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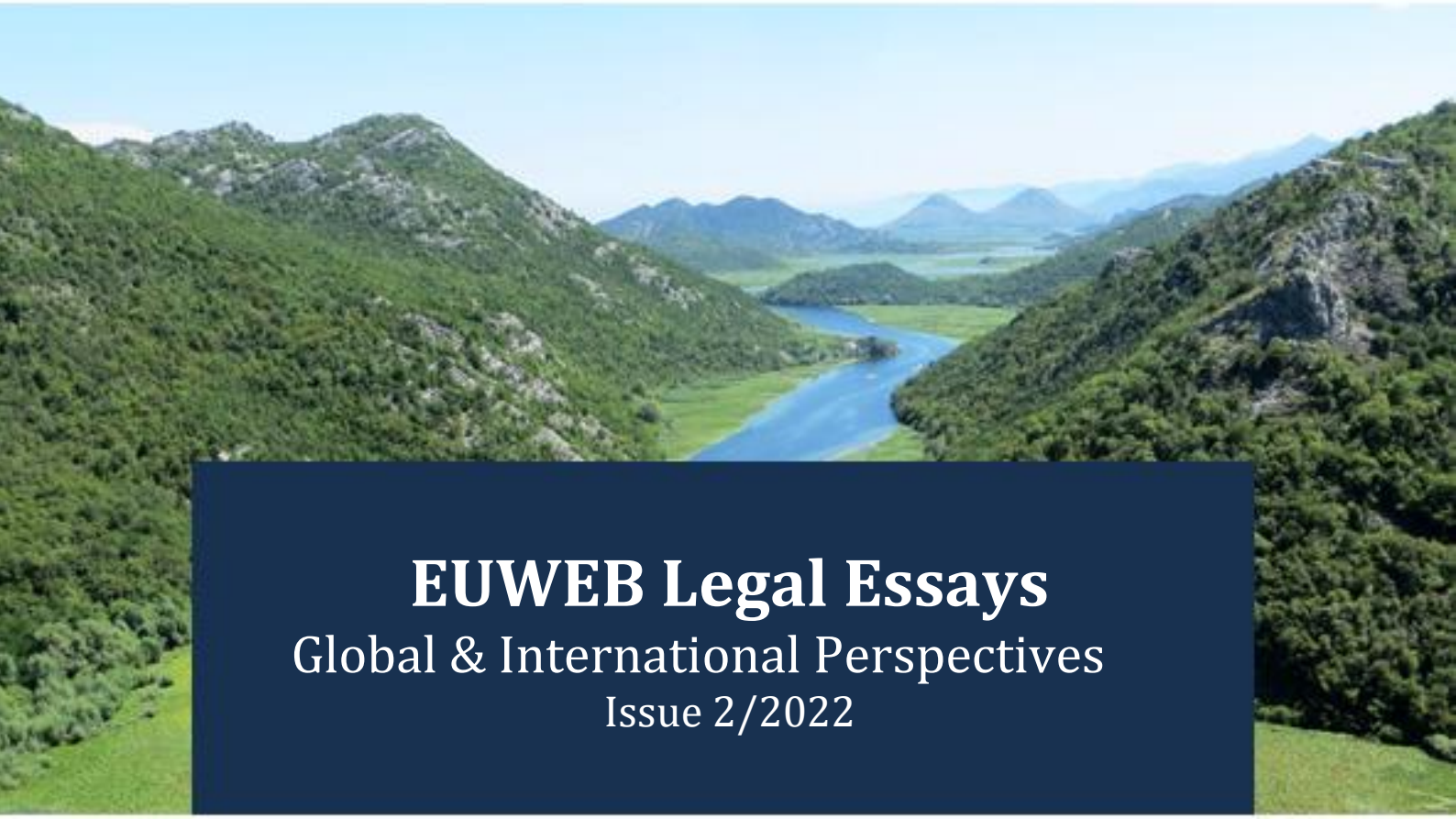

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"*EU-Western Balkans Cooperation on Justice and Home Affairs: Systems, Tools and Procedures to Strengthen Security Towards the EU Accession Process*"

THE PRINCIPLE OF SOLIDARITY AND INTEGRATION IN THE EU: THE CHALLENGE OF WESTERN BALKANS

by Sara Dal Monico[*]

1. Introduction

This contribution explores the notion of the principle of solidarity and particularly its application in the context of the integration process of Western Balkans. It will evaluate whether legal obligations deriving from the solidarity principle can be envisaged for and towards candidate countries, with references to the specific case of Western Balkans (WB). In order to do so, the contribution starts by reconstructing the notion of the principle of solidarity and by establishing its legal nature, first through an analysis of EU primary law and secondly, by looking at the jurisprudence of the European Court of Justice (ECJ).

Indeed, the principle of solidarity is often recalled within the founding treaties of the EU, as well as in secondary law acts, but according to the sector in which it is being implemented, the underlying notion and nature of solidarity changes. It will be demonstrated how provisions within the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) enshrine both a notion of solidarity which is mostly political, as well as a legal conceptualization of solidarity, thus a principle entailing legal obligations, for instance, in sectors such as migration and asylum as well as energy efficiency. The legal nature of the principle has been disputed by legal scholars, arguing either against the notion that such principle entails legal obligations, or in favour of it, as well as by States in front of the ECJ. Indeed, as the analysis of the recent *OPAL* case (or *Germany v. Poland*) of 2021 will demonstrate, Germany has challenged in front of the ECJ the legal nature of solidarity outside of the framework of crisis situations and argued in favour of its mere political value.

The analysis of the recent *OPAL* case allows to ponder even more on the applications of the principle of solidarity and to understand whether a more encompassing conceptualization of the principle is possible. Following that consideration and moving from the fact that solidarity is a general principle of EU Law, thus binding and entailing legal obligations, the contribution will focus on WB. It analyses in particular the Stabilization and Association Agreements (SAAs) with the WB and evaluate the notion of solidarity included – if any – within the SAAs. Solidarity has been oftentimes recalled as the pillar guiding the integration of the EU and in that line of reasoning, candidate countries are an interesting opportunity to reflect upon the notion of solidarity and how it is shaped within that framework. The contribution also reflects on whether an obligation

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of solidarity exists also for candidate countries towards the EU, since the principle holds such a fundamental value in the context of integration.

Actions in solidarity to the WB on behalf of the EU have taken place. The EU has proven its commitment in promoting solidarity towards the WB by enacting several mechanisms especially in the form of micro-financial assistance. For instance, in the aftermath of the COVID-19 pandemic the EU has decided to extend the EU Solidarity Fund to the Western Balkans as well, although a measure envisaged for Member States (MS) in need. The EU has also carried out a series of actions in solidarity with Ukraine as a response to the Russian aggression, which might suggest that the notion of solidarity which is promoted by the EU is an encompassing one which is extended outside the boundaries of the EU itself.

2. An Overview of Solidarity in EU Primary Law

The positions offered by legal scholars on the notion of solidarity have been many and various in their assertions, opening a wide doctrinal debate on whether solidarity is a principle of EU Law or not[1]. The legal scholarship has been divided on the nature of solidarity in the context of EU Law, and more precisely in regards to its legal nature, thus whether solidarity can be enumerated amongst the general principles of EU Law, and, as such, entail legal obligations, or whether it should only be regarded as a value, thus carrying only political significance. This second position has been the one purported by Germany in a recent case in front of the ECJ, which will be analysed in the following pages, which has granted to the Court the occasion to shed some light over the legal nature of solidarity. In order to fully grasp and appreciate such debate, this contribution will first attempt at providing an overview of solidarity in EU primary law.

Nonetheless, the difficulty in framing its legal nature can be also attributed to the fact that it permeates several and different fields of EU Law, from energy efficiency, to migration, to integration, just to name a few. As it will be demonstrated, each field calls for an interpretation and application of the principle of solidarity which is different, and, in line with the reasoning provided by the Advocate General to the *OPAL* case, AG Campos Sánchez-Bordona, it requires a case-by-case approach[2]. Indeed, although some general considerations can be made by looking at the jurisprudence of the ECJ concerning the principle of solidarity, and in particular the recent *OPAL* case, a careful and framework-oriented analysis of the principle of solidarity has to be undertaken.

The notion of solidarity has accompanied the development of the European Union and EU Law since the very beginning. It was Robert Schuman who, back in 1950, mentioned it in the context of European integration, stating that in order to build a strong

[1] For a brief overview of such debate, see G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea*, Sezione "Atti convegni ASIDUE", No. 6, 2021; A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *Solidarity in EU law: Legal Principle in the Making*, Cheltenham-Northampton, 2018; G. MORGESE, *La solidarietà tra gli Stati Membri dell'Unione Europea in Materia di Immigrazione e Asilo*, Cacucci Editore, 2018; A. GRIMMEL, S. MY GIANG (eds.), *Solidarity in the European Union: A Fundamental Value in Crisis*, Springer, 2017; J. CZUCZAI, *The Principle of Solidarity in the EU Legal Order – Some Practical Examples after Lisbon*, in M. MARESCEAU (ed.), *The EU as a Global Actor Bridging Legal Theory and Practice*, Brill Nijhoff, 2017; J. HABERMAS, *Democracy, Solidarity and the European Crisis*, in M. GROZELIER, B. HACKER, W. KOWALSKY, J. MACHNIG, H. MEYER, B. UNGER (eds.), *Roadmap to a Social Europe*, Social Europe Report, 2013; A. SANGIOVANNI, *Solidarity in the European Union*, Oxford Journal of Legal Studies, Vol. 33, No. 2, 2013, pp. 213-241; S. GIUBBONI, *Diritti e Solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Il Mulino, 2012.

[2] See Section 3 of this contribution.

Europe concrete actions and achievements needed to be taken, which would create a *de facto solidarity,* thus underlying it as the basis upon which the project should be built[3]. It was nonetheless not until the Lisbon Treaty that the principle of solidarity starts to permeate EU Law with an interesting number of provisions recalling it. Indeed, primary EU Law presents numerous references to the principle of solidarity, yet this does not ease the process of framing its legal character[4]. It is not the purpose of this contribution to analyse each provision recalling solidarity, rather to focus on some of the most relevant ones according to the object of this work. It should suffice to say that solidarity is envisaged in numerous articles of both the TEU and the TFEU, for what concerns primary level of EU law.

To begin with, in terms of the TEU, it is possible to identify the notion of solidarity enumerated within art. 2 TEU, concerning the founding values of the EU as well as at art. 3 TEU, concerning on the other hand the objectives of the Union. At a first glance, solidarity is presented as a complex and multi-dimensional concept: it is both a *value* as much as an *objective*, which the EU intends to pursue. Of particular interest for this contribution are art. 21 and art. 24 TEU, which will be matter of analysis within the following pages, connecting the issue of solidarity with the framework of the external action of the EU, stating that the principles of equity and solidarity shall guide the Union's action on the international scene.

Art. 2 TEU mentions solidarity within its second paragraph. The first one is dedicated to the founding values of the EU, thus not featuring solidarity which is not included amongst the founding values of the EU but rather, as the wording of the article suggests, depicts it as an attribute of the European society. Morgese deals with the question of whether solidarity can actually be considered a *value* through the analysis of this provision of the TEU but finds a negative answer. He suggests that the solidarity enlisted within art. 2 cannot be framed as a founding value of the EU, since those are enumerated within paragraph one, namely respect for human dignity, freedom, democracy, equality, the respect for the rule of law and for human rights as well as the rights of minorities. Yet again, he recalls that solidarity is incorporated as a value within the Preamble of the Charter of Niece. Although not explicitly mentioned as a value within the TEU, Morgese proposes a solution that reconnects solidarity with a wider value framework of the basis of the EU legal system[5].

Mangiameli argues that this new wording implemented after Lisbon of art. 2, para. 2 TEU is actually rather innovative, hinting at the fact that there actually is a European society, capable of recognising itself in some common values. It is amongst these values

[3] Schuman's speech is available at: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_it; see also: G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea,* cit., p. 85.

[4] *Ibid.*, p. 87. Morgese recalls that, in terms of the development of the principle of solidarity within EU Law, the ECSC and EEC Treaties recall on few occasions the notion of solidarity although some provisions would make reference to it through the principle of loyal cooperation, for instance. The Single European Act as well did not signal any momentous changes in that sense, by only mentioning the principle within the Preamble, without referring to it as such. With the Treaty of Maastricht on the other hand, and with the Treaty of Amsterdam, mentions to solidarity are more numerous, for instance within the Preamble as well as at art. 2 of the Protocol for social and economic cohesion. See also P. PAVLOPOULOS, *The Principle of Solidarity in the Context of the Primary European Law: The Guarantees established by the Treaty on European Union and the Treaty for the Functioning of the European Union, European Review of Public Law*, Vol. 28, No. 4, 2016, pp. 1253-1278.

[5] G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea,* cit., p. 95.

that solidarity surfaces[6]. This is due to the fact that the EU has evolved from its initial mere economic drive towards a more politically integrated organization, resulting in a Union where people have a common citizenship, thus sharing some sense of belonging providing grounds for solidarity. Wouters adopts a more solidarity-inclined approach, suggesting that the list of values enumerated within the article are not to be interpreted in "clinical isolation", not only among themselves but in reference also to other crucial provisions of the founding Treaties[7]. Since the scope of art. 2 is that of outlining the characteristics of the *European identity*, the two sentences should not be read separately and as depicting a hierarchy among the values upon which the EU is based. Art. 2 TEU should instead be read in conjunction with art. 3 TEU and therefore solidarity – within the meaning of the article – should be regarded as a value.

The solidarity referred to in art. 2 TEU has been described as infra-state solidarity, or vertical solidarity[8], as opposed to the horizontal dimension of solidarity which is inferable from art. 3 TEU. This provision recalls solidarity on two instances, offering a dual dimension of solidarity both within Section 3: on the one hand, the notion of *intergenerational solidarity* is presented, which, as the term suggests, promotes the advancement of solidarity amongst generations; and on the other hand, it calls for an infra-state dimension, thus amongst its MS, which is also recollected within paragraph 5 of the same article. In terms of intergenerational solidarity, the EU intends to promote and respect the principle of sustainable development which is closely linked to the issue of the advancement of future generations, both on the internal and on the external levels[9].

In terms of the infra-state dimension, therefore pertaining to the relations between MS, art. 3, para. 3 TEU states, in reference to the objectives that the Union pursues, that: "*it shall promote economic, social and territorial cohesion, and solidarity among Member States*."[10]. The EU is required to promote solidarity between itself and the MS as well as amongst them[11]. This kind of solidarity is mostly realized through structural

[6] See H.J. BLANKE, S. MANGIAMELI, *The Treaty on European Union (TEU): A Commentary*, Heidelberg-New York-Dordrecht-London, 2013, p. 109 ff.

[7] J. WOUTERS, *Revisiting Article 2 of the TEU: A True Union of Values?*, European Papers, Vol. 5, No. 1, 2020, p. 259.

[8] See E. DI NAPOLI, D. RUSSO, *Solidarity in the European Union in Times of Crisis: Towards "European Solidarity?",* in V. FEDERICO, C. LAHUSEN (eds.), *Solidarity as a Public Virtue?: Law and Public Policies in the European Union*, Baden-Baden, 2018. The vertical dimension of solidarity has been stated not only within Art. 2 TEU but also in the Preamble. The authors argue that such an infra-individual dimension of solidarity is a reflection of the EU's recent and strong commitment towards human rights, aspect which can be also derived by looking at the structure of the European Charter of Fundamental Rights. Indeed, the Charter is one of the first legally binding instruments promoting vertical solidarity among European people and which dedicates a whole Title, number IV, to solidarity. Title IV includes provisions concerning worker's rights, social security and social assistance, etc. Namely fields in which infra-individual or vertical solidarity is exemplified. After Lisbon, the inclusion of solidarity within art. 2 TEU as a collective attribution charactering the European society is a strong indicator of the willingness to build a more united Europe. Indeed, it is Art. 1 TEU which states that "*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, (...)*", thus claiming the primary role that "*being European*" and, one may argue, act accordingly, means. This nonetheless shows that the boundary between the concepts of horizontal and vertical solidarity are not that strict.

[9] See G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea,* cit., p. 88.

[10] Treaty on the Functioning of the European Union, cit.

[11] On this note, see E. KÜÇÜK, *Solidarity in EU Law: an Elusive Political Statement or a Legal Principle With Substance?*, in A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *op. cit.*, p. 38 ff. The author suggests that this kind of conceptualization of the infra-state dimension of solidarity can be easily recollected within art. 67 TFEU, concerning the common asylum framework as well as within art. 80 TFEU, always concerning asylum and particularly stating that the Union policies and implementation policies concerning asylum must be carried out in accordance with the principle of solidarity. Of course, solidarity needs to be the guiding principle in fields such as that of immigration, as well as for enlargement policies. The same

means with the aim of reducing the gap between the different regions of the EU. Di Napoli and Russo refer to infra-state or horizontal solidarity as: *"both a general principle to guide infra-state collaboration to achieve the overall goal of the Union, as well as a specific provision in strategic policy areas or in paradigmatic situations, such as, asylum, immigration, energy, foreign policy, and natural or man-made disasters*"[12]. Solidarity in this context is meant as both an objective as well as a criterion guiding the EU, also if read in conjunction with art. 21, which should direct the actions in terms of the relations of the MS both among themselves and in regards to external relation[13].

Infra-state solidarity clearly plays a crucial role in terms of the external dimension of the EU: it is the driving force behind any project of integration. In its external relations, the action of the Union, which includes enlargement and later integration, is guided by Title V TEU and in particular, solidarity is mentioned within Title V at arts. 21 and 24 TEU. It was recalled by the AG within his Opinion concerning the *OPAL* case, that art. 24 TEU mentions solidarity merely as a *political value*, enhancing the notion of mutual political solidarity among the MS. On the other hand, art. 21 recalls solidarity *as a principle* within the first paragraph, amongst the principles which the Union should seek to promote in its external relations. According to Oeter[14], the principle mentioned here recalls the notion of societal attribution, which is codified within art. 2 TEU, rather than a value, and claims that both the institutions of the EU and the MS are bound by the principle of solidarity in its articulations, "*whatever the meaning of such a principle may be in detail*"[15]. Therefore, an obligation to act in solidarity can be envisaged for the EU in the context of its external relations as per art. 21, suggesting an *external dimension* of solidarity[16], and therefore an obligation to act in solidarity within the framework of enlargement policies could also be argued for. It is yet important to recall the Charter of Fundamental Rights of the EU which dedicates an entire Chapter to solidarity, under which labour rights, social security and access to healthcare are envisaged. This could be referred to as a rather ambitious proposition, if we assume that the EU would be bound by such obligations also in the context of integration.

configuration is used for the sharing of burdens in the energy sector, art. 194 TFEU and, the much discussed – at the moment in which this contribution is being written, due to the Ukrainian conflict – arts. 42 TEU and 222 TFEU concerning mutual defense and solidarity in case of terrorist attack or natural disasters. Nonetheless, as the author suggests: "*both the mutual defense clause under art. 42(7) TEU and the solidarity clause under art. 222 TFEU rest on the insurance rationale, whereby reciprocity is more direct*", p. 48. See also E. DI NAPOLI, D. RUSSO, *op. cit.*, pp. 202-203 in which the authors outline the concept of horizontal solidarity and its dimension within arts. 3 TEU, 80 and 222 TFEU. The authors also claim that the establishment of the EU Solidarity Fund through Council Regulation (EC) No 2012/2002, *establishing the European Union Solidarity Fund*, of 11 November 2002, in OJ L 311 of 14 November 2002, is a legal act which can be explained as guided by the principle of infra-state solidarity.

[12] E. DI NAPOLI, D. RUSSO, *op. cit.*, p. 202.

[13] P. PAVLOPOULOS, *The Principle of Solidarity in the Context of the Primary European Law*, cit., p. 1268.

[14] See S. OETER, *Art. 21: the Principles and Objective of the Union's External Action*, cit.

[15] *Ibid*, p. 848.

[16] On this note, see J. CZUCZAI, *The Principle of Solidarity in the EU Legal Order – Some practical examples after Lisbon*, in M. MARESEAU (ed.), *The EU as a Global Actor Bridgning Legal Theory and Practice*, Lieden-Boston, 2017, pp. 147-149. Czuczai argues that solidarity within EU primary can be said to have both an internal as well as an external dimension. The external one refers both to the aims of the EU as set forth by art. 3 TEU as well as those envisaged by art. 21. On the contrary, the *internal* dimension of EU Law, according to the author refers mostly to provisions within the TFEU and in particular art. 222, which is precisely defined as "solidarity clause". This provision binds the MS to act in a spirit of solidarity in case one of them is facing an emergency situation as the ones laid out within the Article. Also art. 42 calling for mutual assistance can be enumerated amongst the examples of the internal dimension of solidarity, which is therefore reserved only to its MS.

In the case of integration, it is difficult to argue exclusively either for a vertical or horizontal conceptualization of solidarity as the two notions might be indeed overlapping. Assuming that the enlargement and later integration processes are aimed at providing full membership to candidate countries, to "*make them feel European*", than it necessarily implies the need for both an infra-state and infra-individual conceptualization of the notion of solidarity. The AG in its Advisory Opinion to the *OPAL* Case stated: "(…) *even though the principle of solidarity is multifaceted and deployed at different levels, its importance in primary law as a value and an objective in the process of European integration is such that it may be regarded as significant enough to create legal consequences. Central to the approach thus taken by the Court is a particular conception of the normative value of the Treaties: their provisions serve the same purpose as any provision having constitutional status and it falls to the body required to interpret them (ultimately, the Court of Justice) to determine the prescriptiveness of their content*"[17].The AG therefore recalled the fact that the main field of conceptualization, where solidarity finds its basis and its expression is that of integration.

Concerning the TFEU, the principle of solidarity is recalled at arts. 67 and 80 TFEU regarding immigration; while recently, it has gained momentum due to the Ukrainian conflict in terms of art. 222 TFEU[18], which calls for solidarity between the Member States in the case in which they are facing either a terrorist attack, a natural calamity or disaster which can also be due to human actions. It is also recalled within the provisions of art. 194 TFEU concerning energy efficiency, which states that the Union shall aim "*in a spirit of solidarity between the Member States*"[19] to ensure the functioning of the energy market as well as energy supply to the MS. The notion of solidarity expressed within art. 194 TFEU will be duly analysed in the following Sections, in regards to the recent *OPAL* case in front of the ECJ. A careful look at the legal basis for the principle of solidarity thus depicts a rather scattered scenario surrounding its conceptualization and even more so in terms of its application. Therefore, looking at the jurisprudence of the ECJ, and particularly the most recent one concerning the issue of solidarity, is helpful in trying to unveil the ambiguity surrounding the notion.

In terms of migration, the analysis of art. 67, para. 2 and art. 80 TFEU demonstrates again how solidarity is differently presented within the provisions of primary law at EU level. Indeed, the former introduces solidarity concerning migration and particularly asylum, recalling the notion of horizontal solidarity – thus amongst the MS, amounting to a general principle of law, although not specifically using such term as for the latter article. The wording used within art. 80 TFEU clearly states that the policies of the EU and MS in that field shall be "*governed by the principle of solidarity*", thus implying that solidarity in this case is not simply a value or an objective, but a principle governing the action of the EU, thus a general principle of law which entails legal obligations. Here, solidarity is envisioned as sharing of burdens and responsibility[20] and there have been cases in which the MS of the EU have been brought in front of the Court for having failed

[17] ECJ, Opinion of the Advocate General, *Germany v. Poland,* cit., paras. 70-71.

[18] As of 24 June 2022, Ukraine has been granted official candidate status by the EU. The request to begin the accession process to the EU came by Ukraine as a response to the aggression perpetrated by the Russian Federation. See European Parliament's Press Release, *Grant EU candidate status to Ukraine and Moldova without delay, MEPs demand*i, 23 June 2022.

[19] Treaty on the Functioning of the European Union of 18 December 2007.

[20] See D. VANHEULE, J. VAN SELM, C. BOSWELL, *The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, Including its Financial Implications, Between the Member States in the Field of Border Checks, Asylum and Immigration: Study*, 2011, available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453167/IPOL-LIBE_ET(2011)453167_EN.pdf.

to respect the obligations under art. 80 TFEU[21]. In the opinion of Advocate General Sharpston concerning the case *Commission v. Poland and others*, the principle of solidarity resonates well beyond the field in which it is being applied, thus implying it as an encompassing principle, which is "*the lifeblood of the European project*"[22].

Last but not least, one of the most prominent fields in which solidarity finds its implementation is the context of crisis management. This refers to the internal dimension of solidarity, which is presented at arts. 122 and 222 TFEU. Indeed, the former one, pertaining to the economic and monetary policy, mentions the possible situation in which "*severe difficulties arise in the supply of certain products, notably in the area of energy*"[23] and in this case the notion of solidarity is referred to as "*spirit*", not as principle as clearly affirmed within the provisions of the aforementioned art. 80 TFEU. Moreover, as set for by the article, the Council is entitled to grant MS financial assistance provided they are facing one of the conditions enlisted within the article[24].

Of particular relevance is art. 222 TFEU, which is most commonly referred to as the "*solidarity clause*"[25]. This clause allows the EU and the MS to act jointly in case of terrorist attacks in the territory of one of the MS or in the occurrence of natural or man-made disasters. This provided the legal basis for the establishment of the European Solidarity Funds, one of the main instruments that the EU has implemented to promote solidarity, although mainly in terms of financial relief. The fund has proved particularly significant in the aftermath of the COVID-19 pandemic, an event which, alongside the Ukrainian crisis, have sparked the debate on solidarity within the EU and may have, on some level, provided a spark for a shift in the implementation of solidarity at EU level. Although art. 222 TFEU reprises the "*spirit of solidarity*" phrase, it has been recognized as producing legal effects and thus amounting to a general principle of law, also in the recent *OPAL* case, which will be discussed within the next Section.

The solidarity clause is a binding norm of the Lisbon Treaty, which sets forth an obligation for the EU to act with "*all the instruments at its disposal*", including the deployment of military means – which will be made available by the other MS – in solidarity and assist a MS facing a terrorist attack or natural disasters. Interestingly, the article does not set forth an obligation in terms of means for the MS: they are free to choose the means that they deem as more appropriate to act in solidarity with the requesting State. Indeed, to this end, the MS shall act in coordination with the Council[26].

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[21] See ECJ, Judgment of 2 April 2020, Joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland and Others*, ECLI:EU:C:2020:257. Poland, Hungary and the Czech Republic had failed to act in conformity with the principle of solidarity and fair sharing of responsibility recalled within Decision 2015/1523 and 2015/1601 in terms of the relocation of applicants for international protection.

[22] See ECJ, Opinion of the Advocate General, 31 October 2019, Joined cases C-715/17, C-718/17 and C-719/17, *European Commission v. Republic of Poland and Others*.

[23] Treaty on the Functioning of the European Union, *cit.*, art. 122.

[24] G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea, op. cit.,* p. 92.

[25] See https://eur-lex.europa.eu/EN/legal-content/glossary/solidarity-clause.html*;* further on this, see also: J. KELLER-NOELLET, *The Solidarity Clause of the Lisbon's Treaty*, in *Think Global – Act European*, No. 7, 2011.

[26] T. RUSSO, *La solidarietà come valore fondamentale dell'Unione Europea: prospettive e problematiche*, in E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN, R. VIRZO, *Dialoghi con Ugo Villani, Bari*, 2017, p. 669. Although there is agreement over the fact that art. 222 amounts to a legally binding norm and so does the principle of solidarity, legal scholars' positions seem to differ in terms of the extent of the obligation. As Russo recalls, some authors have described the obligation under art. 222 as a soft commitment of reciprocal defence in the case in which one of the MS is facing an unconventional threat to its national security, such terrorist attacks for instance. Other purport that the solidarity clause entails a meta-obligation to act in a spirit of solidarity and by means of cooperation, while other affirm a clear

Art. 194 TFEU is another relevant provision especially in terms of this contribution, since it has been at the centre of the recent *OPAL* case, which will be analysed in the following pages. This provision moves away the issue of solidarity from the context of emergencies and shifts it into the energy sector. It requires the EU to meet certain objectives, laid out within the first paragraph[27], in a spirit of solidarity with the MS, guided by the wider aim of preserving and improving the environment.

3. Solidarity as a General Principle of EU Law

The doctrinal debate surrounding solidarity has been lively and various, offering a rather scattered scenario of positions[28] especially over the legal nature of solidarity, ranging from authors who asserted its binding legal nature as a general principle of EU Law and those who have claimed that solidarity is no more than value – although a fundamental one –thus carrying no legal obligations. Indeed, a large part of the discussion on solidarity in EU Law concerns its legal nature, and whether it should be considered a *principle* of EU Law or if, on the other hand, solidarity can only be enumerated amongst the values of the EU. For instance, according to Pavlopoulos, solidarity is a "*key legal principle of the European Union and, even more, a principle that carries a fundamental importance for its consistency and, consequentially for its viability*".[29] According to the author, the principle of solidarity holds a fundamental role within EU Law. This is mostly due to the fact that it allows the EU itself to overcome some of the "*difficulties*" that it faces on account of its own structure on the one hand, and on the other since it contributes to the unity and effectiveness of its functions. Several scholars support this notion that solidarity cannot be simply regarded as a value but must be awarded the status of general principle[30] and of the same opinion is shared by the Court of Justice of the EU, as it will be outlined within the following Section.

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obligation stemming from the principle of solidarity. Interestingly, the author posits that due to the discretional nature of art. 222, there is still a grey area surrounding the solidarity clause. Indeed, since MS can opt for art. 42 TEU, the nature of the obligation to act in solidarity remains unclear: there is an obligation to act but they still retain large discretion in terms of how and provided that certain specific events are occurring.

[27] Treaty on the Functioning of the European Union, cit., art. 194, states at para, 1: "*In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union;(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks*".

[28] See E. KÜÇÜK, *op. cit.*, for instance, who claims that the principle of solidarity entails legally binding obligations according to the functional role that it is being attributed. See also: E. DAGILYTĖ, *Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme*, cit. Conversely, see P. VAN CLEYNENBRUEGEL, *Typologies of Solidarity in EU Law: a Non-Shifting Landscape in the Wake of Economic Crisis*, in A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *op. cit.*

[29] P. PAVLOPOULOS, *The Principle of Solidarity in the Context of the Primary European Law*, cit., p. 1276.

[30] On this note, see J. CZUCZAI, *The Principle of Solidarity in the EU Legal Order – Some Practical Examples after Lisbon*, cit., p. 145. The author highlights the fact that regardless of its wide scope, solidarity has been identified by the CJEU as a general principle of EU Law in several cases, such as for instance Joined Cases C-63/90 and C-67/90, *Portugal and Spain v. Council* as well as in *Poland v. Commission.* Similarly, Butler awards solidarity the status of a *classical principle* of constitutionalism in EU Law despite being a "*fuzzy*" legal term. This hints at the fact that although the legal character of solidarity has been established, it is difficult to grasp it in its entirety. See G. BUTLER, *Solidarity and Its Limits for Economic Integration in the European Union's Internal Market*, in *Maastricht Journal of European and Comparative Law*, Vol. 25, No. 3, 2018, p. 312.

A different position is on the other hand proposed by Van Cleynenbruegel, who recalls the notion of solidarity provided by Habermas, who claimed that solidarity should be a "*policy guidance tool*" [31], which is particularly true and fitting in the field of integration policies. Yet, the author leaves it at nothing more than an instrument which should guide the Union in shaping its policy. Especially in terms of the integration projects of the EU it is claimed that there is no legal basis for solidarity and therefore no obligation, since it cannot be regarded as a legal principle[32]. This preliminary overview already demonstrates that there are opposing approaches as far as the analysis of the legal nature of solidarity is concerned.

A very through and interesting analysis of the different nature of solidarity is provided by Dagilytė[33], who recalled two main *variations*. The first one concerns solidarity as a *value*: to be regarded as such, it should possess three main features, namely: the inability of being directly observed; the consequent moral considerations; and what Dagilytė defines as "*conceptions of the desirable*", suggesting that they refer to an understanding of the legal order as it ought to be. The most relevant criterion is the first, since values are not legal norms and refer to moral aspirations which the EU either is based on or wishes to pursue and promote. Solidarity, as it was recalled, is indeed both a value and an objective according to the provisions of the TEU[34]. The author suggests, in terms of the legal nature of values in EU Law, that: "*although values are part of legal standards, they differ from legally binding norms which can be relied upon in a legal action: while norms command and enable the decision-maker to decide what action to take, values only recommend certain behaviour*"[35]. This understanding of solidarity is the one reflected within arts. 2 and 3 TEU, being a value, which cannot be directly observed but rather able to shape EU legal standards, guiding the Union's actions in those fields in which it is recalled. The second variant – as Dagilytė refers to it – concerns the nature of solidarity as a *general principle* of EU law. Again, the author outlines the features for general principles, which ought to: have constitutional status, have general application, help in the interpretation of EU Law and in case of dispute, be used by the parties as grounds for judicial review[36].

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[31] Habermas' lecture on *Democracy, Solidarity and the European Crisis* is available at the following link: https://www.pro-europa.eu/europe/jurgen-habermas-democracy-solidarity-and-the-european-crisis/?print=print.

[32] P. VAN CLEYNENBRUEGEL, *op. cit.*, p. 25. The author claims that: "*From a general point of view, the values of solidarity appear to be rather devoid of any such substance at all and at best vaguely expounded on in a variety of mutual recognition schemes, regulatory standards, fundamental rights and mixed administration techniques. A result of this is that* no legal principle of solidarity, *which could both guide and restrain MS' burden-sharing obligations within the EU integration project can be identified*" (emphasis added).

[33] See E. DAGILYTĖ, *Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme, cit.*

[34] See Section 2 of this contribution.

[35] See E. DAGILYTĖ, *Solidarity: a General Principle of EU Law? Two Variations on the Solidarity Theme op. cit.*, p. 71-75.

[36] *Ibid*., p. 79-80.

The author also recalls the approaches which the CJEU has adopted in order to identify whether a principle can be regarded as general principle of EU Law. First of all, national convergence is investigated, in order to establish whether the alleged principle is shared among the legal orders of the MS. Interestingly, the requirement does not call for "full convergence". A second approach looks for principles within the constitutional traditions of the MS, looking for trends and adaptations of the principle which interests both the legal systems of the MS and that of the EU. Thirdly, the Court has inferred general principles also from EU legislation by adopting an inductive generalisation and lastly, a number of general principles have also been deduced from the Treaties.

Notwithstanding the criteria identified by Dagilytė to establish whether a principle can be regarded as general principle of EU Law or not, it is not as straightforward as it may seem to define whether solidarity can be regarded as such, due to the fact that it requires a case-by-case approach. This perspective was highlighted, as it will be presented, by the *OPAL* case. There are areas in which solidarity is evoked without entailing legal obligations, and areas in which it has been elevated to a legally binding norm and to general principle of EU Law[37]. The jurisprudence of the ECJ in this sense has been crucial in determining those areas in which solidarity entails legal obligations or where it can be only regarded as a value, and in particular with the *OPAL* case, which will be the object of the following Section, the ECJ has clearly recognised the existence of a general principle of solidarity with legal obligations for the EU and the MS.

4. The Principle of Solidarity in the Recent Jurisprudence of the European Court of Justice

It is a well-recognised fact within the legal scholarship and the studies dedicated to the principle of solidarity that, as the overview of the EU primary law sources has demonstrated, that according to the area in which solidarity is implemented its nature changes. The same view of a case-by-case approach has been affirmed by the Advocate General in the *OPAL* case, which will be duly analysed in the following pages as well as other cases of the ECJ case-law recalling the principle of solidarity.

The *OPAL* case was not the first occasion in which the ECJ dealt with solidarity. Several have been the cases which concern solidarity, such as for instance *B.P. v. European Commission,* in which the Advocate General affirmed that solidarity amounts to fundamental principles of the EU; or again *ENI and others* case of 2017, where AG Mengozzi stated that principle of solidarity could be defined as having constitutional character[38]. Yet the *OPAL* case in of particular interest since it allows an overview of the different positions regarding solidarity and has provided the Court with the opportunity to clarify its legal nature.

The notion of solidarity as a general principle of law featuring two dimensions[39] shares the same traits developed by the Advocate General in his opinion[40] concerning the recent case brought in front of the ECJ, namely *Germany v. Poland* (*OPAL* case)[41]. The *OPAL* case offers the possibility to reflect over the legal nature of the principle of solidarity as it provides a full picture of the different understandings of the legal nature of solidarity. Nonetheless, in this occasion, the Advocate General and the Court took a firm stance in favour of the obligations which derive from the solidarity principle, thus hinting at the fact that solidarity cannot be merely defined as a political value, but by all means as a general principle.

The jurisprudence of the ECJ up until the *OPAL* case can be defined as rather cautious in terms of the solidarity principle. For instance, in *Commission v. France* (ECJ, Case

[37] For instance, Dagilytė asserts that the area of immigration and asylum is one of those fields in which the principle of solidarity has crystalized as general principle of EU Law. Similarly, Russo recalls the legally binding character of solidarity in regards to the solidarity clause, namely art. 222 TFEU. See E. DAGILYTĖ, *Solidarity: a General Principle of EU Law? Two Variations on the Solidarity Theme op. cit*.; T. RUSSO, *La solidarietà come valore fondamentale dell'Unione Europea: prospettive e problematiche, op. cit.*

[38] These cases are recalled by Morgese in particular see footnotes 39 to 43 in G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea, op. cit.,* p. 98.

[39] E. DI NAPOLI, D. RUSSO, *op. cit.*,

[40] ECJ, Opinion of the Advocate General, 18 March 2021, Case C-848/19 P, *Germany v. Poland*.

[41] ECJ, Judgement of 15 July 2021, Case C-848/19 P, *Germany v. Poland.*

6/69 and 11/69) the Court referred to the obligations deriving from the loyalty principle instead of taking a bolder approach and identifying obligations stemming directly from the solidarity principle. Yet, a slight change in the approach of the Court can be seen in *Commission v. Italy* case (EJC, Case 39/72), recalled by Küçük[42], where the Court adopted a solidarity based approach, conceiving it as cooperative action and recognising that there are solidarity duties when MS have to apply Community rules "unselectively" even though they might be against their national interest. Consequently, it can be easily inferred that, as stated by the author, the Court has supported a conceptualization of solidarity which is based on reciprocity, since belonging to a community such as the EU entails having to undertake some duties and responsibilities which might be against national interests[43].

The onset of the *OPAL* case dates back to 2016, when Poland, Latvia and Lithuania complained to the General Court (GC) that the latest Commission's Decision[44] concerning the OPAL pipeline violated the solidarity provision under art. 194 TFEU which specifically refers to the "*spirit of solidarity*" which should guide the Union's actions in the energy sector, read in conjunction with art. 36 of the Gas Market Directive[45]. In that occasion, the Commission claimed that the principle of solidarity lacks a binding character and could therefore not be regarded as a legal requirement, but rather as a political value which should guide the Union's actions in several policy fields and in developing legislation[46]. The GC nonetheless rejected the Commission's argumentation in terms of the nature of the solidarity principle and argued in favour of Poland's position that the Commission's Decision had violated the solidarity provision enshrined within art. 194 TFEU[47].

The most recent case, which dates 2021, concerns Germany's appeal to the GC's decision[48]. In their Advisory Opinion, the Advocate General, in an effort to recollect all of the sources in primary EU Law mentioning the principle of solidarity, came to the conclusion that it is difficult to provide a full and encompassing definition of the principle, although claiming that solidarity possesses both a vertical (between the EU and MS) and a horizontal (between institutions, MS and citizens) dimension[49], thus slightly changing the conceptualization previously recollected – proof, once again, of the scattered and

[42] E. KÜÇÜK, *op. cit.*

[43] The Court actually referred to a "Community solidarity" in the Joined cases C-63/90 and C-67/90, namely *Portugal and Spain v. Council* in 1992 and stated that solidarity is a general principle, inferred from the nature of the Community. See J. CZUCZAI, *The Principle of Solidarity in the EU Legal Order – Some practical examples after Lisbon, op. cit.*

[44] See Commission Decision, *on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third-party access and tariff regulation granted under Directive 2003/55/EC*, C(2016) 6950, of 28 October 2016.

[45] See Directive 2009/73/EC of the European Parliament and of the Council, *concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC*, of 13 July 2009, in OJ L 211, of 14 August 2009.

[46] ECJ, Judgment of the General Court of 10 September 2019, Case T-883/16, *Poland v. Commission*.

[47] On this note, see M. IAKOVENKO, *Case C-848/19 P: Germany v Poland and Its Outcomes for EU Energy Sector: An Extended Case Note on the European Court of Justice judgment in the OPAL case*, in *Journal of World Energy Law and Business*, Vol. 14, No. 6, 2021, pp. 436-446.

[48] Further on the case see M. IAKOVENKO, *A Need for Clarification of The energy Solidarity Principle: What Can Be Learned from the General Court's Judgment in the OPAL Case?, in Journal of World Energy Law and Business*, Vol. 14, No. 1, 2021, pp. 38-48.

[49] ECJ, Opinion of the Advocate General, *Germany v. Poland, cit.*, para. 60. In the following paragraphs, the Advocate General reconstructs the division among scholars surrounding the issue of solidarity, stating that the doctrine is divided between those who accept solidarity has having a binding character, thus, a general principle of law, and those who recognized it as constitutional or structural principle, thus meaningful if read in conjunction with the principle of loyal cooperation; paras. 63-64.

complex framework surrounding the notion of solidarity. The Advocate General recalled also the Court of Justice's case law in terms of the solidarity principle, stressing once again that the Court failed to provide a uniform definition of the notion. Yet, the AG highlighted that the Court has usually applied the solidarity principle in cases concerning States measures contrary to the principle by adopting a case-by-case approach, such as in *Commission v. France*[50] and *Commission v. Italy*[51], but most notably concerning the application of art. 80 TFEU, relating to the policies of immigration, asylum and border control. In these cases, the Court had to adjudicate on the distribution of quotas of applicants for international protection between the MS, thus on the sharing of burdens in terms refugee and asylum applications, and the Court drew legal consequences from the violation of the principle of solidarity, hence reinforcing its legally binding character.

On the other hand, in its appeal, Germany argued against the binding character of the solidarity principle. More precisely, it contended that the notion of energy solidarity as enshrined within art. 194 TFEU is purely a political notion and not a legal criterion determining rights and duties for EU institutions and MS, due to its abstract and ambiguous nature. The principle would apply only in supply crisis situations, thus not being able to produce legal effects in situations other than crisis[52]. The position was disputed by Poland and the other two countries supporting the claim, namely Latvia and Lithuania, who once again reinstated the binding legal nature of the principle of solidarity, which "*creates a sort of 'criterion' for acknowledging Member States' security of supply needs and other objectives in the energy sphere*"[53]. Yet, the AG rejected Germany's position arguing that in those cases in which the Treaties have confined solidarity to mere political value, they have done so clearly and expressly, such as, for instance, in the case of art. 24 TEU which refers to the notion of "*mutual political solidarity*", but the same cannot be concluded for the cases of art. 67 TFEU concerning asylum policy and the one in analysis, which is art. 194 TFEU, concluding that the principle of solidarity is in fact justiciable and "*capable of legal application*"[54].

In the end, the ECJ did not uphold the appeal of Germany, thus agreeing with the conclusions of the AG, recalling the legally binding nature of the solidarity principle and confirming that it entails rights and duties both for the MS and for the EU and recognising it is a general principle of EU Law. According to Iakovenko: "(…) *both the ECJ and Advocate General agreed that ensuring compliance with the solidarity principle cannot be limited only to a general impact assessment on security of supply provided in Art. 36 of the Directive and a more comprehensive approach on case-by-case basis and with a regard to situation in different Member States is to be considered"*[55].

As suggested by the Court, a case-by-case approach is therefore to be preferred when dealing with the cases involving the solidarity principle, due to its complexity and different fields of application. Notwithstanding its conceptualization, the principle presented in the *OPAL* case recalls essentially features of solidarity expressed within other provisions of the treaty. In light of the new decision of the Court, one might wonder whether the same could be said about the enlargement process. Therefore, having established its legally binding nature, confirmed also by the case, the contribution will

[50] ECJ, Judgment of 10 December 1969, Joined cases 6/69 and 11/69, *Commission v. France*, EU:C:1969:68.
[51] ECJ, Judgment of 7 February 1973, *Commission v. Italy*, Case 39/72, EU:C:1973:13.
[52] ECJ, Opinion of the Advocate General , *Germany v. Poland, cit.*, paras. 87-89.
[53] M. IAKOVENKO, *Case C-848/19 P: Germany v Poland and Its Outcomes for EU Energy Sector,* cit., p. 440.
[54] ECJ, Opinion of the Advocate General, *Germany v. Poland, cit.*, paras. 95-100.
[55] M. IAKOVENKO, *Case C-848/19 P: Germany v Poland and Its Outcomes for EU Energy Sector,* cit., p. 440.

now move to determine if the same reasoning can be applied also to the principle of solidarity in the context of the enlargement process.

Even though the Court has offered some insights onto the legal nature of solidarity in this case, it is important to recall the position proposed by Morgese, who suggests a careful approach in regards to a definitive solution in this matter. The author favours an attentive and mindful approach even in light of the declarations made by the AG. Even though both the Court and the legal scholarship seem to be oriented towards a more solidarity-oriented interpretation of EU Law, the fact that the principle is recalled in many different fields and the consequent change in its core content call for a case-by-case approach in terms of solidarity. It is not possible to engage in a unidirectional and to strict reading of solidarity. Still, it must be analysed in light of its context of application[56]. Whether agreeable or not[57], the conclusions reached by the Court and the AG surely demonstrate an evolving trend within the EU in favour of a more solidarity-oriented approach. Yet, it is true that using solidarity as a legal instrument has been done carefully by the Court, despite the fact that it is recognised as a value and as a general principle[58].

5. The Principle of Solidarity in the External Action of the EU: Which Obligations for Candidate Countries?

The longstanding and challenging process of EU integration has been said to rest on solidarity. Numerous scholars have recognised that the basis for integration should be found in a solidarity-oriented approach that the EU has partially developed, and which should have been enriched with the adoption of the Lisbon Treaty. Yet the content of the principle of solidarity, as the conclusions by the AG and the ECJ in the *OPAL* case suggested, changes according to the area in which it is being recalled. Not only does the content change, so does the legal nature and therefore binding effect of solidarity. The solidarity envisaged in the external action of the EU rests on arts. 21 and 24 TEU. Immigration is also a field in which the outside dimension of EU's actions is put to the test, and where solidarity plays an important role as it has been recalled by the analysis of the provisions within the TEU. Solidarity in this context has been object of a number of contributions, which highlight the role that the principle plays in terms of burden sharing[59].

Morgese offers different "*variations*" of the notion of solidarity, moving from the assumption that it is not an encompassing notion but rather one that needs a case by case approach[60]. The first dimension of solidarity, and the most relevant in the framework of the external dimension of the EU, would be that of *preventive solidarity*, which is based on the reciprocal assistance between the MS and the EU. The kind of obligations which

[56] G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea,* cit., p. 101 ff.
[57] *Ibid.*, p. 100
[58] This argument has been found in particular in reference to internal market adjudication by Butler. See G. BUTLER, *Solidarity and Its Limits for Economic Integration in the European Union's Internal Market,* cit., p. 327.
[59] See G. MORGESE, *La solidarietà tra Stati membri dell'Unione europea nel nuovo Patto sulla migrazione e l'asilo*, in *Annali AISDUE*, No. 2, 2020, pp. 16-28; I. G. LANG, *No Solidarity without Loyalty: Why do Member States Violate EU Migration and Asylum Law and What Can Be Done?*, in *European Journal of Migration and Law*, Vol. 22, 2020, pp. 39-59; I. G. LANG, *Is There Solidarity on Asylum and Migration in the EU?*, in *Croatian Yearbook of European Law and Policy*, Vol. 9, No. 1, pp. 1-14; L. MARIN, S. PENASA, G. ROMEO, *Migration Crisis and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity*, in *European Journal of Migration and Law*, Vol. 22, 2020, pp. 1-10.
[60] G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea, op. cit.*, p. 101 ff.

stem from this approach towards solidarity are "*hard*" obligations, since they are based on the principle of loyal cooperation. Although connected, Morgese warns, loyal cooperation and solidarity are connected but not synonyms. This kind of solidarity – the political solidarity upon with the external action of the EU is based – is recalled by art. 24 TEU. States acting unilaterally should do so mindful of the positions of the other MS and so as not to prejudice the common action of the EU[61]. In this sense, it also interesting to recall what Sangiovanni[62] argues for, especially when referring to the international dimension of EU's action. He posits that a three-level approach to solidarity is to be preferred. The first one would be *national solidarity*, which guides the joint production of goods and market related legislation at EU level; followed by *Member State solidarity*, which shares the same traits as horizontal solidarity; and finally, *transnational solidarity*, conceptually similar to vertical solidarity[63]. It is clear that integration calls for a different and multi-layered notion of solidarity, which cannot be either/or. This depicts an even more complex scenario surrounding the notion of solidarity. Even though solidarity in the integration process calls for a two-fold and multi-layered approach, moving from the initial consideration that integrating new countries within the Union means to create a sense of unity and belonging among them, solidarity does not mean altruism. It was stated that "*solidarity refers to the common exercise of interests, for example in risk prevention or in a political struggle, while altruism finds its roots in an individual attitude which is totally unselfish"* and that "*solidarity, rightly understood, has many egoistic traits while altruism, on the other hand, is characterized by a total lack of egoism*"[64]. Therefore, following this approach, solidarity expects reciprocity[65].

Within this same line of reasoning Küçük recalls the understanding of solidarity provided by Durkheim, who rendered the concept of "*organic solidarity*"[66]. This notion draws from the core idea that self-interest is the main driving force within every society: even within a community, or a society, founded on shared common values and a sense of belonging. Individuals belonging to the same society work and behave according to certain rules and rely on other individuals not out of sheer altruism, but due to the unspoken promise of receiving something in return, because the general well-being of the society benefits them as well. In this, Durkheim finds one of the pillars of solidarity: a notion which is not based on altruism, but rather starts from the belief that self-interest guides most of the decisions undertaken both as a society as well as by States, a notion of solidarity which is functional to the society and guided by self-interest. Solidarity becomes a means through which self-interests are safeguarded in a collective context. The same is true if transposed to the field of MS within the EU: MS decided to surrender part of their sovereign powers because the overall benefit, guided by the *national* self-interest in this case, is greater. This conceptualization of solidarity finds resonance in the actions

[61] *Ibid.,* p. 102. The author asserts that the same kind of solidarity is the one recalled by the ECJ case *Commission v. France, supra* note 29, as well as the case *Commission v. Italy, supra* note 50.
The author suggests other two approaches to solidarity, one which could be referred to "*rebalancing solidarity*", which is the one recalled within provisions dealing with territorial cohesion and the same one upon which the Next Generation EU relies. In this case, solidarity aims are balancing unfavourable starting positions within the EU. Last but not least, Morgese recalls "*emergency solidarity*", which, as the name suggests, concerns solidarity obligations in case of emergencies and is therefore the basis upon which arts. 42 TEU and 222 TFEU rest.
[62] See A. SANGIOVANNI, *Solidarity in the European Union, op. cit.*
[63] *Supra,* p. 221.
[64] P. HILPOLD, *Understanding Solidarity Within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union,* Yearbook of European Law, Vol. 34, No. 1, 2015, p. 262.
[65] *Supra*. On this note, see also: A. SANGIOVANNI, *op. cit.*
[66] See E. DURKHEIM, *The Division of Labour in Society*, New York, 1997; E. KÜÇÜK, *op. cit.*, p. 44.

of MS, which have rarely acted purely as a "*desire to deepen the solidarity between their peoples"* to recall – partially – the wording of the Preamble of the TEU.

Indeed, in the *OPAL* case, Germany contested the notion of solidarity being framed as "*unconditional loyalty*", since, according to their view, solidarity also in the energy sector could operate only due to crisis situations as envisioned by the Treaties, thus offering a more restrictive view of solidarity. Yet, the AG in his Opinion stated that Germany had misconstrued the notion of unconditional loyalty as presented by the Court, affirming that "*the General Court has not said that the principle of energy solidarity must entail unconditional loyalty that respects the interests of all the Member States. What the judgment under appeal maintains (and this is an assessment which I endorse) is that that principle requires the relevant interests of the various Member States and of the European Union to be taken into account in the adoption of decisions in energy matters*"[67], thus eventually dismissing Germany's second ground of appeal. Therefore, the notion of solidarity as being founded upon self-interest and reciprocity seems to be distant from the one that the EU is wishing to pursue, especially if the recent actions taken under the flag of solidarity are considered[68].

In terms of the external action of the EU, as it was already recalled, it is arts. 21 and 24 TEU which recall the principle of solidarity. The first one affirms a commitment of the EU regarding its relations with third countries, namely, to advance in its external action the principle of solidarity (along others)[69]. The latter states the concept of political solidarity, which is a key concept in the context of integration, thus considering solidarity more as a value rather than a general principle. Therefore, an obligation to act in solidarity towards third countries can be envisaged under art. 21 TEU[70]. On this note, in the context of the integration of Western Balkans, there have been precedents of actions undertaken by the EU to act in solidarity with candidate countries. One of the most recent examples can be found in Decision 2020/701, which has established a system to provide Micro-Financial Assistance as a response to the crisis due to the COVID-19 pandemic towards neighbouring countries[71]. As it was mentioned, the recent pandemic has been one of the fields enhancing actions undertaken in solidarity both on part of the EU and of the

[67] ECJ, Opinion of the Advocate General, *Germany v. Poland, cit.*, paras. 132-133.

[68] I am specifically referring to the actions which the EU has undertaken in recent years first in the context of the COVID-19 pandemic also for Western Balkans and neighbouring countries, as well as the acts adopted in solidarity with Ukraine in light of the current aggression. Moreover, one of the bases upon which the Next Generation EU is conceptualized is that of strengthening European solidarity, which is considered as an encompassing notion transcending specific fields, but more in line with the "*desire for solidarity*" as expressed in the Preamble of the TEU. A report by SIEPS of 2021, the Swedish Institute for European Policy Studies, stated that: "*Specifically, Next Generation EU underscores the breadth of solidarity across EU Member States, it consolidates an expansion of competences within the European Commission, and it lays the foundations for more effective pan-European macroeconomic stabilization.*" See E. JONES, *Next Generation EU: Solidarity, Opportunity, and Confidence*, in *Swedish Institute for European Policy Studies*, June 2021.

[69] *Supra*.

[70] Yet Morgese underlines a lack of a wider understanding of solidarity on behalf of the European Union for instance towards nationals from third countries wishing to enter the territory of the EU, outside of what is required per art. 80 TFEU. G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea,* cit., p. 125.

[71] Decision (EU) 2020/701 of the European Parliament and of the Council, *on providing Macro-Financial Assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic crisis*, of 22 April 2020, in OJ L 165 of 27 May 2020. This Decision was directed at neighbourhood partners, which includes not only WB countries such as Albania, North Macedonia, Montenegro and Kosovo but also Georgia, Kosovo, Ukraine and Moldova for what concerns the neighbours in Eastern Europe.

Western Balkans[72]. The text of the decision does not mention the principle of solidarity, or binding provision enshrining the principle, neither within the Preamble nor within the text. Nonetheless, these kinds of instruments are enlisted within the measures which the EU takes "*in solidarity*" with its neighbouring countries[73].

It should be pointed out that the EU has taken several steps towards supporting Western Balkans, both in helping relieve from the pandemic and also in promoting socio-economic recovery by, for instance, extending the EU Solidarity Fund also to the Western Balkans that have started negotiations for the accession[74]. Therefore, a pattern is emerging according to which the EU tends to shape its solidarity acts in the context of Western Balkans in the form of financial relief, which might be regarded as a rather narrow approach to solidarity. The EU has framed its support towards WB in a three-fold approach: supporting the recovery from the socio and economic impacts of the COVID-19 crisis, micro-financial assistance in tandem with the IMF and the already mentioned extension of the EU Solidarity Fund to the WB. There have also been examples of actions undertaken in solidarity from the Western Balkans towards the MS of the EU. Indeed, it has already been recalled that Albania sent 30 doctors during the pandemic to Italy, one of the countries which had been mostly impacted by the outbreak of COVID-19.

One of the purposes of this contribution was to understand whether in light of the recent judgment of the ECJ concerning the *OPAL* case a more encompassing notion and approach of solidarity could have emerged, and whether this could be applied also to the context of the external relations of the EU and specifically to that of the Western Balkans. Following the reading of the judgment provided by Morgese, especially in terms of the questions that it leaves unanswered and the reasoning of the AG that the principle of solidarity requires a case-by-case approach, it seems difficult to provide a positive answer. What could be argued for is an emerging tendency by the ECJ, to interpret EU Law in a more solidarity-oriented manner, underlining the fundamental value that the principle has and to underline the obligations under the principle in the contexts in which it is recalled as such. Yet so far, its understanding is too focused on the particular field in which it is being implemented. Indeed, Morgese's image of the "*islands of solidarity*" is a well-fitting metaphor to describe the current situation of solidarity in EU Law[75].

Secondly, this contribution aimed at establishing whether, after having determined that solidarity is a general principle of EU Law, legal obligations can be envisaged also for candidate countries and specifically for the Western Balkans, some of which have long been involved in the accession process to the EU. Establishing whether legal obligations can be envisaged deriving from the principle of solidarity for candidate

[72] During the pandemic also Albania has carried out acts in solidarity with EU Member States and in particular Italy, by sending 30 doctors to the country to help contrast the spread of the virus. The act was referred to as undertaken in "*solidarity and friendship*" and the remark was well noted by the High Representative Joseph Borrell who acknowledged that "*solidarity is at the heart of the values of the Union*". See EEAS's Press Release, *Albania – an example of European solidarity against the coronavirus*. 31 March 2020.

[73] See, for example, the factsheets available at https://ec.europa.eu/info/publications/factsheets-eu-solidarity-ukraine_en. The recent Ukrainian crisis has triggered the EU to act in solidarity on several levels. The fact sheet demonstrates how the EU tends to conceive solidarity in terms of the relations with third countries, partners though, such as Ukraine, which has recently been granted the status of candidate country. Although the current paper focuses on the Western Balkans, this factsheet reinforces the notion that emergency micro-financial assistance – such as the one proposed to help in the aftermath of the COVID-19 pandemic – is the go-to instrument of the EU to act in solidarity. Indeed, Ukraine had been granted MFA also after the COVID-19 pandemic.

[74] On this note, see https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-12/17.12.2021-coronavirus_support_wb.pdf.

[75] See G. MORGESE, *Il 'faticoso' percorso della solidarietà nell'Unione europea, op. cit*.

countries is not an easy task due to the challenging position that candidate countries have in regards to EU Law. Indeed, they are still third countries, therefore not enjoying the same rights, duties and status of MS; nonetheless, they have a preferential status, since they are in the midst of the accession process to the EU. Therefore, specific obligations deriving from the articles within the TEU and TFEU enshrining the duty of solidarity cannot be considered binding upon them while in the midst of the accession process, if not specifically provided for within the SAAs. Still, in order to be granted the status of candidate countries, these States must fulfil the requirements laid out in art. 49 TEU, which specifies that potential candidates must respect the values enshrined within art. 2 TEU, which includes solidarity[76]. As it was demonstrated, the conceptualization of solidarity within art. 2 TEU depicts it as an attribution of European societies, thus materially constitutional and not as a principle entailing legal obligations. Candidate countries must also respect the provisions of art. 6 TEU, which does not mention the principle of solidarity specifically since it establishes the respect of the "*rights, freedoms and principles*" recognized under the Charter of Fundamental Rights of the European Union[77]. Western Balkans, as candidate countries, are required to respect and promote the rights, freedoms and principles enshrined within the Charter.

The respect and promotion of fundamental human rights has been identified as one of the fields in which the advancement of solidarity is enhanced. It was already recalled that an entire chapter of the Charter has been dedicated to solidarity. Therefore, the question arises as to whether the notion enshrined within the Charter is either that of a principle or a value. Within the Charter, solidarity is recalled in the Preamble as a universal value, therefore suggesting that the same conceptualization behind art. 2 is to be applied in this context: solidarity is conceived as a value upon which the EU is funded. No legal obligation deriving from the solidarity principle can be envisaged in this context for the Western Balkans.

Candidate countries are therefore still third countries from the perspective of EU Law although in the midst of enacting the necessary changes to adopt the EU legal system. Consequently, the binding legal obligations which candidate countries need to respect are the ones laid out in the Stabilization and Association Agreements, which is the first moment in the accession process laying out the structure and steps to full membership. From a legal perspective, a closer look at the Stabilization and Association Agreements with North Macedonia, Serbia and Albania for instance reveals that references of solidarity are rather lacking. All three SAAs mention solidarity only once, within the provisions dedicated to political dialogue, with a similar wording: "*Political dialogue between the Parties shall be further developed within the context of this Agreement. It shall accompany and consolidate the rapprochement between the European Union and (…) and contribute to the establishment of close links of solidarity and new forms of cooperation between the Parties*"[78]. The Preambles of all the SAAs are also silent with

[76] T. Russo recalls the obligations of acceding States in terms of arts. 2 and 49 TFEU and provides references in particular to the case of the Western Balkans in T. RUSSO, *Solidarity with Candidate States: The Case of the Western Balkans*, in L. PASQUALI (ed.), *Solidarity in International Law: Challenges, Opportunities and the Role of Regional Organizations*, New York- Turin, Giappichelli, 2022, pp. 219-235.
[77] *Treaty on the Functioning of the European Union*, cit., art. 6.
[78] *Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part*, 18 October 2013, OJ L 278/16. This agreement was concluded between the EU and Serbia, but the ones concluded with Albania and North Macedonia report the same exact wording, of course changing the name of the country. This is due to the fact that additional criteria were requested to all Western Balkans upon accession to the EU which were finalized and outlined within the SAAs. In the SAA with Albania, "*close links of solidarity*" is recalled within art. 8, see *Stabilisation and Association Agreement between the European Communities and their Member States*

regard to solidarity. The provisions enshrining solidarity under the title of political dialogue all make reference to the "*strong links of"* between the Parties and the values that are common to both. The notion of solidarity which is enshrined within this one provision recalls the conceptualization of art. 24 TEU, which, according to the AG[79], does not have a binding character but it is rather a political value, therefore, no obligation of solidarity can be deduced from the SAAs for the Western Balkans.

On the other hand, and although not part of the Western Balkans, it is interesting to underline that the AA between the EU and Ukraine, which was concluded in 2014, provides more references to solidarity. Indeed, it is recalled within the Preamble, stating that the parties are committed to increasing dialogue based on "*the fundamental principle(s) of solidarity*". It also recalled in regards to cooperation for what concerns asylum, migration and border management, at art. 16, which affirms that the cooperation in these areas should be based on "*the fundamental principle of solidarity*"; as well as under title V, concerning the economic and sector cooperation, at art. 338 dealing with energy cooperation, which in this case states that effective mechanisms in order to deal with energy crisis situations should be established "*in a spirt of solidarity*"[80].

From the analysis proposed, it is not possible to infer that specific legal obligations deriving from the principle of solidarity can be contemplated for the Western Balkans as candidate countries to the EU. What it is nonetheless possible to argue is that especially due to the fundamental role that solidarity plays in the context of the integration process, it is possible to consider the principle of solidarity as a guiding principle which must be respected and promoted also by candidate countries, since they are required to share and promote the values upon which the EU is founded. The principle of solidarity should guide the actions of the candidate countries which decide to become a part of the EU, thus entailing a general rule to act in conformity with the solidarity principle, deriving also from the increasing recognition of the principle at the international law level.

The underlying conception of solidarity as a value should draw from the notion developed at the international level, which calls for a more encompassing approach which is the expression of unity among individuals and States, especially when they share common goals, and which is a fundamental principle of international law. Indeed, in 2017, the Independent Expert on human rights and international solidarity presented a Draft declaration on the right to international solidarity, which was the result of two years of consultations with States, civil society and experts. In the declaration a definition of solidarity is provided within art. 1:

> "*1. International solidarity is the expression of a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals.*

of the one part, and the Republic of Albania, of the other part, 28 April 2009, OJ L 107; and again, in the same way at art. 7 for what concerns North Macedonia, see *Stabilisation And Association Agreement between the European Communities and their Member States of the one part, and the former Yugoslav Republic of Macedonia, of the other part,* 20 March 2004, OJ L 84.
This specific reference to the fundamental principle of solidarity in subsequent agreements between the EU and other potential candidate countries shows the recent tendency of the EU to underline its commitment in terms of solidarity and a more oriented approach in that matter.

[79] ECJ, Opinion of the Advocate General, *Germany v. Poland, cit.*, para. 97.

[80] See *Association Agreement between the European Union and its Member States of the one part, and Ukraine, of the other part*, 29 May 2014, OJ L 161/3.

2. International solidarity is a foundational principle underpinning contemporary international law in order to preserve the international order and to ensure the survival of international society"[81].

A notion such as the one presented, which is not legally binding, should be regarded as further instrument in the interpretation of the provisions enshrining solidarity. This approach is useful in going beyond an approach towards solidarity which is based on reciprocity[82], especially when duties of solidarity arise. Whether principle or value, solidarity should be carried out in "*a spirit of unity*" and that is particularly true when referring to integration processes, whose ultimate aim is to bring States and individuals, sharing common values and objectives, closer together.

6. Concluding Remarks

The purpose of this contribution was to analyse the principle of solidarity and determine whether legal obligations could be envisaged within the context of the integration process, both from the point of view of the EU and that of the candidate countries in analysis, namely the Western Balkans. To this point, it is difficult to argue for a general obligation deriving from the principle of solidarity for Western Balkans countries in the midst of the admission process to the EU. Still, due to the role that solidarity plays as a value within the EU legal system and to the fact that it is a pillar in terms of integration, solidarity-oriented actions should be carried out by the candidate countries. They are indeed under the obligation to respect the values enshrined in art. 2 TEU, including solidarity.

The picture depicted so far has provided a rather fragmented scenario surrounding the principle of solidarity, which therefore demands a case-by-case approach. Said fragmentation concerns more the conceptualization behind the notion of solidarity itself and what it does entail, other than the legal nature of the principle. Indeed, it was clearly demonstrated that the principle of solidarity, when expressed as such within EU primary and secondary law, does entail legal obligations and it is recognised as a general principle of EU Law. Determining its legal character is yet the first step in understanding solidarity, which is still rather difficult to grasp as an encompassing notion due to the different applications in the various areas of EU Law. The islands of solidarity, to recall once again Morgese's metaphor, are still too far apart (although connected, we should underline).

So far there has been a rather rigid and unidirectional way in terms of the implementation of the principle of solidarity also for what concerns the Western Balkans, since the EU has carried out its obligations enacting mostly financial measures as an instrument of solidarity. It is surely interesting to notice that the Commission Communication[83] published in 2020 on new perspectives in terms of the enlargement

[81] See UN General Assembly, *Draft declaration on the right to international solidarity*, 25 April 2017, A/72/171, available at https://www.ohchr.org/en/special-procedures/ie-international-solidarity/draft-declaration-right-international-solidarity. The UN General Assembly, *Report of the Independent Expert on human rights and nternational solidarity*, 19 July 2017, A/HRC/35/35, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/099/39/PDF/G1709939.pdf?OpenElement.

[82] Conceiving solidarity as being strongly connected to the notion of reciprocity is a common thread within legal scholarship. On this note, see M. KAEDING, J. POLLAK, P. SCHMIDT (eds.), *European Solidarity in Action and the Future of Europe*, Cham, 2022, as well as A. BIONDI, E. DAGILYTĖ, E. KÜÇÜK (eds.), *op. cit*

[83] European Commission, Communication COM(2020)57 finale from to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Enhancing The Accession Process - A Credible Eu Perspective For The Western Balkans*, 5 February 2020. See also J. Wouters, *op. cit.*, p. 264, where he suggests that the Communication by the Commission on EU

towards WB did not make any reference to the principle of solidarity. Yet, some recent events such and the COVID-19 pandemic and the Ukrainian conflict, as well as changes in the jurisprudence of the ECJ might show a shift in paradigm when it comes to solidarity. The AA with Ukraine which is subsequent to the SAAs with the WB shows more references to solidarity and therefore again a more solidarity-oriented approach in the context of the external action of the EU and in specific areas. A tendency towards a broader and more encompassing notion of solidarity should rely on the concept provided at the international level of "*a spirit of unity*". This notion partially resembles the "*desire for solidarity*" which is expressed within the Preamble of the TEU, and which should be one of the pillars guiding EU integration. Indeed, in a context such as that of integration, which entails the coming together of – in the context of the EU – not only States, but also individuals, who will share the same citizenship for instance, a broader notion is rather necessary.

ABSTRACT

The principle of solidarity has been often referred to as the corner stone, the pillar of the integration process of the EU. Yet, a large doctrinal debate has emerged in terms of its legal content. The purpose of this contribution is to evaluate the legal nature of the principle of solidarity and to understand its application in the context of the enlargement process of the EU. In particular, after having analysed the recent jurisprudence of the ECJ with due reference to the OPAL case, which has allowed the Court to further elaborate on the notion of solidarity and its legal nature, the contribution will analyse the principle of solidarity in relation to the integration of the Western Balkans. It will evaluate whether legal obligations from the principle of solidarity can be envisaged for candidate countries and in particular for the Western Balkans, or whether, on the other hand, solidarity in this context should be regarded as a principle guiding the actions of the candidate countries rather than determining legal obligations.

KEYWORDS

Candidate Countries, External Action, Integration, Solidarity, Western Balkans.

Enlargement Policy of 2016 lacks the opportunity of strengthening the respect of fundamental values enlisted in art. 2 TEU including solidarity.