

## The Principle of Solidarity and Fairness in Responsibility Sharing: More than window dressing?

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### Abstract<sup>1</sup>

The lack of fairness in asylum responsibility sharing within the EU has been a persistent problem, which has long been ignored. The recent refugee crisis has exposed the flaws in the design of the responsibility sharing system more than ever. As a response, a number of steps have been taken, including a proposal to reform the controversial Dublin III Regulation, which has been the major reason of the inequalities. This article seeks to inform the ongoing debate on the existing and proposed solidarity instruments from a constitutional point of view by taking the principle of solidarity and fair sharing of responsibility under Article 80 TFEU as its reference point. It explores the legal relevance of this principle and the way in which it can influence the legal landscape on asylum responsibility sharing. The article sees the principle as an important mechanism in both the enhancement of solidarity and the protection of refugees. It argues that the combined reading of Article 80 TFEU and the Charter of Fundamental Rights provides a strong reason to doubt the constitutionality of the Dublin III Regulation. Despite its limited enforceability, the principle of solidarity can play an important role as an interpretation tool in defining the contours of solidarity obligations imposed under secondary legislation.

### Introduction

This article revisits the relation between the basic principles that shape the EU common asylum policy (in particular the principle of solidarity and fairness in sharing of responsibilities as enshrined in Article 80 TFEU) and the secondary law which fleshes out the said asylum policy (very especially the Dublin III Regulation and the Temporary Protection Directive). I argue that the present system of allocation of competences and responsibilities between Member States on asylum manifestly infringes the principle of solidarity, because responsibility is imposed upon the EU country through which the asylum seeker enters the area without internal frontiers. Thus, responsibility is allocated by reference to the manifestly inadequate criterion of geography, with no mechanisms being in place to ensure the reallocation of responsibilities among Member States. To quote from Advocate General Sharpston's lucid characterisation of the present rules in *Cimeda and Gista*, 'the whole

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<sup>1</sup> All web references have been checked on June 5<sup>th</sup>, 2016.

system of providing protection for asylum seekers and refugees is predicated on the burden lying where it falls'.<sup>2</sup>

On such a basis, I conclude that the Court of Justice of the European Union (CJEU) should declare invalid the key elements of Dublin III, as there are no functional mechanisms ensuring a proper allocation and reallocation of responsibilities among states, resulting not only lead in overloading of the capacity of some Member States, the inadequate protection of the rights of refugees, and at the end of the day, the imperilling of free movement within the 'area without internal frontiers'. Moreover, I show why the CJEU should be not only keener to invoke the principle of solidarity among Member States as a yardstick by reference to which construct EU secondary law by the CJEU, but also to interpret the said secondary law in a less literal and more purposive way, especially the Temporary Protection Directive.

The article is structured in three parts. Section I provides a brief account of the historical context in which the EU asylum responsibility sharing system emerged and evolved, as well as an overview of the workings of the Dublin III Regulation. Section II makes the case for the European unconstitutionality of the Dublin III Regulation. I consider whether Dublin III is in breach of the principle of solidarity, and whether such a breach could result in the CJEU declaring parts of the Regulation invalid; Section III contains the arguments favouring a different interpretation of the Temporary Protection Directive to ensure a better fit with the principle of solidarity. The last section holds the conclusion.

## **I Constitutional framework, rationale and practice of the common European asylum system**

### *A) The close relationship between the suppression of internal frontiers and the establishment of a common asylum policy*

According to Article 67 TFEU, the European Union is to frame a common policy on asylum, immigration, and external borders based on solidarity between the Member States. Article 80 TFEU requires the Union policies on border checks, asylum and immigration and their implementation to be governed by the principle of solidarity and fair sharing of responsibility.

A European asylum policy based on solidarity and fairness is not only a normative requirement that found an expression at Treaty level, but also a functional necessity arising from the general objective

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<sup>2</sup> Opinion of Advocate General Sharpston on Case C-179/11 *CIMADE, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur*, delivered on 15 May 2012, EU:C:2012:298, para 83.

of a single market without internal frontiers, one in which the free movement of persons is realised.<sup>3</sup> This is so because once internal borders between EU Member States are removed, the decision of third country nationals to enter the EU, including those in need of international protection, becomes a common concern to all Member States. Once inside the area without internal frontiers, individuals can easily move from one country to another. In a literal sense, the decision to grant asylum stops being a decision that affects the granting state only and becomes the common concern of all states within the area without internal frontiers, because today's beneficiary of asylum in Ruritania may eventually become tomorrow's resident in Freedonia. Consequently, the abolition of internal borders requires a coordinated approach to the control of the external borders of the area without internal frontiers, extending to asylum. In that sense, the common asylum regime is the stepchild of to the abolishment of border controls within the European Union, or to be more precise, of the Schengen area.<sup>4</sup> However, a system based on common standards would not operate properly if it puts more pressure on some states than others. It is at that point that functional and normative considerations overlap. In addition to being a normative ideal to be achieved, fairness in responsibility sharing also has instrumental value in the attainment of a functional and functioning asylum regime. Indeed, lack of fairness has major costs, as proven by the near collapse of the Dublin system.<sup>5</sup>

#### *B) The law in force: the unbalanced operationalisation of Article 80 TFEU*

The Dublin III Regulation is a key element in the operationalisation of Articles 67 and 80 TFEU. The present Regulation is the result of the transformation and amendment of the original Dublin Convention of 1990, which was then succeeded by the so-called Dublin II (of 2003) and Dublin III (of 2013) Regulations.<sup>6</sup> The key content of the three 'Dublin' pieces of legislation is the determination of the state responsible for the processing of each asylum application within the area without internal

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<sup>3</sup> G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers, 2000), 124 (explaining that the underlying reason for the common asylum system was the establishment of an Internal Market where persons moved freely).

<sup>4</sup> The Dublin area encompasses all EU Member States except Denmark, whereas the Schengen area does not include the UK and Ireland, which opted out, and Bulgaria, Croatia, Cyprus, and Romania, which are in the process of becoming members. Iceland, Norway, Liechtenstein and Switzerland joined both the Schengen and Dublin areas.

<sup>5</sup> Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities OJ L 254, of 19.8.1997, pp. 1-12 (entered into force in 1997) (hereinafter Dublin Convention).

<sup>6</sup> What originally was an international convention was turned into a piece of EU secondary law by the enactment of the so-called Dublin II Regulation in 2003: 'Council Regulation 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, of 25.2.2003, pp. 1-10. Rather small amendments were enacted in 2013, leading to the present Dublin III Regulation: 'Regulation 604/2013 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 L 180, of 29.6.2013, pp. 31-59.

frontiers (which I will refer hereafter as the Dublin area). The ‘default’ rule is that the competent and responsible state is the state of first entry (hereafter, the ‘state of first entry rule’). In the event of asylum seekers moving to another Member State and being stopped by the local authorities, the second Member State is entitled to return the asylum seeker to the country of first entry. Such return is automatic, in the precise sense that the returning state is to assume, without verifying, that the responsible state is a safe country for the asylum seeker. All states part of the Dublin system are to mutually trust each other, and consequently all Dublin states are to be regarded as safe states for asylum seekers.<sup>7</sup>

The country of first entry rule establishes a relatively clear allocation of responsibilities among Member States. These responsibilities involve costs, related not only to the maintenance of border controls and the running of the administration of the asylum system, but perhaps more onerously, also the material sustenance of asylum seekers<sup>8</sup> while their application is being processed. In addition, host states are required to acknowledge those who are granted refugee status fundamental rights, including socio-economic rights (social welfare, healthcare, and housing, among others).<sup>9</sup>

The operationalisation of Article 80 TFEU seems to require not only a clear allocation of responsibilities, but also some mechanisms to redress the eventual imbalances among Member States resulting from their bearing very different burdens.

However, there are only three (and rather limited) mechanisms in the law in force that can result in the said (and needed) rebalancing. Firstly, asylum seekers may be reallocated among Member States in case there is a ‘sudden influx’ of asylum seekers according to the Temporary Protection Directive, which was introduced not by coincidence in the wake of the Kosovo war. However, reallocation is contemplated as an emergency measure, and indeed the concept of ‘sudden influx’ has been construed in an exceedingly narrow way.<sup>10</sup> Secondly, the European Asylum Support Office may, at the request of a Member State, provide limited emergency assistance to national administrative

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<sup>7</sup> Preamble to the Dublin III Regulation, recital 3.

<sup>8</sup> For the conditions, see Chapter II of the Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, of 29.6.2013, pp. 96–116.

<sup>9</sup> See Chapter VII of the Directive 2011/95/EU 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 OJ L 337, of 20.12.2011, pp. 9-26.

<sup>10</sup> 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, of 7.8.2001, pp. 12-23 (hereinafter Temporary Protection Directive).

authorities in case that is needed. Such assistance can extend to coordinating the relocation of the beneficiaries of international protection from Member States that are facing particular pressures, or by deploying a support team that can provide an initial analysis of asylum applications.<sup>11</sup> Thirdly, some very modest funding instruments have been set in place, so that the states at the receiving end of migration flows see a small part of the costs funded by the Union as a whole. It should be stressed that the resources being redistributed remained very small, even after several decisions to increase them.<sup>12</sup>

### *C) From stress to the (near) collapse of the Dublin system*

By the mid-2000s, it became evident that the Dublin system had serious shortcomings. Heightened instability in the Middle East following the US-led wars in Afghanistan and Iraq, plus structural political and economic unrest in sub-Saharan Africa were followed by an increase in numbers of asylum seekers willing to enter the Union by means of crossing the Mediterranean. In particular, there was a sharp increase in the number of migrants that entered Greece. This quickly overloaded the administrative capacities of that Member State, which were insufficient to start with, resulting in a marked deterioration of the position in which asylum seekers found themselves. This led not only to a new round of disputes among Member States regarding the allocation of responsibilities in the Dublin system, but also, and more decisively, to the first visible cracks in the Dublin system. Facts in the ground made it impossible to ignore that the presumption that all Dublin states were safe countries for asylum seekers was too optimistic by half. In its famous *M.S.S.* decision, the European Court of Human Rights (ECtHR) condemned Greece for failing to comply with its protection obligations and Belgium for returning an asylum seeker according to the automatic Dublin II system without verifying whether Greece fulfilled its protection obligations.<sup>13</sup> This ruling made it impossible

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<sup>11</sup> Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office OJ L 132, of 29.5.2010, pp. 11-28.

<sup>12</sup> Initially, financial assistance was provided under the European Refugee Fund with budget of 216 million euro, Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund OJ L 252, of 6.10.2000, pp. 12-18. The Fund was first extended for the period 2004 to 2008 and its budget increased to 630 million euro, Decision 2004/904/EC of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010 OJ L 381, of 28.12.2004, pp. 52-62. In 2007, the Fund was further extended for the period 2008-2013. In this third cycle, the amount of the fund was increased to 700 million euro, Decision 573/2007/EC of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the general programme "Solidarity and Management of Migration Flows" and repealing Council Decision 2004/904/EC OJ L 144, of 6.6.2007, pp. 1-21. For the period 2014-2020, an Asylum Migration and Integration Fund was set up with a budget of 3.1 billion euro, Regulation 516/2014 of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC OJ L 150 of 20.5.2014, pp. 168-194. As a response to the crisis, additional emergency funding has been made available to states that are under particular pressure. For the most recent instrument, see Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union OJ L 70, of 16.3.2016, pp. 1-6.

<sup>13</sup> *M.S.S. v Belgium and Greece*, Application no. 30696/09 (ECtHR, 21 January 2011). The case concerned a protection seeker who entered Europe through Greece and travelled to Belgium, where he lodged an application for asylum. In accordance with the Dublin system (first entry state rule), Belgium returned the applicant to Greece, where he was detained under poor conditions before living on the streets without any assistance for several months.

to continue ignoring that not all Member States honoured their fundamental rights obligations. Consequently, automatic returns conducted on the basis of mutual trust were based on very shaky constitutional ground. Indeed, shortly after *M.S.S* ruling., the CJEU dealt with a similar case, *N.S. and M.E.*, also concerning the mutual trust principle.<sup>14</sup> The CJEU concluded that fully automatic return might put into risk the protection of the fundamental rights of asylum seekers. The Court favoured a marginal recharacterisation of the principle. There should be no automatic return if the transferring state could not be unaware of there being *systemic deficiencies* in the asylum procedures and reception conditions of the receiving state.<sup>15</sup> This was indeed a careful balancing act on the side of the CJEU.

Things only got worse once the impact of the financial, fiscal and economic crises that hit the European Union from 2007 onwards was compounded by the growing instability in some areas of Northern Africa and the Middle East from 2011 onwards. To start with the former, the impact of the financial, economic and fiscal crises on the Member States of the European Union was markedly asymmetric. It was the Eurozone periphery (especially Greece, Portugal, Spain and Italy) that was affected most. Regarding the latter, the failure of the different ‘Arab springs’ led to open wars in countries such as Libya and Syria. This generated a massive flow of asylum seekers, mostly heading to neighbouring countries, but also to the European Union. The countries that were worst hit by the Eurozone crises (and especially Greece and Italy) became the most obvious point of entry into the EU for refugees, even if the preferred final destination was the Eurozone core (especially Germany and Austria,) Sweden and the United Kingdom.<sup>16</sup> The clustering of asylum seekers overloaded the administrative and financial capacities of the countries of first entry, leading not only to a renewed debate about the unfairness of the Dublin system, but also to an erosion of protection standards in the countries of first entry. In its turn, this generated massive flows within the Union, as the overloaded countries of first entry had a clear incentive to tolerate asylum seekers making use of the lack of internal borders to reach the countries of their preferred final destination. As a response, some Member States introduced border checks,<sup>17</sup> making it clear that the existing inequality in

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<sup>14</sup> Joined Cases C 411/10 and C 493/10 *N.S. and M.E.*, EU:C:2011:865.

<sup>15</sup> *Ibid.*, para 86.

<sup>16</sup> For comparative figures that show the increasing pressure on the southern states, in particular Greece, Italy, Cyprus, and Malta, see UNHCR, ‘Asylum Levels and Trends in Industrialized Countries, 2005’ (UNHCR 2006), available at <http://www.unhcr.org/44153f592.html>, at 9; UNHCR, ‘Asylum Levels and Trends in Industrialized Countries, 2009’ (UNHCR 2010), available at <http://www.unhcr.org/4ba7341a9.html>, at 13.

<sup>17</sup> For a list of Schengen countries that reintroduced border controls at their internal borders, European Commission, Temporary Reintroduction of Border Control, available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm).

responsibility sharing, coupled with distrust among the Member States, constituted a threat to the overarching objective of borderless Europe.

#### *D) Reform?*

At the height of the crisis, the Council introduced two emergency instruments, which envisaged the relocation of a total of 160,000 asylum seekers (40,000 in the first one,<sup>18</sup> 120,000 in the second)<sup>19</sup> from Greece and Italy to other Member States. The UK, Ireland and Denmark decided not to take part in relocation arrangements. Slovakia and Hungary, on the other hand, brought actions before the CJEU to challenge the legality of the second scheme, which is based on mandatory quotas defined according to the Member States' relative absorption capacities.<sup>20</sup> At the time of writing, both cases concerning asylum responsibility sharing are pending before the CJEU.

The EU has also made use of rather controversial agreements with third countries to overcome the refugee crisis. An agreement was reached with Turkey on the return of irregular migrants who crossed from Turkey to the Greek islands.<sup>21</sup> The 'temporary' programme covers the return of migrants and asylum seekers who fail to apply for asylum – hoping to move further north before lodging an asylum application – and those whose claims are rejected. In addition, Turkey is expected not only to accept returned migrants, but also to seal its borders to prevent irregular movements from Turkey to the EU. In return, the EU promises to transfer six billion euro under the Facility for Refugees in Turkey, resettle one refugee from Turkey for each migrant and asylum seekers returned, and liberate visa restrictions for Turkish citizen.

Most importantly, having recognised the deficiencies of the Dublin system, the Commission recently presented two proposals with a view to establishing a permanent crisis mechanism. The first proposal seeks to incorporate a permanent mandatory scheme to the Dublin III Regulation that will allow the relocation of asylum seekers among the Member States according to their relative quotas in the face of emergencies.<sup>22</sup> The second proposal, though retaining the country of first entry rule,

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<sup>18</sup> 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, of 15.9.2015, pp. 146-156.

<sup>19</sup> 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, of 24.9.2015, pp. 80-94.

<sup>20</sup> Case C-643/15 *Slovakia v Council* (pending) OJ C 38 of 1.2.2016, pp. 41–43 ; Case C-647/15 *Hungary v Council* (pending) OJ C 38 of 1.2.2016, pp. 43–44.

<sup>21</sup> EU-Turkey Statement, 18 March 2016 - Consilium', available at <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

<sup>22</sup> Proposal for a regulation establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

envisages a broader reform of Dublin III, including the establishment of a permanent emergency mechanism that would relocate asylum seekers according to mandatory quotas.<sup>23</sup>

All these developments are central to the debate about the contours of asylum solidarity in the EU. What is essential to make the asylum system function well and what is politically feasible are important questions that are likely to receive most attention. However, what should also inform the debate and the structure of the future asylum responsibility sharing system are considerations of constitutionality, which will be discussed in the next section.

## **II The constitutionality of the European asylum system: is it sufficiently solidaristic?**

As was already mentioned, Article 80 TFEU requires that all EU asylum policies and their implementation be governed by the principle of solidarity and fair sharing of responsibility. Does EU law as it stands comply with this requirement? If not, as seems to emerge from what was said in the previous Section, are we to conclude that the Dublin III Regulation is in breach of Article 80 TFEU? In case the answer to the latter question is positive, is the lack of compliance so as to justify the European Courts in declaring the relevant parts of the Regulation invalid after a review of its European constitutionality by reference to Article 80 TFEU?

Answering such questions requires consideration of (1) the margin of discretion that the European legislator has when concretising what a legal principle such as solidarity entails in framing European asylum policy; (2) the limits of such discretion, and concretely, what constitutes a manifest infringement of the principle; (3) in what precise sense Dublin III might manifestly infringe the principle of solidarity.

### *A) The margin of discretion in the operationalisation of solidarity*

The general and abstract character of principles<sup>24</sup> necessarily entails that the margin of discretion that the European legislator enjoys when operationalising any principle through the enactment of

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application for international protection lodged in one of the Member States by a third country national or a stateless person, COM(2015)450 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0450>.

<sup>23</sup> 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 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0270:FIN> (hereinafter Dublin Reform Proposal).

<sup>24</sup> The term 'principle' in EU law has been used to denote a wide variety of norms. See on this point, A. Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal*, 95-111, 104-105; O. Wiklund and J. Bengoetxea, 'General Constitutional Principles of Community Law' in U. Bernitz and J. Nergelius (eds), *General Principles of European Community Law* (Kluwer Law International, 2000), 119-142, 129-132. For the purpose of this article, the term principle is used in its conventional meaning to refer norms that impose general imprecise obligations to its addressee. J. Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal*, 823-854, 834-839.

secondary law is wide. Consequently, the CJEU limits the intensity of its scrutiny in light of the margin of discretion that an abstract and open-ended legal basis grants the legislator by an implicit obligation.<sup>25</sup> The wide margin of discretion has been said by the CJEU to follow from the need to strike a balance between the rights of individuals and the decision-making prerogatives of the institutions,<sup>26</sup> something which in the more explicit democratic idiom of national constitutional courts would probably be regarded to be part of what the democratic principle requires.

The margin of discretion that the European legislator enjoys when concretising what solidarity means in the context of asylum policy is very wide, indeed wider than what is the case regarding other principles because solidarity is an essentially manifold and contested concept. European legal scholars have devoted considerable efforts to the conceptualisation of European solidarity<sup>27</sup> and to explore its nature as a legal concept,<sup>28</sup> very especially after the Lisbon Treaty reaffirmed the relevance and transcendence of the principle.<sup>29</sup> Nevertheless, a common understanding of the content and limits of solidarity in European law is far from having emerged.

In the particular context of asylum policy, solidarity can be operationalised in many different ways, ranging from hosting relocated asylum seekers and/or refugees to payments to common funds to be distributed on the basis of the number of refugees being hosted, and including the adoption of

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<sup>25</sup> For example in *Racke*, where the Court was asked to examine the validity of an EU regulation under a principle of customary international law, the Court conducted a light-touch review, 'because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer'. Case C-162/96 A. *Racke GmbH & Co. v Hauptzollamt Mainz*, EU:C:1998:293, para 52.

<sup>26</sup> Opinion of Advocate General Jacobs on Case C-162/96 A. *Racke GmbH & Co. v Hauptzollamt Mainz*, EU:C:1997:582, para 90.

<sup>27</sup> For a categorisation of solidarity based on the parties to the relationship, see A. Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies*, 1-29, 5 (using the term 'national solidarity' to refer to obligations among citizens and residents of Member States, 'Member State solidarity' to refer to the obligations between the Member States, and 'transnational solidarity' to refer to obligations among EU citizens). For a classification based on goals, see F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015) (classifying Union solidarity as market solidarity, communitarian solidarity, and aspirational solidarity).

<sup>28</sup> To name but a few, A. von Bogdandy, 'Founding Principles' in J. Bast and A. von Bogdandy (eds), *Principles of European Constitutional Law* (2nd Revised edition, Hart Publishing/Beck/Nomos, 2010), 11-54, 53-54; M. Ross and Y. Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press, 2010); P. Hilpold, 'Understanding Solidarity within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 *Yearbook of European Law*, 257-285.

<sup>29</sup> At the most abstract level, solidarity appears in the preamble of the Charter of Fundamental Rights, where it is listed among the 'indivisible and universal values' on which the Union is founded. It is also mentioned in the preamble to the TEU, which expresses the desire of the Member States to 'deepen solidarity between their peoples'. In addition, solidarity is expressed in Article 2 TEU as an attribute of European society. As an obligation, it appears among the general Union objectives in Article 3 TEU, which requires the promotion of not only solidarity between generations, but also economic, social, and territorial cohesion and solidarity between the Member States. These objectives are given concrete substance under sector-specific treaty provisions, such as Article 80 TFEU on solidarity in the area of asylum, border checks, and immigration.

common policies as well as the provision of technical and administrative assistance.<sup>30</sup> It remains debatable how solidarity is to be put into effect. Thus, Article 80 TFEU requires that solidarity should extend to financial solidarity. Still, the Treaty is silent on what this entails, and how financial solidarity is to relate to the other dimensions of solidarity. Are responsibility and solidarity fully operative only during emergencies?

It may be thought that some clarification may be drawn from a systemic construction of Article 80 TFEU as a whole. According to the second part of the said article, asylum policy should be so designed as to result in a fair sharing of responsibility among Member States. It could be argued that fairness somewhat amplifies the concept of solidarity and defines its nature and limits. Consequently, the very point of the measures adopted by the Union to realise the principle of solidarity should be the levelling off of inequalities in asylum duties. Having said that, fairness is also a contested concept. There are many conceptions of fairness, leading to very different constructions of Article 80 TFEU. To give just one example, should we say that a solution fair is if it improves the lot of the asylum seekers who find themselves in the least favoured position,<sup>31</sup> or should we say that a solution is fair if it has been approved through a decision-making process in which all those potentially affected by the norm have had an equal opportunity to follow the debates and to participate in them as well as an equal chance of influencing the outcome.<sup>32</sup> Deciding which interpretation is best requires determining which theory of justice underlying each of the two positions is to be preferred. This by itself reveals the limits of solidarity and fairness as limits on the legislator. Often there is no single right way of realising a norm that imposes a general obligation. In these cases, it is for the legislator to make its choice among the possible solutions after weighing in the relevant interests and the immediate policy consequences. When a provision allows the legislator to make such policy decisions, it is a requisite of institutional separation that the Court refrains from substituting its own choice for this decision.<sup>33</sup>

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<sup>30</sup> On the examination of different solidarity instruments in the field of asylum, see Noll, above, n. 3, 270 and ff.; A. Hans and A. Suhrke, 'Responsibility Sharing' in J. C. Hathaway (ed), *Reconceiving International Refugee Law* (Martinus Nijhoff Publishers, 1997) 83-109, 85-102 (providing an outline of responsibility sharing practices at international level).

<sup>31</sup> J. Rawls, *A Theory of Justice* (Harvard University Press, Revised Edition, 2003), 53.

<sup>32</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press, 1996), 166-167.

<sup>33</sup> Due to the wide margin of discretion conferred on the Union institutions and the lack of a certain and conceivable action, the Court is also cautious in finding a failure to act on the basis of norms with general content. For instance, in *Parliament v Council*, when assessing whether the Council failed to act, the Court considered the specificity of the obligation imposed, and accordingly the margin of discretion the legislator enjoyed. For the Court, a failure to act did not exist, because the obligation imposed was not 'sufficiently specific in nature'. Case 13/83 *Parliament v Council*, EU:C:1985:220, paras 46, 53. Given the lack of clarity in relation to the content of the obligation imposed, Article 80 TFEU cannot easily be used in an action for failure to act to force the Union to adopt a new measure in order to give effect to the principle of solidarity and fair sharing of responsibility. See, J. Bast, 'Solidarität im Europäischen Einwanderungs- und Asylrecht' in M. Knodt and A.

## B) What is a manifest infringement of solidarity

The European legislator thus enjoys a wide margin of discretion when operationalising principles, and in particular, the principle of solidarity in asylum policy. In operational terms, the CJEU is willing to undertake the review of European constitutionality of regulations and directives when discretionality cloaks arbitrariness. The key concept in this regard is 'manifest infringement'.<sup>34</sup> What accounts for a manifest infringement when testing the validity of legislation against a principle? What, in concrete, accounts for a manifest infringement of the principles of solidarity and fairness in burden sharing regarding asylum policy?

The jurisprudence of the CJEU does not provide a bright-line test.<sup>35</sup> However, it would be fair to argue that when scrutinising the legality of a legislative act, the Court conducts a light-touch review by giving a narrow scope to the obligation in question. *Italy v Council* is one of the cases where the Court employed the manifest infringement test when considering the validity of secondary legislation in light of a principle.<sup>36</sup> The case concerned a regulation adopted to allocate the percentages of total allowable catch for bluefin tuna among the Member States. Italy contested the regulation, claiming that the criterion by reference to which the allocation was made was manifestly inappropriate for the implementation of the principle of relative stability. It was argued that the quotas assigned to the Member States were based on data from one year, and not the most recent year, instead of being determined by reference to the catches of several years. Applying the manifest infringement test, the Court gave a narrow scope to the obligation imposed by the principle of relative stability. According to the Court, the principle did not require the use of data of more than one year (even if in the case at hand the Council had used data from two years).<sup>37</sup> The manifest infringement test involved also the assessment of the relevance of the data relied upon by the

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Tews (eds), *Solidarität in der Europäischen Union* (Nomos Verlagsgesellschaft, 2014), 143-162, 150 (arguing that an action for failure to act can be invoked on the basis of Article 80 TFEU despite the wide margin of discretion in choosing appropriate means).

<sup>34</sup> E.g. *Racke*, above, n. 25, para 52.

<sup>35</sup> Research on the use of the manifest infringement test by the European Court reveals that no principled approach has been developed by the Court in applying the test. T. Tridimas, 'Community Agencies, Competition Law, and ECB Initiatives on Securities Clearing and Settlement' (2009) 28 *Yearbook of European Law*, 216-307, 274; H.C.H. Hofmann, G.C. Rowe and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2011), 494-499; P. Craig, *EU Administrative Law* (2nd edn, Oxford University Press, 2012), 409-429 (demonstrating that the level of scrutiny of the Court's review has been demonstrated that the way the Court employed manifest infringement also changed over time in the same field).

<sup>36</sup> Case C-120/99 *Italy v Council*, EU:C:2001:567.

<sup>37</sup> *Ibid*, para 42.

legislator. After reviewing the reasons presented by the legislator for using data of particular years, the Court concluded that the Council had not manifestly transgressed its discretionary power.<sup>38</sup>

### C) *The constitutionality of the Dublin system*

In view of the previous two subsections, the constitutional review of the Dublin III Regulation will only lead to a declaration of unconstitutionality (in the actual parlance of the CJEU, to a declaration of its lack of validity) if it can be shown that the Regulation constitutes a manifest infringement of the principle of solidarity as enshrined in Article 80 TFEU.

The case against Dublin III revolves around the inequalities resulting from the country of first entry rule and the absence of means to even the inequalities it creates out.<sup>39</sup>

When configuring a responsibility sharing mechanism, the legislator enjoys a wide margin of discretion, which involves for example the determination of the weights of different components in a distributive key. For instance, the proposal for the establishment of a quota-based relocation scheme uses an allocation key composed of population size and GDP (40% each), the unemployment rate (10%), and the average number of spontaneous asylum applications and the number of resettled refugees per one million inhabitants over the last four years (10%).<sup>40</sup> It is difficult to argue that this responsibility-sharing mechanism manifestly infringes the solidarity principle because it gives more weight to one criterion than to another. Determining the relative weight in the allocation formula involves complex economic and social calculations that necessarily entail the exercise of a certain degree of discretion, for example as to the methodology used. The legislator is well positioned to consider competing interests and make an informed policy decision in its appraisal of the relevant factors. It is perhaps possible to argue that another formulation would be fairer than the one proposed.<sup>41</sup> However, Article 80 TFEU, as a standard of review, does not ensure that an

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<sup>38</sup> Ibid, para 46-47. For a similar approach, see Case C-120/99 *NIPPO and Northern Ireland Fishermen's Federation*, EU:C:1998:67, paras 40-54; Case C-284/95 *Safety Hi-Tech Srl v. S. & T. Srl*, EU:C:1998:352, paras 37-54; Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl*, EU:C:1998:353, paras 35-52.

<sup>39</sup> C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12 *Human Rights Law Review*, 287-339, 336 (arguing that the whole Dublin system is in breach of Article 80).

<sup>40</sup> For the criteria used in the distribution key and their weight see the preamble to the Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM(2015) 451 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0451:FIN>, recital 25. On the other hand, in his suggested formula of  $GNP \cdot 1.5 / \text{population}$ , Grahl-Madsen gave more emphasis to the host country's economic strength than to its population density. A. Grahl-Madsen, 'Refugee and Refugee Law in a World in Transition' (1982) 3 *Michigan Yearbook of International Legal Studies*, 65-88, 74.

<sup>41</sup> In the literature, it has been suggested that the size of a country's territory together with the size of its population and GDP should be used as indicators. K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International, 2000), 419. However, the use of land size as a parameter is controversial due to its indifference to economic variables and the question of whether the land is arable, which is of crucial importance for agricultural societies. UNHCR, 'Statistical Yearbook 2005' (UNHCR 2007), available at <http://www.unhcr.org/464478a72.html>, at 76.

optimal model for the fair allocation of responsibilities is enacted. Its function is a different one, namely, to prevent the adoption of measures that are manifestly unfair. Therefore, even if an allocation scheme falls short of what fairness requires, the said scheme is not necessarily open to be declared void on account of it manifestly infringing the principles of solidarity and fair sharing. The infringement would only be manifest if a totally irrelevant factor would be taken into account or if one clearly relevant is not taken into account and no justification for such course of action is provided. The latter is a good description of the Dublin III system.

The country of first entry rule implies that the allocation of responsibilities is governed by geography. However, geography is a counter-intuitive criterion for the allocation of responsibilities when it comes to asylum policy within the European Union. To start with, only those states with a border with non-EU states (including sea borders that can be reached relatively easily from outside the EU) are likely to be countries of first entry. Moreover, among 'border' states, the responsibility is likely to be unevenly distributed depending on the actual geographical configuration of refugee flows. Frontex data on the migration routes to the EU demonstrates that between the years 2011 and 2015, out of 2,426,152 illegal border crossings including asylum seekers, 43% were made through the Eastern Mediterranean route, 19% through the Central Mediterranean route, and 35% through the Western Balkan route.<sup>42</sup> The first entry state rule puts pressure on the border states that are on the more crowded migration routes. Consequently, the accessibility of each Member State (i.e. its geographical position) from outside the European Union heavily determines the burdens to be assumed by each Member State, unless other states decide to open their borders and spontaneously accept responsibility. Indeed, not all asylum seekers remain and apply for asylum in their first country of entry and the enforcement of Dublin returns are extremely low.<sup>43</sup> However, it is questionable to what extent the ineffectiveness in the application of the Dublin system can compensate its unfairness. Its effectiveness, on the other hand, would mean more inequality in responsibility sharing. Thus, if anything, the ineffectiveness of the Dublin system proves its inappropriateness as a responsibility sharing mechanism. It is also worth mentioning that the suspension of Dublin returns with a view to preventing further fundamental rights violations and more recently Germany's (temporary) open border policy relieved to a certain extent the pressure

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<sup>42</sup> Frontex, 'Risk Analysis for 2016' (Frontex 2016), available at [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annula\\_Risk\\_Analysis\\_2016.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf).

<sup>43</sup> Eurostat, 'Incoming 'Dublin' transfers by submitting country (PARTNER), legal provision and duration of transfer (migr\_dubti)', available at <http://appsso.eurostat.ec.europa.eu/nui/show.do>; Eurostat, 'Outgoing 'Dublin' requests by receiving country (PARTNER), type of request and legal provision (migr\_dubro)', available at <http://appsso.eurostat.ec.europa.eu/nui/show.do>.

on the border states. These developments, however, neither remedy the inequalities resulting from the system, nor change the arbitrariness of the Dublin responsibility sharing system.

Indeed, the country of first entry rule allocates responsibilities on the basis of the arbitrary geographical location of a country to the exclusion of factors which are more relevant to determine the actual relative capacity of each Member State to deal with refugee applications, such as relative economic strength or demographic conditions. This, unsurprisingly, leads to considerable friction among Member States. For example, between 2009 and 2015, Italy received 260,620 asylum applications, while the United Kingdom, with a larger population and a lower unemployment rate, received 213,885 applications.<sup>44</sup> More strikingly, between the years 2008 and 2015, Malta received 14,575 asylum applications, whereas Portugal, with a population more than 20 times that of Malta, an area almost 300 times its size, and more than 20 times its GDP, received a total of 2,860 asylum applications.<sup>45</sup>

Can the country of first entry rule, which is clearly not the natural choice when it comes to the devising of a rule for the allocation of responsibilities, be justified? Some have argued that it can be justified. For one, the Dublin system is said to serve the interests of the refugees. By assigning the responsibility for processing an asylum application to one Member State (and one Member State only), the Dublin system seeks to prevent Member States from sending refugees back and forth, denying jurisdiction to process their applications, and thereby leaving refugees without a country of asylum, i.e. creating refugees in orbit.<sup>46</sup> It is, however, questionable to what extent the country of first entry rule serves the interests of refugees, given that it forces the asylum seekers to remain in countries where the asylum system is often under pressure and where, consequently, actual protection standards may be low. If the purpose is to avoid refugees being left without a country of asylum, this could also be ensured by setting alternative criteria or centralising the review of applications at the European level through a supranational agency.<sup>47</sup>

For two, the Dublin system is said to sustain the efficient handling of asylum claims.<sup>48</sup> The country of first entry rule would enhance legal certainty and prevent the blockages that may result from 'asylum shopping', i.e. asylum seekers moving from one jurisdiction to the other in search of better

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<sup>44</sup> Eurostat, 'Asylum and First Time Asylum Applicants - Annual Aggregated Data (rounded)', available at <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00191&plugin=1>.

<sup>45</sup> *Ibid.*

<sup>46</sup> See the preamble to the Dublin Convention.

<sup>47</sup> Currently, the European Asylum Support Office provides assistance to the Member States in the initial analysis of asylum applications, yet the Member States enjoys full autonomy in decision-making.

<sup>48</sup> See the preamble to the Dublin Convention.

conditions.<sup>49</sup> It goes without saying that Article 80 TFEU has to be construed as requiring to take at heart the interests of all Member States. As was already hinted, there is by now an abundance of empirical evidence that the system may well overload the capacity of the border states, leading not only to blockages in their asylum system, but also to an inadequate protection of refugees. It is hard to escape the conclusion that when it comes to the protection of state interests through Dublin III, some states are more equal than others.

A third and different line of defence of Dublin III goes that while the present EU asylum law may be flawed, on account of its undermining the principle of solidarity, the fault lies not with the Regulation, but with the lack of mechanisms to compensate for the inequalities that result from the application of the Regulation. As the law stands, there are some instruments to tackle inequalities, but the fact of the matter is that they are not only ineffective, but bound to remain ineffective.<sup>50</sup> This is so because existing solidarity instruments are infused by a crisis mentality and largely seek to tackle emergencies. They are, therefore, incapable of eliminating inequalities in responsibility sharing in general. Although a level of financial assistance has been made available to the host states even in situations that do not amount to an emergency, these funding has been kept at purely symbolic levels, something that has not prevented from designing the said measures as purely temporary ones.<sup>51</sup> Similarly, the practical cooperation offered by the European Asylum Support Office, such as the training of judges and judiciary staff, is far from making any significant contribution.<sup>52</sup> No mechanism exists to render possible the relocation of asylum seekers or refugees in the absence of an emergency. This ignores the fact that inequality in responsibility sharing is not an issue that is reserved to emergency situations. The absence of a crisis does not mean that no great differences exist between the responsibilities undertaken by different states.<sup>53</sup>

Moreover, emergency mechanisms have proven rather ineffective. Emergency mechanisms mainly operate in an inter-governmental framework and an *ad hoc* mode. As a result, Member States have wide discretion in determining the level of their contribution, which results in no or very limited

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<sup>49</sup> *N.S. and M.E.*, above, n. 14, para 79; *Case C-394/12 Shamso Abdullahi v Bundesasylamt*, *EU:C:2013:813*, para 53.

<sup>50</sup> In the same vein, see R. Bieber and F. Maiani, 'Sans Solidarité Point d'Union Européenne' (2012) 2 *Revue trimestrielle de droit européen*, 295-327, 319.

<sup>51</sup> See, above, n. 12.

<sup>52</sup> Article 6 of the Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office, above, n. 11.

<sup>53</sup> By way of example, suppose that one of two states with similar absorptive capacities receives around 100 asylum applications each year, whereas the other receives 20. If the number of applications continues in a similar manner, the discrepancy will increase gradually, deepening the unfairness in responsibility sharing. If the situation turns into an emergency, there is a possibility that an *ad hoc* solution will be developed. However, it is also possible that a Member State continuously receives a high number of refugees, but the situation does not reach crisis proportions. There is no strong reason to equate manifest unfairness with inaction in emergencies.

assistance in case of need. I argue below (section III) that the conditions under which the relocation mechanism foreseen in the Temporary Protection Directive could be applied should be interpreted less narrowly. As a matter of actual constitutional practice, the conditions for the application of the Directive have never been regarded as met, not even in the last months, when the flow of refugees was perhaps not sudden, but massive.<sup>54</sup> Likewise, the recent temporary schemes, which were devised to relocate asylum seekers from Greece and Italy, have been adopted on an ad hoc basis, reflecting hard-ball bargaining rather than were inattentive to any consideration of constitutional principles (which has not prevented their ineffectiveness).<sup>55</sup> The Member States can decide on the level of their contribution, or simply deny undertaking any further responsibilities. Take the new mandatory relocation scheme as an example. On the one hand, the scheme provides for responsibility sharing according to a reference key. On the other hand, the reference key does not take the “absorptive capacity” of the beneficiary states into account. As a consequence, Greece and Italy still shoulder heavier responsibilities than many other Member States.<sup>56</sup> It is perhaps too early to reach any definitive conclusions about the extent to which the EU-Turkey agreement will contribute to diminishing the pressure on Greece. However, pinning any hopes on this agreement seems rather optimistic, considering especially that the system is based on a fragile deal that involves sensitive issues, such as visa liberalisation for Turkish citizens. In addition, even if the agreement diminishes illegal entries into Greece, it is likely to create new migration routes that will eventually pressure other border states, such as Bulgaria.<sup>57</sup> The increasing tendency towards strengthening border checks and sealing internal borders is clear evidence that a fair and effective responsibility-sharing instrument is still not in place.

As a response to the pressing need for a fairer solution, the Commission proposed an amendment to the Dublin III Regulation and suggested the introduction of a permanent crisis relocation mechanism in September 2015. Before the legislation process came to a conclusion, the Commission tabled

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<sup>54</sup> When activated, the mechanism facilitates the physical allocation of protection seekers (Article 25), as well as allowing for financial assistance (Articles 24 and 26). The people-sharing system that the Directive envisages allows Member States to claim reimbursement for each person they offer a place. The relocation of the beneficiaries under the Directive can only take place after a voluntary offer from the recipient state and the consent of the transferee (Articles 25 and 26).

<sup>55</sup> For the number of relocated asylum seekers by 11 April 2016, see Annex to the Report from the Commission to the European Parliament, the European Council and the Council - Second report on relocation and resettlement, COM(2016) 222 final, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2016%3A222%3AFIN>.

<sup>56</sup> 120,000 asylum seekers whose relocation is envisaged under the scheme correspond ‘to approximately 43 % of the total number of third-country nationals in clear need of international protection who have entered Italy and Greece irregularly in July and August 2015’. Reported in the preamble to the Decision establishing an emergency relocation scheme, above, n. 19, recital 26.

<sup>57</sup> For the possible implications of the agreement and its limitations in addressing irregular migration, see K. M. Greenhill, ‘Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis’ (2016) 22 *European Law Journal*, 317-332, 329 and ff.

another proposal in May 2016, this time suggesting a reform of the Dublin III Regulation.<sup>58</sup> The Dublin Reform Proposal retains the country of first entry rule among the list of criteria that identify the responsible state, but it also envisages a permanent emergency instrument. Yet, unlike the first proposal that required a Commission decision for the activation of the relocation mechanism, it involves an automatically activated crisis mechanism. The system will be triggered when a Member State exceeds 150% of its absorptive capacity, as defined under the Regulation. In light of the above discussion, it is questionable whether the proposed instruments can eliminate the constitutionality concerns that the country of first entry gives rise to. The proposals address the problem of not having a permanent emergency instrument and, therefore, represent an improvement on the current system.<sup>59</sup> However, both proposals continue to reflect a certain crisis mentality and fail to take into account that inequalities can arise in the absence of a crisis. Thus, even if a permanent emergency instrument was adopted, it is questionable whether the fairness demands of Article 80 TFEU would be met.<sup>60</sup>

It must be added that the constitutionality of the Dublin system can be challenged also on account of the infringement of the rights of asylum seekers. The focus of the Dublin III Regulation on increased effectiveness in the operation of the system runs counter to its objective of enhancing protection levels.<sup>61</sup> Mutual trust between Member States results in automatic returns, independently of whether or not the country of first entry is actually a safe state (despite the fact that, as we have seen, the very design of Dublin III creates the conditions under which countries of first entry may become unsafe countries due to the overloading of their administrative capacities and the overstretching of financial resources). However, the rulings of the ECtHR and the CJEU demonstrate that the Dublin system rests on the rather wishful presumption that Member States will fulfil their protection obligations. Nevertheless, in order to preserve the operability of the

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<sup>58</sup> Whether the Commission will pursue the first proposal depends on the outcome of the Dublin Reform Proposal, which constitutes a part of the major reform of the CEAS.

<sup>59</sup> In particular, the most recent proposal would overcome the arbitrariness of the existing ad hoc emergency instruments by introducing an automatic triggering mechanism.

<sup>60</sup> An interesting aspect from the point view of fairness is the way in which the proposals combine financial solidarity with a relocation scheme. Both proposals allow the Member States to withdraw from the relocation scheme for a period of twelve months. The critical issue is the possibility of repeated withdrawals, which may effectively turn the system to a market model. Unlike the former proposal, according to which the Member States are required to justify their withdrawal and the Commission needs to give a decision, under the Dublin Reform Proposal a Member State only needs to give a notification in order to become free of relocation responsibilities. The time limitation is of great importance, considering that it is difficult to address all aspects of refugee protection costs by means of financial assistance, and the concentration of refugees in one area might result in the erosion of protection standards. This may not be regarded as a great problem, considering that the Member States are required to pay 250,000 euro per applicant whose relocation they refuse. Yet, it will be surprising if the proposal is adopted under these conditions.

<sup>61</sup> For a critical analysis of the amendments, see S. Peers, 'The Dublin III Regulation: What Will Be Different?' (2014) 28 *Journal of Immigration, Asylum & Nationality Law*, 46-51, 47 (pointing out that the objectives of enhancing the efficiency of the system and improving the level of protection are, in fact, to a certain extent in contradiction with each other).

mutual trust principle, the CJEU is determined to exert self-restraint save if systematic flaws occur.<sup>62</sup> Yet, it is evident from the ECtHR's decisions that automatic returns result in fundamental rights violations even in the absence of systematic deficiencies.<sup>63</sup>

As far as fundamental rights are concerned, the Dublin Reform Proposal is, if anything, a step backwards. The Proposal seeks to introduce a number of amendments with a view to increase the effectiveness of the returns,<sup>64</sup> something which has the potential to increase the responsibility on the border states and lead to more fundamental rights violations. In addition, the new design of responsibility sharing under the proposal relies heavily on the plan to return asylum seekers to 'safe' third countries. The proposal imposes a new obligation on the Member States to check whether the application for international protection is 'inadmissible' before applying the criteria defining the responsible state.<sup>65</sup> An application is inadmissible if the applicant is coming from a non-EU first country of asylum or coming from a 'safe' third country. This raises serious concerns given the preparedness of the EU to dilute the meaning of the concepts of 'safe', something which can be seen at work in the EU-Turkey deal. Turkey retains a geographical limitation to the 1951 Geneva Convention Relating to the Status of Refugees, which means that it is not under a legal obligation to grant refugee status to non-European asylum seekers and accordingly is not bound by the non-refoulement principle (i.e. the principle of not returning asylum seekers to a country where they face persecution or danger), unless asylum seekers come from Europe.<sup>66</sup> Turkey has granted Syrian refugees a temporary protection status and allowed them access to basic rights.<sup>67</sup> However, it is questionable whether Turkey qualifies as a safe third country under EU law considering the protection conditions in practice, the fact that protection is only available to Syrian refugees, as well as the poor track-record of Turkey when it comes to the protection of fundamental rights, as evidenced in the case law of the ECtHR.<sup>68</sup> The fact that returns under the EU-Turkey agreement have

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<sup>62</sup> *Shamso Abdullahi v Bundesasylamt*, above, n. 49, para 60. It is possible to observe the Court's conviction of the significance of mutual trust in implementing the Dublin system in the Court's opinion on the accession of the EU to the ECHR, where the Court seems to be troubled by the idea that the ECtHR may disregard the threshold of systematic flaws and compromise the mutual trust principle. On the matter, see Opinion 2/13 of the Court concerning Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, delivered on 18 December 2014, EU:C:2014:2454, paras 191-194.

<sup>63</sup> *Tarakhel v Switzerland*, Application no. 29217/12 (ECtHR, 4 November 2014).

<sup>64</sup> For instance, Article 15 Dublin Reform Proposal abolishes the cessation of responsibility after 12 months from irregular entry.

<sup>65</sup> Article 3(3)(a) of the Dublin Reform Proposal.

<sup>66</sup> Reservations and Declarations on the 1967 Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, Vol. 606, at 267.

<sup>67</sup> Temporary Protection Regulation, No. 29153, Official Gazette 20.10.2014, available at [http://www.goc.gov.tr/files/\\_dokuman28.pdf](http://www.goc.gov.tr/files/_dokuman28.pdf).

<sup>68</sup> To name but a few cases where the Court condemned Turkey for infringing the human rights of asylum seekers and refugees, see *S.A. v. Turkey*, Application no. 74535/10 (ECtHR, 15 December 2015); *Ghorbanov and others v. Turkey*,

already taken place (and continue at the time of writing) constitutes clear evidence that Member States intend to consider Turkey as a third safe country and are prepared to risk undermining their fundamental rights protection commitments.

Last, but not least, neither the Dublin III Regulation nor the reform proposals take into account the preferences of the asylum seekers when it comes to the host state.<sup>69</sup> In particular, the envisaged emergency schemes do not allow asylum seekers to choose their host state, and thereby prioritise fairness among the Member States above fairness towards asylum seekers. A fair solution to responsibility sharing should also be informed by the interests of asylum seekers. In the absence of a sound reason, disregarding the preferences of the asylum seekers raises questions about the constitutionality of the system in the light of Articles 80 TFEU and Article 67 TFEU, which require the establishment of a common asylum policy based on solidarity between the Member States that is fair towards third country nationals.

It follows from the above analysis that the Dublin III Regulation does not only have practical, but also normative flaws. Article 80 TFEU and Article 4 of the Charter of Fundamental Rights constitute strong ground from which to challenge the constitutionality of the Dublin system. This conclusion runs counter to the idea that to address the current refugee crisis it would be enough to ensure that all Member States fulfil their obligations under the Dublin system. Even if the Dublin system would be sustainable in actual practice (which has proven not be), the system would remain deeply flawed as it multiplies instead of evening out inequalities in responsibility sharing.

#### **IV The principle of solidarity as an interpretation tool**

Principles are not only a standard of review under European constitutional law. Principles are also expected to be key parameters in the interpretation of secondary law. Thus, Article 80 TFEU should be relied on when interpreting both primary and secondary EU law governing policies on border checks, asylum, and immigration. When a provision concerning these areas can be interpreted in different ways, it should be constructed in the light of Article 80 TFEU, i.e. in a way that gives effect to the principle of solidarity and fair sharing of responsibility.<sup>70</sup>

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Application no. 28127/09 (ECtHR, 3 December 2013); *Abdolkhani and Karimnia v. Turkey*, Application no. 30471/08 (ECtHR, 22 September 2009).

<sup>69</sup> For the different positions on the matter, see the Explanatory Memorandum to the Dublin Reform Proposal, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0270:FIN>, at 3.4.

<sup>70</sup> Not only the Court of Justice is under an obligation to interpret EU law in the light of Article 80 when relevant, but also national courts. See High Court of Justice, Queen's Bench Division, *The Queen v The Secretary of State for Trade and Industry, ex parte Greenpeace Limited*, No. CO/1336/1999, where EU legislation was interpreted widely in light of

*A) Are European Courts prone to interpret EU asylum law in the light of what the principle of solidarity requires?*

In *Halaf*, the Court was asked to interpret the sovereignty clause, which was at the time laid down in Article 3(2) of the Dublin II Regulation, in light of Article 80 TFEU.<sup>71</sup> The case concerned the transfer of an applicant under the Dublin II Regulation. Having discovered that the applicant had entered the EU from Greece and had already applied there for asylum, the Bulgarian authorities decided to return him to Greece. The applicant appealed the decision, relying on, *inter alia*, the request of the United Nations High Commissioner for Refugees for the suspension of Dublin transfers by European governments to Greece. The national court posed a number of questions to the CJEU, including one on the possible use of Article 80 TFEU as an interpretative tool. In concrete, The Luxembourg judges were asked whether the sovereignty clause in Dublin II was to be interpreted in a way to allow a Member State to assume responsibility to process an application despite the fact that the Regulation did not contain any provisions concerning the application of Article 80 TFEU. The Court, making no mention of Article 80 TFEU, addressed the question by merely stating that the application of the clause was not subject to any particular condition. Relying on the preparatory documents of the Regulation, the Court suggested that the purpose of Article 3(2) was ‘to allow each Member State to decide sovereignly, for political, humanitarian, or practical considerations, to agree to examine an application for asylum even if it is not responsible under the criteria in the Regulation’.<sup>72</sup> The question, however, was not whether a member state *could* process an application under the sovereignty clause, but rather whether it *should* do so under certain conditions. The CJEU avoided deciding on whether the sovereignty clause should be read in conjunction with Article 80, thus imposing specific obligations.

*B) ... but should they?*

The limited use of Article 80 TFEU in the case law is not necessarily indicative of the (lack of) legal relevance of the principle. The Court’s reluctance to consider solidarity in its interpretation results to a certain extent from the contested character of the concept. Undoubtedly, a decision given on asylum solidarity will affect the whole system of responsibility sharing, which is a highly sensitive matter. Imposing solidarity duties through interpretation of EU legislation may once again expose the CJEU to the criticism of judicial activism. It is not difficult to see why the CJEU preferred to resolve the issue through conventional and less controversial routes, rather than by relying on

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environmental principles by an English court, which resulted in the recognition of a wider scope of application of the legislation.

<sup>71</sup> Case C-528/11 *Zuheyr Frayeh Halaf*, EU:C:2013:342.

<sup>72</sup> *Ibid*, paras 36-39.

solidarity where possible. However, it would be wrong to conclude that solidarity is not a legally binding principle but merely a non-compulsory source of policy inspiration. It is true that its enforceability is limited because of the generality of the obligations it imposes. Limited enforceability, on the other hand, does not entail that a norm is not legally binding, even less so that the norm does not have legal effects.<sup>73</sup> Despite its limitations, the principle of solidarity and fair sharing of responsibility can serve as a standard of review and as an interpretation tool. It should be added that the secondary legislation through which the principle is implemented has been rather fragmentary, and accordingly the situations where the principle could play a role have been limited. The principle of solidarity can become a more influential legal tool if future secondary legislation is adopted that facilitates the application of the principle, in particular in the cases where it can be employed to substantiate legislation that imposes solidarity duties.

### *C) The case for a different interpretation of the Temporary Protection Directive*

The solidarity principle can (and, I would argue, should) influence the interpretation of the Temporary Protection Directive. The Directive has never been activated, although it has been in force since 2001. The solidarity mechanism provided for under the Directive is reserved for large-scale refugee movements.<sup>74</sup> The Member States have not shown much enthusiasm for the system when it could have put into use.<sup>75</sup> Recently, Italy unsuccessfully sought to activate the Directive in response to the arrival of a high number of asylum seekers (part of the ongoing refugee crisis).<sup>76</sup> In rejecting Italy's call, the Council members argued that the situation in Italy did not amount to a mass influx situation, relying on a rather literal interpretation of Article 2(d) of the Directive. In the said article mass influx is defined as the 'arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme'.

But is a literal reading of Article 2(d) of the Temporary Protection Directive the best and most fitting way of construing it? If, alternatively, the provision is read in light of the requirement of solidarity

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<sup>73</sup> A. E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly*, 901-913, 907 (suggesting that the lack of a clear obligation does not necessarily show that the law is non-binding, but rather that it is softly enforced).

<sup>74</sup> The procedure to be followed under the Directive is somewhat cumbersome. The Council, acting on the basis of a proposal from the Commission and with qualified majority voting, is first required to determine the existence of a mass influx situation so that the temporary protection scheme can be activated. Temporary Protection Directive, Article 5.

<sup>75</sup> On that point, see E. Guild, 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures' (2004) 29 *European Law Review*, 198-218, 198.

<sup>76</sup> B. Nascimbene and A. Di Pascale, 'Arab Spring and the Extraordinary Influx of People Who Arrived in Italy from North Africa' (2011) 13 *European Journal of Migration and Law*, 341-360, 346-347 (describing Italy's unsuccessful attempts to activate the Directive during the Arab spring).

enshrined in Article 80 TFEU, it should be argued that a mass influx should comprise not only the arrival of a large number of displaced people *at once*, but the gradual arrival of displaced persons which results in overloading the capability of the asylum system of the host state to deal with the situation. The rationale of the emergency solution foreseen in the Temporary Protection Directive is indeed to ensure that Member States that are not able to meet the needs of the new arrivals are assisted by all other Member States. Whether the capacity of a Member State is overloaded by a sudden mass influx or by a continuous influx seems rather irrelevant once we construe the Directive in light of the dual obligation to act in solidarity and to ensure that the Union as a whole stands true to its commitment to protect refugees. The gradual increase in the number of asylum seekers can also jeopardise the effective functioning of the asylum system of a host country, as could be observed and was observed above, in the case of Greece. Furthermore, the mere reliance on the number of displaced persons would be misleading for the reason that the number of refugees is only one indicator of an emergency situation. In that regard, the capability of the asylum system is arguably a more accurate variable. On such a basis, the solidarity principle requires a reading of the expression ‘mass influx’ that is informed by the fact that the capacity of states in hosting refugees is in most cases more relevant than the number of the refugees.

*D) How the principle of solidarity could shape the coming case law of the CJEU*

Soon, the Court will issue a decision on an annulment case brought by Slovakia and Hungary to examine the validity of the Decision establishing the emergency relocation scheme for the relocation of 120.000 asylum seekers based on mandatory quotas.<sup>77</sup> One of the claims brought against the Decision concerns its legal basis, Article 78(3) TFEU, which allows the Council to adopt ‘provisional’ instruments to assist a Member State that is in an ‘emergency situation characterised by a sudden inflow of nationals of third countries’. It has been argued that the conditions for the applicability of Article 78(3) were not fulfilled, because the adopted measure was neither provisional, nor did the situation amount to an emergency triggered by a sudden inflow of migrants.<sup>78</sup> The applicants seemingly attach a narrow meaning to the provision. However, the principle of solidarity militates in favour of a more inclusive reading of the legal basis, which is not limited to extreme situations. First, it is not clear why the applicants do not consider a measure that is restricted in its temporal scope to two years as ‘provisional’ within the meaning of Article 78(3).<sup>79</sup> The predecessor of this provision, Article 64(2) TEC, allowed the Union to adopt measures not exceeding six months. This time

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<sup>77</sup> *Slovakia v Council*, above, n. 20, para 5; *Hungary v Council*, above n. 20.

<sup>78</sup> *Slovakia v Council*, above, n.20, para 5. Hungary raised only the claim that the measure adopted was not provisional. See *Hungary v Council*, above, n. 20.

<sup>79</sup> On the temporal scope, see Article 13 of the Decision establishing an emergency relocation scheme, above, n. 19.

limitation no longer exists. Its removal may be said to be indicative of the intention of treaty makers to allow for measures lasting longer than six months. Given that the challenged measure has been established for a limited period of time in order to tackle the current pressure on the beneficiaries, there is no reason to exclude it from the scope of Article 78(3). It is also not convincing to argue that the measure adopted does not concern an emergency situation characterised by a sudden inflow. The data provided in the preamble to the Decision demonstrates that there has been a rapid increase in both the number of applicants in beneficiary states and the pressure on host states.<sup>80</sup> It is not clear why this considerable increase, which has brought the asylum system of one state to the brink of collapse (Greece) and created severe strains for another (Italy), does not meet the threshold of emergency situation. It would be difficult to reconcile a narrow reading of the provision, establishing a high threshold for its use, as suggested by the applicants, with the principle of solidarity under Article 80 TFEU.

Also interesting for the purpose of this article is the claim made by Hungary that the Decision is disproportionate because it imposes obligatory quotas on all Member States, despite the fact that some (such as Hungary) have already received a high number of asylum applications.<sup>81</sup>

It is difficult to argue that the Decision fails the first prong of the proportionality test. i.e. the suitability. The declared aim of the Decision is to relieve the pressure created by the arrival of a high number of asylum seekers to Greece and Italy and thereby to give effect to the principle of solidarity and fair sharing of responsibility. The relocation of asylum seekers by means of mandatory quotas defined according to relative absorptive capacities of all Member States serves exactly this purpose. Likewise, the claim does not seem to have much of a chance of success at the second stage of the proportionality analysis (necessity). Although there are various ways to share responsibility, the relocation of asylum seekers is the most effective, especially when the concentration of asylum seekers incapacitates the asylum system of host states. It is hard to think of alternative means that would be equally effective while less abrasive of national autonomy. Financial assistance instruments are not adequate to enhance the reception capacity of a host state or address structural inadequacies in the short-term, especially when high numbers of applications are at issue. Similarly, the mandatory nature of the scheme can be justified on the ground that such character is a prerequisite of its efficiency. The EU Relocation Malta Project (EUREMA) perhaps best exemplifies

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<sup>80</sup> For the figures, see the preamble to the Decision establishing an emergency relocation scheme, above, n. 19, recitals 13-14.

<sup>81</sup> The Slovak Republic has also challenged the proportionality of the measure, but its legal representatives do not elaborate on how and why the Decision is in breach of proportionality.

the ineffectiveness of instruments based on voluntary participation.<sup>82</sup> The principle of solidarity does not only entail a degree of assistance, but a fair allocation of responsibilities, which seems difficult to sustain when the Member States have full discretion regarding the level of their contribution. Hungary's argument, on the other hand, seems to concern the last limb of the test, i.e. proportionality in a *narrow sense* (i.e. the actual balancing of the competing constitutional interest at stake). The question here is whether the Decision imposes disproportionate burdens on Hungary. The new scheme clearly requires Hungary and Slovakia to assume a larger share of the common protection duties than they have done so far. At this point, it is useful to remember that Hungary was considered one of the beneficiaries in the draft proposal of the Decision.<sup>83</sup> However, when Hungary withdrew, the Decision was adopted to benefit only Greece and Italy. What Hungary considers as manifestly disproportionate must accordingly be the additional responsibilities imposed by the relocation scheme (306 asylum seekers from Italy and 988 from Greece).<sup>84</sup> This argument remains rather weak, given that the quotas are defined by taking account of the relative absorptive capacities of the Member States. The existing asylum applications are taken into account in identifying the quotas, which is a requirement of fairness in responsibility sharing. The scheme, in fact, is in line with the principle that requires the fair allocation of responsibilities according to the Member States' relative absorptive capacities.

## Conclusion

This article has explored the legal relevance of Article 80 TFEU by examining the substantive content of the principle of solidarity and fair sharing of responsibility and the way in which it influences EU asylum law. I have particularly focused on the controversial Dublin system, which is the backbone of the EU's responsibility sharing system and at the same time the source of most if not all inequalities in responsibility sharing.

The recent refugee crisis has clearly shown that a borderless Europe cannot be sustained in the long run if the Member States act as they see fit. Each national decision affects the area of free

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<sup>82</sup> The project facilitated the relocation of a total of 227 beneficiaries of international protection from Malta to other Member States between 2009-2011. Only six Member States took part in the voluntary scheme. See European Commission, 'Communication on Enhanced Intra-EU Solidarity in the Field of Asylum. An EU Agenda for Better Responsibility-Sharing and More Mutual Trust' COM(2011) 835 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0835>, at 3.2. A second project, which was carried out from 2011 to 2013, also showed little success. Although 97 places were pledged, only 14 persons could be relocated. Reported in European Commission, 'Staff Working Document Accompanying the Document Communication from the Commission to the European Parliament and the Council, 5th Annual Report on Immigration and Asylum' COM(2014) 288 final, available at [http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/reports/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/reports/index_en.htm), at 2.4.1.

<sup>83</sup> See above, n. 40.

<sup>84</sup> See Annex I and II to the Decision establishing an emergency relocation scheme, above, n. 19.

movement as a whole. In order to preserve free movement rights, from which all Member States benefit in different ways, it is necessary for all to accept their fair share of responsibility in protecting refugees. This is not only a practical requirement, but also a constitutional obligation, enshrined in Article 80 TFEU. It should also be remembered that providing protection to refugees is a common concern of the Member States, which is stemming from their national constitutional traditions and international commitments (and obligations) and which is reflected in the Charter of Fundamental Rights. No matter how great the scale of the crisis is, the solutions cannot undermine the rights of asylum seekers as established in European constitutional law. Consequently, any decision on responsibility sharing should be informed by the principle of fair sharing of responsibility and by the protection of fundamental rights. Indeed, a combined reading of the Charter of Fundamental Rights and Article 80 TFEU requires an understanding of fairness in responsibility sharing that covers not only the relationship between the Member States, but also between Europeans and asylum seekers.

Being confronted with an unprecedented refugee crisis, the EU Member States are currently at a crossroads. They may decide to maintain the status quo in the form of Dublin III or seek to amend the system in light of the need to provide for a more equitable distribution of protection duties. Any decision regarding the future structure of the EU asylum system should be informed by the fact that a reform of the Dublin III Regulation is not only a practical matter, but also a constitutional and normative one. The present Dublin system of allocating responsibility falls short of what European constitutional law requires by manifestly infringing the principle of solidarity and fairness in responsibility sharing under Article 80 TFEU. Rather than using allocation criteria, which are obviously relevant to determine the capacity of Member States to host refugees, such as economic strength or population, the Dublin system makes of geographical location the key criterion to allocate responsibility. In the absence of an effective solidarity instrument capable of eliminating permanently the inequalities that the system creates, including in normal (non-emergency) situations, the Dublin III Regulation breaches the principle of solidarity. In addition, the current system overburdens some Member States and renders them incapable of protecting the fundamental rights of asylum seekers. Enforcing the Dublin system and improving its effectiveness can perhaps address some of the most practical concerns raised by the Decision, but not the normative issues concerning its constitutional legitimacy. Regrettably, the proposal to reform the Dublin III Regulation also falls short of complying with the fairness demands of Article 80. Although it introduces a permanent emergency scheme that will be activated automatically in case of an emergency, it does not take into account that great discrepancies in responsibility sharing that can emerge even in the absence of any crisis.

Finally, the principle of solidarity can also play an important role in the future development of an EU responsibility-sharing regime as an interpretation instrument. The potential of solidarity as a guide to legal construction was proven by reference to Temporary Protection Directive. So far, the Court has refrained from employing the principle in the interpretation of asylum legislation, possibly due to the highly sensitive nature of the matter. However, political sensitiveness does not impair that solidarity and fairness in responsibility sharing are constitutional principles, and as such have to be factored in the application and interpretation of EU asylum law.

The recognition of the unconstitutionality of the current Dublin system and the construction of a reformed EU asylum acquis under Article 80 TFEU may alter not only the balance of responsibility between the Member States, but also in the asylum system in general. This may create momentum in developing a common system of asylum based on the joint processing of applications within a centralised scheme rather than by individual Member States and responsibility sharing going beyond crisis management to sustain fairness both among the Member States and towards asylum seekers.