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Chapter 11

Solidarity as Normative Rationale for Differential Treatment: Common but Differentiated Responsibilities from International Environmental to EU Asylum Law?

Elizabeth Mavropoulou and Evangelia (Lilian) Tsourdi*

Abstract The principle of common but differentiated responsibilities (CBDR), though a product of the international environmental law of the 1990s, has crept into the language of most, if not all, areas of common concern at UN level. In this chapter, we trace the development and evolution of the principle of CBDR as an expression of fairness and solidarity in international law and focus on its application in international environmental law. We then further explore whether a logic of CBDR is now reflected in the recent global refugee policy instruments at UN level and whether traces of the principle can be found in EU asylum policy and the Common European Asylum System. We conclude that a logic of CBDR permeates recent asylum and refugee policy at UN and EU level, albeit manifested and operationalised in distinct ways. In the first instance at UN level, although a version of CBDR vaguely frames the non-binding responsibility sharing arrangements under the Global Compact on Refugees, it is not explicit or concrete to help us understand what a common responsibility to protect the refugees entails concretely and how such common responsibility ought to be equitably shared. Failing to explicitly debate and adopt the principle even in a soft law instrument, the Global Compact on Refugees missed the opportunity to collectivise the responsibility to protect refugees and meaningfully address the perennial gap of the Refugee Convention. In the second instance, at EU asylum policy level, the legislative developments do reflect a logic of differentiated contributions in what is conceived as a common responsibility. However,

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differentiation is not serving a conception of solidarity and fair sharing, but merely political expediency by endorsing certain states' reluctance to engage with refugee protection.

Keywords common but differentiated responsibilities • solidarity • environmental law • refugee law • responsibility sharing • EU asylum policy • common European asylum system

11.1 Introduction

International cooperation structurally permeates the UN edifice as means to solving international problems of an economic, social, cultural, or humanitarian character.[1] It goes hand in hand with the principle of solidarity, a guiding, and structural principle of modern international law that seeks to balance the substantive inequalities that arise from the strict and uniform application of the sovereign legal equality of states.[2] In the context of protecting and securing international or regional public goods, such as for example the protection of the environment from climate change, or the protection of the world's refugees through the institution of asylum, the principle of solidarity guides multilateral action and responsibility sharing. The principle of common but differentiated responsibilities (CBDR), an expression of solidarity in international law, though a product of the international environmental law of the 1990s, has gradually crept into the language of most, if not all, areas of common concern at UN level.

This chapter traces the development and evolution of the principle of CBDR before focusing on recent manifestations of the principle in international refugee and EU asylum law. Firstly, it traces the emergence of differential treatment as an expression of fairness and as an application of international solidarity within the broader international cooperation discourse and practice of the developed and developing states in the 1970s and 1990s. It then turns to international environmental law, where it discusses the principle in the context of the United Nations Framework Convention on Climate Change[3] (UNFCC), where it was explicitly articulated and crystallised as the guiding principle of the global responsibility sharing efforts against climate change.

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[1] *Charter of the United Nations* 24 October 1945, 1 UNTS XVI. Article 1(4). (UN Charter)

UN Charter, Article 1(3), 55.

[2] McDonald 1996, at 259. Cullet 1999, at 553.

[3] United Nations Framework Convention on Climate Change May 1992, UNTS 1771. (UNFCCC)

Having identified the principle's conceptual elements and application in the legal regime on climate change, the chapter next explores whether and to what extent a logic of CBDR is now reflected in the recent global refugee policy instruments at UN level. We argue that CBDR can be said to be an emerging concept in international refugee law and policy, as *prima facie* a conception of CBDR guides, albeit implicitly, the operationalisation of responsibility sharing under the Global Compact on Refugees. We submit that in the process of cross fertilisation with international environmental law instruments, refugee law policy makers and UNHCR missed an important opportunity to explicitly conceptualise and debate the principle of CBDR in refugee policy and, hence, the opportunity to flesh out what a *common* responsibility to protect the world's refugees entails in terms of concrete contributions and hence meaningfully address the perennial gap of the Refugee Convention.

In light of these findings, we then move to analyse the relevance of the CBDR principle in the EU's asylum policy and the Common European Asylum System. We argue that legislative developments at the EU level do reflect a logic of differentiated contributions in what is conceived as a common responsibility. However, we term the approach adopted concretely as 'differentiation gone wrong'. Rather than genuinely accommodating differentiated capacities and development levels, differentiation here is merely servicing political expediency by endorsing certain states' reluctance to engage with refugee protection. Such an approach, we argue, fails to structurally embed a fair sharing of responsibility, is unlikely to address the current redistributive *malaise* in asylum,[4] and ultimately has the potential to further undermine refugee protection in the EU.

11.2 Solidarity as the Normative Rationale for Differential Treatment in International Law

Differentiation between states either at the level of legal obligations or at the level of implementation has structurally permeated various legal regimes in international law from the protection of the environment, trade, the law of the sea, and human rights.[5] As Christopher Stone notes, the wider practice of differential treatment between states within legal regimes can be traced back to the Treaty of Versailles.[6] At the normative level, differentiation in law

[4] See also the analysis in Brouwer et al. 2021, at 153-158.

[5] For a comprehensive study, see Rajamani 2006.

[6] Stone 2004, at 276, 278.

stems from an idea of substantive equality between states. [7] This is in contrast to the legal equality of sovereign states that requires their strict and uniform legal treatment.[8] The underlying rationale for differentiation in international law making has been the acknowledgement of the vast differences in capacities and the pervasive inequalities between states in an effort to redress them 'in the service of some notion of fairness, however elemental'.[9] The role of differential treatment is generally understood as twofold; a distributive one insofar as states are not substantively equals, and a facilitating one insofar as it strengthens multilateralism and cooperative action.

Differential treatment emerged shortly after decolonisation as a way of balancing the substantive inequalities and competing interests among states - something that had been previously largely ignored in international law making-[10] in an effort to address common international challenges that would require international regulation and shared responsibilities. In this respect, differences in states' capacities and resources would also warrant differentiation in how states meet their legal obligations as an expression of solidarity in practice. [11]

The principle of solidarity was among the fundamental principles of the movement towards a New International Economic Order put forward before the UN General Assembly in the 1970s. The Declaration on the Establishment of a New International Economic Order was founded in respect for the principles of *inter alia*, 'the broadest co-operation of all the States members of the international community based on "equity" and preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible'.[12] All three New International Economic Order resolutions issued by the UNGA at the time repeatedly affirmed the importance of equity and solidarity, the latter understood as the need to cater for the individual characteristics of developing countries.[13] Shelton has supported that references to equity throughout the texts of the New International Economic Order instruments, such as 'equitable sharing, equitable prices and

[7] Cullet 1999, at 553.

[8] Shelton 2007, at 646.

[9] Rajamani 2006, at 47.

[10] Cassese 1986, at 351.

[11] McDonald 1981, at 281.

[12] UNGA Ad Hoc Committee of the Sixth Special Session Resolution adopted by the General Assembly Declaration on the Establishment of a New International Economic Order 3201 (S-VI), UNDOC A/RES/S-6/3201,1 May 1974. See paragraph 4 (b), (n).

[13] Magraw 1990, at 78.

equitable terms of trade' reflected a concerted effort by the developing countries 'to apply the principle of distributive justice to construct new legal and political arrangements to allow developing countries to overcome the inheritance of their colonial past'.[14]

Within international trade law in particular, the claim for solidarity was pursued by developing countries through an insistence on a notion of solidarity conceived as preferential treatment. Preferential treatment in trade agreements, namely granting special rights and privileges to developing countries only, was one of the earliest instances of differential treatment within international law.[15] During the life of the New International Economic Order movement, the General Agreement on Tariffs and Trade (GATT) tried to accommodate some of the demands of developing countries for non-reciprocity and preferential treatment. In 1964, the GATT was revised to include special provisions for developing countries.[16] In 1979, the GATT established a permanent legal basis for preferential treatment of developing countries, commonly known as the 'enabling clause'. This provided for derogation from 'the most favoured nation', namely the GATT's Article 1 non-discrimination provision in favour of the developing countries.[17] The contracting states adopted the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', which granted preferential tariffs to developing countries and allowed for differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.[18]

Notwithstanding the changes to the GATT framework, the economic and social discrepancies between the developed and developing countries were not reduced and the profits of the vast majority of developing countries were very limited.[19] The claim of developing countries on preferential treatment did not flourish because developed states were not prepared to commit to legally binding, non–reciprocal preferential standards, nor to any form of wealth redistribution.

[14] Shelton 2007, at 650.

[15] Verwey 1990, at 123.

[16] 1948 General Agreement on Tariffs and Trade Part IV Goods. (GATT). Article XXXVI (8) recognized for the first time the principle of non-reciprocity in tariff negotiations or renegotiations.

[17] GATT, Decision of 28 November 1979 (L/4903).

[18] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' 28 November 1979, GATT BISD 1980, 203-205.

[19] Verwey 1990, at 140.

The early 1990s witnessed the demise of the preferential treatment of developing countries in the global trade arena, especially since the establishment of the World Trade Organisation (WTO).[20] A new understanding of solidarity emerged that emphasized on 'mutuality'; '[m]utual responsibility of both developed and developing countries in relation to the various international issues requiring cooperation'.[21] Under this new conception of solidarity as mutual responsibility and partnership, states' diverse interests and realities were to be accommodated into context-specific legal regimes on responsibility sharing in the various areas of common concern.

11.3 Sectoral Manifestations of CBDR in International Law: From International Environmental to International Refugee Law

International environmental law is arguably the most progressive legal arena of crafting responsibility sharing regimes premised on solidarity expressed as common but differentiated responsibilities. This section analyses the principle of CBDR and the trajectory it took in international climate change law before turning to international refugee law.

11.3.1 CBDR in the International Legal Regime on Climate Change

The principle of CBDR captures the essence of differential treatment in international environmental law.[22] At the conceptual level, states have a *common* responsibility to protect the environment from degradation given that all states have contributed to the problem, but this common responsibility, ought to be somehow differentiated based on the extent of contributions to harm on one hand and their capacities to take action on the other. At the practical level, CBDR is a tool for structurally integrating considerations of solidarity either at the level of norms or at the level of implementation of norms. Early multilateral environmental

[20] GATT Multilateral Trade Negotiations (the Uruguay Round): Marrakesh Agreement Establishing the Multilateral Trade Organization (World Trade Organization), 15 December 1993.

[21] Cullet 1999, at 568.

[22] Cullet 1999, at 577.

agreements based on solidarity understood as differential treatment laid the foundations for the crystallisation of the principle of CBDR in international climate change law.[23]

11.3.1.1 CBDR in the United Nations Framework Convention on Climate Change

CBDR was firstly articulated during the United Nations Conference on Environment and Development, the 1992 Earth Summit, in Rio de Janeiro. The Rio Declaration,[24] the outcome of the Summit, incorporated international environmental law's key guiding principles: 'the polluter pays',[25] the 'precautionary principle',[26] and the principle of 'common but differentiated responsibilities'.[27] The Rio Declaration explicitly enunciated CBDR as the guiding principle for international cooperation and responsibility sharing for environmental protection.[28] The rationale of the principle is that all states have a common responsibility to protect the environment from degradation, but the subsequent responsibilities - understood as commitments to take positive action – ought to be further differentiated in accordance with states' different contributions to environmental degradation and their individually diverse capacities to take such action.

The principle of CBDR was codified for the first time in international environmental law when it was included in the United Nations Framework Convention on Climate Change (UNFCCC).[29] The Preamble to the Convention frames the problem of climate change as of common concern by acknowledging its global nature and 'calls for the wider possible cooperation by all countries… in accordance with their common but differentiated responsibilities and respective capabilities'. Article 4, UNFCCC posits that

[23] Examples of early environmental agreements premised on differential treatment are the legal regimes on the Ozone layer and the Biodiversity. See Rajamani 2012, at 605.

[24] Report of the United Nations Conference on the Environment and Development, Annex I Rio Declaration on Environment and Development, Rio Declaration on Environment and Development UNGA A/CONF.151/26 Vol. I August 1992. (Rio Declaration)

[25] Rio Declaration, Principle 16.

[26] Ibid., Principle 15.

[27] Ibid., Principle 7.

[28] Sands 2003, at 231.

[29] UNFCCC, Preamble and Article 3.

> [t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

The principle's original formulation in Rio is thus extended in the UNFCCC to additionally include states' capabilities to respond to climate change. Developed countries insisted that the developing countries were expected to show rapid economic development in the years to come and that such development in capacities ought to be reflected in their differentiated responsibilities to act.[30]

The principle of CBDR as enshrined in the Convention consists of two core conceptual elements. Firstly, it encapsulates the *common* responsibility of states to protect the earth's climate as part of the global commons from excessive warming. States acknowledge that the climate is an integral part of the global commons and their ecosystem and consequently its degradation is a 'common concern of humankind'.[31] Secondly, the common responsibility to protect the earth's climate ought to somehow be shared between states so as to reflect an elemental idea of fairness. Not all states can and should contribute equally to climate change action. They can however contribute e*quivalently*. At the normative level, CBDR reflects a conception of fairness as distributive justice, 'in that it seeks to fairly distribute the burden of addressing climate change with the goal of improving conditions for all humankind'.[32] To this end, CBDR assigns greater responsibility to those countries which have contributed more to the climate's degradation because of their emissions as well as to those countries that have more resources and capacities to take remedial measures without severely compromising their economic development.[33] It can therefore be argued that CBDR at the time of its crystallisation reflected a normative conception of fairness and solidarity towards the developing countries, that at the time, had contributed much less to the problem and had considerably limited resources to act towards rectifying it. Two of the most widely accepted principles of fairness

[30] Bodansky et al 2018, at 127.

[31] Birnie et al 2009, at 132.

[32] Carlane and Colavecchio 2019, at 117.

[33] Weisslitz 2002, at 476.

are obliquely embedded within the CBDR logic; the *contribution to the problem* principle and *the capacity or capability to respond* and take measures.[34]

CBDR was key to the subsequent development and operationalisation of responsibility sharing under the climate change legal regime. This was apparent, first, in the conclusion of the Kyoto Protocol,[35] - an ambitious instrument that supplemented the United Nations Convention on Climate Change and sought to operationalise CBDR through internationally negotiated, legally-binding quantitative emission targets only for the developed countries -, and most recently in the 2015 Paris Agreement on Climate Change. In the years between the Kyoto Protocol and the Paris Agreement, CBDR was continuously the subject of contentious debates between states in terms of its components, legal nature and relevance to the climate change mitigation efforts,[36] which eventually stood the test of time as a dynamically adaptable tool to the ever-changing social and economic realities of states.

11.3.1.2. CBDR in the 2015 Paris Agreement on Climate Change

The Paris Agreement[37] re-introduced CBDR in the context of a multilateral treaty of universal obligations and re-established the principle as the guiding framework underpinning the global responsibility sharing arrangement on climate change. The Paris Agreement however contains a distinct version of CBDR that discards responsibility based on past and present contributions to environmental harm.[38] The common responsibility of states to combat climate change is universal and needs to be shared on the basis of the respective capabilities and the national circumstances of each state-party to the treaty.[39]

Under this Paris version of CBDR, developed countries are still normatively expected to continue to take the lead in climate action because of their greater capacities. The developing countries have always sought to secure the necessary in law the financial, technology and capacity building resources that would help them meet their mitigation and adaptation

[34] Soltau 2009, at 133.

[35] Kyoto Protocol to the United Nations Framework Convention on Climate Change UNTS 2303,162. (Kyoto Protocol)

[36] See Joyner et al 2002, at 358 and Rajamani 2012, at 605.

[37] UNFCCC, Decision 1/CP/.21 'Adoption of the Paris Agreement', entered into force 29 January 2016, FCCC/CP/2015/10/Add.1, Annex. (Paris Agreement).

[38] Rajamani 2016, at 511.

[39] Ibid. Paris Agreement, Article 2 (2).

commitments under the climate change legal regime. Indeed, financial commitments on the part of the developed states have been the *quid pro quo* for the developing countries' cooperation and participation to the development of the climate change legal regime.[40] All climate change law instruments, including the Paris Agreement, provide for developed states' financial commitments to the developing countries.[41] The UNFCCC, for example, notes that the effective implementation of the developing countries' commitments:

> will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties. [42]

Article 9 (1) of the Paris Agreement also provides that developed countries *shall* provide financial resources to assist developing countries with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.[43] This provision establishes *a collective* legal obligation on the part of the developed parties *as a whole* to provide assistance to developing countries. The individual obligations of the developing countries under the Paris Agreement are not however legally contingent on receipt of support.[44] Having said this, the provision reflects the very principle of CBDR, acknowledging the need for resource transfer offering context for the effective implementation of the Agreement. CBDR *qua* principle does not dictate quantifiable shares of the global mitigation action needed.[45] The UNFCCC never formally adopted criteria or distribution keys to measure states' commitments against a fair share because there could be no such agreement on a single indicator that can reflect a globally equitable distribution of efforts.[46] This is why the Paris Agreement sought to overcome this

[40] Bodansky et al 2018, at 138.

[41] UNFCCC, Article 4 (3) 4 (4) 11. Kyoto Protocol, Article 11. Paris Agreement, Article 9, 10, 11.

[42] UNFCCC, Article 4 (7).

[43] Paris Agreement, Article 9 (1), emphasis added.

[44] Bodansky et al 2018, at 131.

[45] Scholtz 2009, at 167.

[46] Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions of the Parties. FCCC/CP/2016/, 2 May 2016, para 25.

challenge by opting for a *sur-mesure* differentiation allowing states to determine their own, self-perceived, 'fair share'.

To conclude, the principle of CBDR structurally permeates international environmental law. In international climate change law, the principle had its own trajectory, partly because of the uniqueness and complexity of the climate change phenomenon. The principle dynamically evolved over the years following scientific advancements, adapting to the social and economic realities of the state - parties to the regime. At times and particularly in the early years of the regime, the principle was the subject of intense controversy between states given that the developing countries attributed the earth's rising temperature solely to the developed countries' past emissions. In some ways, a certain controversy regarding its implementation still exists today.[47] Yet, it remains the chosen normative framework, the bedrock for the global responsibility sharing arrangement on climate change whereby states have a truly common responsibility to take action.

11.3.2 CBDR Elements in International Refugee Law and Policy

11.3.2.1 The Responsibility Sharing Gap of the Refugee Convention

The international legal regime on refugee protection consists of two main legal instruments; the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees (together the Refugee Convention), which removed the geographical and temporal limitations of the Convention.[48] These two are further supplemented by regional refugee and human rights instruments[49] and together with the Office of the UN High Commissioner for Refugees (UNHCR), complete the architecture of the so-called international refugee law regime.

[47] Pauw et al 2020, at 468.

[48] 1951 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. (Refugee Convention). Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

[49] Supranational refugee instruments include the Organisation of African Unity Convention Regulating the Specific Aspects of Refugee Problems in Africa, adopted 14 September 1969, entered into force 20 June 1974 UNTS 14691 (OAU Convention). The 1984 Declaration Cartagena Declaration on Refugees adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama held at Cartagena, Colombia from 19-22 November 1984 (Cartagena Declaration)

On one hand, the international refugee law regime has been praised for its enduring relevance and resilience throughout the years.[50] It is a unique human rights protection framework for individuals around the world fleeing persecution and has managed to stay relevant today where new causes of persecution have been added to the complex nature of forced displacement. On the other hand, it has also been heavily criticised for its responsibility sharing gap. [51] The common and collective responsibility to protect refugees that the very regime is conceptually predicated upon, is not met with either a concomitant legal obligation nor with a formal structure that ensures that protection responsibilities are fairly shared among states.[52] The responsibility under the current protection system is rather 'individuated' as Hathaway aptly puts it,[53] and the asylum state is in practice solely responsible for providing the protection to all refugees who come under its jurisdiction and territory. In the absence of a codified obligation of responsibility sharing, the distribution of a vaguely acknowledged common responsibility to protect refugees between states is determined by 'accidents of geography'[54] and proximity.[55] Although statistics do not always reflect the qualitative differences between refugee situations - and can occasionally cause 'statistics fatigue'- the fact that 86% of the world's refugees is hosted in developing countries, of which 27% is hosted by the Least Developed Countries demonstrates this uneven distribution of responsibility as a result of the absence of a codified obligation of responsibility sharing. [56]

The need to establish a principled framework that would fill in the gap of responsibility sharing had ebbed and flowed every time a mass exodus of refugees occurs in the world putting

[50] McAdam 2017, at 1. Türk and Garlick 2016, at 47.

[51] Indicatively only Einarsen and Engedahl 2016, at 16 – 22. Inder 2018, at 523-554. McAdam 2017, at 1. V Türk, 66th Meeting of the Standing Committee of the Executive Committee of the High Commissioner's Programme, Geneva, 21-24 June 2016. Agenda item 2: International Protection. Statement by Volker Türk, Assistant High Commissioner (Protection) available at http://www.unhcr.org/uk/admin/dipstatements/576d41877/66th-meeting-standing-committee-executive-committee-high-commissioners.html. Assessed 22 September 2021.

[52] Hathaway 2018, at 591.

[53] Hathaway and Neve 1997, at 141.

[54] Ibid., at 596.

[55] Gibney 2004, at 240. Betts 2009, at 34.

[56] UNHCR Global Trends in Forced Displacement in 2020, June 2021. https://www.unhcr.org/flagship-reports/globaltrends/. Assessed 22 September 2021.

pressure on host states.[57] Between 2002 and 2005, the Convention Plus Initiative a three year, UNHCR-led project, brought states together to negotiate a normative framework on international responsibility sharing for refugees seeking to address the responsibility sharing challenge. The "Plus" intended to be a number of generic and special 'soft law' agreements based on three priority strands: the strategic use of resettlement; more effective targeting of development assistance to support durable solutions for refugees; and clarification of the responsibilities of states in the event of irregular secondary movements.[58] These generic agreements would then be applied to specific protracted refugee situations.

The Convention Plus never saw the light of day. The shortcomings of the Convention Plus have been highlighted in literature at great length.[59] The lack of transparency in negotiations between donor and host states and the conditionality of the targeted development assistance to host states were the primary cause of failure. Firstly, the negotiations on targeted development assistance by the Northern donor countries were conducted behind closed doors. Essentially, the Southern refugee hosting states, the would-be recipients of the development assistance, felt and, indeed were excluded, from the negotiations.[60] Secondly, and again related to development assistance, Southern host states requested that any targeted assistance for refugee protection be *additional* to that of poverty eradication and other needs, so that aid does not become conditioned, or as South Africa put it in a meeting during the Convention Plus, 'linked to readmission agreements'.[61] The request was not met by donor states. They made clear that no additional funding for refugee self-reliance would be allocated and any targeted development assistance would come from already allocated and earmarked budgets.[62] In the years that followed the Convention Plus Initiative, the issue of refugee responsibility sharing remained a challenge that reached its peak after the Syrian refugee exodus into Europe in 2016.

[57] Academics have also put forward proposals for filling in the responsibility sharing gap of the Refugee Convention. See indicatively only, Grahl-Madsen1965, at 165; Hathaway and Neve 1997, at 141; Goodwin-Gill 2016, at 688; Schuck 1998, at 276; Wall 2017, at 201.

[58] Ibid.

[59] Zieck 2009, at 394.

[60] Betts 2009, at, 153.

[61] 'UNHCR Summary of Second Forum Meeting' (2004), Statement of South Africa quoted and cited in Betts, 2009, at 170.

[62] Betts 2009, at 171.

11.3.2.2. CBDR an Emerging Concept in International Refugee Policy

The Syrian refugee 'crisis' brought the responsibility sharing gap back to the forefront of refugee policy agendas at UN level. In 2016 and in the aftermath of large-scale refugee arrivals in Europe, the United Nations General Assembly adopted the New York Declaration for Refugees and Migrants which sought *inter alia* to identify ways to balance inequities in the way refugee protection responsibilities are shared and to meet the increasing assistance needs of Southern host states.[63]

The New York Declaration introduced an idea of CBDR to the global refugee *policy* debates at UN level for the first time.[64] Although the Declaration does not explicitly refer to the principle of common but differentiated responsibilities, the language of paragraph 68 contains a conception of CBDR from international environmental law:

> [w]e underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of refugees place on national resources, especially in the case of developing countries. To address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States.[65]

A CBDR logic made it also into the Global Compact on Refugees. The Global Compact on Refugees was adopted on 17 December 2018, by a large majority of 181 votes before the United Nations General Assembly, with the US and Hungary opposing and with Dominican Republic, Eritrea, and Libya absenting.[66] Despite being non-binding, the Compact is rooted in international refugee law and policy,[67] situated within and under the Refugee Convention and

[63] UNGA New York Declaration for Refugees and Migrants A/RES/71/1, October 2016 (New York Declaration).

[64] The link to the principle of CBDR in the language of New York Declaration and the Global Compact on Refugees has also been noted by Rebecca Dowd and Jane McAdam in Dowd and McAdam 2017.

[65] New York Declaration, para 68. Emphasis added.

[66] UN News, 'UN affirms 'historic' global compact to support world's refugees' (18 December 2018) https://news.un.org/en/story/2018/12/1028791.

[67] UNGA Report of the United Nations High Commissioner on Refugees, Part II Global Compact on Refugees 2 August 2018 RES A/73/12 (Global Compact on Refugees).

builds on 'operational practice developed since the earliest days of the UN'.[68] Its primary purpose as stated in the document is to provide a basis for 'predictable and equitable burden and responsibility sharing among all United Nations Member States, together with relevant stakeholders, as appropriate'.[69] The Compact frames the contemporary refugee challenge as the 'common concern of humankind', stressing thus the *common* responsibility of the international community, whilst emphasizing that refugee protection runs parallel with and depends on fair responsibility-sharing.[70] This is the furthest the Compact goes in rooting refugee protection as a common responsibility.

In its opening statement the Compact reads:

> [t]here is an urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States. Refugees and host communities should not be left behind.[71]

One observes how the language of international environmental law, most notably the phraseology of 'common concern' and the Paris version of the CBDR principle have been an evident source of inspiration and cross-fertilisation for refugee policy makers and UNHCR who led the Compact's drafting. The Refugee Compact is operationalised by voluntary contributions to protection and solutions that are further individually determined 'by each State and relevant stakeholder, taking into account their national realities, capacities and levels of development, and respecting national policies and priorities'.[72]

One of the objectives of the Global Compact on Refugees is to support the refugee hosting states by easing pressure to the latter, for they provide a global public good on behalf of the international community.[73] Responsibility sharing for refugees is therefore envisaged as a partnership of states of origin, asylum, transit and destination against a framework of a

Global Compact on Refugees, para 5.

[68] Turk 2019, at 575.

[69] Global Compact on Refugees, para 3.

[70] Gilbert 2019, at 28.

[71] Global Compact on Refugees, para 1.

[72] Ibid., para 1 and 4.

[73] Turk 2018, at 575.

common responsibility, vaguely differentiated on the basis of each state's capacities and resources.[74]

The Compact puts in place a series of voluntary participatory pledging conferences. A periodic Global Refugee Forum is established at a ministerial level, to be convened every four years during which states, and other relevant stakeholders, announce their pledges and contributions to the objectives of Compact.[75] Pledges are then recorded and tracked in a public registry operated by UNHCR. The Compact provides for follow-up and review processes such as a stocktaking of progress and a mechanism that tracks and reviews the implementation of the contributions.[76] At the time of writing, UNHCR has not yet published its three-year progress report on the implementation of the Compact but a recently published report on the Compact's implementation found that there is need 'concerted effort of host countries, donors, and many states who are currently not contributing their fair share, both in terms of financing and resettlement'.[77]

When it comes to what responsibility sharing entails under the Global Compact on Refugees, there is a non-exhaustive list of modalities, 'areas for support' that states can choose to pledge for in line with their capacities.[78] In this sense, the scope of responsibility sharing under the Global Compact on Refugees is considerably broader than what has traditionally been understood to mean financial and physical sharing. It extends from supporting host countries and communities with infrastructure, expertise, and resources, to all identified areas of support, including political support to countries origin.[79] The Compact broadens the scope of responsibility sharing to also include root causes or post conflict prevention. Addressing the root causes of forced displacement, namely preventing refugee flows has been traditionally facilitated through the provision of aid, peace talks, and peacekeeping missions, as well as post-conflict reconstruction and diplomacy.[80] In a seminal article on the geopolitics of refugee studies, Chimni criticised the insistence on the root causes strategy for being responsible for

[74] Global Compact, para 1 and 4.

[75] Ibid., para 17.

[76] Ibid., 101-105.

[77] 'The Global Compact on Refugees Three Years On: Navigating barriers and maximising incentives in support of refugees and host countries' Danish Refugee Council, Norwegian Refugee Council, International Rescue Committee Report (November 2021), at 26.

[78] Ibid., Part II.B serves as such a non-exhaustive list.

[79] Ibid., para 50.

[80] Hurwitz 2009, at 153.

the turn to protection in the region, through humanitarian and development assistance.[81] Taking this criticism on board, the pledges made by states to address root causes and capacity building in countries of origin can be used as tokens of their commitments to refugee protection.[82] The whole edifice of the Compact rests in the good will of states that choose to participate in the Forums every four years.

11.3.2.3. A Missed Opportunity to Collectivise the Responsibility to Protect Refugees

In the process of cross fertilisation with international environmental law instruments, refugee law policy makers and UNHCR missed an important opportunity to collectivise the responsibility to protect refugees. Although the Global Compact endorses *prima facie* a conception of CBDR by promoting in a very abstract and vague way, a notion of responsibility by capacity,[83] it does not explicitly appropriate the principle of CBDR. States and UNHCR missed the opportunity to explicitly conceptualise and concretise the principle of CBDR for refugee protection. Debating the contours of the principle would essentially entail agreeing on a conception of fairness for international refugee law. It would entail an explicit acknowledgment of the common responsibility of states to protect the refugees and provide solutions, including demonstrating solidarity through assisting refugee host states. Unlike international environmental law, where all states have, to different degrees at various times, contributed to environmental harm, not every single state has produced or contributed directly or indirectly, through foreign policy, to refugee flows.[84]

The Refugee Convention neither deals with attribution of blame nor provides for prevention, essentially delimiting the scope of international refugee law to palliative protection. From this perspective, arguments in favour of discarding with the contribution to the problem basis when adapting CBDR for international refugee law and focusing only on capacities are more in line with the object, purpose and spirit of the Refugee Convention. [85]

[81] Chimni 1998, at 351-352.

[82] The risks of considerably broadening the scope of responsibility sharing are also stressed by Hurwitz. Hurwitz 2009, at 154.

[83] Global Compact, para 5.

[84] For an extensive analysis on the various legal, political and ethical arguments surrounding the adaptation of CBDR and the basis for differentiation in international refugee law, see Mavropoulou 2021, at 235-245.

[85] Wall 2017, at 226, footnoted omitted. Dowd and McAdam 2017, at 182.

Today, as the Global Compact on Refugees acknowledges in its opening statement, there is stronger consensus among states that the refugee challenge is the common concern of humankind of which the principle of responsibility sharing is the expression.[86] Explicitly translating this common concern into *a common responsibility* through the explicit adoption of the CBDR would have strengthened the consensus even at UN policy level that refugee protection is a common responsibility of all states and not only of the refugee hosting countries, that needs to be differentiated on the basis of capacities and resources as a normative requirement of solidarity. In failing to do so, we argue, that the Global Compact on Refugees missed the potential of CBDR to address the perennial gap of the Refugee Convention.

11.3.3 CBDR's Migration to Refugee Law and Policy – A Long Road Ahead

The principle of CBDR seeks to operationalise the notions of fairness and responsibility sharing that are integral to areas where international cooperation is a *sine qua non* in order to effectively protect common interests. In the early years of CBDR development in international climate change law, the principle was interpreted as allocating responsibilities for climate change mitigation on the basis of contribution to harm, including past emissions. This interpretation was in line with environmental law's cornerstone principle of the 'polluter pays'.[87] In the years of the principle's fermentation, CBDR dynamically evolved by moving away from the 'contribution to the problem' basis for differentiation towards 'capacity and capability to respond'.

In the refugee protection context, the recent manifestation of the principle within the confines of UN soft law instruments reflects a conception of responsibility towards refugees and refugee host states as one of relative capacity and resources. Although arguments have been put forward on the causal responsibility for refugee flows, direct and through foreign policy by critical international law and postcolonial scholars,[88] states parties to the international refugee law regime have not accepted any causal responsibility for refugee flows or any ensuing responsibility to provide for asylum. For the time being, the principle of CBDR has not yet entered the political challenges and ethical dilemmas that lie at the heart of refugee responsibility sharing.

[86] Ibid., para 1. Hurwitz 2009, at 285.

[87] Rio Declaration, Principle 16.

[88] Chimni 1989; Achiume 2015.

In the next and final section, we will explore in depth firstly whether a logic of CBDR can be found in the design and implementation of one of the most advanced regional frameworks on solidarity and responsibility sharing for refugee protection, namely the EU's Common European Asylum System, and secondly what is the added value CBDR may have in operationalising solidarity and fair-sharing in the EU asylum field.

11.4 In Search of Fair-sharing in EU Asylum Policy: Common but Differentiated Responsibilities Ascendant?

An important conceptual starting point is that the principle of common but differentiated responsibilities does not exist as such in EU law. EU law recognises differentiation in different manners. First, non-Member States selectively adopt EU rules and partake in the policies normally reserved for Member States; this is understood as external differentiation.[89] In addition, the legally valid rules of the EU, codified in European treaties and EU legislation, exempt or exclude individual Member States explicitly from specific rights or obligations of membership in the EU; this is understood as internal differentiation.[90] Internal differentiation in turn, consists of two types of differentiation mechanisms. There are mechanisms which are laid down in the Treaty text, and which therefore have a formal constitutional status, such as opt outs (country-specific derogations) and enhanced co-operation (groups of countries are allowed to co-operate in specific fields of common interest within the main EU institutional framework).[91] In addition, there are forms of differentiation that were developed beyond the treaty text, through the practice of EU institutions and the Member States,[92] such as *inter se* agreements which are agreements of international law among Member States, that are formally situated outside the EU legal order, but very much connected to the European Union in substantial terms.[93]

EU asylum law knows both forms of external differentiation (e.g. the participation of associated States in its responsibility allocation system),[94] and internal differentiation (e.g. opt

[89] Schimmelfennig and Winzen 2020, at 3.

[90] Ibid, 2.

[91] De Witte 2017, at 11-18.

[92] Ibid., 19-23.

[93] De Witte and Martinelli 2018, at 157.

[94] See, e.g., Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the

out of Ireland).[95] These forms of differentiation, while providing flexibility, are unrelated to the philosophy and aims of the principle of common but differentiated responsibilities as understood in public international law and therefore we will not scrutinize them in this chapter. Instead, we analyse a different matter: the extent to which *traces* of the principle of common but differentiated responsibilities can be ascertained in the operationalisation of the legally binding principle of solidarity in EU asylum law (Sects. 11.4.2 and 11.4.3).[96] This enquiry will be preceded by a critical overview of the modes of functioning of EU's asylum policy, and an analysis of the solidarity obligations it incorporates (Sect. 11.4.1).

11.4.1 EU's Asylum Policy: Normative Visions of Fair-sharing and Legislative and Operational Solidarity Deficits by Design

The EU and its Member States have developed a sophisticated regional asylum framework, the Common European Asylum System (CEAS).[97] It encompasses legislative, responsibility allocation, and practical cooperation components. Lack of fair responsibility sharing, an implementation gap, and an externalization impetus riddle the EU's asylum policy. The Union is constantly torn between the opposing imperatives of refugee protection and deflecting protection responsibilities to non-EU countries.[98]

The EU's Common European Asylum System (CEAS) as set down in the Lisbon Treaty was conceptualised as a 'common system of national variants'. What is common is the set of legal rules Member States are called on to implement rather than the implementation stage itself. Neither the Treaties nor secondary legislation initially foresaw intense administrative interaction at the implementation stage. Nonetheless, the development of practical cooperation initiatives and the workings of EU agencies, and most notably of the European Asylum Support

criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 161/8, in force since 1 December 2008.

[95] See, e.g. Protocol No 21 on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

[96] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1. TFEU, Article 80.

[97] TFEU, Art. 78(1)-(2).

[98] See Tsourdi 2021a, at 352-69. On how the EU deflects asylum responsibilities, see Den Heijer 2012 and Moreno-Lax 2017.

Office (EASO), have led to the emergence of an incipient integrated administration.[99] Despite these operational and legislative developments, the EU's asylum system suffers from a fair-sharing deficit by design which is linked with its responsibility allocation system underpinned by the so-called Dublin III Regulation.[100] This Regulation provides a hierarchy of criteria for identifying the State responsible for processing asylum claims within the CEAS.[101] Except for cases involving unaccompanied minors or threats to family unity, the state primarily responsible for the person's presence in the EU will be the one responsible for the asylum claim.[102] In practice, it will usually be the state of first irregular entry to EU territory. Where asylum seekers are not present in the territory of the 'responsible' Member State, they are to be transferred there. However, as a matter of EU law, Member States must abstain from such a transfer when there is a real risk of inhuman or degrading treatment.[103] They may also abstain from a transfer for certain other reasons, including on humanitarian or compassionate grounds.[104] Finally, they retain the right to return the applicant to a safe third country outside EU territory, provided the rules and safeguards contained in the Asylum Procedures Directive are observed.[105]

This system does not lead to the fair-sharing of responsibility between the Member States. On a deeper level, it fails to reflect asylum provision as a regional public good. Instead, once responsibility is assigned, it is for that Member State alone to provide for the person. EU support measures, such as funding, are limited. The CEAS does not generally incorporate people-sharing measures, such as further redistribution of asylum seekers or recognized beneficiaries of international protection.[106] Even once recognized, refugees and subsidiary

[99] See analysis in Tsourdi 2020a, at 212-217 and Tsourdi 2020b, at 506.

[100] 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 L 180/31 of 29 June 2013 (Dublin III Regulation).

[101] Dublin III Regulation, ch. III.

[102] E.g. the Member State that issued a residence document or a visa. See Dublin III Regulation, Art. 12.

[103] See ibid. Art. 3(2); *Joined Cases C-411/10 & 493/10, N.S. and M.E.*, EU:C:2011:865; Case C-578/16 PPU, *CK* v. *Republika Slovenija*, ECLI:EU:C:2017:127.

[104] See Dublin III Regulation, ch. IV.

[105] See ibid. Art. 3(3); Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection [2013] OJ L 180/60 (2013 Asylum Procedures Directive).

[106] People-sharing measures have only been adopted as exceptions, in the form of *ad hoc*, time-limited emergency relocation schemes such as those analysed in the subsection below.

protection beneficiaries do not enjoy free movement across the EU, unless they fulfil the conditions of the Long-Term Residents Directive, which include five years' residence and a stable supply of resources.[107] The problems created by the application of the Dublin system long predated the surge of arrivals in 2015-16. They have been critically assessed by many academic commentators,[108] and have formed the basis of rich 'pre-crisis' litigation before the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).[109]

These legal and operational realities contradict normative visions of solidarity and fair-sharing incorporated in primary EU law. Article 80 TFEU contains a legally binding principle of solidarity and fair-sharing of responsibility.[110] This principle profoundly impacts the goal of EU asylum policy: it dictates a certain 'quality' in the cooperation between the various actors, and arguably unsettles the policy's implementation modes, for example the method of allocating responsibility.[111] Nevertheless, EU asylum policy lacks a system for allocating responsibility among the Member States based on objective indicators.[112] Given an objective assessment of the protection capacity of each Member State, the 'inability to comply' with a state's obligations could be clearly distinguished from an 'unwillingness to comply', reducing tensions between Member States. Instead, the current system pits Member States against one other and creates disincentives for compliance. Despite the arguably structural character of the principle of solidarity and fair-sharing of responsibility established under Article 80 TFEU, solidarity measures in practice are largely emergency driven.[113] They mainly consist of exceptional responses (e.g. emergency funding) rather than permeating the design of asylum policy.

[107] See Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents [2003] OJ L 16/44, as extended in 2011.

[108] McDonough and Tsourdi 2012, at 67-100. Maiani 2016, at 104-14.

[109] See in particular *MSS* v. *Belgium and Greece*, European Court of Human Rights, Appl. No. 30696, Judgment of 21 January 2011; Joined Cases C-411/10 & 493/10, *N.S. and M.E.*, EU:C:2011:865; and commentary in M. Den Heijer 2012, at 1735.

[110] See Case C-848/19 P, *Federal Republic of Germany v. European Commission (Energy Solidarity)*, ECLI:EU:C:2021:598, para. 42.

[111] Tsourdi 2017, at 675. See also analysis in Küçük 2016, at 448; Karageorgiou 2016, at 196.

[112] Bruycker and Tsourdi 2016, at 65. See also Guild et al 2017, at 68-70.

[113] Tsourdi 2017, 675-85.

Despite the glaring fair-sharing and related implementation gaps it generates and its incompatibility with the principle of solidarity and fair-sharing of responsibility, the EU's responsibility allocation system has exhibited a puzzling longevity.[114] At the time of writing, i.e. in 2021, no lasting change had been made to the EU's responsibility allocation system. Nonetheless, several legislative and policy initiatives aim(ed) at a different approach, embedded the logic of differentiated responsibilities to operationalise solidarity and achieve fair-sharing of responsibility. These initiatives can be distinguished in two categories. The first category is underpinned by a 'mandatory' conception of solidarity, where differentiated obligations are due to Member States' different/differing capacities evaluated through a set of objective indicators (Sect. 11.4.2). The second category is underpinned by a 'flexible' conception of solidarity, where differentiated obligations are due to Member States' volition (Sect. 11.4.3). This second strand includes measures that are under negotiation at the time of writing.

11.4.2. 'Mandatory' Solidarity: Meaningful Differentiation but Inadequate Design

Two legislative measures exemplify the conception of 'mandatory' solidarity. Emergency relocation schemes that were operational in the period 2015-2017,[115] and the so-called Dublin IV proposal,[116] presented by the Commission in 2016 and abandoned in 2020 when it was replaced by the legislative instruments forming part of the New Pact on Migration and Asylum.[117] We analyse these two measures in turn.

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[114] See analysis in Tsourdi and Costello 2021, at 807-809.

[115] 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 September 2015 (1st Emergency Relocation Decision); 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 September 2015 (2nd Emergency Relocation Decision).

[116] See European Commission, 'Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)', COM (2016) 270 final (Dublin IV proposal).

[117] European Commission COM (2020)609 "Communication on a New Pact on Migration and Asylum", and relevant legislative proposals. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN).

11.4.2.1 Emergency Relocation Schemes

The emergency relocation schemes that were operational in 2015–2017 constituted a temporary shift to the responsibility allocation regime under the Dublin III Regulation. They were established through the two Council decisions mentioned above to benefit Italy and Greece, which would otherwise have been responsible for the new asylum seekers.[118] Relocation therefore consisted of the organised intra-EU transfer of asylum seekers from Greece and Italy to other Member States. The relocation decisions were adopted as exceptional arrangements based on Article 78(3) TFEU.[119]

Relocation was undercut through several factors, including the schemes' own legislative and administrative features.[120] Both decisions numerically capped the beneficiaries concerned,[121] restrictively defined the eligible applicants for relocation,[122] and expired after two years.[123] Like the Dublin III Regulation, both decisions failed to take into account the preferences of asylum seekers. Finally, certain Member States simply refused to relocate asylum applicants. Slovakia and Hungary first sought to annul the relocation decisions on several procedural grounds; the CJEU rejected this challenge in 2017.[124] Later, on an infringement action initiated by the European Commission, the CJEU held that Poland, Hungary and the Czech Republic violated their obligations under the schemes by refusing to pledge and to effectively relocate applicants to their territory.[125] Nonetheless, both decisions

[118] 1st Emergency Relocation Decision; 2nd Emergency Relocation Decision.

[119] This legal basis foresees that '[i]n the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament'.

[120] De Witte and Tsourdi 2017, at 1459–67. Guild et al 2017, at 42-44.

[121] 1st Emergency Relocation Decision, Art. 4; 2nd Emergency Relocation Decision, Art. 4(1).

[122] 1st Emergency Relocation Decision, Art. 3(2); 2nd Emergency Relocation Decision, Art. 3(2), which establishes the notion of applicants 'in clear need of international protection'.

[123] The first relocation decision applied until 17 September 2017 and the second until 26 September 2017. See 1st Emergency Relocation Decision, Art. 13(2); 2nd Emergency Relocation Decision, Art. 4.

[124] See Joined Cases C-643/15 & C-647/15, *Slovak Republic and Hungary* v. *Council of the European Union*, Judgment of the Court (Grand Chamber) of 6 September 2017, EU:C:2017:631, and commentary De Witte and Tsourdi 2018, at 1457-94.

[125] Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Hungary and the Czech Republic*, Judgment of the Court of 2 April 2020, EU:C:2020:257, and commentary Tsourdi 2021a.

led to the relocation of around 35,000 asylum seekers from Greece and Italy to other Member States.[126]

Despite their design failings, the second relocation decision included binding relocation quotas for Member States, [127] a first in terms of operationalising intra-EU solidarity. The first Council Decision did not contain obligatory quotas leading to lacklustre results. Thus, the Commission insisted in its second proposal on a system of obligatory quotas. Despite the opposition, on this point, of the Slovak Republic, Hungary, Romania and the Czech Republic, the decision was adopted through qualified majority voting.

These quotas varied per Member State; this was not a mere mathematic division of the number of asylum applicants to be relocated by the number of Member States. The obligatory quotas were calculated based on a specific distribution key proposed by the Commission.[128] This was based on the following metrics: a) the size of the population (40 % weighting), b) the total of the GDP (40 % weighting), c) the average number of asylum applications per one million inhabitants over the period 2010-2014 9 (10 % weighting, with a 30% cap of the population and GDP effect on the key, to avoid disproportionate effects of that criterion on the overall distribution) and d) the unemployment rate (10 % weighting, with a 30% cap of the population and GDP effect on the key, to avoid disproportionate effects of that criterion on the overall distribution).[129]

This allocation method bears clear traces of the non-applicable in EU law principle of common but differentiated responsibilities as presented earlier. While all relocating Member States were obliged to participate in the relocation, their mandatory contribution varied based on indicators seeking to objectify their differentiated 'protection capacities'. Interestingly,

[126] Progress Report on the Implementation of the European Agenda on Migration, COM(2018) 301 final.

[127] To be precise, several exceptional arrangements applied, as elsewhere in the CEAS. Denmark was not bound by the decisions. The UK, then an EU Member State, did not opt in to any of them. On 6 October 2015, Ireland opted-in to both Council Decisions; see COM(2016) 165, "First Report on Relocation and Resettlement", at 3. This meant that where quotas were obligatory, they are as of that point obligatory for Ireland as well. Switzerland, Norway and Liechtenstein (associated to the Dublin system) expressed their interest in participating in the relocation scheme and established to that extent bilateral arrangements with Italy and Greece. There were no obligatory quotas for these associated third countries; they relocated based on voluntary commitments.

[128] See for details, European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM(2015)451 Rec. 25 and Annexes I, II and III.

[129] Ibid.

while the European Council accepted the obligatory quotas and the numbers per Member State that were the result of the application of this distribution key, there was no mention of the key *per se* in the final decision. The Member States did not want to set a precedent of committing themselves to this precise method of allocation of responsibility, possibly for fear that it might be used as a blueprint for future permanent amendments to the responsibility allocation system.

11.4.2.2 The Dublin IV Proposal

The second legislative measure underpinned by the logic of 'mandatory' solidarity was the Commission's 2016 Dublin IV proposal which sought to introduce fair-sharing in the responsibility-allocation system through a corrective allocation mechanism. The Commission proposed the creation of an automated system, where all applications for international protection and numbers of those effectively resettled would be lodged, as well as the establishment by EASO of a reference key. More precisely, the reference key would take into account the following two objective criteria of capacity, as ascertained through EUROSTAT data: (a) the size of the population (50 % weighting) and (b) the total GDP (50% weighting).[130] This key was therefore to form the basis for calculating a reference number for each Member State, i.e. what percentage of the total responsibility should a particular Member State handle, bearing in mind its GDP and total population the previous calendar year.[131] Thereafter, the automated system would calculate continuously the percentage of applications for which each Member State was actually designated as responsible, and compare them with the reference percentage based on the key.[132] Once per week, the system would inform the Member States, the Commission and EASO of each Member State's respective shares.[133]

If the system ascertained that the total made up of the number of resettled persons and the number of applications for which a given Member State was responsible, including those found inadmissible or examined under accelerated procedures, exceeds 150% of its reference number, it would notify the Commission and Member States of this fact, automatically triggering the allocation mechanism.[134] Hence, the first phase, the triggering of the mechanism,

[130] Commission proposal to recast the Dublin III Regulation (EU) No 604/2013:(Dublin IV proposal). Dublin IV proposal, Article 35(2).

[131] Ibid., Annex I.

[132] Dublin IV proposal, Article 35(3).

[133] Ibid., Article 35(4).

[134] Ibid., Article 35(1)-(2) and (5)-(6).

was automatic, and based exclusively on objective data calculated by an automated system. This approach had the merit of depoliticising the debate about whether a particular Member State is under, or over-performing and to foster mutual trust. However, the fact that the mechanism would only be triggered when the number of applications a Member State is responsible for reaches over 150% of the reference number is one factor pointing to a less than adequate understanding of 'fair' in fair-sharing.[135]

The next phases of operationalisation of the mechanism were less straightforward. After the threshold was reached, the automated system would allocate applications to another Member State, one which at that point was found to be performing below its share.[136] This allocation would be random, exclusively based on the fact that the second Member State was found to be entertaining responsibility below its numerical threshold. The process foreseen to operationalise the relocation was Kafkaesque.[137] In addition, asylum seekers whose application had been found inadmissible, or was examined under an accelerated procedure, were not eligible for relocation, even if they were counted towards ascertaining disproportionate pressure. The fact these two categories, inadmissible and accelerated applications, were numerically significant further hindered the fair-sharing potential of that proposal.

Finally, a Member State could declare that 'it will temporarily not take part in the corrective allocation mechanism'.[138] In that case, the calculations for everyone would be readjusted, excluding that particular Member State.[139] Member States did not need to present objective reasons for this decision of non-participation. However, they were expected to contribute financially instead, and the proposed amount of their contribution was steep: 'EU 250,000 per each applicant who would have otherwise been allocated to that Member State during the respective twelve-month period'.[140] It is not clear on which basis this precise amount was calculated. It was, however, presented by the Commission as 'a solidarity contribution',

[135] Arguing in this sense, JP Gauci 'Leap Ahead or More of the Same? The European Commission's Proposed Revisions to the Dublin System' EJIL TALK! Blog of the European Journal of International Law May 20 2016. https://www.ejiltalk.org/leap-ahead-or-more-of-the-same-the-european-commissions-proposed-revisions-to-the-dublin-system/. Assessed 22 September 2021.
2016.

[136] Dublin IV proposal, Article 36.

[137] Maiani 2016, at 35-39.

[138] Dublin IV proposal, Article 37(1).

[139] Ibid., Article 37(2).

[140] Ibid., Article 37(3).

rather than as a fine for infringement of obligations and it is to be paid to 'the Member State determined as responsible for examining the respective applications'.[141]

Traces of the non-applicable in EU law principle of common but differentiated responsibilities can arguably be found in the workings of the ill-fated corrective allocation mechanism in Dublin IV. The automated system was to assess responsibility and pressure in real-time by using objective indicators based on capacity that would make up the system's reference key. This would eventually lead to differentiated obligations based on Member States protection capacities as determined by the key. Nonetheless, as we already analysed, several elements in this mechanism's design undermined its fair-sharing potential. Further operational complexities and certain Member States' refusal to partake in 'mandatory' forms of solidarity and responsibility sharing led to an impasse in the negotiations. A policy vision of 'flexible' solidarity thus emerged that has been embedded in the New Pact on Migration and Asylum.

11.4.3 'Flexible' and 'Half-compulsory' Solidarity in the New Pact on Migration and Asylum: Differentiated Responsibilities Gone Wrong

Legal and operational experiments with mandatory solidarity were met with the resistance of certain Member States. Other than refusing to implement their obligations under the emergency relocation schemes, Heads of Government of the so-called Visegrad group (the Czech Republic, Hungary, Slovakia, and Poland) developed a policy vision of 'flexible solidarity'. An early elaboration of flexible solidarity was the following: '[t]his concept should enable Member States to decide on specific forms of contribution taking into account their experience and potential. Furthermore, any distribution mechanism should be voluntary'.[142]

Other than a vision of 'flexible' solidarity, what followed the expiry of the time-bound relocation schemes was small-scale and voluntary solidarity arrangements. For example, disembarkation and relocation of those rescued at sea was organised in an *ad hoc* manner, 'ship-by-ship'. While in the short-term these *ad hoc* actions may provide some reprieve, they are not sustainable. Solidarity à-la-carte has been found to downgrade the consistency of the

[141] Ibid.

[142] Joint Statement of the Heads of Governments of the V4 Countries launching the Bratislava process, 2016, available at: https://www.visegradgroup.eu/calendar/2016/joint-statement-of-the-160919. Assessed 22 September 2021.

EU asylum *acquis,* and to fail to adequately protect individuals' fundamental rights.[143] These processes are extremely time-consuming, while they lead to arrangements concerning only a handful of individuals. Nonetheless, in the wake of the COVID-19 pandemic, small-scale and *ad hoc* relocation arrangements for the benefit of Greece have also been the EU's response to the humanitarian crisis facing asylum seekers, including unaccompanied minors, residing in overcrowded and unsanitary conditions on the islands of Eastern Aegean.[144]

Given the legislative impasse of the Dublin negotiations and the unsustainability of small scale, *ad hoc,* solidarity, the way forward advanced by the European Commission in the New Pact on Migration and Asylum has been to cement 'flexible' solidarity in the Pact legislative instruments. A New Asylum and Migration Management Regulation,[145] with minor tweaks, retains the allocation criteria of Dublin III, including the 'first entry criterion' which is in fact extended to include persons disembarked after Search and Rescue (SAR) at sea operations.[146] The Pact foresees an extremely complex solidarity mechanism that is activated under three circumstances: i) following SAR operations, [147] in situations of 'pressure' or 'risk of pressure',[148] and iii) in 'crisis' situations.[149]

Flexibility is ensured in the following manner: a Member State can voluntarily contribute by relocating individuals or by conducting 'return sponsorships', but also through 'other contributions' namely capacity building, operational support proper, or cooperation with third States. It is only where offers are not sufficient that the Commission, through an implementing act, establishes concrete relocation targets per Member State. If relocations offers are limited (i.e. fall short 30% of the target indicated by the Commission) then a more 'mandatory' element emerges: Member States are obliged to cover at least 50% of the relocation needs set by the Commission through relocations or 'return sponsorships' and only the rest with 'other contributions'. It is only under 'crisis situations', i.e. the third functioning

[143] Carrera and Cortinovis 2019.

[144] See analysis in Tsourdi 2020c, at 374.

[145] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management' COM(2020)610 (AMMR Proposal).

[146] AMMR Proposal, Art. 21.

[147] Ibid., Arts. 47-49

[148] Ibid., Arts. 50-53

[149] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum', COM(2020) 613 (Crisis Regulation Proposal).

modality of the mechanism, that it is obligatory for Member States to contribute to responsibility sharing through people-sharing, i.e. relocations or return sponsorships. Francesco Maiani has branded the whole philosophy underpinning the mechanism as 'half compulsory' solidarity.[150]

Endorsing this smorgasbord of contributions is problematic for several reasons. The first is the lack of comparability between relocation or return sponsorships on the one hand and 'other contributions' itself. Let us take a real-life example. Italy is a Member State arguing that it is under extreme migratory pressure due to the numbers of asylum seekers arriving in its territory compared to its capacities and compared to what should be its share of an essentially 'common responsibility'. It is not straightforward why Italy would and should consider a contribution from Poland in capacity-building activities in Niger an equitable alternative to relocating asylum seekers from its territory. Instead, what the system currently foresees is a heavy reliance on the Commission to decide which contributions are appropriate in case voluntary pledges are not sufficient. Eleni Karageorgiou observes characteristically on the latter point that '[a]rguably we are moving from a majoritarian interpretation of solidarity to an authoritarian one'.[151]

The second problem is the concept of return sponsorship, a concept that the Pact introduces for the first time. Through a return sponsorship a Member State (say Hungary) commits to support another Member State which faces 'migratory pressure' (say Greece) in carrying out the necessary activities to return irregularly staying third-country nationals.[152] While the individuals are present on the territory of Greece, the latter remains responsible for carrying out the return. However, if return has not taken place after 8 months (4 months in situations of crisis),[153] Hungary becomes responsible for transferring the migrants in an irregular situation and should relocate them to its territory.[154]

Return sponsorship is mired with operational complexities and fundamental rights compliance concerns.[155] It will be implemented through bilateral administrative co-operation. It is unlikely to be efficient as it will not allow for the creation of economies of scale. It will

[150] F. Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact', EU Immigration and Asylum Law and Policy/Odysseus Network 20 October 2020. http://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/. Assessed 22 September 2021.

[151] Karageorgiou 2020, at VI.

[152] AMMR Proposal, Rec. 27.

[153] Crisis Regulation Proposal, Rec. 10.

[154] AMMR, Art. 55, para. 2.

[155] See Tsourdi 2022; Trauner and Sundberg Diez 2021.

create additional administrative burdens for the 'benefitting' Member State that, instead of one interface (e.g. an EU agency), will have to collaborate with several Member State authorities that will be acting, understandably, in an uncoordinated manner. In addition, operational support under this framework will not be covered by the enhanced fundamental rights protection layer that has been developed by FRONTEX including, *inter alia*, a fundamental rights officer, an individual complaints mechanism, and fundamental rights monitors.[156] It is certain that these mechanisms are not flawless as the most recent allegations on the role of FRONTEX in pushbacks in Greece once again highlights.[157] However, their complete absence in an environment of transnational administrative co-operation which dilutes accountability and liability is likely to lead to even further human rights violations.

To sum up, these legislative developments do reflect a logic of differentiated contributions in what is conceived as a common responsibility. However, we argue that this approach is 'differentiation gone wrong'. Differentiation here is merely servicing political expediency by endorsing certain States' reluctance to engage with refugee protection. What the Commission has done is to broaden the scope of contributions and the scope of the redistributive net by encompassing the EU's return policy and the EU's asylum policy under the same roof. The hope is obviously that Member States which ideologically oppose asylum provision might be keen to chip in the operationalisation of the EU's return policy instead. Such an approach fails to structurally embed a fair-sharing of responsibility and is unlikely to address the current redistributive *malaise* in asylum.[158] It also has the potential to further undermine refugee protection in the EU.

11.5 Conclusions

This chapter has problematised the normative rationale for differential treatment in international law as expressed in the principle of CBDR. Early multilateral environmental

[156] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295/1, Arts. 108-111.

[157] See, e.g. 'Frontex in illegal Pushbacks von Flüchtlingen verwickelt', *Der Spiegel*, 23 October 2020. https://www.spiegel.de/consent-a-?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Fausland%2Ffluechtlinge-frontex-in-griechenland-in-illegale-pushbacks-verwickelt-a-00000000-0002-0001-0000-000173654787. Assessed 22 September 2021.

[158] See also analysis in Brouwer et al 2021, at 153-158.

agreements in areas of common environmental concern were premised on solidarity understood as differential treatment between the developed and developing countries, but it was in the climate change legal regime where the principle of CBDR was explicitly articulated, crystallised and codified as the guiding principle underpinning the global responsibility sharing efforts.

The principle is rooted in ideas of fairness and solidarity in international environmental law. Two of the most widely accepted principles of fairness are obliquely embedded within the doctrine of CBDR; the *contribution to the problem* principle and *the capacity or capability to respond* and take measures. What is more, distributive fairness under the CBDR extends to the developed countries' responsibilities to continue taking the lead by firstly doing more and secondly by assisting less developed countries in meeting their own comments.[159] CBDR *qua* principle does not dictate quantifiable shares of the global mitigation action needed but it guides the responsibility sharing efforts of each individual state.

We have argued that a notion of CBDR has crept into the language of recent refugee policy instruments at UN level arguably turning CBDR into an emerging concept of international refugee law and policy. Although the Global Compact on Refugees endorses *prima facie* elements of the CBDR principle by vaguely and abstractly promoting responsibility by capacity,[160] it falls short of collectivising refugee protection as common responsibility. An important element of the CBDR principle as it stands in international environmental law is that the states that are well-resourced, namely developed countries are normatively expected to undertake more commitments with respect to environmental protection as well as to assist developing states in meeting their own through financial and technology transfer. This much-needed normative framework for refugee responsibility sharing is, however, absent even in a non-binding instrument. For the time being, the principle of CBDR has not yet entered the political challenges and ethical dilemmas that lie at the heart of refugee responsibility sharing.

Traces of the principle of common but differentiated responsibilities have also emerged in the operationalisation of the solidarity and fair-sharing of responsibility principle in the EU asylum policy. These efforts have largely missed the mark. Mandatory solidarity, such as the one established by the emergency relocation schemes and the Dublin IV Commission proposal, conceptualised differentiation of responsibilities meaningfully to effectively operationalise intra-EU solidarity. However, further elements in their design, including an externalisation

[159] Paris Agreement, Article 4 (4).

[160] Global Compact, para 5.

impetus, complex implementation mechanisms, and a complete lack of consideration of migrants' agency, undermined their fair-sharing potential. More recently, the Commission embedded a variant of flexible solidarity in its New Pact on Migration and Asylum. Heterogeneous contributions, a Byzantine operationalisation mechanism, and an even stronger externalisation impetus riddle these proposals which are unlikely to realise fair-sharing in the EU's asylum policy. While reflecting a logic of differentiated contributions in what is conceived as a common responsibility, differentiation here is merely serving political expediency by endorsing certain states' reluctance to engage with refugee protection.

Different approaches to achieve this goal could include (a combination of) requiring concrete positive contributions to the asylum systems of other Member States even in the exclusion of relocation (e.g. improving reception conditions);[161] a more radical shift in the implementation modes of the EU's asylum policy through further enhancing administrative integration and joint implementation patterns;[162] providing more structural forms of EU funding to Member States for implementing asylum-related obligations;[163] or foreseeing mutual recognition of positive asylum decisions coupled with variants of free movement rights for recognised beneficiaries.[164] Some of those envisaged solutions require amendments in secondary, or even primary law, or a drastic overhaul of the distribution of financial envelopes in the multi-annual financial framework. Such bold policy and legislative moves are however unlikely to occur in the short-term future. For now, a disproportionate focus of the EU and its Member States is directed instead at externalising protection obligations to third States and 'containing' asylum seekers outside the EU's territory.

[161] De Bruycker 2020.

[162] Tsourdi 2020a.

[163] Tsourdi 2017.

[164] Mitsilegas 2017, at 721.

Reference List

Achiume T (2015) Syria, Cost Sharing and the Responsibility to Protect Refugees. Minnesota Law Review 192: 687 - 760

Betts A (2009) Protection by Persuasion: International Cooperation in the Refugee Regime. Ithaca Cornell University Press, New York

Betts A, Durieux J-F (2007) Convention Plus as a Norm Setting Exercise. Journal of Refugee Studies 20 (3) 509-535

Birnie P, Boyle A, Redgwell C (2009) International Law and the Environment. Oxford University Press, Oxford

Bodansky D (2016) The Paris Climate Change Agreement: A New Hope? American Journal of International Law 110 (2): 288 - 319

Bodansky D, Brunnée J, Rajamani L (2018) International Climate Change Law. Oxford University Press, Oxford

Brouwer E, Campesi G, Carrera S, Cortinovis R, Karageorgiou E, Vedsted-Hansen J, Vosyliute L (2021) The European Commission's legislative proposals in the New Pact on Migration and Asylum. Study Requested by the LIBE committee July 2021. https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf. Accessed 23 September 2021

Carlane CP, Colavecchio CD (2019) Balancing Equity and Effectiveness: The Paris Agreement & the Future of International Climate Change Law. N.Y.U. Environmental Law Journal 27: 108-182

Carrera S, Cortinovis R (2019) Search and rescue, disembarkation and relocation arrangements in the Mediterranean: Sailing Away from Responsibility? **(**CEPS 2019) https://www.ceps.eu/ceps-publications/search-and-rescue-disembarkation-and-relocation-arrangements-in-the-mediterranean/ Accessed 22 September 2021

Cassese A (1986) International Law in a Divided World. Oxford Clarendon Press, Oxford

Chimni B S (1998) The Geopolitics of Refugee Studies: A View From the South. Journal of Refugee Studies 11 (4): 350-374

Cullet P (199) Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations. European Journal of International Law 10 (3): 549 - 582

De Bruycker P, Tsourdi E (2016) In search of fairness in responsibility sharing. Forced Migration Review 51:64

De Witte B (2017) Variable geometry and differentiation as structural features of the EU legal order. In: De Witte B, Ott A, Vos H (eds) Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law. Edward Elgar, 9-18

Den Heijer M (2012) Joined Cases C-411 & 493/10, N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform. Common Market Law Review 49 (5):1735 – 1753

De Witte B, Martinelli F (2018) Treaties between EU Member States as Quasi-Instruments of EU Law. In: Cremona M, Kilpatrick C (eds) EU Legal Acts: Challenges and transformation. Oxford University Press, Oxford 150-157

De Witte B, Tsourdi E (2018) Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers. Common Market Law Review 55 (5): 1457-94

Den Heijer M (2012) Europe and Extraterritorial Asylum, Hart Publishing, Oxford

Dowd R, McAdam J, (2017) International Cooperation and Responsibility Sharing to Protect Refugees: What, Why and How. International and Comparatively Law Quarterly 66 (4): 863-892

Dowd R, McAdam J (2017) International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons from International Climate Change Law. Melbourne Journal of International Law 18: 180-218

Einarsen T, Engedahl M (2016) The universal asylum system and the 2016 New York Declaration: towards an improved 'global compact' on refugees? Refugee Law Initiative Working Papers, Working Paper No. 17, 16 – 22. https://rli.sas.ac.uk/sites/default/files/files/RLI_final.pdf. Accessed 22 September 2021

Franck T (1995) Fairness in International Law and Institutions, Oxford University Press, New York

Gibney MJ (2004) The Ethics and Politics of Asylum: Liberal Democracy and The Response to Refugees. Cambridge University Press, Cambridge

Gilbert G (2019) Not Bound But Committed. International Migration 57 (6): 27-42

Goodwin-Gill G (2016). The Movements of People Between States in the 21st Century: An Agenda for Urgent Institutional Change International Journal of Refugee Law 28 (4): 679-694

Grahl-Madsen A (1965). Further Development of International Refugee Law. Nordic Journal of International Law 35 (3-4):159 -180

Guild E, Costello C, Moreno-Lax V (2017) Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece. Study for the LIBE Committee, 68-70. https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf. Accessed 22 September 2021

Hathaway JC (2018) The Global Co-Op Out on Refugees. International Journal of Refugee Law 30 (4): 591–604

Hathaway JC, Neve A (1997) Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection. Harvard Human Rights Journal 10: 115-211

Hurwitz A (2009) The Collective Responsibility of States to Protect Refugees. Oxford University Press, Oxford

Joyner C, Biniaz S, Di Leva CE (2002) Common but Differentiated Responsibility. Proceedings of the Annual Meeting of the American Society of International Law 96: 358-366

Karageorgiou E (2020) Guest Note: The New Pact on Migration and Asylum: Why Pragmatism Cannot Engender Solidarity Nordic Journal of European Law 3 (2) II- VIII

Karageorgiou E (2016) Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees. European Politics and Society 17 (2):196-214

Küçük E (2016) The principle of solidarity and fairness in responsibility sharing: more than window dressing? European Law Journal 22 (4): 448-469

Maiani F (2016) The Dublin III Regulation: A New Legal Framework for a More Humane System? In: Chetail V, De Bruycker P, Maiani F (eds) Reforming the Common European Asylum System: The New European Refugee Law. Brill Nijhoff, The Hague, 101 -14

Magraw D (1990) Legal Treatment of the Developing Countries, Differential, Contextual and Absolute Norms. Colorado Journal International Environmental Law and Policy 1: 69-99

Mavropoulou E (2021) Responsibility Sharing in International Refugee Law Towards Differentiated Legal Obligations .The Thesis was awarded the Ph.D in Law by the University of Westminster in February 2021 (on file with the author)

McAdam J (2017) The Enduring Relevance of the 1951 Refugee Convention. (2017) 29 International Journal of Refugee Law Editorial 1

McDonough P, Tsourdi E (2012) The 'Other' Greek Crisis: Asylum and EU Solidarity. Refugee Survey Quarterly 31 (4): 67-100

Mitsilegas V (2017) Humanizing solidarity in European refugee law: The promise of mutual recognition. 24 Maastricht Journal of European and Comparative Law 24 (5): 721- 739

Moreno Lax V (2017) Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law. Oxford University Press, Oxford

Oliva LP (1989) The International Struggle to Save the Ozone Layer. Pace Environmental Law Review 7 (1): 213-257

Pauw WP, Castro P, Pickering L, Bhasin S (2020) Conditional Nationally Determined Contributions in the Paris Agreement: Foothold for Equity or Achilles Heel? Climate Policy 20 (4): 468 – 484

Rajamani L (2006) Differential Treatment in International Environmental Law. Oxford University Press, Oxford

Rajamani (2012) The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law. International Affairs 88 (3):605 - 623

Rajamani L (2016) The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations. Journal of Environmental Law 28 (2): 337 -358

Redgwell C (2018) International Environmental Law. In: Evans M (ed) International Law. Oxford University Press, Oxford, 675-716

Schimmelfennig F, Winzen T (2020) Ever Looser Union: Differentiated European Integration. Oxford University Press, Oxford

Scholtz W (2009) Equity as the Basis for a Future International Climate Change Agreement: between Pragmatic Panacea and Idealistic Impediment. The Optimisation of the CBDR principle via realism. The Comparative and International Law Journal of Southern Africa 12 (2):166-182

Shelton D (2007) Equity. In: Bodansky D, Brunnée J, Hey E (eds) The Oxford Handbook of International Environmental Law. Oxford University Press, Oxford, 640 - 641

Schuck P (1997) Refugee Burden Sharing: A Modest Proposal. Yale Journal of International Law 22: 243-297

Soltau F (2009) Fairness in International Climate Change Law and Policy. Cambridge University Press, Cambridge

Stone C (2004) Common But Differentiated Responsibilities in International Law. American Journal of International Law 98 (2): 276 - 301

Trauner F, Sundberg Diez O (2021) EU return sponsorships: High stakes, low gains? European Policy Centre (EPC) Discussion Paper. https://www.epc.eu/en/publications/EU-return-sponsorships-High-stakes-low-gains~3ac104>. Accessed 23 September 2021

Tsourdi E (2017) Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System. Maastricht Journal of European and Comparative Law 24 (5): 667 - 675

Tsourdi E (2020a) The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System. In: Bignami F

(ed) EU Law in Populist Times: Crises and Prospects. Cambridge University Press, Cambridge, 212-21

Tsourdi E (2020b) Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible. German Law Journal 21 (3): 506 – 531

Tsourdi E (2020c) COVID-19, asylum in the EU, and the great expectations of solidarity. International Journal of Refugee Law 32 (2): 374–380

Tsourdi E (2021a) Regional Refugee Regimes: Europe. In: Costello C, Foster M, McAdam J (eds) Oxford Handbook of International Refugee Law. Oxford University Press, Oxford, 352-69

Tsourdi E (2021b) 'Relocation Blues: refugee protection backsliding, division of competences, and the purpose of infringement proceedings: Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic*' 58 Common Market Law Review 1819-1844

Tsourdi E (2022) The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding. In: Thym D, Odysseus Academic Network (eds) Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum. Nomos, Baden-Baden, 113-128

Tsourdi E, Costello C (2021) The Evolution of EU Law on Refugees and Asylum. In: Craig P, de Búrca G (eds) The Evolution of EU Law. Oxford University Press, Oxford, 793 - 823

Türk V (2018) The Promise and Potential of the Global Compact on Refugees. International Journal of Refugee Law 30 (4):575–583

Türk V, Dowd R (2014) Protection Gaps. In: Fiddian-Qasmiyeh E et al (eds) The Oxford Handbook of Refugee and Forced Migration Studies. Oxford University Press, Oxford, 283-284

Türk V, Garlick M (2016) From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees. International Journal of Refugee Law 28 (4): 656-678

Verwey WD (1990) The Principles of a New International Economic Order and the Law on General Agreement on Trade and Tariffs. Leiden Journal of International Law 3 (2): 117-142

Wall P (2017) A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol? International Journal of Refugee Law 29 (2): 201- 237

Weisslitz M (2002) Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context. Colorado Journal of International Environmental Law and Policy 13: 473 – 489

Zieck M (2009) Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited. International Journal of Refugee Law 21(3): 387-420

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