MIGRANTS AND REFUGEES: A EU PERSPECTIVE ON UPHOLDING HUMAN RIGHTS THROUGH TAXATION AND PUBLIC FINANCE

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INTRODUCTION

The European Union ("EU") proclaimed the year 2015 as the year for development.[1] The EU is working hard to enhance development within Europe and within developing countries.[2] Development is currently one of the focus areas at the European and at the international level.[3] In the EU Joint Declaration on Consensus on Development, the EU Parliament lists a series of areas of law that affect development.[4] Immigration law is an important topic to tackle within development,[5] together with the provision of sustainable solutions for refugees.[6] The EU strives to make "migration a positive factor for development."[7] The EU

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1. Council Decision 472/2014, art. 1, 2014 O.J. (L 136) 1, 4 (EU) (designating 2015 as the "European Year for Development" (internal quotation marks omitted)).

2. *Development and Cooperation*, EUR. UNION, https://europa.eu/european-union/topics/development-cooperation_en [https://perma.cc/G7HX-QJRP].

3. *See Development Centre*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], http://www.oecd.org/dev/ [https://perma.cc/LNC6-XGME].

4. *See generally Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting Within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus,'* 2006 O.J. (C 46) 1 (EU) [hereinafter *European Consensus on Development*].

5. *Id.* at 7 ("Development is also the most effective long-term response to forced and illegal migration and trafficking of human beings."). For a more recent statement, see *Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting Within the Council, the European Parliament and the Commission: The New European Consensus on Development: 'Our World, Our Dignity, Our Future,'* 2017 O.J. (C 210) 1, 4 (EU) [hereinafter *European Consensus on Development*] (acknowledging that "mobility and migration" is an element that needs to be addressed in order to achieve sustainable development).

6. *European Consensus on Development*, *supra* note 4, at 4.

7. *Id.* at 7.

Commission supported this view in their recent document "*A Global Partnership for Poverty Eradication and Sustainable Development.*"[8]

The need to integrate migration policies into development policies has also been suggested by the EU Commission in another document discussing the development-migration nexus and maintaining that refugees and other migrants can result in positive assets for the national economies.[9]

The interconnections between migrants, refugees,[10] and development is an area of intervention and research which is very well explored in doctrine: the same cannot be said unfortunately of the links these factors have to tax law and public finance,[11] even though systematic investigations of this interplay is attracting considerable European and international attention in the specific field of tax law.

This Paper aims to provide an initial survey of the problems that connect taxation and public finance to current migration and refugee policies. It then discusses the existing EU obligations in the light of both European and international regulations and constraints in the area and concludes by illustrating the role taxation could play in supporting solutions to the refugee and migrant crisis that are respectful of the principles adopted by the EU Charter of Fundamental Rights,[12] with the goal of providing benchmarks for further analysis and an initial platform for possible improvements in the light of future reforms.

8. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Global Partnership for Poverty Eradication and Sustainable Development after 2015*, at 14, COM (2015) 44 final (Feb. 5, 2015).

9. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Maximising the Development Impact of Migration*, at 3, COM (2013) 292 final (May 21, 2013) (explaining how refugees can benefit economies through human capital, labor skills, and creating demand for goods and services).

10. Refugees are persons escaping from armed conflict or persecution. *See* United Nations Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]. The protection of refugees includes the guarantee of different human rights. Conversely, migrants decide to move not because of a direct threat of persecution or death. *See UNHCR Viewpoint: 'Refugee' or 'Migrant' – Which Is Right?*, U.N. REFUGEES AGENCY (July 11, 2016), http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html [https://perma.cc/UCA6-B9K2?type=image].

11. For the link between tax law and development, see generally *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Tax and Development, Cooperating with Developing Countries on Promoting Good Governance in Tax Matters*, COM (2010) 163 final (Apr. 21, 2010).

12. *Charter of Fundamental Rights of the European Union*, 2012 O.J. (C 326) 391, 395 (EU) [hereinafter *EU Charter*] (noting that the EU is "based on the principles of democracy and the rule of law").

I. THE EU COMMITMENT TO UPHOLDING HUMAN RIGHTS

Concerns for social justice are nowadays strongly intertwined with concerns about immigration flows. The migrant and refugee phenomenon currently experienced in Europe is alarming because of the unpreparedness of both the EU and the individual EU Member States in dealing with the massive social and governance issues that the unrelenting inflow of people presents.[13]

In 2015, one million individuals entered the EU creating an unprecedented humanitarian crisis with enormous political repercussions.[14] The EU Commission recognized that, albeit reactions were timely, they fell collectively short of managing the situation, leading to the recent set up of the Agenda on Migration of the EU.[15] It has been estimated that currently more than sixty million people have been coercively pushed out of their countries because of conflicts or natural disasters.[16]

The EU certainly is committed to upholding human rights. The Lisbon Treaty[17] considers human rights and the people's well-being a core value for the EU, as proclaimed in Article 2 of the Treaty of the European Union ("TEU").[18] The respect of human rights not only governs EU internal activities, but also all EU external actions.[19] Specifically, EU external policies concerned with development cooperation[20] have to be respectful of human dignity, freedom, democracy, equality, and the rule of law.[21] The European Court of Justice ("ECJ") upheld this correspondence between human rights and development in *European Parliament v. Commission of the European Communities.*[22]

13. *Refugees and Internally Displaced Persons*, EUR. COMM'N (June 19, 2017), http://ec.europa.eu/echo/refugee-crisis_en [https://perma.cc/MRW8-9FVJ].

14. *Migrant Crisis: One Million Enter Europe in 2015*, BBC NEWS (Dec. 22, 2015), http://www.bbc.com/news/world-europe-35158769 [https://perma.cc/7EK5-7HHW].

15. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, at 2, COM (2015) 240 final (May 13, 2005).

16. EUR. CIVIL PROT. & HUMANITARIAN AID OPERATIONS, EUR. COMM'N, FORCED DISPLACEMENT: REFUGEES, ASYLUM-SEEKERS AND INTERNALLY DISPLACED PEOPLE (IDPs) 2 (2017), http://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/refugees_en.pdf [https://perma.cc/23VQ-KSKM].

17. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 (EU) [hereinafter Treaty of Lisbon].

18. Consolidated Version of the Treaty on European Union art. 2, Oct. 26, 2012, 2012 O.J. (C 326) 13, 17 (EU) [hereinafter TEU].

19. *Id.* art. 21, at 28–29.

20. Consolidated Version of the Treaty on the Functioning of the European Union art. 208(1), Oct. 26, 2012, 2012 O.J. (C 326) 47, 141 [hereinafter TFEU].

21. Sergio Carrera, Daniel Gros & Elspeth Guild, *What Priorities for the New European Agenda on Migration?*, CEPS COMMENT., Apr. 22, 2015, at 1, https://www.ceps.eu/system/files/MigrationPriorities.pdf [https://perma.cc/K4C2-XCV3].

22. Case C-403/05, Parliament v. Comm'n, 2007 E.C.R. I-9070, ¶ 57.

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Additionally, Articles 18 and 19 of the EU Charter of Fundamental Rights assure the rights of asylum and also protect people subjected to removal, expulsion or extradition in the event that a serious risk exists that these people would face a death penalty, torture, or any other inhuman or degrading treatment or punishment.[23] The EU Member states are also signing parties in the Refugee Convention, thus accepting to provide international protection to people escaping from persecution or serious harm.[24] The Convention also grants refugees, among other rights, the rights to work, education, housing, and access to the judicial system.[25]

EU Member States can violate human rights under the protection of the EU Charter in times of humanitarian crisis if those rights are in fact ineffective.[26] Breach may occur if the discussed area of law falls under the scope of application of the EU Charter, and if a Member State's inaction violates the rights of asylum seekers.[27] Infringements of the EU Charter's provisions may occur when EU Member States implement or fail to implement EU law.[28] It is worth stressing that after the entry into force of the Lisbon Treaty, the EU Charter has become a binding instrument.[29]

II. THE FINANCIAL BURDEN OF THE IMMIGRATION INFLOW

Amidst this humanitarian crisis, the EU and its Member States are finding out they cannot protect human rights if there are not sufficient public finance and taxation funds specifically devoted to sustaining this effort, nor if there are no adequate institutional structures prepared to cope and manage such states of emergency. This way, the letter of the law becomes a stranglehold: costs associated with the refugee inflow and the related duties states have to fulfill are

23. *EU Charter* arts. 18, 19, *supra* note 12, at 399.

24. *Acceptance of Selected UN Conventions*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., http://fra.europa.eu/en/publications-and-resources/data-and-maps/int-obligations/un [https://perma.cc/JNN3-M34S].

25. Refugee Convention arts. 16–17, 21–22, *supra* note 10, at 164, 166, 168 (recognizing "access to courts," "wage-earning employment," "housing," and "public education" as rights).

26. *See* VICTORIA METCALFE-HOUGH, OVERSEAS DEV. INST., THE MIGRATION CRISIS? FACTS, CHALLENGES AND POSSIBLE SOLUTIONS 4 (2015), https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9913.pdf [https://perma.cc/V9RY-7NJR] (explaining the challenges facing Member States due to the scale of the crisis and the financial costs associated with housing, education, health, and other welfare sources).

27. *See* Simas Grigonis, *EU in the Face of Migrant Crisis: Reasons for Ineffective Human Rights Protection*, 2 INT'L COMP. JURIS. 93, 96 (2016) ("[D]uring the migrant crisis most of the actions that allegedly infringed the rights of asylum seekers were performed by the Member States. It was the Member States that . . . prevented [asylum seekers] from entering their respective territories [and] did not provide sufficient information or ensure due process for their rights defense.").

28. *EU Charter* art. 51, *supra* note 12, at 406.

29. Grigonis, *supra* note 27, at 96.

obligations,[30] not options[31] or acts of charity,[32] but the political and social costs connected to substantial public resources being redirected and spent are proving too onerous.[33]

All the same, EU principles, intents, and statutes are conflicting with the costs that Europe and EU Member States sustain to manage the unfolding crisis. Protecting and upholding human rights[34] is proving a difficult proposition requiring vast public finance expenditures and constant deployment of more resources,[35] both nationally and at the community level:

> [A] refugee can . . . be properly processed, housed, and fed, and given medical care at the cost of 35 percent of the host country's per capita GDP. . . . For EU member states, this would give us an average fiscal cost per refugee and year of roughly €10,000. For 3.5 million refugees, this would come to €35 billion per year. . . . In fiscal terms, accepting 3.5 million refugees into the EU should not be a problem, if it is properly managed. Still, given the limits on the EU's budget and the political difficulties of reform – raising €70 billion from the existing budget would probably require an overhaul of the Common Agricultural Policy . . . it would be unrealistic to hope to mobilise resources of this magnitude merely by shifting funds around. It may also be unrealistic to get this amount in additional transfers from national budgets to the EU, given that budgets are already strained.[36]

30. *See* Giovanni Sartor, *Fundamental Legal Concepts: A Formal and Teleological Characterization*, 14 ARTIFICIAL INTELLIGENCE & L. 101, 120 (2006) ("If one wants to achieve the conditioned legal result . . . one must bear the cost . . . of realizing the additional condition.").

31. SERENA BRUGNOLA, INST. OF EUR. DEMOCRATS, ARE REFUGEES THE REAL THREAT TO EUROPEAN IDENTITY? 20 (2016), https://www.iedonline.eu/download/2016/schengen/BRUGNOLA.pdf?m=1466518861 [https://perma.cc/59FV-LSA8].

32. URBAN JONSSON, HUMAN RIGHTS APPROACH TO DEVELOPMENT PROGRAMMING 20–21 (2003) ("Decisions and actions must be taken in recognition that every human being is a subject of human rights, not an object of charity or benevolence."); *see also* CEMAL KARAKAS, ECONOMIC CHALLENGES AND PROSPECTS OF THE REFUGEE INFLUX 2 (Eur. Parliament Research Serv., Briefing No. PE 572.809, Dec. 2015), http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572809/EPRS_BRI(2015)572809_EN.pdf [https://perma.cc/X6V8-T5E2] ("In the long term . . . the refugee influx might be positive for the European economy.").

33. SEBASTIAN DULLIEN, EUR. COUNCIL ON FOREIGN RELATIONS, PAYING THE PRICE: THE COST OF EUROPE'S REFUGEE CRISIS 2 (2016), http://www.ecfr.eu/page//ECFR_168_PAYING_THE_PRICE_-_THE_COST_OF_EUROPES_REFUGEE_CRISIS.pdf [https://perma.cc/HUL6-W6QJ] (mentioning the differences in the economic sustainability of refugee inflows across the EU Member States).

34. *See* WOLFGANG OBENLAND, TAXES AND HUMAN RIGHTS 1 (Tax Justice Network Ger., Policy Brief No. 08e, Feb. 2013), http://www.rightingfinance.org/wpcontent/uploads/2013/02/Read-full-document.pdf [https://perma.cc/3495-BMTF] (recognizing that "protecting and ensuring human rights" is among the "most important obligations of governments").

35. *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 97 (1999) ("Rights will regularly be curtailed when available resources dry up . . . .").

36. DULLIEN, *supra* note 33, at 10–11.

Rejection of refugees may be an alternative for EU Member States, but it too may impose a financial burden and related monetary costs as well. The EU Commission has presented a first set of legislative proposals to reform the Common European Asylum System and create "a fairer, more efficient, and more sustainable system for allocating asylum applications among [EU] Member States."[37] According to the proposal, a EU Member State may have the option to reject a refugee.[38] In that case, the EU Member State would need to pay a financial solidarity contribution of €250,000 for each applicant for whom it would otherwise have been responsible under the fairness mechanism of distribution of refugees.[39] Very clearly, both alternatives carry an economic burden; consequently, public finance or taxation measures need to be investigated to assure resources are available that can cover the costs of refugees and the guaranteeing of their human rights.[40]

III. THE ROLE OF TAXATION AND PUBLIC FINANCE

The recent EU Commission's preparatory works stress the link between taxation and migration.[41] In the 2016 preparatory work "*Forced Displacement and Development*," the EU Commission emphasizes the double role tax law and public finance play in such scenarios.[42] Public spending allows the creation of public services for displaced persons, but it can also be used as a tool to ease the process.[43]

In a more recent document, "*Proposal for a New European Consensus on Development*," the EU Commission has reaffirmed its continuous commitment in respect to migration, while at the same time paying particular attention to tax

37. European Commission Press Release IP/16/1620, Towards a Sustainable and Fair Common European Asylum System (May 4, 2016).

38. *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)*, at 10, COM (2016) 270 final (May 5, 2016).

39. *Id.* at 19.

40. *See* JACOB FUNK KIRKEGAARD, TOWARD A EUROPEAN MIGRATION AND MOBILITY UNION 1–2, 6–8 (Peterson Inst. for Int'l Econ., Policy Brief No. PB15-23, Dec. 2015), https://piie.com/publications/pb/pb15-23.pdf [https://perma.cc/UWF6-ZEAH] (investigating new funding sources).

41. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Lives in Dignity: from Aid-Dependence to Self-Reliance, Forced Displacement and Development*, at 15, COM (2016) 234 final (Apr. 26, 2016) ("[T]he financial burden on the host country from hosting refugees could also be achieved through tax revenues.").

42. *Id.* at 15–17.

43. *Id.* at 15 ("Public spending creates public services for displaced persons, and it can be used as a tool to ease the integration process.").

law and its role in fostering development.[44] In this light, taxation seems to be able to play a substantial role and help increase the visibility of the EU efforts in this area and increase awareness within EU Member States, following in the footsteps of other fundamental rights which are individually named and funded through taxation, such as healthcare or education.

In the EU framework, taxes are public revenue and contributions for general community, social, and economic policies.[45] Non-fiscal or extra-fiscal interests come in when we approach taxes from the point of view of their goals and in terms of economic or social policing.[46] Taxes work toward cooperation and solidarity: they are not the only tools that the public operators have at their disposal, of course, but they are rather effective when pursuing redistributive, allocative, and social policies that foster growth and development. From this perspective, taxes are perceived and evaluated more in ethical terms as promoting social welfare and as distributive justice.[47] This is a view shared by the Lima Declaration on Tax Justice and Human Rights:[48] this nonbinding document maintains that tax revenue is the most crucial tool to provide resources to support, protect, and uphold human rights in "*sufficient, equitable, and accountable ways.*"[49]

International obligations for contracting states also exist in respect to collecting financial resources to make the upholding of human rights more effective. This is what the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[50] prescribes in Article 2(1), concerning the duty for contracting states to collect revenue in order to secure and make effective human rights as contained in the international instrument.[51] The link among tax and

44. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: Proposal for a New European Consensus on Development, Our World, Our Dignity, Our Future*, at 25, COM (2016) 740 final (Nov. 22, 2016) (stressing that particular attention should be given to combating tax avoidance).

45. CÉCILE REMEUR, TAX POLICY IN THE EU: ISSUES AND CHALLENGES 1 (Eur. Parliamentary Research Serv., In-Depth Analysis No. PE 549.001, Feb. 2015).

46. *See* José Marcos Domingues, *Biofuels, Megacities, and Green Taxes: The Whys and Wherefores of Non-Fiscal Fuel Taxation. Brazil in World Context*, *in* 7 CRITICAL ISSUES IN ENVIRONMENTAL TAXATION: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 283, 288 (Kurt Deketelaere et al. eds., 2009); Joachim Englisch & Henning Tappe, *The Federal Republic of Germany*, *in* TAX ASPECTS OF FISCAL FEDERALISM: A COMPARATIVE ANALYSIS 273, 320 (Gianluigi Bizioli & Claudio Sacchetto eds., 2011) ("[T]ax laws may also pursue extra-fiscal policy objectives.").

47. RICHARD W. TRESCH, PUBLIC FINANCE: A NORMATIVE THEORY 173 (3d ed. 2015).

48. LIMA DECLARATION ON TAX JUSTICE AND HUMAN RIGHT ¶ 1 (2015).

49. *Id.* ¶ 2.

50. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

51. *Id.* at art. 2(1) ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and

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fiscal policy, revenue raising and expenditures of Article 2(1) of the ICESCR, and human rights has been recently acknowledged by the United Nations. U.N. Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, submitted her report concerning the impact of fiscal and tax policy on human rights at the 26th Session of the U.N. Human Rights Council in June 2014.[52] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights maintain that while guaranteeing these rights is a matter of international law, national states are de facto carrying responsibility for their effective upholding.[53] Violations of human rights generated by sub-standard public financing shift the responsibility of any deriving social and fiscal injustice to the individual state.[54]

IV. INVESTIGATING OPTIONS

A. Taxation of Refugees and Limits from International and EU Law

Proposals based on shifting the burden of taxation onto refugees have been suggested to render states less attractive to migrants and refugees.[55] These consider refugees liable to taxation simply on the basis of entering the country, with an income tax applied in the territory of the hosting state. The application of such a tax would result in an income tax roughly comparable to what they would pay in the country they fled. The reasoning is that the tax would consent to introduce a barrier that would help differentiate between refugees and those who falsely claim that status.

Tax law doctrine supports this approach. Domestic and customary international law do not prevent a country from applying a worse tax treatment to foreigners, and therefore refugees, subjecting them to protectionist taxation measures in the host country.[56] Such a solution would not formally conflict with

technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.").

52. Magdalena Sepúlveda Carmona (Special Rapporteur), *Report on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/26/28 (May 22, 2014).

53. *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶ 6, U.N. Doc. E/C.12/2000/13, *reprinted in* 20 HUM. RTS. Q. 691, 693 (1998) (noting that states have the obligation to protect economic, cultural, and social rights).

54. *See* Ignacio Saiz, *Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective*, *in* HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 77, 92 (Aoife Nolan et al. eds., 2013).

55. Ryan Bubb, Michael Kremer & David I. Levin, *The Economics of International Refugee Law*, 40 J. LEGAL STUD. 367, 383 (2011).

56. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 529 n.1193 (2005) (citing BRIAN J. ARNOLD, TAX DISCRIMINATION AGAINST ALIENS, NON-RESIDENTS, AND FOREIGN ACTIVITIES: CANADA, AUSTRALIA, NEW ZEALAND, THE UNITED KINGDOM, AND THE UNITED STATES 23 (1991)).

the letter of international law on the point. Article 2(1) of the ICESCR prescribes each state to take positive action in collecting as much of its available resources as it can, the end goal being to fully realize economic, social, and cultural rights.[57] On the other hand, this would go directly against another international obligation, since the Refugee Convention, Article 29, positively maintains that: "Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations."[58]

The references to "*duties, charges or taxes*" in the Refugee Convention are included in a provision bearing the heading of "*Fiscal charges*" and therefore purportedly including tax measures and "every kind of public assessment, be it of a general nature (taxes and duties) or for specific services rendered by the authorities to a given person (charges)."[59]

The United Nations observed that the provision included in Article 29 of the Refugee Convention was necessary, since refugees, formally stateless, are not protected by bilateral tax treaties:

> In principle foreigners residing in a country are subject to the taxes, duties and charges to which nationals are liable. They may also be subject to special taxes, duties and charges. A large number of bilateral treaties concluded on the basis of reciprocity stipulate that nationals of the contracting country shall enjoy the same treatment in fiscal matters as nationals. Stateless persons cannot invoke these treaties.[60]

Article 29 also prevents worse treatment to refugees in respect to citizens, specifically mentioning "*other*" (meaning different) or "*higher*" taxes or charges.[61] A refugee's fiscal position is a very unsafe one, with an increased tax liability and paradoxically higher risks of double taxation. Even when tax treaties can be invoked, the possibility they do not include clauses of protection

57. International Covenant on Economic, Social and Cultural Rights, *supra* note 50, at art. 2(1).

58. Refugee Convention art. 29, *supra* note 10, at 172.

59. HATHAWAY, *supra* note 56, at 530 (quoting NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION: A COMMENTARY 148 (1953)) (internal quotation marks omitted).

60. U.N. Ad Hoc Comm. on Refugees & Stateless Persons, *A Study of Statelessness*, U.N. Doc. E/1112;E/1112/Add.1, at 24 (Aug. 1, 1949).

61. HATHAWAY, *supra* note 56, at 531.

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against discrimination based on nationality[62] or citizenship[63] are very real, or that reciprocity is rejected on the basis of political reasons.[64]

Doctrine maintains that the fiscal equality deriving from this provision is a formal guarantee that does not exclude the possibility for refugees to pay higher taxes than the citizens of the host country.[65] For example, their source of income could be subject to a different and more penalizing tax treatment than the average source of income for citizens.[66]

The obligations descending from the Refugee Convention are binding for contracting states such as the EU Member States,[67] and are placed, according to Article 35, under the supervision of the United Nations.[68] National authorities are required to cooperate and facilitate U.N. supervision in respect to the application of the Refugee Convention.[69] Then, the introduction of a tax bearing on refugees would also be in conflict with EU law. The ECJ, in the *Dimensione Direct Sales* case, explicitly states that EU law must be interpreted consistently with international law, especially where a connection exists between the two.[70]

The doctrine of consistent or uniform interpretation[71] is also in line with the TEU, whose Article 3(5) states that the EU promotes the strict observance of

62. *See* OECD, Model Convention with Respect to Taxes on Income and on Capital art. 24(1), Jan. 28, 2003, http://www.oecd.org/tax/treaties/1914467.pdf [https://perma.cc/5426-NVYN] (forbidding discrimination by one Contracting State against nationals of another contracting state).

63. *Id.* at art. 3(1)(g)(i) (defining "national," in relation to a Contracting State, as "any individual possessing the nationality or citizenship of that Contracting State."). The principal rule for the non-discrimination clause in the OECD Model Tax Convention is nationality, while the criterion of residence is not the ground for the applicability of Article 24). *See* Ines Hofbauer, *Tax Treaty Interpretation in Austria*, *in* ECOTAX, TAX TREATY INTERPRETATION 13, 20 (Michael Lang ed., 2001).

64. HATHAWAY, *supra* note 56, at 527–31.

65. *Id.* at 531.

66. *Id.*

67. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

68. Refugee Convention art. 35, *supra* note 10, at 176 ("The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.").

69. *See generally* Monica Erasmus-Koen & Sjoerd Douma, *Legal Status of the OECD Commentaries – In Search of the Holy Grail of International Tax Law*, 61 BULL. FOR INT'L TAX'N 339, 350 n.21 (2007).

70. Case C-516/13, Dimensione Direct Sales Srl, Michele Labianca v. Knoll International SpA, ¶ 23 (May 13, 2015), http://curia.europa.eu/juris/document/document.jsf?docid=164262&doclang=EN [https://perma.cc/T3U6-8ZBW].

71. Jan Wouters, Jed Odermatt & Thomas Ramopoulos, *Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*, *in* THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES

international law.[72] Nevertheless, national attempts from both non-EU and EU Member states to introduce some form of differentiated tax burden for migrants and refugees are not so farfetched. In 1995, the federal government of Canada introduced a 975 Canadian dollar fee to every adult refugee and immigrant for the right of landing.[73] In 2000, refugees were exempted, and as of 2006, immigrants pay a reduced fee.[74] The tax has been widely criticized in that its flat-rate nature does not respect the principle of ability-to-pay for newcomers, hurts immigrants from poorer countries more, and is not tied to any provision of services.[75] Additional perplexities are associated with it being in possible breach of the Refugee Convention, whose Article 34 regulates naturalization and prescribes contracting states to facilitate the assimilation and naturalization of refugees, specifically indicating how charges and costs may be an obstacle to the process: "They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[76]

Europe is not exempt from similar experiences. Under the Single Permit Directive,[77] EU law allows Member States to charge fees for issuing permits.[78] The fee has to be "proportionate and may be based on the services actually provided for the processing of applications and the issuance of permits."[79]

249, 249 (Marise Cremona & Anne Thies eds., 2013) (stating that the ECJ "has interpreted EU law in light of international law").

72. TEU art. 3(5), *supra* note 18, at 17.

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Id.

73. *Fees: Right of Permanent Residence Fee (RPRF) - R303, Background*, GOV'T CAN. (Feb. 24, 2017), http://www.cic.gc.ca/english/resources/tools/fees/imm/rprf.asp [https://perma.cc/WQ4V-K6A5].

74. ANDREW BROUWER, CALEDON INST. OF SOC. POL'Y, PROTECTION WITH A PRICE TAG: THE HEAD TAX FOR REFUGEES AND THEIR FAMILIES MUST GO 2–3 (June 1999), http://www.caledoninst.org/Publications/PDF/headtax.pdf [https://perma.cc/VBR6-LARC]; GOV'T CAN., *supra* note 73.

75. THE HEAD TAX AND ITS EARLY HISTORY, THE GETTING LANDED PROJECT, https://www.cpj.ca/files/docs/headtax_kit_no_cover1.pdf [https://perma.cc/653K-E9FF].

76. Refugee Convention art. 34, *supra* note 10, at 176.

77. The Single Permit Directive regulates residence and work permits for non-EU citizens. Directive 2011/98, of the European Parliament and of the Council of 13 December 2001 on a Single Application Procedure for a Single Permit for Third-Country Nationals to Reside and Work in the Territory of a Member State and on a Common Set of Rights for Third-Country Workers Legally Residing in a Member State, 2011 O.J. (L 343) 1, 1 (EU).

78. *Id.* art. 10, at 7.

79. *Id.*

However, the Directive does not specify any ceiling. In the case of long-term residence permits, the ECJ maintained they should be "reasonable and fair and they must not discourage third-country nationals who satisfy the conditions laid down by that directive from exercising the right of residence conferred on them by that directive."[80]

This has not stopped Italy from stipulating that the issuing and renewing of residence permits for third-country nationals who are long-term residents should be subject to an obligatory tax and financial contribution, which is eight times the one for obtaining a national identity card.[81] Italian law prescribes the payment of a fee, the amount of which shall be set at a minimum of €80 and a maximum of €200 by joint decree of the Ministry of the Economy and Finance and of the Ministry of the Interior.[82] Exemption of payment in case of issuance and renewal of residence permits for asylum, request for asylum, subsidiary protection, and humanitarian reasons has only been introduced in 2009.[83] The ECJ found Italian legislation in breach of the principles of the Single Permit Directive,[84] mandating a disproportionate fee in the light of the objective pursued by said Directive and liable to create an obstacle to the exercise of the rights conferred therein.[85]

B. A EU Approach Based on the Principle of Solidarity

The EU is a "community of solidarity," and its budget has a distinct solidarity aim.[86] Following the Lisbon Treaty, the EU introduced Article 80 of the TFEU, establishing "*the principle of solidarity and fair sharing of responsibility, including its financial implications*" in the chapter devoted to policies on border checks, asylum, and immigration.[87] Before Article 80, Article

80. Case C-508/10, Comm'n v. Kingdom of the Netherlands, ¶ 46 (April 26, 2012), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0508&from=EN [https://perma.cc/ZR3D-Y5CB]; *see also* OECD, RECRUITING IMMIGRANT WORKERS: EUROPE 2016, at 170 (2016).

81. Case C-309/14, Confederazione Generale Italiana del Lavoro (CGIL), Istituto Nazionale Confederale Assistenza (INCA) v. Presidenza del Consiglio dei Ministri, Ministero dell'Interno, Ministero dell'Economia e delle Finanze, ¶¶ 14, 19 (Sept. 2, 2015), http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0309&from=EN [https://perma.cc/C8HH-SHR8].

82. Decreto Legislativo 25 luglio 1998, n.286, L. Mar. 6, 1998, n.40, art. 5(2b) (It.).

83. Legge 15 luglio 2009, n.94, G.U. July 24, 2009, n.170, supplement ordinario n.128, art. 1(22)(b) (It.) (amending L. Mar. 6, 1998, n.40, art. 5(2b)).

84. Case C-309/14, ¶ 30.

85. *Id.* ¶ 31.

86. *Financing the European Union: Commission Report on the Operation of the Own Resources System*, at 17, COM (2004) 505 final, Volume II (June 9, 2004).

87. TFEU art. 80, *supra* note 20, at 78; *see also* Paul McDonough & Evangelia (Lilian) Tsourdi, *The "Other" Greek Crisis: Asylum and EU Solidarity*, 31 REFUGEE SURV. Q. 67, 74 (2012); BRUGNOLA, *supra* note 31, at 15. The solidarity principle has led to the approval of several

63 of the Treaty Establishing the European Community only "*promot(ed) a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons*."[88]

In the context of the TFEU, solidarity as introduced by Article 80 means solidarity between the EU and the Member States, with the specific aim to reach the goals set out in the EU treaties.[89] Solidarity is also enacted through the redistribution of public financial resources via taxation.[90]

And while the EU Commission is reviewing use and results of financial instruments in the area of immigration,[91] lack of coordination means that emergency efforts are carried out by individual states that also adopt national approaches to solving the matter of migrants and refugees. A good example is the Mare Nostrum Operation, which was launched by the Italian Government in 2013,[92] solely financed via the Italian national public budget, and carried an overall cost of nine million euros per month, or approximately 100 million euros per annum.[93]

This annual figure is negligible in respect to the EU budget and the Italian GDP, sizing up to approximately 1/1,500th of the former and 1/15,000th of the latter, respectively.[94] Nonetheless, the political debate around the operation was fierce and mostly focused on how the financial burden was not shared between EU Member States.[95]

common funds. DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW: TEXT AND MATERIALS 539 (3d ed. 2014).

88. Consolidated Version of the Treaty Establishing the European Community art. 63(2)(b), Dec. 24, 2002, 2002 O.J. (C 325) 33, 59 (EC).

89. *See* TFEU art. 80, *supra* note 20, at 78.

> The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Id.

90. DIRK VANHEULE ET AL., THE IMPLEMENTATION OF ARTICLE 80 TFEU, at 28 (Eur. Parliament, Study No. PE 453.167, 2011).

91. *See id.* at 88.

92. *Mare Nostrum Operation*, MINISTERO DELLA DIFESA (It.), http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx [https://perma.cc/H79M-C5NJ].

93. *The New European Operation Frontex Plus/Triton: An Operation with Differing Objectives and More Limited Means than the Mare Nostrum Operation*, EUR. ASS'N FOR DEF. HUM. RTS., www.aedh.eu/The-new-European-operation-Frontex.html [https://perma.cc/9E9E8TSJ].

94. *EU by Topic: Budget*, EUR. UNION, http://europa.eu/european-union/topics/budget_en [https://perma.cc/R6SK-5SC7] (showing that the EU budget is 145 billion euros); *Italy GDP*, TRADING ECON., http://tradingeconomics.com/italy/gdp [https://perma.cc/R99K-7F5G] (showing that the Italian GDP was approximately 1.5 trillion euros in 2016).

95. *See* Carrera et al., *supra* note 21, at 1–2.

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V. DISCORD BETWEEN THE EU AND THE EU MEMBER STATES

The ongoing inflow of refugees in Europe is of course a primary political concern of the Union, but widespread consensus on how to manage the related financial burden created by the phenomenon is still to come.[96] Different proposals considering public finance measures or taxation have been pushed forward recently by both the EU and by individual Member States which support the idea that the current national and European budget need to be reinforced through the introduction of new taxes.[97] In January 2016, the European Commissioner for Economic and Financial Affairs, Taxation and Customs stated that while there is agreement that the refugee crisis requires an increase in financial resources, the same cannot be said of how such additional resources should be collected.[98]

Solutions which have been proposed include an increase of the budget currently allocated to refugees and migrants' aid and management from 1% to 10% of the EU's budget;[99] the introduction of a Schengen Fund based on national contributions pro rata GDP,[100] especially targeting short-term costs and one-off investments due to the migration inflow;[101] a cost-sharing fund that would be financed by national contributions;[102] and a new tax on travel into the EU and on visa applications for tourism or labor purposes, primarily targeting non-EU citizens.[103]

96. *See* Joakim Ruist, *Fiscal Cost of Refugees in Europe*, VOX: CEPR'S POLICY PORTAL (Jan. 28, 2016), voxeu.org/article/fiscal-cost-refugees-europe [https://perma.cc/V283-VNXS]. Policymakers are in disagreement over how to react to the inflow of refugees because of "the perceived financial burden that would result from larger intakes." *Id.*

97. *See, e.g.*, Eszter Zalan, *Germany Proposes EU Petrol Tax to Pay for Refugees*, EU OBSERVER (Jan. 18, 2016), http://euobserver.com/migration/131876 [https://perma.cc/4C8UDY6L].

98. *See* Cécile Barbière, *EU Considers Petrol Tax to Pay for Refugee Crisis*, EURACTIV (Jan. 19, 2016), http://www.euractiv.com/section/justice-home-affairs/news/eu-considers-petrol-tax-to-pay-for-refugee-crisis [https://perma.cc/3EZQ-5P5A].

99. *Divert 10% of EU Budget to Refugee Crisis, Says German Minister*, THEPRESSPROJECT (May 24, 2016, 3:18 PM), http://www.thepressproject.gr/article/95189/Divert-10-of-EU-Budget-to-Refugee-Crisis-says-German-Minister [https://perma.cc/K2DY-7GL5].

100. HENRIK ENDERLEIN & NICOLE KOENIG, TOWARDS DUBLIN IV: SHARING NORMS, RESPONSIBILITY AND COSTS 21 (Jacques Delors Institut – Berlin, Policy Paper No. 169, June 29, 2016).

101. *Id.*

102. Jacopo Barigazzi, *Matteo Renzi Proposes European 'Migration Bonds,'* POLITICO (Apr. 15, 2016, 10:23 PM), http://www.politico.eu/article/matteo-renzi-proposes-european-migration-bonds-donald-tusk-jean-claude-juncker-border-controls/ [https://perma.cc/48RQ-P93Y]; *see* SUSANNE KRAATZ & MAGDALENA DIMOVA, LABOUR MARKET INTEGRATION OF REFUGEES; EU FUNDING INSTRUMENTS 8 (Eur. Parliament, Briefing No. PE 570.005, Feb. 2016).

103. George Soros, *Europe: A Better Plan for Refugees*, N.Y. REV. BOOKS (Apr. 9, 2016, 10:00 AM), www.nybooks.com/daily/2016/04/09/europe-how-pay-for-refugees/ [https://perma.cc/XDM7-93AC?type=image].

At the Economic and Social Affairs Council meeting on January 15, 2016, German Finance Minister, Wolfgang Schäuble, proposed to introduce a European petrol tax to secure expenditures to respond to the crisis and protect the external borders of the EU,[104] with the possibility to supplement it with an additional carbon tax on fossil fuels.[105] Such a measure would also address environment- and development-related goals,[106] reflecting the inextricable interplay between environmental issues and refugee management within the larger scope of sustainable development. Schäuble's proposal has legal standing on the basis of the TFEU, since Article 191 and Article 192 give the Union competence on the EU's environmental objectives.[107] Finland's reaction exemplifies how fractured the EU political landscape is, with Finnish Finance Minister, Alexander Stubb, reacting positively, even if recognizing the proposal would be hard to implement, and Finnish Foreign Minister, Timo Soini, reacting negatively on the grounds that a new tax remains the sovereign competence of individual national states and not of the EU, with internal transfers of EU funds from other areas of the budget as the preferred way to intervene.[108]

CONCLUSION

The Lima Declaration on Tax Justice and Human Rights maintains that tax revenue is the most crucial tool to provide resources to support, protect, and uphold human rights in "*sufficient, equitable and accountable ways*."[109] EU law establishes ties between European and national tax policies[110] that, in light of the principle of EU financial solidarity, result in inextricable links between human rights policies and fiscal policies. The European Union acknowledges solidarity as one of its primary drivers. This includes the sharing of all financial burden related to asylum. All the same, EU and national-level answers in respect

104. Zalan, *supra* note 97.

105. ALBERTO MAJOCCHI, GROWTH, JOBS AND MIGRATIONS: THE REAL CHALLENGES 8 (Centre for Studies on Federalism, Policy Paper No. 18, June 2016).

106. Jan Corfee-Morlot & Stephanie Ockenden, *Finding Synergies for Environment and Development Finance*, *in* OECD, DEVELOPMENT CO-OPERATION REPORT 2014: MOBILISING RESOURCES FOR SUSTAINABLE DEVELOPMENT 207, 207 (2014).

107. Guntram B. Wolff, Opinion, *European Financing for the European Refugee Crisis*, BRUEGEL (May 11, 2016), http://bruegel.org/2016/05/european-financing-for-the-european-refugee-crisis/ [https://perma.cc/L9CC-2NW7].

108. *Stubb Says EU Petrol Tax to Fund Migrant Crisis Worth Considering, Soini Says No Way*, YLE UUTISET (Jan. 17, 2016, 7:50 PM) (Fin.), https://yle.fi/uutiset/osasto/news/stubb_says_eu_petrol_tax_to_fund_migrant_crisis_worth_considering_soini_says_no_way/8602347 [https://perma.cc/KZ3X-TFYT].

109. LIMA DECLARATION ON TAX JUSTICE AND HUMAN RIGHT ¶ 2 (2015).

110. *See* FLAVIA PIPERNO, MIGRATION AND DEVELOPMENT IN THE POLICIES OF THE EUROPEAN UNION: TRENDS TOWARD A COSMOPOLITAN APPROACH 8 (Centro Studi di Politica Internazionale, Policy Paper, Nov. 2014) (recognizing that policy related to human rights and the well-being of migrants is now a "transnational issue").

to the use of tax measures to help solve or mitigate the migration and refugees crisis have been inadequate and uncoordinated, with a number of ad-hoc initiatives[111] taking the place of the concerted, proactive fiscal campaign the circumstances would require. The consequential lack of financial resources to properly manage the phenomenon and the absence of a single European policy that naturally extends to tax policies places both the EU and its Member states at risk of violating those human rights that the EU Charter of Fundamental Rights has been instated to protect. This is extremely unsettling when considering that because of the EU Charter and its principles, additional primary EU legislation has been promulgated in the field of asylum and immigration.

Article 80 of the TFEU requires more than "mere cooperation" between the EU and its Member states,[112] introducing a specific legal obligation of financial solidarity in the field of asylum policies. The joint stipulations of the EU Charter and the TFEU suggest that fiscal measures that support the human rights of asylum seekers is not a matter of political debate[113] any more, but rather a EU-level duty to ensure that the European and national systems are able to meet human rights standards as they are protected not only under international law, but also under primary EU law.[114]

Solidarity is a EU legal principle with substantive obligations, especially if we read it under the lens of the EU Charter on the right of asylum. The EU and its Member States cannot afford noncompliance, especially when a humanitarian crisis puts fundamental European values at great risk.[115] Noncompliance with compulsory primary EU law could lead to a procedure before the ECJ for violation of EU law, in accordance with Article 263 of the TFEU,[116] which stipulates that any natural or legal person may bring any act addressed to them or which is their direct and individual concern before the Court, if they are of the opinion that such an act violates their fundamental rights as protected and regulated by the EU.[117]

111. Grigonis, *supra* note 27, at 94.

112. ELENI KARAGEORGIOU, THE LAW AND PRACTICE OF SOLIDARITY IN THE COMMON EUROPEAN ASYLUM SYSTEM: ARTICLE 80 TFEU AND ITS ADDED VALUE 4 (SIEPS - Eur. Policy Analysis, No. 14, Nov. 2016).

113. Philippe De Bruycker & Evangelia (Lilian) Tsourdi, *Building the Common European Asylum System Beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension* in REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: THE NEW EUROPEAN REFUGEE LAW 499 (Vincent Chetail et al. eds., 2016).

114. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced Intra-EU Solidarity in the Field of Asylum: An EU Agenda for Better Responsibility-Sharing and More Mutual Trust*, at 2, Brussels, COM (2011) 835 final (Dec. 2, 2011).

115. KARAGEORGIOU, *supra* note 112, at 11.

116. *Id.* at 6 & n.39.

117. Grigonis, *supra* note 27, at 96.

A major point in the *querelle*[118] is the fact that the EU does not have general taxation powers. This is not expected to change in the near future.[119] Nevertheless, changes to the way taxation and public financial measures are handled at the community level are needed if the EU wants to successfully tackle phenomena such as the ongoing crisis, where issues of migration, refuge, human rights, and development are tightly intertwined.

This Paper maintains that the legal basis for solidarity measures relying on taxation would be the principle of financial solidarity as laid out in Article 80 of the TFEU. While it can be argued that the language of the new provision in Article 80 is unclear,[120] such lack of clarity can be dissipated by means of the provisions in Article 18 and Article 19 of the EU Charter. Read and discussed in context, these provisions create a much more meaningful framework that can be used to assess the boundaries of the financial obligation to protect human rights introduced by Article 80.

Furthermore, the joint obligations of the EU Charter and of the TFEU on the right of asylum would suggest that it would be desirable to achieve unequivocal agreement between the EU and its Member States on what can be done through taxation to help respect and uphold the human rights of refugees and migrants. Additionally, more attention should be paid to the second part of Article 80 of the TFEU, as it gives the EU the power to adopt measures to make the principle of financial responsibility effective.[121] There is a legal basis for solidarity measures through taxation in the new Article 80 as supported by Article 18 and Article 19 of the EU Charter. Further investigation is most certainly necessary, but such a solidarity tax would not only be in line with the ongoing reforms at the EU level, but would also positively acknowledge the international responsibility of individual EU Member states deriving from Article 2(1) of the ICESCR and the limits that the Refugee Convention, Article 29 and Article 34, poses on tax measures for refugees.

118. Definition: "A quarrel about petty points." VOCABULARY.COM, https://www.vocabulary.com/dictionary/fr/querelle [https://perma.cc/5YKP-G5WA].

119. KIRKEGAARD, *supra* note 40, at 7.

120. Elspeth Guild, *Administrative Law and the Common European Asylum System*, *in* RESEARCH HANDBOOK ON EU ADMINISTRATIVE LAW 137, 144 (Carol Harlow et al. eds., 2017).

121. Article 80 maintains in its second part: "Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle." TFEU art. 80, *supra* note 20, at 78.