



The crisis of the Common European Asylum System: rethinking solidarity in light of Human Rights

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ABSTRACT: In 2015, the unprecedented arrival of refugees and irregular migrants in the European Union (EU) put a strain on the Common European Asylum System (CEAS), thus exposing a number of deficiencies in EU external border, asylum and migration policy. The need to reform the system became urgent and the EU was presented with both a challenge and an opportunity to further advance towards a much-needed consensual and long-term solution for the harmonisation of the asylum system, standing on the basis of solidarity and responsibility-sharing. This paper argues that the new comprehensive approach to migration and asylum praised by the European Commission (EC) is still missing in the recent Pact on Migration and Asylum of 2020, which represents more a missed opportunity than the real reform that the CEAS needs. The chosen legislative path, the dualistic understanding concerning the approach to migrants, and the new solidarity mechanism envisioned in the Pact show how the lack of consensus among Member States, the tendency towards the creation of a “Fortress Europe”, and an asymmetric idea of inter-state solidarity prevail, preventing the development of a common European framework for migration management that is both effective and in line with the EU’s values and objectives. This paper further argues that, if the EU fails to shift the paradigm of solidarity, the system is at risk of remaining fractured and incapable of withstanding the future challenges of migration. A new framework must be grounded on the principle of solidarity, as defined in the Article 80 of the Treaty on the Functioning of the European Union (TFEU) which, in turn, needs to move from a state-centred approach to a concept of solidarity based on affected individuals, thus setting its foundations on a human rights basis. The EU needs, in fact, to strongly step up as a humanitarian actor and place protection and responsibility-sharing at the centre of its agenda: the protection of fundamental human rights in its territory and beyond is at stake.

KEYWORDS: Common European Asylum System – The Pact on Migration and Asylum – Article 80 of the Treaty on the Functioning of the European Union – solidarity crisis.

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*Europe will always provide shelter
to those who are in need of international protection.*

President-elect von der Leyen,
Speech in the European Parliament Plenary on the occasion of
the presentation of her College of Commissioners and their programme,
27th of November 2019, Strasbourg (France)

1. Introduction

Since its construction, the Common European Asylum System (CEAS) has been in constant development, with the objective of putting in place a fair, effective and standardised reception system throughout the European Union (EU), as well as defining a framework of responsibility sharing among Member States capable of managing the influx of displaced people seeking shelter in its territory.

Nevertheless, the “refugee crisis”¹ of 2015, which resulted in a more onerous and uneven burden for border states, exposed a series of deficiencies in the EU asylum and migration policy, thus prompting the need for a thorough reform of the CEAS, hindered by the lack of solidarity between Member States. The attempts towards the creation of a mechanism to ensure a fair sharing of responsibility and offer a comprehensive approach to migration recently culminated in the Pact on Migration and Asylum presented by the Commission on 23 September 2020.

This paper aims at understanding where the Pact stands in the path towards the reform of the EU migration management system and how solidarity can and should be framed to build the CEAS and the relationships among Member States on stronger foundations.

2. The Common European Asylum System (CEAS) and the Need to Reform it: a Path of Issues and Obstacles

Asylum is a fundamental right and an international obligation for countries, as recognised by the Convention Relating to the Status of Refugees, also known as the 1951 Geneva Convention.² Within the EU, Member States have a shared responsibility to welcome asylum seekers in a dignified manner and ensure that procedures are fair, effective, and standardised in order to produce similar outcomes throughout the EU territory as a whole.³ However, asylum flows are not constant and are unevenly distributed across Member States with countries that, given their position along the external border of the EU, withstand the highest number of arrivals of people fleeing their homeland.⁴ With this in mind, in 1999 the EU began the construction of a Common European Asylum System (CEAS) as a mean

¹ The use of the term “crises” to refer to a high influx of migrants is problematic since what constitutes a migration crisis is not clear. Furthermore, the term can be a value judgement, used for political and ideological reasons that might lead to a securisation of migration, racism and xenophobia. See Alex Sager, “Ethics and Migration Crises”, in *The Oxford Handbook of Migration Crises*, ed. Cecilia Menjivar, Marie Ruiz and Immanuel Ness (New York: Oxford University Press, 2018), 589-602.

² “Common European Asylum System”, European Commission – Migration and Home Affairs, accessed December 5, 2022, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en.

³ “Common European Asylum System”.

⁴ “Common European Asylum System”.

to manage high influxes of displaced persons “by accommodating persons in need of protection while supporting Member States experiencing pressure on their asylum systems”.⁵ The CEAS is based on the understanding that the EU is an area where countries share the same fundamental values and therefore need to have a common approach to implement transparent, effective and equitable procedures. “At its core, the CEAS aims to achieve:

- a clear and functional process to determine which country is responsible for examining an application for protection;
- a set of common standards to inform fair and efficient asylum procedures;
- a set of common minimum conditions for the dignified reception of applicants for protection; and
- convergence on the criteria for granting protection statuses and for the content of protection associated with those statuses.”⁶

Within the context of CEAS, the Tampere Declaration, that resulted from the special meeting held by European Council on 15 and 16 October 1999 in Tampere, Finland, “set out the foundation for a comprehensive approach to migration by addressing political, human rights and developmental issues in countries and regions of origin and transit.”⁷ Stemming from this agreement with governments, the legislative and policy measures that set the framework for managing migration in the EU were adopted⁸. Since its very first phase (from 1999 to 2005), the CEAS has been further developed and improved by Member States that acted on the legislations that govern the minimum standards of the European asylum system,⁹ namely:

- The Asylum Procedures Directive, whose objective is to create a coherent system and therefore, ensure that decisions on applications for international protection are taken efficiently and fairly;¹⁰
- The Reception Conditions Directive, that aims at establishing common standards of reception conditions throughout the EU;¹¹
- The Qualification Directive, that sets “the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted”;¹²

⁵ “Common European Asylum System”.

⁶ European Asylum Support Office (EASO). *EASO Asylum Report 2020: Annual Report of the situation of asylum in the European Union*, 2020, <https://easo.europa.eu/asylum-report-2020>.

⁷ European Asylum Support Office, *EASO Asylum Report 2020*, chap. 2.1.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ “Asylum procedures”, European Commission – Migration and Home Affairs, accessed January 8, 2023, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/asylum-procedures_en.

¹¹ “Reception conditions”, European Commission – Migration and Home Affairs, accessed January 8, 2023, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/reception-conditions_en#:~:text=The%20Reception%20Conditions%20Directive&text=ensures%20that%20applicants%20have%20access,minors%20and%20victims%20of%20torture.

¹² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary

- The Dublin III Regulation, that determines which EU Member State is responsible for the examination of an application for asylum, currently applying a ‘first country of entry’ principle;¹³
- The Eurodac Regulation that provides the legal basis for the functioning of a European Database for the comparison of fingerprints to facilitate the application of the Dublin Regulation.¹⁴

Nevertheless, the increased pressure that national asylum and reception systems in EU+ countries faced since 2015 with the unprecedented arrival of refugees and migrants, put a strain on the CEAS, thus exposing a number of deficiencies in EU external border, asylum and migration policy.¹⁵ In fact, the 2015 so-called “*refugee crisis*”¹⁶ resulted in there being more onerous and uneven burdens for border states, hindering the system for lack of solidarity and solid agreements on responsibility sharing between the Member States by a quota system.

In response to the crisis, in May and July 2016, the European Commission (EC) put forward two packages of reform proposals to “*address the core components of the CEAS, which included: a reform of the Dublin system to better balance responsibility and solidarity for asylum applications among EU+ countries; steps toward reinforcing the Eurodac regulation; strengthening the mandate of EASO toward a fully-fledged agency for asylum; replacing the Asylum Procedures Directive with a regulation directly applicable in national asylum systems to harmonise asylum procedures across EU+ countries and achieve convergence in recognition rates; replacing the Qualification Directive with a regulation directly applicable in national asylum systems to further harmonise protection standards and rights for beneficiaries of international protection; and reforming the Reception Conditions Directive to ensure that applicants for international protection benefit from harmonised and dignified reception standards and prevent secondary movements and abuse.*”¹⁷ Additionally, the EC presented a proposal to establish a permanent Union Resettlement Framework in order to replace existing *ad hoc* schemes and provide legal and safe pathways to the EU as well as common rules for resettlement and humanitarian admission, while contributing to global resettlement and humanitarian admission initiatives and supporting third countries that host many persons in need of international protection.¹⁸

Since the definition of these proposals, progress was made regarding the EU Asylum Agency, the Eurodac Regulation, the Union Resettlement Framework Regulation, the Qualification Regulation and the Reception Conditions Directive.¹⁹ However, a consensus over a reformed Dublin system and an Asylum Procedures Regulation is still pending because of fundamental political differences among

protection, and for the content of the protection granted (recast) [2011] OJ L 337.

¹³ “Country responsible for asylum application (Dublin Regulation)”, European Commission – Migration and Home Affairs, accessed January 8, 2023, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en.

¹⁴ Anita Orav, “Fingerprinting migrants: Eurodac Regulation”, *European Parliamentary Research Service*, November 23, 2015, <https://epthinktank.eu/2015/11/23/fingerprinting-migrants-eurodac-regulation/>.

¹⁵ Micaela Del Monte and Anita Orav, “Solidarity in EU asylum policy”, January 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI\(2020\)649344_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649344/EPRS_BRI(2020)649344_EN.pdf).

¹⁶ *Ibid.*

¹⁷ European Asylum Support Office, *EASO Asylum Report 2020*, chap. 2.1.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Member States, whose majority also showed reluctance in adopting the proposals separately before all were ready for adoption.²⁰ After three years of EU Council discussions on such reform, there is still no agreement regarding a concrete definition of solidarity, thus “*preventing the creation of a permanent, EU treaty-based mechanism to ensure the fair sharing of responsibility for asylum-seekers.*”²¹ In fact, although there seems to be a common unanimity on the fact that the current system is not ensuring a fair distribution of asylum-seekers, how the solidarity principle should be applied in order to tackle such failings is still uncertain.²² The balance between solidarity and responsibility is indeed one of the biggest obstacles to the finalisation of the CEAS reform and is affecting the EU asylum policy since well before the most recent reform proposals.²³ Such missing and long-awaited reform, together with temporary solidarity measures based on *ad hoc* solutions, “*exposes a crisis of solidarity that shows no sign of being resolved.*”²⁴

3. The New Pact on Migration and Asylum of 2020: A Missed Opportunity to Build a Common Migration Policy

In January 2020, the European Commission published its new work programme, planning to launch a new Pact on Migration and Asylum which “*will acknowledge the interconnectedness of internal and external aspects of migration and build more resilient, more humane and more effective migration and asylum systems.*”²⁵ The Pact was then presented by the Commission on 23 September. According to the Commission Communication, the New Pact on Migration and Asylum foresees “*a robust and fair management of external borders, including identity, health and security checks; fair and efficient asylum rules, streamlining procedures on asylum and return; a new solidarity mechanism for situations of search and rescue, pressure and crisis; stronger foresight, crisis preparedness and response; an effective return policy and an EU-coordinated approach to returns; comprehensive governance at EU level for better management and implementation of asylum and migration policies; mutually beneficial partnerships with key third countries of origin and transit; developing sustainable legal pathways for those in need of protection and to attract talent to the EU; and supporting effective integration policies.*”²⁶ Nevertheless, on 26 November of the same year, it was already clear how the Pact represented more of a missed opportunity than the real reform that the CEAS needs.²⁷ In fact, strong criticisms were presented during a high-level conference held by the European Economic and Social Committee (EESC) where stakeholders, including representatives of civil society, social partners, think tanks,

²⁰ *Ibid.*

²¹ Del Monte and Orav, “Solidarity in EU asylum policy”.

²² *Ibid.*

²³ Sarah Gerwens, Nicholas Millet, Nicoletta Enria and Natascha Zaun, *Reforming the Reform? The Future of The Common European Asylum System* (1989 Generation Initiative, LLC, 2020), <https://89initiative.com/wp-content/uploads/2020/02/Reforming-the-Reform.pdf>.

²⁴ Del Monte and Orav, “Solidarity in EU asylum policy”.

²⁵ European Asylum Support Office, *EASO Asylum Report 2020*, chap. 2.1.

²⁶ Anja Radjenovic, “A New Pact on Asylum and Migration and accompanying legal proposals (Articles 78 and 79 TFEU)”, Legislative Train Schedule – European Parliament, January, 2023, accessed January 11, 2023, <https://www.europarl.europa.eu/legislative-train/theme-promoting-our-european-way-of-life/file-a-new-pact-on-migration-and-asylum>.

²⁷ “New EU Pact on Migration and Asylum: a missed opportunity for a much-needed fresh start”, European Economic and Social Committee, November 30, 2020, <https://www.eesc.europa.eu/en/news-media/news/new-eu-pact-migration-and-asylum-missed-opportunity-much-needed-fresh-start>.

the European Commission and the European Parliament, found that “*the new Pact does not deliver the changes needed to create a proper common European migration and asylum system.*”²⁸

Among the criticisms of the Pact, three main strands stand out:

- the chosen legislative path;
- the dualistic understanding concerning the approach to migrants; and
- the new solidarity mechanism.²⁹

On a legislative point of view, the pact followed an intergovernmental approach and allowed negotiations to start before the submission of a legislative proposal on behalf of the European Commission in an area where the EU had competence.³⁰ On the words of Sergio Carrera, head of the Justice and Home Affairs Programme at the Centre for European Policy Studies (CEPS) and Professor at the Migration Policy Centre (MPC) and the European University Institute (EUI), “*calling it a pact is rather misleading, because it was not concluded between different parties. This is simply the European Commission policy agenda for the next years. If we look at the Treaties, the decision-making should start after the Commission presents legal acts, not before.*”³¹

The Pact also favours a perspective of migrants that are seen either as real refugees or as expellable illegal individuals. In fact, through the pre-screening mechanism, migrants are considered and treated as if they had not entered EU territory, which would lead to an increased use of detention.³² Moreover, the emphasis placed on localisation speed and de-territorialisation that translate into faster procedures might undermine the international right to asylum. Such procedures, in fact, imply short deadlines and demanding operational, financial and human resource requirements, thus making extremely difficult for Member States to operationalise the regulations without violating asylum seekers’ rights. Insufficient investment could indeed lead to the poor implementation of the Pact and result in serious violations of individual rights, including the principle of non-refoulement, especially in the case of a new increase in the number of arrivals.³³ Additionally, the pact proposal’s mandatory asylum border procedures raise concerns, as this reinforces the responsibility on the Member States of first entry, and might replicate today’s situation with people being stranded indefinitely at the external borders.³⁴ The European Trade Union Confederation (ETUC) affirmed that “*the pact had not provided a ‘fresh start’ in managing migration but further perpetuated the previous security-oriented approach, with a strong focus on border control, deterrence, detention and deportations.*”³⁵ Seemingly, and although welcoming the development of safe and legal pathways to access the European territory, especially through resettlement and community-sponsored programmes, the EESC considers that “*these channels only meet*

²⁸ “New EU Pact on Migration and Asylum: a missed opportunity”.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Iris Goldner Lang, “The New Pact on Migration and Asylum: A strong external and a weak internal dimension?”, *European Foreign Affairs Review*, v. 27, no. 1 (2022): 1-4, <https://doi.org/10.54648/eerr2022001>.

³⁴ Lang, “The New Pact on Migration and Asylum”, 1-4.

³⁵ “New EU Pact on Migration and Asylum: a missed opportunity”.

*the needs of individuals with a specific profile and do not provide comprehensive, effective or secure responses to the need for regular channels of immigration into the EU, safe pathways for asylum or the inclusion and integration of non-EU nationals in the EU.”*³⁶

Finally, criticisms are directed towards the new solidarity mechanism, which foresees solidarity as compulsory but flexible. In fact, in this new framework relocation remains an option since States can choose to show their solidarity through other channels, namely through “sponsoring” the return of migrants to their countries of origin or providing assistance to countries at the front line with expertise or practical help.³⁷ In this way, the Pact promotes an idea of an asymmetric inter-state solidarity³⁸ and it is insufficient for the development of a common European framework for migration management that is both effective and in line with the EU’s values and objectives.³⁹ Moreover, it is not clear if the principle of solidarity adopted will contribute to solve major coordination challenges since there is no mention of incentives for the Member States to participate in this mechanism and some of them already refused to participate in the previous relocation programme.⁴⁰ Other issues that cause the current impasse in the Member States’ negotiations on the legislative proposal concern the procedure to adopt in the case of migrants that cannot be returned as well as in situations of significantly increasing migration flows where the choices of support measures conceptualised in the Pact are narrowed down either to relocation or return sponsorships, thus leaving the mandatory return sponsorships as the only alternative to relocation.⁴¹ Given that returns not having been completed after a certain time result in migrants being transferred back to the territory of states that sponsored these respective returns, this measure encounters the opposition of Central and Eastern European (CEE) states and their efforts to deter migration toward their territories in the first place. The Mediterranean states, instead, have stressed their position on the absence of any “*viable alternative to mandatory relocation to share the ‘burden’ of asylum-seeking migration.*”⁴²

For all the above reasons, the EESC stresses that “*the EU needs to strike the right balance between effective and realistic migration management that is humane and sustainable while ensuring security and control of its external borders*” and send “*a clear message to Europeans that migration can be better managed collectively.*”⁴³ The Pact, in fact, insists on reflecting the tendency of the EU, ongoing over the past years, of placing more emphasis on the external dimension of its migration and asylum policies, with the external

³⁶ Opinion SOC/649 of the European Economic and Social Committee of 27 January 2021 on Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum [2021] COM(2020) 609 final.

³⁷ Ramona Bloj and Stefanie Buzmaniuk, “Understanding the new migration and asylum pact”, *Fondation Robert Schuman*, European Issue no. 577 (2020): 1-6, <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-577-en.pdf>.

³⁸ “New EU Pact on Migration and Asylum: a missed opportunity”.

³⁹ Opinion SOC/649 of the European Economic and Social Committee.

⁴⁰ Opinion SOC/649 of the European Economic and Social Committee.

⁴¹ Leila Hadj-Abdou, “From the migration crisis to the new pact on migration and asylum: the status quo problem”, *European University Institute*, BRIDGE Network, BRIDGE Network - Working Paper 11 (2021): 1-13. <https://hdl.handle.net/1814/73657>.

⁴² Leila Hadj-Abdou, “From the migration crisis to the new pact on migration and asylum”, 1-13.

⁴³ Opinion SOC/649 of the European Economic and Social Committee.

measures having been allocated significantly more resources than internal ones.⁴⁴ The consequences of this strategy are visible in the delineation of a ‘Fortress Europe’⁴⁵ that refuses to adopt long-term solutions, applies double standards with respect to migrants⁴⁶ and allows illegal pushbacks in land and sea⁴⁷ as well as detention centres just outside its borders.⁴⁸ Furthermore, it clearly shows how it is politically easier to negotiate a budgetary increase than to reach an EU-wide agreement on a change of EU migration and asylum legislation.⁴⁹ Since EU states are incapable of finding internal solutions, they have been increasingly striving to shift the solution outside of the EU⁵⁰ at the great expense of the human rights of those fleeing in search of a better life.

4. Prospecting a Shared Approach on Asylum: Rethinking Solidarity in light of Human Rights

In order to offer “*the comprehensive approach needed to manage migration in an effective and humane way*” praised by the EC⁵¹ in the delineation of the Pact, it is necessary to truly acknowledge solidarity both among Member States but also towards the migrants that try to reach the EU. The “*new forms of solidarity*” that the von der Leyen Commission considered as pivotal for a new EU asylum system, as previously declared in March 2020,⁵² revealed themselves to be too weak and volatile in the understanding of the Pact since the ‘flexibility’ leaves too much room for interpretation.⁵³ De facto, such flexibility places strong emphasis on cooperation, with the success of the endorsed measures depending highly on Member States’ voluntary participation at a time when it is unclear whether such solidarity exists in the first place.⁵⁴ Populist, protectionist and anti-immigration sentiments are more and more defining the approach to migration worldwide, and the EU just missed an opportunity to legislate in an area it had competences, thus failing to contribute to the reduction of the discretion that Member States apply when deciding who can

⁴⁴ Leila Hadj-Abdou, “From the migration crisis to the new pact on migration and asylum”, 1-13.

⁴⁵ The Guardian, “The Guardian view on Fortress Europe: a continent losing its moral compass”, accessed January 12, 2023. <https://www.theguardian.com/commentisfree/2021/aug/01/the-guardian-view-on-fortress-europe-a-continent-losing-its-moral-compass>.

⁴⁶ Emily Venturi and Anna Iasmi Vallianatou, “Ukraine exposes Europe’s double standards for refugees”, *Chatham House*, March 30, 2022, <https://www.chathamhouse.org/2022/03/ukraine-exposes-europes-double-standards-refugees>.

⁴⁷ Refugee Rights Europe (RRE) and the End Pushbacks Partnership (EPP), *Pushbacks and Rights Violations at Europe’s Borders*, 2020, <https://dylbw5db8047o.cloudfront.net/uploads/pushbacks-and-rights-violations-at-europes-borders.pdf>.

⁴⁸ Human Rights Watch, *No Escape from Hell - EU Policies Contribute to Abuse of Migrants in Libya*, 2019, https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf.

⁴⁹ Leila Hadj-Abdou, “From the migration crisis to the new pact on migration and asylum”, 1-13.

⁵⁰ *Ibid.*

⁵¹ “Statement from Commission on the co-legislators’ Roadmap on the New pact on migration and asylum”, European Commission, accessed November 17, 2022. https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_5383.

⁵² Del Monte and Orav, “Solidarity in EU asylum policy”.

⁵³ Philippe De Bruycker, “The New Pact on Migration and Asylum: What it is not and what it could have been”, *EU Migration Law Blog*, December 15, 2020, <https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/>.

⁵⁴ Emma Kollek, “Uncertain solidarity: Why Europe’s new migration pact could fall apart”, *European Council on Foreign Relations*, September 29, 2020, https://ecfr.eu/article/commentary_uncertain_solidarity_why_europes_new_migration_pact_could_fall_a/.

be welcomed and whether effective support will be provided. By failing to institute a fairer mechanism of binding shared responsibilities, it also missed the chance to bring more stability to the EU asylum system and to make it more capable of withstanding the challenges that are yet to come. In a scenario where migration is looming as one of the defining issues of the 21st century,⁵⁵ with increasing global humanitarian needs and forced displacements, together with the emergence of new types of migrants such as climate refugees, the EU needs to strongly step up as a humanitarian actor and place protection and responsibility-sharing at the centre of its agenda.

Therefore, the EU asylum and migration domain is urgently in need of solutions capable of addressing its deficiencies and the “crisis of governance” that has unfolded in the past years.⁵⁶ One crucial departing point to build a framework for such solutions is to rethink and consolidate the very concept of solidarity on a human right perspective, in order to build the CEAS upon stronger foundations.

In the EU, the principle of solidarity is set out in Article 80 of the Treaty on the Functioning of the European Union (TFEU). Since the adoption of the Treaty of Lisbon, its dispositions cover not only asylum policies but also immigration and border control policies with solidarity implied as a general notion and sharing of responsibilities seen as an expression of solidarity.⁵⁷ Article 80 clarifies that “*whenever necessary, appropriate measures to give effect to the principle of solidarity and fair sharing of responsibility – including its financial implications – shall be adopted.*”⁵⁸ Therefore, for such principles to be effective, other legislative or policy measures must be applied.⁵⁹ However, the notions of “*solidarity*” and “*fair sharing of responsibilities*” are not defined in terms of their goals or the standards necessary to meet them⁶⁰ and the Article has not been used as a legal basis.⁶¹ In fact, there is currently relatively little consensus regarding the effects, scope and outlook of Article 80 TFEU, even if cooperation on these issues is seen as crucial for the success of border, asylum and immigration policies, and of the entire EU.⁶² Divergent views on the applications of the Article stem from different approach towards its interpretation. A Member State-based approach, for example, would imply a centrality for Member States’ needs and interests, but these do not necessarily align with EU policy goals⁶³ – or with the needs and interests of the individuals that are the central figures of migration flows.

In an attempt to promote a renewed (and perhaps complementary) interpretation, solidarity could be analysed from a human rights’ perspective, and, in this regard, the EU can draw some lessons from the international community⁶⁴.

⁵⁵ Alexander Betts, “Human migration will be a defining issue of this century. How best to cope?”, *The Guardian*, accessed January 16, 2023. <https://www.theguardian.com/commentisfree/2015/sep/20/migrants-refugees-asylum-seekers-21st-century-trend>.

⁵⁶ Leila Hadj-Abdou, “From the migration crisis to the new pact on migration and asylum”, 1-13.

⁵⁷ Vanheule, Dirk, *et al.*, *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* (Brussels: Directorate General for Internal Policies, 2011), 8.

⁵⁸ Del Monte and Orav, “Solidarity in EU asylum policy”.

⁵⁹ Vanheule, Dirk, *et al.*, *The Implementation of Article 80 TFEU*.

⁶⁰ *Ibid.*

⁶¹ Del Monte and Orav, “Solidarity in EU asylum policy”.

⁶² *Ibid.*

⁶³ Vanheule, Dirk, *et al.*, *The Implementation of Article 80 TFEU*.

⁶⁴ Markus Kotzur, “Flexible solidarity – effective solidarity?”, *Völkerrechtsblog – International Law and International Legal Thought*, November 16, 2016, <https://voelkerrechtsblog.org/about/the-blog/>.

The UN-General Assembly Resolution 59/193, in fact, better defines solidarity as “*a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most*”, adding a notion of “*responsibility to protect*” to its meaning. Furthermore, the protection of refugees has a human rights basis that is visible in many rights to asylum-guarantees present in the constitutions of the Member States (direct protection such as in Article 16 of the German Basic Law or indirect protection such as implicit in the duty to protect human life or the non-refoulement principle), together with the dispositions of the 1951 Refugee Convention, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the jurisprudence of the Strasbourg Court and the EU Charter of Fundamental Rights, among others.⁶⁵ “*Flexible solidarity*” as envisioned in the Pact could, therefore, acquire an adequate operational meaning if it supports an irrevocable human rights basis, working always as an “opt in” to accept shared responsibilities and never justifying an opt-out from human dignity-based human rights obligations.⁶⁶ In other words, such an interpretation of solidarity would allow Member States to volunteer on the “how” of burden-sharing but, at the same time, would oblige them to accept binding human rights standards.⁶⁷

On this line, it is possible to argue that in its interpretation of Article 80, the Court of Justice of the European Union (CJEU) needs to move “*from a state-centred and exclusionary concept of solidarity – one that is focused exclusively on the state and inter-state relations – to a concept of solidarity based on affected individuals, thus respecting their fundamental rights.*”⁶⁸ Even if the Article mentions that the “*policies of the Union on borders, asylum and immigration will be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*”, such a focal point can lead to a very limited interpretation of solidarity.⁶⁹ In fact, when the focus of the impact of migration flows is on the state rather than on the asylum seeker, the use of the term “burden” to characterise the increased pressure stemming from migration in the Member States contributes to a vision of solidarity as “*burden sharing*”, shedding a negative light on the migrants.⁷⁰ Such conceptualisation also promotes a concept of solidarity which is securitised and exclusionary,⁷¹ thus reinforcing the tendency of creating a “*Fortress Europe*” to handle migration flows.

The principle of solidarity in Article 80 TFEU can also serve as a guide to interpretate European asylum law in the light of a solidarity that needs, nonetheless, to undergo a paradigm change: departing from a state-centred, securitised, and exclusionary concept of solidarity to reach a new meaning that strictly bundles such solidarity with the obligation of the EU and its Member States to respect fundamental rights.⁷² In this way, the principle of solidarity will abandon its current exclusive focus on the state and inter-state solidarity to concentrate instead on

⁶⁵ Kotzur, “Flexible solidarity – effective solidarity?”.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Del Monte and Orav, “Solidarity in EU asylum policy”.

⁶⁹ Valsamis Mitsilegas, “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, v. 2 (2014): 181–202, <https://doi.org/10.5117/CMS2014.2.MITS>.

⁷⁰ Valsamis Mitsilegas, “Solidarity and Trust in the Common European Asylum System”, 181–202.

⁷¹ *Ibid.*, *loc cit.*

⁷² *Ibid.*, *loc cit.*

solidarity towards the affected individuals,⁷³ reinforcing human rights protection inside and outside EU borders. Article 80 can also be used in conjunction with the asylum provisions of Articles 77 to 79 TFEU as a legal basis for the adoption of measures leading gradually to the establishment of a single EU asylum system, so to implement the principle of solidarity and fair sharing of responsibility in the areas of asylum, immigration and border control.⁷⁴

Inter-state cooperation based on a “blind” mutual trust between national authorities turned out to be defective in the case-law of European Courts. As a result, they are now employing a greater scrutiny and evaluation of national asylum systems on the ground, boosting monitoring mechanisms at EU level while also paying greater attention to evaluation reports drafted by the actors in the field, such as the UNHCR and NGOs.⁷⁵ The need to monitor national asylum systems goes hand-in-hand with a concept of solidarity that is increasingly viewed from the perspective of the asylum seeker, an important step that will be key to the evolution of the CEAS.

Conclusion

On one hand, the analysis of the evolution of the CEAS clearly shows how solving the issue of solidarity and responsibility sharing is pivotal for the effective management of migration flows towards the EU. On the other hand, the obstacles faced by the European institutions to reach a consensus on the definition of solidarity also demonstrates how the political will of Member States to put in place a fair system of responsibility sharing is hard to accomplish.

The new Pact on Migration and Asylum, and its “flexible” solidarity are a half-way solution that, even if resting on an agreement between Member States, does not provide a solid basis for a longstanding management of migration but rather, perpetuates a security-oriented approach that leaves human rights protection at the EU borders. Arrival states will likely continue to withstand the majority of the influxes towards the Union without the possibility of relying on the support of other EU countries, a failure that will probably exacerbate their feeling of isolation on migration issues and consequently challenge the very common basis on which the EU project stands.

For all of the above reasons, the CEAS is at risk of remaining fractured if the EU fails to shift the paradigm of solidarity and to solve the discrepancies between national asylum systems.⁷⁶ Rethinking solidarity from a human right perspective becomes therefore imperative for the European asylum law⁷⁷ and for the future of migration both inside and outside the EU.

⁷³ *Ibid.*, *loc cit.*

⁷⁴ Del Monte and Orav, “Solidarity in EU asylum policy”.

⁷⁵ Valsamis Mitsilegas, “Solidarity and Trust in the Common European Asylum System”, 181–202.

⁷⁶ *Ibid.*, *loc cit.*

⁷⁷ *Ibid.*, *loc cit.*