Solidarity’s Reach:

Meaning, Dimensions, and Implications for EU (External) Asylum Policy

Violeta Moreno-Lax*

ABSTRACT:

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

KEYWORDS:

Solidarity; shared responsibility; Article 80 TFEU; EU-Turkey deal; external dimension of the Common European Asylum System (CEAS)
1. Introduction: More than Meets the Eye

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

Perspectives on the principle, however, vary, with stark differences between countries along the ‘North-South’ axis. While Western countries generally embrace the ‘Safe Third Country’ (STC) notion, maintaining that earlier presence in the territory of a State, through passage or stay, engages legal responsibility to determine status and provide protection, developing countries emphasize the negative impact of such a rule, highlighting its ‘burden shifting’ rather than ‘burden sharing’ effect.

Very tellingly, prior to the conclusion of the EU-Turkey deal in March 2016, Turkey persistently opposed STC transfers, underlining the unfair result to which they lead,

---

* Lecturer in Law, Queen Mary University of London.


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


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

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

Regionalizing protection and concentrating responsibility on transit countries that happen (by geographical chance) to be closer to refugee-producing States.\footnote{Report of the Sub-Committee of the Whole, A/AC.96/671, para. 68. See also statements by Turkey, A/AC.96/SR.418, para. 74; A/AC.96/SR.430, para. 66; A/AC.96/SR.456, para. 6-7.}

Imbalances and disagreement on how to allocate international protection duties have not been overcome over the years. Discussions on the ‘irregular secondary movements’ strand of the Convention Plus initiative, launched in 2002 by UNHCR, have yielded no results,\footnote{For an overall presentation and related documents see: <http://www.unhcr.org/pages/4a2792106.html>.} and calls for a ‘New Deal’ on burden sharing, nearly ten years later, have yet to materialize.\footnote{‘UNHCR chief calls for ”New Deal” in managing the world's displaced’, UNHCR News Stories, 8 Oct. 2010, at: <http://www.unhcr.org/4caf29e79.html>.} The debate has regained momentum during the ‘refugee crisis’ and, particularly, after the 2016 New York Summit, ‘acknowledg[ing] a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner’.\footnote{New York Declaration for Refugees and Migrants, A/71/L.1, 13 Sept. 2016, para. 11.} Such ‘shared responsibility’ is considered essential to demonstrating ‘solidarity with, and support for, the millions of people […] who, for reasons beyond their control, are forced to uproot themselves[...]’\footnote{Ibid., para. 8.}

In response, the UNHCR Executive Committee programme (EXCOM) has ‘reaffirmed’ its ‘commitment to international solidarity and responsibility- and burden-sharing involving all members of the international community’ and has engaged itself ‘to further strengthening international cooperation and solidarity and equitable responsibility and burden sharing’.\footnote{EXCOM Conclusion on international cooperation from a protection and solutions perspective, No. 112 (LXVII) 2016, Recital 4 and para. 1. See also Conclusions No. 18 (XXXI) 1980; No. 40 (XXXVI) 1985; No. 52 (XXXIX) 1988; No. 56 (XL) 1989; No. 80 (XLVII) 1996; No. 67 (XLII) 1991; No. 100 (LV) 2004; No. 101 (LV) 2004; No. 104 (LVII) 2005; No. 105 (LVIII) 2006, para. (i) (i); No. 107 (LXVIII) 2007, para. (b) (xiii); No. 109 (LX) 2009; No. 111 (LXIV) 2013; and No. 91 (LII) 2001.} Yet, a codified ‘solidarity obligation’ at the universal level is still lacking,\footnote{G. Noll, Negotiating Asylum (Martinus Nijhoff, 2000), at 277; M. Barutciski and A. Suhrke, ‘Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing’, 14 JRS (2001), p. 95, at p. 109; and G. Noll, ‘Protection in a Spirit of Solidarity’, in R. Byrne, G. Noll, and J. Vedsted-Hansen (eds.), New Asylum Countries? (Kluwer, 2002).} which diminishes the legal strength of the principle and its practical traction as an ordering standard to apportion responsibility for ‘durable solutions’ on the global scale.

Nonetheless, this contribution argues that there is more than meets the eye, especially within the Common European Asylum System (CEAS), upon the
positivization of imperative ‘solidarity clauses’ in several areas across EU law, including the immigration field.\(^\text{14}\) It submits that there is an (autonomous) EU requirement to engage externally with the wider world in a manner that is ‘solidarity-prone’ and produces ‘fair’ outcomes for refugees;\(^\text{15}\) that EU solidarity produces ‘hard’ legal obligations on the regional plane, adding concretion to international statements on sharing and cooperation, as part of the principal obligation to ‘develop a common policy on asylum […] with a view to offering appropriate status to any third-country national [TCN] requiring international protection […]’ enshrined in Article 78(1) TFEU.

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

2. The Normative Foundations of EU Solidarity

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

\(^{15}\) TFEU, Article 67(2).

\(^{16}\) TFEU, Articles 67 and 2, as well as TEU, Article 6.

\(^{17}\) TEU, Articles 3(5) and 21.

\(^{18}\) TEU, Articles 4(3) and 13(3).

\(^{19}\) TE, Article 21(3), 2\textsuperscript{nd} indent. See also TEU, Articles 13(1), 16(6), 18(4), 26(2).
The idea of solidarity as an ordering principle of legal relations has a long pedigree. In the civil law system of post-revolutionary France, the notion was linked with the republican ideals of liberté, égalité, fraternité, which found articulation in the Napoleonic Code of 1804. Classical sociologists have built on this and theorised the normative foundations of the principle, concluding to the existence of a ‘societal community’ as an essential condition of possibility for solidarity to thrive. Under this conception, recognition and identity or affinity with others is what allows for a sense of belonging, mutuality, and common struggle to emerge that motivates the pooling of resources and joint action towards a shared objective.

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

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

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

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

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


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

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

34 H. Brunkhorst, Solidarity: From Civic Friendship to a Global Legal Community (MIT Press, 2005). See also S. Benhabib, The Rights of Others (CUP, 2004); S. Benhabib, Another Cosmopolitanism (OUP, 2006).
37 TEU, Article 2 and Preamble. See also TEU, Article 1.
38 TEU, Preamble.
39 Something similar happens with the European Convention of Human Rights, 1950 CETS 5 (hereafter: ECHR). The fact that human rights obligations primarily benefit citizens and residents within territorial domain does not impede the extraterritorial protection of aliens abroad, but coming
3. Solidarity as Founding Value, General (Meta-)Principle, and Primary Obligation

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

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

---


\(^{41}\) \textit{Kadi I}, para. 304.

\(^{42}\) Ibid., para. 285.


\(^{44}\) C-305/05 \textit{Ordre des barreaux} [2007] \textit{ECR} I-5305, para. 28.

\(^{45}\) Ibid.
[2 TEU] as a foundation of the Union’ is prohibited.\textsuperscript{46} By contrast, market freedoms could exceptionally be derogated from in accordance with today’s Article 351 TFEU. Consequently, Article 2 TEU values (within which solidarity is contained), as founding meta-principles of European integration, constitute a frame of reference or ‘constitutional paradigm’,\textsuperscript{47} which is to govern the lawfulness, interpretation, and operationalization of the entire body of EU law. Solidarity, through this lens, should work ‘in much the same way that the principles of equal treatment or non-discrimination’ and, thus, ‘transform existing legal relationships’, ‘shaping and directing other core values and legal institutions’.\textsuperscript{48} Once streamlined, solidarity should dictate choice between alternative options and direct preferences towards the most ‘solidarity-friendly’ among those available. Legal outcomes should hereafter be mediated and penetrated by solidarity (both in internal and external policies).

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

\textsuperscript{46} \textit{Kadi I}, para. 303.


\textsuperscript{48} Ibid., at 36.


\textsuperscript{50} Costituzione Italiana, Article 2: ‘La Repubblica riconosce e garantisce i diritti inalienabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale’ (emphasis added), <http://www.governo.it/costituzione-italiana/principi-fondamentali/2839>.
aggregate of its members] founded on the common ideals of liberty, equality and fraternity', thereby highlighting the institutional, regime-related nature of solidarity. All these facets—it is posited—are encompassed in the common legal heritage of the EU.

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

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


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

55 TFEU, Articles 2(2) and 4(2)(c).

56 TFEU, Article 176.

57 TFEU, Article 177.

58 TFEU, Article 174(1).

59 TFEU, Article 174(2).

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

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

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

61 TFEU, Article 175(1).
62 TEU, Article 42(2).
63 TEU, Article 42(5).
64 TFEU, Article 222(1)(a), 2nd indent.
dynamic and contextual meta-principle of constitutional rank, it underpins, as the next section illustrates, the construction of the Internal Market, the maintenance of the Euro, as well as the development of the CEAS, requiring joint action and mutual support for the continuous fulfilment of Treaty ambitions.

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

---


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


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

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

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

---

74 On the identification of the public interest/common good in supranational polities, like the EU, see J. Lenoble and M. Maesschalck, ‘Reviewing the Theory of Public Interest: The Quest for a Reflexive and Learning-Based Approach to Governance’, in O. De Schutter and J. Lenoble (eds.), Reflexive Governance: Redefining the Public Interest in a Pluralistic World (Hart, 2010) 3; J. Lenoble and M. Maesschalck, Democracy, Law and Governance (Ashgate, 2010).
76 Commission v. Italy Commission v. Italy [1973], para. 25 (emphasis added).
On a systematic reading of the provision, the immediate intention of Article 80 TFEU solidarity is to deliver fairness ‘between the Member States’ and to procure a ‘balance of efforts’ regarding the reception of protection seekers and grants of asylum. But the final goal must not be lost of sight. The ultimate aspiration towards which all institutional and material efforts (both single and collective) must converge is the development of ‘a common policy on asylum…with a view to offering appropriate status to any [TCN] requiring international protection’. The delivery of fairness to TCNs, in line with fundamental rights (qua essential/universal requirements of justice under the cosmopolitan vision of solidarity), is the overarching rationale—as specified in the ‘general provisions’ opening Title V TFEU. Accordingly, within the CEAS, inter-state solidarity is a-means-to-an-end that must, above all, attend to refugee protection needs.

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

---

82 The ‘balance of efforts’ wording is found in the former TEC, Article 63(2)(b), preceding TFEU, Article 78.
83 TFEU, Article 78(1).
84 TFEU, Articles 67(1) and (2). See also TFEU, Article 79(1) on ‘fair treatment’ of TCNs as guiding principle of EU migration policy. Generally, on the constitutional standing of fundamental rights, see TEU Article 2, 6 and the EU Charter on Fundamental Rights (hereafter: EUCFR).
86 TFEU, Article 78(2)(e) must, as a result, be read in line with the imperatives of TFEU, Article 80, which must, in turn, take account of the final goal of TFEU, Article 78(1), in accordance with TFEU, Article 67(1) and TEU, Article 6(1) parameters.
compulsory, basilar foundation of the common asylum policy, setting aside national self-interest.  

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

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

87 Both provisions (TFEU Articles 78(3) and 80) cannot mean the same. The principle against redundancy prevents such a reductionist construction of separate obligations. See, e.g., A. Orakhelashvili, The Interpretation of Acts and Rules in Public International Law (OUP, 2008), at 422 ff. This argument is also developed in the contribution of E. Tsouri in this volume.
89 Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31, (hereafter: Dublin Regulation).
the ‘corrective’ approach proposed by the Commission.\textsuperscript{92} The political elevation of Dublin as the ‘cornerstone’ of the CEAS,\textsuperscript{93} above the exigencies of primary norms, contravenes the most basic tenets on the hierarchy of sources of EU law—especially in the post-Lisbon context of positivized solidarity.\textsuperscript{94} The ‘first country of entry’ rule, following which asylum claims are to be allocated to the Member State most responsible for the presence of the refugee in the EU (as if geographical fortuity could be determined or controlled), shifts, rather than shares, responsibility. It has no basis in the Refugee Convention—its blame-based rationale may even contravene the principle of non-penalisation for irregular entry enshrined in Article 31—\textsuperscript{95} and its logic disfavours distributive justice. In the optic of Article 80 TFEU, it is both inappropriate and unnecessary. It transgresses the level of discretion allowed in the choice of means to realize the explicit objectives of solidarity and responsibility sharing.

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

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

\textsuperscript{93} Ibid., p. 4.

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

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

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


\textsuperscript{99} A mechanism of à la carte contribution or ‘flexible/effective solidarity’, such as that proposed by the Visegrad countries, would be inappropriate. See Solidarity and responsibility in the CEAS – progress report by the Slovak Presidency, Council doc. 15253/16, 5 Dec. 2016.
Reactive, compensatory solidarity is therefore not enough. Article 80 TFEU calls for a proactive, structural solidarity-based arrangement that optimizes the CEAS’ effectiveness. Solidarity therein should be apprehended as a tripartite institutional, procedural, and material duty of shared responsibility that is ab initio fair.

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

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

---

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


104 Ibid., para. 81 and 94 ff.

105 Ibid., para. 93.


107 Ibid., para. 56.
nationals in a host Member State, specially those non-economically active, the Court has developed the concept of ‘a certain degree of financial solidarity’ that must be shown towards certain categories of EU residents able to show a meaningful link to it (through prior lawful residence of sufficient length).  

Although the conditions for such link to be established have become stricter in the post-financial crisis environment, the ‘solidarity obligation’ per se still remains. This is essential to ensuring that ‘Union citizenship [becomes] the fundamental status of nationals of the Member States’, presumably so as to ‘deepen the solidarity between [EU] peoples’. The justification, borrowing from the Schuman Declaration, is possibly to ‘build concrete achievements which first create a de facto solidarity’, as a prelude to the emergence of a (transnational) European community that ‘feels’ like one. Similarly to the financial costs related to the reception of asylum seekers, solidarity hereby involves the sharing of resources with the less endowed (who may not be able to immediately reciprocate) in the quest for ‘an ever closer union among the peoples of Europe’ (or the constitution of a CEAS in line with fundamental rights, as in the GISTI case). This is how the institutional and material elements of solidarity intertwine, through a duty of loyal contribution to a shared, fair result.

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

---


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

112 TEU, Preamble.


114 TEU, Preamble.

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

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

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


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

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

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

\textsuperscript{121}TEU, Preamble.
\textsuperscript{122}TEU, Article 3(5).
\textsuperscript{123}TEU, Article 78(2)(g) (emphasis added).
\textsuperscript{124}TEU, Article 21(1), 2\textsuperscript{nd} indent.
Within that framework, the 1951 Convention constitutes an expression of ‘the indivisible, universal values’ on which the EU is founded, of which (cosmopolitan) solidarity vis-à-vis protection seekers and those hosting the highest numbers of exiles forms part. The Convention itself recognises the ‘international scope’ of refugees’ plight, and enjoins States to find ‘a satisfactory solution’ through the medium of ‘international cooperation’, requiring them to do ‘everything within their power’ for their effective protection, ‘to prevent this problem from becoming a cause of tension between States’ and, at the same time, ‘assure refugees the widest possible exercise of [their] fundamental rights and freedoms’. Upholding (refugee) rights can thus be framed as a manifestation of solidarity grounded in Brunkhorst’s *globale Rechtsgenosenschaft*, part of the global *bonum commune* represented by the protection of human dignity beyond formalised (national supra-national) bonds. As the EU Charter confirms, the ‘[e]njoyment of these rights entails responsibilities […] with regard to […] the human community’ as a whole. So, the call on the Union and its Member States should be taken as one of ‘meaningful’ partnership with third countries for the realization of the (universal) rights of refugees.

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

---

125 EU CFR, Preamble.
126 CSR51, Preamble.
128 CFR, Preamble.
130 See, extensively, S. Prechal and B. van Roermund (eds.), The Coherence of EU Law (OUP, 2008).
131 TEU, Articles 21(3), 2nd indent, and 13(1). See also TEU, Articles 16(6), 18(4), and 26(2) on the ‘consistency’ duties of the several EU institutions with responsibility for external action.
From a substantive perspective, solidarity as a means-to-an-end within the CEAS remains subject to the delivery of ‘fairness’ to TCNs already noted, which includes, at minimum, respect for their fundamental rights.\(^\text{132}\) The fundamental rights of asylum seekers and refugees that the EU legal order recognises constitute the common framework of primary law norms shared across the internal-external continuum of the CEAS that the vertical facet of solidarity encapsulates.\(^\text{133}\) The fact that those in need of protection are non-citizens, coming from abroad, does nothing to diminish the legal strength of commitments in their regard. Post-Lisbon, the Charter ‘shall have the same legal value as the Treaties’.\(^\text{134}\) In fact, it ‘reaffirms…the rights as they result, in particular, from the […] international obligations common to the Member States’,\(^\text{135}\) including those stemming from the 1951 Convention.\(^\text{136}\)

Territoriality/extraterritoriality does not determine per se their applicability. Whenever (internal/external) action falls within the remit of EU law, the ‘applicability of the […] Charter’ is activated, since there cannot be ‘situations […] which are covered […] by European Union law without […] fundamental rights being applicable’.\(^\text{137}\)

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

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

---

\(^{132}\) TFEU, Article 67(1)-(2).

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

\(^{134}\) TEU, Article 6(1).

\(^{135}\) CFR, Preamble.


\(^{138}\) TFEU, Article 78(1). See also CFR, Article 18.
intended purpose of ‘a satisfactory solution of a problem [i.e. that of forced migration on a planetary scale] of which the UN has recognized the international scope’.\textsuperscript{139}

From this perspective, intra-EU systemic solidarity (towards the CEAS) should be deemed at the service of extra-EU systemic solidarity (towards the Refugee Convention) for the regional and universal regimes to reach their common goal.\textsuperscript{140}

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

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

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

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

\textsuperscript{139}CSR51, Preamble.
\textsuperscript{140}On this point, see Vienna Convention on the Law of Treaties, 1155 UNTS 331 (hereafter: VCLT), Article 30(2): ‘[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail’.
\textsuperscript{141}TEU Article 4(3).
\textsuperscript{142}TFEU, Article 78(1).
\textsuperscript{143}Policy Plan on Asylum, COM(2008) 360, p. 3-4 and 9.
\textsuperscript{144}Ibid., p. 9.
responsibility’ for hosting refugees, e.g. via resettlement programmes and humanitarian admission schemes, as ‘a visible and concrete expression of European solidarity towards the international community’.

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

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

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

145 Ibid., p. 11 and para. 5.2.1, 5.2.2 and 5.2.3. For analysis, see V. Moreno-Lax, ‘The External Dimension of the CEAS’, in S. Peers et al. (eds), EU Immigration and Asylum Law, Vol. 3 (Brill, 2nd edn, 2015), p. 617.
146 Towards a Reform of the CEAS, COM(2016) 197, p. 15.
149 EU-Turkey Statement.
Europe. The presumption is that Turkey is a STC for returns from Greece, despite it maintaining a geographical limitation to the 1951 Convention, and regardless of its widely documented mistreatment of refugees.

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

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

---

154 On this understanding, see J. Rawls, A Theory of Justice (Harvard University Press, rev. edn., 2003), at 53.
156 For a contestation of this approach, see V. Türk and M. Garlick, ‘From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees’ 28 JRL (2016), p. 656.
rather than undermining, the rights of refugees and the goal of their realization underlying the international (and EU) protection regime.  

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

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

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

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

---

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

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

159 TFEU, Article 78(2)(g).

160 TFEU, Article 67(2).

161 TFEU, Articles 78(1) and 67(1).
means-to-an-end in the construction of a CEAS ‘with due respect for the rules’ of the
(‘mother’) global protection system deriving from international refugee law.\textsuperscript{162}

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

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

\textsuperscript{162} EU CFR, Article 18 and VCLT, Article 30(2).
\textsuperscript{163} TEU, Article 3(5) and TFEU, Article 21.
\textsuperscript{164} TFEU, Article 78(1).
\textsuperscript{165} On this, see V. Chetail, P. De Bruycker, and F. Maiani (eds), Reforming the CEAS (Brill, 2016). See
also, E. Guild et al., Enhancing the CEAS and Alternatives to Dublin, Study PE 519.234 (European