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**Which Solidarity for the Migrants
through the Waters of the
Mediterranean?**

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Which Solidarity for the Migrants through the Waters of the Mediterranean?

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1. Introduction

Much has been written about the role of solidarity in the field of migration and European asylum system policies.¹ The way in which this issue has been dealt with can be sketched under three main aspects. First, “EU solidarity” has been investigated in the context of the sharing of asylum responsibility among EU member States for refugee protection purposes. This approach has detected the key implications of solidarity described as an EU obligation of “shared responsibility” among member States.² Second, attention has been focused on the external dimension of the Common European Asylum System (CEAS) revealing the application of the principle of solidarity, not only between Member States *inter se*, but also when the action has external impacts on the international protection regime.³ Third, the issue has been analyzed in the practices of solidarity in border controls activities in the Mediterranean,⁴ against which, recently, by

¹ See *inter alia* Carrera, S. and others, 2015. The EU's Response to the Refugee Crisis. Taking Stock and Setting Policy Priorities, *CEPS essay* 20; Tsourdi, E.L., 2019. Solidarity in EU Asylum Policy: From an Emergency-Driven Approach to the Fair Sharing of Responsibility, *European Policy Center* 24, pp. 85 ff.; Marin, L. and others, 2020. Migration Crises and the Principle of Solidarity in Time of Sovereigns: Challenges for EU Law and Polity, *European Journal of Migration and Law* 22, pp. 1-10.

² Morano-Foadi, S., 2017. Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures, *European Journal of Migration and Law* 19(3), pp. 223 ff.

³ Moreno-Lax, V., 2017. Solidarity's Reach: Meaning, Dimensions and Implications for EU (external) asylum policy, *Maastricht Journal of European and Comparative Law* 24(5), pp. 740-762.

⁴ Jones, B., (2018), EU Common Policy on Asylum, Irregular Migration and External Border Control and Solidarity between Member States, in *Solidarity and Protection of Individuals in E.U. Law. Addressing new challenges of the Union*. C. Jimenez Piernas, L. Pasquali, F. Pascual Vives (eds.), Giappichelli, Torino, pp. 203 ff.; Carrera, S., Cortinovis, R., 2019. Search and Rescue, Disembarkation, and Relocation Arrangements in the Mediterranean, *CESP Paper in Liberty and Security* 10. See also, Moreno-Lax, V., 2018. The EU Humanitarian Border and the Securitization of Human Rights: The ‘Rescue-Through-Interdiction/Rescue-Without-

examining the New Pact on Migration and Asylum, it has also been criticized as an approach “criminalizing solidarity”.⁵

Adopting a different approach, our analysis will be restricted to the possible role of solidarity relating to the idea of a fundamental right to migration, as proclaimed in the Lampedusa Charter, a document written and circulated by the associations of the civil society, gathering in Lampedusa in 2014, in which the voice of migrants is well expressed.

For this purpose, we will immediately move from the new rules on the fundamental right of migration for everybody everywhere as fostered in the Lampedusa Charter (section 2) and, after selecting the most relevant legal acts within the European asylum system, we shall investigate to what extent the European migration policies, based on burden sharing obligations, are designed on the solidarity with the migrants (sections 3-4). Furthermore, we shall explore several proposals by the EU Institutions adopted to find solutions to the issue of migration and asylum (section 5) until the recent “New Pact on Migration and Asylum” to assess if the proposed “solidarity mechanisms” assume effectively obligations in favor of migrants claiming for international protection (section 6).

Eventually, having thus illustrated different strategies adopted in the EU asylum and migration policy, we will be able to consider what we asked in the title of this chapter by providing some concluding remarks.

2. The Lampedusa Charter 2013. Peoples’ Reaction to a European Mass-Killing

October 23, 2013, the European Parliament approved a resolution on migration flows in the Mediterranean, requiring effective interventions of the Union and its Member States to avoid tragedies like that of October 3 in Lampedusa (with at least 366 victims), stating inter alia, that

Protection’ Paradigm, *Journal of Common Market Studies* 1(56), pp. 119-140; Moreno-Lax, V., 2020. The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the “Operational Model”, *German Law Journal* 3(21), pp. 385–416; Moreno-Lax, V., 2011. Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea, *International Journal of Refugee Law* 2(23), p.174 ff.; Rosenfeldt, H. (2017). The European Border and Coast Guard in Need of Solidarity: Reflections on the Scope and Limits of Article 80 TFUE, in: *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*. Mitsilegas, V., Moreno-Lax, V., Vavoula, N. (eds.), Leiden-Boston, Brill Nijhoff, pp. 169 ff.

⁵ Moreno-Lax, V., 2021, A New Common European Approach to Search and Rescue? Entrenching Proactive Containment, available at eumigrationlawblog.eu. Starita, M., 2020, Search and Rescue Operations Under the New Pact on Asylum And Migration, available at www.sidi-blog.org.

“ ... Lampedusa should be a turning point for Europe and that the only way of preventing another tragedy is to adopt a coordinated approach based on solidarity and responsibility, with the support of common instruments”.⁶

It is a declaration that moreover echoes several others released by various organizations following the massacre.⁷

Rightly, in fact, what happened in Lampedusa can be defined a European tragedy, also, and above all I would say, because the European Union bears the political responsibility, if not directly legal, because of its unrealistic, confused and wavering Mediterranean policy and its unfriendly migration policy.

Relations with Mediterranean countries have in fact always been of great importance for Europe and above all in the last twenty years.

In 1995, at a conference held in Barcelona, Europe took the initiative to establish the so-called Euro-Mediterranean Partnership, which was merged into the European Neighborhood Policy in 2004.⁸

Yet migrations from the southern shore to the north of the Mediterranean area may be defined the realization, certainly frantic and in some cases irrational, of that free circulation within the area of the Euro-Mediterranean Partnership, which was promised and never fully realized.

They show that the political intuition that had driven Europe to seek a partnership with the countries of the southern shore was correct. The migratory forces linked to situations of political instability are not in fact the only

⁶ European Parliament Resolution of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)). The quote is from point 2 of the Resolution.

⁷ *EU moves to prevent new migrant deaths after Lampedusa*, available at www.bbc.com. Italian Premier Enrico Letta, speaking at a British Council Conference, announced that the victims of the Lampedusa shipwreck were posthumously awarded Italian citizenship, then concluding “Today is a day of mourning in Italy, one that involves all of Europe” claiming also for Europe to “raise the level” of intervention (see www.ansa.it). But see also the joint declaration by the Migreurop Network at www.statewatch.org

⁸ The Barcelona Process or Euro-Mediterranean Partnership (Euromed) started in 1995 with the Barcelona Euro-Mediterranean Conference. It was organized by the European Union to strengthen its relations with the countries in the Mashriq and Maghreb regions. The partnership laid the foundations for what came to be the Union for the Mediterranean. The European Union enlargement of 2004 brought two more Mediterranean countries (Cyprus and Malta) into the Union, while adding a total of 10 to the number of Member States. The Euro-Mediterranean Partnership today comprises 39 members: 27 European Union member states, 3 Candidate States: Croatia, Macedonia and Turkey, and 9 Mediterranean Partners: (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria and Tunisia). Libya has had observer status since 1999.

component of the phenomenon. The population of non-EU Mediterranean countries is growing at a rate that is certainly higher than in the countries of the Union: it is clear therefore that the pressure of the peoples of the southern shore over the countries of Europe is, and increasingly will be, an unavoidable reality.

A European policy would therefore be necessary to face the expectations generated by the many promises made and never kept. Today, however, the European Union is represented in the Mediterranean almost exclusively by the questionable presence of FRONTEX and EUNAVFORMED.⁹

⁹ The European Border and Coast Guard Agency, also known as FRONTEX, is an agency of the European Union headquartered in Warsaw, Poland, tasked with border control of the European Schengen Area, in coordination with the border and coast guards of Schengen Area member states. FRONTEX was established in 2004 as the European Agency for the Management of Operational Cooperation at the External Borders and is primarily responsible for coordinating border control efforts. In response to the European migrant crisis of 2015–2016, the European Commission proposed on 15 December 2015 to extend FRONTEX's mandate and to transform it into a fully-fledged European Border and Coast Guard Agency. On 18 December 2015, the European Council roundly supported the proposal, and after a vote by the European Parliament, the European Border and Coast Guard was officially launched on 6 October 2016 at the Bulgarian external border with Turkey. This European integrated border management should consist *inter alia* of providing security but also of enhancing and promoting respect for human rights, with a “solidarity mechanisms, in particular Union funding instruments” (see, Article 3 of REGULATION (EU) 2019/1896 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624). See, V. Moreno-Lax, *The EU Humanitarian Border and the Securitization of Human Rights* (cit. *supra*, note 4). In addition to FRONTEX, it is worth mentioning the EUNAVFORMED Operation launched in June 2015 with Council Decision (CFSP) 2015/972, of 22 June 2015, launching the European Union military operation in the southern Central Mediterranean (EUNAVFOR MED). Assets were made available by 14 Member States and included vessels, helicopters, drones and aircrafts. The operation completed its first phase in early October of the same year and was limited to surveillance in international waters and airspace. Further phases two and three were devoted to much more effective activities, though the whole operation was judged thoroughly unsatisfactory. See G. Butler, M. Ratcovich, *Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea*, in *Nordic Journal of International Law*, 3, 2016, pp. 235-259; G. Licastro, *L'Operazione Sophia e la formazione della guardia costiera e della marina libica: profili che suscitano perplessità da allontanare*, in *Diritti dell'Uomo. Cronache e battaglie*, 2, 2016, pp. 371-383; A. Annoni, *Il ruolo delle operazioni Triton e Sophia nella repressione della tratta di esseri umani e del traffico di migranti nel Mediterraneo centrale*, in *Il Diritto dell'Unione Europea*, 4, 2017, pp. 829-859. P. D'Argent, M. Kuritzky, *Refoulement by Proxy? The Mediterranean Migrant Crisis and the Training of Libyan Coast Guards by EUNAVFORMED Operation Sophia*, in *Israel Yearbook on Human Rights*, 47, 2017, pp. 233-264; F.L. Gatta, *The trilateral cooperation between the African Union, the European Union and the United Nations on migration and Libya: a successful example of collaboration?*, in *www.federalismi.it*, 3, 2019, pp. 13 ff.

The promise of an integrated Mediterranean area, where people and goods could circulate freely and peacefully, could not have been betrayed more clearly and severely.¹⁰

Therefore, in 2014, from January 31 to February 2, peoples from every part of Europe gathered in Lampedusa to write down a new pact, pledging new rules on the fundamental right of migration for everybody everywhere. This was to be known as the Lampedusa Charter, a grass-root project carried out by activists and supporter of the idea of a fundamental right to migration.¹¹

«Starting from the construction of a freedom-based alternative, founded on new prospects for individual lives, with no distinctions made on the basis of nationality, citizenship and/or place of birth, the Charter of Lampedusa calls for a radical transformation in the social, economic, political, cultural and legal relations which form the basis of global injustice. The Charter of Lampedusa states that, as human beings, we all inhabit the planet Earth as a shared space. This

¹⁰ See Amnesty International, *The Human Cost of Fortress Europe. Human Rights Violations against Migrants and Refugees at Europe's borders*, Amnesty International Ltd., London, 2014, available at www.amnesty.org, but also M. Martin, *Prioritising Border Control over Human Lives: Violations of the rights of migrants and refugees at sea*, Euro-Mediterranean Human Rights Network (EMHRN), Copenhagen 2014; T. Kushner, *Lampedusa and the Migrant Crisis. Ethics, Representation and History*, in *Mobile Culture Studies. The Journal*, 2016/2, pp. 59-92; V. Minnucci, *International migrations in Europe. From the fall of the Berlin Wall to the Mediterranean crisis: an historical overview*, in V. De Cesaris (ed.), *One Way Trip. Essays in Mediterranean Migrations*, Perugia Stranieri University Press, Perugia 2016, pp. 7-23; F. Strano, *Lampedusa Europe's Gateway*, *ibid.* pp. 73-90.

¹¹ Full text available at www.lacartadilampedusa.org. But see also at www.mcbett.ie. The idea of a Charter of migrant rights was first conceived by the association Meltingpot Europe which organized two web conferences on November 29 2013 and January 15 2014 promoting the idea of a gathering in Lampedusa to write the Charter and adopt it. On the Charter and the implications of civil society participation in its writing see the case study by L. Giannetto, *The Charter of Lampedusa: Organised civil society in the EU multi-level system of governance*, in A. Cunha, M. Silva and R. Frederico (eds.), *The Borders of Schengen*, Bruxelles 2015, pp. 99 ff. where the distinguished scholar argues that “the Charter of Lampedusa was conceived from the very beginning as a grass-roots transnational movement, antagonizing the EU approach to border management. The Preamble of the Charter reads: “The Charter of Lampedusa is a pact achieved mainly through a constituent grassroots process”. Further on, the Preamble also reflects the movements disillusion towards top-down EU policies of border control, and therefore the necessity for a new approach: “All the groups and individuals who undersign the Charter of Lampedusa commit to putting it into practice... whether or not the Charter obtains recognition by current state and/or supra-state institutions”. The willingness of this transnational movement of local CSOs to advocate for migrant rights by implementing a new Charter of rights, independently from EU acceptance, highlights an ideological position that is irreconcilable with advocacy at the EU level” (*ibid.*, at p. 111). On the relationship of the Charter with existing international law see M.M. Pappalardo, *La Carta di Lampedusa. Migrazioni e diritti nel Mediterraneo*, in *Fogli di Lavoro per il diritto internazionale*, 2014-1.6, p. 5 retrievable at www.lex.unict.it

common environment must be respected. Differences must be considered as assets, a source of new opportunities, and must never be exploited to build barriers». ¹²

The Charter of Lampedusa lists in a first part the inspiring principles of the action aimed at promoting the right of every man to freely decide where to live his life, the right to leave but also to stay, and then states in a second part the concrete strategies for dealing with the difficulties of everyday life.

The first part opens with the affirmation of freedom of movement for all, which turns into a prohibition of discrimination as to the enjoyment of this right, because

«no distinction can or should be made between:

- people who can move freely and those who cannot, on the basis of their native countries and their social, legal and economic status;
- those who can move freely and those who are subjected to the needs of the destination country;
- those who can move freely and those who require permission;
- those who can move freely and those who, to travel the same path, must suffer discrimination, exploitation, violence – including sexual violence, dehumanization and marketization, limitation of their personal freedom, and the risk of losing their lives». ¹³

This freedom of movement implies the freedom of choice, the freedom to choose the place to live in

«The Charter of Lampedusa asserts:

the freedom to stay as the freedom of individuals to live as they choose in places other than the place of their birth/citizenship and the freedom to plan their lives in these new places.

Recognizing that:

¹² See www.mcbett.ie

¹³ *Ibidem* at www.mcbett.ie. The possibility of claiming a general and universal right to mobility has been often advocated. See, in this connection, the thorough discussion of legal issues in A. Pécoud, P. de Guchteneire, *International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility*, in *Journal of Borderlands Studies*, 2006, 21, 1, pp. 69 ff. More on these issues in Global Migration Group, *International Migration and Human Rights. Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, New York, 2008.

through formal allowances based on market rules, national and global socio-economic systems manipulate the right to stay, exploit and differentiate people's legal status and their life chances,

The Charter of Lampedusa affirms that:

- the freedom to stay in a chosen country should in no way depend on working 'legally' in the place of arrival on the basis of labour market needs;
- the freedom to stay and to plan a life in a chosen place, implies freedom from any form of exploitation and it requires access to healthcare, housing, work, education, communication and legal information, with no discrimination».¹⁴

But these freedoms to move and to stay, also imply the freedom to resist, and in this sense, it is true that the Lampedusa Charter also is a document of civil disobedience in that it advocates for

«everyone's Freedom to resist policies which foster inequality and disparity, intended to create divisions, discrimination, exploitation and precariousness of human beings, and which generate inequalities.

Because:

current migration control policies are one of the main instruments to create these conditions,

The Charter of Lampedusa affirms:

the freedom of everybody to resist these whole policies, as well as in their specific operating mechanisms, such as the institutions of containment and/or detention centres, of borders, acted through stay permits linked to work contracts.

We affirm the freedom to resist practices of deportation and refoulement, unequal access to jobs and housing, exploitation of the migrant labour force, increasing uncertainty of living and working conditions, policies of selection and containment of mobility on the basis of the market economy, visa policies, quota policies, militarization of sea and land, to control and prevent the mobility of human beings».¹⁵

The Lampedusa Charter affirms the idea that migration issues should be regulated in accordance with rules and norms elaborated in a directly democratic way, and not exclusively by Governments and Institutions. Which, on the contrary, is precisely what the European Union has done through the years, looking

¹⁴ Ibidem at www.mcbett.ie

¹⁵ Ibidem at www.mcbett.ie On Civil Disobedience and International Law see F. Mégret, *Civil Disobedience and International Law: Sketch for a Theoretical Argument* (July 19, 2008) available at SSRN: ssrn.com or dx.doi.org

for a compromise among the different Member States' positions on these crucial issues.

So, the confrontation is open between what peoples think and wish on the regulation of migrations and what Member States Governments and European Institutions are prepared to concede. Which is not so much, indeed, given the fact that these policies are dominated by the exigencies of security.¹⁶

Therefore, it is striking the contrast between the attitude shown by the associations of the civil society gathered in Lampedusa to reaffirm rights of the migrants and asylum seekers before the European States and the European Union migration policies which appear based on burden sharing obligations based not on solidarity with the migrants, but, ultimately, between the Member States *inter se*.

3. Schengen and Dublin. A Tale of Two Cities?

But, to properly understand the reason why European States and Institutions are not particularly keen to assume obligations in favor of migrants and events such as those in Lampedusa occurred so many times, one should think of the tight relationship between the idea of a free movement across national (in EU lexicon, internal) borders through the Schengen Agreements and the Dublin regime concerning people coming from non-European countries and claiming for international protection by European States.¹⁷

It was in fact when the free movement across internal borders in the European Union area became real and effective through the Schengen Agreements, that this problem arose: precisely that of determining which country in the European Union was to decide over an asylum seeker's application, thus ensuring that only one Member State should process each asylum application. This problem arose because free movement across national borders without controls meant that also asylum seekers could move from one State to another searching for the better response to their application.¹⁸

¹⁶ See J. Huysmans, *The European Union and the Securitization of Migration*, in *Journal of Common Market Studies*, 38, 5, 2000, pp. 751-778.

¹⁷ On the original Schengen Agreement of 1985, including the provisions on responsibility for asylum seekers' applications within the border-free Schengen area, as well as the Dublin Regime see the detailed analysis provided by Noll, G., (2000). *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff.

¹⁸ On the complex relationship between the Schengen and the Dublin Agreements see the Commentaries by Sapienza R., (2019). Article 78 TFEU on Common European Policy on Asylum. Article 77 TFEU on Policies on Border Controls, in: *Smith & Herzog on the Law of the European Union, ad voces*. Herzog, P., Campbell, G. (Eds.), Newark, NJ. See also De Somer, 2018. M., *Dublin and Schengen: A Tale of two cities, EPC Discussion Paper Series*, Brussels: European

A “Convention determining the State responsible for examining applications for asylum lodged in one of the member states of the European Communities” was then agreed 15 June 1990 in Dublin, and this is why it was called the Dublin Convention, and the Asylum Regime in the European Union has since been defined the Dublin Regime.¹⁹

The Convention entered in force in 1997, once ratified by all the Member States of the European Union, and sets out a series of criteria (in Articles 4 to 8) according to which a State can be identified as the sole State having jurisdiction to examine the claim for international protection.²⁰

The Dublin Convention, anyway, proved ineffective, mainly because of different interpretations by Member States, always possible when enforcing a treaty. The European Commission therefore began to draft a proposal for a Council Regulation on the matter, intended to replace the Convention.

Meanwhile, at the European Council meeting held in Tampere in October 1999, a clear political program for the development of a European policy based on the creation of a common asylum system was approved, foreseeing the establishment of a Common European Asylum System (CEAS).

Several acts were adopted in this connection and they were to represent the so-called Dublin II package, whereas in 2013 the Dublin III package was adopted.²¹

Policy Centre; 2020, Schengen: Quo Vadis?, *European Journal of Migration and Law* 2 (22), pp. 178-197; Hailbronner, K., Thiery, C., 1997. Schengen II and Dublin: Responsibility for asylum applications in Europe, *Common Market Law Review* 4(34), pp. 957-990; Kuijper, P.J. 2000, Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis, *Common Market Law Review* 2(37), pp. 345-366.

¹⁹ *Official Journal of the European Communities*, no. C 254 of August 19, 1997 available at eur-lex.europa.eu. Regarding the historical evolution of the Dublin Regime see Hurwitz, A., (2009). *The Collective Responsibility of States to Protect Refugees*, OUP. Faria, C. (2001), *The Dublin Convention on Asylum: Between Reality and Aspirations*, European Institute of Public Administration, Maastricht; Hailbronner, K. (2000) *Immigration and Asylum Law and Policy of the European Union*, The Hague; Marx, R., 2001. Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications, *European Journal of Migration and Law* 7, p. 7 ff.

²⁰ *Official Journal of the European Communities*, no. C 254 (1997), p. 4.

²¹ On the Dublin II Regulation see the ELENA (European Legal Network on Asylum), *Summary Report on the Application of the Dublin II Regulation in Europe*, ECRE (European Council on Refugees and Exiles) 2006 available at www.ecre.org. On the Dublin III package see ec.europa.eu and the Final Report by the EU DG Migration and Home Affairs, *Evaluation of Dublin III Regulation*, 2015 available at ec.europa.eu. For a critical appraisal on the new dispositions in Dublin III Regulation see, Peers, S., 2014. The Dublin III Regulation: What will be Different, in *Journal of immigration asylum and nationality law* 1(28), pp. 46-51. On the perspective that the Dublin cooperation cannot deal with massive influx since it does not implement any redistributive solidarity mechanism within the aim of protection of Geneva Convention see *ex multis*

This policy was further developed as a central element of the efforts for the establishment of a European Area for Freedom, Security and Justice. The CEAS has been object of extensive criticism, being identified as a way of restricting access to international protection by third country nationals or stateless persons, all this amounting to the building of a “Fortress Europe”.²²

This criticism is maybe exaggerated, though it is true that the metaphors of the siege or rather of the invasion have been diffusely recurred to by European political leaders. All in all, the CEAS should be properly seen as a work in progress, moreover as a work in progress going on in a situation of massive influx of migrants such as the one taking place in the Mediterranean Area since the year 2000.²³

Moreover, an European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) was created with EU Regulation 2007/2004 to provide control and supervision at the external borders.

Vitiello, D., 2018. The Dublin System and Beyond: Which Way Out of the Stalemate?, *Diritti Umani e Diritto Internazionale* 3(12), pp. 463-480, p. 466. Nascimbene, B., 2016. Refugees, The European Union and the ‘Dublin System’. The Reason for a Crisis, *European Papers*, pp. 101-113. Anyway, apart from the reform of the rules, important effects may be due to the judges’ attitude concerning the migrants and asylum seekers condition. See in this connection Pappalardo, M.M., 2014. Respingimenti in mare ed emergenza immigrazione: nuove prospettive nel sistema Dublino III, *La Comunità internazionale*, 4(68), pp. 793-813; 2020. Il risk assessment in materia di richieste di asilo: modelli di valutazione a confronto nel caso N.A. c. Finlandia, *Diritti Umani e Diritto Internazionale* 2, pp. 644-653.

²² In line with this orientation, one might think that, since the power to admit or exclude aliens from the territory is an attribute of national sovereignty, ‘Fortress Europe’ was strategically managed by the EU to dispose of it, without having the competence to do so and just for its own purpose. Lenart, J., 2012. ‘Fortress Europe’: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Merkourios: Utrecht Journal of International and European Law* 28(75), pp. 4-19. Peers, S., 1998. Building Fortress Europe: The development of EU migration law, *Common Market Law Review* 6 (35), pp. 1235-1272; Binetti, A., 2020. You Shall Not Pass: How the Dublin System Fueled Fortress Europe Armstrong, *Chicago Journal of International Law* 2, p. 332 ff.

²³ Data and trends about Mediterranean migration routes are available at <https://data2.unhcr.org/en/situations/mediterranean>. On the COVID-19 impact on irregular migration into EU see European Border and Coast Guard Agency, (2021, January). *Irregular migration into EU last year lowest since 2013 due to COVID-19*, frontex.europa.eu. Statistics on migration to Europe available at ec.europa.eu. As shown by these data, the lack of addressing the root causes of migratory and refugees’ flows makes access to Europe more tough, increasing the reliance of people trying to entry in Europe on human smugglers and rising the number of borders deaths. Last T., Spijkerboer, T., (2014). Tracking deaths in the Mediterranean, in: *Fatal Journeys: Tracking Lives Lost During Migration*. Brian T., Laczko, F., (Eds.), International Organization for Migration, pp. 85–106.

Visa regulations, border controls by States, border patrolling by FRONTEX, the Dublin regime for asylum seekers are only different moments and articulations of a strategy of migratory fluxes containment under strong political pressure by European peoples fearing loss of their security and ease.²⁴

In fact, though written in a normative language aimed at providing a general discipline of these issues, it is easy to detect behind the formal language of law used in EU treaties and laws, harsh attitudes against what is deemed by many to be an “invasion” to repeal.

Moreover, in several occasions States have unilaterally suspended free movement through their internal borders. For instance, when in 2011 due to extensive mass influxes of Tunisian Migrants Italy gave six months residence permits to thousands of migrants, France blocked trains at the border of Ventimiglia, though not formally suspending Schengen Guarantees.²⁵

Later on, in 2015, Germany decided to restore temporarily border controls in order to secure a regular inflow of the migrants. Other countries too, have restored border checks due to massive migrant fluxes.²⁶

4. The European Union desperately in search of solidarity

It must be recognized, however, that the Union has also built obligations for States based on the principle of solidarity. Over the years, the solidarity principle has assumed peculiar importance in the field of border controls, asylum and immigration.

²⁴ Joint Statement of the Heads of Governments of the V4 Countries, Bratislava, 16 September 2016. Den Heijer, M., 2017. Corrective allocation or effective solidarity? The Slovak Presidency non-paper on the revision of the Dublin system, 10 March 2017, available at <https://eumigrationlawblog.eu/>; De Bruycker, P., Tsourdi, E. (L.), 2016. The Bratislava Declaration on migration: European irresponsibility instead of solidarity, *EU Immigration and Asylum Law and Policy*, www.eumigrationlawblog.eu, 27 September 2016.

²⁵ The so-called Franco-Italian affair raised the need to rethink of the Schengen framework on temporary internal border checks and reform the Schengen Borders Code. Crises in the Schengen system are not so uncommon. Groenendijk, K., 2014. Reinstatement of Controls at the Internal Borders of Europe: Why and against Whom?, *European Law Journal* 2(10), pp. 150-170.

²⁶ These ‘bad’ practices show that in time of emergency not even the interstate solidarity seems to be a considerable response. For example, after the outbreak of the coronavirus pandemic and the consequent increase in European countries, some EU countries tightened internal border controls to the point of total closure in response to the spread of the virus. Aware this trend, recently, the European Commission proposed a revision of the Schengen Borders Code to ensure that internal borders between EU countries can only be returned in cases of extreme need, see the Proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No 1053/2013, Brussels, 2.6.2021 COM(2021) 278 final.

With the Treaty of Amsterdam, in article 73.2, a solidarity mechanism was introduced for the first time in favor of those Member States that were faced with an emergency situation characterized by a sudden influx of third-country nationals, through which the Council, acting in qualified majority on a proposal from the Commission, could adopt temporary measures for the benefit of the State concerned lasting no longer than six months.

And again, the Lisbon Treaty introduced article 80 TFEU, according to which the policies relating to border controls, asylum and immigration must be governed by the principles of solidarity and fair sharing of responsibilities between Member States, including financial matters.²⁷

The reformed text of article 78.3 TFEU also maintains the possibility, introduced by the Treaty of Amsterdam, that the Council adopts measures for the benefit of those Member States that are faced with emergency situations characterized by a sudden influx of third-country nationals, eliminating the reference to the maximum duration of six months present in the original text.

Operational assistance is mainly provided by the European Border and Coast Guard Agency (FRONTEX), called upon to supervise the effective functioning of border control and contribute to an integrated management of external borders; to provide more technical and operational assistance to Member States through joint operations and rapid border interventions; and organize, coordinate and carry out operations and repatriation operations.²⁸

With regard to financial solidarity, instead, the European Commission for the 2014/2020 programming cycle, in the context of a reorganization of the funds allocated to support the immigration policies of the Member States, provided for the establishment of the Fund on Asylum, Migration and Integration and the Internal Security Fund.

²⁷ Gottwald, M., (2014). Burden Sharing and Refugee Protection, in: *The Oxford Handbook of Refugee and Forced Migration Studies*, Fiddian-Qasmiyeh E. et al. (eds.), Oxford, pp. 525 ff.

²⁸ Sea operations coordinated by the Agency have been criticized for not fully complying with human rights standards, nevertheless the response by a Fundamental Rights Strategy and a Code of Conduct (amended on 14 February 2021 and available at frontex.europa.eu). Although protecting human rights during Frontex operations is an obligation and not just an option, a security strategy is predominant, see Parliamentary Assembly, Council of Europe, Report, Doc 13161, 08 April 2013, Committee on Migration, Refugees and Displaced Persons, 2013. Frontex: Human Rights Responsibilities Parliamentary Assembly of the Council of Europe, Rapporteur: Mr, Mikael Cederbratt, Sweden, Group of the European People's Party, *International Journal of Refugee Law* 2(25), pp. 407-434. Papastavridis, E., 2010. "Fortress Europe" and FRONTEX: Within or Without International Law?, *Nordic Journal of International Law*, 1 (79) pp. 75-111; Santos Vara, J., Sanchez-Taberner, S.R., 2016. In Deep Water: Towards a Greater Commitment for Human Rights in Sea Operations Coordinated by Frontex?, *European Journal of Migration and Law* 1(18), pp. 65-87.

In particular, the Asylum Migration and Integration Fund (AMIF) - which brings together the European Fund for the Integration of Third-Country Citizens, the European Refugee Fund and the European Return Fund - aims to

contribute to the efficient management of migration flows and to the implementation, strengthening and development of the common policy on asylum, subsidiary protection and temporary protection and the common immigration policy, while fully respecting the rights and principles enshrined in the Charter of Fundamental Rights of the European Union.²⁹

The allocation of reception burdens, however, should not be limited to the financial plan alone, but should extend to the responsibility of Member States for examining asylum applications. The application of the criteria envisaged in this regard by c.d. “Dublin system”, which as a rule designates the State in which the foreigner has irregularly entered as the controller of the application, leading to an unsustainable pressure for those who, for geographical reasons, suffer more intense immigration.³⁰

However, these provisions do not clarify which actions should be taken to ensure the application of the principle of solidarity, nor which measures could be adopted by the Council pursuant to the aforementioned article 78, paragraph 3: in practice there is both the presence of operational assistance measures and various forms of financial support.³¹

²⁹ Commission Implementing Decision of 26.6.2020 on the financing of Union Actions in the framework of the Asylum, Migration and Integration Fund and the adoption of the work programme for 2020, C(2020) 4223 final.

³⁰ The term “Dublin System” covered different meanings, since it is used to refer to the Regulation (EU) no. 604/2013 and also to the institutional and procedural aspects of the Regulation, including the Dublin units work. Garlik, M. (2016), *The Dublin System, Solidarity and Individual Rights*, in: *Reforming the Common European Asylum System: The New European Refugee Law*, Chetail, V., De Bruycker, P., Maiani, F., (eds), Brill Nijhoff, Leiden Boston, pp. 159-194. For a critical point of view on the challenge of the distribution of asylum claims see Mouzourakis, M., 2014. ‘We Need to Talk about Dublin’ Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Working Paper Series No. 105, *Refugee Studies Centre Oxford Department of International Development University of Oxford*, December 2014.

³¹ This provision, of course, evokes a mechanism of emergency designed to stimulate certain conducts of interstate solidarity, whose are necessary for the attainment of certain benefits. Mitsilegas, V., (2018). *Solidarity Beyond the State in Europe’s Common European Asylum System*, in: *Critical Perspectives on Migration in the Twenty-First Century*, Karakoulaki, M., Southgate, L., Steiner, J. (Eds.), E-International Relations, Bristol, p. 196 ff. Tsourdi, E., 2017, *Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System*, *Maastricht Journal of European and Comparative Law* 5(24), pp. 667-686; Bast, J., 2016. *Deepening Supranational Integration: Interstate Solidarity in EU Migration Law*, *European Public Law* 2(22), p. 289-304.

The correct implementation of the principle of equitable distribution, therefore, should result in the transfer of asylum seekers to Member States less affected by this phenomenon, or in a revision of the criteria.

The two decisions adopted by the Council in September 2015 pursuant to art. 78, par. 3, TFEU, have introduced a temporary derogation from the system, governing an emergency relocation mechanism to assign to states other than the arrival the examination of applications for asylum seekers in clear need of protection Decisions (EU) 2015/1523 of Council of 14 September 2015 establishing temporary measures in the field of international protection for the benefit of Italy and Greece, (EU) 2015/1601 of the Council of 22 September 2015 establishing temporary measures in the field of international protection for the benefit of Italy and Greece.³²

The so-called relocation is organized according to a complex algorithm that combines various criteria of an objective nature to determine the quota of asylum seekers to be sent to other Member States: total population, GDP, unemployment rate, average number of spontaneously presented asylum applications and the number of refugees resettled per million inhabitants in the period 2010-2014. However, the relocation slowed down considerably: from September 2015 to February 2017, less than 12,000 people were relocated, compared to the 160,000 expected.³³

One should also add to these the critical attitudes of those States who did not accept the relocation obligations of refugees from other Member States.

In this connection it is to be noted that the Court of Justice on 6 September 2017 has ruled against these States in her judgment in Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council*, originating from the refusal of the recurring States to enforce Council Decision (EU) 2015/1601 of 22 September 2015, establishing provisional measures in the area of international

³² However, there is no trace of interstate solidarity within the EU in this emergency relocation scheme to derogate to the Dublin system, showing indeed a structural lack of solidarity in the implementation patterns. De Witte, B., Tsourdi, E., 2018. Confrontation on relocation: The Court of justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: *Slovak republic and Hungary v. Council*, *Common market law review* 5, pp. 1457-1494, p. 1492. Guild, E., Costello, C., Moreno-Lax, V., 2017. Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefits of Italy and of Greece, Study for the LIBE Committee of the European Parliament, PE 583 132, March 2017.

³³ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, pp. 80–94; European Commission (2017). COM(2017) 465 final, Fifteenth report on relocation and resettlement, Brussels: European Commission (6 Sept 2017). See European Commission Statement following the decision at the Extraordinary Justice and Home Affairs Council to relocate 120,000 refugees, 22 September 2015.

protection for the benefit of Italy and Greece. In her judgment the Court stated inter alia that

When one or more Member States are faced with an emergency situation within the meaning of Article 78(3) TFEU, the burdens entailed by the provisional measures adopted under that provision for the benefit of that or those Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy. Accordingly, in the present case the Commission and the Council rightly considered, at the time of adoption of the contested decision, that the distribution of the relocated applicants among all the Member States, in keeping with the principle laid down in Article 80 TFEU, was a fundamental element of the contested decision. That is clear from the many references which the contested decision makes to that principle, in particular in recitals 2, 16, 26 and 30.³⁴

Against this background, solidarity principle has assumed peculiar importance in the field of border controls, asylum and immigration. However, while the problem of migration flows remains a constant that is expected to endure over time, attempts to solve it by introducing continuous legislative adjustments turn out to be ineffective and, indeed, increase the challenges of solidarity in times of crisis.³⁵ The risk of these shortcomings is the rise of unlawful and uncontrolled national policy strategies³⁶ rather than implementing solidarity mechanisms for asylum seekers among Member States.

³⁴ ECLI: EU: C:2017:631, paras. 291-292. Labayle, H., 2017. Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council), eumigrationlawblog.eu. See also the Opinion of Advocate General Bot delivered on 26 July 2017, Cases C-643/15 and C-647/15 Slovak Republic, Hungary v Council of the European Union, ECLI:EU:C:2017:618, paras 241-242.

³⁵ Marin, L., 2020, The COVID-19 Crisis and the Closure of External Borders: Another Stress-test for the Challenging Construction of Solidarity Within the EU?, *European Papers* 5, *European Forum*, Insight of 28 October 2020, pp. 1071-1086.

³⁶ Such as several Italian policies so-called “push-back”, “pull-back” and “closed ports”. Moreno-Lax, V., 2020. Papastavridis, E., 2018. Recent “Non-Entrée” Policies in the Central Mediterranean and Their Legality: A New Form of “Refoulement”?, *Diritti Umani e Diritto Internazionale* 3(12), p. 493-509; Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., 2018. Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia, *International and Comparative Law Quarterly* 2(67), pp. 315-351.

5. Which way out of here? The European Commission and the European Parliament striving for solutions

The European Commission drafted a proposal amending the relevant provision of the Dublin III Regulation aimed at addressing the pitfalls identified by these judgments. This proposal for a Dublin IV Regulation, put forward in 2016, as a pivotal element of a thorough reform of the Common European Asylum System was confronted with sharp critical discussions.³⁷

The proposed revision aimed to increase the efficiency of the criteria for determining the Member State responsible for examining the asylum application; prevent secondary movements within the area of freedom, security and justice by discouraging abuse and asylum shopping; seeking a high level of solidarity and fair sharing of responsibilities.³⁸ Without amending the usual criterion of first entry, Commission continued to support “*a linkage between the allocation of responsibility in the field of asylum and the respect by Member States of their obligations in terms of protection of the external border*” and just a “*corrective allocation mechanism*” based on an exceeding 150% of a quota referred to a Member State in case of disproportionate number of asylum applications.³⁹

In November 2017 the European Parliament adopted a report in which several amendments to the Commission proposal were put forward. All in all, the main feature of this proposed reform is the modified allocation procedure: the applicant is not bound to find reception in the Member State of arrival but is given the choice between four Member States with the lowest number of asylum seekers. But a thorough reform of the system still seems too difficult to attain, considering the current political climate ...not favourable to burden-sharing.⁴⁰

³⁷ European Commission, 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), COM (2016)270 final of 4 May 2016. Morgese, G., 2019. Dublin System, “Scrooge-Like” Solidarity and the EU Law: Are There Viable Options to the Never-Ending Reform of the Dublin III Regulation?, *Diritto, Immigrazione e Cittadinanza*, 3 November 2019, pp. 86 ff.; Munari, F., 2016. The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime, *Diritti Umani e Diritto Internazionale* 3(10), pp. 517-547.

³⁸ Vitiello, D., 2016. Du vin vieux dans de nouvelles outres? Réflexions sur la proposition de règlement “Dublin IV”, *European Papers - European Forum*, www.europeanpapers.eu, 27 December 2016.

³⁹ Di Filippo, M., 2016. The Reform of the Dublin System and the First (Half) Move of the Commission, *SIDIBlog*, www.sidiblog.org, 12 May 2016.

⁴⁰ Report on the 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

As far as the principle of solidarity is concerned, the developments of the ECJ's jurisprudence on the solidarity measures within the meaning of Article 80 are, on one hand, entirely based on the fact that no positive obligations are placed on Institutions for amending the Dublin Regulation in terms of Article 80⁴¹ and, on the other hand, on the circumstance that the Regulation is in line with the principle. Thus, since the Institutions are not bound to act consistently with Article 80, “*at least as long as such a need has not been previously acknowledged*”,⁴² the Dublin system could not be deemed in breach of the principle of solidarity, even though it seems constitutes “*the antithesis of solidarity and the result of an unfair responsibility-sharing*”.⁴³ In other words, in the ECJ approaches, the principle of solidarity does not affect the interpretation or application of the Dublin system, remaining valid dispositions such as the option of “*sovereignty clause*” which is “*not subjected to any particular condition*”.⁴⁴ Anyway, the system cannot be derogate even in the case of a massive and unusually large number of third-country nationals seeking international protection.⁴⁵ Despite, in *Jafari* case, the Court expressly refers to the direct link between the responsibility criteria established in a “spirit of solidarity” and reminds the need of common efforts towards the management of external border as the interest of all Member States and not only of Member State which carries out the border control,⁴⁶ its reasoning enhances the full compliance of the regulation with the principle of solidarity. Furthermore, in accordance with Article 80 TFEU, a member State, unilaterally or bilaterally, may also applies the power provided for in Article 17.1 of the Regulation, in order to examine the asylum applications

national or a stateless person (recast); LIBE Committee, Rapporteur: Cecilia Wikström, A8-0345/2017, 6 November 2017. Maiani, F., Hruschka, C., 2017. The Report of the European Parliament on the reform of the Dublin system: certainly bold, but pragmatic?, *EU Immigration and Asylum Law and Policy*, www.eumigrationlawblog.eu, 20 December 2017.

⁴¹ C-643/15 and C-647/15 Slovakia and Hungary v Council, see supra.

⁴² Morgese, G., (2019). The Dublin System vis-à-vis EU Solidarity before the European Court of Justice: The Law, The Whole Law, and Nothing But The Law!, in: *Migration Issues before International Courts and Tribunals*. Bruno, C.G., Palombino, F.M., Di Stefano A., (Eds.), CNR-Edizioni, p. 392.

⁴³ Ibidem, p. 393.

⁴⁴ C-528/11, *Zuheyr Frayeh Halaf V Darzhavna agentsia za bezhantsite pri Ministerskia savet*, 30 May 2013, ECLI:EU:C:2013:342, para. 36.

⁴⁵ C-646/16, *Jafari*, 26 July 2017, ECLI:EU:C:2017:586, para. 92. See also Case C-490/16, A.S., 26 July 2017, ECLI:EU:C:2017:585

⁴⁶ Ibidem, para. 85. Moreover, the criteria established by Regulation No 343/2003, which included the irregular crossing of the border of a Member State, were based, inter alia, on the idea that each Member State is answerable to all the other Member States for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof in a spirit of solidarity and fair cooperation, ibidem, para. 88.

even if such examination is not its responsibility under the criteria laid down in the Regulation,⁴⁷ showing solidarity.

Structural flaws of the CEAS and Dublin system, in particular, have been rather revealed by the ECJ in that decisions where it seems clear the need to balance the asylum seekers' fundamental rights with the right to refuse entry in the territory of a member State, but with no significant reference to the breach of the principle of solidarity.

According to the CJEU, the threshold for determining a violation of fundamental rights is reached when the State responsible suffers from systemic flaws in the asylum procedure and reception conditions for asylum, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State.⁴⁸

But even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment.⁴⁹

The responsibility for solidarity actions, thus, remains among Member States even though their wide margin of discretion could compromise human rights of asylum seekers.

In December 2018, the European Commission called all Member State to adopt temporary arrangements until the reform of the Dublin Regulation as the solidarity strategy to response to any temporary peaks of arrivals, with the promise of a full EU support for these measures through the Agencies and the financial programmes.⁵⁰

In July 2019 a draft Temporary Disembarkation Scheme was supported by a coalition of 14 Member States that resulted in the subsequent "Joint Declaration of Intent on a Controlled Emergency Procedure - Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism", agreed

⁴⁷ Ibid. 100

⁴⁸ See C-411/2010 and 493/2010, *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, ECLI:EU:C:2011:865; See also Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, 14 November 2013, ECLI:EU:C:2013:740; Case C-394/12, *Shamso Abdulahi v Bundesasylamt*, 10 December 2013, ECLI:EU:C:2013:813.

⁴⁹ C-578/16 PPU - *C. K. and Others v Republika Slovenija*, 16 February 2017, ECLI:EU:C:2017:127. These decisions also show the limits of mutual trust and of the presumption that every Member State as such is safe for asylum applicants within the Dublin system.

⁵⁰ Communication from the Commission to the European Parliament, the European Council and the Council, Managing migration in all its aspects: progress under the European Agenda on Migration, 4 December 2018, COM (2018) 798 final.

in Malta in September 2019⁵¹. The declaration aimed to create a “predictable and efficient temporary solidarity mechanism” to ensure “dignified disembarkation” of rescued seaborne refugees in the central Mediterranean.⁵² Briefly, person eligible for international protection were to be relocated to another participating Member State within four weeks, while ineligible persons had to be returned “immediately” after their disembarkation.⁵³ Despite the European Commission tried to foster a wide participation to the solidarity pact, at the end of March 2020, the pilot project expired with just a few of joining⁵⁴ with no predictable solution for disembarkation of rescued migrants in the Mediterranean area.⁵⁵

Finally, at least for the moment being, on September 23rd 2020 the European Commission presented her New Pact on Migration and Asylum, containing various proposals which should be considered, at least according to the Commission, to be a “fresh start for migration in Europe”, a new comprehensive strategy based, as stated by Article 80 TFEU, on the principle of solidarity and fair sharing of responsibilities.⁵⁶

More in detail, the Commission proposed to replace the Dublin III Regulation with a new Regulation on Asylum and Migration Management, establishing a common framework based on a comprehensive approach to migration issues.

The proposed Regulation is based on the principle of solidarity and fair sharing of responsibility between Member States accepting the fundamental idea that migration issues are to be considered a challenge directed not to single Member States, but to the European Union as a whole.

The obligations based on solidarity are various and multifaceted leaving the Member States free to choose among a variety of strategies, all inspired by the idea of a fair sharing of responsibilities.⁵⁷

⁵¹ Joint Declaration of Intent on a Controlled Emergency Procedure—Voluntary Commitments by Member States for a Predictable Temporary Solidarity Mechanism (Malta declaration), 23 September 2019. <http://www.statewatch.org/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf>

⁵² Ibidem, para 1.

⁵³ Ibidem, para. 4

⁵⁴ Portugal, Luxembourg and Ireland were the only “willing” participating.

⁵⁵ For a critical appraisal on the “Malta declaration” see Van Berckel Smit, J., 2020. Taking Onboard the Issue of Disembarkation the Mediterranean Need for Responsibility-Sharing after the Malta Declaration, *European Journal of Migration and Law* 4(22), pp. 492–517.

⁵⁶ A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, Press release, 23 September 2020, Brussels.

⁵⁷ The refugee challenge therefore reveals a deep European crisis which threatens human rights and solidarity. Rizcallah, C., 2019. Facing the Refugee Challenge in Europe: A Litmus Test for the European Union, A Critical Appraisal of the Common European Asylum System through the

As for the treatment of asylum seekers, the proposed Regulation gives particular consideration to their best interest, providing unaccompanied minors and other vulnerable categories with stronger guarantees⁵⁸.

Along with the Asylum and Migration Management Regulation, the New Pact on Migration and Asylum launches a new Crisis and Force Majeure Regulation dealing with situations which can be defined of crisis and *force majeure*, for which it provides stronger solidarity obligations and simplified procedures.⁵⁹

6. The “new” European Pact on Migration and Asylum. Old Wine in New Bottles?

Now it is difficult to share these ideas, given the fact that since the beginning, the Pact starts from the general consideration that mass influxes of migrants should be regarded as mainly made up by economic migrants, whereas only a minority should have the possibility of being eligible for international protection.

And what is more, it is difficult not to agree with those who contend that this attitude has inspired the European policies towards migration issues through the years, as we have already shown in other parts of this paper.

European States (all of them) and, following their positions, the European institutions fail to understand that Europe is confronted today with a migration crisis, which is part of a thorough scenario of economic problems throughout the world, and particularly in the countries on the shores of the Mediterranean Sea⁶⁰.

The chosen approach is still the same. There is no such thing as structural problems, both economic, social and geographical. We only have a crisis

Lens of Solidarity and Human Rights, *European Journal of Migration and Law* 2(21), pp. 238-260.

⁵⁸ Consoli, M.T., 2014. Solidarietà e associazionismo: alcuni spunti di riflessione nei servizi ai minori, *MINORIGIUSTIZIA* 2, pp. 165-169, DOI:10.3280/MG2014-002020. As for women's issues see Pappalardo, M.M., 2019. Framing The “Risk Assessment” Test in Women's Asylum Claims: A Critical Analysis of The Domestic Jurisprudence Vs. The European Court of Human Rights, in: *Migration Issues before International Courts and Tribunals*. Bruno G.C., Palombino F.M., Di Stefano A., (eds.), CNR-Edizioni, pp. 331-353.

⁵⁹ Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, COM/2020/613, Final.

⁶⁰ The failures of the European asylum and the border policies is due to a fragmented nature of the EU governance in these field in which no common asylum, no federal asylum courts, and no EU executive powers are provided. The implementation of the EU's policies remains on the hands of the Member States, see Den Heijer, M., Rijpma, J., Spijkerboer, T., 2016. Coercion, Prohibition, And Great Expectations: The Continuing Failure of The Common European Asylum System, *Common Market Law Review* 53, pp. 607-642.

situation, or even several crisis situations, and we shall fix them provided we are better prepared and organized.

Furthermore, it seems that in this “new” Pact there is no place for the idea that asylum should be regarded as a fundamental human right recognized by Article 18 of the European Charter on Fundamental Rights, and solidarity a duty which European Member States owe each other and towards the poorest on the Earth, who seek refuge from persecution and bad living conditions.⁶¹

Except for unaccompanied minors and asylum seekers with family members⁶² already residing in a Member State, the asylum system has never been concerned with the protection expectations of migrants who, as demonstrated by the two European Courts, have repeatedly found themselves in situations of inhuman and degrading treatment.⁶³ Reports and studies, by analysing the asylum seekers behaviors, showed that in order to avoid the criteria associated with Dublin system and to be transferred in the Member State responsible for examining the application for international protection where there are systemic flaws, asylum seekers avoid registration, lying about travel routes and documents, reasons for applying asylum until cutting off fingertips.⁶⁴

One feel forced to reach this conclusion, given the fact that the Dublin system is not once and for all filed in the archives of past errors, but on the contrary is still held to be a viable solution for coping with migration issues.

Nor is the relocation problem solved in any way. According to the Pact “The new solidarity mechanism will primarily focus on relocation or return

⁶¹ Few words spending for human rights of asylum seekers cannot conduct to the presumption that this new strategy will be effectively oriented toward a solidarity for migrants. To ensure a right-compliant asylum system one should change the meaning of solidarity focused on the refugee and not only on the State, See Mitsilegas, V., 2018, p. 196 ff. In other words, “the European crisis is a crisis of refugee policy, not a refugee crisis”, it is the way in which the European Union deals with the number of refugees which could do the difference and not the number in themselves. Den Heijer, M., Rijpma, J, Spijkerboer, T., 2016.

⁶² Pappalardo, M.M., 2018, La tutela delle relazioni affettive dei migranti nell’ordinamento europeo: tra protezione internazionale e ricongiungimento familiare, *Studi Emigrazioni* LV(212), pp. 613-632.

⁶³ Tsourdi, E., 2015. Reception conditions for asylum seekers in the EU: towards the prevalence of human dignity, *Journal of Immigration, Asylum and Nationality Law* 1(29), pp. 9-24; Lubbe, A., 2015. Systemic Flaws and Dublin Transfers: Incompatible Tests before the CJEU and ECtHR, *International Journal of Refugee Law* 1(27), pp. 135-140.

⁶⁴ German Bar Association et al., 2013. Memorandum: Allocation of refugees in the European Union: For an equitable, solidarity-based system of sharing responsibility, Pro Asyl – Der Einzelfall Zählt, March 2013; IRIN, 2017. *How a fingerprint can change an asylum seeker’s life*, 21 November 2017, available at: <https://www.refworld.org/docid/5a1694724.html>; Vavoula, N. 2020. Transforming Eurodac from 2016 to the New Pact From the Dublin System’s Sidekick to a Database in Support of EU Policies on Asylum, Resettlement and Irregular Migration, *Ecre Working Paper* 13.

sponsorship”. Successful relocations will depend on the cooperative Member States but without no space for the EU solidarity in this return sponsorship which is still essentially bilateral.⁶⁵

Relocation still remains an option for those among the Member States wishing to choose it, but in no way compulsory. This implies that countries at the EU external borders will continue to be left alone while they are confronted with increasing reception responsibilities and people entering Europe through these external borders will be left in unacceptable conditions, which the European Court of Justice as well as the European Court of Human Rights and also some national courts have ruled to be in violation of fundamental rights.⁶⁶

It also is difficult to accept the focus on the return policies. How could the asylum problem be solved through a policy of returns? The Pact has an answer for this question:

EU migration rules can be credible only if those who do not have the right to stay in the EU are effectively returned. Currently, only about a third of people ordered to return from Member States actually leave. This erodes citizens’ trust in the whole system of asylum and migration management and acts as an incentive for irregular migration. It also exposes those staying illegally to precarious conditions and exploitation by criminal networks. The effectiveness of returns today varies from Member State to Member State, depending to a large extent on national rules and

⁶⁵ Furthermore, in order to balance the unchanged first entry criteria, the reforms necessary require tools base on the paradigm of corrective solidarity among Member States. Marin, L., Pistoia, E., 2021. Captured between subsidiarity and solidarity: any European added value for the Pact on Migration and Asylum?, *Freedom, Security & Justice: European Legal Studies* 2, pp. 192 ff.

⁶⁶ See *inter alia* Moreno-Lax, V., 2012. Dismantling the Dublin System: M.S.S. v. Belgium and Greece, *European Journal of Migration and Law* 1(14) 2012, pp.1-31; Vicini, G., 2015, The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust, *European Journal of Legal Studies* 2(8), p. 50 ff.; Morano-Foadi, S., Andreadakis, S., 2011. The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: the ECJ and ECtHR Jurisprudence, *European Journal of International Law* 4(22), p. 1071 ff.; Ippolito, F., 2015. Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?, *European Journal of Migration and Law* 1(17), pp. 1-38; Morgades-Gil, S., 2015. The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?, *International Journal of Refugee Law* 3(27), p. 433-456; Thym, D., 2018. Judicial maintenance of the sputtering Dublin system on asylum jurisdiction: Jafari, A.S., Mengesteab and Shiri, *Common Market Law Review* 2(55), p. 549-568; Buchinger, K., Steinkellner, A., 2010. Litigation before the European Court of Human Rights and Domestic Implementation: Does the European Convention Promote the Rights of Immigrants and Asylum Seekers?, *European Public Law* 3(16), p. 419 ff.

capacities, as well as on relations with particular third countries. A common EU system for returns is needed which combines stronger structures inside the EU with more effective cooperation with third countries on return and readmission. It should be developed building on the recast of the Return Directive and effective operational support including through Frontex. This approach would benefit from the process proposed under the Asylum and Migration Management Regulation to identify measures if required to incentivize cooperation with third countries.⁶⁷

Again, the focus comes on the externalization of ways of migration fluxes control.⁶⁸ In other words, the new Pact represents an important attempt to frame solidarity in the management of migration flows but without any solidarity for migrants and their rights. It shows how then the reform is looking for a solidarity response between EU member States and third countries as well, rather to reflect its consistency with EU values and human rights migrant protection.⁶⁹

Anyway, it is important to recognize also some positive aspect in this document. For instance, the idea that an independent monitoring mechanism should be established to review possible human rights violations in asylum screening procedures.

But the way is still long to go.

7. Some conclusions

Having explored the most relevant legal acts related to the European migration and asylum system with the purpose of finding some responses to the expressed requests in the Lampedusa Chart, a few concluding remarks can be submitted.

⁶⁷ Policies of externalization of European borders controls have been criticized in several respects such as systemic violations of migrants' human rights. Liguori, A., (2019). *Migration Law and The Externalisation of Border Controls*, Routledge Focus, London and New York; Moreno-Lax, V., (2017). *Accessing Asylum Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law*, Oxford University Press, Oxford; Zaiotti, R., (2016). *Externalizing Migration Management Europe, North America and the spread of 'remote control' practices*, Routledge.

⁶⁸ And at the end the scheme is the same: stemming the flow of migrants without taking care of migrants' human rights by cooperating with unsafe third countries. One need only think to the EU-Turkey deal of March 2016 and to the Memorandum of Understanding (MoU) of February 2017. See *inter alia* Den Heijer, M., Spijkerboer, T., 2016. Is the EU-Turkey Refugee and Migration Deal a Treaty?, *EU Law Analysis*, 7 April 2016; Benvenuti, B., 2017. The migration paradox and EU-Turkey relations, *IAI Working Papers*, No. 17/05, January 2017.

⁶⁹ Marin, L., Pistoia, E. 2021. p. 167 ff.; Partipilo, F.R., 2021. The European Union's Policy on Search and Rescue in the New Pact on Migration and Asylum: Inter-State Cooperation, Solidarity and Criminalization, in Freedom, Security & Justice, *European Legal Studies* 2, p. 215 ff.

One can ask oneself, first, whether that attitude shown by the associations of the civil society asking for rights of the migrants and asylum seekers emerge also in the policies adopted by EU institutions and member States as well.

In this regard, as already stressed, Visa regulations, border controls by States, border patrolling by FRONTEX and the Dublin system as a whole follow patterns based on the logic of burden sharing obligation among EU member States rather than for human rights migrants' protection. We feel forced thus to conclude that the exigencies of security are predominant.

Not even the desperate pursuit of solidarity by the European Union with continuous legislative adjustments has, in our opinion, turned out efficient for overcoming the structural flaws of the asylum system. It must be recalled that, according to article 80 TFEU, solidarity is the principle which governs EU migration and asylum policy.⁷⁰

The second issue that one might raise is whether the announced “fresh start for migration in Europe”,⁷¹ based on the principle of solidarity and fair sharing of responsibilities, reflects the high demands proclaimed in the Lampedusa Charter.

If, indeed, it is true that within the new Pact particular consideration is given to the vulnerable categories of asylum seekers, specially to the best interest of unaccompanied minors, it is also true, on the other hand, that “*policy imperatives such as free movement in the Schengen area, safeguarding fundamental rights...*” remain just mere references in the introduction part, since there is no mention to their freedom of movement in any place else of the Pact.

There can be no denying that the prohibition of the refugee movement is “*both unrealistic (refugees are bound to seek safety, whether we like it or not), and it is illegitimate morally (Art. 14 of the Universal Declaration of Human Rights grants everyone the right to seek asylum) as well as legally (the principle of non-refoulement)*”.⁷²

However, we found a new consideration of solidarity, with a mechanism *ad hoc* to make it more concrete.

On this perspective one might ask oneself, finally, what we asked in the title: which solidarity for the migrants through the waters of the Mediterranean?

As it has already pointed out several times in this paper, the solidarity sought for does not include, at least in the new Pact, a solidarity towards asylum-

⁷⁰ ECJ, *Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council*, 6 September 2017, ECLI: EU: C:2017:631, paras. 291

⁷¹ A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, Press release, 23 September 2020, Brussels.

⁷² Den Heijer, M., Rijpma J., Spijkerboer, T., 2016, p. 641.

seekers.⁷³ And, as argued in detail by others, “*financial support, the relocation of asylum-seekers and the work of asylum and border control agencies are emblematic of the compensatory logic of the solidarity principle*”.⁷⁴ This latter remains undoubtedly an interstate solidarity in which the EU Commission continues to play the role of “broker”⁷⁵ in order to simplify the arrangement of the transactions among Member States.

After all, the New Pact is “on Migration and Asylum” and not “for migrants and asylum-seekers” and, under this perspective, it provides stronger solidarity obligations and simplified procedures in the migration and asylum system for member States. Perhaps, at this point, it is not a coincidence that the text of the Lampedusa Charter makes no mention of “solidarity”.

⁷³ Carrera, S., (2021). Whose Pact? The Cognitive Dimensions of the EU Pact on Migration and Asylum, in: *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees. International Experiences on Containment and Mobility and their Impacts on Trust and Rights*, Carrera, S., Geddes, A., (eds.), Florence, pp.1-25.

⁷⁴ Thym, D., Tsourdi, E., 2017. Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions, *Maastricht Journal of European and Comparative Law* 5, pp. 605-621.

⁷⁵ Gatta, F.L., Frasca, E., 2020. The Malta Declaration on search and rescue, disembarkation and relocation: Much Ado about Nothing, *EU Immigration and Asylum Law and Policy*, 2020.