

Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures

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Abstract

The principle of solidarity is embedded in the foundations of the European Union (EU) legal system and is integral to the very ethos that has made the Union possible. However, as Member States struggle with contemporary challenges such as high migration flows, terrorism and economic turmoil they have predominantly adopted individualist and protectionist strategies which undermine the character of the Union. Those strategies include, for instance, building walls and securitising internal borders. This contribution argues that solidarity is inextricably linked with responsibility.

Solidarity gives rise to responsibility and is a desired consequence of responsibility. Thus, this work suggests that strengthening the binomial of solidarity/responsibility is the solution that will create effective practices in meeting the humanitarian needs of refugees and sharing burdens between Member States.

The contribution analyses the EU's commitment to solidarity/responsibility and calls for Member States to demonstrate their commitment. Three types of Member State solidarity/responsibility are identified: 1) towards refugees and migrants, 2) towards fellow countries and 3) towards the EU itself. The latter finds its legal foundation in the principle of 'sincere cooperation' as enshrined in Article 4 (3) TEU and constitutes a means of protecting collective interest and precluding unilateral Member State actions that might jeopardize the entire EU project.

Keywords

solidarity – Member States' responsibility – migration and refugee crisis and the EU

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1 Introduction

International migration is an inextricable feature in the story of modern Europe, which includes emigration to the colonies, immigration from the colonies and migration between European countries, especially during World War II and the Balkan conflicts, after the fall of the Communist bloc and as facilitated by the free movement project of the European Union.¹ More recently, Europe has faced a wave of mass migration of people displaced by sustained conflicts and instability in the Middle East and in certain African nations.² Thousands and thousands of migrants and asylum seekers are failing to reach their desired destinations safely as a result of catastrophic accidents and fatalities,³ and those who arrive in Europe often experience poor reception conditions in refugee camps.⁴ Xenophobic and anti-immigration campaigns within Member States of the European Union have resulted in the closure of internal borders. Populist movements and extremist political parties have surged in popularity by evoking issues of sovereignty, citizenship and nationality, and by scapegoating migrants for the effects of prolonged regimes of economic austerity.⁵ Politicians and the media have fuelled this volatile situation with fear, hostility and resentment toward migrants and asylum seekers, not least by constructing ‘an automatic link between asylum seekers and terrorism’.⁶ The consequent intensification of

¹ United Nations High Commissioner for Refugees, *Global Trend 2013* (Geneva: UNHCR, 2013), available at <http://www.unhcr.org/statistics/country/5399a14f9/unhcr-global-trends-2013.html>, (last visited 10 July 2017).

² United Nations High Commissioner for Refugees, *Global Trend 2013* (Geneva: UNHCR, 2013), available at <http://www.unhcr.org/5399a14f9.html> and <http://www.bbc.co.uk/news/world-europe-34131911> (last visited 12 August 2015); European Parliament, *Tracking European Commission priority initiatives in 2015, Number 2*, 17 June 2015, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/559509/EPRS_BRI%282015%29559509_EN.pdf (last visited 19 November 2016).

However, data collected by agencies such as Frontex on the number of migrants entering the EU might not be completely accurate, available at <https://theconversation.com/seeing-double-how-the-eu-miscounts-migrants-arriving-at-its-borders-49242> (last visited 16 October 2015). See also EUROSTAT (EC) *Asylum and first time asylum applicants— aggregated data for 2015*, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report (last visited 18 December 2016).

³ Evidence on all casualties in 2014–15, available at http://www.theguardian.com/world/2016/may/29/refugee-crisis-13000-people-rescued-in-mediterranean-in-one-week?CMP=share_btn_fb (last visited 31 May 2016); and <http://www.theguardian.com/world/2016/may/01/newborn-baby-among-dead-after-shipwrecks-in-mediterranean-libya-coast> (last visited 31 May 2016).

⁴ Available at <http://www.theguardian.com/world/2016/may/28/greece-refugee-warehouses-not-fit-for-animals> (last visited 29 May 2016).

⁵ European Anti-Poverty Network, *Migrants in Europe’s Age of Austerity* (Brussels: EAPN, 2015), available at <http://www.eapn.eu/wp-content/uploads/2016/11/EAPN-2015-EAPN-migration-report-899.pdf> (last visited 6 July 2017).

⁶ Carr, M., *Fortress Europe, Inside the War Against Immigration* (London: Hurst Publishers, 2015), p. 275 ff; Rudiger, A., *Prisoners of Terrorism? The Impact of Anti-Terrorism Measures on Refugees and*

border control mechanisms challenges the integrity of the whole EU project, and the basis of that project, which is on the principles of solidarity, dignity and equality. The default Dublin rule⁷ which is the current mechanism in place in Europe, generally requires migrants to claim asylum in the EU Member State which they first entered.⁸ Yet, the subsequent refugee status acquired in one Member State does not automatically confer free circulation and residence rights in another Member State.⁹ This creates massive distributive imbalances to the detriment of the States located at the external borders of the EU.

Currently, an impasse has been reached among Member State leaders, whose commitments to national interests have led to increasingly isolationist immigration policies that neither address the problem nor assist other Member States in dealing with it. The imminence and intensity of the current humanitarian phenomenon demands solutions which align with the EU's internal and international human rights obligations and are deemed politically and economically viable by each of the Member States.¹⁰ In pursuit of such solutions, and from the position that academic research and participation can contribute to their formation, this paper focuses on the twin concepts of 'solidarity' and 'responsibility'. In the context of asylum and immigration policy, solidarity is linked to the concept of fairly sharing responsibility i.e. equitably distributing the burdens of the refugee and asylum seeker influx between Member States on the basis of their capacities. This research therefore considers solidarity to be inextricably linked with responsibility. Solidarity gives rise to responsibility, but it is also true to say that enhanced solidarity is a desired consequence of adhering to responsibilities.

The aim of this work is to investigate whether a renewed commitment to solidarity and responsibility can help end the current impasse in Europe by facilitating a coordinated and equitable approach to managing the pressures of immigration into the EU. More specifically, the paper examines the legal concept of solidarity/responsibility as enshrined in the EU Treaties and secondary

Asylum Seekers in Britain (London: Refugee Council, 2007), p. 5, available at https://www.refugeecouncil.org.uk/assets/0001/5919/prisoners_of_terrorism.pdf (last visited 28 June 2017).

⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L180/2013 pp. 31–59 (Dublin III). This Regulation replaced Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003 (Dublin II).

⁸ The system also applies to the UK and Ireland.

⁹ Gelatt, J., *Schengen and the Free Movement of People Across Europe* (Washington DC: Migration Policy Institute, 2005), available at <http://www.migrationpolicy.org/article/schengen-and-free-movement-people-across-europe> (last visited 4 March 2016).

¹⁰ Gibney, MJ., 'Liberal Democratic States and Responsibilities to Refugees', 93(1), *American Political Science Review* (1999) pp. 169–81, at p. 176.

legislation, as well as considers some of the more practical difficulties in applying these concepts to the asylum and immigration context in the EU. The lack of political will to solve the migration issue and scarcity of cooperation between Member States and the EU are argued to be the major obstacles to finding a responsible solution to migratory challenges. Accordingly, the paper analyses the EU's commitment to solidarity and calls for faith in the solidarity/ responsibility ethos to be reaffirmed within the EU. Three types of Member State solidarity/responsibility are identified: towards 1) refugees (and, to a certain extent, other migrants), 2) fellow EU countries and 3) the EU itself. It is argued that the latter category offers 'transformative' opportunities for Europe to achieve social justice and shift the focus on values.¹¹

2 The General Principle of Solidarity in EU Law

Solidarity is a complex term with multi-disciplinary facets and meanings. It is used in multiple contexts across different disciplines, including sociology, philosophy, politics and law. Classical sociologists have argued that society cannot possibly exist without solidarity.¹² Similarly, political philosophers have considered its importance in political discourse.¹³ Lawyers manage to confer clearer meaning to the concept in accordance with particular areas of law; ergo solidarity can be applied to social and economic rights or to issues of integration, equality and inclusion.

It is no exaggeration to claim that solidarity has played a central role in the EU legal system since its very beginning, and the principle still shapes its structure today. In the EU framework, the strength of the principle of solidarity lies in its legal connotation; it is included in the Treaties and is also part of the general principles of Union law.¹⁴ The multifarious functions embedded in this concept make it difficult to determine the exact legal status of the corresponding principle;¹⁵ its meaning depends on the context in which it is used.¹⁶

¹¹ Garavoglia, M., *How Europe Could Turn the Migrant Crisis into a Win for Itself* (Washington DC: Brookings, 2015), available at <http://www.brookings.edu/blogs/order-from-chaos/posts/2015/12/21-europe-refugee-crisis-win-garavoglia> (last visited 23 December 2015).

¹² Durkheim, E., *The Division of Labour in Society* (London: Palgrave, 1893); Simmel, G., *Sociology: Investigations on the Forms of Sociation* (Leipzig: Duncker & Humblot, 1908).

¹³ Habermas, J., 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', 92(3) *Journal of Philosophy* (1995) pp. 109–131.

¹⁴ Thielemann, E., 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', 16(3) *Journal of Refugee Studies* (2003) p. 263; Wellens, 'Revisiting Solidarity as a (Re)Emerging Constitutional Principle: Some Further Reflections', in Wolfum and Kojima (Eds.) *Solidarity: A Structural Principle of International Law* (Berlin- Heidelberg: Springer, 2010), p. 20. See also *Case Commission v. Italy* (ECJ 1973, p. 102); *Commission v. Great Britain* 128/78 (ECJ 1978, p. 419).

¹⁵ Casolari, F., 'EU Loyalty After Lisbon: An Expectation Gap to Be Filled?', in: L.S. Rossi & F. Casolari (Eds.), *The EU after Lisbon Amending or Coping with the Existing Treaties?* (Cham: Springer, 2014), p. 120.

¹⁶ Morgese, G., 'Solidarietà e ripartizione degli oneri in materia di asilo nell'Unione europea', in: G.

The focus of this paper is thus limited to its applications within migration law and policy. It emerges clearly from primary and secondary legislation that although solidarity has been used in different areas of law, neither the judiciary nor EU political institutions have provided a definition of the term. The Court of Justice of the European Union (CJEU) has affirmed that ‘failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community [now Union] strikes at the fundamental basis of the Community legal order’.¹⁷ The Court has also linked this concept to the principle of sincere cooperation or loyalty.¹⁸

Fundamental to the process of European integration, solidarity has been recognized since the Schuman Declaration of 9 May 1950, which stated that ‘Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a de facto solidarity (...)’ (emphasis added).¹⁹ This type of solidarity was the basis for the creation of the European Coal and Steel Community (ECSC) in 1951 and the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in 1957.

In 1992, the Maastricht Treaty on European Union (TEU) stated in its Preamble that Member States aimed ‘to deepen the solidarity between their peoples while respecting their history, their culture and their traditions’. Then, ‘solidarity between Member States’ was included as one of the community objectives in Article 2 of the Treaty establishing the European Community (TEC).²⁰ Following the refugee crisis in the Balkans in 1990, a first reference to ‘burden sharing’ was made by EU ministers responsible for asylum and immigration at their meetings of 30 November and 1 December 1992.²¹ The concept was subsequently inserted into the 1997 Treaty of Amsterdam in relation to asylum

Caggiano (Ed.), *I Percorsi Giuridici Per L’integrazione. Migranti e titolari di protezione internazionale tra diritto dell’Unione e ordinamento italiano* (Turin: Giappichelli Editore 2014) at p. 370.

¹⁷ See Case 39/72 *Commission v. Italy*, ECR [1973] 101, para 24; Case 128/78 *Commission v. Great Britain*, ECR [1978], 419, para 12). For further detail on this point see Ross, M., ‘Solidarity—A New Constitutional Paradigm for the EU?’, in: M. Ross and Y. Borgmann- Prebil (Eds.), *Promoting Solidarity in the European Union* (Oxford: Oxford University Press, 2010), pp. 39–40; McDonough, P. & E. Tsourdi, *Putting solidarity to the test: assessing Europe’s response to the asylum crisis in Greece*, Research Paper 231 (Geneva: UNHCR 2012), available at <http://www.unhcr.org/4f269d5f9.pdf> (last visited 1 August 2015). Also see Sangiovanni, A., ‘Solidarity in the European Union’, *Oxford Journal of Legal Studies*, (2013) 1 ff; McDonnell, A., ‘Solidarity, Flexibility, and the Euro-Crisis: Where Do Principles Fit In?’, in: L.S. Rossi & F. Casolari (Eds.), *The EU after Lisbon Amending or Coping with the Existing Treaties?* (Cham: Springer, 2014), p. 84.

¹⁸ See Joint Cases 6 & 11/69 *Commission v France* [1969] ECR 523, para 16.

¹⁹ The expression of the principle of solidarity evoked in the Schuman Declaration/Plan in 1951 can be found in the principle of sincere cooperation and loyalty (Articles 86 ECSC, 5 ECC (then Article 10 EC) AND 192 ECSC), available at http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm (last visited 18 June 2016).

²⁰ Art. 2 TEC.

²¹ For further detail on this point see Thielemann 2003, note 14, at p. 260.

policy. Article 63 (2) (b) TEC contemplated the possibility that the Council could introduce measures to ‘promot[e] a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons’.

In 2007, the Lisbon Treaty enriched the *acquis communautaire* of the EU through many references to solidarity, including:²²

- Within the different objectives of Union policies: Article 3 (3) TEU promotes solidarity between ‘generations’ and economic, social and territorial cohesion ‘among Member States’; and Article 3 (5) TEU refers to ‘solidarity and mutual respect among peoples’ in the EU’s dealings with the wider world.
- Article 2 TEU cites solidarity as one of the elements that characterizes the Member States’ society, along with other common values such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.
- Within the principle of sincere cooperation:²³ solidarity is implied in the requirement that ‘the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties’ (Article 4 (3) TEU). While loyalty ‘is an enforceable, primarily vertically directed principle, solidarity is rather [a] political [one]’.²⁴
- Article 21 (1) TEU states that solidarity is one of the guiding principles that inspired the Union’s creation and upon which its external action should be grounded. The EU foreign and security policy is, therefore, based on the ‘development of mutual political solidarity among Member States’ (Article 24 (2) TEU).²⁵
- In regard to the mechanism of abstention in a vote, Article 31 (1) TEU states that ‘in a spirit of mutual solidarity, the Member State shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position.’
- Article 222 TFEU, which is entitled ‘solidarity clause’, refers to the ‘spirit of solidarity’ in relation to joint actions between the Union and its Member States in the event of a terrorist attack or natural or man-made disaster.
- The EU Charter of fundamental rights, which has the nature of primary law, refers to the principle of solidarity in Chapter IV.²⁶

²² See on this point Thielemann 2003, note 14; Morgese 2014, note 16, at p. 371; Sangiovanni 2013, note 17, pp. 1 ff.

²³ For further discussion on the principle of loyalty see Klamert, M., *The Principle of Loyalty in EU Law*, (Oxford: Oxford University Press, 2014).

²⁴ *Ibid.*, pp. 298–299.

²⁵ For further detail see Keukeleire, S. & T. Delreux, *The Foreign Policy of the European Union* (London: Palgrave, 2014), p. 158.

²⁶ The rights contained are workers’ rights, protection of family and professional life, access to social security and social assistance, health care, access to services of general economic interest, environmental protection and consumer protection (Arts. 27–38). In relation to the nature of the

Thus, solidarity is enshrined in the very essence of EU law.

3 The Role of Solidarity in the EU's Area of Freedom, Security and Justice (AFSJ)

Provisions relating to freedom, security and justice reiterate the solidarity concept as the inspiring principle of common policy on border checks, asylum and immigration. Article 67 TFEU urges, as suggested by the language therein ('ensure' and 'endeavour'), the Union to 'frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.' The solidarity concept, as stipulated in Article 67 TFEU, refers to Member States in their reciprocal relationship but does not mention solidarity towards third-country nationals, who are considered to be the beneficiaries of a 'fair' policy.

Then, Article 80 TFEU explicitly states that Union policies on border checks, asylum and immigration shall 'be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. The language suggests different forms of solidarity, including the provision of financial support for heavily burdened Member States.²⁷ The Article justifies Union institutions' measures of solidarity and burden sharing.²⁸ It is noteworthy that for the first time the two terms 'solidarity' and 'responsibility' are mentioned together in the same Article, suggesting that these two concepts are interconnected. It is hereby argued that the fair sharing of responsibility, i.e. burden sharing²⁹ between Member States, is a direct consequence of solidarity, while the latter is the motivation for burden-sharing.³⁰ Together they are the constitutive elements of a single principle applicable in this area.³¹

In addition to primary law, many pieces of secondary legislation also establish commitments of mutual support amongst Member States, for example the Temporary Protection Directive, Frontex Regulation, European Asylum Support

rights contained in this chapter, see A.G. Trstenjak Opinion, 8 September 2011, Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, para 76, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109267&pageIndex=0&doclang=en&m ode=req&dir=&occ=first&part=1&cid=39339> (last visited 14 October 2016).

²⁷ This type of solidarity manifests in the European Refugee Fund established in Council Decision 2000/596/EC, of 28 September 2000, available at http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund/index_en.htm (last visited 18 June 2016).

²⁸ Peers, S., 'Legislative Update: EU Immigration and Asylum Competence and Decision- Making in the Treaty of Lisbon', 10(2) *European Journal of Migration and Law* (2008) pp. 219 ff, at 236.

²⁹ Thielemann 2003, note 14, pp. 253 ff.

³⁰ See on this point Mason, A., *Community, Solidarity, and Belonging: Levels of Community and their Normative Significance* (Cambridge: Cambridge University Press, 2000).

³¹ Morgese 2014, note 16, p. 373.

Office (EASO) Regulations, European Union Solidarity Fund (EUSF) and more recently, the Council Regulation on the provision of emergency support within the Union.³² An entire chapter in the Temporary Protection Directive has been devoted to the principle of solidarity, which details how ‘soft’ solidarity mechanisms can facilitate an equitable distribution between Member States in the case of a ‘mass influx’.³³ Yet, this directive, grounded in Article 78 (2)(c), has never been applied.³⁴

More importantly, since 2013, new asylum rules have been established to set out ‘common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system’.³⁵ As part of the European Agenda on Migration,³⁶ ‘in a spirit of solidarity, the EU has proposed three lines of intervention to tackle the massive migratory flows: 1) redistribution mechanisms between Member States, 2) targeting criminal smuggling networks, and 3) strengthening Frontex’s role and capacity.’³⁷

Subsequently, specific mechanisms,³⁸ including a set of measures to manage

³² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7 August 2001 (Temporary Protection Directive); Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, L349/1 (Frontex Regulation); Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, L132/11 (EASO Regulation), supported respectively by Articles 77(1)(b), (c); and 78(1), (2). Both regulations also draw on Article 74; Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, OJ L 311, 14/11/2002 p.3–8; Council Regulation 6977/16 on the provision of emergency support within the Union on the provision of emergency support within the Union of 9th March 2016, available at <http://data.consilium.europa.eu/doc/document/ST-6977-2016-INIT/en/pdf> (last visited 25 October 2016).

³³ See *ibid.*, Chapter VI of the Temporary Directive.

³⁴ Matera, C. and A. Taylor, *The Common European Asylum System and Human Rights: enhancing protection in times of emergencies*, Working Papers 2014/7 (The Hague: Centre for the Law of EU External Relations (CLEER), 2014), p. 13, available at http://www.asser.nl/media/2485/cleer14-7_web.pdf (last visited 14 December 2016).

³⁵ The rules introduced in 2013 are available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm (last visited 5 August 2016).

³⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *The European Agenda on Migration* (COM (2015) 240 final). European Commission, *European Agenda on Migration—Legislative documents* (Brussels: European Commission, 2015), available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/index_en.htm (last visited 20 May 2016).

³⁷ *Ibid.*

³⁸ Such as the EU humanitarian admission scheme with Turkey for refugees from Syria, see C 9490 Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey (2015), available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/commission_recommendation_for_a_voluntary_humanitarian_admission_scheme_with_turkey_en.pdf (last visited 5 August 2016); or for the relocation system see footnote 43.

the EU's external borders and protect the Schengen area,³⁹ have been introduced together with a European Border and Coast Guard,⁴⁰ and systematic database checks for all people entering and exiting the Schengen zone.⁴¹ To complement the Dublin system with mechanisms benefiting Member States confronted with an emergency situation due to a sudden influx of third-country nationals, the Council of the EU issued two decisions on relocation,⁴² based on Article 78 (3) TFEU.⁴³

4 Solidarity and Responsibility: The New Dublin IV

One of the factors that exacerbates the humanitarian repercussions of the current refugee crisis relates to the rules for determining the country responsible for asylum applications.⁴⁴ The Dublin system was never intended as a burden-sharing

³⁹ See EU-Turkey joint action plan, Brussels, 15 October 2015, available at http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm (last visited 13 September 2017) Brussels (2015). This proposal has been criticized by academics for doing 'too much in the area of border controls (where the Frontex proposal exceeds EU powers and is politically unprincipled) and too little in the area of asylum (since there is no significant attempt to address humanitarian or protection needs within the EU)'. Also, the most affected Member States have been sceptical towards the idea of having European Border and Coast Guards controlling their own territories without their consent. See Peers, S., *The Reform of Frontex: Saving Schengen at Refugees' Expense?* (EU Law Analysis, 2015), available at <http://www.statewatch.org/analyses/no-281-frontex-schengen-refugees.pdf> at p. 1. (last visited 29 May 2016).

⁴⁰ On 6 October 2016, the European Border and Coast Guard Agency was officially launched. See http://europa.eu/rapid/press-release_IP-16-3281_en.htm (last visited 14 December 2016).

⁴¹ Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant data-bases at external border, COM(2015) 670 final 2015/0307 (COD) of 15.12.2015. An agreement was reached on 5th December 2016 by the European Parliament and the Council. See further details at http://europa.eu/rapid/press-release_STATEMENT-16-4273_en.htm (last visited 14 December 2016).

⁴² Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80, 22.9.2015 p. 80.

⁴³ The Article was never used before, despite the competence having been conferred to the Council since the Treaty of Amsterdam (1997). The Lisbon Treaty only added the need to consult the European Parliament before the adoption of such measures. For further detail on this see Groenendijk, K. & B. Nagy, *Hungary's appeal against relocation to the CJEU: upfront attack or rear guard battle?* (Brussels: Odysseus Network, December 2015), available at <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/> (last visited 21 January 2016).

⁴⁴ Amnesty International, *Greece: Briefing on the Draft Law on Asylum, Migration-Related Detention and Returns of Third Country Nationals* (London: AI, 2011); UNHCR, *Asylum Situation in Greece Including for Dublin II Transferees* (Geneva: UNHCR, 2011); UNHCR, *Oral Submissions in Joined Cases of NS (C-411/10) and ME and Others (C-493/10)*, 2011; see also McDonough, P. & E. Tsourdi, 'The "Other" Greek Crisis: Asylum and EU Solidarity', *4 Refugee Survey Quarterly* (2012), pp. 67 ff, at p. 70.

mechanism of solidarity.⁴⁵ It aimed to identify the Member State responsible for processing an asylum application on the basis of providing effective access to international protection.⁴⁶ Consequently, a limited number of individual Member States ‘had to deal with the vast majority of asylum seekers arriving in the Union, putting the capacities of their asylum systems under strain and leading to some disregard of EU rules’.⁴⁷ The Commission in its Dublin reform proposal (Dublin IV),⁴⁸ which is under review at the time of writing, states that ‘the Dublin system must be reformed, both to simplify it and enhance its effectiveness in practice, and to be equal to the task of dealing with situations when Member States’ asylum systems are faced with disproportionate pressure’.⁴⁹ It then proposes a mechanism ‘to ensure fair sharing of responsibilities between Member States by complementing the current system with a corrective allocation mechanism.’⁵⁰ This mechanism would be activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers.’⁵¹

Yet, the Dublin system is still ‘ineffective and inefficient, inflicts hardship on protection seekers and damages the efficiency of the CEAS’.⁵² Like its predecessors,⁵³ the new Dublin IV Proposal still maintains that the country

⁴⁵ Communication ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ of 6 April 2016, COM (2016) 197 final.

⁴⁶ See Preamble No. 5 Regulation 604/2013/ EU (Dublin III), supra note 7.

⁴⁷ *Ibid.*

⁴⁸ See Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast), Brussels, 4.5.2016 COM(2016) 270 final 2016/0133 (COD), available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf (last visited 28 October 2016), the so-called Dublin IV.

⁴⁹ *Ibid.*, at p. 4.

⁵⁰ The corrective mechanism would have the same function as the ‘crisis relocation mechanism’. For further detail about the system see, Maiani, F., *The Reform of the Dublin III Regulation Study* (Brussels: Directorate General for Internal Policies Policy Department C: Citizens’ Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, 2016), pp. 33 ff, available at <http://www.europarl.europa.eu/supporting-analyses> (last visited 13 December 2016).

⁵¹ For a discussion on the advantages and disadvantages of the corrective allocation mechanism, see Guild, E., Costello, C. & Moreno-Lax, V., *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece* (Brussels: European Parliament Policy Department for Citizens Rights and Constitutional Affairs, 2017), p. 63.

⁵² CEAS is an abbreviation for the Common European Asylum System. See Maiani 2016, note 50 at p. 6.

⁵³ The Default Dublin rule was originally introduced by the 1990 Dublin Convention, an inter-governmental agreement between Member States, that replaced the Schengen rules and established that asylum applications had to be processed in the EU country of arrival. In 1999, following the entry into force of the Treaty of Amsterdam, the Schengen acquis was integrated into the European Union framework, conferring competence to the EU institutions to enact legislation in this area. In 2003, the Dublin II Regulation replaced the 1990 Dublin Convention clarifying the criteria for determining responsibility. This Regulation was subsequently repealed by the Dublin III

responsible for processing an application shall be the first country where an asylum application is made. This system makes it possible to determine swiftly the responsible Member State.⁵⁴ However, such a mechanism has increased asymmetry between Member States. The frontline countries at the EU's external borders, such as Greece, Italy, Malta and the EU Balkan Member States, are the most susceptible to migratory flows and also among the least wealthy countries.⁵⁵ For example, Greece has been overburdened with mixed flows of migrants for years; its reception conditions are extremely poor and the country is suffering from both a financial and economic crisis.⁵⁶ A similar situation is found in Italy and Malta, countries which have been subject to migratory flows from the Mediterranean. More recently, a large number of migrants have fled from Syria to the Balkans.⁵⁷

In line with the principle of solidarity, an equitable distribution⁵⁸ based on factors considering country sizes, economic capacities and other criteria is evidently far more appropriate, as the geographical proximity principle cannot be the best way to determine which states should shoulder responsibility. A fundamental reform of the CEAS's responsibility allocation system is necessary, as to criticism has also been made of the new corrective allocation mechanism included in Dublin IV.⁵⁹

Another problem refers to the fact that Member States, all respecting the principle of non-refoulement,⁶⁰ 'are considered ... safe countries for third-country nationals.'⁶¹ Nevertheless, significant differences in domestic asylum systems, for example in terms of reception conditions, are present within the EU.⁶² Thus, the

Regulation, which requires that the Member State responsible for the examination of an asylum application is, in principle, the first country where an application is made.

⁵⁴ See Preamble No. 5 Regulation 604/2013/ EU (Dublin III), *supra* note 7.

⁵⁵ See Nicoletti, M., 'After Dublin—the urgent need for a real European asylum system (Strasbourg: Council of Europe, 2014), at p. 9, available at <http://website-pace.net/documents/19863/1278654/20150909-AfterDublin-EN.pdf/755eb5b6-3bd1-4d99-af22-0b18fdb5a513> (last visited 4 July 2017).

⁵⁶ *M.S.S v Belgium and Greece*, App no 30696/09 ECtHR, 21 January 2011; Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.

⁵⁷ See <http://www.bbc.co.uk/news/world-europe-34131911> (last visited 29 May 2016).

⁵⁸ *Ibid.*, at p. 12.

⁵⁹ *Ibid.*, and see also Maiaini 2016, note 50, pp. 33 ff.

⁶⁰ The principle of non-refoulement protects refugees from being returned to places where they are likely to face persecution or suffer torture; and is, indeed, a milestone in both international and EU refugee law. See Goodwin-Gill, G., *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996) p. 117.

⁶¹ See Preamble no.3 Regulation 604/2013/ EU (Dublin III), *supra* note 7.

⁶² Reception conditions for asylum seekers and the system in place for processing applications for international protection are notoriously poor in Greece. See *M.S.S.*, *N.S.* and *M.E.* cases, *supra* note 56. Since the *M.S.S. v Belgium and Greece* and the *N.S. and M.E. v UK* cases, Member States have ceased carrying out Dublin transfers in cases where Greece was the country of arrival. The European Court of Human Rights, in the *M.S.S.* case, has held that states that return asylum seekers to Greece are in breach of the prohibition against torture and inhuman or degrading treatment. The Court of

absolute presumption that all Member States are ‘safe countries’ has created dysfunctions in the system.⁶³ This presumption is based on the mutual trust principle between Member States, which implies that they assume that the quality and enforcement of each other’s laws is in adherence to shared minimum standards of protection and international obligations.⁶⁴ Indeed, since 2011, dysfunctions in the Dublin system have been highlighted first by the European Court of Human Rights (ECtHR) and then by the Court of Justice of the EU.⁶⁵ The CJEU has acknowledged the necessity of allowing exceptions to the mutual trust principle between EU Member States, setting a high threshold to ‘rebut trust’ by establishing the criterion of ‘systemic deficiencies’.⁶⁶ This problem is due to disparities between Member States’ asylum systems.⁶⁷ The new Dublin IV Proposal contains some good suggestions in relation to replacing some of the directives with regulations to achieve greater harmonisation between EU countries.⁶⁸

The current common policy on asylum, immigration and external border control is therefore not in line with the concept of solidarity as set out in Articles 67 and 80 TFEU.⁶⁹ The EU has attempted to intervene in support of Dublin, primarily establishing a system of relocation, then offering financial support to the affected countries and proposing the 2016 Commission’s New Package of Reforms of CEAS.⁷⁰

Aiming at the redistribution of responsibility, the Relocation Decisions evoke

Justice of the European Union in the N.S. and M.E. case confirmed the systemic deficiencies in the asylum procedure and reception conditions of asylum seekers in Greece.

⁶³ *Ibid.*

⁶⁴ See for example cases Gözütok and Brügge, C-187/01 and C-385/01, para 33, where the CJEU in relation to the *ne bis in idem* principle in criminal law clearly states that Member States should observe the principle of ‘mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied’.

For an academic discussion on the principle see Möstl, M., ‘Preconditions and Limits of Mutual Recognition’, 47 CML Rev. (2010) pp. 405–436; Brouwer, E., ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’, 9 Utrecht Law Review (2013) 135–147, at 138; Velluti, S., ‘Who has the right to have rights? The judgments of the CJEU and ECtHR as building blocks for a European ‘*ius commune*’ in asylum law’, in: S. Morano-Foadi & L. Vickers (eds.), *Fundamental Rights: A Matter for Two Courts*, Modern Studies in European Law (Oxford: Hart Publishing, 2015), pp. 131–149.

⁶⁵ See M.S.S. v. Belgium and Greece, supra note 56; N.S. and M.E. v. UK (Secretary of State), supra note 56, para 83.

⁶⁶ *Ibid.*, N.S. and M.E. v UK, at para 83.

⁶⁷ ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered* (Brussels: ECRE, 2008), p. 14.

⁶⁸ See Communication ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ of 6 April 2016, COM (2016) 197 final, at p. 6.

⁶⁹ See Dublin Regulation (supra note 5) which places the burden of vetting, feeding, housing, granting refugee or asylum status and a job within 9 months to the first country where the refugee sets foot in EU territory.

⁷⁰ See Communication 197 final, supra note 68.

solidarity between Member States. Their aim is for protection seekers to be relocated from the country of arrival to other Member States, on the condition that migrants would be subject to compulsory fingerprinting. The relocation mechanism would apply only to Syrians, Eritreans and Iraqis who are considered *prima facie* refugees 'in clear need of protection'.⁷¹ Beneficiary countries (e.g. Italy and Greece) are required to set up and operationalize the so-called hotspots, which are structured border zones where national authorities are responsible for the identification, registration and fingerprinting of asylum seekers.

Although these measures have attempted to move beyond rhetoric,⁷² thereby offering a solution to the present migratory crisis,⁷³ they have been heavily criticised as weak instruments induced by emergency logics.⁷⁴ The Commission is concerned about the speed of the process, which is slow and inefficient mainly because of a lack of political will⁷⁵ from the beneficiary and the relocating countries.⁷⁶ In particular, in its third implementation report, the Commission introduced recommendations to improve the relocation schemes and urged Member States to comply fully with their obligations under the Relocation Decisions.⁷⁷ Unfortunately, the CEAS as a whole, which includes mandatory relocation mechanisms, is struggling to thrive.⁷⁸ The mandatory mechanisms are

⁷¹ Regulation (EU) 603/2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third- country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJEU L 180, 26.6.2013, pp. 1–30.

⁷² Decision (EU) 2015/1523 and Decision (EU) 2015/1601, *supra* note 42.

⁷³ Owing to the large numbers involved, the system pertains only to Syrian, Eritrean and Iraqi migrants who are applying for international protection and entering the EU through Italy or Greece for a period of 24 months. The scheme aims to relocate 160,000 people in clear need of international protection. In addition to this scheme there is also an EU resettlement scheme for 20,000 people in need of international protection. This voluntary scheme was adopted to show solidarity towards third countries in North Africa, the Middle East and the Horn of Africa that are equally affected.

⁷⁴ See Matera & Taylor 2014, note 34, at p. 13.

⁷⁵ Hungary and Slovakia have challenged Decision (EU) 2015/1601. However, on 6th September 2017 the Court of Justice of the EU has rejected their challenge. Moreover, the migratory pressure on Sweden and Austria has led these two Member States to request suspension of their obligations under the Council Decisions on relocation. Austria has been given temporary suspension for one year, see European Commission, COM (2016) 165 final, Brussels, 16.3.2016, p. 3. In relation to Sweden, the one-year suspension from re-location has expired in June 2017.

⁷⁶ See Maiani 2016, note 50.

⁷⁷ The European Commission has evaluated both the relocation and the resettlement schemes. See European Commission, Communication Brussels, 18.5.2016 COM(2016) 360 final, available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160518/communication_third_report_on_relocation_and_resettlement_en.pdf (last visited 3 June 2016).

⁷⁸ The two Council relocation decisions are based on Article 78(3) TFEU, which states 'In the event of

now compulsory (they used to be voluntary)⁷⁹ and have attracted criticisms from some Member States.⁸⁰ However, direct actions against Decision (EU) 2015/1601⁸¹ on relocation have been rejected by the Court of Justice of the European Union.⁸²

5 EU Financial Solidarity towards Member States

On 19 February 2016, Council Regulation 6977/16 was introduced to provide humanitarian assistance internally in support of countries which face large numbers of refugees and migrants. Based on Article 122(1) TFEU, the Regulation introduced Union emergency provisions.⁸³ In its preamble, it states ‘mutual assistance and support in the face of disasters is both a fundamental expression of the universal value of solidarity between people and a moral imperative, as such disasters may lead to a significant number of people being unable to meet their basic needs, with potentially severe adverse effects on their health and lives.’⁸⁴ Then, whilst referring to the current migration and refugee situation, the Regulation describes it as ‘a notable example of a situation where, despite the efforts undertaken by the Union to address the root causes located in third countries, the economic situation of Member States may be directly affected’.⁸⁵

Thus, the EU has timidly attempted to show solidarity towards the affected Member States by introducing an appropriate instrument available at Union level to address the humanitarian needs of disaster-stricken people within the Union.⁸⁶ Previously, the Union was in a position to grant support of a macro-financial nature to Member States, expressing European solidarity to disaster-stricken regions through the European Union Solidarity Fund (EUSF), but there was no

one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.’

⁷⁹ The first one, Council Decision (EU) 2015/1523 of 14 September 2015, is voluntary and the second, Council Decision (EU) 2015/1601 of 22 September 2015, is mandatory, see *supra* note 42 for full reference.

⁸⁰ The V4 Group meeting, available at https://sputniknews.com/politics/201610151046375_999-v4-migrant-crisis-solidarity/; this refers to a meeting held in September 2016 in Bratislava by the V4 Group, which comprises the Czech Republic, Poland, Hungary, and Slovakia, to oppose the implementation of the mandatory EU quota scheme to relocate refugees.

⁸¹ See Council Decision (EU) 2015/1601, *supra* note 42.

⁸² See Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union* [2017] ECR I-631.

⁸³ See Council Regulation 6977/16, *supra* note 32

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Mutual assistance could also be offered under the Union Civil Protection Mechanism pursuant to the European Parliament and Council Decision No 1313/2013/EU of 17 December 2013 on a Union Civil Protection Mechanism (OJ L 347, 20.12.2013, p. 924). However, the operation of that Mechanism is based on voluntary contributions from Member States.

specific instrument to provide assistance and resources, such as food, emergency healthcare, shelter, water, sanitation and hygiene, protection and education, to the affected people. Existing Union policies, such as those which aim at establishing an area of freedom, security and justice in the Union, are accessory and ancillary to the pursuit of the principal policy objectives of those instruments and, therefore, limited in scope and scale.

The EU is currently showing solidarity towards Member States in need, offering humanitarian ‘emergency support’. However, more support is needed. Solidarity schemes to the benefit of affected countries to compensate for the asylum costs, which asymmetrically impact on national budget,⁸⁷ should be allocated on a regular basis (they have temporarily been included in the Relocation Decisions). This would reiterate the EU’s commitment towards the collective good and reinstate Member States’ trust in solidarity.⁸⁸ EU funding under the Asylum, Migration and Integration Fund (AMIF) and other financial incentives in support of EU-sponsored allocation or relocation schemes should also be intensified. It is now Member States’ turn to commit to solidarity and responsibility.

Disagreement and contrasting attitudes between the EU’s actions and State practices are clear signs of the different perceptions of the principle by individual Member States.⁸⁹ Faith in solidarity/responsibility needs to be restored as Europe needs to focus more on its founding values to advance integration. Notwithstanding the fact that national contributions have proved insufficient to avert or alleviate the migrant crisis, States are still reluctant to exercise ‘solidarity’ towards migrants, fellow countries or the whole of the EU. Unilateral measures from transit and destination States, such as temporary suspension of the application of the Schengen Agreement, and building walls or fences at their internal borders have been introduced.⁹⁰ Despite the legal obligation explicitly grounded in the aforementioned Treaty articles and secondary legislation on asylum, immigration and external border control, Member States appear not to adhere to the principle of solidarity. Even if the concept was deemed to have legal connotations, the principle is not sufficiently enforced, especially in relation to mass flows. While the principle is frequently referenced in relevant laws, it lacks the necessary implementing provisions that would translate it from a general principle to legally enforceable obligations. This work aims at reframing solidarity

⁸⁷ See Maiani 2016, note 50, p. 8.

⁸⁸ *Ibid.*

⁸⁹ See in this regard: Raspotnik, A., M. Jacob & L. Ventura, The Issue Of Solidarity In The European Union, Discussion Paper at the TEPSA Pre-Presidency Conference 14–15 June 2012 (Brussels: European Commission, 2012); Turksen, U., ‘Euro-Vision of Energy Trade with Russia: Current Problems and Future Prospects for EU Solidarity in Energy Trade’, 4 OGEL (2014).

⁹⁰ For further detail see Weyembergh, A., C. Brière, H. Labayle, P. De Bruycker & D. Watt, The Paris Terrorist Attacks: Failure of the EU’s Area of Freedom, Security and Justice? (Brussels: Odysseus Network OMNIA Project, 2016), available at <http://eumigrationlawblog.eu/the-paris-terrorist-attacks-failure-of-the-eus-area-of-freedom-security-and-justice/> (last visited 21 January 2016).

and responsibility at the referential centre for discussion and action, recognising the need to shift focus from transient and short-sighted economic arguments to long-term arguments based on fundamental principles as paramount to resolving the current impasse in European integration.

6. The Role of the Member State: Commitment to Solidarity/Responsibility

The implementation of policies on border checks, asylum and immigration, as stated in Article 80 TFEU, cannot be attained without the application of the 'principle of solidarity and fair sharing of responsibility' between Member States. Having stressed the legal nature of solidarity and its practical constraints, this paper turns now to examine Member State commitments to responsibility, starting from the assumption that 'any solidarity act has a counter-part element of responsibility [...] solidarity only grows stronger with consequent responsibility'.⁹¹

Member State solidarity/responsibilities can be structured into three interconnected categories in the area of asylum and immigration. The first, which is their legal solidarity/responsibility towards refugees and migrants, is briefly considered in this paper. The second is Member State legal solidarity/responsibility towards fellow EU countries, which implies its distribution amongst States, which can be executed in accordance with the legal term of 'fair sharing'. The third one is their solidarity/responsibility towards the EU as an integral entity, which finds its legal foundation in the 'sincere cooperation' principle.

6.1 Member State Solidarity/Responsibility towards Refugees and Migrants

The legal treatment of refugees and people in need of international protection is different from that of migrants fleeing poverty or famine; the latter are considered 'economic migrants'. This distinction is enshrined in Article 1 (A)(2) of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, which defines a refugee (for the purposes of the Convention) as a person who fears being persecuted in their home country.⁹² Thus, States differentiate their responsibility

⁹¹ Vignon, J., *Solidarity and Responsibility in the European Union*, Notre Europe Policy Brief, No. 26 (Brussels: European Commission, 2011), available at http://www.institutdelors.eu/media/bref27_jvignon_en.pdf?pdf=ok (last visited 23 November 2016).

⁹² Article 1 (A)(2) provides that the term 'refugee' shall apply to any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.' UNTS 150.

towards migrants depending on how they define refugees, which often depends on the parameters that they place around the concept of a ‘well-founded fear of persecution’.⁹³

The aims of the Refugee Convention and of EU law (such as the Qualification directive and the re-cast directive)⁹⁴ are, firstly, to ensure that States apply a common approach in how they identify persons who are in need of protection, and secondly, to ensure that States provide a minimum standard of protection to such persons.⁹⁵ This so-called surrogate protection is meant to come into place only in situations when that protection is otherwise unavailable.⁹⁶ States therefore have a legal responsibility to accept refugees when adequate protection is not afforded by their home State,⁹⁷ which has a primary duty to protect its citizens.⁹⁸ Although it must be clearly stated that there is a major difference between the legal significance of the 1951 Refugee Convention, which has been ratified and applied by 145 countries⁹⁹ for over 50 years, and the EU secondary law that applies within the EU and can be more easily amended.

While not a source of legal obligations, the international doctrine of ‘responsibility to protect’ (R2P) can be considered as a framework around which responses to international migratory pressures can be shaped, especially where mass migration results from humanitarian crises. R2P was developed in response to humanitarian tragedies towards the end of the 20th century¹⁰⁰ and is based on a theory of ‘sovereignty as responsibility’, whereby a State’s sovereignty is not viewed as absolute, but rather premised on the provision of adequate protection for its citizens.¹⁰¹ Thus, when protection is not available domestically, the

⁹³ For example, see Jung on the extension of refugee status to persons fearing persecution due to their sexual orientation and the assumptions that are made in assessments of genuine need in such cases. Jung, M., ‘Logics of Citizenship and Violence of Rights: The Queer Migrant Body and the Asylum System’, 3(2) *Birkbeck L Rev* (2015) pp. 305–335.

⁹⁴ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 (Qualification Directive); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast Qualification Directive) OJ L 337.

⁹⁵ *Ibid.*, Council Directive 2004/83/EC, preamble, para 6.

⁹⁶ In *Canada (Attorney-General) v Ward* (1993) 103 D.L.R. (4th) 1, 12; Lord Keith of Kinkel observed in *Reg. v Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] A.C. 958, 992H–993A.

⁹⁷ Horvath [2001] 1 AC 489 at pp. 499–500.

⁹⁸ Horvath [2001] 1 AC 489 at pp. 499–500, per Lord Hope; Gibney, M.J., ‘Liberal Democratic States and Responsibilities to Refugees’, 93 *American Political Science Review* (1999) 169– 181, at 175; Shacknove, A.E., ‘Who is a Refugee?’, 95 *Ethics* (1985) pp. 274–84, at p. 275.

⁹⁹ As of 28 June 2017, available at <http://www.unhcr.org/uk/1951-refugee-convention.html>.

¹⁰⁰ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001).

¹⁰¹ Convention on the Prevention and Punishment of Genocide (1948) 78 UNTS 277, Art. 1; Deng,

international community should be available to citizens as a substitute.¹⁰² Originally unanimously endorsed by the UN General Assembly in the context of protection against crimes against humanity,¹⁰³ it has since been suggested that the R2P principle should include providing asylum protection for refugees who are fleeing such heinous crimes (which would include those fleeing conflict in Syria).¹⁰⁴ This represents an expansion from mandating humanitarian intervention abroad,¹⁰⁵ obliging States to allow the impacts of foreign conflicts to cross into their own territories, thereby further reformulating the parameters of sovereignty. That said, it is necessary to clarify that the main of the obligation to protect refugees is not R2P. In fact, it is international refugee law, stemming from the 1950 Statute of the Office of the United Nations High Commissioner for Refugees¹⁰⁶ and 1951 Refugee Convention (as developed by regional law, practice and jurisprudence), that offers a set of strong and independent binding norms and legal international protection obligations. These instruments predate by some five decades the discussions on R2P, which is not, by contrast, accepted as a source of law.¹⁰⁷ Even though the legal status of R2P in international law is arguably a grey area—especially regarding the extent to which States are obliged to respond to each other’s failures to protect their own citizens¹⁰⁸—it remains a valuable concept with regard to injecting a strong sense of solidarity within the EU. Indeed, R2P and solidarity may be seen as complementary insofar as the former focuses on responsibility towards individuals and the latter is often framed

F.M. et al., *Responsibility: Conflict Management in Africa* (Washington: Brookings, 1996). See also Peters, A., ‘Humanity as the A and Omega of Sovereignty’, 20 *EJIL* (2009) p. 513.

¹⁰² Horvath, [2001] 1 *AC* 489 at pp. 499–500.

¹⁰³ UN General Assembly, ‘2005 World Summit Outcome’ (24 October 2005) UN Doc A/Res/60/1, paras. 138–140; Report of the Secretary General on Implementing the responsibility to protect (12 January 2009) UN Doc A/63/677; Un Security Council Resolution 1674 (28 April 2006) UN Doc S/Res/1674.

¹⁰⁴ Barbour, B., *Embracing the ‘Responsibility to Protect’: a Repertoire of Measures Including Asylum for Potential Victims*, *New Issues in Refugee Research*, Research Paper No. 159, 20 (4) *Int J Refugee Law* (2008) pp. 533–566; Achiume, E.T., ‘Syria, Cost-sharing, and the Responsibility to Protect Refugees’, 100(2) *Minnesota Law Rev* (2015) p. 687; Hadfield A. & A. Zwitter, ‘Analyzing the EU Refugee Crisis: Humanity, Heritage and Responsibility to Protect’, 3(2) *Politics and Governance* (2015) p. 129; Bellamy, A.J., *The Responsibility to Protect and the Migrant Crisis* (Oxford: Oxford University Press, 2016), available at <https://protectiongateway.com/2016/04/02/the-responsibility-to-protect-and-the-migrant-crisis/> (last visited 11 June 2016).

¹⁰⁵ For a critical analysis of the rhetoric of protection in international intervention see Orford, A., *International Authority and the Responsibility to Protect* (Cambridge: CUP, 2011).

¹⁰⁶ Available at <http://www.unhcr.org/3b66c39e1.pdf>.

¹⁰⁷ Rosenberg, Sheri P., ‘Responsibility to Protect: A Framework for Prevention’, 1 *Global Responsibility to Protect* (2009) pp. 442–477, available at [http://responsibilitytoprotect.org/The%20Responsibility%20to%20Protect%20A%20Framework%20For%20Prevention%20\(Rosenberg\).pdf](http://responsibilitytoprotect.org/The%20Responsibility%20to%20Protect%20A%20Framework%20For%20Prevention%20(Rosenberg).pdf).

¹⁰⁸ De Baere, B., ‘The EU and the Responsibility to Protect’, in: B. van Vooren, S. Blockmans & J. Wouters (Eds.), *The EU’s Role in Global Governance: The Legal Dimension* (Oxford: Oxford university Press, 2013).

in relation to responsibility towards other States.¹⁰⁹ Both approaches are necessary for providing effective solutions to the migration crisis.¹¹⁰ While the EU has embraced this concept,¹¹¹ it still has not expressly included it as part of the instruments of EU law. However, R2P can be viewed as promoting the responsibility of States in relation to refugees, and in harmony with both the customary norm of humanitarian assistance for victims in need of surrogate protection and the concept of solidarity.¹¹²

Countries are defending not only their sovereignty by controlling who is entering their territory, but are also exacerbating disparities in the burdens on their fellow States which are located in more migratory-exposed geographical areas. In such instances, States are neglecting both their responsibility to protect and their commitments to solidarity. In relation to refugees and people in need of international protection and based on the R2P and in line with both customary rules and solidarity,¹¹³ States should not only offer the protections that they are required to under the 1951 Refugee Convention and major regional conventions,¹¹⁴ but should also assist States that are facing a disproportionate burden from refugee influxes and those refugees that are suffering as a result.

By contrast, State's responsibility/solidarity towards economic migrants or migrant workers is controversial. The Convention for the Protection of the Rights of all Migrant Workers and Members of their Families accords both documented/legal and undocumented/illegal migrants with civil, social and labour rights.¹¹⁵ However, to date, the Convention has mainly been ratified by

¹⁰⁹ For analysis of the connections between R2P and solidarity, see Almqvist, J., 'Enforcing the Responsibility to Protect through Solidarity Measures', 19(8) *IJHR* (2015) 1002; Boisson de Chazournes, L., 'Responsibility to Protect: Reflecting Solidarity?', in R. Wolfrum & C. Kojima (Eds.), *Solidarity: A Structural Principle of International Law* (Berlin-Heidelberg: Springer, 2010).

¹¹⁰ For further discussion on peace and security, see Turksen, U., *Protection Seekers, States and the New Security Agenda* (Izmir: Altin Nokta, 2010).

¹¹¹ Council Doc 11298/11, para 6; "European Parliament resolution on the outcome of the United Nations World Summit (14–16 September 2005)" (21 September 2005), para 9. See also, Oxfam International, *The Responsibility to Protect and the European Union* (Brussels: Oxfam International, 2008) available at http://responsibilitytoprotect.org/files/Oxfam%20R2P%20and%20EU%20Mar%2008%20final%203_.pdf (last visited 11 June 2016).

¹¹² Wellens 2010, note 14, p. 20.

¹¹³ *Ibid.*

¹¹⁴ See, for example, the Council of Europe conventions relating to the protection of refugees and asylum seekers, which includes the 1950 European Convention on Human Rights (ETS No. 5), the 1995 Framework Convention for the Protection of National Minorities (ETS No. 157), the 1992 Convention on the Participation of Foreigners in Public Life at Local Level (ETS No. 144), the 1997 European Convention on Nationality (ETS No. 166), the 2006 Council of Europe Convention on the avoidance of Statelessness in relation to State Succession (CETS No. 200) and the Council of Europe Convention on Action against 2005 Trafficking in Human Beings (CETS No. 197).

¹¹⁵ For an analysis of the Convention see De Guchteneire, P., A. Pécoud & R. Cholewinski, *Migration*

developing countries; none of the EU Member States has ratified it.¹¹⁶ A fragmented and patchy legal framework regulates legal entry for this category of migrants within the EU.¹¹⁷

6.2. Member State Responsibility/Solidarity towards One Another

Responsibility between Member States goes hand in hand with the principle of inter-state solidarity within the EU. It also evokes the concept of burden sharing, which imposes special responsibilities on States towards one another—responsibilities which are greater than those which Member States have towards humanity at large. The extent to which States would be inclined to accept migrants and refugees depends on how they apply solidarity towards fellow countries. Several articles in the EU Treaties refer to this principle, which necessitates shared responsibility based on a communitarian principle, i.e. ties arising from shared goals, activities, commitments, and common identities and history.¹¹⁸ Unfortunately, as noted above, solidarity has faded away as the guiding approach, as many Member States have refused to play their part in sharing the humanitarian burden of the migration crisis. Some have built walls/fences as part of their border control policy and others have refused to comply with the mandatory relocation quotas envisaged by the Council.¹¹⁹ This has subsequently placed heavy burdens on countries which have adopted an open approach towards migrants. This will become an unsustainable burden if it is not shared.¹²⁰ The Treaty appears to require Union institutions to govern asylum and immigration policies in accordance with the principle of solidarity and the fair sharing of responsibility between Member States.

The question of how solidarity/responsibility towards other fellow countries can be substantiated deserves some consideration based on a normative discussion on solidarity and shared responsibility. Commitment to the well-being of others can be conceived 'in terms of the recognition of special obligations

and Human Rights—The United Nations Convention on Migrant Workers' Rights (New York: UN University Press, 2009).

¹¹⁶ For an update on the ratification status of The United Nations Convention on Migrant Workers' Rights, available at <http://indicators.ohchr.org/> (last visited 14 October 2016).

¹¹⁷ For a more detailed analysis of this, see Morano-Foadi S. & M. Malena, Integration for third country nationals: the equality challenge (Cheltenham: Edward Elgar Publishing, 2012).

¹¹⁸ Miller, D., 'Distributing Responsibilities', 9(4) *The Journal of Political Philosophy* (2001) pp. 453–471, at p. 462

¹¹⁹ See Cierco, T. & J. Tavares da Silva, 'The European Union and the Member States: two different perceptions of border', 59(1) *Rev. bras check. polít. int.* (2016), available at <http://www.scielo.br/pdf/rbpi/v59n1/0034-7329-rbpi-59-01-00003.pdf> (last visited 23 November 2016); Baczynska, G. & S. Ledwith, How Europe built fences to keep people out (Reuters, 2016), available at <http://www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7> (last visited 23 November 2016).

¹²⁰ On this point see Mason, A., *Community, solidarity, and belonging: levels of community and their normative significance* (Cambridge, Cambridge University Press, 2000).

between the members of a group, which exist in virtue of their being members of it'.¹²¹ An example elaborated by Miller about a group of hikers going on a trip in the mountains together illustrates the nature of this concept.¹²² If one of the hikers (alias a frontline Member State) falls and is injured 'it is taken for granted that the responsibility for bringing aid to the injured member falls in the first place collectively on the whole group rather than on other climbers who happen to be in the vicinity at the time.'¹²³ The other members of the groups (the other Member States) should distribute the burden depending on their capabilities. Each party will have a different role in accordance with financial or non-financial indicators. In the case of the hikers, a doctor or nurse fellow would provide first aid to the injured party; an athlete would run to the nearest village to ask for help; and a security guard would be physically fit to carry the wounded person to the nearest hospital. This is grounded in a spirit of cooperation which does not imply uniformity, but rather appreciates a diversity of approaches and capabilities. Its acceptance stands in the conviction that solidarity is one of the foundations of the European Union and a guiding principle governing the relationship of Member States with each other. This responsibility is understood as a concern for other members of a group.¹²⁴ Consequently, in the name of a common EU mission,¹²⁵ Member States ought to be allies and share the burden of this project. Thus, the main features of this type of commitment are: collective agency and motivation. The basis of the latter is mutual trust between people/States who share common values.¹²⁶ Collective agents have shared goals, a procedure for selection to become part of the group and display rationality in their actions.¹²⁷ This form of collective agency, which would ideally apply to all twenty-eight Member States, has, in reality, been weakened by the way they see the EU, i.e. as an instrument to remedy emergencies by protecting national interest. This is also shown by the concept of flexible solidarity recently proposed by the V4 group countries (i.e. Czech Republic, Hungary, Poland and Slovakia), which advocate the possibility of choosing their own special forms of contribution to the migration crisis, taking into account their potential and experience.¹²⁸

Solidarity expresses a 'horizontal bond of unity'¹²⁹ between the Member States, but to be a ground for infringement or a source of concrete obligations for

¹²¹ Thielemann 2003, note 14, at pp. 257–258.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ See supra note 118.

¹²⁵ In this connection, see Borg-Barthet, J. & C. Lyons, The European Union migration crisis, 20 *Edin LR* (2016) 230–34, who contended that 'the horizontal relationship between the member states has reverted to traditional notions of absolute territorial sovereignty'.

¹²⁶ Miller, D., *The Left, the Nation-State and European Citizenship*, Dissent, (1998) p. 48.

¹²⁷ Sangiovanni 2013, note 17, p. 408.

¹²⁸ EU Welcomes V4 Group's Idea of Flexible Solidarity to Tackle Migrant Crisis (2016), available at <https://sputniknews.com/politics/201610151046375999-v4-migrant-crisis-solidarity/> (last visited 23 November 2016).

¹²⁹ Klamert 2014, note 23, p. 37.

the Member States, it needs to be included in a piece of secondary legislation or be linked to Article 4(3) TEU. Consequently, this raises a number of questions on the enforceability of solidarity/responsibility: how this type of responsibility can be substantiated; what its main features are; whether legal consequences are available if and when States refuse to abide by solidarity measures.

6.3 Member State Solidarity/Responsibility towards the EU

The two above-discussed levels of Member States' solidarity/responsibility, i.e. towards refugees and migrants and towards other Member States, have not proved to be strong enough to solve the present impasse. This paper suggests an ultimate level of solidarity/responsibility, i.e. towards the EU as a whole. The introduction of an additional level has the twofold purpose of complementing the other two levels and casting the appropriate importance to solidarity and responsibility, so as to enable them to fulfil their relevant role for which they have been originally designed. The concept is in fact enshrined in Article 4 (3) TEU, which 'has produced some of the strongest "ties that bind" the Member States within the European Union'.¹³⁰ The article confers mutual obligations on the Union and the Member States to carry out the tasks arising from the Treaties. Thus, both the Union and the Member States are responsible, in mutual respect, to perform the duties enshrined in the Treaties. Moreover, it requires Member States (1) to ensure fulfilment of the obligation arising from the Treaties or resulting from the acts of the Union institutions, (2) to facilitate the achievement of the Union's tasks, and (3) to abstain from any contravening measures which can jeopardise the Union's objectives.

Three obligations arise from this article. The first is a positive obligation, requiring Member States to introduce measures either emanating from the Treaties (for example, respecting solidarity as prescribed in Article 67 TFEU) or from secondary legislation (for example, enforcing the Council Decisions' rules on relocation).¹³¹ The second is also a positive obligation, entailing the facilitation of the Union's tasks, for example, in relation to the creation of an area of freedom, security and justice.¹³² The last one is a negative obligation, which compels Member States to refrain from introducing measures that can endanger the fulfilment of the Union's objectives, such as reinstating internal borders within the Schengen area.¹³³

Thus, solidarity/responsibility towards the European project constitutes a 'fixed hegemonic formation', or a 'nodal point',¹³⁴ which requires conscientious

¹³⁰ *Ibid.*, p. 1.

¹³¹ See supra note 41.

¹³² See Title V of the Treaty on the Functioning of the EU (TFEU).

¹³³ Arguably the current temporary measures introduced by some Member States, have been justified as taken in line with exceptional provisions allowed for in the Schengen system.

¹³⁴ Laclau, E. & C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985), p. 142.

actions from Member States to sustain it. Their responsibility ‘flows from a requirement of solidarity’,¹³⁵ which finds its constitutional basis in the principle of loyalty contained in Article 4 (3) TEU.

Whether legal consequences are available in cases where States refuse to abide by solidarity measures introduced via legislative measures, enforcement instruments are left to the discretion of the Commission, in accordance with Articles 256–258 TFEU, as the enforcer of the Treaty. The extent to which Article 4 (3) TEU can be evoked in some of these circumstances is developed in the following section.

7 Emergency and Crisis: The Intertwined Principles of Solidarity and Loyalty

What is relevant for the purpose of this discussion is that cooperation between the Union and Member States denotes a process, and a relationship between different actors, which implies duties of mutual assistance amongst Member States and with the EU as a whole. The crucial point is the conviction that the adoption of unilateral measures, such as internal border controls, disrupts solidarity and undermines the foundations of the whole EU project. Unilateral Member State practices can destabilize the principle of solidarity and strengthen individual self-interest rather than collective good. Consequently, particularly in periods of emergency or crisis, unilateral actions carry scattered effects and ascribe to Member States the direct responsibility for the disintegration of the Union. In general, the issue of border control, be it internal borders between Member States or external borders at the frontiers of Europe, is problematic in a humanitarian crisis, as it suggests a quasi-military model of border enforcement which does not support the commitment to European values.

The connubial solidarity/responsibility towards the Union, as an entity, and as an agreement which has bound together States and people,¹³⁶ presents a means of protecting the collective interest and precludes unilateral Member State actions that might jeopardize the entire project. The crux, therefore, is the question of how to make Member States, for example, enacting refugee relocation mechanisms introduced by the institutions or how to reinstate Schengen in order to fulfil their obligations towards the Union. The current migratory phenomenon, coupled with recent financial crisis, has produced a certain degree of distrust regarding the welfare state itself as well as a common ground for solidarity. Parts of the European discourse on solidarity contradicts individualism and the economic self-interest of the Members States in favour of collective actions. Yet the richest trading bloc in the world is under threat because

¹³⁵ *Ibid.*, at p. 32.

¹³⁶ See Case 26/62, *Van Gend en Loos v Nederlands Administratie der Belastingen* [1963] ECR 1. It is beyond the scope of this paper to deal with the question of the kind of legal order the European Union constitutes.

of ‘the creation of a climate of fear, hostility, and resentment that precludes the search for a more creative, humane, and imaginative responses to complex challenges of the twenty-first-century migration’.¹³⁷ Politicians, the media and the public are all responsible for such tensions. Political responses are essential to turn the powerful legal aspects of responsibility and solidarity into practical reality. Yet the current situation shows disunity between Member States, lack of mutual trust between them, disillusion towards the common European project and concerns on the issue of security.¹³⁸

Ownership of responsibility is a key element because the lack of real commitment from Member States towards the Union, which was intended as an organization and collectivity of people, makes legal obligations a dead letter if they are not properly applied; they become ‘paper tigers, fierce in appearance but missing in tooth and claw’.¹³⁹ Yet, the TFEU in relation to the Area of Freedom Security and Justice (AFSJ) expressly recognises a ‘spirit’ of solidarity that should pave the way to frame and carry out policies in the AFSJ (Article 67 TFEU), especially in regard to border checks, asylum, and immigration (Article 80 TFEU). When unilateral action by a Member State, violates EU Law, the principles of solidarity and loyalty to the EU are intrinsically connected.

The CJEU in the 1969 *Commission v France* case stated that ‘solidarity [...] is at the basis [...] of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the [EEC] Treaty [now Article 4(3) TEU, i.e. the Loyalty Clause]’.¹⁴⁰ Solidarity and loyalty must be conceived of as two sides of the same coin, which favour common general interest over the national interests of Member States.¹⁴¹

In the *Commission v Italy* case the Court referred to a ‘duty of solidarity accepted by Member States by the fact of their adherence to the Community’.¹⁴² Thus, solidarity is essential for the ‘equilibrium between advantages and obligations owing from [a Member State’s] adherence to the Community’.¹⁴³ It is this principle that prohibits Member States from pursuing purely national interest, if they compromise the interests of the Union. Member States are barred from acting unilaterally when their action or inaction disturb this equilibrium.¹⁴⁴ However, the ground for infringement as a source of concrete obligations for the Member States per se, needs to be included either in a piece of secondary

¹³⁷ Carr 2015, note 6, p. 286.

¹³⁸ Terror attacks in Europe, which have been almost daily in recent months, will continue. See <http://www.usatoday.com/story/news/world/2016/07/26/analysis-string-if-terror-attacks-europe-likely-continue/87578584/> (last visited 2 August 2016).

¹³⁹ Hepple, B., *Social and Labour Rights in a Global Perspective* (Cambridge, Cambridge University Press, 2002), p. 238.

¹⁴⁰ *Joined Cases 6/69 and 11/69 Commission of the European Communities v France*, supra footnote 19, para 16.

¹⁴¹ See Casolari 2014, note 15, p. 124.

¹⁴² *Case 39/72, Commission v Italy (Premiums for Slaughtering Cows)* [1973] ECR 101, para 24.

¹⁴³ *Ibid.*

¹⁴⁴ See Klamert 2014, note 23, at p. 37.

legislation or be linked to Article 4(3) TEU.¹⁴⁵

Indeed, solidarity measures entailing a sharing of responsibility are strongly justified in times of crisis for their exceptional nature.

In this regard, a clear example of a measure introduced in an emergency situation to give effect to the principle of solidarity and shared responsibility, is the recent Council Decision 2015/1601 on mandatory relocation, based on Article 78 (3) TFEU and Article 80 TFEU. The mechanisms conceived in this measure, provide (a) solidarity mechanisms in the form of operational support to Italy and to Greece to be activated in the event of an emergency situation; (b) financial solidarity measures for both Member States receiving more refugees and those receiving fewer refugees as a result of the relocation measures; (c) further solidarity measures in case of further emergency situation requiring the suspension of the participation of a specific Member State in the relocation as well as possible compensatory measures for the beneficiary countries.

However, when introduced by the EU institutions such measures require a Member State's implementation. Failure to comply with such measures can provoke disastrous consequences for all other Member States, and for the Union as well. Consequently, if solidarity provisions are not fully implemented by Member States—generally as a result of the impasse between sharing burdens and giving primacy to national interests—then the loyalty principle may be invoked as a 'gap filler' between what primary law imposes and those respective omissions or actions.¹⁴⁶ It follows that lack of implementation of solidarity mechanisms can be challenged by interpreting EU legislation in the light of the loyalty principle.

Also, in *N.S.*¹⁴⁷ the CJEU ensured some degree of solidarity between Member States, in requiring them to exercise the discretionary power provided by the Dublin Regulation by not transferring an asylum seeker to the Member State (Greece). The Court ruled that it would be unreasonable for Member States to ignore that the asylum seeker could face a real risk of being subjected to inhuman or degrading treatment in the responsible Member State, owing to well-known systemic deficiencies in that State's asylum system. The Court's rationale primarily lies in the need to respect the human rights of asylum seekers, and hence the need to ensure the effectiveness of the Charter of fundamental rights.¹⁴⁸

Failing implementation of solidarity measures, the Commission can exercise its discretion to enforce secondary legislation to ensure compliance with EU law as also reiterated by Article 197 TFEU, which states that the 'effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, p. 125

¹⁴⁷ See *N.S.* case, note 56.

¹⁴⁸ Casolari 2014, note 15, p. 125.

interest', derived from Article 4 (3) TEU.¹⁴⁹

8 Conclusions

This contribution attempts to prepare a novel bedrock for robust foundations to accommodate future solutions in mass migratory emergencies. The seminal principle prompting the discourse in the preceding pages is solidarity, quintessential to EU law and permeating the whole structure of the Treaty. In Union policies on border checks, asylum and immigration, solidarity is expressly connected to shared responsibility. The spine of the whole paper, then, is built and stretched between the twin poles of solidarity and responsibility.

The origin of the principle of solidarity can be traced back to the Schuman Declaration of 9 May 1950. Its legal connotation, in relation to immigration and asylum, is evident in Article 80 TFEU, which relates solidarity to shared responsibility. In addition, numerous pieces of secondary legislation evoke the very concept in an attempt to apply it to specific actions, such as the relocation of refugees across Member States.¹⁵⁰

This paper is based on the conviction that reaffirming the centrality of the role of solidarity and responsibility within the EU is essential, because their function has been gradually fading away. Solidarity is 'not just a factual necessity, but is a legal, normative obligation, embedded in EU law';¹⁵¹ its explicit reaffirmation, particularly at times when it is most needed, can solve the current impasse in Europe. Together with shared responsibility, this concept should be at the core of the Member States and EU migratory agendas, not to defend States' self-interests, but in the name of a common European project. The binomial solidarity/responsibility should be the basis of a newly founded Europe. A shift of focus on these two concepts has the potential to overcome tensions between the EU and Member States and to facilitate long-term solutions to emergencies.¹⁵² Rather than being divided by nationalistic ideologies, Member States are called to act as a united corpus within the Union, overcoming market and security logics in favour of more humanitarian goals.¹⁵³

This paper has suggested orienting the attention of EU and national policy

¹⁴⁹ Klamert 2014, note 23, at p. 13.

¹⁵⁰ See supra note 41.

¹⁵¹ McDonnell, 2014, note 17, p. 59.

¹⁵² Poptcheva, E.A., EU Legal Framework on Asylum and Irregular Immigration 'On Arrival'. State of Play (Brussels: European Parliamentary Research Service, March 2015), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551333/EPRS_BRI\(2015\)551333_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/551333/EPRS_BRI(2015)551333_EN.pdf) (last visited 20 September 2016).

¹⁵³ See European Scrutiny Committee, Second Report, Session 2015–16, pp. 17 ff; Bahá'í International Community, Rising Together: Building the Capacity to Recover from Within, World Humanitarian Summit in Istanbul, Turkey, 17 May 2016 available at <https://www.bic.org/statements/rising-together-building-capacity-recover-within#HYcEhHGQMhHqIxlL99> (last visited 15 June 2016).

makers, politicians and the public towards a 'refreshed' Europe, a Union based on forces of integration and compassion. Although the binomial solidarity/responsibility is explicitly recognized in the field of migration,¹⁵⁴ still some Member States attempt to evade their obligations towards migrants, each other and the EU. The need for effective responses to volatile market-based economies is difficult to reconcile with these values, which tend to be forgotten at times of crisis. The legal principle is available but the process of eliciting an EU response to the migratory pressure, despite recent developments,¹⁵⁵ has been slow, hesitant and not too ambitious. Certainly, the concern mainly stands with Member States, which clearly seem to prefer peer pressure and consensus-building under the open method of co-ordination over binding rules in this area.¹⁵⁶

This paper submits that a new approach to law-making based on a more participative process of integration, which encompasses values such as solidarity and responsibility should be adopted. It does not suggest merely introducing soft law measures to deal with mass migratory flows, as this would undermine the binding effect of EU rules, but to build legislative solidarity actions inspired by values. It is compelling to have a stronger united Europe as migratory flows are not a one-off phenomenon. The intensity of the current mixed-movements has challenged the foundation of Europe, testing the working of the EU and its values. The humanitarian crisis is unlikely to stop any time soon as many African and Asian countries are destabilized. There will be future flows and this situation is likely to persist for the many years to come. Faced with such continuous migratory pressure, Member States can either safeguard the Union or trigger its disintegration. Recent events have demonstrated that migration cannot be controlled in the way some EU Member States would like it to be. Countries cannot isolate themselves by building walls, barriers and fences. The Union cannot ignore humanitarian responsibilities, fail to protect fundamental human rights, and remain a viable international coalition. Failure to respond to such EU measures introducing solidarity duties needs to be rectified using enforcement procedures available within the EU. However, EU measures should overcome the emergency rationale. The logic of solidarity and shared responsibility goes beyond emergency, as it is embedded within the EU structural architecture, but under current circumstances it should be reaffirmed as fundamental in the area of migration.

¹⁵⁴ McDonnell 2014, note 17.

¹⁵⁵ In 2016, the Commission has made a series of proposals to reform the Common European Asylum System (CEAS), for further detail see *supra* note 68.

¹⁵⁶ See flexible solidarity approach, *supra* note 128.