required economic solidarity between member states was created due to the Covid19 pandemic which affected most of the world in 2020. At the onset of the pandemic it soon became very clear that in addition for the massive number of deaths, there would also be a significant impact to the economy due to the lockdown and social distance measures put in place. The first calls for help and solidarity came from the southern member states and France which were more badly affected than the others. However, these calls were not met with a serious enough response from other less affected member states who were still preoccupied with other internal matters until late March to early April when everyone was then affected and it became a general concern. The issue which arose was how member states were supposed to handle the crisis. There was a division between the northern and southern member states in terms of their proposals for dealing with the crisis. France, Spain, Italy, and Portugal proposed high risk pooling policies such as the creation of `Coronabonds' to deal with the problems whereas Austria, Denmark, Sweden, and the Netherlands which were tagged as the `Frugal Four' with the support of Finland and eastern member states opposed these proposals.

They instead proposed using already existing crisis resolution mechanisms and the use of conditional loans to affected countries, as this would in their opinion favor national responsibility instead of the southern proposal of debt mutualisation which would not. The divide grew larger with lots of antagonistic statements being made from both sides. This back

[137] See the work of the former Greek minister of finance Yanis Varoufakis especially chapter 2 for a more in-depth analysis of the conditional measures. Yanis Varoufakis, Adults in the Room. My Battle with Europe's Deep Establishment, (London: The Bodley Head, 2017).

and forth between both sides was exemplified in the heated exchange between Wopke Hoekstra the Dutch finance minister and the Portuguese Prime minister Antonio Costa. The Dutch finance minister called for a Commission audit of the member states which claimed that they had no budgetary margin to handle the crisis even though the Eurozone had experienced growth within recent years, and the Portuguese prime minister responded by calling the statement repugnant and senseless "That statement is repugnant in the framework of the European Union, and that is exactly the right expression for it repugnant. No one has any more time to listen to Dutch finance ministers as we did in 2008, 2009, 20010 etc".[138]

After this initial stage of intense disagreements and hostility, both groups slowly began to tone down their remarks about each other and further negotiations were made in order to find a workable solution. The decided factor was when Germany which had maintained a conciliatory position towards both sides tilted towards the position of the southern states when Merkel together with Macron proposed the Franco-German plan which was in favor of resource pooling. After intense council meetings in July, an agreement was reached to create the Next Generation EU (NGEU) fund which would provide economic assistance to aid the recovery of the member states. This solution provided a compromise for both sides, as it was not as ambitious as the southern states had proposed, but was overall a pro risk pulling solution as it allowed the Commission to borrow about 750 billion Euros on the capital market

[138] Hans Von Der Burchard and others, `Dutch try to calm north-south economic storm over coronavirus', https://www.politico.eu/article/netherlands-try-to-calm-storm-over-repugnant-finance-ministers-comments/ accessed 7th of December 2020.

between that time and 2026 in order to provide financial recovery packages to member states.[139]

Some scholars have pointed out that the Covid19 pandemic seems to have vindicated those concerned about exceptionalism which holds that the Union has the tendency to advance extraordinary measures in the name of crisis response.[140] This was due to the lack of timely response to Italy's request for assistance which allowed for the escalation of a serious health concern into a political crisis. Individual member state reactions to the virus led to a loss of personal liberties while at the Union level, disagreements on proposals to share fiscal risks in the euro zone led to another crisis in solidarity. Having said this, although the initial actions of the member states were not ideal, the overall steps taken are still commendable and indicate an improvement in the level of solidarity in this area. As they were able to cooperate and work through serious differences in fiscal policies in order to reach a solution which involved pooling funds together instead of the using previous mechanisms which involved loans with conditions.

3.3 SOLIDARITY IN THE AREA OF ENERGY CREATION AND SUPPLY

Solidarity has also played a key role in the European energy community. It has been enshrined in Article 194 of the TFEU provides that Union policy on energy shall aim, in a spirit of solidarity

[139] Recovery Plan for Europe, https://ec.europa.eu/info/strategy/recovery-plan-europe_en accessed 7th of December 2020.

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[140] Jonathan White, Politics of the Last Resort: Governing by Emergency in the European Union, (Oxford University Press, 2019) chapter 2.

to ensure the functioning of the energy market, the security of energy supply, promote energy efficiency and the interconnection of energy networks.[141] Although Article 194 provides for solidarity in this area, there have still been issues of lack of solidarity and cooperation. This is due to national energy independence where states sometimes pursue incompatible national energy programs which often leads to them making certain strategic decisions concerning some aspects of national energy policy on a unilateral basis without the consultation of neighboring states, which is against the spirit of solidarity. Another point of contention is that the treaty provision does not provide a clear definition of what solidarity in this field entails, but merely states that certain things are to be achieved in a spirit of solidarity. This has resulted in different member states taking different positions on what solidarity should or should not entail in relation to energy. Hence, they choose national interests over the collective approach, and even favor international cooperation outside of Union structures (e.g. with Russia) on issues of security of supply, without thinking that they are not acting in the spirit of solidarity.

For example, in 2016 some central and eastern member states called on other member states to show solidarity in opposition to the Nord Stream II project which would add a second pipeline to the already existing Nord Stream pipelines and end up shipping double the amount of gas directly from Russia to Germany, thereby bypassing the affected states. This would consequently create a loss of transport fees for those member states (Ukraine, Slovakia, Czech Republic, Belarus, and Poland).[142] Despite this, Germany still continued with the project and it was only placed on hold in 2019 due to fears over economic sanctions from the USA.

[141] Article 194 TFEU.
[142] EU Leaders sign letter objecting to Nord Stream II, https://www.reuters.com/article/uk-eu-energy-nordstream-idUKKCN0WI1YV accessed 11th January 2021.

These relationships with Russian gas companies have at other times led to instances where solidarity could have been shown, as from 2006 to 2009 Russia had on more than occasion cutoff gas networks passing through Ukraine due to conflicts between Gazprom a Russian company and the Ukrainian gas company Naftogaz over increases in gas prices which Gazprom intended to raise.[143] At that time about 70% of the gas sent into the Union by Russia went through Ukraine. Hence, this decision to cutoff supply affected other member states such as Austria, Slovakia, Slovenia, Romania, Hungary and several others which imported gas via Ukraine. Several industries in these countries shut down, many homes went without heating and the overall economies of these countries were negatively affected. These energy crises brought the lack of solidarity in this area to light and also exposed the vulnerabilities of several member states and their over reliance on Russian gas. It also highlighted the deficiencies of the Union and member states in providing a timely response to the problem considering that the overall amount of gas in the EU, especially in storage was sufficient to address the issue.[144]

In addition to the lack of solidarity between member states, EU institutions (the Commission in particular) have also being guilty of making decisions that do not foster solidarity. An example of this was in the Ostee-Pipeline-Anbindungs-Leitung (Opal) pipeline decision. This was a pipeline which links the Nord Stream I pipeline to Eastern Europe through an interconnection at the border of Germany and Czech Republic. The Commission approved of Germany's regulatory authority's decision to grant Gazprom monopoly of use over this pipeline.[145] In response to this, Poland brought an action against the Commission before the

[143] Sami Andoura and Jacques Delors, `Energy Solidarity in Europe: From Independence to Interdependence', (2013) Notre Europe – Institut Jacques Delors, p34.
[144] Ibid.
[145] European Commission Decision C(2016) 6950.

General court, and it was joined by Latvia and Lithuania. The applicants argued that the Commission's approval was in breach of Union law, and that the increase in volume of gas that would be imported would have a negative impact on their energy security and could derail the Union's attempts to diversify gas imports, as it would lead to a decrease in the use of other transit routes. It also argued that this was in violation of Article 194 TFEU which provides that the Union's energy policy should be carried out in the spirit of solidarity. The general court ruled in favor of the applicants and annulled the Commission's decision holding that it had not complied with the principle of solidarity (energy solidarity to be specific), as it had not taken into account the effects it would have on Poland's energy security.

This was an important decision by the General Court, as up until that time the principle of solidarity had not been deemed to have legal effect in this area. In addition, it also indicated the court is capable of giving decisions which are aimed at improving solidarity and meeting other Union goals, such as the diversification of gas imports in this area. Nevertheless, the decision of the General Court was not accepted by Germany which has made an appeal to the Court of Justice arguing among other things that the term energy solidarity is an abstract and indeterminable concept which should not possess legal effect.[146] This has also been pointed out by Dirk Buschle and Kim Talus who argue that the ambiguity of the interpretation of `Energy Solidarity' in the Courts judgment could create problems in terms of identifying the scope of interests of each member state in such solidarity tests in the future.[147] What can be taken from these incidences is that in the area of energy production and supply, there does not appear to be sufficient cooperation and consideration among member states for the

[146] Case T-883/16 *Poland v Commission* [2019].
[147] Dirk Buschle and Kim Talus, `One for All and All for One? The General Court Ruling in the OPAL Case' (2019) 17(5) OGEL 9.

consequences of their policies on each other, as expediencies and individual profits are sometimes placed first. Another issue is that the Commission has sometimes made decisions which are not conducive for the fostering of the spirit of solidarity. Finally, it would be very important for the Court of Justice to decide on appeal whether energy solidarity falls under the spirit of solidarity in Article 194, and what these terms mean and involve in terms of guiding the energy policies to be pursued by member states (The decision of the CJEU on appeal is discussed in chapter 6 on pages 188-192).

3.4 SOLIDARITY IN THE COMMON SECURITY AND DEFENSE POLICY AREA.

The next area of member state solidarity is that of common defense and security. The area of common defense and security has always been of great importance to the Union, and even stretches back to the aftermath of the Second World War before the creation of the European Coal and Steel Community (ECSC). After World War II and the soviet invasion of Eastern Europe, the UK, France and the Benelux states fearing a soviet invasion made the Brussels treaty which provided that if any of the signatories were to be the victims of an armed attack in Europe, then the other parties to the treaty had to provide military support to the attacked party.[148] However, this was later superseded by the formation of North Atlantic Treaty Organization (NATO) which provided an integrated military structure and the inclusion of nuclear escalation as a deterrence to the soviets. With the formation of the ECSC in 1952, the beginnings of the formation of a common defense and security policy started to appear. In

[148] Article IV Brussels treaty, https://www.cvce.eu/en/obj/the_brussels_treaty_17_march_1948-en-3467de5e-9802-4b65-8076-778bc7d164d3.html accessed 13th January 2021.

1954 the western European Union (WEU) was created after the 1948 treaty of Brussels was amended.

It incorporated the mutual defense clause from the treaty of Brussels and remained active but took on a lesser to NATO and its mutual defense clause was not activated despite armed aggression directed at some of its members such as the UK by Argentina in the Falklands war, and during France's Algerian war.[149] Seeking greater European integration, European leaders sought the establishment of the EU through the Maastricht treaty which included a Common Foreign and Security policy. However, ratification was delayed due the Danish population voting against it in a referendum, as the treaty provided that it should be ratified through the constitutional processes present in the contracting states, and in the case of Denmark this included a referendum. In order to ensure that the treaty was ratified in a subsequent referendum, concessions were made which included four exceptions for Denmark. One of these was an opt-out from European security and defense cooperation which still applies till present, as Denmark does not participate in decisions or actions of the Union which involves common defensive measures to be implemented.[150]During the Kosovo crisis in 1998, the then British Prime Minister Tony Blair proposed at the Franco-British summit at St Malo in December 1998 to increase of the EU's military capacity and the creation of a joint military force for autonomous actions when NATO was not involved. Consequently, the 1999 European council in Helsinki green-lit the formation of an EU military force of about 60,000 soldiers by 2003. Since then, the EU has only conducted two operations, one which was it

[149] Hartwig Hummel, `The meaning of solidarity in Europe's Common Security and Defense Policy', p.4 https://www.researchgate.net/publication/314246452_The_Meaning_of_Solidarity_in_Europe's_Common_Security_and_Defence_Policy accessed 13th January 2021.
[150] Ibid.

taking over the peace keeping mission from NATO in Bosnia-Herzegovina, and the operation Concordia in Macedonia.

The academic debate on the scope of the CSDP has generally centered around two positions. The first of which is constructivism which asserts that identities are the most significant factor in terms of making decisions and policies. As the standards of acceptable conduct and behavior in any group will inevitably influence or predispose the elites of that group to make choose some policies over others. Hence the historic experiences which formed these countries would dictate what behaviors are normative in regards to defense and would inevitably contribute significantly to the types of defense policies adopted by these nations.[151] Although these differences pose a stumbling block to an integrated EU security and defense, the constructivists see the creation of the CSDP as a step in the right direction towards the eventual convergence of the differing national norms and the creation of a CSDP at the Union level instead of the mostly intergovernmental format currently in place.

The other position is Neorealism which proposes that policy choices of defense of a nation are shaped by the balance of power or the balance of threat. Hence perceived threats or shifts in the balance of power serve as a motivation for a convergence of defense policies in European nations (e.g. the threat of the Soviet Union induced the formation of NATO, while the balance of power is now gradually creating a move away from the USA and NATO).[152] Neorealism therefore argues that within the context of an international system which resembles individuals in a state of nature, states will prioritize their economic and military

[151] For more on constructivism see, Paul Cornish and Geoffrey Edwards, `Beyond the EU/NATO Dichotomy', International Affairs, Vol.77, No.3 (2001), pp.587-603. Bastien Giegerich, European Security and Strategic Culture (Baden:Nomos, 2006). Frederic Merand et al. `Governance and State Power: A Network Analysis of European Security' Journal of Common Market Studies (2011), pp.121-147.
[152] See Tom Dyson, `Balancing threat, Not Capabilities: European Defense Cooperation as Reformed Bandwagoning', Contemporary Security Policy Vol.34, No.2 (2013), pp.387-91.

interests. Therefore, they would be very hesitant in surrendering their sovereignty in the area of security and defense due to the possibility of abandonment by other states within the alliance. As a result of these issues, this position does not have an optimistic view about the achievement of and integrated defense and security policy. However, it could be argued that although these theories do provide a good understanding of the motivations which drive policy decisions in this area, it is likely not a case of the existence of one to the exclusion of the other. For just as historic experiences can shape defense policies (e.g. the Pleven Plan which the French General Commissioner proposed due to fears over German Rearmament),[153] geo-political events also shape such policies.

Some of the obstacles to solidarity in this area includes ambiguity and some of the concessions made by the treaty of Lisbon. For example, Article 42(7) TEU includes the mutual security clause in the event of an armed aggression against a member state. However, what this actually involves in practice was not clarified, as the CSDP activities thus far have been limited to crisis management and peace keeping missions.[154] In addition, although Article 42(2) TEU allows for the progressive formation of a common EU defense policy, it also includes concessions to the member states, as it states that the specific character of the security and defense policy of certain member states are to be fully respected. It particularly referred to those member states who have their common defense realized through NATO and stated that the policy of the Union in this regard would not prejudice such commitments. This therefore grants primacy to NATO obligations over those of the CSDP.[155] Furthermore, Article 42(6) also adds to the problem by creating multiple layers of commitments and structure

[153]The Organization of Post-War Defense in Europe. https://www.cvce.eu/en/education/unit-content/-/unit/803b2430-7d1c-4e7b-9101-47415702fc8e/29a4e81c-c7b6-4622-915e-3b09649747b8 accessed 22nd January 2021.
[154] `The Meaning of Solidarity in Europe's Common Security and Defense Policy',p8
[155] Article 42(2) Treaty on the European Union.

within the CSDP, thereby undermining the meaning of "Common" in the CSDP. It states "that member states who are of a high military capability and have made binding agreements with each other in this area with a view to the most demanding missions shall establish a permanent structured cooperation within the Union Framework". [156] This creates the possibility of those smaller groups of member states in this area evolving into a defense association capable of surviving outside the Union structure with its own rules of conduct and institutions.[157]

With the Lisbon treaty not interfering with national prerogatives in military and defense planning, EU law focuses more on defense industries and procurement for the CSDP. Even on this issue, member states are still resistant to surrendering any decision making power to Union institutions, even though there have been several EU procurement initiatives.[158] Member states defense procurement is a complicated system, as there are many criteria (e.g. effectiveness of weapons of a certain defense contractor) and legal requirements regarding the making and publication of such defense contracts, and defense usually takes up a significant portion of member states budgets for expenditure. Due to these circumstances, member states are unwilling to cede decision making power in this area despite it being within the scope of EU law regarding the prohibition of barriers to free movement in the internal market. The area of national defense procurement has been harmonized by the Directive 2009/81/EC and Directive 2009/43/EC which means that defense procurement contracts with cross-border interests have to comply with EU law, but member states still opt for protectionist measures in regards to their national defense industries, and have found a legal

[156] Article 42(6) Treaty on the European Union.
[157] Theodore Konstadinides, `Now and Then: Fischer's Core Europe in the Aftermath of the Collapse of the Defense 2003 Constitutional Talks', Vol.11, No.1, Irish Journal of European Law (2004),p.117.
[158] See Badouin Heuninckx, `Towards a Coherent European Defense Procurement Regime? European Defense Agency and European Commission Initiatives', Public Procurement Law Review, (2008) Vol.17, No.1, pp.1-20

basis for doing this. They rely on the exceptions provided by Article 346 TFEU which state that no member state will be obliged to provide information which if disclosed would be contrary to its security interests,[159] and that any member state can take such measures it deems necessary for its security in relation to the production or trade of arms, munitions, but that such measures should not negatively affect the conditions of competition in the internal market for products which are not specifically intended for military purposes.[160]

These provisions are not particularly clear on what certain terms mean which has allowed the member states to be able to justify their policies under these terms. For example what criteria would be used to decide what measures are "necessary" for the protection of the essential interests of security? And when will products be deemed not to be intended for military purposes, and when will they be? The courts have tried to clarify some of these issues in the treaties over the course of time. For example, in the case of *Agusta*, Italy tried to argue that the exemption could be applied in cases (in this case the equipment was a helicopter) where despite the civilian use of the equipment, it could also be used for military purposes. The Court rejected this view and held that Article 346 TFEU required that the subject of the contract be designed specifically for military use, which was not so in this case.[161]

Another important case was that of *InsTiim*i.[162] The case involved the Finnish Defense Forces inviting four companies to submit tenders for the supply of tiltable turntable equipment. The contract was awarded to one of the companies pursuant to a negotiated procedure which did not satisfy the stipulations of Directive 2004/18. InsTiimi which was one of the companies that wasn't granted the contract filed a suit in court. In the court of first instance the case was

[159] Article 346(1)(a) Treaty on the Functioning of the European Union.
[160] Article 346(1)(b) Treaty on the Functioning of the European Union.
[161] Case C-337/05, *Commission v Italy* [2008] ECR I-02173.
[162] Case C-615/10 *Insinooritoimisto InsTiimi* [2012] 00000.

dismissed, as the court held that equipment was suited for military purposes and that that was the reason for its procurement by the authorities. An appeal was made to the Supreme Administrative Court where InsTiimi argued that the equipment was a technological innovation from the civilian sector and could be used in both sectors, and was thus not primarily suited for military purposes. Therefore the Finnish Defense Authorities could not exclude the scope of Directive 2004/18 based on the protecting the essential interests of their security. The Court decided to make a preliminary reference to the CJEU concerning the interpretation of Article 10 of Directive 2004/18, Article 346(1)(b) TFEU

The CJEU referred to the need to respect the general principle that exceptions from Union public procurement rules should be interpreted strictly. It held that although member states do have a right to implement such necessary measures for their national security, the area of procurement of military equipment was still covered by Union law. Therefore it was possible for protectionist measures for defense contracts taken by member states to be in violation of conditions for competition in the common market if the equipment's are not specifically intended for military use.[163] The CJEU's decision in this case was in agreement with the Advocate general's opinion which went into extensive detail on the qualifications and criteria that needs to be met in order for the exception to be applied.[164] The Advocate general pointed out that both conditions set out in Article 346(1)(b) must be met. Concerning the first which is that the contract must be related to arms munitions and war material, a restrictive approach was applied which limited such war materials to the categories listed in the 1958

[163] Ibid.

[164] See Agnieska Chwialkowska and Jerzy Masztalerz, `Defense Procurement: The ECJ Keeps its Ground on "Dual use" Products: Case C-615/10, *Insinooritoimisto InsTiimi Oy*, Judgment of the Court (4th Chamber) 7th June 2012, *European Procurement & Public Private Partnership Law Review*, Vol.7, No.4 (2012), pp.289-292.

list and must also be intended for specific military purposes.[165] In deciding whether they are for military purposes, the product should be designed both objectively and subjectively. The military nature of the product should result from its intended use by the contracting authority (Subjective) and the products specific design and characteristics (objective). Hence products designed for civilian purposes but later modified and adapted for military purposes would in principle not fall under the exception unless the modification has provided it with objective characteristics which make it specifically usable for military purposes and different from its civilian counterparts.[166] The second condition is that the derogation from Directive 2004/18 be necessary for the protection of the essential security interests of the member state, and this would have to be proven by the contracting authorities before the national courts.[167]

Another step in the right direction is the institutionalization of the European defense Agency (EDA) within the framework of the CSDP. Its role is not just merely to replicate already existing collaborative programmes, but to act as an enabler and facilitator for ministries of defenses that are willing to work on collaborative defense projects, and overall help develop capabilities that underpin the CSDP. The general rule is that public contracts are sent to the EDA which then awards them on behalf of the member states. However, it has no say over the member states' security interests and does not have the power to rely on Article 346 TFEU to derogate from EU law requirements. As such it does not really have any important powers and cannot yet be said to be a procurement coordinator, but more of a facilitator.[168]

[165] See Council Decision 255/58 of April 15 1958 which defined the list mentioned in Article 436(2) TFEU, https://data.consilium.europa.eu/doc/document/ST-14538-2008-REV-4/en/pdf accessed 7th April 2021.
[166] Case C-615/10 *Insinooritoimisto InsTiimi* [2012] , Opinion of AG Kokott, para V, https://curia.europa.eu/juris/document/document.jsf?text=&docid=118141&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13899888#Footnote8 accessed 7th April 2021.
[167] Ibid.
[168] https://europa.eu/european-union/about-eu/agencies/eda_en accessed on 18th April 2021.

Finally, it could be said that the task of achieving a high level of solidarity in the CSDP faces a lot of problems. These range from member states' attitudes towards ceding more control to EU Institutions and collaborating with each other, to the treaties actually making concessions towards these attitudes. Nevertheless, the decisions by the Court do appear to be filling in the gaps left by the treaties on important areas. For example, regarding the exception in Article 346, they to have raised the bar much higher in terms of clarification, as it has provided parameters for determining what qualifies as "necessary" and also provided examples (even hypothetical ones) of when procured equipment's can be deemed not to be intended for specific military purposes. These coupled with the Institutionalization of the EDA into the CSDP framework indicate that the level of solidarity is growing even though there is still much to be done.

3.5 SOLIDARITY IN RELATION TO REFUGEE ACCEPTANCE

Regarding solidarity in relation to the Common European Asylum System (CEAS), this area is generally covered by Article 78 TFEU which provides for the necessary components of the CEAS such as a common system of subsidiary protection, a uniform system of asylum, mechanisms for determining responsible member states etc.[169] Also, Article 80 TFEU provides that the policies of the Union set out in the chapter and their implementation are to be governed by the principle of solidarity and fair sharing of responsibilities. Despite this, solidarity and cooperation between member states in this area has not been very effective. The main regulation which governs the area of refugees and asylum seekers is the Dublin III Regulation which was issued by the Commission, and establishes the hierarchy of criteria for

[169] Article 78 Treaty on the Functioning of the European Union.

identifying the member state responsible for the examination of an asylum claim in Europe. While it takes into account things like health and family ties, the main rule is clear: the first country of entry and registration is supposed to deal with the claim.[170] However, this regulation was extremely flawed as was highlighted in the Syrian refugee crisis where more than a million refugees poured into Europe, with some 850,000 entering Greece, and some 200,000 entering Italy.[171]

The flaws were exposed when migrants refused to be fingerprinted by Greek or Italian officials, as it would destroy their chances of being able to stay in other preferred destination countries. This attitude was also reciprocated by the Greek and Italian officials who showed little to no desire to force the migrants to be registered, as it would increase the chances of them becoming another country's responsibility. More lack of solidarity was also shown when with the exception of Germany, none of the other member states triggered Article 17 of the Dublin III Regulation which allows any member state to be able to derogate from the responsibility criteria especially on humanitarian grounds, or in order to bring a family together even if the asylum application had not been lodged with it, and therefore not its responsibility.[172] In addition, the Visegrad group (Poland, Hungary, Czech Republic, Romania, and Slovakia) also refused to take in their fair share of asylum seekers, arguing that solidarity could not be made compulsory.

The case was heard in Court, and the CJEU held that solidarity as expressed in Article 80 TFEU could have legal effect once it has been adapted into concrete measures through the process

[170] Council Regulation (EU) No 604/2013 of 26 June 2013, Chapter III.
[171] https://www.unhcr.org/uk/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html accessed 18th April 2021.
[172] Council Regulation (EU) No 604/2013 of 26 June 2013, Article 17.

of adoption.[173] Due to these flaws in the Dublin III Regulation, the Commission proposed a new pact in the Asylum and Migration Management Regulation (AMMR) in September 2020 which aims to solve some of the Problems of Dublin III. In relation to solidarity, it will provide for compulsory solidarity and fair sharing of responsibilities among the member states which is in line with the CJEU's previous decision in the case of *Slovak Republic and Hungary v Council of European Union*. Other proposals were also made which would also cover other issues such as rescue operations by private vessels,[174] a crisis and force majeure regulation,[175] border screening regulations,[176] etc.

The compulsory solidarity mechanism will only be used in times of pressure or expected pressure, and it will be the job of the Commission to decide this. If it decides that such a situation is present, then action would be divided into four stages namely trigger, assessment of needs, response, and confirmation. As the names of the stages imply, in such an event, the Commission would trigger the solidarity mechanism, which would then be followed by an assessment of the needs of the member states which will be made by the Commission. The next stage would involve each member state submitting a solidarity response plan which would include the measures it intends to take. The choice of measures is optional, but participation is required. The final stage would then be the Commission confirming the measures taken by the member state.

[173] Joined cases C-643/15 and C-647/15, Slovak Republic & Hungary v Council of the European Union, Court of Justice of the European, 6th September 2017.
[174] https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32020H1365 accessed 22nd May 2021.
[175] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295614020&uri=COM:2020:613:FIN accessed 22nd May 2021.
[176] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601291190831&uri=COM:2020:612:FIN accessed 22nd May 2021.

Now, it should be said that despite the non-compliance by the Visegrad group, many other member states did take in refugees in order to alleviate the burden on the member states at the external border during the crisis in 2015/2016. In addition, during the Russian invasion of Ukraine in February 2022, there was once again a refugee crisis as millions of Ukrainian refugees flooded into member states on the border with Ukraine. On the 4th of March 2022, the Commission activated the temporary protection directive to alleviate the pressure placed on national asylum systems and to create harmonized rights for them across the EU.[177] In addition to this, the Council adopted a legislative act to make available the sum of 3.5 million Euros to member states based on the number of refugees received from Ukraine.[178] These actions by the Commission and the Council are actions meant to promote solidarity by helping overwhelmed member states like Poland which allowed in millions of Ukrainian refugees. In addition, the ratio of distribution of Ukrainian refugees across EU member states also illustrates that member states have taken in a lot of refugees, thereby spreading out the burden of protection.[179]

Finally, having examined some of the problems of solidarity in relation to the CEAS, it could be said that despite these issues, the EU institutions (especially the CJEU with the decisions it has reached in key cases, and the Commission for being proactive in proposing new laws which could help rectify the problems) are playing a big part in creating solidarity and ensuring that free rider member states in the CEAS are made more cooperative with others.

[177] https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/
[178] https://www.consilium.europa.eu/en/press/press-releases/2022/04/12/ukraine-increased-financing/
[179] https://www.statista.com/statistics/1312584/ukrainian-refugees-by-country/

3.6 CONCLUDING REMARKS

Finally, having examined solidarity between member states in different areas such on Common Security and Defense Policy (CSDP), Fiscal policies, refugee protection etc. It could be said that solidarity generally faces similar obstacles across the different fields albeit with some small differences. For example, in the area of fiscal solidarity had an issue of trust between the donor states and the receiving states did not really trust the national fiscal policies of the recipients. Other problems included the poor phasing of treaty provisions which do not properly define concepts and provide their scope and criteria. Thereby leaving room for member states to take different understandings of them and consequently reduce the amount of solidarity and cooperation. Also, concessions and opt outs provided by EU institutions to certain member states (for example those member states which are part of NATO, and also opt out which was provided to Denmark) especially in relation to the CSDP have also weakened cooperation in matters of defense and security. Some would argue that this creates flexibility, as it gives the member states options.

Therefore, they would not feel forced especially in a sensitive area such as defense, and this will allows for a the creation of good faith and make them more willing to cooperate in future enterprises on their own volition. The last issue plaguing solidarity and cooperation is the tendency for some member states to place self-interest and personal profit ahead of working together with other member states for the overall good of the Union. This was discussed in relation to energy creation and supply where certain member states entered into energy agreements with non-EU member states for the supply of gas, which was going to place a number of its fellow member states at an economic disadvantage, and even went contrary to EU stated goals to reduce its over reliance on Russian gas. These indicate that path to greater

solidarity is still fraught with many obstacles which could threaten the Union objective of achieving more integration in different areas. However, the actions of EU institutions especially the CJEU and the Commission in delivering critical decisions were principles are clarified (CJEU) and making proposals for amending or creating new laws (Commission) are serving to promote cooperation and solidarity which will inevitably play an important role in the European integration process.

CHAPTER 4 (SOLIDARITY IN INTERNATIONAL REFUGEE PROTECTION)

4.1 INTRODUCTION TO SOLIDARITY ON THE INTERNATIONAL STAGE

Solidarity on the international stage has had a long history beginning in the 18th century. However, a major obstacle to solidarity on the international stage is that international law has been based on the principle of sovereignty, whether in modern times with nation states or in the past centuries with empires. This means that every nation is sovereign and has the discretionary power to enter into or reject relationships with other political entities. This is very similar to Thomas Hobbes's state of nature in which every man was independent and was not subject to a higher authority, or in this case all nations are sovereign and are free legal agents interacting on the international sage without any superior authority. This problem of solidarity being hindered by national sovereignty on the international stage is similar to that of the EU, as the EU is also a coalition of nations with no central authority (although the EU does have some elements of a federation such as a central bank, a central

court in the form of the CJEU, a Parliament etc.). This provides an opportunity for an in-depth analysis, as the EU occupies a unique position in between a state and a loose confederacy of states (e.g. the UN). This chapter will detail the workings of solidarity in international law and analyses the challenges it faces and makes a comparison of this with those in the EU.

Solidarity as a principle of international law goes back to the 18th century to the works of Christian Wolff and Emer de Vattel. Wolff posits that mutual assistance is the foundation or purpose of the law of nations. He reasoned that as man is in a society and needs to help of other men in society in order that the common good may be achieved by their combined efforts, so also a nation alone is not self-sufficient and requires the help of other nations to achieve the common good. This is because the common good of all cannot be achieved except through their combined efforts, thus it could be said that there is nothing more beneficial for a nation than the cooperation of other nations.[180] Drawing from Wolff's position, Vattel considered solidarity to be a natural law which formed the very basis of the community of states, and could therefore not be abolished or altered (Jus Cogens).[181] However, he was not of the view that solidarity should be a legally enforceable principle, but that it was rather a principle that creates moral obligations. This therefore creates a few problems which are still relevant in modern times.

These are the issues of how a principle as essential as solidarity can be voluntary and unenforceable, whereas another equally essential principle of state sovereignty can be

[180] Christian Wolff, Jus Gentium Methodo Scientifica Petractratum, (1764). English Translation available at https://archive.org/details/in.ernet.dli.2015.89798/page/n15/mode/2up Accessed 5th September 2021.
[181] Emer de Vattel, Le Droit Des Gens Ou Principes De La Souverainete, (1758), Preliminaires ss.1-16, Book II, Chapter I, ss.11-20. English Translation available at https://www.academia.edu/391188/Emer_De_Vattel_and_the_Externalization_of_Sovereignty accessed 5th September.

enforceable.[182] The subsequent centuries such as the 19th and 20th century saw this issue of balancing inter-state solidarity and state sovereignty reach new heights, as the principle of state sovereignty was taken in its most lethal form and almost eclipsed the principle of solidarity. For example, in the 19th century, state sovereignty had superseded solidarity to a point where colonial powers justified their colonization with solidarity. They framed their empire building as a form of solidarity were they were helping out other nations through colonization.[183] Although in the early 20th century attempts were made to improve inter-state solidarity in the form of the league of nations, it nevertheless presented no decline in the primacy of national sovereignty but only an ascendancy, as the first part of the century saw violent competition and strife amongst the colonial powers culminating in the first and second world wars.

Although the League of Nations could not ensure a greater commitment to solidarity among the nations. It did manage the inclusion of a duty of cooperation and tutelage in covenant 22 in which there was to be a sacred trust of civilization between mandates (i.e. the empires) and the colonies which were soon to be independent. Nevertheless, the principle of mutual responsibility was not a general responsibility of the whole international community but was relevant to the extent that it was contained in specific treaties ratified between nations.[184] After the destruction and enormous loss of human lives caused by the Second World War, the international community became more interested in creating a legal framework for global cooperation and responsibility among states. This was to be accomplished in the formation

[182] R.S. J. Macdonald, `Solidarity in The Practice and Discourse of Public International Law', Pace International Law Review 8, (1996), p261.
[183] Ibid.
[184] Article 22 of The Covenant of the League of Nations, available at: https://avalon.law.yale.edu/20th_century/leagcov.asp#:~:text=ARTICLE%2022.&text=Certain%20communities%20formerly%20belonging%20to,are%20able%20to%20stand%20alone. Accessed 16th September 2021.

of the United Nations whose founding charter specifically states that its purpose is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person".[185]

In addition, article 1 chapter 1 provides some of the goals of the UN which are to (i) maintain international peace and security, (ii) to develop friendly relations among nations based on the principles of equal rights, and self-determination of peoples, (iii) to achieve international cooperation in solving problems of an economic, social, cultural, and humanitarian character, (iv) finally, to become a center for the harmonization of actions to achieve the aforementioned goals. For each one of these goals to be achieved cooperation and solidarity had to be fostered, to this end the founding charter created certain principal organs which would be responsible for this. These include the General Assembly, the Security Council, the Economic and Social Council, Trusteeship Council, the International Court of Justice (ICJ), and the Secretariat. Although the UN founding charter does provide a framework and establishment of institutions for improving cooperation amongst nations, the issue of resolving its nature still lingers. On this issue, there are a few schools of thought which propose different ideas about the nature of solidarity and what obligations it should create or not create. One school proposes that solidarity should have no extralegal obligations, which it holds arises from treaties and other legally binding agreements between states. The opposing view to this is that solidarity should create extralegal obligations especially in relation to developed nations providing assistance to developing nations or at least to not

[185] Opening section of the Charter of the United Nations available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf Accessed 16th September 2021.

interfere with the interests of other states through implementing entirely self-interested economic policies.

However, there is a third position of solidarity which proposes that solidarity is a principle that informs the entire system of international law and forms a destination to which international community is travelling towards.[186] The third position can actually be classed as a variation of the second position of solidarity creating legal obligations, because if solidarity is the direction in which the international community is travelling, that means that the international community is in a continuous process of establishing norms and treaties which will eventually lead to the legal enforcement of solidarity. This appears to be the direction in which the international community is moving in. This can be seen in the actions of states and certain UN institutions such as in the rulings of the International Court of Justice. For example, in the Barcelona Traction case in which the court in its obiter differentiated between obligations which a state owes to the international community as a whole and those owed to individual states. It stated that there are some international legal obligations which are so important by virtue of their nature that all states have an interest in their protection.[187] This was an important step by the Court as it held certain obligations (e.g. prohibition of slavery, acts of aggression, racial discrimination etc.) which if breached could jeopardize cooperation, good faith and the overall existence of the international community to be intrinsically important. The ICJ in this decision has shown a willingness to address actions which could threaten the existence of the international community. Despite this willingness by the ICJ to

[186] See Milan Bulajic, Principles of International Development Law, (1986), p.236, Paul de Waart, The Right to Development: Utopian or Real?, In Restructuring The International Economic Order: The Role of Law And Lawyers, p.99, Pieter Verloren Van Themaat, The Changing Structure of International Economic Law, (1981), p.194.

[187] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, International Court of Justice (ICJ), 24, July 1964. Available at https://www.icj-cij.org/en/case/50/judgments accessed 21st October 2021.

address such issues, there are still a lot of areas in which there have been breaches of international law and general lack of cooperation. The subsequent paragraphs will seek to analyze some of such areas to ascertain if the measures of enforcement have increased the level of state solidarity and cooperation.

4.2 SOLIDARITY IN THE AREA OF REFUGEE PROTECTION

The first area is that of refugee protection and it is one where there has been compliance at certain times and non-compliance at other times and is marked by a general lack of cooperation and breaches of treaty obligations. This area of international law is regulated by the 1951 refugee convention and its 1967 protocol which defines a refugee and establishes rules relating to their acceptance and protection. This convention places certain limitations to state sovereignty in the form of deciding who may enter and remain within their territories. Consequently, various states have not always acted in accordance with these stipulations leading to humanitarian crisis in many parts of the world. Beginning with the principle of non-refoulement which prohibits states from removing persons from their territories back to countries where they are at risk of persecution and other human rights violations. Now for this duty to become effective, the refugee first has to be within the territory of the state. In order to circumvent this, certain states (mostly first world states) have implemented measures to make sure that the refugees do not reach their territories. Some of these measures include using naval ships to intercept refugee boats and return them back to their states of origin. For example, the US coast guard was used to intercept Haitian refugees at sea, the asylees were put onto the US ships and the boats which they were travelling in were

destroyed. They were then transported back to Haiti where they were at risk of human rights violations and this was not condemned by the Supreme Court.[188]

A different tactic albeit with the same result was used by France in declaring certain parts of its airport to be "International zones" which should be free from both domestic and international law, and from whence it could detain and return asylees.[189] The principle of non-refoulement has also been violated when the asylees have managed to enter the territory of a state and have been granted protection. This can be seen in the actions of the German government towards refugees from Bosnia and Herzegovina in the 90s during the war in Yugoslavia. Germany took in about 350,000 Bosnian refugees and gave them protection as temporary guests.[190] Once the 1995 Dayton Peace accords were signed, Germany announced a few months later that it would begin the repatriation of the Bosnian refugees but halted its plans temporarily due to unsafe conditions. However, after the elections were concluded in Bosnia, the plans for repatriations were once again put into effect. This was done despite the fact that it was still unsafe for a lot of the refugees to return home, as evidences at the time which included a report from the NATO- led peace forces showed that the situation on ground was still volatile, as houses which refugees could return to were being blown up by mines and destroyed with fire in order to prevent them from being used by the returning refugees.[191] Despite these threats to the Bosnian refugees, the German government still proceeded with the repatriation, and by 1998 250,000 of the 350,000 refugees had left Germany. However,

[188] Sale v Haitian Centers Council, Inc, 509 U.S. 155 (1993). See also Guy S. Goodwin-Gill, The Haitian Refoulement case: A comment, 6 Int'l J. REFUGEE I, 103 (1994).
[189] The decision of the ECTHR in Amuur v France where the court held that the so-called international zones did not have extraterritorial status. Therefore, France's denial of humanitarian, legal and social assistance to the asylees in this designated zone amounted to a violation of Art 5(1)(f) of the ECHR.
[190] Germany to Begin Returning Bosnians, Refugee Reports, September.30, 1996, p.13. Can also find information at https://migration.ucdavis.edu/mn/more.php?id=1077 accessed 21st October 2021.
[191] Ibid.

many of them still fearing for their safety back home fled to other countries such as The USA and Canada.

4.3 VIOLATIONS BY DEVELOPING NATIONS

The above examples of violations are not limited to developed nations, as there have also been violations by developing nations. Unlike first world nations which possess more financial might and modern technologies for border control which enable them to indirectly prevent refugees from reaching their territories, developing countries have found more direct ways of stopping refugees from entering into their territory. For example, during the Liberian civil war, many African countries directly closed their borders after receiving a certain number of refugees. These included Sierra Leone, Ghana, Guinee, Cote D'Ivoire, who after taking in several thousand refugees decided that they would not take any more in.[192] This situation was similar to that in south east Asia where many countries refused to accept refugees fleeing from Cambodia, Laos, and Vietnam. These were done over fears that taking in these asylees in the short term would eventually lead to long term responsibility for them. They would only later begin accepting asylees when they had obtained international commitments from other countries to resettle these refugees, and this only went on for as long as these countries kept their promise. Once they opted to stop receiving more refugees, the south Asian countries of first asylum become reluctant to offer further protection.[193]

[192] Jana Mason, `Liberian Refugee Crisis: Africa Reconsiders its Tradition of Hospitality', Refugee Rep, July 30 1996, pp.1-10.

[193] See James C Hathaway, Labelling the "Boat People": The failure of the Human Rights Mandate of The Comprehensive Plan of Action for IndoChinese Refugees, 15 Hum. RTS.Q. (1993), p.686. See also A. Bronee, The History of the Comprehensive Action Plan, 5 Int'l J. Refugee L. (1993), p.534.

Other more egregious examples were in the case of the Rwandan genocide between the Tutsi's and the Hutu tribes were about a million Tutsi's were killed. The refugees who had fled from Rwanda into neighboring states such as Zaire (currently known as Democratic Republic of the Congo) and Tanzania became victims of violence and hostility and were eventually forcefully removed. In the case of Zaire, it had originally taken in thousands of Rwandan refugees in 1994. However, the refugees were not given a positive reception by the host population who blamed the refugees for an increase in insecurity and environmental degradation. The situation continued until in 1995 Zaire began the forcible removal of thousands of refugees and stated that this would continue until there were significantly laid out plans for the return of the refugees.[194] In the case of Tanzania, in December 1996 about 500,000 Rwandan asylees were also forcible expelled under an edict which was carried out by the military, even though it was not particularly safe for them, as the animosity between the Hutu and Tutsi's had not been resolved.[195]

4.4 THE SO CALLED "RIGHT TO REMAIN"

Another strategy which states have employed is to put pressure on UN institutions to deemphasize the right to seek asylum and create a less demanding alternative to the duty to receive refugees. Under pressure from the governments which provide funding to the United Nations High Commissioner for Refugees (UNHCR), the UNHCR responded by declaring a "right to remain" which basically tries to shift the emphasis from access of refugees to safe third countries to trying to eliminate the situations which cause them to flee in the first place.

[194] Amnesty International, Rwanda and Burundi – The Return Home: Rumors and Realities, Feb 20. 1996.
[195] Tanzania and the U.N. Tell Rwandan Refugees to Go Home, N.Y. Times, Dec.6, 1996, p.15.

Now on the face it, it does present a reasonable solution, as eliminating the root causes of asylum seeking or at least creating a safe space within these countries where those fleeing from armed conflict or persecution may remain is more reasonable.[196] This is because it is reasonable to assume that people would prefer to remain in the land of their birth and a culture that is familiar to them as compared to fleeing their homes and all they have worked for in order to find safety in a foreign land. This so called right to remain is usually effected by a dominant military power which is neutral to the conflict or a coalition force creating safe zones/spaces within the nation which is at war. Now, safe spaces can be defined as specific areas within a country engulfed in armed conflict which have been designated by an agreement by parties to the armed conflict, by the UN or by a more powerful external nation wherein military forces will not deploy, carry out attacks, or make recruitments.

Despite them being labelled safe spaces, it is important to determine if these areas actually provide safety to the vulnerable civilians in them. Because if they do not, then this cannot be thought of as a viable alternative to granting asylum to refugees. First, safety would have to be explored to ascertain its true scope, as mere protection from the armed conflict may not be enough, as those fleeing could also be subjected to abuse by those securing these safe spaces. In respect to this, there are certain international laws which provide rules on how civilians are to be treated during a period of armed conflict. From these, we can glean a number of criteria that should be met in order to say that those within these safe spaces are safe. The first is International Humanitarian Law which is based on the fourth Geneva Convention which sets out rules that provide a limitation on the types of actions which can be carried out during a period of armed conflict. The Protocol 1 to the 1977 to the Geneva

[196] James C. Hathaway and R. Alexander Neve,`Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', Harvard Human Rights Journal, (1997), p.134.

Conventions provides general protections for civilians against dangers during international military conflicts and protects them from military activities in such areas where the armed conflict is present.[197]

In addition, Protocol 2 of the same convention provides a similar protection but in situations of non-international armed conflict. In a nutshell, together they both provide that civilians should not be the target of an attack.[198] This sets out the basic level of safety which is that the civilians should at least not be targeted by armed combatants. The next area of law which helps set out the criteria of safety is International Human Rights law, as a safe zone cannot be deemed to be safe if the human rights of those who seek protection there are abused. On this, there are some human rights which are absolutely foundational such as the freedom of movement, freedom from slavery, right to life, the right to be free from torture, cruel and inhuman or degrading treatment.[199] The International Covenant on Civil and Political Rights also contains similar rights but provides that states may be able to derogate from some human rights (these does not include some very important rights) in times of public emergency which threatens the life of the nation.[200]

From these international laws, a list of minimum requirements can be put forth as necessary for evaluating whether the designated safe zones are indeed safe. The first is that the civilians who take refuge in these zones should not be the target of armed aggression, and their human rights such as freedom from slavery, torture and inhuman treatment should be respected.

[197] Protocol I additional to the Geneva Convention in June 1977. Available at https://ihl-databases.icrc.org/en/ihl-treaties/api-1977
[198] Protocol II additional to the Geneva Convention in June 1977. Available at https://www.ohchr.org/en/professionalinterest/pages/protocolii.aspx accessed 9th November 2021.
[199] https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf
[200] https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx Article 4 allows for the derogation but excludes derogation from Articles 6,7,8,11,15,16 and 18.

Concerning other derogable rights such as freedom of movement, it could be said that regarding designated safe spaces, states should not be allowed to derogate from it. This is because the movement of refugees withing these safe spaces cannot be said to be a threat to the life of a nation, hence states should in theory not be able to rely on such an emergency to limit freedom of movement. Now, going through examples of designated safe zones which have been set up in past, the evidence overwhelmingly indicates that these safe zones have failed to provide the minimum level of protection which asylees should be provided with based on international humanitarian law and human rights. For example, in 1993 during the war in the former nation of Yugoslavia, the UN security council designated the city of Srebrenica to be a safe zone under resolution 819 demanding that all armed parties concerned treat the city and its surroundings as a safe zone which should be free from any armed attack.[201]

Despite this, Srebrenica continued to be shelled and attacked by Serbian forces, and the UN officials did not respond to calls for reinforcement by the UN forces which had been stationed in the enclave. Instead, the UN officials designated more areas such as Zepa, Gorazde, Sarajevo etc. as safe spaces. This lack of reinforcements by the UN officials only served to embolden the Serbian forces which embarked on a campaign of ethnic cleansing where about 7000 men and boys were killed and many other inhuman atrocities such as rape and torture were carried out against the elderly and children. It soon became clear that the designated safe zones where the most unsafe places in Bosnia.[202] All these events culminated in the fall of Srebrenica and its surroundings to Serbian forces in 1995, and by the end of the war tens

[201] United Nations Security Council Resolution 819 adopted on 16th April 1993, Available at https://digitallibrary.un.org/record/164939

[202] United States Committee for Refugees and Immigrants, World Refugee Survey 1997 – Bosnia and Herzegovina, Available at https://www.refworld.org/docid/3ae6a8b220.html.

of thousands of Bosnians had been ethnically cleansed.[203] Another similar situation was in the aftermath of the Iraqi Kurdish civil war in 1991, were hundreds of thousands of Kurds tried to flee into Turkey but many of them were turned back into northern Iraq by Turkish soldiers. The UN security council passed resolution 688 to create safe zones in which international humanitarian organizations would be able to provide aid.

Just like in the case of Srebrenica, the Kurdish safe zones did not also provide safety to those residing there. As the Turkish military continued to carry out operations into the Kurdish part of northern Iraq looking for suspected Kurdish opposition groups.[204] It claimed that rebels of the Kurdistan Workers' Party were hiding in these safe zones. These operations continued and were supplemented with an additional 35,000 soldiers and air raids in which these safe zones were bombed. This was done even though a coalition of states such as the US, UK, France etc. (This was part of the "Operation provide comfort") had declared the area a no flight zone to enable them provide support to the displaced persons. Once, the western nations laxed in their military enforcement of the no-fly zone, they were violated which resulted in the residents being killed, injured and kidnapped. Not only did Turkish forces encroach on these areas, but the Iraqi government under Saddam Hussein also did likewise with his successful invasion of the Kurdish city of Irbil where they arrested hundreds of people and summarily executed many others.[205] To make a bad situation even worse, the Iraqi government may have possibly obtained the information about what persons to arrest and execute from confiscated computers, personnel files from ransacking the offices of

[203] Ibid.
[204] UNHCR, The State of The World's Refugees: The challenge of Protection 84-85 (1993). US Committee for Refugees, World Refugee Survey 99-100 (1993).
[205]United Nations Refugee Agency, `Chronology for Kurds in Iraq', (2004). It contains Key information on the Iraqi Kurdish Civil War of the 1990's and is available at https://www.refworld.org/docid/469f38a6c.html Accessed on 10th November 2021.

humanitarian organizations and from threatening those Kurds who had worked for the US aid agencies.

Another high-profile incident of a safe zone not providing safety to displaced persons was during the Sri Lankan decades long civil war. During the closing stages of the war, most of the areas controlled by the rebels (the Liberation Tigers of Tamil Eelam) were designated as safe zones by the government and the government called civilians to take refuge in these places by dropping flyers containing the relevant information with the air force. Nevertheless, the government continued to attack these areas, and the rebels' prevented civilians from leaving for the government-controlled areas. This resulted in several thousands of civilian casualties in the rebel enclaves who died because of shelling by the Sri Lankan government.[206] This led to blame shifting from both sides, as the government denied the reports of civilian casualties and claimed that any casualties were the fault of the rebel group who prevented civilians from entering government-controlled zone and using them as human shields. The rebels denied these claims and responded by claiming that it was the fault of the government for continuing to attack these zones. Hence, they were primarily responsible for the direct deaths of the people (i.e., those who died from direct attacks) and indirectly responsible for the other deaths, illnesses, and injuries which many others suffered due to lack of medical supplies and aid which was unable to reach because of the unsafe situation.

[206] Human Rights Watch, `War on the Displaced, Sri Lankan Army and LTTE Abuses against Civilians in the Vanni', Report, 2009, Available at https://www.hrw.org/report/2009/02/19/war-displaced/sri-lankan-army-and-ltte-abuses-against-civilians-vanni . See also International Committee of the Red Cross, `Sri Lanka, Conflict in the Vanni – How Does the Law Protect in War?', Available at https://casebook.icrc.org/case-study/sri-lanka-conflict-vanni . See also United Nations News, `Sri Lanka: Growing UN concern as civilians in "safe zone" come under fire', 17th February 2009, Available at https://news.un.org/en/story/2009/02/291382

4.5 THE FAILURE OF SAFE ZONES TO PROVIDE SAFETY

Applying the minimum standards that should be met in order for the conditions in designated safe zones to be deemed to be safe, it could be said that trying to affirm the right to remain through creating safe zones has not been very successful, as the individuals who have sought refuge in these zones have been the objects of military attacks as in the cases of Srebrenica and the Kurds in northern Iraq. This on its own is a violation of one of the most fundamental tenets of the law of armed conflict in which non-combatants are not to be targets of armed attacks. However, coupled with other actions such as raiding to capture people, and limiting the access of humanitarian organizations which provide aid and the situation becomes even more dire. Now, no military conflict can be carried out without a certain amount of collateral damage.

With this reality in mind, the goal in these situations should always be to meet these basic requirements of keeping those within these zones safe from attacks and guarantee access for humanitarian aid and prevent human rights abuses. However, this has not been the case, and till present, there has not been a single case of a designated safe zone in which these minimum requirements of safety have been met. One could even argue that practically speaking, under the current international system, safe zones will never be able to meet the desired goal of providing safety. This is because of a couple of issues of international law relating to armed conflict. The first issue is that there is no binding law which guarantees a right to deliver basic amenities like food and medical supplies. Although AP1 and AP2 to the

Geneva Convention do provide a limited provision for humanitarian assistance, neither of them provides any sort of absolute right to humanitarian aid.[207]

This can be seen in AP1 which only provides that actions of humanitarian aid will be subject to the agreement of the parties concerned,[208] while AP2 provides that when a civilian population in an area of armed conflict is being subject to undue hardship, humanitarian actions should be carried out subject to the consent of the high contacting parties concerned.[209] In addition the International Committee of the Red Cross has also stated that the customary international humanitarian law which is applicable in areas of non-international armed conflict also provides a similar semi-constrained arrangement as the additional protocols to the Geneva Convention. It provides that parties to the conflict must allow access to humanitarian aid without partiality and without distinction, subject to their right of control.[210] This does not bode well for the civilians in these safe zones, as the provision of humanitarian aid to them is subject to the consent of the concerned parties.

Therefore, the states could refuse to allow such aid, and in the event that they do allow it, they could subject it to stringent and even unreasonable conditions. For example, in order to allow humanitarian aid, a concerned party may mandate that in order for it to be sure that only aid supplies (e.g. food, medicine etc.) are being transported to the safe zones, a thorough search must be conducted by its agents on all vehicles and air planes bringing supplies. In such a situation, they could legitimately dismantle a truck bringing medicines and food stuffs, even

[207] Protocol I and II additional to the Geneva Convention in 1977, available at https://www.ohchr.org/en/professionalinterest/pages/protocolii.aspx Accessed on 10th November 2021.
[208] AP1 Article 70(1).
[209] AP2 Article 18(2)
[210] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Cambridge University Press, 2005) Vol 1, Rule 55.

if it may lead to the supplies being damaged.[211] Having highlighted the problems with obtaining the consent of the parties to the armed conflict, this is not the only problem with this area. This is because in practice, humanitarian organizations wishing to deliver aid in non-international armed conflicts do not just have to deal with state actors, but also have to deal with non-state actors in the form of rebel groups and sometimes even terrorist groups who could prevent the delivery of aid and endanger the lives of the those providing the aid.

The second issue is due to the decentralized nature of the international political landscape in which there is no central political power. Consequently, UN organizations have to rely on certain nations in order to organize and maintain a peace keeping force. This leaves the creation and maintenance of these forces at the willingness of these nations which provide the troops. Besides this, the international community has been selective about the conflicts it intervenes in, especially in regions not deemed to be economically important or when the conflict involves a powerful nation. This can be seen in the civil wars of Liberia and Sierra leone, and the Russian civil war against Chechnya. In addition, when these nations initially agree to provide soldiers for such peace keeping missions, they have not been able to provide effective protection, and have at times abandoned their peace keeping duties and gone home. An example of this is that of France during the Rwandan civil war where it intervened in order to stop the flow of asylees out of the country. It did this by providing French protected camps for them. However, France ended its peace keeping mission and withdrew its soldiers

[211] Geoff Gilbert and Anna Magdalena Rusch, `Policy Brief Creating Safe Zones and Safe Corridors', Kaldor Centre for International Refugee Law 2017, pp9-10 https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_brief_Creating_safe_zones_and_safe_corridors.pdf .

in the midst of the conflict and left the country.[212] This inevitably left many asylees vulnerable and led to thousands of deaths.

Also, when certain nations provide peace keeping forces, they are not likely to be inclined to keep them in these areas of conflict for prolonged periods, as many international and domestic conflicts take years to resolve and some even last for decades. This will inevitably cost the contributing countries much in terms of finances as well as the loss of the lives of their citizen soldiers. Due to these problems, what happens in practice is that UN organizations in a lot of instances must rely on the parties to the conflict to respect designated safe zones. They usually try to negotiate an armistice between the parties in relation to those zones. However, as has been noted above, these agreements are not always respected, and are usually broken when doing so would favor one of the parties.

Considering all these deficiencies with affirming the "right to remain", it could be said that this is just another mechanism used by powerful states to avoid meeting their obligations under international law to grant asylum to asylees. This is because it is often used as an alternative to providing asylum. However, its effectiveness as a viable alternative can only be measured by its ability to compel governments and parties to armed conflicts to respect the human rights of those in these zones, and to provide adequate protection to them on site. So far, the right to remain has failed to meet these criteria as up until present, there has been no international commitment to intervene to prevent the root causes of refugee flows, which is antecedent to any legitimate exercise of the right to seek asylum. Therefore, the right to

[212] Howard Adelman & Astri Suhkre, `Early Warning and Conflict Management 56 (Joint Evaluation of Emergency Assistance to Rwanda, The International Response to Conflict and Genocide: Lessons from the Rwanda Experience', Study 2, 1996). See also `Macron asks Rwanda to forgive France over 1994 genocide role', https://www.bbc.co.uk/news/world-europe-57270099 accessed 2nd November 2021.

remain can be classed together with the other non-entre measures which states have undertaken and continue to undertake.

4.6 EXAMPLES OF COMPLIANCE WITH INTERNATIONAL REFUGEE LAW

Although states on the international stage have not always complied with international law in relation to refugee protection. This situation of non-compliance is not always the case, as defaulting states in one instance may be compliant states in other instances. For example, India accepted about 10 million refugees from East Pakistan (now Bangladesh) in 1971 during the Pakistani civil war which claimed millions of lives, and despite these large numbers which was one seventh of the east Pakistan population at the time (the population at the time was around 70 million), India did not breach the principle of non-refoulement by returning them to Pakistan. Instead, they were integrated into the Indian society.[213] The case of Malawi is also another example of a third world country doing its best to provide protection to refugees fleeing war torn zones. During the Mozambique civil war which lasted from 1977 to 1992, Malawi took in about 1.1 million refugees which amounted to 10 percent of its population at the time.[214] This significant intake put a strain on the Malawian society, but despite these difficulties it kept the refugees in its territory during the duration of the civil war.

However, the great number of refugees coupled with Malawi's poor economic situation was not conducive for the general welfare of the refugees, as many of the refugees suffered many

[213] B.S. Chimni, The Legal Condition of Refugees in India, 7 J. Refugee Stud (1994), pp.378-381.
[214] https://data.worldbank.org/indicator/SP.POP.TOTL?locations=MW Accessed 3rd November 2021.

ills such as theft of food rations, sexual abuse, etc.[215] More developed nations too have not always been non-compliant, as in the case of Germany during the Syrian refugee crisis in 2015. During this period, Germany received about 1.3 million refugee applications and took in almost a million refugees (890,000 to be precise)[216]. The immediate impact was overwhelming to German society, as there was not enough housing and social amenities to cater for them, and the financial costs of providing these things numbered in the billions (the budget allocation for asylum seekers for 2017 and 2018 stood at 21.2 billion and 20.8 billion).[217] Nevertheless these asylees were not returned to Syria, and over the following years, the integration effort by Germany has yielded positive results, as the employment rate, educational attainment, acquisition of German language skills etc. have increased amongst the migrant populations that were granted refuge in Germany.[218]

4.7 REASONS FOR NON-COMPLIANCE & SOLUTIONS TO THE PROBLEM

Having considered all this, the overall picture which emerges from state interactions with asylum laws is one of non-compliance and shifting of responsibility. Regarding these behaviors by various states, there are three schools of thought which propose reasons and solutions to these problems. Beginning with the realist position, it holds that these activities

[215] Richard Carver, Lawyers Committee for Human Rights, African Exodus: Refugee Crisis, Human Rights and The 1969 OAU Convention 3, (1995), pp.80-83.
[216] https://www.reuters.com/article/us-europe-migrants-germany-idUSKCN1201KY Accessed 15th November 2021.
[217] https://wenr.wes.org/2019/08/the-state-of-refugee-integration-in-germany-in-2019 Accessed 15th November 2021.
[218] Ibid.

such as high sea interception of refugees, setting up international zones on airports, offshore asylum procession are evidence that the legal duty to protect refugees is understood by states to not be a fairly apportioned collective responsibility and therefore not being in their best interests to always comply. The realist position argues that these activities by states are a natural and legitimate response by these states when faced with asylum pressures. The proposed underlying reason for this is that international law only matters to the extent that it creates a self-enforcing equilibrium where there are clear benefits for states to participate. Hence, the lack of an equilibrium in international refugee law would result in a return to politicking by the states, where they make references to international refugee laws not because they agree with its stipulations, but merely as a smoke screen to hide their politicking.[219] In essence, it means that when states comply with international laws, they do not do so because they have internalized these laws, or that they believe in them and have a moral obligation to comply, but they do so out of self-interest.[220]

The opposite position is the progressive one which sees international refugee law as a developing project which will result in a continuous increase in international governance and willingness of states to comply with international laws and submit to the decisions of international institutions.[221] The progressive view holds that although the 1951 convention has its shortcomings, the job of states, international institutions and lawyers should be to steadily fill up the gaps in the treaty through subsequent codification, soft law, judicial decisions and clarifications on general interpretation and best practice procedures. Examples of these include the creation of the 1967 protocol to the 1951 convention, and the gradual

[219] S.D. Krasner, `The Hole in the Whole: Sovereignty, Shared Sovereignty and International Law', Michigan Journal of International Law 25, (2004), pp.1075-1101.
[220] Jack Goldsmith and Eric Posner, The Limits of International Law, (Oxford University Press, 2005), p225.
[221] Thomas Gammeltoft-Hansen, `International Refugee Law and Refugee Policy: The Case of Deterrence Policies', Journal of Refugee Studies 27 J. (2014), p579.

acceptance of the definition to encompass gender and sexual orientation-based persecution. Nevertheless, proponents of the realist position would argue that states would not generally be inclined to do this and despite such advances, they will actually be inclined to oppose such activities when they are not in their best interest. For instance, while most states do accept the 1951 refugee convention, many still presented an opposition to further attempts at making subsequent international laws legally binding. This can be seen in the failed attempt to come to an agreement on the 1977 Draft Convention on Territorial asylum in which many states till present have refused to ratify the treaty, as they do not want to be legally bound by it.[222]

Proponents of the progressive view would still argue that this is a continuous progress and although it does move slowly, eventually most states will reach a point of mostly complying with international norms willingly. However, the opposite view would argue that international law does not really have any effect in compelling states towards certain actions. They contend that the real driving force in international law is self-interest, and states will continue to show disregard to international laws with their actions such as their deterrent measures which are meant to avoid legal responsibility for refugees, all the while giving verbal support to these conventions. Hence, the current state of dissonance between the words uttered in support of international laws and the actions of these same states will continue to be the status quo as long as these laws do not provide some sort of benefit to the states. Hence, in the current international order with no overarching authority, powerful states will continue to shirk their responsibilities and treat international norms as a sort of buffet, choosing what they like and ignoring those which they do not like.

[222] https://www.oas.org/juridico/english/sigs/a-47.html Accessed 10th December 2021.

On the other hand, the progressives could argue that this view by the realists is not entirely accurate, as opposition to certain international refugee laws through deterrent measures are not an indication that these international laws do not have a legally binding effect on these states. They posit that it actually means the opposite, that the actions of moving migration control to the high seas or foreign territories are not done because international law has no effect, but precisely because they do have legal effect. Hence these actions are an implicit acceptance that these international norms are not without effect, as why would these states resort to such complex and coordinated actions if these norms had no effect. The more sensible thing to do would be to simply refuse the intake of refugees and carry on as normal, instead of organizing navy and third-party ships to intercept refugees on the high seas. Consequently, these actions are merely designed to shift responsibility, and not to deny that a responsibility exists in the first place. This lends credibility to the progressive position, as government institutions and state representatives are compelled to present their deterrence schemes as being in line with international refugee law even though their arguments are often bogus or incorrect. At other times when their schemes have some sort of legal grounds, it is because they are taking advantage of certain gaps in the convention.

Therefore, they are trying to honor the letter of the law while simultaneously trying to circumvent its intention. This can be seen in the actions of the USA and Australia in dealing with refugees. In the case of the former, navy ships were used to intercept Haitian refugees on the high seas, while in the second, Australia forcibly moved refugees seeking asylum to the island of Nauru where they were to be processed.[223] In both cases, both states did not feel free to ignore international refugee law, but tried to argue that their actions were in line with

[223] https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/ accessed 25th January 2022.

international refugee law by arguing that the principle of non-refoulement did not apply extraterritorially, or at least it was nominally complied with in the case of Australia by their relocation of the refugees to the third state of Nauru. All these activities by non-complying states such as interception in non-territorial waters, cooperating with third states for the return and processing of refugees do come at a very high financial cost. For example, in the case of the cooperation between Italy and Libya for the interception of refugees fleeing from Libya cost the Italian Government a lot of money, as they pledged about 5 billion US Dollars for construction contracts in exchange for Libya doing the interceptions and preventions for them.[224] Similarly, it is estimated that overall annual cost to Australia for the offshore processing of refugees at Nauru which involves construction of holding facilities, and foreign aid for potential resettlement, amounts to about a billion Dollars per year.[225] This provides even more support to the progressive view that the very existence of these practices are proof that international refugee law does matter, as states would not incur so much financial expenses in order to avoid certain responsibilities if these international norms do not have some legal weight behind them.

4.8 THE THIRD POSITION & A BROADER PICTURE OF THE RELATIONSHIP BETWEEN STATES AND INTERNATIONAL LAW

A third position on this issue comes from scholars associated with the critical legal studies movement. These critical scholars emphasize that international law is a product of particular

[224] Treaty on friendship, Partnership and Cooperation between Italy and Libya, 30 August 2008, entry into force 2 March 2009. The funds were to be transferred to Libya over a 25 year period.
[225] https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/6/ (Refugee Council of Australia) accessed 25th January 2022.

social, political, and cultural interests and that creating these international norms is a continuous process of back and forth between states to ascribe political meanings and boundaries.[226] This is because there will always be a lot of compromises which goes into the creation of treaties, which will most likely result in the use of open-ended and sometimes vague words with multiple meanings which creates the gaps and loopholes which states exploit in order to shift their responsibility. They therefore see the rise in deterrent measures as a natural consequence of the nature of international law. The premise of this position is the belief that international law is inherently relative and to an extent indeterminate. This view allows for instrumentalism up to a certain point but not completely, and this instrumentalism therefore provides states with the ability to justify their political policies in legal terms.

This position contains elements of the earlier two, as it acknowledges that states will act in their own self-interest but does not go all the way in saying that international law has no binding effect. Based on this view, it could be said that the drafters of international laws should do a better job in foreseeing the different ways in which states may be able to circumvent these treaties. This is especially so in relation to the drafting of the 1951 Convention where perhaps they should have been able to foresee that at some point states would resort to going onto the high seas to carry out actions which they are prohibited to do on their territories. But those of the progressive position could argue that the critical view that international law is inherently relative and indeterminate is actually refuted by the presence of these policies. As the fact that states have to resort to exceptionalism and

[226] see B.S.Chimni, `The Geopolitics of Refugee Studies and the Practice of International Institutions: A view from the South', Journal of Refugee Studies, (1998), pp.350-374. Also see S.E. Davies, `Legitimising Rejection: International Refugee Law in Southeast Asia', (2007), C. Harvey, `Talking About Refugee Law', Journal of Refugee Studies, (1999), pp.101-134.

creative deterrent measures indicate that at least under some circumstances, international refugee law does set up some limits that these states accept as being without dispute. So, it could be said that although international law casts a wide enough net where certain political practices such as some deterrent measures could fall somewhere between the gaps, there still exists a framework which provides a limit to how far the treaties can actually be interpreted to justify such measures.[227]

From the above arguments and counter arguments to each position, it could be said that no one position provides a complete understanding of the relationship between international law and states. Nevertheless, certain points could be drawn from each of these positions in order to create a more nuanced understanding of how international law affects the behavior of states. In analyzing these positions, the picture which emerges of the effect of international law is that of simultaneously creating limits to state activities while being sufficiently vague enough or less specific to allow states to carry out activities to fall within these gaps. Therefore, international law really has an effect on states in setting frameworks on what can and cannot be done. Nonetheless, acknowledging the reality of the realist position is also necessary, as states are still motivated by self-interest. Hence industrialized nations with the finances and infrastructure when faced with the option of complying with the 1951 Convention when it does not benefit them will look for any gap in the treaty to avoid their responsibilities. But these practices should not be looked at as an indication of a diminishing regard for international law but as a sign of healthy respect to the ability of international law to impose responsibility. Although international law does impose obligations, it still leaves quite a bit of room for states to wiggle out of their responsibilities by creating clever legal

[227] Thomas Gemmeltoft-Hansen, `International Refugee Law and Refugee Policy: The Case of Deterrence Policies', Journal of Refugee Studies 27 J. (2014), p.582.

arguments to validate their deterrent measures. But these actions by these states do not just proceed without challenge, as the courts have at times played a part in reigning in these deterrent measures.

4.9 ENFORCEMENT OF OBLIGATIONS BY THE COURTS

As international law carries with it obligations just like any other form of law, it needs to be interpreted and enforced, as rules do not apply themselves.[228] This is even made more important due to the nature of international obligations being open textured which means that interpretation will often depend on things such as transnational adjudication, state practice, and general principles.[229] This situation consequently leaves some room for interpretational manoeuvre by national courts. This is similar to the margin of appreciation concept developed by the European Court of Human Rights (ECTHR) which refers to the amount of space for manoeuvre given to national authorities in fulfilling some of their obligations under the ECHR. This concession was made due to the fact that the signatories to the convention had diverse cultural and legal traditions, and they did not all face the same political and financial realities (e.g. threats to national security etc.). This margin of appreciation plays a vital role in assisting the continued growth and effectiveness of international law from the perspective of international institutions and judiciaries while at the same time providing a balanced situation by not imposing iron cast rules on the states but allowing some leeway.[230]

[228] L. Wittgenstein, Philosophical Investigations, (Oxford: Blackwell Publishing, 1953), p.201.
[229] Hart H.L.A., The Concept of Law, (Oxford: Clarendon Press, 1961), pp.121-141.
[230] Thomas Gammeltoft-Hansen, `International Refugee Law and Refugee Policy: The Case of Deterrence Policies', Journal of Refugee Studies 27 J. (2014), p.584.

This is most important especially in cases involving international refugee law where different states come from different legal traditions and do not face the same social realities. For example, not all states will be able to take in a certain number of refugees due to their financial capabilities or perhaps the political situation of the state may be unstable. Under such circumstances it would be reasonable to expect that such states may not be able to comply fully with their obligations under the 1951 Refugee Convention. It is also important in a different way, as it enables the courts to curtail certain actions of states which fall outside this margin of appreciation. Sometimes, some national courts have allowed certain deterrent measures, but in most cases some of these measures have been successfully challenged, thereby forcing these states to either abandon such policies or make adjustments to them. Such cases have included states use of third countries for the processing of refugees, excising parts of their territory (by creating so called international zones at their airports), interception of refugees on the high seas etc. On these, national courts have set limits to what can and cannot be done. The first of these cases to be discussed here is the case of *Amuur v France*.[231]

In this case, the applicants were Somali refugees who had arrived in France and stated that they had fled their country of origin due to the overthrow of the then Somali President Siyad Barre and the killing of several members of their family. They were nevertheless refused entry into French territory on the grounds that their passports had been forged. They were held at the hotel Arcade which had been leased to the ministry of the interior and was converted to a waiting area for the airport. The applicants applied for asylum to the French Office for the Protection of Refugees and Stateless Persons (OFPRA) to grant them asylum under the 1951 Geneva Convention. Their application was refused, and they were sent to Syria. The

[231] Amuur v France [1996] ECHR 25.

applicants unsuccessfully appealed this decision to the Refugee Appeals Board claiming that holding them in the international zone of an airport was in violation of Article 5 (right to Liberty) of the ECHR. The court had to consider whether the holding of refuges at these international zones or transit zones were in violation of Article 5. In determining this, it examined the circular published by the minister of the interior which stated that any alien who has been refused leave to enter and is waiting to be sent away has the right to freedom of movement within the transit zone. It also stated that when they had been refused entry, the immigration control authorities should carry out appropriate surveillance, but this surveillance should in no circumstances take the form of total isolation in a locked room. In addition to the circular, the French authorities also claimed that since the asylees could voluntarily leave the country, there could not have been a violation of Article 5.

The court acknowledged that holding asylees in international zones of airports would involve a measure of restriction of their liberty, as this was necessary to states to enable states prevent unlawful immigration while determining whether to grant asylum. Nevertheless, such confinements would only be acceptable if they were accompanied with safeguards, and concerning this particular case, such safeguards had not been met as the applicants were under strict police surveillance without access to legal aid or social assistance. Regarding the argument that there was no violation of Article 5 because the asylees could voluntarily leave the country, the court held that their ability to leave the country cannot exclude a violation of the right to liberty, therefore holding the asylees in those conditions in international zones was a violation of Article 5. This case provided an opportunity for the courts to clarify the situation regarding international zones at airports which are not considered to be part of the territory of the state in relation to granting asylum. The courts clarified that these international zones were not outside the jurisdiction of French law but were actually under

both French law and international law. Therefore, the state could be held liable for violations of international refugee law in these zones.

In addition, it should be highlighted that legal interpretation of international laws do evolve over time in relation to state policies. A very good example is the evolution of the interpretation of the geographical scope of the non-refoulment principle. Because unlike other Articles of the 1951 Geneva Convention, Article 33 of the Convention does not provide a proper limit on what location a state will become responsible for non-refoulement. Early commentaries on the convention held a strictly territorial interpretation (i.e. the asylee has to be on the nations territory), even to the point of stating that the principle of non-refoulement did not apply to those standing at, but not having crossed the physical borders of an asylum state. The was succinctly stated by Robinson as "if a refugee has succeeded in eluding the frontier guards, he is safe, if he has not, it is his dumb luck".[232] This position was initially followed by the US Supreme Court in the case of *Sale v Haitian Centers Council*.[233] In this case, executive order No.12807 signed by the then US president George Bush senior allowed the Coast Guard to intercept sea vessels illegally conveying people from Haiti to the US and return them back to Haiti without first determining whether they qualify as refugees.

The Haitian Centers Council which represented illegal Haitian aliens argued that the executive order was in violation of s243(h) of the Immigration and National Act 1952 and Article 33 of the 1951 Geneva Convention. The District court ruled against of the Haitian Council, holding that the national legislation and Article 33 did not provide protection to aliens in international waters. This decision was appealed, and the Court of appeal reversed the earlier decision,

[232] N. Robinson, `Convention relating to the Status of Refugees: its History, Contents and Interpretation – A commentary. New York: Institute for Jewish Affairs (1953)
[233] Sale v Haitian Centers Council, 509 U.S. 155 (1993).

holding that the effect of these laws was not merely limited to the USA, but they did also apply to aliens on international waters. The case finally reached the Supreme Court where it reversed the decision of the Court of Appeal. It held that neither s243(h) or Article 33 limited the President's power to authorize the Coast Guard to intercept and repatriate undocumented aliens on international waters. Regarding the domestic legislation, it held that Acts of Congress do not generally have application outside the territory of the USA except explicitly stated, while on Article 33 it held that it was silent as to whether it could be applied extraterritorially.[234]

Despite this decision by the US Supreme Court, there has been a shift, as this position of the principle of non-refoulment having no effect until the refugee enters into the territory of the state as expressed in the case of *Sale* is no longer the dominant interpretation of Article 33 of the 1951 Convention. There is now an understanding that interpretation of the Convention should also take into account state practices which have been developed over the decades, as well as those of international organizations.[235] Applying this interpretative method to the current political reality where states border controls have moved from their traditional border territories to international waters or foreign third countries, the convention should also be interpreted in way that allows it to keep up with these adjustments made by states. This can be seen in more recent cases in which Courts have gone in the opposite direction of the decision reached by the US Supreme Court in *Sale*. An example which also involved intercepting refugees on the high seas was that of *Hirsi v Italy*.[236] The applicants here were about two hundred persons who boarded three sea vessels from Libya intending to get to

[234] Ibid.
[235] G. Goodwin-Gill, The Refugee in International Law (Oxford: Clarendon Press, 1983), p.76.
[236] Hirsi Jamaa and Others v Italy, Application No.27765/09.

Italy. In May 2009, they had entered into the Maltese Search and Rescue Region of Responsibility when they were intercepted by ships of the Italian Revenue Police and Coastguard. They were then transferred into the Italian ships and transported back to Libya where they were handed over to the authorities.

The applicants claimed that during the voyage, they (i.e. the Italian authorities) made no effort to identify them or inform them of the destination of their voyage. In addition to this, the Italian minister of the Interior subsequently stated that these high sea interception operations were carried out based on the then bilateral agreement they had entered into with Libya for the control of immigration.[237] The ECTHR held that the applicants were within the jurisdiction of Italy even though they had been intercepted on the high seas, as the principle of international law as codified in the Italian Navigation code envisaged that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the state of the flag it was flying. Concerning Italy's argument that this was permissible due to the bilateral agreement with Libya, the court found that Italy could not avoid its responsibility under the ECHR by relying on obligations arising out of a subsequent bilateral agreement. It held that Italy had violated the principle of non-refoulement as they had made no attempt to vet the persons on the vessels and distinguish between irregular migrants and asylum seekers before repatriating them.

Furthermore, information coming out of Libya at the time indicated that there were serious human rights abuses going on in the country, and this was information that the Italian authorities were aware of or could have been easily acquired. This was further compounded by the fact that two of the applicants died in unknown circumstances after being returned.

[237] Italy – Libya Treaty on Friendship, Partnership and Cooperation, Article 19.

Considering all this, they had failed in their obligations to uphold human rights and had breached the principle of non-refoulement. What's more, Judge Pinto De Albuquerque in his concurring opinion stated that this case is about the international protection of refugees on one hand and the compatibility of border control policies with international law on the other.[238] He agreed with the majority and specifically stated that the US Supreme Court had reached the wrong decision in the case of Sale. He stated that "the court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the UN Convention and departs from the common rules of treaty interpretation" and the fact that it had reached a different conclusion was not decisive.

4.10 "LEGAL ARMS RACE" BETWEEN STATES & THE COURTS

Now, while this ability to interpret international laws in a way in which it keeps up with evasive policies of states is cause for some optimism. It should not cloud the reality of the situation, as states do not simply just give up once a decision has been given by a court. They instead go back to the drawing board to come up with other ways in which they can avoid or shift their responsibility. For instance, now that states are aware that judicial interpretation of the Convention has finally caught up with their high seas interception tactics and has rendered it a violation of the 1951 Convention. They have responded by devising new methods of evasion like making use of immigration liaison officers,[239] bilateral agreements granting exclusive rights of control in parts of another state's territory etc. Take the case of Italy, after the

[238] Hirsi Jamaa and Others v Italy, Application No.27765/09, Concurring Opinion of Judge Pinto De Albuquerque.
[239] Savitri Taylor, `Offshore Barriers to Asylum Seeker Movement: The Exercise of Power Without Responsibility? In McAdam, J. Forced Migration, Human Rights and Security, Oxford: Hart (2008), p.103.

decision of the ECTHR's finding of its interception tactics and bilateral agreement with Libya to be in violation the ECHR and non-refoulement as discussed above, the Italian government entered into a new agreement with Libya. The new agreement does not provide for any direct involvement by the Italian authorities, as they had learnt from their previous experiences that a direct involvement of their own officials and agents will most likely result in liability on their part. The new agreement instead obliges Libya to reinforce its borders with Italy providing technical assistance, training Libyan officials, and supplying the necessary technology.[240] Other states have also engaged in similar arrangements like the USA and Mexico, were under the Merida initiative, the USA would provide funds and support to the Mexican authorities to help them sure up their border and prevent smuggling of refugees and other illegal immigrants into the US.[241]

As has been discussed above the state of the relationship between international refugee law and states can almost be compared to the relationship between tax avoiders and the law, where they constantly find gaps in the law to avoid paying full taxes and the law makers react by tightening up the law. If this continues to be the state of the international refugee system, then it is safe to say that as the years go by, it will protect fewer and fewer people fleeing desperate situations. Hence alternative methods must be sought in order to increase its efficacy. One issue which should be pointed out, and which also causes a lot of problems in the international refugee system is that of the fears of states. Many states do not comply with their duties under the 1951 Convention not out of disregard for the law, but because of

[240] Italy – Libya Memorandum of Understanding on Cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the state of Libya and the Italian Republic. Available at https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf .
[241] U.S. Embassy & Consulates in Mexico, `The Merida Initiative', https://mx.usembassy.gov/the-merida-initiative/ .

resistance to externally imposed changes to the composition of their societies. As compliance will allow refugees to legally trump immigration controls, which basically means that people not of the state's choosing will be allowed to join their communities.[242] This is especially so in western countries which have a tradition of equating refugee status with a right to remain permanently, but this is not only limited to western nations, because several examples have been given in this chapter of states in other parts of the world which refused or expelled refugees based on this same fear. The fear is that the influx of refugees will lead to widespread social changes which the host society does not want.

When this is the case, then resistance to complying with international refugee law is inevitable. At this point, there are generally two responses that could be made. The first is that the governments of these states are condemned for their prejudice, or at least for giving into the demands of the prejudiced part of their population.[243] The second will be to make adjustments to allow for an alignment between the states interest and the protection of refugees. Concerning the first, a long-term approach would be to implement societal policies that promote more tolerance and the breaking down of irrational fears of foreigners. Nevertheless, in the meantime practical solutions have to be created to deal with the issues as they exist currently. As such it would not be politically prudent to insist that states enfranchise those who seek asylum in their territories. Hathaway argues that such a position would hold the refugee's hostage to a major project of social engineering.

[242] Hathaway, James C, Neve, R. Alexander, `Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', p138

[243] See Victor Malabrek, `Haven's Gate: Canada's Immigration Fiasco', (1987), 62-80. See also Arthur C. Helton, United States Immigration Policy: The Conflict Between Human Rights and Perceptions of National Identity and Self-interest, In Legitimate and Illegitimate Discrimination: New Issues in Migration 235 (Howard Adelman ed, 1995).

Therefore, the prudent solution would be to come up with a system where the refugees are allowed to enter and remain, albeit with a qualified right. Qualified in the sense that the right will be for temporary protection wherein they will be able to stay in the host nation up until the conditions for their safety in their countries of origin are met and confirmed by the host nation. This would prevent the refugees from becoming pawns in the internal struggle of the host states over the meaning of community and who forms part of it.[244] However, the refugees should be treated with full respect, their human rights respected, and that they be allowed access to employment and education should these be available, so that they do not become a burden to the host state during the period of their stay.

4.11 Conclusion

In conclusion, solidarity in the international refugee system has a long and complex history. In the drafting of the 1951 Geneva Convention and subsequent Protocols, every reasonable effort was made to provide a legal basis for the protection of those fleeing for their lives from places in which they are in danger. However, due to the nature of international law, and the self-interest of states, compliance and protection of refugees has not always been straight forward. This dissonance between what the law provides for and what states actually do, has led to more teleological interpretations of the Convention by courts in order to curtail some of the policies of states which were created to evade their responsibilities. But these judicial methods do not address the root cause of non-compliance by states which will occur when they believe that compliance will not be in their best interest. Hence a better suggestion may

[244] Hathaway, James C, Neve, R. Alexander, `Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection', p139.

be to make adjustments to ensure that there is some sort of alignment between state interests and refugee protection.

CHAPTER 5

5.1 SOLIDARITY IN THE AREA OF INTERNATIONAL ENVIRONMENTAL LAW

In the area of environmental law, the situation is similar to that of international refugee law and asylum seeking discussed in the previous chapter. In this area, there are no instruments of global application which clearly delineate the rights and duties of nations on environmental matters.[245] Nevertheless, there are resolutions and declarations by international agencies, state practices, regional environmental treaties, and the decisions of international tribunals which have played a crucial role in the development of environmental rules.[246] Before delving into these rules, it is also good to note that this area of international law is plagued by the same struggle between state sovereignty and solidarity as is the case in international refugee law. This is because states have a sovereign right over their natural resources and may decide to extract or use them in a way that causes harm to the environment. This prerogative of the state over its resources was confirmed by the United Nations General Assembly (UNGA) where it states that nations have the permanent sovereignty over their natural resources which should be exercised in the interests of their national development and the wellbeing

[245] Max Valverde Soto, `General Principles of International Environmental law Notes and Comments', (1996) ILSA Journal of International & Comparative law, Vol 3, Iss.1, p.194.
[246] Ibid

of their subjects.[247] This has also received Judicial support in cases such as *Texaco Oversees Petroleum Co. and California Asiatic Co. v Libya*, *Kuwait v Independent Am. Oil Co*, etc.[248] The following sections of this chapter will explore this area of international law, it will look at its sources of law, the role of International organisations, tribunals, and the ICJ in fostering cooperation and ensuring compliance.

5.2 SOURCES OF INTERNATIONAL ENVIRONMENTAL LAW

Now, concerning the rules which govern this area of international law, they can be divided into two broad categories which are "Hard law" and "Soft law".[249] Hard law here refers to those having binding legal effect whereas soft law refers to those which although not formally binding, have varying degrees of authority as an indication of international consensus or best practice.[250] Article 38(1) of the statute of the ICJ provides the sources which give international laws authority. These are (i) International conventions i.e., Treaties, (ii) International custom, as evidence of a general practice accepted as law, (iii) General principles of law recognised by civilian nations, (iv) The decisions of national courts and teachings of highly qualified jurists as subsidiary sources.[251] The sources of international environmental law listed in the statute of the ICJ are not exhaustive, as the International Law Commission's (ILC) list provides other

[247] Declaration on Permanent Sovereignty over Natural Resources Pe1803 (XVII) (Dec 14, 1962), see Also Declaration of the Right to Development, General Assembly Res.41/128 (Dec 4, 1986).
[248] *Texaco Oversees Petroleum Co. and California Asiatic Co. v Libya,* (1982) 53 I.L.R. 87. *Kuwait v Independent Am. Oil Co*, 21 I.L.M. 976.
[249] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), p.101.
[250] Ibid.
[251] Statute of the International Court of Justice, Article 38(1). https://www.icj-cij.org/en/statute

sources of international law such as the binding decisions of international organisations and the decisions of international courts/tribunals in addition to those found in the ICJ statute.[252]

Treaties are the primary source of legal rights and obligations in international environmental law. They can be bilateral, regional, or global. Certain treaties have greater authority than others and are sometimes called "law making treaties". This is because they are created for the purpose of providing general rules of conduct or creating room for specific rules to be created in subsequent protocols among a large enough number of states. In determining which treaties have authority over a certain environmental matter, certain factors which would be considered include the subject matter it addresses, the number of states which are parties to it, and the obligations and commitments which it establishes.

Acts of international organisations are considered to be secondary law behind treaties. They can be legally binding in certain occasions, but their authority is based on treaties. The treaties in such a case would usually specify its legal consequences. An example of this is the UN Charter which Article 25 states that the resolutions of the security council are binding on states,[253] whereas the resolutions of the General Assembly can be either recommendatory or binding.[254] As can be seen from the example above, the treaty provides that the Security Council's resolutions will be binding whereas those of the General Assembly could be binding. As stated earlier, acts of international organisations established by environmental treaties are not always legally binding but can be so under certain circumstances. One of such examples can be seen in relation to the International Whaling Commission which can adopt non-binding

[252] International Law Commission, Draft Articles on State Responsibility, Part 2, Article 5(1), `Report of the ILC to the United Nations General Assembly', UN Doc. A/44/10, 218 (1989).
[253] United Nations Charter, Article 25. https://www.un.org/en/about-us/un-charter/full-text
[254] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), p.116.

regulations or can adopt regulations which are only effective for parties not raising an objection to it.[255] In addition, they can also adopt resolutions, recommendations, or decisions without a clear provision from a treaty which establishes the consequences of such acts. In such cases, such acts are not binding but can contribute to the development of customary international law and may also aid in the interpretation of certain international agreements.[256] An example would be the United Nations Environmental Programme (UNEP) which has made resolutions concerning principles, guidelines and recommended practices to states and other members of the international community.[257]

Finally, concerning customary international law, its formative process cannot be considered to follow a specific formal procedure. This therefore makes it somewhat difficult to prove. In order to prove the presence of customary international law in any field, it would require the provision of evidence of consistent state practice over a considerable period. However, the requirement of time is not absolute, as the ICJ ruled in the *North Sea Continental shelfs* cases that even without the passage of any considerable time, a very widespread participation in the convention can be enough to show custom, as long as it includes the states whose interests are particularly affected.[258] Customary international law can be proven from various sources such as ratification of treaties, domestic legislation, rulings of national courts, from its votes in international organisations.

[255] International Whaling Convention, 1946, Article V (1)(3) and VI.
[256] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), p.117.
[257] See the UNEP's Guidelines for Conducting integrated environmental assessments, 2019. See also the UNEP'S Guidelines Concerning the Environment Related to Offshore Mining and Drilling Within the Limits of National Jurisdiction, 1982.
[258] *North Sea Continental shelfs Cases* (1969) ICJ reports 3, para. 73.

5.2.1 HISTORICAL DEVELOPMENT

Before going further into the issue of state sovereignty over natural resources, it would be prudent to provide a background to international environmental law with its historical development and its present realities. Much like international refugee law, the beginnings international environmental law can be traced back to the nineteenth century and has evolved from that time until now in the early 21st century. Its evolution so far can be divided into four stages. The first stage began with bilateral treaties between particular states and ended with the creation of international organisation in 1945.[259] The second phase started with the creation of the UN and reached its conclusion with the UN conference on Human Environment in Stockholm in 1972. The third stage began from the 1972 Stockholm conference and ended with the UN Conference Environment and Development (UNCED) in Brazil in 1992 (i.e. Rio declaration).

The fourth period is the current era which commenced after the Rio Declaration and includes subsequent treaties like the Kyoto protocol 1997 and the Paris agreement 2015. Each of these phases have been characterised by greater awareness and knowledge of the environment and the consequences of certain actions on the environment. For example, during the first stage there was a realisation on the part of the nations that the process of industrialisation required certain limitations to be place upon it to reduce the exploitation of certain natural resources.[260] Take for instance the Ascension Island where the awareness of the problems which deforestation causes such as reduced water levels in lakes and other issues such as erosion, siltation etc, had become evident.[261] There was a spring at the foot of a mountain

[259] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), pp.21-22
[260] Ibid.
[261] A Goudie, The Human Impact: Man's Role in Environmental Change (Oxford: Blackwell, 1981), p.2.

which was covered with trees, the area was deforested and the spring dried up. The loss of the spring was attributed to the loss of the timber and new trees were subsequently planted which led to the revival of the spring.[262]

A similar situation existed in the case of fishing, as states realised that overfishing (Overfishing means the catching of certain species fish at a greater rate than they can replenish themselves) could cause irreparable damage to the marine habitat in the form of possible loss of marine species. This led states into bilateral treaties meant to put a limit on the amount of fish which could caught at any period of time.[263] These realisations by states of the impact of their economic activities on the environment gradually led to the creation of legal instruments and international organisations with competences in environmental issues after the Stockholm Conference. This then led to the developments at the UNCED where the international community consolidated a patchwork of different international legal commitments and also prioritised certain areas of environmental issues such as protection of the atmosphere, protection of land & sea/ocean resources etc.[264]

5.2.2 STATE SOVEREIGNTY & GENERAL PRINCIPLES

Now, concerning the right of a state to use its natural resources as it sees fit. The state is sovereign and can extract and use its resources as it deems fit. However, this right is not considered to be absolute but is tempered by a duty of cooperation and solidarity. The

[262] J.B. Boussingault, Rural Economy (London: H. Bailleire, 1845, 2nd edition), cited by A Goudie, The Human Impact, p.3.
[263] Some examples of such treaties and instruments include: The Convention Between France and Great Britain Relative to Fisheries, Article. XI, Paris, 11th November 1867, 21 IPE 1. See also North Sea Fisheries (Overfishing Convention), 1882, UN Doc.ST/LEG/SER.B/6, 1957, 695. See also Convention for the Regulation of Whaling, Geneva, 24th September 1931, 155 LNTS 351.
[264] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), p.5

Stockholm conference set out twenty-six Principles for the Preservation and Enhancement of the Human Environment. Of these twenty-six principles, Principle 21 to 24 calls for states to act in a spirit of cooperation in order to effectively prevent, control and eliminate adverse environmental effects originating from activities carried out in all areas, in such a manner that due regard is paid to the sovereignty and interests of all states.[265] Principle 21 also specifically provides that states have a responsibility to ensure that activities carried out in their jurisdiction does not cause damage to areas outside of their jurisdiction.[266]

Hence, a state's use of it natural resources should be conditional upon the state using such resources in a way that does not cause harm to the environment of other states. The history of this exception goes back even before the Stockholm conference and can be traced down through history in international charters and also in the judicial decisions of the ICJ and international tribunals. For example, in the case of *Trail Smelter* stated that no state has the right to use its territory in such a way as to cause damages in the territory of another state.[267] The UNGA also declared in 1961 that the fundamental principles of international law impose a duty on all states regarding actions that may cause harmful biological consequences for those in other states.[268] Finally, the 1992 Rio Declaration also provides that:

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and their responsibility to ensure that their

[265] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972), Principles 21, 22, 23, and 24. Available at https://docenti.unimc.it/elisa.scotti/teaching/2020/22646/files/stockholm-declaration#:~:text=Principle%2021.,the%20limits%20of%20national%20jurisdiction.
[266] Ibid, Principle 21.
[267] *Trail Smelter (United States v Canada)* (1938 and 1941) 3 UNRIAA, p.1905.
[268] G.A. Res. 1629 (XVI) (1961). See also G.A. Res. 2849 (XXVI), para. 4(a) (1972).

activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of its national jurisdiction."[269]

Now, this duty of the state to not use its resources in a way that damages the environment falls under the principle of good neighbourliness[270] and usually involves a duty to cooperate in identifying, investigating and preventing environmental damage. Such cooperation which involves sharing of information and investigation with other states are not universal but are usually governed by international treaties which apply to the nations which are signatories to it.[271] This principle of good neighbourliness can be divided into a couple of categories, the first is to take preventative actions and this is not solely limited to causing environmental damage to the environment of another state but could also include damage caused within a state's own borders.[272] Preventative here means that the state should take steps to prevent environmental damage and whenever there has been an environmental disaster (e.g. a discharge of any substance toxic to the environment) the state should immediately take steps to halt and reduce the impact of such incidents rather than waiting to restore the contaminated areas.[273] Such preventative responsibilities would require states to anticipate and take pre-emptive actions to avoid environmental harm.

Hence, states may create authorisation procedures, commitment to environmental standards, and may even carry out environmental impact assessments to ascertain

[269] United Nations Convention on the Rio Declaration of Environment and Development, June 15, 1992, princ. 2, 31 I.L.M. 876.
[270] See Sompong Sucharitkul, `The Principles of Good-Neighbourliness in International Law', (1996), Publications 559. Available at https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1559&context=pubs
[271] See the Vienna Convention for the Protection of the Ozone Layer 1985, and also see the Montreal Protocol on substances that Deplete the Ozone Layer 1987 as examples of such international treaties.
[272] See Judge N. Singh, Foreword to Environmental Protection and Sustainable Development: Legal Principles and Recommendations xi-xii (1986).
[273] Max Valverde Soto, `General Principles of International Environmental law Notes and Comments', (1996) ILSA Journal of International & Comparative law, Vol 3, Iss.1, p.200.

environmental risks before undertaking a particular environmental project.[274] Concerning this, the Rio Declaration provides further clarification by stating that the precautionary approach should be applied by states according to their capability where there are warnings of serious damage to the environment, lack of full scientific certainty should not be used as an excuse for delaying effective measures to prevent environmental damage.[275] The main reason for this is that full scientific details and facts often times come too late for the government and possibly NGO's to be able to undertake effective measures. Therefore, to wait for the arrival of full scientific facts before action could possibly lead to irreversible damage to the environment. Although this duty exists, the threshold for when precautionary steps can be taken has moved up from not requiring the possibility of serious damage in the 1991 Bamako Convention to requiring more than a mere possibility of damage in the 1992 Convention for the Protection of the Marine Environment of the Northeast Atlantic.[276]

This duty plays a very important role in providing a framework for state action and cooperation. For example, cooperation in form of exchange of information is a critical facet of monitoring implementation of treaty obligations of states such as monitoring the progress of endangered species,[277] greenhouse emissions etc.[278] The importance of information exchange has been recognized internationally as certain conventions have created separate

[274] Ibid, p.193.
[275] Rio Declaration on Environment and Development, Principle 15. https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf
[276] See Article 4(3)(f) of the Bamako Convention. See also Article 2(2)(a) of the Convention for the Protection of the Marine Environment of the Northeast Atlantic which provides that the precautionary principle entails taking preventive measures when there are reasonable grounds for concern that certain actions may cause environmental hazard.
[277] See Convention on the International Trade in Endangered Species of Wildlife and Flora, Mar.3, 1973, Art.7, 993 U.N.T.S. 243.
[278] See United Nations Framework Convention on Climate Change, (1992) Art.12. Available at https://unfccc.int/resource/docs/convkp/conveng.pdf

international bodies with the purpose of information generation and distribution.[279] The exchange of information would include things like prior notification to other states which could be negatively affected by its environmental activities and also enter into consultation within a reasonable period of time if it is requested.[280]

The next duty is the duty to make restitution for any harm caused to another state as a result of a state's action. This means that when there has been a violation of international law and an environmental damage has been caused, the defaulting state has a duty to stop the wrongful act and take steps to restore the condition that existed before the wrongful act was undertaken. Where this is no longer possible, the defaulting state has a duty to pay compensation to the injured state. This principle of international law can be seen in the case of *Federal Republic of Germany v Poland*.[281] This case involved the German Reich suing the Polish government over damage suffered by two companies called the Oberschlesische and the Bayerische Stickstoffwerke. The polish government refused to pay compensation and argued that the Court had no Jurisdiction. The Permanent Court of International Justice (PCIJ) held that that it had jurisdiction to hear the matter under Article 23 of the Geneva Convention and the fact that the suit was pending before the German-Polish arbitral tribunal did not preclude the Court from ruling on the matter. It held Poland to be violation of German-Polish agreement concluded at Geneva in 1922 concerning upper Silesia where the companies were

[279] See the Convention for the Protection of the Marine Environment of the Northeast Atlantic (OSPAR, 1998), Article 2(1)(b). Available at https://www.ospar.org/convention/text

[280] Report of The United Nations Conference on Environment and Development (Rio de Janeiro, 1992), Principle 19. Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

[281] *F.R.G v. Poland*, 1928 P.C.I.J. (Serie. A) No.17.

located and was therefore liable to compensate for any loss suffered by Germany as a result of the companies.[282]

Although a defaulting state has a duty for restitution, this all depends upon how liability is determined and apportioned. A state will be liable under international law when a wrongful action occurs which is (i) attributable to the state under international law, and (ii) constitutes a breach of an international obligation of the state.[283] This definition although useful, leaves some points which need further clarification in the area of international environmental law. The points in question here are what criteria should be used to for determining liability? Again, what definition is to be used for environmental damage? Finally, what would be the appropriate form of reparation?[284] Concerning the first issue of determining state liability, liability can be based on negligence, and this is a matter of fact whereas whether it can be attributed to a particular state or group of states is a matter of law.

The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides that for there to be state responsibility, the state has to have breached an existing responsibility, and the breach must have been caused by an organ of the state or persons and entities acting under the direction and control of those organs.[285] In regards to a breach, the breach could be against primary rules (like in the case of a bi-lateral treaty or international customary law) or secondary rules as in the case of ARSIWA rules. An example of a breach of

[282] Ibid.
[283] See Drafts Articles on Responsibility of States for Internationally Wrongful Acts [2001] International Law Commission, Article 2, now contained in the annex of the U.N.G.A resolution 56/83 on 12th December 2001 https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf . See also Draft Articles on State Responsibility, [1980] 2 Y.B. International Law Commission.
[284] Max Valverde Soto, `General Principles of International Environmental law Notes and Comments', (1996) ILSA Journal of International & Comparative law, Vol 3, Iss.1, pp.202-203.
[285] Drafts Articles on Responsibility of States for Internationally Wrongful Acts [2001] International Law Commission, Articles 4, 5, 6, 7, and 8. Available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

primary rules was in the *Trail Smelter case*. Here, a Canadian based corporation which owned a smelting plant which emitted hazardous fumes across the border into the United States of America causing damage to the soil and the ecosystem.

A Tribunal was convened consisting of two national members and an independent chairman. It held that the hazardous fumes had caused damage to the environment and ordered indemnity to be paid to the USA.[286] Although the wrongful acts carried out by organs of the state or persons affiliated with the state would mean that the state is liable, a problem arises when environmental harm or degradation occurs as a result of the actions of a variety of entities separate from the state. In such a situation, how is attribution supposed to be made? Should the state be held liable or absolved? The court has dealt with this issue in a couple of cases. However, the Courts decisions may have created some other problems in the area of state responsibility. For example, in the South China Arbitration case

For the question of what is classed as environmental damage, environmental damage would be any act or omission in violation of international law which causes injury or harm to nature, or which causes a degradation of natural resources, landscape, the ecosystem etc. Now, with regards to the issue of what would be the appropriate standard for compensation, the ICJ has provided what compensation is meant to achieve. It made this ruling in its decision in *F.R.G v Poland* that compensation for damage caused is part of international law. It stated That

"The essential principle contained in the actual notion of an illegal act ...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if it is not possible, payment of a sum corresponding to the values which

[286] *Trail Smelter (United States v Canada)* (1938 and 1941) 3 UNRIAA, p.1905.

a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[287]

This standard provided by the ICJ creates certain problems for making adequate restitution. One of these issues is that the statement by the Court that, when possible, reparation must reverse the consequences of the breach and restore the situation of the victims to the position they were in before the breach can be extremely difficult. For example, when there has been a damage to an ecosystem and there has been a loss of some endangered species, no amount of compensation or restitution can restore the original condition of the ecosystem. In addition, in a situation where restoration may be possible through science and technology, the cost of it may not be economically feasible.[288]

5.2.3 ENFORCEMENT OF STATE OBLIGATIONS

Regarding the issue of state compliance with their obligation under international environmental law, the situation is not much different from other areas of international law and is a matter of serious concern. This is shown in the number of environmental disputes which have come before the ICJ and other environmental tribunals over the years. Non-compliance comes in different forms such as a failure to fulfil substantive norms required by a Treaty the state is a signatory to (e.g. limiting emission of greenhouse gases etc.), or to fulfil

[287] *F.R.G v Poland*, 1928 P.C.I.J. (Seria. A) No.17, at 377.
[288] Max Valverde Soto, `General Principles of International Environmental law Notes and Comments', (1996) ILSA Journal of International & Comparative law, Vol 3, Iss.1, p. 204.

procedural requirements (e.g. to undertake an environmental impact assessment), or to fulfil institutional requirements like submitting a report to an international organisation.[289]

In considering the issue of compliance there are three points which are important. These are what processes and steps should be taken to effect compliance? Who has the legal standing to enforce the international environmental obligations of other states. Regarding the question of who has the ability to take measures to effect compliance on the part of a defaulting state, states have this ability as they have legal personality and are the principal subjects of international law. In addition to states, corporate entities and individuals also can also commence proceedings against their own state in their national courts in order to ensure that the state complies with its environmental obligations under treaties it is a signatory to. Finally, International organisations also have this ability, but this is limited as the sovereign interests of states have prevented them from transferring too much enforcement capabilities onto international organisations. However, they are still able to enforce obligations that others may have towards them, and also can carry out enforcement in certain situations when states have granted them the enforcement roles in specific areas.[290]

5.2.4 ROLE OF INTERNATIONAL ORGANISATIONS AND ARBITRATION IN COMPLIANCE

On the question of what steps are to be taken to effect compliance, there are a few ways in which states can do this. One of these is through international organisations which unlike international tribunals and courts have not played a defining role in enforcement. However, they have still played a part in ensuring compliance. They may be able to play a role in

[289] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), p.145.

[290] An example of this is the Danube Mix Commission which was given certain Enforcement capabilities by the Danube Fishing Convention.

compliance when states transfer certain enforcement powers to them. An example of this kind of transfer if the Danube Fishing Convention which provided the River Danube Mix Commission to come up with agreed measures for the regulation of fishing in the Danube.[291] The powers granted by the Danube Fishing Convention are modest like other treaties transferring enforcement powers to International Organisations. Nevertheless, there are some outliers like the 1992 Oil Fund Convention which created an enhanced role for the Fund in enforcement. It gave it rights and obligations, legal personality in the laws of each party and being a party in enforcement proceedings before national courts.[292] In addition to this, international organisations can sometimes play a role in dispute resolution between states. This usually comes in the form of being a mediator between the parties like in the case of a long-standing dispute between Guatemala and Belize where the Organisation of American States (OAS) served as a mediator.

In addition to the above-mentioned organisations, certain multilateral treaties have included non-compliance procedures into their agreements to help ensure compliance. Such treaties would usually stipulate the creation of a committee or commission whose job it would be to follow through with the procedures. For example, the 1987 Montreal Protocol included a non-compliance procedure and implementation committee which was set up by the second meeting of the parties to the protocol.[293] Where any party was of the opinion that another party was not complying with their obligations under the protocol, it could submit its issues in writing to the committee, which would have the responsibility to investigate the matter.

[291] 1958 Danube Fishing Convention, Article 12(1).
[292] 1992 Oil Pollution Fund Convention, Article 2(2)
[293] See Decision II/5, (non-compliance), report of the second meeting of the parties to the Montreal Protocol on substances that deplete the Ozone layer, UNEP/OzL.2/3, 29th June 1990. See also Decision IV/5 and Annexes IV and V adopting the non-compliance procedure, Report of the Fourth Meeting of the Parties, UNEP/OzL.4/15, 25th November 1992.

The committee was made up of 10 members elected by the parties based on geographical distribution with a term of 2 years. Where there has been a failure to fulfil obligations by a party, the committee will first try to resolve the issue in an amicable way before reporting to the parties who will then decide on what measures to take to ensure compliance. The Parties at this point can implement a host of measures including providing assistance if the defaulting party is unable to perform its obligations rather than being unwilling, issue cautions, or suspend some of the rights and privileges of the defaulting party under the protocol.[294] These non-compliance procedures help create other quicker avenues to achieving compliance amongst the parties to a treaty and also in reducing the cost of litigations.

Another alternative method of ensuring compliance is through the use of arbitration. States can include specific provisions for the use of arbitration in the event of a breach when negotiating an environmental treaty. In this process, judges of their choice are chosen to make up a tribunal which would then adjudicate on the matter. An example of this was the `Special Commission' to be established at the request of any of the parties to disputes involving high seas fishing and conservation.[295] Another example would be the detailed provision for the establishment of an arbitral tribunal in the Annex to the 1969 Oil Pollution intervention Convention.[296] The tribunals established based on such provisions give rulings over disputes and the respective states comply with them. Take the *Pacific Fur Seal Arbitration* case where a dispute over hunting of seals between the UK and the United States was decided by an arbitration panel made up of chosen arbitrators from both states and from neutral states of France, Norway, Italy, and Sweden.[297] The USA had seized Canadian sea

[294] Fourth meeting of the parties to the Montreal Protocol, Decision IV/5.
[295] 1958 High Seas Conservation Convention, Articles 9 to 12.
[296] 1969 Oil Pollution Intervention Convention, Article VIII and Annex.
[297] Bering sea Arbitration, (1893), Volume XXVII, pp.263-276. Available at https://legal.un.org/riaa/cases/vol_XXVIII/263-276.pdf

going vessels which had been hunting seals in the Bering Sea claiming jurisdiction over this area. The UK oversaw the Canadian foreign affairs at that time and commenced diplomatic relations for the release of the vessels. The Tribunal was set up and ruled in favour of the UK, ordering the release of the seized vessels, reducing the area of US jurisdiction back to its initial zone and for compensation to be paid to the sealers.[298]

5.2.5 COMPLIANCE THROUGH NEGOTIATION OR CONCILIATION

Apart from judicial means of compliance, there are other methods utilised by states in order to ensure compliance with international environmental law and also to receive restitution for injuries suffered. The method of negotiation is a very popular and use method of resolving environmental disputes and has even been endorsed by the ICJ in the *Fisheries Jurisdiction* case. Here it stated what the objectives of a negotiation should be in the context of the case which was to the delimitation of the rights and interests of the parties and to balance and regulate equitable questions regarding those rights.[299] It also stated that such negotiations should be carried out in good faith and reasonable regard should be paid to the rights of the other party thereby reaching an equitable result. It also made reference to its earlier statement in *North Sea Continental Shelf cases* that achieving equity was not just a matter of applying equity as a matter of abstract justice, but of the application of a rule of law which requires the application of equitable principles.[300]

A lot of environmental treaties usually include articles which provide for member states to first engage in negotiations before resorting to other formal means such as the ICJ or

[298] Ibid.
[299] *Fisheries Jurisdiction* case (1974) ICJ Reports 3, at 31.
[300] Ibid, 33 and 47.

international tribunals.[301] An example of this was when Canada and the Soviet Union entered negotiations over the damage caused to Canada by the disintegration of the Soviet nuclear-powered satellite (Cosmos 954).[302] The Canadian authorities took the responsibility of scouring the affected provinces to locate and clean up the radioactive fallouts from the soviet satellite. After this, it then claimed the sum of 6 million Canadian Dollars to cover the costs of restoring the affected areas to their prior position and for compensation. The negotiations were done in accordance with the provisions of the 1972 Space Liability Convention which both parties were signatories to. It based its claim specifically on Article VII of the 1967 Outer Space Treaty which made the Soviet Union liable for any damage caused by any object it launches into outer space. A settlement was reached with the Soviet Union agreeing to pay Canada the sum of 3 million Canadian Dollars as full compensation and Canada accepted it.[303]

The use of negotiation as the first port of call does not mean that all negotiations must cease in the event that the dispute goes to the ICJ. An example of this was in the *Aerial Herbicide Spraying case.*[304] Here, Colombia had been engaged in efforts to eradicate illicit crops grown for narcotics by guerrilla groups. In order to do this, it began large scale aerial sprays of herbicides in year 2000 which would destroy the crops. The spraying of the herbicide was concentrated in the southwest regions of Putumayo and Narino, which have a border with Ecuador. Some of the Herbicides had entered into Ecuadorian territory and had caused damage to crops, animals, the natural environment, and even humans, with many people suffering from skin and eye problems and other medical complications as a result of it.

[301] Some examples of such treaties include the 1985 Vienna Convention, Article 11(1) and (2). 1972 Space Liability Convention, Article IX. 1992 Climate Change Convention, Article 14.
[302] Canada, Claim against the USSR for Damage caused by Soviet Cosmos 954, January 23 1979, 18 ILM 899-908 (1979).
[303] Protocol between Canada and The Soviet Union, 20 ILM 689 (1981), Articles I and II.
[304] *Aerial Herbicide Spraying (Ecuador v Colombia)* Order of 13 September 2013, I.C.J. Reports 2013, p. 278.

Ecuador commenced action against Colombia in 2008 after negotiations had proved unsuccessful. Nevertheless, negotiations did not cease while the case was in court, and in 2013, Ecuador notified the Court that it had reached a settlement with Colombia and wished to discontinue proceedings. The settlement with Colombia involved Colombia agreeing to pay the sum of 15 million Dollars to Ecuador without admitting liability.[305]

It also set up a 10-kilometre zone at the border where no aerial fumigation was to take place. Finally, the agreement also established a joint commission whose purpose it would be to ensure that no herbicide would drift into Ecuadorian territory. Here, negotiation enabled the dispute to be brought to an end without litigation, and most importantly it set up mechanisms to ensure compliance with International environmental laws on the part of Colombia and allowed the injured victims to receive compensation. In addition to Negotiation, states may also make use of mediation or conciliation when negotiations fail. Through the method of mediation, an independent and impartial third party is engaged by the parties and the third party plays an active role in helping the parties reach a resolution by making proposals which can then be accepted by the parties. The role of mediator can be filled by an international organisation like in the dispute between Guatemala and Belize. Here, the OAS was appointed by the disputing parties to serve as mediator in the dispute. The OAS made proposals which included the creation of an ecological park and a three states subregional fisheries commission between Guatemala, Belize, and Honduras.[306]

[305] Ibid.

[306] Organisation of American States, `Proposals for Resolving Belize-Guatemala Territorial Dispute Win Broad International Support' (OAS Press Release, 1 October 2002) available at https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-191/02 . See also Arlenie Perez-Rogers and Others, `Belize-Guatemala Territorial Dispute and its Implications for Conservation', Journal of Tropical Conservation Science, Vol.2, (2009).

The proposals were accepted by the parties and the dispute came to an end. Conciliation while similar to mediation in that it involves a third party, differs from it in terms of formality. International mediation is less formal whereas Conciliation is more formal and usually involves a commission with the ability to issue formal orders and decisions. In the cases of conciliation, the conciliator would have the permission to investigate the full background and details of the dispute and based on its findings, it would then issue formal proposals for the resolution of the dispute. An example of this was the dispute between India and Pakistan over India's construction of a hydro-electric Dam on the Chenab River. An expert was appointed by the World Bank as a conciliator who after investigation, made a decision in favour of India.[307] This instance of conciliation did not succeed in ending the dispute, as Pakistan disagreed with the expert decision and subsequently sought arbitration to resolve the dispute.

5.2.6 ENFORCEMENT IN DOMESTIC & INTERNATIONAL COURTS

Other than Tribunals, legal enforcement of international environmental law can also be done through the courts, both domestic and international. Concerning enforcement in domestic courts, it is possible for individuals and corporate entities to bring an action against a state in the national courts for failing to fulfil environmental obligations. In such a situation, they may be able rely directly on the treaty provisions in the case of a Monist state or rely on the domestic legislations transposing the treaty in a dualist state. This provides another axis of enforcement, as defaults by states may not need to be brought before the ICJ by other aggrieved states, but can be brought by individuals within the state, thereby ensuring

[307] Raymond Laffiite, `Baglihar Hydro-Electric Plant: Expert Determination, Executive Summary', (2007) available at https://mowr.gov.pk/SiteImage/Misc/files/Baglihar%20Expert%20Determination%20Executive%20Summary%20(PDF).pdf

compliance from within. An example of this was in the recent case of *Mejillones*, where a tourist services association and other local community organisations brought an action against the state authorities in Antofagasta.[308]

In this case, Mejillones which is a tourist service association brought an action against the Environmental Assessment Service (EAS) of Antofagasta for their decision of refusing to include climate change variables into the exceptional revision of the Environmental Assessment Resolution No 290/2007 for the thermonuclear power plant Angamos. Some of the issues before the Chilean Court of Appeal was whether this refusal by the EAS to factor in climate change variables in their resolution violated the constitutional rights of the citizens to live in an environmental free of pollution, and whether it was also a failure to comply with Chile's obligations under the United Nations Framework Convention on Climate Change (UNFCCC) such as those contained in the Paris accords which aims to keep global average temperatures below 2 degrees Celsius.[309]

The Court of Appeal rejected the claimants claim holding that it did not have the jurisdiction to rule on the matter as it involved the exercise of power belonging to the executive arm of the government. An appeal was made to the Supreme Court which ruled in favour of the claimants. It ordered the EAS to include the climate change variables and ruled that its original resolution which did not take into account the variables was in breach of Chile's obligations under the UNFCCC.[310]

[308] Mejillones Tourist Service Association and Others with the Environmental Evaluation Service (SEA) of Antofagasta, (2021) Chilean Supreme Court, Case No 6930-2021, Case No71.628-2021.
[309] Ibid.
[310] Ibid.

Regarding enforcement through international courts. The jurisdiction of the ICJ can either be by the consent of the parties to the dispute, or by a compulsory clause in the treaty which they are signatories to.[311] The ICJ has played a significant role in ensuring compliance and over the last 150 year has also helped develop international environmental law. As stated earlier, the various principles such as the duty to prevent, duty to make restitution etc, have been created through decisions of the ICJ. The prevent duty was first articulated in the Trail Smelter case where it held that states did not have the right to use their resources in a way that causes injury to another.[312] It then considered and further expanded this principle in subsequent cases such as in *Pulp Mills*. Here, Argentina commenced action against Uruguay over unilaterally authorising the building of two pulp mills on the river Uruguay which was in violation of the treaty signed between both states.[313]

The treaty stipulated an obligation of prior notification of the other party and to engage in a consultation process before carrying out such an action. The ICJ took this opportunity to expand upon the prevent principle by deciding that it included the obligation to adopt appropriate rules and measures as well as exercising a certain level of vigilance in their enforcement.[314] The ICJ's decision in the case of *Pulp Mills* has played a crucial role in clarifying the specificities of the duty to prevent and has become a cornerstone in international environmental law. Although this decision provides clarification, the ICJ has not been clear on a number of issues relating to the prevent principle. These are the issues of if the duty to prevent is an obligation of result or if it is an obligation of conduct. In the *Trail Smelter* case, the ICJ interpreted it to be a duty to prevent significant trans-boundary pollution

[311] Article 36(1) ICJ statute. Available at https://www.icj-cij.org/en/statute
[312] *Trail Smelter (United States v Canada)* (1938 and 1941) 3 UNRIAA, P.1905.
[313] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, [2010] ICJ 14, 79
[314] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, [2010] ICJ 14, 79, para 197, 204.

which makes it an obligation of result.[315] Whereas, in Pulp Mills it interpreted the duty to prevent as an obligation of conduct, which is to act with due diligence.[316]

The cases of *Trail Smelter* and *Pulp Mills* indicate that the ICJ's decisions have not been consistent or clear in relation to if the duty to prevent is one of obligation of result or conduct. This situation was also made more confusing by the International Law Commission which interpreted the duty to prevent as an obligation of conduct in its Draft Articles on Prevention of Transboundary harm.[317] In Article 3, it provides that the duty to prevent means that the state of origin shall take all appropriate measures to prevent significant harm or at least minimize the risk of it.[318] It then further explains in comment 7 of the same Article that this duty to prevent is one of due diligence on the part of the state of origin, and that it is the conduct of the state of origin which will determine whether it has complied with this obligation.[319] These decisions by the ICJ do appear to be contradictory, and coupled with the ILC's interpretation, it becomes further confounding. However, these decisions may be harmonised if they are not looked at from the perspective of an "either or" situation but as encompassing both in such a way that the duty to prevent is both an obligation of result as well as conduct. Notwithstanding these supposed inconsistencies in the ICJ's decisions and the ILC interpretation, the ICJ still helped facilitate protection of the environment through its decision in *Pulp Mills*.

[315] *Trail Smelter (United States v Canada)* (1938 and 1941) 3 UNRIAA, p.1905.
[316] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, [2010] ICJ 14, 79, para.204.
[317] See Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Comments [2001] International law Commission, Article 3.
[318] Ibid.
[319] See Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Comments [2001] International law Commission, Article 3, Comment 7 and 8.

Especially as it included a duty to make environmental impact assessments as an aspect of due diligence. It did this through scrutinising the environmental assessment carried out by Uruguay to ascertain if it had been done with due diligence.[320] It also found that assessments should be taken prior to the commencement of the project and also during its duration.[321] This means that states do not only have a duty to conduct preliminary assessments as to the impact of any proposed environmental project, but also have a responsibility to monitor the effects of the project on the environment as time unfolds.[322] This ruling on environmental impact assessment given by the ICJ in *Pulp Mills* was further strengthened by the ICJ in the latter case of *Nicaragua v Costa Rica* where the ICJ held that Costa Rica had breached its duty to undertake an assessment of the impact of its road construction project on the environment on the border area with Nicaragua.[323]

In addition to furthering the duty to prevent, the ICJ has also helped in providing guidance on the evaluation of damage caused to the environment and the commensurate compensation to be made. This was done in the case of *Costa Rica v Nicaragua* in which the ICJ awarded damages to Nicaragua and held that an injured state is owed compensation by the defaulting state. During the case, both parties had suggested using different metrics for evaluating the amount of damages. Nicaragua had suggested evaluating the damages based on the approach of the UN Compensation Commission which was caused by Iraq's illegal invasion of Kuwait, whereas Costa Rica suggested using an `Ecosystem Services' approach.[324] The Court held that

[320] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, (2010) ICJ 14, para 205.
[321] Ibid
[322] Daniel Bodansky, `The Role and Limits of the International Court of Justice in International Environmental Law', Public International Law, (2020), p.10.
[323] Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica), [2015] ICJ Rep. A /71/4.
[324] Certain Activities carried out by Nicaragua in the Border Area *(Costa Rica v Nicaragua)*, (2018) ICJ 15, paras .41 and 45.

international law did not provide a specific valuation system for determining the amount of compensation to be paid, hence when making a valuation, the specific circumstances of the case have to be taken into account.[325] In this case, the Court began with Nicaragua's calculation of damages using Costa Rica's ecosystem services approach, but then made certain adjustments for other specific issues. These adjustments came in the form of additional financial compensation for specific injuries like the sum of 120,000 US Dollars for loss of environmental goods and services of the affected area, and another sum of 2,708.39 US Dollars for restoration measures in respect of the wetland etc.

Although the ICJ has in the above decisions held states accountable for their breaches and contributed to customary international environmental law, there are some areas where it has not been as effective. For example, concerning the precautionary principle, the Court has not provided a ruling which gives clarification as compared to what it has done in the case of the prevent principle. Take for instance the case of *Gabčikovo-Nagymaros* where Hungary brought up the precautionary principle in its submissions, but the ICJ did not go into any detail on it other than giving it a brief mention that the parties had agreed to take precautionary measures.[326] This is also not an isolated case, as in the case of *Japanese Whaling*. Here, New Zealand also raised the precautionary principle, arguing that it involved a reversing of the burden of proof.[327] Even though the ICJ has not gone into sufficient detail on the scope of this principle, in the case of *Pulp Mills*, it did touch upon it by describing the precautionary principle as an `approach' rather than a principle and that whatever the approach may entail, it does not involve a reversal of the burden of proof.[328] This reluctance by the ICJ to properly

[325] Ibid, para.52.
[326] *Gabčikovo-Nagymaros Project (Hungary v Slovakia)*, Order, 1997 I.C.J. Rep 3, ICGJ 65, para.97 and 113.
[327] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, Judgment, 2014 I.C.J 148, para.27.
[328] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, (2010) ICJ 14, at 164.

determine its scope or even determine if it is a part of general international law has created a vacuum which may have to be filled in by future multilateral treaties.

So far, the areas of state responsibility and enforcement discussed above have been at the horizontal level which involves the relationship between two particular states, but now this work will now touch upon the vertical axis which involves state obligations towards groups of states or the international community as a whole. This responsibility would apply to all the states which are parties to a treaty or to states in the international community as an obligation erga omnes. Some examples of when a state can owe a responsibility to the international community would be in case of pollution of the high seas, pollution that leads to climate change etc. Regarding state responsibility on this axis, the issue of attribution and obligations would be quite straight forward when it comes to specific treaties which they are signatories to, as the treaties would specify these things and how disputes are to be resolved. However, the problem arises when the defaulting state is not a signatory to the particular treaty. In such a case, how will the defaulting state be held accountable, and which state has the right to invoke responsibility? Can a state other than the one which suffered the injury be able to invoke responsibility?

The ILC Articles do envisage a situation where a non-injured state may be able to invoke the responsibility such as when the obligation breached is owed to a group of states including that state (i.e. applicant) which are signatories to a treaty which the defaulting state is party to (i.e. Obligations erga omnes partes), or to the international community as a whole (i.e. obligations erga omnes).[329] The second category of obligations owed to the international community as a whole (i.e. obligations erga omnes) is where the problems begin to arise. The

[329] Article 48(1)(a)(b).

ICJ has tried to tackle some of these issues, but at the same time will not venture into others. Take for example the *Nuclear Tests Cases* brought by New Zealand and Australia against France. Here Australia and New Zealand commenced action against France in order to prevent it from carrying out nuclear testing in the atmosphere over the South Pacific Region.[330]

The case raised some important questions like did Australia and New Zealand have the right to bring an application before the ICJ on the grounds of a violation of obligations erga omnes. It basically posed the issue of whether a state had the standing to bring a case on an environmental matter to prevent damage beyond its own national borders (*Actio Popularis*). This was an issue because generally speaking, in international law, a state will have a right to enforce a violation of an obligation when it has suffered an injury or in order to prevent the same. This right is based on the principle of state sovereignty, therefore if a state has not suffered any environmental damage to its territory or is not a signatory to a treaty which the defaulting state is also a signatory to, it should in theory not have a right to bring action against the defaulting state. This position on international law was affirmed by the ICJ in the case of *South West Africa*. Here, Ethiopia and Liberia commenced proceedings against South Africa concerning the League of Nations mandate for South West Africa and the duties of South Africa as Mandatory Power. In the second phase of the judgment, the ICJ ruled that Ethiopia and Liberia could not be considered as having a legal interest in the subject matter of their claims.[331] Hence their applications were dismissed.

It stated in particular that an *actio popularis* may be existent in the national laws of certain states, but it is unknown in international law, nor is the Court able to treat is as imported by

[330] *Nuclear Tests case (Australia v France)* (Interim Measures) (1973) ICJ Reports 99.
[331] *South West Africa (Ethiopia v South Africa)* Preliminary Objections, Judgment, I.C.J GL No.46, [1962] ICJ Rep 319.

the general principles of law referred to in Article 38(1)(c) of its statute.[332] The ICJ after this decision appeared to have issued a contradictory ruling in a later case. The ICJ ruled that in certain situations, states not directly affected by a breach may be able to have a legal interest to bring the matter before the Court. The decision was made in the *Barcelona Traction case* where the ICJ held that there were certain international obligations that were of utmost importance that all states had an interest in protecting them.[333] More specifically related to international environmental law, the issue of *actio popularis* was further complicated in the following *Nuclear Tests* cases where dissenting judges in the decision of the ICJ provided further details by stating that there could be circumstances in which the ICJ may deem such an action capable of litigation.[334]

"If the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise character and the content of that rule and, in particular, whether it confers a right on every state individually to prosecute a claim to secure respect for the rule. In short, the question of legal interest cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognise that the existence of a so-called *actio popularis* is a matter of great controversy, the observations of this court in the *Barcelona Traction*, Light and Power Company ltd case suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court"[335]

[332] *South West Africa (Ethiopia v South Africa, Liberia v South Africa)*, 1966 I.C.J., 41-59.
[333] *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* Judgment [1970] I.C.J Rep 3.
[334] *Nuclear Tests Case* (1974) ICJ Reports 253, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock, pp. 369-370. Available at https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-07-EN.pdf
[335] Ibid.

The two decisions of the ICJ in the *South West Africa* case and the *Barcelona Traction* cases coupled with the comments of the dissenting Judges in the *Nuclear Tests* case make the entire issue of *actio popularis* a very murky area of international law. This has led to debates and criticisms of the Courts decisions with some speculating over the requirements for obtaining legal standing.[336] It is also reasonable to question the possibility that it may give rise to universal standing for all states because responsibility under international law has been based on conceptions of "Tort" and was therefore only acknowledged between the injured state and the defaulting state.[337] Another potential problem is that it could be deemed to imply that states can be held accountable to all members of the international community based on the judicial endorsement of the importance of the obligations involved for other states.[338]

Now, concerning *actio popularis* in situations of obligations *erga omnes partes*, the ICJ's decisions here appear to be more straight forward. The endorsement of obligations *erga omnes partes* would mean that a state which has not suffered any injury may have the legal standing to bring proceedings against another state if that state is also a party to the treaty. Regarding this, the ICJ made a ruling in the case of *The Gambia v Myanmar*. The Gambia commenced action against the state of Myanmar by filing a request for provisional measures. It claimed that Myanmar had breached its duty under the Genocide Convention by committing genocide against the Rohingya peoples within its borders.[339] The violence had slowly built up for decades and escalated into a full-blown conflict in 2017 between the

[336] See Peter D. Coffman, `Obligations Erga Omnes and the Absent Third State', 39 GER. Y.B. OF Int'l L, 285, 296-297 (1996), See also Christian J. Tams, `Enforcing Obligations Erga Omnes in International Law', (2005) 15.
[337] See Clyde Eagleton, International Organisation and the Law of Responsibility, 76 Recueil Des Cours, 319, 432 (1950).
[338] Pok Yin S. Chow, `On obligation Erga Omnes Partes', George Town Journal of International Law (2021), p.471.
[339] Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(The Gambia v Myanmar)*, Provisional Measures, (Jan.23, 2020).

Myanmar military and the Islamist group called the Arakan Rohingya Salvation Army. The conflict resulted in thousands getting killed, maimed, and the survivors displaced into the neighbouring state of Bangladesh.

Myanmar argued that the Gambia did not have an interest in the matter as it had suffered no injury and that if any states had the right to bring proceedings it was Bangladesh which had to host the fleeing refugees. As such, The Gambia had no standing to bring the matter before the Court. The ICJ ruled that the Gambia had prima facie standing against Myanmar. This was regardless of the fact that it had suffered no injury and was thousands of miles away. The Court stated that in view of their shared values, all the states party to the Genocide Convention had a common interest in ensuring that acts of genocide are prevented.[340] It held that the Convention about the individual advantage or disadvantage of a state, but for the attaining of the common goal of prevention of genocide.[341] Since The Gambia was a party to the Convention, it therefore had a legal interest in ensuring compliance with the obligations of the Convention. This decision of the ICJ is also reflected in the draft articles of the ILC on state responsibility. In Article 42 states that an injured state is entitled to invoke the responsibility of that state if the breached obligation is either owed to the state individually.[342] Nevertheless, it also states in section B that the same could apply in respect of a group of states which includes that particular state, especially if the breach affects that state,[343] or is of such a kind as to radically change the position of other states in respect to the further performance of the obligation.[344]

[340] Ibid, Judgement para 41.
[341] Ibid, para 106.
[342] Draft Article on Responsibility of States for Internationally Wrongful Acts, Article 42(a). Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf
[343] Ibid, Article 42(b)(i).
[344] Ibid, Article 42(b)(ii)

The last category of radically altering the position of other states from further performance of their obligation implies that a state which has suffered no injury may be able to invoke responsibility when the breach could affect the ability of other members to a treaty from performing their obligations under said treaty. This taken together with Article 48(1)(a) which allows a non-injured state to invoke the responsibility of another state when the obligation is owed to a group of states and is created with the purpose of protecting the collective interest of the group.[345] These illustrate that there situations wherein non-injured states may be able to invoke state responsibility as part of a group. This is especially so in the case article 48(1)(a), as it was created to address instances where obligations are established for the protections of the collective interest of the group. This article takes into account the situation of many multilateral treaties which have created of the interests of the group, the environment, or human rights. As such they are created to "transcend the sphere of bi-lateral relations of the state parties".[346]

In other words, such treaties were not created to be bundles of bi-lateral treaties placed together in a bigger treaty, but were intended to encompass all the parties, hence becoming truly multilateral. An example of this would be the provisions of the Constitution of the International Labour Organisation (ILO). Article 26 of its constitution states that "any of the members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other member is securing effective observance of any Convention which both have ratified in accordance with the foregoing articles".[347] Other articles of the constitution also include dispute resolution mechanisms such as a Commission of Inquiry

[345] Ibid, Article 48(1)(a)
[346] Linos Alexander Sicilianos, `The Classification of Obligations and the Multilateral Dimension of the Relations of International responsibility', 13 EUR. J. Int'l L. (2002), p.1135.
[347] Constitution of the International Labour Organisation Article.26, 1946, 15 U.N.T.S. 35. Available at https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A27

which has the job of receiving complaints from members and issuing a report detailing the issues and its recommendations.[348] Finally, it also provides that in the event that the states are not satisfied with the recommendations of the Commission of Inquiry, they may bring the matter before the ICJ whose decision will be final.[349]

The reasoning of the Court in its recent decision in the case of *The Gambia v Myanmar* illustrates that the court is willing to interpret certain multilateral treaties as providing obligations *erga omnes partes* which would confer on non-injured member states with legal standing to bring proceedings before the Court. More specifically related to international environmental law, the *Nuclear Tests case* raised a similar situation. In that case, neither Australia nor New Zealand had suffered any injury, and the planned nuclear tests by France were not to be carried out within the territory of Australia or New Zealand. In this case, both Australia and New Zealand argued from a similar albeit slightly different perspectives. Australia argued that the ICJ should declare the French nuclear activities as a violation of the applicable rules of international law because it (a) violated its right to be free from atmospheric nuclear tests by any nation, (b) that it would allow the deposit of radioactive debris into its airspace, (c) that it would interfere with ships and aircrafts on the high seas, as well as infringing the freedom of the high seas by causing pollution to the sea itself through radioactive fallout.[350] New Zealand on the other hand argued that the nuclear tests had violated the rights of all member states of the international community to be free from the radioactive debris from the nuclear tests, and the unjustifiable contamination of their terrestrial, marine and aerial environment by the radioactive debris.[351]

[348] Ibid, Articles 27 and 28.
[349] Ibid, Articles 29 and 31.
[350] *Nuclear Tests case (Australia v France)* (Interim Measures) [1973] ICJ Reports 99, at 103.
[351] *Nuclear Tests case (New Zealand v France)* (Interim Measures) [1973] ICJ Reports 135, at 139.

These arguments by both Australia and New Zealand included not only possible infringements upon themselves but those of other states in the international community. The ICJ granted interim measures which asked France to cease any action which aggravate the situation pending the Court's decision. However, the Court never got to make a ruling on the substantive matters as France declared that it would cease further nuclear activities in the area. Although the Court never reached the point of giving a ruling on the substantive matters, the exchange between the president of the Court Sir Humphrey Waldock and the Australian representative during the oral hearings illustrate the difficulty that the ICJ would have faced in determining if radioactive debris from France's nuclear activities would constitute harm. The President had asked if in Australia's view, any transmission by natural causes of chemical or other matter from one state's territory into another would automatically create grounds for legal action in international law without needing to prove anything more. Australia conceded that there are instances in which the transmission of certain kinds of chemical fumes into another state may not be illegal, but this legality is sanctioned by state toleration of certain activities which are regarded as natural uses of territory in the modern industrial age and although may cause some inconvenience, still create common benefit.

Nevertheless, in this case, it did not consider France's use of its territory for atmospheric nuclear tests as a normal use of its territory, and that it did not also consider the possible transmission of radioactive debris into its territory to be a kind of nominal harm or damage but would amount to a sufficient harm.[352] Despite the Court not tackling this issue due to France's declaration, Judge de Castro took the opportunity to touch upon the issue in relation

[352] *Nuclear Tests cases (Australia v France)* (Interim Measures) [1973] ICJ Reports 99, (New Zealand v France) (Interim Measures) [1973] ICJ Reports 135.

to the *Trail Smelter* case in his dissenting opinion. Here, he stated that if it is a general rule that there is a right to demand prohibition of emission of neighbouring harmful fumes, then it follows that the applicants have the right to ask the Court to uphold its claim that France should cease its activities.[353] This opinion can also be backed up by the latter case of *Gabčikovo-nagymaros* where the Court recognised the prevention of trans-boundary harm arising from hazardous activities as part of customary international law.[354]

5.2.7 OBSTACLES TO EFFECTIVE ENFORCEMENT

One such obstacle to compliance with international environmental law is the proliferation of environmental treaties. This has created the possibility for conflict and overlaps between treaties covering the same subject matter and sometimes with the same signatories. In addition to this, there is also the potential for conflict with World Trade Organisation (WTO) and regional trade treaties which have the goal of the reduction or elimination of tariffs between nations. Consider the relationship between the WTO rules and the 2000 Biosafety Protocol. Under the Biosafety Protocol, parties are allowed to prohibit the import of `living modified organisms' LMOs on the grounds of biosafety risk.[355] However, such provisions could pose a conflict with WTO rules if both countries are part of WTO, as If one of the parties were to ban LMOs, which obligations will prevail, those of the Biosafety Protocol or those of the WTO?[356]

The problem of proliferation of treaties also creates issues on dispute resolution clauses especially in relation to jurisdiction. Hypothetically, if two states are signatories to two

[353] *Nuclear Tests cases* (Australia v France) [1974] ICJ Reports 253 at 389. Available at https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-08-EN.pdf
[354] *Gabčikovo-Nagymaros* Project (Hungary/Slovakia) *(*Judgment) [1997] ICJ Rep 7.
[355] 2000 Biosafety Protocol, Articles 10 and 11.
[356] Philippe Sands and Others, *Principles of International Environmental Law*, (Cambridge University Press, 4th Edition, 2018), p.113

treaties which are about the same matter, in the event of a dispute, what makes a state entitle to invoke the dispute resolutions articles under one treaties as opposed to the other treaty? An example of such a situation was in the *Southern Bluefin Tuna* cases where two treaties on the same matter had different dispute resolution provisions.[357] Here, the parties were Australia, New Zealand, and Japan and the dispute was over whether the bluefin Tuna, a valuable migratory species of tuna which ranges near the Antarctic was recovering from overfishing. If it was the case that they were indeed recovering from overfishing, then measures such as temporary prevention of fishing as well as other methods would have to be taken to ensure their recovery. Prior to this dispute, all three states had entered into the Convention on the Conservation of Southern Bluefin Tuna which established a commission to set a total allowable catch alongside other measures. The Convention has a provision for the settlement disputes which allows the parties to choose whatever peaceful means of settlement. In addition to this, all three parties were also signatories to the United Nations Convention on the Law of the Sea (UNCLOS) which also had provisions on the fishing of migratory species of fish and had provisions for compulsory dispute settlement.

Australia and New Zealand chose to commence proceedings at the International Tribunal for the Law of the Sea (ITLOS) under the 1982 UNCLOS instead of the 1993 Convention on the Conservation of Southern Bluefin Tuna which was a regional treaty. Japan contested this, stating that ITLOS did not have jurisdiction as the matter fell under the gambit of the 1993 Convention and that UNCLOS allowed parties to avoid compulsory dispute resolutions if another treaty excludes it. Since this was the case with the 1993 Convention, ITLOS which was set up in accordance with UNCLOS would therefore have no jurisdiction in the matter. The

[357] *Southern Bluefin Tuna, (New Zealand v Japan)*, Provisional Measures, ITLOS Case No 3, [1999] 38 ILM 1624.

Tribunal ruled by 4 to 1 in favour of Japan, it held that this was a single dispute covered by both Conventions and since the 1993 Convention excluded compulsory jurisdiction over disputes falling under both it and UNCLOS, it consequently did not have jurisdiction.[358] The decision in this case was more straight forward due to the fact that the 1993 Convention excluded the compulsory dispute settlement under UNCLOS. In a situation where one treaty does not provide specification on which obligation is to be invoked and what form of dispute resolution is to be used, the difficulties may become more difficult to resolve and could result in further damage of the environment.

This also creates the possibility of conflict between international institutions and regional institutions like in the MOX Plant case. The matter was over the installation of a power plant in Sellafield in Cumbria on the coast of the Irish sea by the UK. The purpose of the power plant was to reprocess spent nuclear fuel containing plutonium dioxide and uranium dioxide into a new type of fuel know as mixed oxide fuel (MOX). After its installation, Ireland commenced action at ITLOS over the distribution of radioactive materials and pollution caused by the power plant in the Irish sea. Ireland sought provisional measures to prevent further activities which may aggravate the situation pending the decision of the tribunal.[359] The UK argued that ITLOS did not have jurisdiction to hear the matter as the dispute concerned other treaties especially EU law which had its own dispute resolution provisions. ITLOS rejected this argument and held that "Considering that, even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or

[358] Arbitral Award of 4th August 2000, para 57, 39 ILM 1359 (2000).
[359] *The MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, ITLOS case No.10, (2001) ICGJ 343.

obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention".[360]

Furthermore, it also stated that the application of international law rules on interpretation of treaties to similar provisions of different treaties may not produce the same outcomes taking into account differences such as context, purpose etc.[361] However, this decision by the Tribunal was refused by the CJEU when it held Ireland to be in violation of EU law for commencing proceedings against the UK under UNCLOS regarding the MOX power plant.[362] It stated that since the Union was a party to UNCLOS, the specific UNCLOS provisions which prohibited marine pollution were now part of the Union's legal order and the dispute was hence one of interpreting or applying the EC treaty, which meant that the CJEU had exclusive competence.[363] Ireland subsequently withdrew its claim against the UK from the Tribunal in 2007, but it was not until 2008 in which the Tribunal finally dismissed the case and ended its proceedings. Based on the ruling of the CJEU, it now appears that moving forward, where such situations occur, the CJEU will have exclusive competence over the dispute.

However, the entire ordeal starting from 2001 up until 2007 created an atmosphere of uncertainty, as the issue of jurisdiction and consequently the interpretation of the relevant obligations was uncertain. Although the Tribunal did give some provisional orders for Ireland and the UK to cooperate in the exchange of information, monitoring of risks, and also to come up with measures to prevent possible pollution of the marine environment as a result of the

[360] *The MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, ITLOS case No.10, (2001) ICGJ 343, Order of December 2001, para.50. Available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-3_dec_01.pdf
[361] Ibid, para.51.
[362] Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paras 149-151.
[363] Ibid.

operation of the plant,[364] these orders could have been ignored by the UK pending a decision by the CJEU. In other words, such conflicts between treaties and international institutions have the potential to create conducive situations for non-compliance on the part of states which could have negative effects on the environment.

Another major impediment to compliance is the issue of state sovereignty and its manifestation in the form of refusals to acknowledge the Jurisdiction of International Courts and tribunals or a refusal to comply with a decision once given. Consider the *South China Sea Arbitration* case, where the Philippines brought a case against China concerning China's nine-dash line, other activities such as physical enhancements made to the Spratly Islands, and the enforcement of a moratorium on fishing in the South China Sea.[365] The matter was brought under Annex VII of UNCLOS which was both ratified by the Philippines and China. Arbitrators were to be drawn from both parties according to article 3 of Annex VII, however, China declared that it would not be a party to the proceedings and that the Tribunal did not have jurisdiction over the matter.

It pointed out that it had excluded itself from the compulsory dispute resolution procedures under UNCLOS in accordance with the provision in Article 298 section 3 of Part XV. The Tribunal was formed despite China's absence, and it ruled that it did have jurisdiction to hear the matter. It also ruled in favour of the Philippines and held that China's historical rights claim within the "nine-dash line" where incompatible with the convention. It stated that UNCLOS "leaves no space for an assertion of historic rights," and that "China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with

[364] *The MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, ITLOS case No.10, (2001) ICGJ 343, Press Release 62. Available at https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_No.62.pdf

[365] *South China Sea Arbitration, (Philippines v China)*, Award, PCA Case No2013-19, ICGJ 495 (PCA 2016).

the Convention."[366] Following the decision, China refused to acknowledge it and has continued as before. This action by China could reduce confidence in the dispute resolution measures contained in UNCLOS, as it could serve as a precedent for future lack of compliance.

Although the main issue in the South China Arbitration case was a territorial issue (i.e. The nine-dash line), it still illustrates the fact that state sovereignty can and has been used to circumvent compliance with Court decisions, as they can simply opt out of compulsory dispute resolution procedures, or just refuse to comply. In addition to state reluctance to comply with judicial decisions, sometimes the courts are also to blame. For example, in the *Gabcíkovo-Nagymaros* case, where Hungary cited environmental concerns as one of its reasons for abandoning the building construction of its own portion of the dam.[367] Hungary had signed a treaty with Czechoslovakia for the construction of the dam on the Danube, and Slovakia the successor state to Czechoslovakia brought the matter before the ICJ, as negotiations with Hungary had failed.[368] The ICJ ruled that the treaty was still valid but did not make any specific orders due to the potential environmental consequences argued by Hungary. Instead, it imposed upon the parties a duty to negotiate the modalities of the judgment in good faith.[369] This decision by the ICJ was very vague and can be described as an action akin to the Court washing its hands clean and leaving the parties to their own devices.

The decision essentially left the parties at exactly the same position they were in before the matter was brought before the Court. What does negotiating in good faith in relation to that particular project entail? This was never explained in sufficient detail by the court. What

[366] Ibid, 261.
[367] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 1, at paras 15-22, 37 ILM (1998) 162.
[368] See the Special Agreement for Submission to the International Court of Justice of the Differences Between Them Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), 7 Apr. 1993, 32 ILM (1993) 1293.
[369] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 1, at paras 144-155, 37 ILM (1998) 162.

solution did the court expect the parties to reach through negotiations? They had brought the case before the Court precisely because negotiations were not working. The problematic nature of this decision was evidenced in the problems that followed in the negotiation process post-judgment, as negotiations broke down in 1998, commenced again in 2002 to 2004 with no success, and went on and off until the case was finally withdrawn by the Slovak government in 2017, with Hungary acceding to it. All the while, the Nagymaros (Hungary's part of the dam) was never built. This decision of the ICJ was criticised, with a commenter stating that:

> "…it is curious that the Court was upholding the parties to a bargain which both regarded was at an end, and no longer wanted to apply in its original terms. Principle would suggest that a contract repudiated by both parties was a dead letter, and the Court should have been concerned only with delineating the legal consequences of its termination. The decision can only be defended as a pragmatic one. The very serious financial and political implications of a finding that the contractual regime had been frustrated was not lost on the Court. Slovakia had already expended huge sums of money on the project and did not want it abandoned. On the other hand, completion of the project in its original form was utterly unacceptable to Hungary and genuinely imposed serious environmental threats. By asking the parties to negotiate a solution, possibly with the help of a third party, it

is arguable that the Court was abdicating the very responsibility that the parties had assigned to it."[370]

5.3 CONCLUSION

In conclusion, cooperation amongst state in relation to international environmental law appears to be reasonably high. This is evidenced by their willingness to enter into negotiations and when these do not yield a resolution, they are usually willing to allow the matter to be resolved by a tribunal or by the ICJ and to follow through with the judgments given. The Courts and the other international Tribunals have also been mostly effective in the environmental cases in which they have adjudicated, as their decision have helped in formulating some principles of international environmental law, creating commissions for monitoring compliance, and provided injured states with compensation. Notwithstanding this, this area of international law is also not free from problems, as cooperation and compliance with the law is not always a smooth process. Some of these problems have been cause by dual international environmental treaties covering the same subject matter, hence creating problems of jurisdiction and obligations. In addition to this, the issue of state sovereignty and its consequences, such as states having to consent to the jurisdiction of international courts and tribunals, and having the ability to also opt out from the dispute resolution procedures of treaties of which they are signatories to, have also been a hindrance in achieving optimum compliance. Finally, the overall picture seems to be one which is moving in the direction of more compliance with environmental law and cooperation between states to achieve solutions. The ICJ has also played a vital role in moving things in this direction, as it has been

[370] Phoebe Okowa and Malcolm Evans, `Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)', The International and Comparative Law Quarterly, Vol 47, No.3 (1998), pp.688-697.

willing to allow parties to carry out negotiations during ongoing cases, order provisional measures to prevent environmental harm, and also barring its terrible decision in Gabcíkovo-Nagymaros, it has mostly helped in ensuring compliance and promoting cooperation.

CHAPTER 6 (THE ROLE OF THE CJEU & THE COMMISSION IN ENFORCING SOLIDARITY IN THE EU)

6.1 ENFORCEMENT OF SOLIDARITY IN THE EU

As has been discussed in previous chapters, the origins of solidarity goes back to the founding treaty of the ECSC but had a slow evolution over the years through subsequent treaties and the Jurisprudence of the CJEU. Having said this, it becomes important to examine how member states can be motivated to show solidarity, and when a failure to show solidarity arises on their part, how are such issues to be addressed. This is where enforcement comes into view, as if solidarity is not enforceable, it will open the door for further defaults which could pose a threat to the survival of the Union. Enforcement of EU law is generally carried out by the Commission and the CJEU. These are generally called infringement procedures which include a pre-litigation phase and then a litigation phase. The enforcement procedure begins with the Commission detecting a lack of compliance by a member state, the Commission then engages in informal talks with the defaulting member state in order to find a solution and a deadline usually in the weeks is set.

Where the informal procedure fails, the Commission triggers the formal procedure which is granted by Article 258 TFEU. This pre-litigation process involves the Commission requiring the member state to provide a letter of formal notice which comments on its non-compliance. If the response of the member state is unsatisfactory, the Commission issues a reasoned opinion to the member state which stipulates a timeframe for compliance. If this time limit elapses without compliance or an appropriate response, the Commission then brings the matter to the CJEU. It is at this stage that the CJEU adjudicates on whether the member state has complied or not and has the power to impose pecuniary penalties on the defaulting state. Once directives have been transposed into national law, the enforcement process does not come to an end, as it is then up to national decision makers and national courts to implement them.

Other than directives which do not need to be transposed, other forms of EU laws such as Regulations and Decisions still require implementation. This implementation is carried out by a host of actors, both state and non-state actors in different fields, which include agencies, regulatory bodies etc. One of the issues which plague the implementation of EU law and consequently solidarity amongst member states is the use of ambiguous language in the issuing of directives, regulations and even treaty provisions. Other problems include reluctance from member states (i.e. state actors) to implement directives, Improper transposition instruments by member states which compromise the original intentions of the Law. Due to national sovereignty, the direct enforcement of EU law has been kept in the purview of the member states with a few exceptions. However, over the years, the Union has gradually increased its area of competence in terms of direct national enforcement of EU law. In the subsequent paragraphs, this chapter will tackle the issue of enforcement at the EU Level. It will analyse the role of the Commission and the CJEU in relation to how they ensure

compliance with solidarity. Key cases in different sectors of the Union will be discussed and analysed to see how effective the Court and the Commission have been.

6.2 THE CJEU'S ENFORCEMENT OF SOLIDARITY

6.2.1 IMMIGRATION & ASYLUM

In enforcing solidarity, the CJEU has played a pivotal role, sometimes for the better and other times further muddying the waters. As the Court has the role of interpreting the treaties, it has over the years interpreted and given meaning to provisions of the treaties which talk about solidarity and has also been called upon to hold certain member states responsible for failures to show solidarity. In area of immigration and asylum seeking, the Court has made decisions, some of which have been important such as in the case of the joined cases of *Slovak Republic and Hungary v Council of The European Union*.[371] The background to this case involved the Council's adoption of a binding Decision for the relocation of 120,000 refugees from the territories of member states at the borders of the Union which were overwhelmed at the height of the migrant crisis in 2015. The Decision was taken by the Council based on Article 78(3) TFEU which provides that in a situation where one or more member states are faced with an emergency of a sudden inflow of third country nationals, the Council on a proposal from the Commission can adopt measures to alleviate the situation of the member states concerned.

[371] Joined cases C-643/15 and C-647/15, Slovak Republic & Hungary v Council of the European Union, Court of Justice of the European, 6th September 2017.

However, this Decision was resisted by certain member states (Hungary, Poland, Czech Republic, Romania, and Slovakia) and an action was brought before the CJEU by Slovakia and Hungary challenging the Council's Decision. Whereas France, Greece, Belgium, Italy, Sweden, and Luxembourg intervened with the Commission on the side of the Council. The applicants argued firstly that Article 78(3) did not provide a proper legal basis for the Decision of the Council. Secondly, that there were procedural errors (Failure to reconsult the Parliament) made when the Decision was made and these therefore created a breach of essential procedural requirements. In relation to solidarity, their arguments were based on proportionality and voluntariness. Concerning proportionality, they argued that the Commission's decision was unnecessary to achieve the intended objectives, as the same objectives could have been actualized through the use of other measures (e.g. Temporary Protection Directive, assistance from Frontex in the form of "rapid intervention") which would have taken in the context of already existing instruments.

The Court ruled that Article 78(3) provided the institutions with the power to make temporary measures to deal with exceptional refugee inflows in a quick and effective manner. It ruled that such measures could introduce exceptions to the regulations of legislative acts. However, this could only be done if the range of the exceptions are strictly stated in terms of both timeframe and objectives and that they did not introduce any permanent change to the regulation of Acts.[372] The Court ruled that the Decision of the Council had complied with this requirement. Regarding the lack of proper consultation with the EU Parliament, the Court ruled that although the original motion of the committee concerning the contested Decision was changed (this was done due to the Hungarian motion to exclude them from the list of

[372] Ibid, Para 80. of the Judgment.

member states using the relocation mechanism), the EU Parliament was informed about the changes before accepting the relevant resolution. In addition, the other changes made to the original motion were of no consequence to the essence of the motion.[373]

Concerning Solidarity, The Court dismissed this argument, and found that the council was giving effect to the principle of solidarity and fair sharing of responsibility based on Article 80 TFEU when it adopted the decision in question.[374] Therefore, the principle of solidarity once adapted into concrete measures through the process of adoption can be legally binding upon member states. In addition, the court also stated that the other measures suggested by the applicants are of a complimentary nature and cannot on their own achieve the goal of alleviating the situation of the beneficiary states. Furthermore, the decision of the Court to give binding legal effect to the principle of solidarity, and also its willingness to deal with the issue of voluntariness indicates that solidarity can be made to be coercive once it has been adapted into measures, as the applicants had tried to argue that commitments in EU migration policy should be carried out "in a spirit of solidarity" which is more of a value than a general principle of Community law.[375]

6.2.2 POLAND V COMMISSION (ENERGY PROCUREMENT)

Another area which the Court has played a role in enforcement is that of Energy Solidarity. Solidarity in this area is provided in Article 194 TFEU which states that that Union policy on energy shall aim, in a spirit of solidarity to ensure the functioning of the energy market, the security of energy supply, promote energy efficiency and the interconnection of energy networks.[376] Despite this call for solidarity by the TFEU, this sector has not been known for

[373] Ibid, Paras 163-169 of the Judgment.
[374] Paras. 252, 329.
[375] Para, 231
[376] Article 194 TFEU.

solidarity and cooperation and this has largely been due to member states having their own individual energy strategies. These individual energy policies have actually created the opposite of solidarity, with member states entering into conflict and disagreements with each other. When these conflicts have occurred, the CJEU has been called upon to decide the issue and lay down the position of the law. A very important case in the area of energy solidarity was in the case of *Poland v Commission*.[377]

The issue came as a result of the Commission's Decision to grant German's regulatory authority the ability to give Gazprom (a Russian Company) monopoly over a pipeline which links the Nord stream I pipeline with eastern Europe. The applicants challenged this Decision claiming that it was in violation of Article 194 as it did not take into account the adverse effects the monopoly would cause to the energy security of the affected states and that it also put the Union's plans to diversify its energy procurement in jeopardy as it promoted an overreliance on Russia. The Commission submitted that in its opinion, that the principle of solidarity between member states contained in Article 194 is first addressed to the legislator and not to the (national) administration applying the legislation. It also argued that the solidarity provided for by Article 194 only pertains to instances of crisis in the supply or functioning of the internal gas market. Finally, the Commission denied that its decision had put the Union's energy policies in jeopardy as the Nord Stream I pipeline is a project which serves the common interest and is a realisation of a priority project of European Interest contained in Decision No 1364/2006/EC.[378]

[377] Case T-883/16, *Poland v Commission* [2019].
[378] Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC (OJ 2006 L 262, p. 1)

The General Court considered the points made by both sides and reached a decision. It ruled that the Commission's argument that the solidarity provided for by Article 194 only pertains to emergency situations was not correct. It stated that the principle of energy solidarity does not only impose a duty of mutual assistance when emergencies such as natural disasters etc put the energy supply of a member state in jeopardy, but also when this is not the case.[379] It ruled that the energy policy of the Union requires both the Union institutions and member states in the exercise of the powers in this area to refrain from implementing measures which are likely to negatively affect the interests of the Union and other member states. Nevertheless, it did emphasize that

"The application of the principle of energy solidarity does not however mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in the field of energy. However, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict"[380]

The decision of the general court was not accepted by Germany which made an appeal to the CJEU. The applicants claimed that the concept of solidarity was too vague and was never intended to have legal effect, and that the General Court was wrong in its decision to interpret it in such a way as to give it legal effect. The CJEU upheld the decision of the General court and dismissed the grounds of appeal. In its decision, it emphasized the link between the principle of solidarity and sincere cooperation found in article 4(3) TEU.[381] The court also

[379] Case T-883/16, *Poland v Commission* [2019], Judgment, para 72.
[380] Judgment, para 77.
[381] *Germany v Poland*, [2021] Case C-848/19, para 41.

stated that the principle of solidarity in this area gave rise to a duty for the Commission to conduct an assessment of the security of supply as part of the exemption granting process. In addition, it also concurred with the Advocate General's reliance on the precedent of granting solidarity legally effect laid down by the court in the area of immigration and asylum as and saw no reason why the principle of solidarity mentioned in Article 194(1) TFEU should not also be interpreted as being justiciable.

Finally, the Court also went further in its decision by stating that beyond the context of energy security, energy solidarity applies to all other objectives of EU energy (e.g., interconnected energy networks, energy efficiency etc) and that solidarity was the glue that kept all these objectives together and made them coherent. Although the Court upheld the decision of the General Court, there were still questions which were left unanswered. This was an opportunity for the CJEU to elaborate on the principle of energy solidarity and what it entails. One of such issues which were not touched upon by the CJEU was the practical application of the principle of solidarity. Since the CJEU concurred with opinion of the AG that the Commission had to consider the impact of its decision in regards to member states and the EU, a key question of what criteria should be used in determining if the decisions of the Commission have complied with solidarity.

After the decision of the General Court, this criticism was made by several authors such as Kim Talus, Katja Yafimava etc.[382] However, with the arrival of decision of the CJEU, sufficient clarification was not still provided. This poses a particularly tricky situation in the field of energy creation, as this is a field where member states have different energy creation and

[382] See Dirk Buschle and Kim Talus, 'One for All and All for One? The General Court Ruling in the OPAL Case' (2019) 17(5) OGEL 9. See also Katja Yafimava, 'The OPAL Exemption Decision: A Comment on the Advocate General's Opinion on Its Annulment and Its Implications for the Court of Justice Judgment and OPAL Regulatory Treatment' (2021) 87 Oxford Inst En Stud 6.

procurement schemes, and the EU also has its own goals on energy creation and sustainability. Hence, if the Commission makes a decision which complies with the EU goals on Energy creation but at the same time puts the energy strategy of another member state in jeopardy, will this decision be deemed to be against the principle of solidarity? This was an important juncture in the road wherein the CJEU could have laid down some sort of criteria or template. Since CJEU's judgment mostly concurred with the AG's opinion, then perhaps the AG's opinion that the Commission carryout an analysis of the interests involved when making a decision and the CJEU having the role of arbiter to decide if the decision is in line with solidarity maybe the situation moving forward. Nevertheless, it has been pointed out that the lack of clarity on the practical application of Solidarity could lead to increasing discrepancy in understanding the common EU energy policy, especially in this area where Union policies and goals exist side by side with national energy policies and goals.[383] For example, the Courts decision could be interpreted as a greenlight to prioritise national energy policies over Union ones or prioritise certain dimensions of energy policy over others.[384]

6.2.3 AGUSTA, & INSTIIMI (COMMON DEFENCE & ARMS ACQUISITION)

The Court has also been involved in enforcement of solidarity particularly in explaining the implications of Treaty provisions regarding the EU's common defence goals and policies. The area of Common Security and Defence Policy is a very complex area in which EU defence policies take second place in relation to NATO alliances, and member states have national prerogatives in terms of their national military planning and weapons procurement. Since national defence policies flow from the state's right to a monopoly of force, it has therefore

[383] Mykola Iakovenko,`Case C-848/19: Germany v Poland and its Outcomes for EU energy sector: an extended case note on the European Court of Justice judgment in the Opal case: Judgment of the Court (Grand Chamber) of 15th July 2021, C-849/19, Germany v Poland, Section 4.
[384] Ibid.

been long accepted that on the issue of procurement of military equipment's, member states have the ultimate responsibility. This acknowledgement of member state responsibility has been codified in Article 346 of the Lisbon Treaty which provides them with an exemption from regulations of the single market in this area.

This exemption provided in the area is due to the fact the military procurement market does not function like other normal capital markets where there exists lots of sellers who develop products of their own initiative and consumers who decide which products to reward with profits. In this industry, there is almost a monopoly with state's being the main legitimate purchasers and since they have a monopoly on the use of force, they often control the exports of weapons by made by domestic armaments companies. This coupled with the fact that the creation of military equipment requires heavy financial investment in terms of research and production, makes it virtually impossible for funds to be raised privately. Hence, states usually have to fund the development of the kind of weapons which they will eventually purchase.[385]

The issue of national defence procurement was harmonised by Directive 2009/81/EC and Directive 2009/43/EC which means that defence procurement contracts with cross-border interests have to comply with EU law. However, due to their individual military interest's member states have been reluctant to comply with EU law in this area. They have tried to justify their actions based on exceptions contained within Article 346 TFEU which states that no member state will be obliged to provide information which if disclosed would be contrary to its security interests, and that any member state can take such measures it deems necessary for its security in relation to the production or trade of arms, munitions, but that

[385] Peck and Scherer, `The Weapons acquisition process – An Economic Analysis', (1962), p.736. See also William P. Rogerson, `Incentive Models of the Defence Procurement Process', (1995), pp. 311-317.

such measures should not negatively affect the conditions of competition in the internal market for products which are not specifically intended for military purposes.[386] These provisions are not particularly clear on what certain terms mean which has allowed the member states to be able to justify their policies under these terms. For example, what criteria would be used to decide what measures are "necessary" for the protection of the essential interests of security? And when will products be deemed not to be intended for military purposes, and when will they be?

The Court was called upon to provide clarification on the issue in the case of Agusta. Here, Italy tried to argue that the exemption could be applied in cases (in this case the equipment was a helicopter) where despite the civilian use of the equipment, it could also be used for military purposes. The Court rejected this view and held that Article 346 TFEU required that the subject of the contract be designed specifically for military use, which was not so in this case.[387] The CJEU also had to clarify the situation on equipment's with dual purposes in the case of *InsTiim*i.[388] The case involved the Finnish Defence Forces inviting four companies to submit tenders for the supply of tiltable turntable equipment. The contract was awarded to one of the companies pursuant to a negotiated procedure which did not satisfy the stipulations of Directive 2004/18. InsTiimi which was one of the companies that wasn't granted the contract filed a suit in court. In the court of first instance the case was dismissed, as the court held that equipment was suited for military purposes and that that was the reason for its procurement by the authorities. An appeal was made to the Supreme Administrative Court where InsTiimi argued that the equipment was a technological

[386] Article 346(1)(a) Treaty on the Functioning of the European Union, and Article 346(1)(b) Treaty on the Functioning of the European Union.
[387] Case C-337/05, *Commission v Italy* [2008] ECR I-02173.
[388] Case C-615/10 *Insinooritoimisto InsTiimi* [2012] 00000.

innovation from the civilian sector and could be used in both sectors and was thus not primarily suited for military purposes. Therefore, the Finnish Defence Authorities could not exclude the scope of Directive 2004/18 based on the protecting the essential interests of their security. The Court decided to make a preliminary reference to the CJEU concerning the interpretation of Article 10 of Directive 2004/18, Article 346(1)(b) TFEU.

The CJEU referred to the need to respect the general principle that exceptions from Union public procurement rules should be interpreted strictly. It held that although member states do have a right to implement such necessary measures for their national security, the area of procurement of military equipment was still covered by Union law. Therefore, it was possible for protectionist measures for defence contracts taken by member states to be in violation of conditions for competition in the common market if the equipment's are not specifically intended for military use.[389] The CJEU's decision in this case was in agreement with the Advocate general's opinion which went into extensive detail on the qualifications and criteria that needs to be met in order for the exception to be applied.[390] The Advocate general pointed out that both conditions set out in Article 346(1)(b) must be met. Concerning the first which is that the contract must be related to arms munitions and war material, a restrictive approach was applied which limited such war materials to the categories listed in the 1958 list and must also be intended for specific military purposes.[391]

In deciding whether they are for military purposes, the product should be designed both objectively and subjectively. The military nature of the product should result from its intended

[389] Ibid.
[390] See Agnieska Chwialkowska and Jerzy Masztalerz, `Defense Procurement: The ECJ Keeps its Ground on "Dual use" Products: Case C-615/10, *Insinooritoimisto InsTiimi Oy*, Judgment of the Court (4th Chamber) 7th June 2012, *European Procurement & Public Private Partnership Law Review*, Vol.7, No.4 (2012), pp.289-292.
[391] See Council Decision 255/58 of April 15 1958 which defined the list mentioned in Article 436(2) TFEU, https://data.consilium.europa.eu/doc/document/ST-14538-2008-REV-4/en/pdf accessed 21st June 2022.

use by the contracting authority (Subjective) and the products specific design and characteristics (objective). Hence products designed for civilian purposes but later modified and adapted for military purposes would in principle not fall under the exception unless the modification has provided it with objective characteristics which make it specifically usable for military purposes and different from its civilian counterparts.[392] The second condition is that the derogation from Directive 2004/18 be necessary for the protection of the essential security interests of the member state, and this would have to be proven by the contracting authorities before the national courts.[393]

6.2.4 PRINGLE (FINANCIAL SOLIDARITY)

On the issue of Financial and Monetary solidarity, the Union created the European Stability Mechanism (ESM) which is a permanent institution which is made up of the member states which form part of the Eurozone. It was creation by the Treaty Establishing the European Stability Mechanism in 2012. Its creation was necessitated by the global financial crisis of 2008 which created a situation in which certain member states like Ireland, Portugal, Greece etc. which were hit very badly by the crisis had to be provided financial assistance. Prior to this, the European fiscal framework was based on crisis prevention through complying with financial rules which were created to keep deficits and public debts within acceptable limits. The primary goal of the ESM is to provide financial assistance to member states which have temporary difficulties in accessing, despite having a sustainable public debt.[394] Since this

[392] Case C-615/10 *Insinooritoimisto InsTiimi* [2012] , Opinion of AG Kokott, para V, https://curia.europa.eu/juris/document/document.jsf?text=&docid=118141&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=13899888#Footnote8 accessed 21st June 2022.
[393] Ibid.
[394] Ignazio Visco,`Testimony on the Functioning of the European Stability Mechanism and the prospects for its reform', 2019. https://www.bis.org/review/r191210g.pdf

mechanism was created to create financial assistance and maintain the stability of the Euro, it is therefore a mechanism for furthering financial solidarity.

Shortly after the creation of the ESM, a challenge was brought to the CJEU on the validity of its creation and purpose. This was the case of Pringle, where the litigation was started by an independent MP in Ireland.[395] He challenged the legality of the Council Decision 2011/199 which enabled the creation of the ESM. The Council Decision had provided for the amending of article 136 TFEU to include a reference to the ESM, through the use of the simplified treaty revision procedure contained in article 48(6) TEU. The treaty was altered with the introduction of section 3 which reads "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".[396] The case was initially heard in the Irish High Court and then the Supreme Court, after which it was referred to the CJEU.

The applicant challenged the validity of the Council Decision. It was argued that the ESM only related to two areas which are monetary policy and the coordination of economic policy, which was not within part III of the TFEU, and that by doing this it was increasing the Union's competences, as the Institutions were given new responsibilities. Other arguments made by the applicants were (1) that the ESM allowed a circumvention of the "no bailout clause" contained in article 125 TFEU, (2) that member states could not sign up to the ESM treaty as it went against EU law (i) it infringed the principle of sincere cooperation (ii) it breached the Union's exclusive competence in areas of monetary and economic policy (iv) that the CJEU

[395] *Thomas Pringle v Republic of Ireland and Others*, [2012] Case C-370/12.
[396] Article 136(3) TFEU.

did not have the jurisdiction to make a ruling, as the matter pertained to the validity of primary law (treaty) which was outside the scope of article 267 TFEU. Considering the first issue, the Court ruled that the primary purpose of the ESM was safeguard the stability of the Eurozone as a whole, which in its view was different from maintaining price stability. It determined that even though an economic policy may have an indirect effect on price stability, it does not necessarily become a monetary policy. Since the ESM's primary objective was to help provide stability during a financial crisis, coupled with new economic regulations which came with it, it was deemed to fall within the area of economic policy.[397]

Regarding whether article 136 TFEU had increased the competences of the Union, the Court ruled that this was not the case. It stated that the reference to a stability mechanism did not bring about any change to what the Union could or could not do, as the ESM was created and run by the member states and not the Union. Furthermore, the fact that certain EU Institutions such as the Commission and the European Central Bank were to be utilised by the ESM did not undermine the fact that the member states were still to be the primary operators, and that the Decision itself was silent as to any possible role of EU institutions.[398] The Court also considered whether the ESM violated the Union's exclusive competence in the area of monetary and economic policy. On this, it decided that it did not. It stated that the ESM did not compromise the stipulations of article 3(1)(c) which grants the EU exclusive competence in monetary policy or that of article 127 TFEU concerning the European System of central banks. This was because the ESM did not set interest rates or issue currency, its goal was to provide finance to member states within the Eurozone facing financial troubles. Hence, any effect it may have upon the rate of inflation would be an indirect consequence of

[397] *Thomas Pringle v Republic of Ireland and Others*, [2012] Case C-370/12, paras 59,60.
[398] Para 74.

its activities. Moreover, the finances provided by the ESM was funded through paid-in capital or by issuing financial instruments which comply with the provisions of article 123(1) TFEU.[399]

The argument made by the applicants that the ESM allowed the sidestepping of the "no bailout clause" in article 125 TFEU was dismissed by the court. It ruled that article 125 TFEU did not create an absolute prohibition, as it was apparent from the wording of the article that it did not prohibit either member states or the Union from providing any form of financial whatsoever to any member state. It buttressed its reading of article 125 with those of other articles relating to economic policy such as articles 122(2) TFEU which allows for the Union to provide ad hoc financial assistance to a member state facing difficulties caused by natural disasters or some other exceptional occurrence beyond its control.[400] Since article 122(2) TFEU did not state that it derogated from article 125 TFEU, it therefore meant that article 125 TFEU was not meant to be understood as an absolute prohibition.[401]

The Court further clarified what kind of financial assistance would be compatible with article 125 TFEU. In doing this, it highlighted the origins of the prohibition contained in article 125 TFEU which were in article 104b EC and later article 103 EC. It stated that the original purpose of the prohibition was to ensure that member states followed a sound budgetary policy, and subject them to the logic of the market should they fall into debt, which would help sustain the financial stability of the monetary Union.[402] Hence, it interpreted the prohibition in article 125 TFEU as prohibiting any financial assistance by the Union or member states which would cause or incentivise the recipient member state to pursue an unsound budgetary policy.[403]

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[399] Roderic O'Gorman, `Thomas Pringle v Government of Ireland, Ireland and Attorney General', p.225. https://www.jstor.org/stable/44026366?seq=2#metadata_info_tab_contents
[400] *Thomas Pringle v Republic of Ireland and Others*, [2012] Case C-370/12, paras 130,131.
[401] Ibid.
[402] Paras 134,135.
[403] Para 136.

In its view, the ESM would not incentivise recipient member states in this way, as none of the financial instruments to be used by the ESM in granting financial assistance would absorb the debt of the recipient state. On the contrary, they would lead to the creation of new debt which would be owed to the ESM and would be paid with interest.[404] Finally, considering the alleged breach of the principle of sincere cooperation in article 4(3), the Court having already examined the ESM treaty and determined that it contained sections such as article 13(6) and article 20(1) which allowed it to comply with EU law. Therefore, the principle of sincere cooperation in article 4(3) TEU does not prohibit member states in the Eurozone from concluding agreements such as ESM.

6.2.5 GAUWEILER (FINANCIAL SOLIDARITY)

After this decision, the CJEU was called upon to give a decision in the case of Gauweiler.[405] This case involved a challenge to the European Central Bank's (ECB) decision to implement its Outright Monetary Transactions (OMT) Programme which was supposed to grant it the power to buy member state bonds in the secondary market. The background to the case was the aftermath of the financial crisis which started in 2008. By 2012, the yields of the bonds of some member states to incorporate redenomination risk premia (i.e., the risk that a Euro asset will be redenominated into a devalued legacy currency).[406] This created a risk of possible abandonment of the Euro by some member states and a return to other currencies. Reacting to this risk the ECB decided to implement the OMT. Generally, the ECB regulates the economy and price levels through monetary policies which are implemented through transmission mechanisms. However, there are other instruments such as the use of interest rates, and in

[404] Para 139.
[405] Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, [2015].
[406] Robert A. De Santis, `A measure of Redenomination risk', (2015) https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1785.en.pdf

the event that there is a disruption by dysfunctional market segments and the Central Bank's rate is evenly transmitted around the Eurozone, the Central Bank can intervene by purchasing the securities it usually accepts as collateral on the secondary market.[407]

This was the situation with the earlier Security Markets Programme (SMP) and the later OMT which the Central Bank introduced. The OMT programme was implemented in 2012 to replace the SMP and involved open transactions in secondary sovereign bond markets. It would be used just for selected member states which are under a macroeconomic adjustment programme based on the financial assistance obtained through the European Financial Stability Facility (EFSF) or the ESM.[408] However, it was different from the SMP in that it contained the "strict and effective conditionality" as a prerequisite for the conduct of the OMT and also to provide the member states with the necessary incentive to implement the required prudent fiscal policies.

An action was brought to the German Federal Constitutional Court (FCC) about the compatibility of the OMT with the German constitution. The FCC ruled that the ECB had acted ultra vires as the OMT was an exercise in economic rather than monetary policy and was thus not within its competence. In addition, it also stated that the OMT violated article 123 TFEU which prevents the ECB and national central banks from providing overdraft facilities and purchasing debt instruments in favour of Union institutions or member state governments. Finally, it held that implementing the OMT would give rise to a risk of financial loss for the German Central Bank, which would affect the affect the German Parliament's budgetary sovereignty.[409] Although the FCC had reached this decision, it nevertheless still provided an

[407] "Outright Monetary Transactions" (ECB, Jan. 1, 2014).
[408] Takis Tridimas and Napoleon Xanthoulis, `A legal Analysis of the Gauweiler case', p.2.
[409] Para. 28 and 33 of the order for reference.

alternative interpretation of the validity of the OMT with the goal of supplying another route in which it could still be legal. This would involve exclusion of a debt cut, that the government bonds of the select member states would not be purchased to an unlimited amount, and that interferences with the price formations of the Union market would be avoided where possible.[410]

Considering all this, the FCC made a preliminary reference to the CJEU on the matter. Some governments questioned the admissibility of the reference made by the FCC on the ground that a question as to the validity could not be directed at an Act like the OMT decision which was merely in its preparatory phase and had not yet implemented.[411] The CJEU disagreed and dismissed this argument by stating that the reference was of interpretation and not a question of validity. This was because the FCC had asked as to whether the law must be interpreted as allowing the European systems of central banks (ESCB) to implement the OMT programme.[412] Regarding the first point raised by the FCC that the OMT strayed from the area of monetary policy into the area of economic policy, the Court ruled that this was not the case. It held that the objectives of a particular measure would determine whether it belonged to the economic realm or the monetary realm. The Court considered Article 119(2) TFEU which provided that the monetary policy should be single, and that Article 282(1)(4) TFEU gives the responsibility of conducting the monetary policy of the Union to the ECB which is enabled to adopt any measures necessary to carry out this task in accordance with laid down in the statute of the ESCB and the ECB. In the view of the Court, since the objective of the OMT was to secure the appropriate monetary policy transmission and the singleness of

[410] BVerfG, Case No. 2 BvR 2728/13 (Jan. 14, 2014) at [100].
[411] Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, [2015], para 23.
[412] Ibid, para 30.

monetary policy, it therefore fell within the Article 18.1 of the Protocol of The ESCB and ECB Which allows the ECB to buy and sell marketable instruments.[413]

In addition, the CJEU in reaching its conclusion affirmed the submission of the ECB that the effectiveness of the ESCB's single monetary policy and its ability to impact market price developments depends on whether it can send "impulses" across financial market to the various areas of the economy.[414] Hence, if the transmission mechanism is somehow disrupted, it could jeopardise the ESCB's capacity to ensure price stability in the Eurozone and undermine the single monetary policy.[415] The Court then turned its attention towards the specific properties of the OMT. The OMT was created to specifically target the bonds of member states that were disruptive to the monetary policy transmission mechanism. In the opinion of the referring court, this aspect of the OMT which targeted the specific bonds was one of the reasons for it being deemed to be an economic policy rather than a monetary policy. The CJEU on the other hand took a different view on it, it held that just because the OMT selectively targeted those bonds issued by member states which could be disruptive did not mean that it went beyond the realm of monetary policy.[416]

It reasoned that in conducting monetary policy, the ECB has the responsibility of promoting sound public finances since the secondary objective of the monetary policy is to support the general economic policies of the EU which are to be conducted in line the guiding principles in Article 19(3) TFEU. It followed therefore that a programme which includes conditions which prevent it from providing member states with an incentive to pursue or maintain

[413] Gauweiler, Para 47. See also Protocol On The Statute of The European System of Central Banks And of The European Central Bank Article 18. https://www.ecb.europa.eu/ecb/pdf/orga/escbstatutes_en.pdf
[414] Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, [2015], Para 50.
[415] Ibid.
[416] Ibid, para 55.

unsustainable financial practices, cannot be deemed to have exceeded the confines of monetary policy framework.[417] Furthermore, the OMT will not automatically be implemented in all cases where a particular member state has complied with the macroeconomic adjustment programme. It would only apply in situations where there is a need to maintain price stability and the transmission mechanisms or when there has been a disruption in the single monetary policy.[418]

6.2.6 ANALYSING THE IMPLICATION OF THE COURT'S DECISIONS

Although the CJEU has for the most part interpreted the treaties in a way that supports solidarity, it has not always done a clean and coherent job while doing this. In the case of *Slovak Republic and Hungary v Council of The European Union*, the Court provided a good landmark decision for enforcement of solidarity. This decision clarified the position of solidarity in that it held that once it had been adapted into measures, it could become enforceable. However, when this decision of the Court is compared to its decision in *Poland v Commission* on the issue of Energy solidarity, there are some obvious differences. In the case of *Hungary v Council of The European Union*, the Court's decision was straight forward and clarified the position of the law, especially as the defendant's argument that the measures should be carried out in the spirit of solidarity which implied that it was not meant to be enforceable. Whereas, in *Poland v Commission*, the CJEU's decision left a lot to be desired. For example, when determining that solidarity in the area of Energy could have legal effect, the CJEU however failed to explain how solidarity was to be applied and what criteria is to be used. This is very important, as the area of energy procurement is one in which national energy policies and Union policies exist.

[417] Ibid, Para 61.
[418] Ibid, Para 62.

The Court left open the issue of what criteria would be used to determine if a particular member states energy policy is in the spirit of solidarity. One would ask by what is it to be judged against, is it to be judged against energy policies and goals at the Union level? Or is it to be judged against how it affects the energy policies of other member states or even the revenues they accrue through energy deals (as was the case for Poland in *Poland v Commission*). One could also ask whether any negative impact on Union Energy policies or other member states energy policies would be sufficient to render a particular member state's energy policy against the spirit of solidarity? Or does the negative impact have to be of a serious nature? This is further compounded by the General Courts statement in the same case that member states are to take into account the impact of their energy policies, but that the application of energy solidarity does not mean that Union energy policies can under no circumstances have a negative effect on the energy interests of particular member states. This implies that there will be certain situations where negative energy policies of the Union would not breach solidarity. However, the decision of the CJEU on appeal did not clear up this ambiguity, as to when this exception could be applied.

The issues this ambiguity creates also extends into the Union's environmental policies and goals. The EU has in previous years embarked on a journey to play its part in reversing climate change, reduce reliance on fossil fuels and transition into a green/clean energy. [419] This is very critical as the likelihood of potential conflicts are high. This is due to the fact that in order to achieve its goals for renewable energy and the phasing out the use of fossil fuels for energy creation, Union institutions would have to adopt binding decisions which would affect member states energy creation and supply goals. This would eventually require some form of

[419] Fit for 55: The EU's plan for a Green Transition, Council of The European Union, https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/

balancing between the powers of the Union's institutions and the discretion of member states to choose the conditions for exploiting their energy resources and energy supply. Hence, if a member state chooses one method of energy creation instead of another or perhaps is not as prompt in meeting Union targets and consequently has a negative impact on another member state or perhaps delays the Union from reaching its Union-wide green energy goals, what would be the deciding factor in determining if the negative impact would be of such a kind that does not fall foul of the spirit of solidarity.

On this, the CJEU's decision in the case of *Austria v Commission* indicates that it favours allowing certain measures implemented by member states to meet national energy targets to be legitimate even though they may not be in line with Union goals in the same area. This case involved the Commission approving the United Kingdom's plans to give state aid to NNB Generation Company Limited (NNBG) for the construction of two EPR reactor at Hinkley Point C nuclear power station. The Commission deemed this provision of state aid to be compatible with Article 107(3) TFEU which provides that member states can provide aid to facilitate the development of certain economic areas, where providing such aid will not have an adverse effect on trading conditions to an extent contrary to the common interest. Austria challenged this decision in the General Court which ruled in favour of the United Kingdom. It held that there was no need to establish a Union wide objective of common interest for the project, and that the Euratom treaty principles are separate from those of the TFEU therefore principles of environmental protection do not apply to Euratom. It reached this interpretation on environmental protection based on the Article 106a (3) Euratom Treaty which states that

the provisions of TEU and TFEU will not derogate from the provisions of the Euratom Treaty.[420]

Austria appealed this decision claiming that the approval of the state aid by the Commission was not in line with Union policy to support renewable energy. The CJEU was mostly in line with what the General Court had decided with the difference being that it held that state aid for economic activities which break environmental rules cannot be deemed to be compatible with the internal market. It affirmed the decision of the General Court that the compatibility of the state aid is not dependent on the pursuit of a Union-wide common interest and that in the absence of rules specific to state aid in the Euratom Treaty, the state aid rules of the TFEU would apply to the nuclear energy sector. The CJEU also held that Commission is required to consider the negative impacts of state aid on trade and competition between member states only, and that it did not have to consider the negative impacts of the state aid on environmental principles.[421]

This decision of the CJEU is also consistent with its earlier decision in the case of *Ålands vindkraft* where it also favoured a national support scheme for renewable.[422] In this case, Sweden had required electricity distribution companies to put up a set amount of green certificates for each year, and these had to be purchased from energy producers. Sweden had created this process because it was easier to identify green energy initiatives at the production stage rather than at distribution stage when electricity had entered into the transmission system. This system was based on the Directive 2009/28 whose aim is to promote the use of energy from renewable sources and allows them to implement national

[420] Case T-356/15 *Austria v Commission*, [2018].
[421] Case C-594/18 P *Austria v Commission*, [2020].
[422] Case C-573/12 *Ålands vindkraft AB v Energimyndigheten*, [2014].

development measures to encourage best practices in the production of energy from renewable sources.[423]

The controversial issue was that the Swedish government only granted approval of the certifications of domestic producers of renewable energy and refused to grant them to foreign producers. The Finnish company Ålands vindkraft applied for approval for a green certificate for its wind farm located in Finland and was refused. It challenged this decision and the CJEU was called upon to decide the matter. The CJEU ruled in favour of Sweden and generally it based its decision on three points. It held that the decision of the Swedish authorities to refuse approval did not violate free movement of goods. It held that although the Swedish measure did restrict free movement of goods, it was still lawful, as protection of the environment was a proper justification for this. It referred to its previous decision in *Preussen Elektra* where it held that a reduction in greenhouse emissions was for the protection of the environment.[424] It also held that the Swedish measure was justifiable due to practical realities, in that it was easier to easier to track and grant approval at production stage rather than at distribution, and that in accordance with the Directive, member states had to be able to control the effect and costs of their support schemes based on their different potentials.[425]

This decision of the court was not conducive with solidarity in the area of energy creation and supply at the Union level. This is especially so as the Commission had the goal of creating an internal electricity market and has advocated removing possible distortions to the single market arising from different national approaches to energy procurement. In its

[423] Directive 2009/28/EC of the European Parliament and Council, Article 3. https://eur-lex.europa.eu/eli/dir/2009/28/oj
[424] Case C-379/98, *PreussenElektra AG v Schhleswag AG*, [2001].
[425] Case C-594/18 P, *Austria v Commission*, [2020].

communication, the Commission stated its goals for a Europeanisation of the energy sector and highlighted some of the issues with differing national energy support schemes such as financially disadvantaging other EU energy companies.[426] It stated that unilateral interventions by single member states do not just solely harm companies in neighbouring states but could also turn out to be more expensive overall and less effective than a joint intervention with several other member states. It projected that the net financial benefit for such joint actions would amount to about 7.5 billion Euros per year.[427]

Finally, the areas of potential conflict therefore come down to two categories which are member states implementing measures to pursue national energy goals and, in the process, negatively affecting other member states. The second category would be member states doing the same thing, but instead of having a negative effect on a particular member state, they actually fall foul of Union level goals. On this issue, the CJEU's decisions in the above cases of *Austria v Commission* and *Ålands vindkraft* indicate that in certain cases at least, it allows the prerogative of member states being able to choose their own method of energy production and supply to take precedence over attaining certain Union level goals.

Turning towards the area of common defence, the Court's decisions here have also had a significant impact on solidarity. Before analysing the CJEU's decisions in the two landmark cases of *Commission v Italy* and *InsTiim*i, the nature of this area and the difficulties which come with it should first be noted. As stated earlier, the area of defence is complicated

[426] Communication From the Commission, `Delivering the Internal Electricity Market and Making the Most of Public Intervention', p.11. https://energy.ec.europa.eu/system/files/2014-10/com_2013_public_intervention_en_0_0.pdf

[427] Veit Bockers and Others,`Cost of Non-Europe in the Single Market for Energy, Benefits of an Integrated European Electricity Market: The Role of Competition'. http://publications.europa.eu/resource/cellar/99d4fd94-7619-44f4-9f4b-5541235b90d1.0001.04/DOC_1

because some member states have split responsibilities due to their membership of NATO. In addition, Integration objectives by the European Defence Agency (EDA) must be combined with the very real issue of protecting the national security of member states which is provided for under Article 346 TFEU. Furthermore, whenever the Court is called upon to give a decision on the procurement of military equipment's, it cannot simply apply the regular EU rules on public procurement.

This is for a couple of reasons, the first is that in military acquisition especially when procuring weapons for combat such as tanks, jets etc, there is requirement for high security and intelligence in order to provide confidentiality and protect national security. Due to this, public procurement procedures may not always apply, as public procurement rules involve a certain level of transparency which may be detrimental to national security. Another reason is due to crisis situations and the possibility of quick escalation. Such situations would require member states to act promptly, and they may not be able to do so if they if they have to follow public procurement rules which would require the awarding of such contracts for military equipment to go through competitive procedures (i.e., Tenders).

With this in mind, the CJEU has not allowed the exception of "essential security interests" provided by Article 346 TFEU to be used as a carte blanche by member states in order to avoid complying with Union law specifically Directive 2009/81/EC which covers the area of defence procurement. In determining what acquisitions fall under the exception, the CJEU did not employ its teleological approach to interpretation but chose to use a more literal interpretation. In these two cases, it held respect to the first that the since the helicopters were not intended specifically for military purposes, they did not fall under the exception and

in the second, it referred to a Council definition in 1958 where military equipment are defined as equipment that has been designed specifically for military usage. The Court applied Article 346 1(b) TFEU strictly, thereby making clear the limits in which member states can justify their military procurements. In laying down these definitions and parameters, the Court has limited the ability of member states to implement protectionist policies which would exponentially favour domestic manufacturers of military equipment and stifle competition in the internal market. Nevertheless, it still has to work with the realities which exist in the area of security and defence, and strike a reasonable balance, as there will be instances where member states have to make military acquisitions which they deem necessary for the protection of the essential interests of their security.

6.2.7 THE ROLE OF THE COMMISSION

Just as the CJEU has played a major role in the enforcement of solidarity, the European Commission has also played a played a part. Some of its actions have been effective in furthering solidarity while some other have not been. As explained in the introductory part of this chapter, the Commission is goes through the informal and formal stages of enforcement with a member state when there has been a failure to comply with Union law. In the case of *Slovak Republic & Hungary v Council of the European Union*,[428] the Commission played a crucial role in the background to the case in that it when Italy and Greece were being overwhelmed by refugees, it made a proposal to the council for the relocation of some of the asylees to other member states. The Council then adopted the binding decision (EU) 2015/1601 based on the proposal for the relocation.[429] This action by the Commission was

[428] Joined cases C-643/15 and C-647/15, Slovak Republic & Hungary v Council of the European Union, Court of Justice of the European, 6th September 2017.
[429] Council Decision (EU) 2015/1601, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1601&from#:~:text=This%20Decision%20establishes%20provisional%20measures,2.

meant to facilitate solidarity amongst member states by requiring member states on the mainland of the EU to help alleviate the burden of those on the peninsulas and border of the EU. This action of the Commission here can be contrasted with the Commission's action in the case of *Poland v Commission*.[430]

The background to this case involved the OPAL pipeline which was an on-land section of the Nord Stream I gas pipeline with its entry point in northern Germany and its exit point in the Czech Republic. In this area, Union law allows for the granting of exemptions from EU gas rules on third party access, regulated tariffs and unbundling, albeit with the approval of the Commission. The rationale for this was to enable investments which would not be made if EU law were to be applied fully. In 2009 the OPAL pipeline was under full exemption on third party access and tariff regulation provisions, but to enable effective competition and prevent a monopoly, the companies with a dominant position such as Gazprom could reserve only 50% of the cross-border capacity of the OPAL pipeline unless they implemented a gas release programme which is a sale of gas under conditions set by the regulatory authority. The gas release programme was not implemented which resulted in the other 50% of the pipeline remaining unused. Considering this situation, the German regulator informed the Commission in 2016 on request from Gazprom of its intention to modify the certain provisions on the original exemption granted in 2009.

The modifications would replace the restriction imposed by the original decision on the capacity that could be reserved by the dominant companies and allow access to the unused capacity but with the obligation to offer by auction at least 50% of the capacity operated by it. This meant that all parties including the dominant parties could book this half of the

[430] Case C-848/19 P, *Germany v Poland,* [2021].

pipeline while the other half would remain. The Commission gave the green light to the German regulators submission and adopted Decision C(2016) 6950 with certain amendments. The commission justified its review on Article 36 of Directive 2009/73 which allowed for new major new gas infrastructure, therefore it was entitled to review the original exemption, and since new factual developments had occurred since the original exemption decision, this was a valid reason for the review. As explained earlier in this chapter, this decision of the Commission put other member states such as Poland at a disadvantage and the Court ruled that Commission failed to examine the impact of the exemption for OPAL on the energy security of other member states.

In the prelude to the case of *Austria v Commission*, the Commission also had to make a decision as to whether a proposed UK national measure on energy. The UK intended to provide state aid to NNBG in the form of revenues and a credit guarantee for the investor (NNBG) for investment in a new nuclear plant at Hinkley Point C.[431] There was a preliminary agreement which specifically provided for a contract for difference (CFD) which would be used to provide certainty of revenue for NNBG. The contract for difference basically meant that NNBG would receive a fixed amount of revenue for its output, this fixed price level decided by the contract is the `Strike Price'. The electricity produced by NNBG would be sold on the market and in the event that the reference price at which it is sold is less than the Strike Price, the Secretary of State would pay the difference between the Strike Price and the Reference Price.[432] This would make sure that NNBG with a fixed level of revenue and would provide them with the confidence to invest.

[431] Case C-594/18 P, *Austria v Commission*, [2020].
[432] Ibid.

The UK claimed that this measure met three objectives of security of `Energy supply' as the closure old plants would compromise future supplies, `decarbonisation' as nuclear plants produce electricity at low carbon emissions, and the `Diversification' of electricity. The Commission ran a formal investigation into the proposed measures. The UK had claimed that its proposed measures were did not fall under the definition of state aid in Article 107(1) TFEU. The Commission decided otherwise, as it found that both the investment contract and the credit guarantee had the potential to distort competition and trade between member states. This was because the proposed measures would lead to a development of a large level of capacity which may otherwise have been available to other private investors using alternative technologies either from the UK or from other member states. [433] Nevertheless, the Commission held that although the measures amounted to state aid under Article 107(1), they were compatible with the exceptions provided for in Article 107(3)(c). It reached this decision having considered issues such as the proportionality of the measures, the incentive effect, and having regard to the Union's overarching goal to reduce carbon emissions and transition to green energy. This Decision adopted by the Commission was deemed to be sound by the CJEU as it held that the Commission had taken into account the potential negative impacts it could have on other member states.

In the area of common defence, the Commission is also working to increase solidarity between member states. The Commission has adopted a proposal for a Regulation by the European Parliament and Council establishing the European Defence Industry Reinforcement through common Procurement Act (EDIRPA). The Commission made this announcement in a

[433] Commissions Formal Investigation, Published in the Official Journal of the European Union on 7th March 2014 (OJ 2014 C 69, section 6.10.). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2014.069.01.0060.01.ENG&toc=OJ%3AC%3A2014%3A069%3ATOC

Joint communication and stated that EDIRPA was a short-term measure and would lay the foundation for a more long-term measure called the European Defence Investment Programme (EDIP) which would have a bigger budget. This was done in response to the renewed Russian aggression in Europe (specifically Ukraine). This instrument responding to the Council's request has the goal of addressing the urgent requirements for defence products in the event of further Russian aggression. The proposed budget is 500 million Euros from 2022 to 2024 and hopes met the urgent need for more military equipment and to provide an incentive to member states to make common defence procurements in a spirit of solidarity. It is intended to prevent competition between member states for the same products and reduce expenditure. It would also allow the European Defence Technological and Industrial Base (EDTIB) to better adjust and increase its production capacity in order to meet the demand for defence products. It would support procurement actions by groups of member states of at least three.[434]

However, a possible problem with this proposal for the Regulation is that it is expected to contain rules which would include exclusions for products that are subject to third-country restrictions. This would most likely create a problem as due to the nature of defence procurements; a lot of defence products originate from outside the EU, especially from the USA. This could lead to certain member states pushing back and not being willing to participate. Nevertheless, this is just a draft of the regulation for EDIPRA, and it is possible that amendments could be made before EDIP comes into effect in 2023. Another problem is that the proposed budget of 500 million Euros is not a proper incentive to member states

[434] Communication from the Commission, `Proposal for a Regulation of the European Parliament and of the Council On Establishing the European Defence Industry Reinforcement Through Common Procurement Act', 2022/0219, https://data.consilium.europa.eu/doc/document/ST-11531-2022-INIT/en/pdf

considering the 200 billion Euros in which member states have planned to use to equip their respective armed forces. Therefore, this sum proposed by the Commission is not likely to provide sufficient motivation for member state cooperation in this regard. Having considered these problems, these proposals by the Commission in this area are a step in the right direction, as it aims to improve solidarity and cooperation, and it is likely that the Long-term EDIP would provide enough financial incentives for cooperation and could possibly provide some exceptions to the third-country restrictions.

6.3 CONCLUDING REMARKS

Finally, enforcement of solidarity has not been a very straight forward process as has been evidenced from the various cases and Commission decisions and proposals. There have been many obstacles in the way of enforcing solidarity which have usually come from uncooperative member states. However, the challenges posed by these member states is not without some merit. This is due to the fact that they often times rely on certain provisions in the Treaties. This then leads to the next issue of the drafting of Treaties. Some of the areas of the treaties which contain the principle of solidarity are somewhat vague with terms such as "in the spirit of solidarity" and are not very clear in terms of their meaning and implication. This has therefore led to a lacuna in the law which member states have over the years tried to exploit in order to not show solidarity when it not be very convenient for them to do so. The CJEU has had to step in and try to interpret these parts of the treaties in such a way that gives effect to solidarity.

In addition, even with the Judicial intervention of the Court, the process has not gone without some bumps. As in certain cases, the CJEU's decisions did not completely clear up the question marks and properly explain the implications of the solidarity provisions in certain

fields, as was the case in Poland v Commission in which the Court stated that member states had to consider the impact of their energy schemes on other member states but did not provide the criteria by which these energy schemes were to be evaluated. The Commission too has also contributed to some of the lack of solidarity as it did when it endorsed the proposal of the German regulators in relation to OPAL where this would have put a couple of eastern member states at a financial disadvantage, jeopardised the Union's goal of diversifying energy production & supply and allow Russian controlled companies to acquire a monopoly on energy supply within the Union. Notwithstanding the presence of instances when the CJEU and the Commission have provided decisions that are not conducive to solidarity, they have on the whole done a commendable job in providing clarity to the principle of solidarity.

For instance, in the case of Slovak Republic & Hungary v Council of the European Union the CJEU laid down a foundation for solidarity in that for the first time it ruled that solidarity was not merely a value but could become enforceable once it is put into concrete measures. This decision set the stage for its other rulings in other areas of solidarity like Pringle, Poland v Commission, etc. All these decisions have played a part in closing the gaps in the treaties and making sure that member states understand their obligations in solidarity towards other member states. Also, the Commissions activities in the form of making proposals such as in Slovak Republic & Hungary v Council of the European Union where its proposal to the Council for the relocation of refugees which eventually led to the case reaching the CJEU and solidarity being declared enforceable. This coupled with the Commissions other decisions such as when it considered Union wide goals for green energy when it allowed state aid for the UK which led to the case of Austria v Commission, and its proposal for EDIRPA and EDIP in the area of common defence show that it has also tried to promote solidarity where it able to do so. All

of these put together indicate that the CJEU and the Commission have played a major and positive role in enforcing and promoting solidarity in the EU.

CHAPTER 7 (COMPARISON BETWEEN THE ENFORCEMENT OF SOLIDARITY AT EU LEVEL AND THE GLOBAL LEVEL)

7.1 INTRODUCTION

The last three chapters have delved into how solidarity is enforced on the international level and the EU level, but this chapter will now compare how compliance is achieved at both levels. It will look at the shared obstacles on both levels, the measures implemented, and state behaviour in response to these measures. The comparison will be done in two major areas of environmental protection and refugee protection. After this, selected areas of Energy procurement in the EU and extra-territorial military intervention on the international stage will be compared.

7.2 COMPARISON IN THE AREA OF ENVIRONMENTAL LAW

The protection of the environment has been an important goal of the European Union and is enshrined in Article 3(3) TEU which states that “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment

and social progress, and a high level of protection and improvement of the quality of the `environment".[435] Article 191(1) TFEU also provides that the Union's environmental policy shall contribute towards certain objectives such as preserving and improving the quality of the environment, prudent and rational use of natural resources etc.[436] These objectives require member states to cooperate and moderate their economic activities and use of natural resources. It also requires the Courts to properly interpret the treaty provisions, EU institutions to issue secondary law, and national implementation on the part of member states.

Concerning the role of the CJEU in interpreting treaty provisions on environmental law, the Court has played a major role in clarifying the level of environmental protection which is to be achieved by member states. It did this by interpreting Article 19(2) which states that Union policy on the environment shall aim at a high level of protection taking into account the different situations in various regions of the Union to mean providing a minimum level of protection but does not mean that Union institutions or member states must provide the highest level of environmental protection. In the case of *Deponiezweckverband eiterköpfe* the CJEU held that it was not contrary to article 5(1) and (2) of the Landfill Directive for a member state to set its limit of acceptance of biodegradable waste for landfill at a level higher than that of the Directive.[437] It stated that community rules do aim to create complete harmonisation in the area of the environment, and that member states were allowed to implement more stringent measures of their own in order to attain a higher level of

[435] Treaty on European Union, Article 3(3). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008M003
[436] Treaty on the Functioning of The European Union, Article 191(1). Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E191%3AEN%3AHTML
[437] *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] Case C-6/03, Paras 27 and 28.

protection.[438] It also held that the contention that there was a proportionality test imposed by Article 193 TFEU was not the case, and that it was up to the member states to define the extent of the protection to be achieved.[439]

In the following case of *Azienda Agro-Zootecnica Franchini* the CJEU addressed two additional issues of importance. The first was in what circumstances is a member state can lawfully exceed the minimum standard of environmental protection mandated by a Directive. This was based on the facts of the case in which Habitats and Birds Directive provided that an environmental impact assessment be made on the project to be carried out around the Natura 2000 Network. The Italian government imposed a stricter measure which restricted a priori the building of wind turbines intended for self-consumption without undertaking the environmental assessments. The second question was whether meeting other EU objectives such as developing new and renewable forms of energy under Article 194 TFEU could take precedence over environmental protection objectives. On the first question, the CJEU held that Article 193 TFEU allows member states to implement stricter protective measures, and as long as these are compatible with the treaty and are communicated to the Commission, then they are permissible. In this case however, the Commission had not been notified of the measures, but the CJEU held that although there was a requirement to notify the Commission, the implementation of the planned measures were not dependent on the Commission agreeing or objecting.[440] On the second question, the CJEU held that in the current situation, the measures implemented by the Italian government did not put at jeopardy Union's goal of creating renewable energy.[441] Moreover, it also stated that Article 194(1) provides that the

[438] Ibid
[439] Ibid, Para 61.
[440] Ibid, para 53
[441] Ibid, para 57

Union's policy on energy must have regard to environmental preservation and improvement.[442]

The situation in terms of clarifying certain aspects of environmental law is similar to that on the international stage, as the courts (i.e. the CJEU and ICJ) have played key roles in interpreting treaty provisions and laying down important principles on how environmental law functions. Nevertheless, the CJEU's decisions here have been straight forward and without for ambiguity whereas the ICJ has sometimes provided decisions which appear to be contradictory. For example, the ICJ in relation to the prevent principle, in the case of *Trail Smelter*, the ICJ interpreted it to be a duty to prevent significant trans-boundary pollution which makes it an obligation of result.[443] Whereas, in Pulp Mills it interpreted the duty to prevent as an obligation of conduct, which is to act with due diligence.[444] Although these two decisions can be harmonised, they have the potential to create a loophole in which states can use to justify their lack of compliance with environmental law. When this is compared to the CJEU's decisions in the above cases of *Deponiezweckverband eiterköpfe* and *Azienda Agro-Zootecnica Franchini,* the CJEU's decisions are firm and clear in setting the standard of compliance expected from member states and also dealing with arguments that that other Union goals such as that of developing renewable energy take precedence over environmental issues.

Concerning general enforcement and holding defaulting states liable, at the level of the EU, the CJEU has given decisions against member states which have violated environmental law. A very good example of this was in the case of *Commission v Ireland*.[445] This case pertained

[442] Ibid, para 56
[443] *Trail Smelter (United States v Canada)* (1938 and 1941) 3 UNRIAA, P.1905
[444] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, (2010) ICJ 14, 79, para.204.
[445] *Commission v Ireland*, [2005] Case C-494/01.

to a systemic breach of environmental law by Ireland. Here, three complaints were lodged against Ireland concerning the dumping of construction and demolition waste on wetlands, and the storage of organic waste in lagoons and its disposal on land without the relevant permit.[446] The Commission issued a reasoned opinion to Ireland in regard to the complaints and asked it to take measures with the Waste Framework Directive, but Ireland denied that there was lack of compliance on their part. The Commission received five further complaints on the same issue and a further four complaints bringing the total to 12 complaints. A final reasoned opinion was issued to Ireland, but it failed to comply with the Directive within the timeframe provided by the Commission. The case was brought before the CJEU with the Commission arguing that the 12 separate complaints concerning the illegal waste activities was evidence of a general and persistent breach of Ireland's obligations under the Directive.

The CJEU ruled in favour of the Commission holding Ireland in breach of the Directive, it also further stated in regards to a systemic breach "On the other hand, in so far as the action seeks to raise a failure of a general nature to comply with the Directive's provisions, concerning in particular the Irish authorities' systemic and consistent tolerance of situations not in accordance with the Directive, the production of additional evidence intended, at the stage of proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent cannot be ruled out in principle".[447] This decision by the CJEU was meant to strengthen the position of the Commission in cases of systemic breaches of environmental law, as it allows the Commission to continue its evidence gathering process from other sources after triggering Article 260 TFEU without only having to rely on the arguments and evidence it provided in its reasoned opinion. In addition, it also ruled that once

[446] Ibid.
[447] Ibid, para 37.

the Commission had provided `Sufficient' evidence that the there was a systemic breach on the part of the member state, the burden of proof would shift to the member states who then have to show that this was not the case by disprove the Commissions evidence in substance and detail.[448]

This decision by the CJEU was confirmed in the subsequent case of *Commission v Italy*.[449] This case also involved the disposal of waste which was not done in accordance with a number of Directives.[450] The Commission commenced proceedings against Italy over many illegal and unsupervised landfills in Italy. In its decision, the CJEU noted the existence of about seven hundred unsupervised waste tips in Italy which contained hazardous waste of which only four hundred and twenty had been licensed and these were not contested by Italy. Based on this, it ruled that Italy had generally and failed to fulfil its obligations under the relevant Directives.[451] In this case, the Commission originally relied on the date provided by Corpo Forestale dello Stato (CFC) which issued a report detailing the number of uncontrolled waste tips in Italy. It had obtained this information by carrying out several surveys over a couple of years, the last of which was undertaken in 2002.[452] However, the Commission also conducted more investigations due to the situation appearing to be one of systemic breach. It obtained further proof of illegal waste tips in other regions which were not contained in the report of the CFC, as it found that the regions of Sicily, Fruili-Venezia Guilia, Trentino-Alto and Sardinia all had numerous illegal waste tips and abandoned waste sites.[453] It obtained this information from official documents from the authorities of those regions and reports from parliamentary

[448] Ibid, para 47.
[449] *Commission v Italy*, [2007] Case C-135/05.
[450] These Directives were Article 4, 8, and 9 of Directive 75/442/EEC on Waste, Article 2 of Directive 91/689/EEC on hazardous waste, and Article 14 (a) to (c) of Directive 1999/31/EC on the Landfill of waste.
[451] *Commission v Italy*, [2007] Case C-135/05, para 45.
[452] Ibid, Paras 9 and 10.
[453] Ibid, Paras 12 and 13.

commissions of inquiry, and also from official press articles.[454] Here, the Commission exercised its ability to undertake further gathering of information in order to `Sufficient' evidence that this was a systemic breach of EU environmental law.

Comparing this to enforcement on the international stage, the situation is also similar, as the ICJ and Tribunals have provided decisions which hold defaulting states liable for their breach. For example, in the joined cases of *Costa Rica v Nicaragua* and *Nicaragua v Costa Rica*.[455] Costa Rica contended that Nicaragua carrying out certain activities on the San Juan River including the construction of a canal and the dredging of the river had environmental consequences and violated its territorial sovereignty. Whereas Nicaragua claimed that Costa Rica's construction activities along the border between both states violated its own sovereignty and posed an environmental hazard to its territory. The ICJ ruled that they were both in breach of their duties under international environmental law. On the part of Costa Rica, it held that its construction of the road along the border posed a risk of transboundary harm and it therefore had a duty to undertake an environmental impact assessment which it failed to do. While it held that Nicaragua's construction activities had actually led to transboundary environmental damage to Costa Rica, particularly the impairment of the environment to provide goods and services. It therefore ordered compensation to be paid to Costa Rica for the restoration of the damaged areas.

As it has been illustrated above that the Courts both at the EU level and the international level are willing to hold defaulting states accountable for their failures to fulfil their obligations

[454] Ibid.
[455] See Construction of a Road in Costa Rica Along the San Juan River *(Nicaragua v Costa Rica)*, Judgment [2015] ICJ Rep. A /71/4. See also Certain Activities carried out by Nicaragua in the Border Area *(Costa Rica v Nicaragua)*, [2018] ICJ 15, paras .41, 45, and 52.

whether under EU treaties, International treaties or general international environmental law. This work will now turn to the issue of how states comply with the decisions of the courts at both levels in order to ascertain how effective they have been. On the EU level, compliance with the decisions of the CJEU on the environmental obligations of member states is generally easy to achieve except in areas of cultural or political significance to the member state. What this means is that on cultural or politically controversial matters, member states usually come up with different schemes and methods to avoid complying with the Courts decision. For example, in *Commission v Republic of Malta*, a decision was given against Malta which it refused to comply with.[456] The background of this case involved a failure by Malta to comply with the Conservation of Wild Birds Directive 79/409/EEC. Malta had authorised the hunting of protected species such as quails and turtle doves during their spring time migration in 2004.

In response to this, the Commission issued a reasoned opinion which Malta responded to by arguing that its actions were based on the conditions for a derogation under Article 9(1)(c) of the Directive. Unable to resolve the matter, the Commission commenced action against Malta. In Court, it argued that Article 7(1) of the Directive provides that in relation to migratory species, member states are to ensure that they are not hunted during their return to their breeding ground, the purpose of this was that if they were hunted before being able to breed, eventually they could go extinct. In this particular situation, these birds would migrate from Africa to Europe to breed during spring, and this was when they were being hunted in Malta. On account of this, it applied for interim measures to be issued by the Court so a to prevent further hunting of these birds pending the final decision of the Court. The Court granted the interim measures and eventually ruled against Malta. It held that a

[456] *Commission v Republic of Malta*, [2009] Case C-76/08.

condition for applying the derogation in Article 9(1) of the Directive would be when there was no other solution. That condition cannot be satisfied when the hunting season under derogation coincides without need, with periods where the Directive aims to provide protection. In addition, the species being hunted in spring were also available during the Autumn even if at fewer numbers, as long as they are not inconsiderable.[457]

Malta did not comply with this decision, therefore causing the Commission to bring proceedings against them for failure to comply. Eventually Malta conducted a referendum in 2015 concerning the spring hunting of migratory birds in which those in favour of continuing the spring hunt won by a narrow margin.[458] As a result of this, the hunting of these birds have continued till today. Comparing this to the international stage, the ICJ does not have an extensive list of cases involving environmental law as the CJEU does. Hence, there are not a lot of cases of non-compliance. However, in the case of *Gabčikovo-Nagymaros* Project, there was a lack of compliance here with the ICJ's decision, as both parties failed to reach a settlement. However, this failure was due the vagueness of the Courts decision which instructed both parties to negotiate in good faith without clarifying what this would entail.[459] Other decisions of the ICJ have usually ended with the defaulting party paying some form of compensation like in case of *Costa Rica v Nicaragua*[460] or with both parties reaching an out of Court settlement for compensation through Negotiation like in *Ecuador v Colombia*.[461] The overall picture which appears in the area of environmental law on both the international and EU level is one of overall compliance, especially on the international stage. However, at the

[457] Ibid, paras 49, 50, and 51.
[458] See Referendum on Spring Hunting of Migratory Birds by the Electoral Commission of Malta. Available at https://electoral.gov.mt/ElectionResults/referendum
[459] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 1, at paras 144-155, 37 ILM (1998) 162.
[460] Certain Activities carried out by Nicaragua in the Border Area *(Costa Rica v Nicaragua)*, [2018] ICJ 15, paras .41, 45, and 52.
[461] *Aerial Herbicide Spraying (Ecuador v Colombia)* Order of 13 September 2013, I.C.J. Reports 2013, p. 278.

EU level, member states are willing to comply except in certain circumstances which involve politically charged topics which have to do with long held traditions like in the case of spring hunting of migratory birds in Malta.

7.3 COMPARISON IN AREA OF REFUGEE LAW AND PROTECTION

In the area of refugee protection, both the EU and the International community make provisions for the protection of refugees in the 1951 Refugee Convention, CEAS and Articles 78 to 80 of the TFEU respectively. In achieving protection of refugees, the courts interpreting the relevant treaties and providing decisions holding states to their obligations under the treaties. In considering this, the role of the CJEU will first be examined before comparing it to judgments on the international stage. The CJEU in the joined cases of *X, Y and Z v Minister Voor Immigratie en Asiel*, the court laid down an important decision regarding granting asylum and the principle of non-refoulement.[462] In this case, three asylum seekers originally from Sierra Leone, Uganda, and Senegal who were applying for asylum in the Netherlands. They sought asylum on the basis that if they sent back to their countries of origin, they would suffer persecution and criminal prosecution due to their sexual orientation. Homosexuality is a criminal offence in these countries with the maximum sentence in Sierra Leone and Uganda being life in prison and up to 5 years in Senegal. The Dutch Council of State sought clarification from the CJEU as to whether they qualified for asylum based on the Qualification Directive 2004/83/EC which provided the requirements for asylum qualification.

In particular, it asked three important questions to the CJEU. The first was whether homosexual foreign nationals constituted a `particular social group' capable of qualifying for

[462] *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, [2013] Joined Cases C-199/12 to C-201/12.

protection under article 10 of the Directive. The second was whether such foreign nationals could be expected to conceal their orientation or exercise restraint in the country of origin so as to avoid persecution. Finally, it asked if the criminalisation of these activities and the possibility of imprisonment in their home countries would amount to persecution under the Directive, specifically Article 9 of the Directive. Regarding the first question, the CJEU ruled that the existence of criminal laws which targets homosexuals supports the position that they form part of a social group.[463] On the second question it ruled that criminalisation of homosexual behaviour on its own would not amount to persecution, but if the punishments like imprisonment were actually carried out, it would amount to persecution.[464] Finally, it held on third question that such applicants cannot be expected to conceal their homosexuality in their home countries or exercise reserve in the expression of their sexual orientation.[465] This decision by the CJEU helped in clarifying the relevant provisions of Directive 2004/83/EC and upholding the principle of non-refoulement as it prevented the applicants from being returned to countries in which they would face persecution.

A similar decision was given in the joined cases of *Bundesrepublik Deutschland v B and D*.[466] Here, applicant B claimed asylum based on the fact that he had supported a guerrilla warfare group in Turkey and had killed another prisoner back in Turkey who he thought was an informant. The other applicant D claimed asylum because he been a senior official of the PKK which when he had left began to send him death threats. Concerning the first applicant, based on the Qualification Directive, the German court of first instance denied him asylum due to him having committed a serious non-political crime, but a higher administrative court heard

[463] Ibid, para 48.
[464] Ibid, para 56.
[465] Ibid, paras 71 and 76.
[466] *Bundesrepublik Deutschland v B and D*, [2010] Joined Cases C-57/09 and C-101/09.

the case and came to a different interpretation on the Directive. Regarding the second applicant D, the court of first instance (Bundesamt) had granted him asylum, but revoked it three years later on the same basis as in the case of B. This revocation was annulled by a higher administrative court and the Bundesamt appealed to the Federal Administrative Court which stayed proceedings pending clarification from the CJEU. Due to the similar issues in both cases, the Court decided to hear them together. The German Court asked if it would constitute a serious no-political crime under Article 12(2)(b) and (c) of Directive 2004/83 if the person seeking asylum was a member or occupied a prominent position in an organisation which is included in the list of groups annexed to the Common Position 2001/931 on application of measures to combat terrorism.

The CJEU examined the acts committed by organisations annexed to the Common Position 2001/931 and found that they did fall within the scope of serious non-political crimes under Article 12 of the Directive. It held that in general, international terrorist acts are contrary to the purposes of the UN, and competent authorities in a member state can apply Article 12 of the Directive to such persons who were members of such an organisation.[467] The court did however clarify that even in such situations, the competent authorities must investigate each particular case in order to determine what role the particular individual played in the commission of such crimes, and mere membership of such a group should not automatically exclude refugee status.[468] The Court further listed out factors which should be considered when making such an investigation. It stated that such factors should include "the true role played by the person concerned in perpetration of the acts in questions; his position within the organisation; the extent of knowledge he had; or was deemed to have, of its activities;

[467] Ibid, para 84.
[468] Ibid, para 88.

any pressure to which he was exposed; or other factors likely to have influenced his conduct".[469]

Comparing this to that of the ICJ on the international stage, in the case of *Colombia v Peru*, the ICJ was called upon to interpret the provisions of the Havana Convention and the granting of diplomatic asylum.[470] This case involved the granting of asylum by Colombia to the Peruvian national Victor Raúl Haya de la Torre a political figure who was accused of inciting a military rebellion in Peru. Colombia had granted him political asylum at their embassy in the Peruvian Capital city of Lima. Peru disagreed with this and both parties decided to submit the matter before the ICJ for a verdict. The Pan-American Havana Convention had stipulated that under certain conditions, asylum could be granted in a foreign embassy to a political refugee who was a national of the territorial state. The issue before the ICJ was whether Colombia could unilaterally determine whether the offence committed by the Asylee was political or was a common crime. The court ruled that the Havana treaty did not recognise the right of unilateral qualification either explicitly or implicitly and that the other treaty (Montevideo treaty) which Colombia had also sought to rely on had not been ratified by Peru.[471] It therefore ruled in favour of Peru's counter claim that asylee had been granted asylum in contravention of the Havana Treaty.

As has been shown in the examples above, both the CJEU and the ICJ have expounded on treaty provisions and the obligations of states under them. However, state compliance with these decisions have not always been forth coming both on the international stage and on

[469] Ibid, para 97.
[470] *Asylum (Colombia v Peru)* Judgment [1950] ICJ Rep 266, ICGJ 194, p.1 and 2 of summary judgment. Judgment available at https://www.icj-cij.org/sites/default/files/case-related/7/1851.pdf
[471] Ibid.

the EU level. Take for example the case of *Hirsi v Italy*.[472] The applicants here were about two hundred persons who boarded three sea vessels from Libya intending to get to Italy. In May 2009, they had entered into the Maltese Search and Rescue Region of Responsibility when they were intercepted by ships of the Italian Revenue Police and Coastguard. They were then transferred into the Italian ships and transported back to Libya where they were handed over to the authorities. The applicants claimed that during the voyage, they the Italian authorities made no effort to identify them or inform them of the destination of their voyage.

In addition to this, the Italian minister of the Interior subsequently stated that these high sea interception operations were carried out based on the then bilateral agreement they had entered into with Libya for the control of immigration. The ECTHR held that the applicants were within the jurisdiction of Italy even though they had been intercepted on the high seas, as the principle of international law as codified in the Italian Navigation code envisaged that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the state of the flag it was flying. Concerning Italy's argument that this was permissible due to the bilateral agreement with Libya, the court found that Italy could not avoid its responsibility under the ECHR by relying on obligations arising out of a subsequent bilateral agreement. It held that Italy had violated the principle of non-refoulement as they had made no attempt to vet the persons on the vessels and distinguish between irregular migrants and asylum seekers before repatriating them.[473]

Furthermore, information coming out of Libya at the time indicated that there were serious human rights abuses going on in the country, and this was information that the Italian

[472] *Hirsi Jamaa and Others v Italy*, Application No.27765/09. Judgment available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-102%22]}
[473] Ibid.

authorities were aware of or could have been easily acquired. This was further compounded by the fact that two of the applicants died in unknown circumstances after being returned. After this decision by the ECTCHR, Italy simply found another way to circumvent their responsibilities by entering into a new bilateral agreement with Libya. The new agreement does not provide for any direct involvement by the Italian authorities, as they had learnt from their previous experiences that a direct involvement of their own officials and agents will most likely result in liability on their part. It instead obliges Libya to reinforce its borders with Italy providing technical assistance, training Libyan officials, and the necessary technology.

On the Union Level, members states have also been unwilling to comply with secondary legislation and Court decisions on refugee protection. The most famous example of this was the Council Decision 2015/1604 which allowed for the relocation of asylees. Concerning this Council Decision, certain member states such as Hungary, Slovakia, Czech Republic etc (AKA the VISEGRAD group), voted against it and refused to comply with Decision after it had passed by a qualified majority. The states of Hungary and Slovakia subsequently brought a case before the CJEU for the annulment of the Council Decision.[474] The applicants relied on several arguments, but the relevant arguments relating to solidarity were on proportionality and voluntariness. Concerning proportionality, they argued that the Commission's decision was unnecessary to achieve the intended objectives, as the same objectives could have been actualized through the use of other measures (e.g. Temporary Protection Directive, assistance from Frontex in the form of "rapid intervention") which would have taken in the context of already existing instruments. The Court dismissed this argument and found that the council

[474] Joined cases C-643/15 and C-647/15, *Slovak Republic & Hungary v Council of the European Union*, Court of Justice of the European, [2017].

was giving effect to the principle of solidarity and fair sharing of responsibility based on Article 80 TFEU when it adopted the decision in question.[475]

Therefore, the principle of solidarity once adapted into concrete measures through the process of adoption can be legally binding upon member states. In addition, the court also stated that the other measures suggested by the applicants are of a complimentary nature and cannot on their own achieve the goal of alleviating the situation of the beneficiary states. After this decision of the CJEU, member states like Hungary which had stated that they would comply with the Courts decision turned around still refused to take in any more asylees. This lack of compliance continued for years, prompting the Commission to commence another action against Hungary in 2020 for its failure to fulfil its obligations.[476] The CJEU in this matter also upheld the Commission's action and ruled that Hungary had failed to fulfil its obligations. Yet, despite this decision again by the Court, Hungary has still refused to comply. This lack of compliance by states such as Italy, Hungary and Slovakia further illustrate that on certain politically charged areas, states are willing to not comply with their obligations in refugee protection regardless of court decisions both on the international stage and the EU level.

7.4 AREAS OF ENERGY PROCUREMENT & MILITARY INTERVENTION

In the area of energy procurement in the EU, member states have also failed to show solidarity. In the case of *Poland v Commission* concerning the OPAL pipeline decision.[477] The Commission had given a decision approving of Germany's regulatory authority's decision to grant Gazprom monopoly of use over this pipeline.[478] In response to this, Poland brought an

[475] Paras. 252, 329.
[476] *Commission v Hungary*, [2020] Case C-808/18. Judgment available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/cp200161en.pdf
[477] *Poland v Commission,* [2019] Case T-883/16.
[478] European Commission Decision C(2016) 6950.

action against the Commission before the General court, and it was joined by Latvia and Lithuania. The applicants argued that the Commission's approval was in breach of Union law, and that the increase in volume of gas that would be imported would have a negative impact on their energy security and could derail the Union's attempts to diversify gas imports, as it would lead to a decrease in the use of other transit routes. It also argued that this was in violation of Article 194 TFEU which provides that the Union's energy policy should be carried out in the spirit of solidarity. The general court ruled in favour of the applicants and annulled the Commission's decision holding that it had not complied with the principle of solidarity (energy solidarity to be specific), as it had not taken into account the effects it would have on Poland's energy security. The case was appealed to the CJEU and the CJEU upheld the decision of the General court and dismissed the grounds of appeal. In its decision, it emphasized the link between the principle of solidarity and sincere cooperation found in article 4(3) TEU.[479] The court also stated that the principle of solidarity in this area gave rise to a duty for the Commission to conduct an assessment of the security of supply as part of the exemption granting process.

Although this decision by the CJEU prevented Germany and the Commission from providing Russian controlled companies with a monopoly on energy supply, afterwards, member states still failed to show solidarity in reaching the Union goal of diversification of energy sources, as they continued to patronize and receive a large part of their energy supply from Russia. This over reliance Russian gas by member states did not still cease until when Russia launched its invasion of Ukraine in February 2022, and the subsequent destruction of the Nord Stream pipelines in September of the same year. This has consequently led to an increase in energy

[479] *Germany v Poland*, [2021] Case C-848/19, para 41.

bills across the many member states, as they have had to find other alternatives within a short period of time, which now costs them more.

On the international stage, the area of military intervention is also another area in which states, especially powerful states sometimes refuse to comply with their obligations. A very good example of this was in the case of *Nicaragua v USA*.[480] Here, Nicaragua commenced proceedings against the US for its support of an armed rebel group in Nicaragua in order to overthrow the government and install a more US friendly system. It first sought interim measures from the ICJ pending a final decision. The court issued provisional measures requiring the US to cease its activities in Nicaragua, stating that Nicaragua had a right to sovereignty and political independence which should be respected. The ICJ then examined the issue of whether it had jurisdiction to hear the matter, and it held that Nicaragua's 1929 Declaration recognising the compulsory jurisdiction of the Court was valid and it was entitled to invoke the US's Declaration of 1946 as grounds for the courts jurisdiction. The US challenged this and claimed that the Court had no jurisdiction in this matter and refused to participate any further with the hearings. The ICJ finally found in favour of Nicaragua, it rejected the US justification of collective self-defence and held the US to have breached its obligations under customary international law by means of its military and paramilitary activities and restricting access to Nicaragua's ports.[481] These obligations were not to interfere in the internal matter of another state, to not use force against another state, and to not interfere with its sovereignty. The Court finally made an order of reparations to be paid

[480] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United states of America)*, Judgment on Jurisdiction and Admissibility, [1984] ICJ Rep 392.
[481] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United states of America),* Merits [1986] ICJ reports, p.14. Summary of the judgment available at https://www.icj-cij.org/sites/default/files/case-related/70/6505.pdf

to Nicaragua, but the US has refused to comply and has not still paid any amount in reparations to Nicaragua.

7.5 CONCLUDING REMARKS

In conclusion, the picture which appears on both the EU level and on the international stage is one of general compliance, as states do not actively go out of their way to put other states at a disadvantage or to defy the rulings of the Courts. However, there are certain situations in which states may decide to put other states at a disadvantage and even refuse to comply with court decisions which try to hold them accountable. They would usually do this when they believe that doing so would be in their benefit and the costs of non-compliance will not be so dire as to cancel out the initial benefits like in the case of Germany in *Poland v Commission*. Another reason also has to do with a position of strength, where powerful nations on the international stage like the US, China, Russia etc can play fast and loose with their international obligations because of a lack of repercussions like the case of the US in *Nicaragua v USA*. Finally, in relation to the EU, there may be some light at the end of the tunnel, as the CJEU in February 2022 in the joined cases of *Hungary v Parliament and Council*, and *Poland v Parliament and Council*, has upheld the Commission's ability to withhold funds from member states who fail to comply with EU rules and regulations.[482] The CJEU specifically stated that "compliance by the Member States with the common values on which the European Union is founded – which have been identified and are shared by the Member States and which define the very identity of the European Union as a legal order common to those States such as the rule of law and solidarity, justifies the mutual trust between those

[482] *Joined Cases C-156/21 and C-157/21, Hungary v Parliament and Council, and Poland v Parliament and Council*, [2022].

States. Since that compliance is a condition for the enjoyment of all the rights deriving from the application of the Treaties to a Member State, the European Union must be able to defend those values".[483] This decision by the CJEU will hopefully provide the Commission with some amount of force to ensure compliance from non-complying states.

CHAPTER 8

8.1 CONCLUSION

Solidarity in the European Union has been fraught with many disagreements and conflicts with member states showing cooperation sometimes, while putting their individual interests above that of others at other times. The different reasons for this have been throughout this work. However, the most important factor which causes member state lack of solidarity is self-interest. As discussed in the first and second chapters of this work, enlightened self-interest which is a bend of moral reasons and personal gain wherein the member states realise that cooperating to achieve the goals of the Union would in the long run be in their own interest was highlighted as the motivation for member state cooperation. However, the `self-interest' part of enlightened self-interest still exists and manifests itself through the means of state sovereignty whenever member states find themselves in positions in which due to political reasons or financial reasons it would be more beneficial to them to not comply than to comply. Having compared the situation on the EU level to that on the international stage, the situation is very similar with states taking unilateral initiatives which put other

[483] *Joined Cases C-156/21 and C-157/21, Hungary v Parliament and Council, and Poland v Parliament and Council*, [2022], Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf p.2.

states at a disadvantage or even outright refusing to comply with decisions of the Courts like in the case of China in the South China Sea Arbitration.

Due to the lack of any form of centralised power on the international stage, disputes are also regularly resolved through negotiations and conciliation, especially when one party realises that the other party is less likely to comply with the decision of the ICJ or an international tribunal. Hence, even though a settlement may be reached, the settlement may not always be fair. At the level, the situation is a bit better, as there are overarching structures and there is a lot more integration amongst member states, in terms of the Common Market, a shared currency, and greater judicial integration. Hence, the Union has more effective means of ensuring member state compliance. In achieving this, both the Commission and CJEU have been pivotal, as many issues of non-compliance are usually dealt with by the Commission at the pre-litigation phase without the CJEU being called upon to provide a decision. While those which are taken before the court are mostly handled in a concise manner, with the CJEU usually taking the opportunity to clarify the position of the law, like it did in relation to solidarity in the case of Poland v Commission and the joined cases of Slovak Republic & Hungary v Council of the European Union.

Despite this greater enforcement ability possessed by the Union, it does not still ensure complete compliance as has been illustrated in the preceding chapters. Member states have still continued to put their personal interest above those of the Union in areas where they stand to gain a benefit, and it does not appear that this situation may change in the near future. Based on this understanding of solidarity and member state behavior, it could be said that the methods used by EU institutions to effect compliance in areas of low integration have not been effective. Therefore, it would be prudent for the EU to not set targets which are too

high or costly to member states in areas where there has not been sufficient integration, as member states will be less likely to comply.

For example, in the areas of energy creation & procurement, and asylum, this situation has been evident, as in the area of energy procurement, member states have always been choosing the option of buying cheap gas from Russia over more financially costly alternatives which would help reach the Union goal of energy diversification. In the area of Asylum, the flawed nature of the Dublin III and member state disagreements on CEAS allowed for a massive lack of compliance from the Visegrad Group. Therefore moving forward, in order to achieve a better state of compliance amongst member states, the EU should in addition to not setting high targets in areas of lower integration, the Union should also endeavor to provide member states with some benefits in certain difficult areas because the Union is not a federation with the powers of complete enforcement, and as such, state sovereignty and the interests of those sovereign states will always play a part in their decisions to cooperate and comply with the decisions of the CJEU.

Since member state sovereignty continues to play a part in their decisions to cooperate or not, it would also be very useful for the Union to also try to effect compliance in areas of low integration through other non-legal means (the use of the word non-legal here does not mean illegal, it simply refers to other mechanisms besides the use of the law and Courts). One such means which the Union could utilize is that of lobbying/Interest representation. The EU Commission defined lobbying in the EU as “activities carried out with the objective of influencing the policy formation and decision making processes of the European

institutions".[484] The Commission specifically stated that lobbying activities do play a legitimate and useful role in a democratic system and came up with a `Register of Interest Representatives' which would contain active EU lobbyists whether they be trade associations, NGO's, Corporate lobby Units etc.

The Commission also proposed a code of conduct for all registering Representatives in addition to the Register with the aim of promoting transparency in the lobbying process.[485] This was done in accordance with Article 11 TEU which allows Union institutions to maintain open, transparent, and regular dialogue with representative associations and carry out consultations with concerned parties.[486] Lobbying has been used successfully by various organisations both at EU and national levels and the EU currently has hundreds of registered lobbyists.

Therefore, it is suggested that the EU should create specific agencies with the purpose of lobbying at the national level in member states in areas where there is likely to be member state reluctance to comply. In addition to lobbying policy makers at the national level, these agencies could also be used to work with NGOs in order to promote specific EU objectives at the grassroots level. For example, such agencies could work with NGOs to promote more awareness of negative impacts of climate change on the environment and the EU's 2050 net-zero objective or promote more integration in the area of common defense in light of rising external threats to the Union. They could do this at secondary schools, universities, local

[484] Communication from the Commission – Follow-up to the Green Paper `European Transparency Initiative' {SEC(2007) 360}, section 2.1.1. Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52007DC0127

[485] Ibid section 2.1.4. See also `Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register', Annex I Code of Conduct, 20th May 2021, Official Journal of the European Union. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2021.207.01.0001.01.ENG

[486] Article 11 Treaty on European Union, Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M011

organized events etc. Doing this will increase the number of people who support these goals and could sway them to vote for political parties whose political agendas align with these goals. Hence, in the case of grassroots activism promoted by these agencies, this would promote solidarity organically without directly engaging politically.

8.2 FUTURE IMPLICATIONS

The research issues and questions posed at the start of this thesis ought to be considered in the context of future implications in this field. The Union appears to follow the line of reasoning of providing benefits in certain areas of Union policy. For example, in the energy sector, the Union's Clean Energy for All Europeans Package which was adopted in 2019 based on proposals from the Commission in 2016 and political agreement between the same and the Council in 2019.[487] Two of its main goals are for energy efficiency and renewable energy, and it set a 2030 target of 32.5% for the first and 32% for the second. The process requires member states to create National Energy and Climate Plans (NECPs) running from 2021 to 2030. In order to achieve this goal, it provides for Co-financing of investments, with the Commissions multi-annual financial Framework and the 'NextGenerationEU' instrument directly co-financing energy investments with money from the Recovery and Resilience Facility, Cohesion policy funds, and Modernisation funds.[488] This funding will help alleviate state and private investments in energy and would provide states with a bit more incentive to play their own parts in reaching the stated goal.

In response to the destruction of the Nordstream Pipeline and the loss of supply of gas from Russia, the EU Energy Platform was launched in order to secure energy supply and phase

[487] See the EU's Clean energy for all Europeans package. Available at https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en
[488] https://energy.ec.europa.eu/topics/energy-efficiency/financing/eu-programmes/current-funding_en

out reliance on Russian gas. Energy Platform provides for demand aggregation and joint purchasing. It matches the demand with supply and allows companies to enter agreements with gas suppliers either individually or as a consortium which would be cheaper for smaller companies.[489] Nevertheless, the Energy Platform is voluntary and up to states to participate in it. In the area of Common Defence, the Commission proposed in 2022 for more cooperation in defence and for joint procurement of weapons and other military equipment.

The Commission is promising to commit 500 million Euros of the Union's budget over two years to provide incentive to member states.[490] The above measures are examples of the EU providing member states with positive incentives to cooperate and participate in certain schemes. Nevertheless, this method of fostering solidarity and cooperation may not always work, hence in other situations, the EU would have to compel some of its member states. It should do this by imposing fines or withholding funds or a combination of both. These would be able to prevent non-complying member states from further non-compliance. Furthermore, moving forward, the Union's current approach of providing incentives to member states in certain areas is a good strategy and should be carried on. However, it must also be prepared to also enforce solidarity with actual financial penalties especially in relation to continued defiance of Court decisions, because if this is not tackled, it could lead to a failure of the EU to reach key objectives which could in the long run undermine the stability of the Union.

[489] https://energy.ec.europa.eu/topics/energy-security/eu-energy-platform_en
[490] https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3143

To summarise the future impact of this thesis on policy makers in this area, four key policy strategies have been developed through this research to improve member state compliance with their solidarity obligations, and they are:

- The Union should seek to provide member states with positive incentives especially in monetary form in order to increase cooperation in areas (e.g. Common Defence & Weapons procurement, Energy creation, procurement & distribution) where member states feel that following national objectives may be more beneficial.

- (ii) The Union should not set extremely high targets in areas where the targets do not match the level of integration. In such situations, it should investigate ways of addressing and building the level of integration before adopting high targets.

- (iii) The Union should also use make use of financial penalties and withholding of funds in important/core areas where there is member state defiance.

- (iv) The Union should also create an agency or agencies with the responsibility of lobbying at the national level for EU objectives and growing grassroots support for EU objectives.

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