

Facing the Refugee Challenge in Europe: A *litmus test* for the European Union

A Critical Appraisal of the Common European Asylum System Through the Lens of Solidarity and Human Rights

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Abstract

According to mainstream discourse, the EU is facing a “refugee crisis” due to a mass influx of asylum seekers, which is putting the Common European Asylum System (CEAS) under pressure. Although this paper acknowledges that the CEAS is currently under pressure, it aims to take a different view from the assumption that the – admittedly significant – arrival of asylum seekers constitutes in itself a problem for the EU. It suggests that the problems encountered by the CEAS are rather symptomatic of a deeper gridlock resulting from this system's lack of compliance with two main EU's fundamental values, the respect of which constitutes the “fundamental premise” of EU integration, namely solidarity and human rights. From both an historical and a legal perspective, the EU is indeed founded on a set of values comprising the respect of human rights and solidarity. The treaties further require their respect internally (i.e. Articles 2 and 6 TEU), but also *vis-à-vis* the rest of the world (i.e. Articles 3(5) and 21 TEU). However, the current responses to the arrival of asylum-seekers are, in several respects, in contradiction with these founding values. On the one hand, the internal management of the influx of refugees reveals a lack of solidarity and results in breaches of asylum-seekers' fundamental rights. On the other, the EU's asylum policy does not meet the requirement according to which the Union shall, in its relations with the wider world, uphold and promote these values. These observations lead us to believe that facing the refugee challenge constitutes, from a normative perspective at least, a *litmus test* for the EU at large. Indeed, the EU's difficulties in dealing with the arrival of the asylum seekers – which have already been the subject of extensive research – appear to be the evidence of an identity crisis. The way the EU, hand in hand with its Member States, responds to this challenge thus amounts to a “decisively indicative test” for its normative foundations that are a prerequisite for the viability of the entire undertaking, and, notably, of the principle of mutual trust.

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Keywords

Common European Asylum System – Values – Human Rights – Solidarity – Identity Crisis – Dublin IV

Introduction

According to mainstream discourse, for some years now the European Union (hereafter the EU) has been facing, a so-called “refugee crisis” threatening its integrity, due to a mass influx of asylum seekers into the European territory². This subject does indeed currently constitute one of the leading topics in EU politics and academic research, notably because of the rise in the numbers of asylum-seekers attempting to reach Europe and the apparent shortcomings of the Common European Asylum System (hereafter CEAS).

At its inception in 1999, the CEAS was presented by its creators as an ambitious and comprehensive scheme of protection for asylum seekers in the EU, comprising a common definition of the refugee and other forms of protection status, harmonized asylum procedures and reception conditions and a system of responsibility-sharing between member states for the examination of asylum applications³. Even though it has been subject to several reforms, the CEAS nevertheless suffers from “structural deficiencies”⁴ which have impeded the EU from responding adequately to the rise in asylum-seekers seeking protection in Europe.

This paper questions the roots of the current issues faced by the EU in the management of the refugee challenge. If it does not call into question the observation that the EU is currently facing a significant if not unprecedented challenge, it does, however, aim to stress that the shortcomings in managing asylum-seekers movements into Europe cannot be considered exclusively as a consequence of the rise in their number. We argue that rather than facing a “refugee crisis”, the difficulties encountered by the EU in the field of asylum reveal a deeper *identity crisis* resulting from the undermining of two of the EU’s founding values by the CEAS’ current shape.

More precisely, this paper argues that CEAS’ shortcomings reveal a disavowal of two main components of the EU’s historical and normative identity: solidarity and human rights. It therefore suggests that the CEAS crisis could possibly jeopardize the European construct as a whole. The problems encountered by the CEAS as well as the currently proposed solutions are indeed symptomatic of a deeper gridlock resulting from this system's lack of compliance with EU’s objectives and fundamental values, the respect of which constitutes the “fundamental premise” of EU

² See, for example, J.-C. Juncker's speech on the State of the Union in 2015, where he attributes the refugee crisis to the fact that “nearly 500 000 people have made their way to Europe”, at the beginning of 2015, *State of the Union 2015: Time for Honesty, Unity and Solidarity*, Strasbourg, 2015.

³ European Council, Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, paragraphs 13 – 15.

⁴ D. THYM, « The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy », *Common Market Law Review*, 2016 p. 1549.

integration⁵. Viewed in this way, the EU's difficulties in dealing with the arrival of asylum seekers – which have already been extensively dealt with by academics⁶ – constitute a *litmus* test for the EU as a whole since they appear to be the evidence of an identity crisis⁷, besides being a challenge in itself. Indeed, by risking to jeopardize the foundations of the European construct, the management of the CEAS indeed constitutes a “decisively indicative test”⁸ for the EU as a whole.

Having demonstrated that the EU is founded, both from a historical and a legal perspective, on the existence of a community of values which include solidarity and the respect of human rights (I) this article will attempt to demonstrate that the CEAS in its present form entails serious infringements of these founding values (II). It will finally conclude that the management of the refugees' arrival constitutes a *litmus test* for the European project at large.

Chapter I – The European Union's Value-Based Identity: Human Rights and Solidarity as Bedrock of the European Construct

Arguing that the current shape of the CEAS disregards the key components of the EU's identity implies first and foremost sketching out what we consider these elements to be. This paper opines that the EU has a value-based constitutive identity comprising among others human rights and solidarity, the respect of which constitutes a normative condition underpinning the whole system's viability.

From a historical perspective, the roots of the construction of Europe are to be found, at least partially, in the willingness to replace the destructive forces of nationalism that resulted in the catastrophe of two World Wars with peace and stability⁹. Although in practice European construction started with purely economic cooperation, this original *raison d'être* was never denied (Section I). Rising to meet its destiny, the economic cooperation later evolved towards genuine political union founded, from a

⁵ Court of Justice, 18 December 2014, Opinion 2/13, EU:C:2014:2454, paragraph 168.

⁶ See, among others, G. K. BHAMBRA, « The current crisis of Europe », *op. cit.*, pp. 1545 -1573; E. TSOURDI, « 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*, 2017, vol. 24, n° 5, pp. 667-686.; V. CHETAIL, « The Common European Asylum System: Bric-à-brac or System? », in V. CHETAIL, P. DE BRUYCKER and F. MAIANI (dir.), *Reforming the Common European Asylum System: The New European Refugee Law.*, pp. 3 -38 ; F. MAIANI, « The reform of the Dublin system and the dystopia of 'sharing people' », *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, n° 5, pp. 622-645.; V. MITSILEGAS, « Humanizing solidarity in European refugee law: The promise of mutual recognition », *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, n° 5, pp. 721-739.; A. J. MENÉNDEZ, « The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration: Editorial », *European Law Journal*, 2016, vol. 22, n° 4, pp. 388-416. and V. MORENO-LAX, « Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy », *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, n° 5, pp. 740-762.

⁷ G. K. BHAMBRA, « The current crisis of Europe », *op. cit.*, p. 1545.

⁸ Definition of “litmus test” A. STEVENSON, *Oxford dictionary of English*, Oxford, Oxford University Press, 2011.

⁹ P. CRAIG et G. DE BÚRCA, *EU law: text, cases, and materials*, Sixth edition., Oxford, Oxford University Press, 2015, p. 2.

legal point of view, on common democratic values purportedly shared and respected by its Member States (Section II).

Section I – The Political Roots of the European Union: the European Union’s Historical Axiological Identity

I. The European Union’s Inception: a Dormant “Political Messianism”

No explicit focus was as such put on the European identity in the earliest days of the European construct¹⁰. Specific political features nonetheless implicitly characterized the first milestones of the project¹¹ although the initial concrete achievements were mainly economic. There is indeed no doubt that European construction finds, at least partly, its original roots in a strong political ambition to establish a common destiny for the peoples of Europe¹², safeguarded from the breaking-out of new armed conflicts on the continent¹³. In the absence, however, of a strong political will to directly enter into a broad project of political integration¹⁴, the EU founding fathers advanced more modest proposals which led to the setting-up of the European Coal and Steel Community (ECSC)¹⁵. The establishment of the ECSC in 1951 entailed the pooling of the administration of the coal and steel produced in the EU’s six founding States. Besides the economic objectives of this cooperation, the focus on these materials is also explained by their essential utility for military expansion. Placing their administration under an international umbrella constituted effective means to avoid further armed conflicts between the participating countries¹⁶.

Furthermore, the idea of a deeper political integration was not at all denied. As stated by R. Schuman in his 1950 Declaration, the pooling of coal and steel production was a first step for the setting up of a European federation which will change the destinies of its people¹⁷. The same Schuman added around 1960 that Europe “should not stay an economic and technical undertaking: there must be a soul, [...] a political will serving a common human ideal”¹⁸.

¹⁰ R. MEHDI, “L’identité de l’Union européenne”, in A. LEVADE, V. MICHEL, M. STEFANINI and R. MEHDI (dir.), *L’identité à la croisée des Etats et de l’Europe : Quel sens ? Quelles fonctions ?*, Bruxelles, Bruylant, 2015, pp. 143-161.

¹¹ G. KREIS, “L’émergence de la notion d’ ‘identité’ dans la politique de la Communauté européenne : Quelques réflexions autour de la Déclaration du sommet de Copenhague de 1973”, *Relations internationales*, 2009, vol. 140, n° 4, pp. 53 - 72.

¹² D. SIDJANSKI, *The federal future of Europe: from the European Community to the European Union*, Ann Arbor, University of Michigan Press, 2000, p. 30.

¹³ P. CRAIG et G. DE BURCA, *EU law*, *op. cit.*, p. 2.

¹⁴ *Ibid.*, p. 4.

¹⁵ Treaty establishing the European Coal and Steel Community, Paris, 1951.

¹⁶ R. SCHUMAN underlined in his declaration of 9 May 1950 in this regard that “the solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible”.

¹⁷ R. SCHUMAN, Declaration of 9 May 1950.

¹⁸ R. SCHUMAN, *Pour l’Europe*, Fondation Robert Schuman, Paris, 1963, p. 78, quoted by G. KREIS, “L’émergence de la notion d’ ‘identité’ dans la politique de la Communauté européenne.”, *op. cit.*, p. 68.

Several years after the creation of the ECSC, the Member States incidentally entered into a deeper economic cooperation aiming to establish a common market through the conclusion of the Treaty of Rome¹⁹. Despite its limited material scope, the Treaty of Rome already mentioned explicitly several of the cardinal values underpinning the European project, namely freedom, peace and solidarity²⁰.

The coming together of European nations was to be done progressively, “through concrete achievements which first create a *de facto* solidarity”²¹ and was rooted in what J.H.H. Weiler called a “political messianism”, a shared implicit ideal and destiny to be achieved at the end of the road²². This “Promised land”²³ was undoubtedly marked by the shared values of peace, freedom and equality between its people²⁴, that will be accomplished through the establishment of a genuine solidarity between Member States²⁵. The 1957 Communities were thus, albeit implicitly, inspired by a human ideal steeped in the values of solidarity and human rights, presumably shared by the six founding States²⁶.

II. Achieving a Political Union: the European Union Rising to Meet its Destiny

The political purpose of EU integration and its dormant “messianic”²⁷ assignment were made explicit within the context of the deepening of European cooperation. At the European Summit of 1973 held in Copenhagen, the Heads of State or Government of the then nine Member States of the European Communities explicitly introduced the concept of “European identity”. In this respect, European identity consists, according to the drafters, of sharing “the cherished values of [Member States’] legal, political and moral order” that notably include the respect for human rights²⁸. Frankly assumed, the axiological identity of the European construct was presented as finding its roots in the Member States’ common heritage and their common progressing ideals and objectives. The value-based character of the Community was also underlined by the Belgian Prime Minister, Leo Tindemans in his Report of 1975, which aimed at defining the terms “European Union”, drafted at the request of the nine Member

¹⁹ Treaty establishing the European Economic Community, Rome, 1958.

²⁰ Opinion of Advocate General Y. BOT, 26 July 2017, joint cases C-643/15 and C-647/15, EU:C:2017:618, paragraph 19 and S. LABAYLE, *Les valeurs de l’Union européenne*, Thèse de doctorat en droit sous la direction de O. Delas et R. Mehdi, Université de Laval et Aix-Marseille Université, 2016, p. 162.

²¹ R. SCHUMAN, Declaration of 9 May 1950.

²² J. H. H. WEILER, “Europe in Crisis - On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’”, *Singapore Journal of Legal Studies*, 2012, pp. 248 – 256.

²³ *Ibid.*, p. 256.

²⁴ A. BAILLEUX and H. DUMONT, “*Le pacte constitutionnel européen : Fondements du droit institutionnel de l’Union*”, Brussels, Bruylant, 2015, p. 393.

²⁵ R. SCHUMAN, Declaration of 9 May 1950.

²⁶ G. DE BÚRCA, “The Evolution of EU Human Rights Law”, P. Craig and G. De Búrca, *The Evolution of EU law*, Oxford, OUP, 2011, p. 475.

²⁷ J. H. H. WEILER, “Europe in Crisis - On ‘Political Messianism’, ‘Legitimacy’ and the ‘Rule of Law’”, *op. cit.*, p. 249.

²⁸ Declaration on European Identity, Copenhagen, 14 December 1973.

States. He notably emphasized that the EU's image had to be in line with the solidarity of its peoples and the values deriving from their common heritage²⁹ which include fundamental rights³⁰.

On the occasion of the European Communities' transformation into a veritable *polity*, usually located between 1986 and 1992³¹ with the signature of the Single European Act and the conclusion of the Maastricht Treaty, the EU's political messianic was finally expressed in its founding legal texts. In this regard, the Contracting Parties recalled in the preamble of the Maastricht Treaty "the historic importance of the ending of the division of the European Continent", "their attachment to the principles of liberty, democracy and respect of fundamental freedoms and of the rule of law" and their desire to "deepen the solidarity between their peoples". With the Treaty of Amsterdam, the common principles of liberty, democracy and the respect of fundamental freedoms and of the rule of law were presented, in the corpus of the Treaty, as being the *foundation* of the EU, at Article F(1)³².

Section II – Human Rights and Solidarity as the Cornerstone of the European Construct: the European Union's Normative Axiological Identity

1. The internal and external dimensions of the EU's axiological identity

The law in force confirms, from a legal perspective, the pivotal role of the foundational common values in the European construct. Article 2 of the Treaty on the European Union (TEU) indeed states that "the Union is *founded* on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (emphasis is ours). Article 3 of the TEU further stresses that the "Union's aim is to promote peace, its values and the well-being of its peoples" and that "it shall promote (...) solidarity among Member States". The respect of these values moreover constitutes a condition *sine qua non* for accession to the EU³³, and their undermining by Member States could, in addition to classical judicial proceedings for breach of EU law, lead to serious political sentences, at least in theory³⁴. The Lisbon Treaty also conferred the same legal value as the Treaties to the EU Charter of Fundamental Rights³⁵. In its Opinion 2/13, the Court of Justice acknowledged the central role of common values by stating that the existence of a community of values between the Member States constitutes a premise of the EU. According to the Court, this

²⁹ *The European Union*, Report by Mr Leo Tindemans, Prime Minister of Belgium to the European Council and S. LABAYLE, *Les valeurs de l'Union européenne*, *op. cit.*, p. 75.

³⁰ I. MANNERS, "The constitutive nature of values, images and principles in the European Union", in I. LUCARELLI and I. MANNERS (dir.), *Values and Principles in European Union Foreign Policy*, London, Routledge, 2006, p. 20.

³¹ D. SIDJANSKI, *The federal future of Europe*, *op. cit.*, p. 263.

³² S. LABAYLE, *Les valeurs de l'Union européenne*, *op. cit.*, p. 119.

³³ Article 49 TEU.

³⁴ Article 7 TEU, see on this, mechanism, P. OLIVER and D. WAELBORECK, « La crise de l'Etat de droit dans l'Union européenne : que faire? », *Cahiers de droit européen*, 2018, pp. 299 – 342.

³⁵ Article 6 TEU.

consideration incidentally underpins and justifies the principle of mutual trust between Member States³⁶.

These values, which cement Member States relationships within the Union, should also direct the EU's conduct towards the rest of the world³⁷. Article 3(5) TEU accordingly underlines that “in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”. Article 21 TEU moreover confirms that EU's international actions must among others be guided by the principles of democracy, the rule of law, human rights and solidarity.

2. The components of the EU's axiological identity : the case of solidarity and human rights

It is thus clear from the above that common values and shared ideals are, both from a historical and a legal perspective, the EU's bedrock. These values in particular include the respect of human rights, including human dignity of every human being (a.) and solidarity (b.). They moreover have to be upheld by the EU in its relations towards the rest of the world.

a. Human Rights

If no explicit focus was made on Human Rights at the very outset of the European construct, they are now, beyond doubt, part of the core of the EU's founding values³⁸. First devoted by the case-law of the Court of justice³⁹, the EU protection of fundamental rights has later been codified by the EU Charter of Fundamental Rights, enacted in 2000, and solidified by the treaties. Article 2 of the TEU indeed lists the respect of Human rights as one of the foundational values of the EU⁴⁰. With the entry into force of the Lisbon Treaty, the Charter has moreover gained the same legal value as the treaties.

³⁶ Court of Justice, 18 December 2014, Opinion 2/13, EU:C:2014:2454, paragraph 168.

³⁷ M. CREMONA, “Values in the EU Constitution: the External Dimension”, Working Paper, no. 26, *CDDRL*, Stanford Institute for International Studies, November 2004, p. 2.

³⁸ A. WILLIAMS, *The Ethos of Europe. Values, Law and Justice in the EU*, Cambridge, CUP, 2010, p. 110.

³⁹ On the development of a EU protection of fundamental rights, see C. RIZCALLAH, « La protection des droits fondamentaux dans l'Union européenne : l'immuable poids des origines ? », *Cahiers de droit européen*, 2016, pp. 399 – 427.

⁴⁰ Art. 2 TEU.

The EU legal landscape thus now provides a binding catalogue of fundamental rights, which, yet supposedly, expresses a pan-European “constitutional consensus”⁴¹.

Despite its central importance, the EU protection of fundamental rights enjoys, as a result of the principle of conferral, a limited scope of application⁴². Nevertheless, the rights and freedoms laid down in the Charter must be complied with – externally and internally – by the EU institutions in any circumstances, as well as by the Member States when they are acting within the scope of EU law.

b. Solidarity

Solidarity also plays a crucial role in forging the EU’s identity. As underlined by Article 21 TEU, the principle of solidarity has indeed inspired its creation. Although solidarity is surprisingly absent from the list in Article 2 TEU⁴³, “the requirement of solidarity [nonetheless] remains at the heart of the process of integration”⁴⁴. If the exact status of solidarity is still the object of debate⁴⁵, it appears in a variety of provisions covering different facets of this value and some of which laying down legally binding duties.

Internally, solidarity is, on the one hand, referred to in order to designate the solidarity among the peoples, which is primarily linked to the ideal of the European Social Model⁴⁶. This understanding is notably reflected in several of the Charter's provisions in the Chapter dedicated to “solidarity”⁴⁷. Yet, on the other hand, solidarity is also used to qualify the Member States’ relationships. Article 3(5) states in that regard that the Union shall promote solidarity among Member States. If these two facets of solidarity differ, they are logically linked. As underlined by the Advocate General Bot, it would indeed not be possible to deepen the solidarity between the peoples while excluding it between the Member States⁴⁸. Solidarity between Member States moreover constitutes “the bedrock of European construction”⁴⁹ since its outset⁵⁰, and its promotion continues to be one of the EU’s cardinal objectives⁵¹.

⁴¹ K. LENEARTS, « EU Values and Constitutional Pluralism : The EU system of Fundamental Rights Protection », *Polish Y.B. Int'l L.*, 2014, p. 142.

⁴² Art. 51 of the Charter ; see, on this provision, F. PICOD, “Article 51. Champ d’application”, in F. PICOD and S. VAN DROOGHENBROECK in collaboration with C. RIZCALLAH, *La Charte des droits fondamentaux de l’Union européenne. Commentaire article par article*, Bruxelles, Bruylant, 2018, pp. 1059 – 1082.

⁴³ S. LABAYLE, *Les valeurs de l’Union européenne*, *op. cit.*, p. 148.

⁴⁴ Opinion of Advocate General Y. BOT, 26 July 2017, joint cases C-643/15 and C-647/15, EU:C:2017:618, paragraph 19.

⁴⁵ De WITTE and L. TSOURDI, “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”, *C.M.L.R.*, 2018, pp. 1478.

⁴⁶ M. CREMONA, *op. cit.*, p. 22.

⁴⁷ Chapter IV of the Charter.

⁴⁸ Opinion of Advocate General Y. BOT, 26 July 2017, joint cases C-643/15 and C-647/15, EU:C:2017:618, paragraph 17.

⁴⁹ B. FAVREAU, “La Charte des droits fondamentaux : pourquoi et comment?”, *La Charte des droits fondamentaux de l’Union européenne après le traité de Lisbonne*, Bruylant, Brussels, 2010, pp. 3 to 38, in particular p. 13. See also R. BIEBER and F. MAIANI, “Sans solidarité point d’Union européenne, Regards croisés

From an external perspective, Article 3(5) TEU underlines that, in its relations with the wider world, the EU shall moreover continue to contribute, in a dynamic perspective, to solidarity and mutual respect among peoples. Although intra-EU solidarity admittedly “distinguish[es] the EU and its members from other parts of the world and international organizations”⁵², totally excluding the EU’s positioning towards the rest of the world from the solidarity paradigm appears to be in contradiction with the EU’s core identity as encapsulated by the EU law in force. A. Lamassoure, member of the Convention on the Future of Europe, in that regard underlined in his working document related to the guiding principles of Union’s external relations that the EU had a particular responsibility deriving from its colonial past which imposes it to act in a spirit of solidarity towards the rest of the world⁵³.

3. The European Union’s Founding Values and the Common European Asylum System

Unsurprisingly, the EU’s founding values are called upon to play a central role in the CEAS. As a European policy, the CEAS should respect EU primary law, including Article 2 TEU and the Charter. In the light of this, solidarity has been expressly referred to in relation to asylum. According to articles 67 and 80 of the TFEU, the CEAS shall indeed be based on⁵⁴ and governed by the principle of solidarity and fair sharing of responsibility between Member States⁵⁵. As stressed by E. Karageorgiou, this duty is moreover not constrained to emergency situations nor to the financial aspect of solidarity⁵⁶. In the field of asylum, it comprises two dimensions: the “inter-state dimension”, and the “state-refugee dimension”⁵⁷. If the legal nature of the principle of solidarity is disputed, we consider, with other authors⁵⁸, that it should at the very least be considered as a standard of review of the CEAS.

With regard to fundamental rights, they should also play a key-role in the domain of asylum. Although the Charter has a limited material scope of application⁵⁹, it would, however, be tantamount to heresy to consider that non-EU citizens are completely excluded from the benefit of the entirety of

sur les crises de l’Union économique et monétaire et du Système européen commun d’asile”, *Revue trimestrielle de droit européen*, Dalloz, Paris, 2012, p. 295 according to whom “the Treaties confer on that concept a scope that varies according to the context — sometimes an objective or parameter for EU action, sometimes a basic value, sometimes a criterion of the obligations to which the Member States have subscribed by acceding to the European Union. The common denominator that links those various emanations of solidarity in the context of the European Union is the recognition of the existence of a “common interest”, separate from and separable from the sum of the individual interests”, quoted by Advocate General Y. BOT, in his opinion of 26 July 2017, joint cases C-643/15 and C-647/15 EU:C:2017:618, paragraph 19.

⁵⁰ R. SCHUMAN, Declaration of 9 May 1950.

⁵¹ Article 3 TEU.

⁵² I. HARTWIG and P. NICOLAIDES, “Elusive Solidarity in an Enlarged European Union”, *Eipascope*, 2013, p. 19.

⁵³ A. LAMASSOURE, “Déclaration des principes des relations extérieures de l’Union”, WGIVII – WD 03, quoted by M. CREMONA, *op. cit.*, p. 23.

⁵⁴ Article 67 TFEU.

⁵⁵ Art 80 TFEU.

⁵⁶ E. KARAGEORGIOU, “Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees”, *European Politics and Society*, 2016, p. 198.

⁵⁷ *Ibid.*, p. 199.

⁵⁸ L. TSOURDI, *op. cit.*, p. 672 and E. KÜCÜK, *op. cit.*, p. 448.

⁵⁹ Article 51 of the Charter.

its rights⁶⁰. Its Preamble confirms to this end that the “enjoyment of these [fundamental] rights entails responsibilities and duties with regard to other persons, to the human community” as a whole⁶¹ and several rights especially concern third-country nationals (TCNs)⁶².

Chapter II – The Current Shape of the Common European Asylum System: a Symptom of the European Union’s Identity Crisis

Today’s political and academic narratives often highlight the existence of a serious “refugee crisis” faced by the EU and its Member States as a result of the large number of migrants arriving on the European continent. According to this discourse, the so-called “refugee crisis” moreover threatens the CEAS, if not the Union in its entirety. As underlined by V. Chetail, the CEAS is “part and parcel of a broader design which is intrinsically associated with EU construction”⁶³, and it is thus true that its endangerment could have fatal consequences for the EU. Although it is presented as a area of protection and solidarity⁶⁴, the CEAS was indeed first and foremost established as a flanking measure compensating for the abolition of internal borders⁶⁵. This observation can incidentally be currently illustrated by the establishment of “temporary” border controls by ever more Member States, prompted notably by the large-scale influx of asylum-seekers⁶⁶, despite this being at odds with the essential objectives of the EU⁶⁷.

Although jeopardizing the CEAS could thus have disastrous consequences for the EU, this paper suggests, however, that the ongoing difficulties encountered by the EU in the domain of asylum constitute rather a symptom of a deeper identity crisis than a “refugee crisis”. In contrast with the discourse imputing the current difficulties faced by the EU to the rise in asylum seekers in the EU, this article assumes that the shortcomings encountered in the management of the influx of migrants result, at least partly, from the disrespect, by the CEAS, of the EU’s core identity as described above. It is indeed, in our opinion, the lack of compliance with fundamental EU values by the CEAS in its current form that is causing the prevailing deficiencies in the system and that, moreover, potentially threaten the EU as a whole. Before detailing this core argument, the observation that the current response to asylum arrivals in the EU is at odds with cardinal EU values can primarily be illustrated by the arguments put forward by the Polish government in its action for annulment brought against the EU

⁶⁰ Several rights are however precisely concerning solely EU citizens (Art. 39, 40, 45.1 and 46 of the Charter).

⁶¹ V. MORENO-LAX, “Solidarity’s reach”, *op. cit.*, p. 757.

⁶² Articles 18 and 19 of the Charter.

⁶³ V. CHETAIL, “The Common European Asylum System: Bric-à-brac or System?”, *op. cit.*, p. 4.

⁶⁴ Council of the European Union, “The Stockholm Programme – An open and secure Europe serving and protecting the citizens”, 2 December 2009, p. 67.

⁶⁵ V. CHETAIL, “The Common European Asylum System: Bric-à-brac or System?”, *op. cit.*, p. 4, see moreover Article 3(2) TFEU.

⁶⁶ Y. PASCOUAU, “Schengen and solidarity, the fragile balance between mutual trust and mistrust”, *European Policy Centre Policy Papers*, 2012.

⁶⁷ A. J. MENÉNDEZ, “The Refugee Crisis”, *op. cit.*, p. 388.

Decision⁶⁸ establishing a relocation scheme of migrants from Italy and Greece. Indeed, one of the arguments advanced by Poland was that the relocation scheme would result in “disproportionate effects of those quotas on a number of host Member States which [...] are ‘virtually ethnically homogeneous, like Poland and whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory’”⁶⁹. As a matter of fact, putting forward such arguments should be totally inconceivable for Member States that are supposed to share and respect the EU’s core values⁷⁰. Such arguments are at first glance symptomatic of the ongoing and deeper identity crisis in the EU.

This deeper crisis is furthermore reflected, on the one hand, with regard to the internal organisation of the CEAS (Section I) and, on the other, with respect to the EU’s positioning regarding the rest of the world (Section II).

Section I – The CEAS’s Compatibility with the European Union’s Founding Values: the Internal Dimension

a. Lack of inter-state solidarity within the European Union

The first type of core identity components wrecked by the CEAS in its current form concern the intra-EU relationships between Member States and, more precisely, the lack of solidarity they demonstrate. Indeed, one of the CEAS’ keystones, the Dublin system, which shares responsibility between Member States for examining asylum applications lodged within the EU, suffers from a serious “solidarity deficit”⁷¹ that is acting as the catalyst for its obliteration. This system, initiated by a Convention signed in 1990 in the city whose name it bears, was in 2003 replaced by the “Dublin II” Regulation⁷² and then, in 2013, by the “Dublin III” Regulation⁷³. Theoretically, its main goals consist, on the one hand, in ensuring the access of TCNs to the asylum application procedure and, on the other, in rationalising the processing of asylum applications by avoiding forum shopping and the existence of multiple applications within the EU. The system is underpinned by the fundamental idea of the equivalence of Member States’ asylum systems, presuming, therefore, that asylum-seekers would not benefit from any advantage by having their application examined in a specific country. It therefore establishes a mandatory set of criteria which determine which Member State is, in a particular situation, responsible

⁶⁸ 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.

⁶⁹ The Court of Justice upheld the relocation decision, 6 September 2017, *Slovak Republic and Hungary v. Council of the European Union*, joined cases C-643/15 and C-647/15, EU:C:2017:631.

⁷⁰ H. LABAYLE, “Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice”, *Eumigrationlawblog*, <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>

⁷¹ D. THYM, “The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy”, *op. cit.* p. 1550

⁷² Council Regulation (EC) 343/2003

⁷³ Regulation (EU) 604/2013 of the European Parliament and of the Council

for examining an asylum-seeker's application. The general rule is that (in effect) the State of first entry into the EU is the responsible Member State, but there are several exceptions, *inter alia* for family considerations. The system is supported by the Eurodac Regulation⁷⁴ which establishes an EU asylum-seekers' fingerprints database and thereby enables the determination of the first country of entry. If another Member State is approached, that state can either, on the basis of the Dublin system, automatically transfer the asylum seeker lodging the application to the responsible state, but it can also decide to examine the application itself as it so wishes⁷⁵.

Yet, this system is one of the main weaknesses of the CEAS and this precisely because it contravenes the principle of solidarity. Indeed, for years now, it has served to massively disadvantage States at the external border of the EU⁷⁶. The asymmetry resulting from "lying the burden where it falls"⁷⁷ and the ensuing disrespect of the principle of solidarity, led to major flaws in the system. The system notably gives little incentive to geographically disadvantaged Member States to comply with its rules⁷⁸. Hand in hand with the asylum seekers' willingness to avoid identification upon arrival, a reluctance in implementing the obligation of fingerprinting all those who arrive imposed by the Eurodac Regulation⁷⁹ is evident⁸⁰. By bypassing this obligation, first-entry countries can avoid the return of asylum-seekers who entered the Union through their borders. Moreover, several Member States at the external border, overwhelmed with the arrival of very large numbers of asylum-seekers, facilitated their movement to their destination of choice, in allowing them to use their road network and providing them with facilities such as transport⁸¹. This so-called "waving-through" policy was nonetheless not approved by the European Council⁸² and condemned by the Court of Justice⁸³ despite the exceptional circumstances faced by the EU's external border countries⁸⁴. Eventually, the high

⁷⁴ Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013, on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

⁷⁵ Article 17, Dublin III Regulation: the "sovereignty-clause".

⁷⁶ E. KÜÇÜK, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?: The Principle of Solidarity and Fairness", *European Law Journal*, 2016, vol. 22, n° 4, pp. 448-469.

⁷⁷ Opinion of Advocate General E. SHARPSTON, 15 May 2012, C-179/11, EU:C:2012:298, paragraph 83.

⁷⁸ D. THYM, "The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy", *op. cit.*, p. 1550

⁷⁹ Article 9 of Regulation (EU) 603/2013.

⁸⁰ F. MAIANI, "The reform of the Dublin system and the dystopia of 'sharing people'", *op. cit.*, p. 626.

⁸¹ Opinion of Advocate General Sharpston, 8 June 2017, cases C-490/16 and C-646/16, EU:C:2017:443, paragraph 9.

⁸² European Council conclusions of 19 February 2016, Doc. 1/16 at 8(d); quoted by D. THYM, "The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy", *op. cit.*, p. 1548

⁸³ Court of Justice, 26 July 2017, *A.S.*, case C-490/16, EU:C:2017:585 and *Jafari*, case C-646/16, ECLI:EU:C:2017:586.

⁸⁴ N. KOGOVŠEK ŠALAMON, "CJEU rulings on the Western Balkan route: Exceptional times do not necessarily call for exceptional measures", *Euimmigrationlawblog*, <http://eumigrationlawblog.eu/cjeu-rulings-on-the-western-balkan-route-exceptional-times-do-not-necessarily-call-for-exceptional-measures/>.

pressure to which some Member States are subject owing to their geographical position also resulted in the collapse of some national asylum systems failing to properly deal with the large amount of asylum application lodged with them.

It can further be observed that the currently proposed reforms of the Dublin system do not depart from this paradigm⁸⁵. In its “Dublin IV” regulation proposal⁸⁶, the Commission indeed maintains the logic and principles of the previous system, and, in particular, the principle of responsibility of the first State of entry. A corrective allocation mechanism is established, which provides for a relocation of asylum-seekers in case a Member State is “confronted to a disproportionate number of applications”⁸⁷. The burden nevertheless in principle remains on the first-line states and the exception contained in the corrective mechanism has already been considered as “administratively unworkable”⁸⁸.

The lack of interstate solidarity within the EU is moreover illustrated by the weakness of the emergency relocation scheme adopted in 2015 in order to tentatively derogate to the Dublin system’s unfair sharing of responsibilities⁸⁹. In order to reinforce internal solidarity, this mechanism provided, on a temporary basis, for the relocation of a number of asylum-seekers from Italy and Greece to other Member States. Yet, in addition of having been challenged before the Court of justice by several Member States refusing a mandatory redistribution of asylum-seekers across the EU⁹⁰, it has suffered from a severe lack of implementation⁹¹.

b. The Endangerment of Asylum seekers’ Fundamental Rights

In plus of contravening the solidarity component of the EU’s identity, the current responsibility-sharing system also erodes the respect of Human rights within the EU. Indeed, the Dublin system’s solidarity deficit has resulted in the undermining if not the collapse of some national asylum services. Due to their geographic situation and the absence of corrective solidarity mechanisms between

⁸⁵ For an in-depth discussion of this proposal, see F. MAIANI, “The reform of the Dublin system and the dystopia of ‘sharing people’”, *op. cit.*, pp. 622 – 645.

⁸⁶ 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/2016/0270 final - 2016/0133 (COD)

⁸⁷ Recital 31.

⁸⁸ F. MAIANI, “The reform of the Dublin system and the dystopia of ‘sharing people’”, *op. cit.*, p. 634.

⁸⁹ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, O.J. 2015, L 239/146 and 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, O.J. 2015, L 248/80.

⁹⁰ The Court of Justice upheld the relocation decision, 6 September 2017, *Slovak Republic and Hungary v. Council of the European Union*, joined cases C-643/15 and C-647/15, EU:C:2017:631. On this case, see, B. De WITTE and L. TSOURDI, *op. cit.*, pp. 1457 – 1494.

⁹¹ B. De WITTE and L. TSOURDI, *op. cit.*, pp. 1492.

Member States, some national authorities were faced with a high number of arrivals that put their asylum-seekers' reception infrastructures under pressure, and resulted in a serious degradation of the reception conditions for immigrants. In these circumstances, several Member States were facing the material impossibility of satisfactorily complying with at least the EU's minimum standards for asylum procedures and reception. The automaticity of the transfer of asylum-seekers between Member States enabled by the Dublin regulation, founded on the premise of equivalence between national asylum services, consequently appears problematic in terms of the protection of asylum-seekers' fundamental rights. The proof of this is that the European Court of Human Rights (ECtHR) held Belgium liable for breaching the European Convention on Human Rights (ECHR) by having transferred an asylum seeker back to Greece on the basis of the Dublin system, while this country, in its examination of asylum applications, was not fulfilling its obligations under the ECHR. The ECtHR noted, in the case of *M.S.S c. Belgium and Greece*⁹², that Belgium, being aware of, or having a duty to be aware of the poor detention and reception conditions of asylum-seekers in Greece, should have relied upon the "sovereignty-clause" of the Dublin II Regulation, to refrain from transferring this individual to a country where he was facing a real risk of becoming a victim of inhuman and degrading treatment in accordance with Article 3 ECHR. Less than a year later, the ECJ addressed the same issue with the additional difficulty of having the duty to safeguard the Dublin system's *effet utile*. In the well-known *N.S.* case⁹³, the Court held that a transfer should be prohibited "if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman and degrading treatment, within the meaning of Article 4 of the EU Charter of Fundamental Rights (corresponding to Article 3 ECHR), of asylum-seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision"⁹⁴. The lack of solidarity between Member States in the Dublin system, by leading to serious infringements of asylum-seekers' fundamental rights, has thus resulted to a certain extent in its unworkability.

Nevertheless, according to the Court of justice, not any infringement of asylum-seekers' fundamental rights justifies to derogate to the Dublin system⁹⁵. As underlined by the Advocate General Wathelet, "it would not be compatible with the objectives and system of the Dublin III Regulation if any violation of the rules governing the common asylum system were sufficient to prevent any transfer of an asylum seeker to the normally competent Member State"⁹⁶. By virtue of the principle of mutual

⁹² ECtHR, 21 January 2011, *M.S.S c. Belgium and Greece*, application No 30696/09.

⁹³ Court of Justice, 21 December 2011, *N.S.*, joined cases C-411/10 and C-493/10, EU:C:2011:865.

⁹⁴ Court of Justice, 21 December 2011, *N.S.*, joined cases C-411/10 and C-493/10, EU:C:2011:865, paragraph 86.

⁹⁵ Court of Justice, 21 December 2011, *N.S.*, joined cases C-411/10 and C-493/10, EU:C:2011:865, paragraph 82. See also, the opinion of Advocate General Wathelet, 7 February 2017, C-163/17, EU:C:2018:613, paragraph 83.

⁹⁶ Opinion of Advocate General Wathelet, 7 February 2017, C-163/17, EU:C:2018:613, paragraph 83.

trust, it seems indeed that only particularly serious risks threatening absolute fundamental rights prevent Member States to proceed with transfers on the basis of the Dublin system⁹⁷. The Court of justice has, in that respect, considered that a transfer should be suspended, even in the absence of systemic deficiencies in the responsible Member State, in case of risk of inhuman or degrading treatment resulting from the medical condition of the concerned asylum-seeker⁹⁸.

More generally speaking, the CEAS currently demonstrates that, instead of taking first and foremost into consideration the asylum-seekers' need for protection, its organisation is strongly driven by Member States' interests⁹⁹. This lack of humanity¹⁰⁰ also constitutes one of the reasons for its inefficiency. By way of illustration, the Dublin system gives no say to asylum seekers in determining the State responsible. According to F. Maiani, the responsibility-sharing mechanism indeed "denies by design all relevance to the applicants' preferences concerning their designation and largely disregards the requirement to take into account their 'connections or meaningful links' with particular Member States"¹⁰¹. Yet, this type of allocation can entail, according to the author, an infringement of "the duty to consider each case in the light of human rights obligations, of the family connections of the applicant, as well as of his or her personal circumstances and special needs"¹⁰². If this duty is not explicitly enshrined in law itself¹⁰³, it is, however, required by the authoritative standards established by the UNHCR¹⁰⁴ and taken over by EU law itself in relation to returns to "third safe countries"¹⁰⁵. The denial of these principles that would ensure that asylum-seekers would be treated fairly further constitutes "one of the chief causes of the inefficiency and ineffectiveness of the system"¹⁰⁶ since sharing migrants without their consent means they are unwilling to cooperate. Lawful or not, the lack of consideration of the will of asylum-seekers when shared among Member States, as well as rendering the system inefficient, is also far from desirable¹⁰⁷ for a Union whose cardinal values include the respect for human dignity, freedom and equality.

⁹⁷ On the "exceptional circumstances" allowing the rebuttal of the principle of mutual trust, see C. RIZCALLAH, "Le principe de confiance mutuelle: une utopie malheureuse?", *Revue trimestrielle des droits de l'homme*, 2019, forthcoming.

⁹⁸ Court of Justice, 16 February 2017, *C.K.*, C-578/16 PPU, EU:C:2017:127; see on this judgement, C. RIZCALLAH, "The Dublin system: The ECJ Squares the Circle Between Mutual Trust and Human Rights Protection", available at <http://eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html>.

⁹⁹ V. MITSILEGAS, "Solidarity and Trust in the Common European Asylum System", *Comparative Migration Studies*, 2014, vol. 2, n° 2, p. 187.

¹⁰⁰ V. MITSILEGAS, "Humanizing solidarity in European refugee law", *op. cit.* p. 721.

¹⁰¹ F. MAIANI, "The reform of the Dublin system and the dystopia of 'sharing people'", *op. cit.*, p. 627.

¹⁰² *Ibid.* p. 641.

¹⁰³ On human transfers agreements and fundamental rights see T. CLARK and F. CRÉPEAU, "Human Rights in Asylum Sharing and Other Human Transfer Agreements", *Neth. Q. Hum. Rts.*, 2004, pp. 217 – 240.

¹⁰⁴ United Nations High Commissioner for Refugees (UNHCR), "Executive Committee (1979). Conclusion No 15 (XXX) 1979 Refugees Without an Asylum Country", UNHCR (1979), <http://www.unhcr.org/uk/excom/exconc/3ae68c960/refugees-asylum-country.html>, para. (h).

¹⁰⁵ Article 38(2)(c) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

¹⁰⁶ F. MAIANI, "The reform of the Dublin system and the dystopia of 'sharing people'", *op. cit.*, p. 727.

¹⁰⁷ *Ibid.*, p. 727.

Section II – The CEAS’s Compatibility with the European Union’s Founding Values : the External Dimension

The second type of core identity components wrecked by the CEAS in its current form concerns the EU’s and its Member States’ attitude towards the rest of the world. As previously extensively underlined, the Treaty lays down that “in its relations with the wider world, the Union shall uphold and promote its values” and that it shall contribute to solidarity and mutual respect among peoples as well as the protection of human rights”¹⁰⁸. As observed by E. Herlin-Karnell, Article 3(5) TEU in this way enshrines a “far-reaching proclamation of human rights as a constitutional compass for [the EU’s] interrelationship with the international legal order”¹⁰⁹. The present management of the influx of migrants nonetheless obviously distances itself in several respects from these values that are supposed to frame the EU’s identity on the international scene¹¹⁰.

a. The Exclusive Implementation of Solidarity

The first gap that is apparent between the prevailing organization of the CEAS and fundamental EU’s values in relation to the wider world also concerns solidarity. As emphasised by V. Mitsilegas, solidarity within the framework of the CEAS – as well as being unsatisfactorily observed internally – is understood in an “exclusive” manner, leaving little, if any, space for its application to third-country nationals¹¹¹. Yet, as underlined above, the founding Treaties do indeed require the EU to uphold and promote solidarity among peoples¹¹² and to be guided by the principle of solidarity in its actions on the international scene¹¹³.

According to E. Guild, the exclusion dimension of the CEAS is apparent since its inception¹¹⁴. Today’s EU’s responses to the migration flows remain in contradiction with this value. The exclusive character of the solidarity principle is notably demonstrated by the EU’s actions intended to bar the asylum seekers from entering into its territory. V. Chetail pointed out in that regard the EU’s apparent objective to contain refugees as much as possible outside the EU, notably by imposing to asylum

¹⁰⁸ Article 3(5) TEU.

¹⁰⁹ E. HERLIN-KARNELL, “EU values and the shaping of the international legal context”, in: D. KOCHENOV and F. AMBTENBRINK (dir.), *The European Union's Shaping of the International Legal Order*, Cambridge, CUP, 2013, p. 90.

¹¹⁰ Declaration on European Identity, Copenhagen, 14 December 1973.

¹¹¹ V. MITSILEGAS, “Humanizing solidarity in European refugee law”, *op. cit.*, p. 723.

¹¹² Article 3(5) TEU.

¹¹³ Article 21 TFEU.

¹¹⁴ E. GUILD, “The Europeanisation of Europe’s Asylum Policy”, *International Journal of Refugee Law*, Vol. 18, 2006, pp. 630 – 651. See, also, J. PIRJOLA, “European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language”, *Eur. J. Migration and L.*, 2009, p.p. 347 – 366.

seekers the same migration controls than those applied to any other third-country national¹¹⁵. A Frontex reform was moreover initiated to that end¹¹⁶, with the intention of strengthening the EU's external borders. If one of the EU's objectives consists in safeguarding its external borders¹¹⁷, it should nonetheless be pursued in accordance with the EU's founding values, which – as we previously demonstrated – comprise solidarity and the respect of fundamental rights including the right to asylum¹¹⁸. Literature has already ascertained that in certain conditions, the interceptions and push-backs made at the European border could constitute *refoulement* by sending persons back collectively to the place of departure and thus be in breach with international refugee law¹¹⁹. Furthermore, in March 2016 the EU concluded an agreement with Turkey, aimed at reducing the large-scale movement of refugees to Greece¹²⁰, requiring, among other matters, Turkey to “take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU”, and, thus, to bar the route of people legitimately seeking protection in the EU¹²¹. Yet, these mechanisms potentially result in serious breaches of EU and International legal obligations¹²² and are at odds with the EU's duty of solidarity *vis-à-vis* the rest of the world. The disavowal by the Union of its solidarity-based character in the current management of the refugee flows thus jeopardizes the EU's very foundations.

b. The Endangerment of Asylum Seekers' Fundamental Rights

The prevailing problems encountered by the CEAS moreover also reveal a major denial of the EU's values of human dignity, pluralism, equality and non-discrimination, and more generally human rights, despite the fact that they are meant to lie at the heart of EU's identity¹²³. Fundamental rights laid down in the EU Charter are indeed supposed to enshrine the “universal values of the inviolable and inalienable rights of the human person on which European construction is founded and which the

¹¹⁵ V. CHETAIL, “Looking Beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System”, *Journal européen des droits de l'homme - European Journal of Human Rights (JEDH)*, 2016, vol. 2016, n° 5, p. 588.

¹¹⁶ Regulation (EU) 2016/1624 of the European Parliament and the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

¹¹⁷ Article 3(2) TEU.

¹¹⁸ Article 18 of the Charter.

¹¹⁹ S. TREVISANUT, “The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection”, in A. VON BOGDANDY and R. WOLFRUM (dir.), *Max Planck Yearbook of United Nations Law*, Leiden, Brill, 2008, pp. 205-246.

¹²⁰ I. BORGES, “The EU-Turkey Agreement: Refugees, Rights and Public Policy”, *Rutgers Race & the Law Review*, 2017, pp. 121-144.

¹²¹ Ph. DE BRUCKER et H. LABAYLE, “L'accord Union européenne – Turquie : faux semblant ou marché de dupes?”, *Blog GDR-ELSJ*, 2017.

¹²² Note that an action for annulment is currently pending before the Court of Justice on this issue.

¹²³ R. MEHDI, “L'identité de l'Union européenne”, *op. cit.*

EU and its Member States defend and promote, both on their territory and in their relations with third countries”¹²⁴.

One of the major issues raised by the CEAS’s present form result from the absence of legal access routes to the right to international protection within the EU territory. The directive which regulates the asylum procedure indeed expressly excludes from its scope of application requests submitted through Member States’ consular or diplomatic channels outside their territory¹²⁵. Despite several calls for the establishment of safe and legal channels for migrants to reach the EU¹²⁶, asylum-seekers still have, as their sole option, to risk reaching the European territory illegally, involving the “help of unscrupulous traffickers” and/or the “sea crossing to the European Union, risking their lives in the process”¹²⁷. As underlined by Advocate General Mengozzi, the absence of a decisive legal answer by the EU to cut through this Gordian knot is at odds with cardinal rights of the EU Charter and “particularly the rights of an absolute nature, such as those relating to human dignity (Article 1 of the Charter), the right to life (Article 2 of the Charter), the integrity of the person (Article 3 of the Charter) and the prohibition of torture and inhuman and degrading treatment (Article 4 of the Charter)”¹²⁸. As a matter of fact, although Member States are, according to the Court of Justice, not required by EU law in its current state to provide such a route¹²⁹, the absence of such obligation nevertheless appears in conflicts with the EU’s founding values¹³⁰.

Hand in hand with the observations made regarding the intra-EU management of incoming asylum seekers, these considerations on the EU’s attitude towards the outside world in the area of asylum reveal a major identity crisis in the European construct. There does indeed appear to be a major inconsistency between its asylum policy and the core values constituting and founding EU identity.

Conclusion – The “Refugee Crisis”: a *Litmus* Test for the European Union

This article aims to highlight the fact that the prevailing organisation of the CEAS contravenes, in several respect, two main EU historic and legal foundational values : solidarity and human rights. On the one hand, the internal management of the waves of incoming refugees does not comply with Member States’ duty to show solidarity to each other. Moreover, the breach of this principle, which lies at the very heart of the European construct, leads to serious breaches of the asylum-seekers’

¹²⁴ Opinion of Advocate General P. MENGOZZI, 7 February 2017, C-638/16 PPU, EU:C:2017:93, paragraph 65.

¹²⁵ Article 3.2. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

¹²⁶ European Parliament, Resolution on the latest tragedies in the Mediterranean and EU migration and asylum policies, 27 April 2015, 2015/2660(RSP), §5; and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, 13 May 2015, COM(2015) 240 final, p. 4.

¹²⁷ Opinion of Advocate General P. MENGOZZI, 7 February 2017, C-638/16 PPU, EU:C:2017:93, paragraph 150.

¹²⁸ Opinion of Advocate General P. MENGOZZI, 7 February 2017, C-638/16 PPU, EU:C:2017:93, paragraph 137.

¹²⁹ Court of Justice, 7 March 2017, *X. and X.*, C-638/16 PPU, EU:C:2017:173.

¹³⁰ The question of the existence of a right of access by a legal route is currently pending before the European Court of Human Rights, ECtHR, *M.N. and others v Belgium*, application No 3599/18.

fundamental rights. Secondly, EU asylum policy and Member States' attitude *vis-à-vis* people seeking refuge on the European continent do not meet the essential requirements laid down by the Treaties.

These observations lead us to believe that the so-called "refugee crisis" constitutes a *litmus test* for the EU as a whole. The way the EU, hand in hand with its Member States, will respond to the new challenges resulting from the increase in asylum-seekers indeed amounts to a "decisively indicative test"¹³¹ for these founding principles. The difficulties faced by the CEAS as well as the currently proposed solutions reveal, in our view, a serious undermining of the axiological bedrock of the Union. The refugee challenge, by pushing limits of the CEAS, therefore reveals a deep EU's identity crisis threatening human rights and solidarity. Yet the effective respect of the EU's values constitutes a legal condition for the viability of the whole undertaking. The disavowal of these values could indeed in the first instance call into question the principle of mutual trust between Member States and thereby endanger the Union as a whole. This principle, which is of "fundamental importance in EU law"¹³², indeed relies upon the presumption of compliance, by all Member States, of fundamental EU values, including fundamental rights¹³³. One can indeed legitimately ask how Member States' preferential bonds of cooperation incumbent upon them by virtue of being within the EU are justified, when those same Member States refuse, at the cost of major violations of cardinal human rights, to show solidarity with one another. More fundamentally, the whole legal structure of the Union is "based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected"¹³⁴. The observance of common values by the Member States as well as by the EU itself thus constitutes the genuine precondition for the workability of the European construct. Besides the fundamental importance of improving the current CEAS such that it complies with these values for the sake of the asylum-seekers, it also constitutes a normative condition for the EU's survival. The future attitude of the EU and its Member States should therefore break the current deadlock in order to meet the legal conditions of its existence.

¹³¹ Definition of "litmus test" A. STEVENSON, *Oxford dictionary of English*, Oxford, Oxford University Press, 2011.

¹³² Court of Justice, 18 December 2014, Opinion 2/13, EU:C:2014:2454, paragraph 191.

¹³³ Court of Justice, 21 December 2011, *N.S.*, joined cases C-411/10 and C-493/10, EU:C:2011:865, paragraph 83.

¹³⁴ Court of Justice, 18 December 2014, Opinion 2/13, EU:C:2014:2454, paragraph 168.