# 4 Resettlement to the EU

## *4.1 EU competence and its limits*

The following section outlines the competence and limits under EU law to regulate resettlement at the EU level. Legislative attempts (within the framework of the current EU Treaties) are only possible if they do not go beyond areas where the Treaties give the EU competence to act. This derives from the principle of conferral of powers under Art 5 para 2 TFEU.[711]

EUMS have continuously accepted a loss of sovereignty by transferring competences in the realm of migration and asylum to the EU.[712] So far, the EU has focused on the development of a common asylum policy rather than a common refugee policy.[713] Does that make a (legal) difference? Indeed, there are national law examples, such as in Germany,[714] where asylum and refugee law are legally distinct. Yet, from the perspective of international law, asylum can be considered as legally equivalent to international protection for refugees. *Van Selm* points out that refugee policy can be understood more broadly than asylum policy. In this perspective, asylum policy constitutes an internal matter of a state, generally allocated in the domain of Justice and Home Affairs. It "*frames the procedure for decisions taken as to the status of individuals who, having crossed a state border,*

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711 Art 5 para 2 TFEU states that "*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*".

712 See Albert Bleckmann, 'Das Souveränitätsprinzip im Völkerrecht' in (1985) 23 Archiv des Völkerrechts 4, 450 (463) <https://www.jstor.org/stable/40798156?seq=1> accessed 20 March 2021; see also Konrad Schiemann, 'Europe and the Loss of Sovereignty' in (2007) 56 The International and Comparative Law Quarterly 3, 475 (487).

713 See Joanne van Selm, 'European Refugee Policy: is there such a thing?', UNHCR Research Paper nº115 (May 2005) abstract.

714 See Art 16a para 1 Basic Law for the Federal Republic of Germany [Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl S 1) BGBl III/FNA 100-1]: "*Politically persecuted persons enjoy asylum*" [*Politisch Verfolgte genießen Asylrecht*] versus recognition of refugee status under Section 3 German Asylum Act [Asylgesetz vom 2. September 2008 (BGBl I S 1798)].

*arrive spontaneously and request protection and refugee status*".[715] Refugee policy, in contrast, "*encompasses a broader view of international or foreign affairs*"[716] and covers a wider range of protection tools, such as resettlement and humanitarian admission.[717]

EU primary law does not literally refer to refugee policy. Art 78 TFEU mentions a "*common policy on asylum, subsidiary protection and temporary protection*".[718] Several commentators took the view that this Article not only covers a competence to make asylum policy, but also refugee policy, including resettlement.[719] This mainly derives from the objective of the provision, which targets persons seeking international protection. Accordingly, resettlement is allocated to the external dimension of EU's asylum policy.[720] Asylum policy, in turn, belongs to the Area of Freedom, Secu-

715 Joanne van Selm, 'European Refugee Policy: is there such a thing?', UNHCR Research Paper nº115 (May 2005) 2.

716 Ibid 2.

717 See ibid 1.

718 Art 78 para 1 TFEU states that "[t]*he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties*" (emphasis added).

719 See e.g., Adelheit Rossi in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta* (CH Beck 5th ed 2016) Art 78 TFEU, para 12, who expressly refers to a competence covering asylum and refugee law ["*materielles Asyl- und Flüchtlingsrecht*"]; see also Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 68th supplement October 2019) Art 78 TFEU, para 36: "*Aus den gleichen Gründen kann die Norm konzeptionell eine Resettlement-Politik* [...] *umfassen*" (emphasis as in original); see also Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 320: "*Art 78 para 2 TFEU confers upon the Union the competence to harmonise resettlement rules*"; see also Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary* (CH Beck/Hart/Nomos 2nd ed 2016) 1037: "*Such scenarios may include, but are not limited to, a European resettlement scheme*" (emphasis as in original); see also Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law (Text and Commentary)* (Brill 2nd ed 2015) 629.

720 See Kris Pollet, 'A Common European Asylum System under Construction: Remaining Gaps, Challenges and next Steps', in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 74 (88ff); see also Steve Peers,

rity and Justice,[721] i.e. a policy field of shared competence,[722] meaning that EUMS take regulatory action where the EU has exercised its competence.[723]

Shared competence implies compliance with the principles of subsidiarity and proportionality.[724] The principle of subsidiarity requires that legislative action on resettlement at the EU level be taken only if action at the national level appears insufficient and the EU is better placed to act (Art 5 para 3 TFEU). The Commission argued in its 2016 Union Resettlement Framework Regulation Proposal that the harmonization of EUMS' resettlement policies would make it "*more likely that persons eligible for resettlement will not refuse to be resettled to one Member State as opposed to another*", and that such harmonization "*would also increase the overall influence of the Union vis-à-vis third countries in policy and political dialogues and sharing the responsibility with third countries to which or within which a large number of persons in need of international protection has been displaced*".[725] By nature, resettlement to the EU has transnational aspects. The admission of resettlement beneficiaries by an EUMS entails access to EU territory, an Area of Freedom, Security and Justice without internal border controls,

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Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 619; see also Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 326, who discusses whether resettlement forms part of the CEAS or of immigration policy (immigration management) and concludes that resettlement is formally and materially integrated into the CEAS.

721 This area covers the harmonization of private international law, extradition arrangements between EUMS, policies on internal and external border controls, common travel visa, immigration and asylum policies and police and judicial cooperation.

722 Art 4 para 2 lit j TFEU.

723 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 16.

724 The principles of subsidiarity and proportionality require the EU to act only "*if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*" (Art 5 para 3 TFEU); furthermore, "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*" (Art 5 para 4 TFEU). See Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1030, para 12.

725 Commission, Proposal for a Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final 2016/0225 (COD) 6.

where asylum shopping and secondary migration have been long-term concerns shared among EUMS. Whether, as the Commission argued, harmonization could help to ensure that persons in need for resettlement do not refuse to be resettled in a particular EUMS remains debatable. Basically, this depends on whether resettlement beneficiaries would receive a status that allows them to move freely within the EU and reside in any EUMS of their choice. Moreover, considering that EUMS such as Germany and Sweden – that are by no means considered "*unpopular*" among protection seekers – count among the most active resettlement contributors in the EU, the problem of refusals to be resettled there does not seem to be of large scale. In terms of Treaty objectives, resettlement serves the proclaimed goal of providing international protection to third-country nationals in need (Art 78 para 1 TFEU) and aligns with the principle of solidarity (Art 80 TFEU). The point is whether these objectives would really be distorted if no regulation was made at the EU level. Additionally, one must ask whether a regulation based on voluntariness of EUMS, as proposed in 2016, would really make a significant difference in terms of achieving these objectives, and whether it would produce clear benefits by reason of its scale or effects. In the end, subsidiarity assessment is not purely technocratic since the outcome of such assessment remains highly political and depends on the control through the national parliaments of the EUMS (Art 69 TFEU).

In terms of proportionality, it mainly depends on the Commission's choice of the form of the proposed legal instrument and its content: whether the proposal exceeds what is necessary to achieve its objectives. For the 2016 Union Resettlement Framework Regulation Proposal, the choice of the form of a regulation is remarkable (see 4.2.11.1).[726] By comparison, at the time of writing, most aspects of the CEAS are still regulated through (less intrusive) directives (with the exception of the Dublin system).

726 According to the Commission, a "*higher degree of convergence will allow more synergies in the implementation of the Union Resettlement Framework and contribute to discouraging persons eligible for resettlement from refusing resettlement to a particular Member State as well as discouraging secondary movements of persons resettled*". Ibid 7.

### 4.1.1 Rules of competence

The Commission based the 2016 Union Resettlement Framework Regulation Proposal on Art 78 para 2 lit d (referring to the establishment of common procedures; see 4.1.1.1) and g TFEU (referring to cooperation with third countries; see 4.1.1.3). The argument of the Commission was that resettlement required international protection.[727] This links resettlement to Art 78 TFEU, which aims at "*offering appropriate status to any third-country national requiring international protection*".

However, as a means for legal entry, resettlement could also be seen from the angle of visa policy. After the Commission had launched the 2016 Proposal, the Court of Justice pointed to Art 79 para 2 lit a TFEU as potential legal basis for future EU legislation on humanitarian (long-term) visas in its judgement in *X and X v État belge*.[728] In that case, the Court decided that the applications at issue fell solely under the scope of Belgium's national law because "*no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits to third-country nationals on humanitarian grounds*".[729] So far, the Commission has not followed the suggestion of the Court of Justice to propose EU legislation on humanitarian visas on the basis of Art 79 TFEU.[730]

The distinction between Art 78 TFEU and Art 79 TFEU is relevant since visa policy under Art 79 TFEU forms part of immigration policy, as opposed to asylum policy. Indeed, there are aspects of migration policy that reflect the purpose of refugee resettlement. First, migration policy comprises long-term immigration, including permanent residence and citizenship. Second, integration forms an integral part of immigration policy under Art 79 TFEU,[731] along with equal treatment between third-country

727 See ibid 6. See also interview with Dora Schaffrin, Assistant Officer Legal and International Affairs, European Commission (10 July 2019).

728 See Case C-638/16 PPU *X and X v État belge* [2017] EU:C:2017:173.

729 Ibid para 44.

730 See Janine Prantl, ''Lessons to be learned' für ein zukünftiges, gemeinsames EU Resettlement' in (2020) Europarecht Supplement 3, 124f.

731 See Wolfgang Weiß in Rudolf Streinz (ed), *EUV/AEUV Kommentar* (CH Beck 3rd ed 2018) Art 79 TFEU, para 3; see also Adelheit Rossi in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta*, Art 79 TFEU, paras 39ff.

nationals and EU citizens.[732] This again mirrors the nature of resettlement as defined by the UNHCR (see 2.2.1). Nevertheless, with its primary target group of particularly vulnerable refugees, refugee resettlement is inherently linked to international protection and should correspondingly be carried out under the special protection regime for refugees. This results from the above-mentioned analysis of additional obligations that receiving countries face under the Refugee Convention (see Chapter 3), and becomes apparent through the specific role of the UNHCR as actor in the resettlement process (see 2.5.2). A shift away from asylum policy could make it more difficult to establish consistency between resettlement and the already well-established protection regime in the internal EU asylum *acquis*. It is recognized that the international and European human rights framework apply in the broader context of migration policy, but there is a risk that EUMS would neglect the special protections set out in international refugee law and in the EU asylum *acquis* if resettlement was detached from international protection.[733]

These considerations ultimately speak in favor of the Commission's approach to locate resettlement within Art 78 TFEU. On that basis, the following analysis elaborates on the specific EU competences under Art 78 TFEU.

#### 4.1.1.1 Centralized assessment

Various stages in the resettlement process, such as the conduct of interviews with potential resettlement beneficiaries and the review of negative selection decisions (see 5.2.3.9), require procedural rules. In this respect, Art 78 para 2 lit d TFEU constitutes the relevant provision, stipulating that the EU legislator is competent to set up "*common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status*; [...]". This rule of competence covers the establishment of a variety of procedural rules, e.g. concerning "*the personal interview, the evaluation by administrative*

732 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 68th supplement October 2019) Art 79 TFEU, para 5. In particular, the status of non-EU nationals who are long-term residents in the EU entails several equal treatment rights (see 5.4.3.3).

733 See ibid Art 79 TFEU, paras 3, 9f; see also Adelheit Rossi in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta*, Art 79 TFEU, para 22.

*authorities or special rules for vulnerable persons together with guarantees for judicial protection*".[734]

The wording of Art 78 para 2 lit d TFEU refers to 'common' instead of 'uniform' procedures. The term 'common' is used under EU law in various contexts, and it does not *per se* rule out the adoption of a uniform procedure by EU legislators. Art 207 para 1 TFEU addresses the 'common' commercial policy, stating that it "*shall be based on uniform principles*", which provides an example in this regard. Nonetheless, the same cannot be automatically implied for asylum policy under Art 78 TFEU. Specifically, when looking at the systematic context of Art 78 TFEU para 2, it is striking that litera a allows for measures to establish "*a uniform status of asylum for nationals of third countries, valid throughout the Union*", and litera b refers to a "*uniform status of international protection*" – litera d, however, does not mention 'uniform' at all. The fact that Art 78 para 2 lit d, in contrast to the other literas of the same paragraph, does not precisely mention 'uniform' suggests that litera d aims at a lower degree of harmonization.[735]

Another question that is slightly distinct from whether the EU legislator is competent to adopt rules on a uniform resettlement procedure concerns the regulation of centralized EU assessment. Against the backdrop that the EU "*shall act only within the limits of the competences conferred upon it by the Member States in the Treaties*" (Art 5 para 2 TEU; principle of conferral of power), it is the prevailing opinion that centralized EU assessment would only be possible if EUMS transferred their competence of assessing claims for international protection to the EU[736] in a Treaty amendment.[737]

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734 Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1036, para 25; see Gerhard Muzak in Heinz Mayer and Karl Stöger (eds), *Kommentar zu EUV und AEUV* (141st supplement 2012) Art 78 TFEU, para 31.

735 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 34.

736 See Kris Pollet in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 84f; see also Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 321f: "*The EU does not have the competence to decide on individual claims for international protection in territorial asylum procedures. Therefore, it seems that 'replacing' UNHCR with the EU agency with regard to the assessment of the individuals' eligibility for resettlement would be incompatible with Art 78 para 2* [...]".

737 See Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1037, para 27.

Notwithstanding, the current Constitutional Framework allows the EU to "*sponsor the effective application of the EU asylum acquis*".[738] To that effect, Art 78 paras 1 and 2 TFEU have served as legal basis for the establishment of EU agencies, namely the former European Asylum Support Office (EASO),[739] and for today's (better equipped) EU Agency for Asylum (EUAA)[740].[741]

*Tsourdi* addressed the differences between assisted, common and EU level processing in the context of the CEAS.[742] Accordingly, 'assisted processing' means that officials of the competent EUMS conduct the examination of applications for international protection with support of officials from other EUMS possibly coordinated through the EUAA. A shift from assisted to 'common processing' entails that the competent EUMS grants deployed experts or authorities from other EUMS or the EUAA executive discretion over individuals who would otherwise be outside their decision-making authority. Eventually, 'EU level processing' centralizes the entire decision-making authority at the EU level, which would, as just elaborated, require Treaty amendment. Regarding the *status quo* in terms of examining applications for international protection, *Tsourdi* found that only the stage of assisted processing was reached. The limited mandate

738 Ibid 1037, para 27; "*While there have been calls for 'more EU' in processing asylum claims, direct involvement in assessing claims would necessitate* [...] *that this competence – which presently lies with member states – be transferred to an EU institution* [...]. *In the short term, EU institutions are limited to acting through EASO to support national asylum systems operationally and financially*", Mattia di Salvo et al, 'Flexible Solidarity: A comprehensive strategy for asylum in the EU', MEDAM Assessment Report (15 June 2018) 31f <https://www.medam-migration.eu/fileadmin/Dateiverwaltung/MEDAM-Webseite/Publications/Assessment_Reports/2018_MEDAM_Assessment_Report/MEDAM_Assessment_Report_2018_Full_report.pdf> accessed 20 March 2021; see Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 321.

739 Regulation 2010/439 (EU) establishing a European Asylum Support Office [2010] OJ L132/11-28.

740 Regulation 2021/2303 (EU) on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 [2021] OJ L468/1-54.

741 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 37.

742 See Evangelia (Lilian) Tsourdi in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects*, 214; see also Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 506 (514ff). This classification is particularly relevant in terms of who holds the final decision-making power, and bears responsibility to ensure compliance with the relevant human rights obligations.

of the then still operative EASO in Art 12 para 2 EASO Regulation[743] reaffirmed her argument.[744] By contrast, the current EUAA Regulation ingrains some elements of 'common processing'. While it appears from the negotiations and the Recitals of the EUAA Regulation that decision-making power on applications for international protection remains without prejudice to the competence of EUMS,[745] the EUAA Regulation provides a basis for the EUAA to potentially handle such applications.[746] Upon request of the competent EUMS or on its own motion (subject to the condition of consent), the EUAA, namely deployed experts, can decide upon applications for international protection if the asylum and reception system of the respective EUMS experiences disproportionate pressure.[747] For further elaboration whether such binding decision-making powers over individuals can be delegated, or rather conferred to the EUAA under the EU Constitutional Order, see 4.3.2.

#### 4.1.1.2 Extraterritorial processing

By its very nature, resettlement includes extraterritorial processing. Therefore, it needs to be assessed whether Art 78 para 2 lit d TFEU provides a

743 "[...] *The documents shall not purport to give instructions to Member States about the grant or refusal of applications for international protection.*"

744 See Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 514f; see also Philippe de Bruycker and Evangelia (Lilian) Tsourdi, 'Building the common European asylum system beyond legislative harmonisation: practical cooperation, solidarity and external dimension' in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 473 (505).

745 See Recital 21 EUAA Regulation. See also Jan Schneider and Anna-Lucia Graff, 'EASO Reloaded: Can The New EU Asylum Agency Guarantee A Standardised System of Protection?' (June 2018) 8 <https://www.svr-migration.de/en/publications/eu_asylum_agency/> accessed 17 July 2022. See also ibid 4, fn 7.

746 Recital 55 EUAA Regulation.

747 This concerns the task of the EUAA under Art 2 para 1 lit i to "*provide effective operational and technical assistance to Member States, in particular when their asylum and reception systems are subject to disproportionate pressure*". See further Art 16ff EUAA Regulation; under Art 16 para 2 lit c EUAA Regulation, the agency may, amongst others, "*facilitate the examination by the competent national authorities of applications for international protection or provide those authorities with the necessary assistance in the procedure for international protection*".

legal basis for the enactment of procedural rules applied outside EU territory. As such, Art 78 para 2 lit d TFEU remains silent on its geographical scope.[748] It does not specify whether the procedures based on this Article necessarily apply within the territory of the EUMS. In that respect, Art 78 para 2 lit d TFEU differs from more restrictive earlier formulations.[749] Art 63 para 1 lit d Treaty of Amsterdam referred to "*procedures in Member States*". In contrast, Art III-266 para 2 lit d Treaty establishing a Constitution for Europe (Constitutional Treaty)[750] did not specify the geographical scope, just like Art 78 para 2 lit d TFEU. Given the political debate on the desirability of external asylum reception centers that took place in parallel to the drafting of the Constitutional Treaty, discussions on the geographical scope of rules on asylum processing came up. The discussions ended with a conscious silence on the territorial scope of Art III-266 Constitutional Treaty. Since the drafters consciously refrained from a territorial restriction, interpretation in light of these discussions suggests that – like its predecessor under the Constitutional Treaty – Art 78 para 2 lit d TFEU covers extraterritorial processing of applications for international protection.[751] In general, therefore, nothing speaks against an extraterritorial resettlement procedure based on Art 78 para 2 lit d TFEU.

#### 4.1.1.3 Cooperation with third countries

Due to the fact that resettlement depends on partnerships between EUMS and third countries, i.e. countries of (first) refuge and home countries, Art 78 para 2 lit g TFEU constitutes another rule of competence worthy of consideration. This provision addresses "*partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection*". As an explicit EU competence, Art 78 para 2 lit g TFEU allows EU institutions to independently conclude agreements with third countries, even if an implicit external competence

748 See Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 320; see also Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 36.

749 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 36.

750 OJ [2004] C 310/3.

751 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 36.

under Art 3 para 2 TFEU is missing.[752] This is relevant because financial and operational support for third countries cannot be linked to the EU asylum system in itself.

The primary purpose of Art 78 para 2 lit g TFEU is the establishment of partnerships to control the influx of third country nationals into EU territory, in order to preserve the effectiveness of the CEAS. However, partnerships under this provision can also be understood as "*managing the flow*" to third countries without expecting further migration influx in EU territory.[753] When reflected upon critically, this implies that Art 78 para 2 lit g TFEU could be misused for preventive retention of refugees in third countries, such as Morocco or Libya (see 4.2.7).

Extraterritorial action is generally covered by Art 78 para 2 lit g TFEU.[754] Yet, this does not mean that Art 78 para 2 lit g TFEU provides a basis for extraterritorial *processing*. There is a fundamental legal difference between the promotion of refugee protection by third countries and the rendering of asylum decisions by EU officials abroad and this legal difference must be taken into account.[755] Considering the fact that the EU envisaged reception centers for North Africa[756] in 2018 (see 4.2.5), *Hailbronner* and *Thym* argued that Art 78 para 2 lit g TFEU "*does not, in itself at least, provide a sufficient legal basis for the initiation of such centres*".[757] The key point here is that EU officials cannot simply circumvent the fundamental rights protections under EU law by taking asylum decisions outside the EU. If, on the other hand, authorities of non-EU countries have this decision-making power, they are (only) bound by the fundamental rights obligations that apply under their respective legal regimes. Therefore, a distinction must be made between (mere) cooperation without shifting decision-making

752 See Case C-22/70 *Commission v Council* [1971] EU:C:1971:32; see also Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 320.

753 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 45.

754 See ibid Art 78 TFEU, para 47; see also Wolfgang Weiß in Rudolf Streinz (ed), *EUV/AEUV Kommentar* (CH Beck 3rd ed 2018) Art 78 TFEU, para 45.

755 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 47.

756 See Commission, 'Managing migration: Commission expands on disembarkation and controlled centre concepts' (*Press release*, 24 July 2018) <http://europa.eu/rapid/press-release_IP-18-4629_en.htm> accessed 27 February 2021.

757 Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1040f, para 35.

power to the EU, and extraterritorial processing (with EU decision-making power).

More likely, extraterritorial processing, including the extraterritorial resettlement selection process, falls within the scope of Art 78 para 2 lit d TFEU. Art 78 para 2 lit g TFEU can be used in a complementary manner for third-country support to ensure the effective application of international protection obligations.

### 4.1.2 Principles governing the exercise of EU competences

Besides rules of competence, on which EU legislative action on resettlement must be based, EU legislators are also bound by general principles underlying the EU legal order.[758]

In the external dimension of the CEAS, where resettlement is located, three principles deserve particular consideration, namely (i) the principle of solidarity and fair sharing of responsibility, (ii) adherence to international refugee law and international and European human rights as well as (iii) consistency between internal and external action. The following section elaborates on the specific characteristics of these principles.

#### 4.1.2.1 Solidarity and fair sharing of responsibility

Already in 1973 the Court of Justice made clear that "[i]*n permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules*".[759] The Court of Justice saw a "*failure in the duty of solidarity*"[760] when an EUMS, following its own conception of national interest, unilaterally breaks the equilibrium

758 The function of these principles is threefold: (i) They enable the CJEU to fill normative gaps and ensure the autonomy and coherence of the EU legal system; (ii) they serve as a source for interpretation, and (iii) they may be relied upon as grounds for judicial review; see Koen Lenaerts and José A Gutiérrez-Fons, 'The Role of General Principles of EU Law' in Anthony Arnull et al (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 179 (179ff).

759 Case C-39/72 *Commission of the European Communities v Italian Republic* [1973] EU:C:1973:13, para 24

760 Ibid para 25.

between advantages and obligations.[761] From this follows that solidarity is not a one-way street.[762] In 1979, the Court of Justice defined solidarity as a general principle of EU law, flowing from the particular nature of the (then existing) communities.[763] In this vein, Art 2 TEU refers to a society "[...] *in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*".[764]

Yet, EU law does not establish a general legal definition of solidarity.[765] Art 80 TFEU stipulates the most concrete primary law provision anchoring the principle of solidarity in relation to the CEAS.[766] It states that the CEAS and its implementation "*shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle*".[767] Art 80 TFEU links solidarity to responsibility sharing. A close reading of this Article suggests "*that solidarity and fair sharing of responsibilities are one single principle. Otherwise, the drafters would have opted for the plural*".[768]

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761 See ibid para 24.

762 Christian Calliess, '"In Vielfalt geeint" – Wie viel Solidarität? Wie viel nationale Identität?' in Christian Calliess (ed), *Europäische Solidarität und nationale Identität. Überlegungen im Kontext der Krise im Euroraum* (Mohr Siebeck 2013) 5 (17).

763 See Case 128/78 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1979] EU:C:1979:32.

764 Emphasis added; see Joined Cases C-715/17, C-718/18 and 719/17 *European Commission v Republic of Poland, Hungary and Czech Republic* [2019] EU:C:2019:917, Opinion of AG Sharpston, para 248.

765 See Herbert Rosenfeldt, 'The European Border and Coast Guard in Need of Solidarity: Reflections on The Scope and Limits of Article 80' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 169 (170).

766 See Andreas Th Müller, 'Solidarität in der gemeinsamen europäischen Asylpolitik' in (2015) Zeitschrift für öffentliches Recht, 486.

767 By addressing "*financial implications*", this Article has served as a basis for financial support measures for over-indebted EUMS in the past. Recalling, for instance, the financial crises in Greece and the opposition of some EUMS as well as the emotional reactions among EU citizens claiming to be saddled with the debt burden of the Greeks shows how sensitive it is to achieve support and commitment by invoking solidarity. Christian Calliess in Christian Calliess (ed), *Europäische Solidarität und nationale Identität. Überlegungen im Kontext der Krise im Euroraum*, 10f.

768 Herbert Rosenfeldt in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 178.

That link between solidarity and responsibility sharing fosters the relevance of Art 80 TFEU in the resettlement context because, as elaborated, resettlement not only constitutes a sign of international solidarity with countries of (first) refuge, but also a responsibility-sharing mechanism (see 2.1.1).

The wording of Art 80 TFEU expressly refers to solidarity between EUMS.[769] Notwithstanding, Art 80 TFEU is not limited to solidarity within the EU. Against the backdrop that resettlement concerns solidarity with third countries, it is relevant that solidarity in the CEAS context has indeed been extended to third countries outside the EU, as indicated in Art 78 para 2 lit g TFEU.[770]

In terms of the means to implement solidarity, Art 80 TFEU goes beyond the expressly stated financial solidarity (compensation for overburdened EUMS/third states) by including normative solidarity (common rules), operational solidarity (EU agencies), and, eventually, solidarity in the form of physical relocation or resettlement of refugees.[771]

Implementing resettlement to effectuate solidarity and responsibility sharing implies fairly-divided resettlement contributions of all EUMS. A potential duty of EUMS to participate in resettlement presupposes that normative force is vested in the principle of solidarity and responsibility sharing under Art 80 TFEU. When examining the normative force of Art 80 TFEU, two issues need to be considered: First, whether individuals can take legal action against EU institutions and EUMS not complying

769 Solidarity in EU law refers either to the relationship between human beings and groups of people, or to the relationship between EUMS or more broadly to the relationship between states, whereas the context and wording of a specific Treaty provision dealing with solidarity determines which of the mentioned relationships is addressed; see Herbert Rosenfeldt in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 171.

770 See Wolfgang Weiß in Rudolf Streinz (ed), *EUV/AEUV Kommentar* (CH Beck 3rd ed 2018) Art 80 TFEU, para 1; see also Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 68th supplement October 2019) Art 80 TFEU, para 4.

771 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 80 TFEU, para 5; see also Obiora Chinedu Okafor, 'Cascading toward "De-Solidarity"? The Unfolding of Global Refugee Protection' in (30 August 2019) TWAILR Reflections 2, 2 <https://twailr.com/cascading-toward-de-solidarity-the-unfolding-of-global-refugee-protection/> accessed 27 February 2021.

with this principle; and second, which obligations, if any, arise out of Art 80 TFEU between EUMS.

As regards potential legal action taken by individuals invoking Art 80 TFEU, it must be noted that this Article is generally conceived as state-centered.[772] Moreover, individuals can only invoke EU-law provisions before domestic courts if these provisions have direct effect. Direct effect demands a precise, clear and unconditional obligation, not calling for additional national or European measures.[773] Consequently, scholars raised doubts about the legislative effectiveness of Art 80 TFEU. They claimed that Art 80 TFEU is too imprecise and unclear to have a direct effect.[774] Hence, the prevailing legal opinion does not consider Art 80 TFEU to be justifiable by itself. Consequently, individuals cannot rely on this Article as a basis for a challenge under Art 263 TFEU or for an action for failure to act under Art 265 TFEU. As opposed to individuals, EUMS are privileged claimants and do not have to prove "*direct and individual concern*"; thus, they could indeed invoke Arts 263 and 265 TFEU.

In light of the second perspective on obligations between EUMS, Art 80 TFEU frames an attitude of working together, namely an obligation of means where "*policies are yet to be adopted*".[775] Essentially, this Article impacts the interpretation of EU secondary law in the field of asylum and migration, including a prospective Union Resettlement Framework Regulation.[776] Beyond that, it compels EUMS to follow a specific course of action and to adopt and implement defined measures. *Thym* compared the principle of solidarity with the federal aim [*Staatszielbestimmung*] in the German Constitution.[777] What is more, *Kotzur* put forward that Art 80 TFEU included concrete obligations to act.[778] *Peers et al* confirmed that the

772 See Evangelia (Lilian) Tsourdi in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects*, 202.

773 See Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECLI:EU:C:1963:1.

774 See Herbert Rosenfeldt in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 181.

775 Ibid 173.

776 See Andreas Th Müller, 'Solidarität in der gemeinsamen europäischen Asylpolitik' in (2015) Zeitschrift für öffentliches Recht, 486f (with further references).

777 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 80 TFEU, para 4.

778 See Markus Kotzur in Rudolf Geiger, Daniel Erasmus-Khan and Markus Kotzur (eds), *European Union Treaties: Treaty on the European Union, Treaty on the Functioning of the European Union* (CH Beck/Hart 2015) Art 80 TFEU, para 2.

principle of solidarity created a series of positive obligations, namely an obligation to adopt legal measures for the management of refugee influx. In the same vein, *Tsourdi* affirmed that Art 80 TFEU "*in fact requires the adoption of concrete measures, whenever necessary*".[779]

Eventually, the ECtHR approved that Art 80 TFEU imposes direct obligations on EUMS. The Court stated in its judgement on the violation of relocation decisions by Poland, Hungary, and the Czech Republic that the obligations under "*the provisional measures provided for in Decisions 2015/1523 and 2015/1601, […] adopted under Article 78(3) TFEU […] must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, which, in accordance with Article 80 TFEU, governs the Union's asylum policy*".[780] There can indeed be reasons, such as national security and public policy, that justify EUMS' refusal of admission. However, as Advocate General (AG) *Sharpston* aptly concluded in the infringement proceedings against the Czech Republic, Hungary, and Poland: Allowing EUMS to reject commitment *in toto* would run counter to the principle of solidarity and fair sharing of responsibilities. She made clear that even if the defendant EUMS "*were really confronting significant difficulties*", unilateral absolute suspension was not "*the appropriate course of action to pursue in order to respect the principle of solidarity*".[781] As a result, the past effort to impose a mandatory quota for *intra*-EU relocation demonstrates that such quota did not attain the anticipated relocation contributions.

The politically contentious question consists of whether EUMS enjoy discretion as to the means to be employed to implement solidarity and responsibility sharing under Art 80 TFEU. Considering this issue, the concept of so-called 'flexible solidarity' arose. Already in 2012, the Council of the EU affirmed that "*the framework for genuine and practical solidarity is a flexible and open 'tool box' compiled of both existing and possible new measures*".[782] In 2016, when EUMS lacked consensus on concrete actions, numbers and what kind of refugees to take, the Visegrád group proposed

779 Evangelia (Lilian) Tsourdi in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects*, 203 (emphasis as in original).

780 Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Republic of Poland, Hungary and Czech Republic*, para 181.

781 Joined Cases C-715/17, C-718/18 and 719/17 *European Commission v Republic of Poland, Hungary and Czech Republic*, Opinion of AG Sharpston, para 235.

782 Council of the EU, 'Council Conclusions on a common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows', 7115/12 ASIM 20 FRONT 30 (8 March 2012) <https:/

flexible solidarity as an alternative to mandatory quotas. The underlying argument is that flexible solidarity would enable EUMS to contribute according to their experience and potential,[783] allowing them to volunteer on the *how* of burden sharing. This concept is not about forcing EUMS to admit refugees, it rather deals with what an EUMS can offer as an alternative. After all, the enforceability of flexible contributions remains debatable.

Four years after the Visegrád group's demand for flexible solidarity, the Commission brought the topic back on the political agenda. With the New Pact on Asylum and Migration, the Commission proposed a 'flexible' solidarity mechanism as part of a prospective Asylum and Migration Management Regulation.[784] At the same time, it expressly referred to the above-mentioned judgement of the Court of Justice[785] in the infringement proceedings concerning unfulfilled obligations under the 2015 relocation scheme (see 2.1.2), highlighting that "[s]*olidarity implies that all Member States should contribute*".[786] From this statement, it can be inferred that the Commission does indeed – perhaps unlike some EUMS – deduce a positive obligation to act from the principle of solidarity and fair sharing of responsibilities.

Ultimately, any kind of flexible solidarity must not unburden EUMS from binding international obligations.[787] In this context, *Schmalz* aptly stated that while the law did not restrict the scope of political actions

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/www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/130731.pdf> accessed 27 February 2021.

783 See Markus Kotzur, 'Flexible Solidarity – Effective Solidarity?' (*Völkerrechtsblog*, 16 November 2016) <https://voelkerrechtsblog.org/flexible-solidarity-effective-solidarity/> accessed 27 February 2021; see also Milan Nič, 'The Visegrád Group in the EU: 2016 as a turning-point?' in (2016) European View, 281 (286f); see also Heads of Government of the V4 Countries, 'Joint Statement of the Heads of Governments of the V4 Countries' (16 September 2016) 3 <https://www.euractiv.com/wp-content/uploads/sites/2/2016/09/Bratislava-V4-Joint-Statement-final.docx.pdf> accessed 20 March 2021.

784 See Commission, Proposal for a Regulation on asylum and migration management and amending Council Directive 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final; see also Communication on a New Pact on Migration and Asylum, 5.

785 See Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Republic of Poland, Hungary and Czech Republic*.

786 Commission, Communication on a New Pact on Migration and Asylum, 5.

787 See Markus Kotzur, 'Flexible Solidarity – Effective Solidarity?' (*Völkerrechtsblog*, 16 November 2016).

to zero, some legal stipulations were just not freely negotiable politically, including the protection of human rights.[788]

#### 4.1.2.2 A policy in accordance with international refugee law and international and European human rights

With a view to adopting future EU resettlement legislation that complies with the Refugee Convention and relevant human rights treaties, it needs to be questioned whether the EU is bound by these treaties.

From a general international law perspective, the EU – unlike the EUMS – is not bound to comply with the Refugee Convention and its Protocol because the EU has never acceded to these Treaties. It is also not bound by way of functional succession. The doctrine of functional succession in EU law considers that the EU is bound by an international treaty to which it is not formally a party if all EUMS are contracting parties and the treaty falls within an area in which the EU has assumed exclusive competence.[789] All EUMS are Contracting Parties to the Refugee Convention, but the Convention does not fall within an area where the EU has assumed exclusive competence. Consequently, the EU is not bound by the Refugee Convention and its Protocol by way of functional succession.[790]

Nevertheless, or rather for this very reason, the references in Art 78 para 1 TFEU and Art 18 Charter to the Refugee Convention are of significant relevance. Art 78 para 1 TFEU makes it clear that EU's policy to develop a CEAS "*must be in accordance with the Geneva* [Refugee] *Convention* […] *and the Protocol* […] *relating to the status of refugees, and other relevant treaties*". In addition, Art 18 Charter stipulates that "[t]*he right to asylum shall be guaranteed with due respect for the rules of the Geneva* [Refugee] *Convention* […] *and the Protocol* […] *relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union* […]". Even in the absence of a formal obligation under

788 See Dana Schmalz, 'Am Ende der Kraft' (*Verfassungsblog*, 14 September 2020) <https://verfassungsblog.de/am-ende-der-kraft/> accessed 27 February 2021.

789 See Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2014) 109ff.

790 See Andreas Th Müller, 'Solidarität in der gemeinsamen europäischen Asylpolitik' in (2015) Zeitschrift für öffentliches Recht, 470; see also Martin Nettesheim in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (CH Beck 68th supplement October 2019) Art 4 TFEU, para 7.

international law, EU primary law incorporates the Refugee Convention as legally binding. Consequently, EU legal instruments must respect international refugee law, which can be understood as 'international supplementary constitution' of the CEAS.[791] In line with this, the Court of Justice confirmed that "*although the European Union is not a contracting party to the Geneva* [Refugee] *Convention, Article 78(1) TFEU and Article 18 of the Charter nonetheless require it to observe the rules of that convention*".[792] The EU legislator must "*adopt measures on asylum, in accordance with the Geneva* [Refugee] *Convention and other relevant treaties*".[793] An infringement of the Refugee Convention constitutes an infringement of Art 78 para 1 TFEU and Art 18 Charter, invalidating EU secondary law or requiring an interpretation in conformity with the Refugee Convention.[794] The Court of Justice has jurisdiction "*to examine the validity* […] *in the light of Article 78(1) TFEU and Article 18 of the Charter and, in the context of examination, to verify whether* […] *provisions* […] *can be interpreted in a way which is in line with the level of protection guaranteed by the rules of the Geneva Convention*".[795]

Hence, the Court of Justice would have jurisdiction to examine whether a future Union Resettlement Framework Regulation was developed and interpreted in conformity with the Refugee Convention.

What is more, Art 78 para 1 TFEU refers to "*other relevant treaties*". According to the prevailing opinion, all treaties related in content to the provision of international protection are considered to be relevant, including at least the ECHR,[796] and also other pertinent universal human rights treaties.[797] It follows that the human rights treaties analyzed in Chapter 3

791 See Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 332 with further references.

792 Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides* [2019] EU:C:2019:403, para 74.

793 Case C-175/08 *Aydin Salahadin Abdulla v Bundesrepublik Deutschland* [2010] EU:C:2010:105, para 51.

794 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 16.

795 The high threshold of compliance with the Refugee Convention was confirmed by the Court of Justice in Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides*, para 75, where the validity of the Qualification Directive with regards to Art 78 para 1 TFEU was assessed.

796 The binding relationship to the ECHR already arises from Art 6 para 3 TEU.

797 See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, para 19; see also Gerhard

– ICESCR, ICCPR, CAT, CRC, CEDAW, UNCRPD, as well as the ECHR – are covered by the reference in Art 78 para 1 TFEU. This means that future secondary law on resettlement must be developed and interpreted not only in conformity with the Refugee Convention, but also with international and European human rights.[798] As a result, the international law obligations outlined in Chapter 3 are relevant in the EU law context, as they inform the development and interpretation of EU law.[799]

Besides international human rights and refugee law, EUMS as well as the EU as such are bound to guarantee the rights under the Charter, which observe the meaning and scope of the rights under the ECHR.[800] Art 51 para 1 Charter addresses these rights to the EUMS "*only when they are implementing Union law*" – without territorial restriction.[801] At present, refugee resettlement is not attached to any binding EU law obligation, posing the question whether discretionary provisions can trigger implementation of EU law.

Case law of the CJEU suggests that even if a prospective Union Resettlement Framework Regulation failed to determine mandatory quotas and relied on EUMS' discretion, the Charter could apply. According to the

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Muzak in Heinz Mayer and Karl Stöger (eds), *Kommentar zu EUV und AEUV*, Art 78 TFEU, para 6.

798 In contrast to earlier provisions, Art 78 para 1 TFEU "*clarifies, however, that the necessary respect for the Geneva Convention and corresponding human rights guarantees applies to all instruments building the EU asylum acquis*", Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1029, para 9.

799 Given that resettlement comprises extraterritorial action, it is important to highlight commentators agreeing that the EU cannot bypass these obligations when acting outside EU territory. See Daniel Thym in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, Art 78 TFEU, paras 36, 47; see also Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1037, para 26; see also Wolfgang Weiß in Rudolf Streinz (ed), *EUV/AEUV Kommentar*, Art 78 TFEU, para 45.

800 At least, the meaning and scope of the Charter rights shall be the same as those laid down by the ECHR. See Art 52 para 3 Charter.

801 See Stephanie Law, 'Humanitarian Admission and the Charter of Fundamental Rights' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Hart/Nomos 2020) 77 (99): "*As regards the existence of a territorial requirement, the CFR is silent*"; see also Koen Lenaerts and Piet van Nuffel, *European Union Law* (Sweet & Maxwell 3rd ed 2011) 837, paras 22-27.

judgement of the Court of Justice in *Florescu and others*,[802] implementation of EU law can be assumed when an EUMS adopts measures based on discretion conferred upon it by an act of EU law. This also applies in the specific context of the CEAS, which the Court of Justice already approved earlier in *NS and ME and Others*.[803] Indeed, *de Boer* and *Zieck* asserted that EUMS were implementing EU law when conducting resettlement, namely by claiming the lump sum reserved by the AMIF. Although the AMIF Regulation does not oblige EUMS to resettle at all, EUMS are implementing EU law when conducting resettlement under the terms of the AMIF.[804] However, the Court of Justice has not consistently followed this approach. For example, in its order in *Demarchi Gino*,[805] the Court recalled that the application of fundamental EU rights required an EU law obligation in the subject area with regard to the situation at issue.

In conclusion, CJEU case law indicates that EUMS can be bound by the Charter when exercising discretion conferred upon them by an act of EU law. This speaks in favor of EUMS facing Charter obligations when conducting AMIF-funded resettlement. The AMIF Regulation does not set out strict obligations but imposes several requirements on EUMS to get funding (see 4.3.1). EUMS hence do not entirely act under their national laws when conducting resettlement according to the requirements set out in the AMIF – they arguably implement EU law triggering the application of the Charter.[806]

The implementation of EU law giving rise to Charter obligations can equally be assumed for resettlement under a prospective Union Resettle-

802 See Case C-258/14 *Eugenia Florescu and others v Casa Județeană de Pensii Sibiu and others* [2017] EU:C:2017:448, para 48.

803 See *NS and ME and Others*, paras 64-69.

804 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 80.

805 See Joined Cases C-177/17 and C-178/17 *Demarchi Gino Sas and Graziano Garavaldi v Ministero della Giustizia* [2017] EU:C:2017:656, paras 21ff.

806 Against the backdrop that AMIF-funded resettlement triggers the application of the Charter, funding could be a tool to strengthen compliance with both human rights and refugee rights. To wit, the 2018 report on the EU Charter highlighted "*the need to use funds in full compliance with Charter rights and principles. Actions implemented with the support of EU funds should take particular account of the fundamental rights of children, migrants, refugees and asylum seekers and ensure the full respect of* […] *the rights of those in need of international protection* […]". Commission, '2018 report on the application of the EU Charter of Fundamental Rights' (2019) 12 <https://ec.europa.eu/info/sites/info/files/2018_annual_report_charter_en_0.pdf> accessed 28 February 2021.

ment Framework Regulation – irrespective of whether such Regulation would set out a binding obligation to resettle. As a result, the conduct of resettlement under the proposed Union Resettlement Framework Regulation would trigger Charter obligations.

The situation is again different for EU agencies, such as the EUAA. In this regard, Art 51 para 1 Charter states that the provisions of the Charter are addressed "*to the institutions, bodies, offices and agencies of the Union*". Unlike EUMS, EU institutions and agencies would not only be bound by the Charter in situations of implementing EU law. For instance, if the EUAA engages in the decision-making of the resettlement of an individual to an EUMS, it is bound by the Charter – regardless of whether it applies EU law or national law of that EUMS.

#### 4.1.2.3 Consistency

As clarified above, EU secondary law developing a CEAS must uphold the protection standards in international refugee law and international and European human rights. That is why these standards are incorporated in the firm set of secondary legislation forming the *internal* EU asylum *acquis*. Resettlement is, however, located in the *external* CEAS, which still lacks such a firm set of legislative acts and overlaps with the external action of the EU.

In this light, the principle of consistency becomes relevant. Consistency in EU law primarily aims at ensuring that concepts of EU law which have already been determined, e.g. by CJEU case law, are properly interpreted and applied.[807] This implies a sense of attachment or entanglement among EU policy areas – as aptly depicted in the French term "*cohérence*".[808] Hence, consistency concerns whether the protection standards set out in the Directives of the internal EU asylum *acquis* "*should be understood to prevent the EU from engaging extra-territorially in the promotion of less protective*

807 For elaborations on the distinction between unity and consistency of EU law see Sandra Hummelbrunner, 'The Unity and Consistency of Union Law: The Core of Review under Article 256(2) and (3) TFEU' in (2018) 73 Zeitschrift für öffentliches Recht, 295 (307).

808 See Hans-Joachim Cremer in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta* (CH Beck 5th ed 2016) Art 21 TEU, para 13.

*standards*".[809] In concrete terms, the question to be addressed is whether the principle of coherence prevents the EU or its EUMS from observing a lower standard of protection in the resettlement context than in the internal EU asylum *acquis*.

Art 7 TFEU, the general rule on consistency, states that "[t]*he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*". This Article demands consistency between different EU policy fields, i.e. in the case of resettlement the CEAS and the external action of the EU. In terms of the latter, Art 21 para 3 TEU constitutes the more specific rule on consistency, namely that "[t]*he Union shall ensure consistency between the different areas of its external action and between these and its other policies*". The wording of this provision makes it clear that it addresses not only external action but also overlapping policy areas,[810] such as the *external* CEAS, including resettlement.

Art 7 TFEU is directed to "[t]*he Union*". The primary addressees are the Commission, the Council of the EU and the Common Foreign and Security Policy (CFSP) High Representative, but not the EUMS.[811] Yet, resettlement procedures are implemented at the national rather than at the EU level. Here, Art 24 para 3 subpara 2 sentence 2 TEU comes into play. It clarifies that "[t]*hey* [EUMS] *shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations*". In addition, under the principle of loyalty (Art 4 para 3 TEU), EUMS face a duty to act consistently with the EU.[812]

As with the principle of solidarity and responsibility sharing (see 4.1.2.1), the normative force of the principle of consistency depends on justiciability. In that respect, it is important to note that the assessment of consistency within actions under the CFSP is outside the scope of CJEU's jurisdiction due to the non-effectuation clause in Art 40 TEU. Notwithstanding the CJEU's power to review the internal consistency of measures in policy areas outside the CFSP, even if they affect external

809 Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 632f; from the Directives of the internal asylum *acquis*, only the scope of application of the Qualification Directive is not restricted to the territory of EUMS; see Art 3 paras 1 and 2 Asylum Procedures Directive; Art 3 paras 1 and 2 Reception Conditions Directive.

810 See Elfriede Regelsberger and Dieter Kugelmann (ed), *EUV/AEUV Kommentar* (CH Beck 3rd ed 2018) Art 21 TEU, para 17.

811 See ibid Art 21 TEU, para 18.

812 See ibid Art 21 TEU, para 19.

action.[813] Furthermore, the principle of loyalty in Art 4 para 3 TEU as well as Art 7 TFEU, the general provision on the principle of consistency, fall within the scope of CJEU's jurisdiction. This means that the consistency of resettlement measures with the internal asylum *acquis* (amongst others, this concerns consistency with the Asylum Procedures Directive[814], the Qualification Directive and the Reception Conditions Directive[815], as well as their interpretation in line with international refugee and international and European human rights) can be subject to review – albeit that such measures affect external action.

From the perspective of individuals, they can hardly rely on the principle of consistency by itself. Similar to the principle of solidarity and responsibility sharing, the rules on consistency in Art 7 TFEU and Art 21 para 3 TEU are considered to be vague,[816] thus not precise enough to confer rights on individuals.

Eventually, consistency under EU law is well-established, and it provides valid arguments for a formal procedure of resettlement measures in compliance with the internal EU asylum *acquis*.[817] Such consistent approach would necessarily prohibit EUMS from distinguishing rights of individuals on the basis of their means of entry, i.e. through a resettlement program or irregular border-crossing. Since EU's internal asylum *acquis* establishes a firm set of rights for persons eligible for international protection, it would only be consistent to equally apply those rights in the resettlement context.

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813 See ibid Art 21 TEU, para 19; see also Andreas Th Müller, 'Das Individuum im auswärtigen Handeln der Union' in Andreas Kumin, Julia Schimpfhuber, Kirsten Schmalenbach and Lorin-Johannes Wagner (eds), *Außen- & sicherheitspolitische Integration im Europäischen Rechtsraum – Festschrift Hubert Isak* (Jan Sramek 2020) 51 (71).

814 See Directive 2013/32 (EU) on common procedures for granting and withdrawing international protection [2013] OJ L180/60-95.

815 See Directive 2013/33 (EU) laying down standards for the reception of applicants for international protection [2013] OJ L180/96-116.

816 See Matthias Ruffert in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta* (CH Beck 5th ed 2016) Art 7 TFEU, para 5; see also Kirsten Schmalenbach in Thomas Jaeger and Karl Stöger (eds), *Kommentar zu EUV und AEUV* (238th supplement June 2020) Art 21 TEU, para 16; see also Hans-Joachim Cremer in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Grundrechtecharta*, Art 21 TEU, para 13.

817 See Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 533.

### 4.1.3 Preliminary conclusion

The relevant rules of competence for resettlement are Art 78 para 2 lit d and lit g TFEU. Art 78 para 2 lit d TFEU allows for the establishment of procedural rules on various aspects of the resettlement process, but does not go as far as to allow for procedures on centralized EU assessment. Furthermore, Art 78 para 2 lit d TFEU accounts for the extraterritorial aspects of resettlement since it covers the establishment of procedural rules that apply outside EU territory. While extraterritorial processing falls within the scope of Art 78 para 2 lit d TFEU, Art 78 para 2 lit g TFEU can be used in a complementary manner for third-country support to ensure the effective application of international protection obligations.

Besides, EU legislators must consider the principle of solidarity and responsibility sharing (Art 80 TFEU), international refugee law and international and European human rights (Art 78 para 1 TFEU) as well as the principle of consistency when regulating resettlement (Art 21 para 3 TEU and Art 7 TFEU).

The principle of solidarity and responsibility sharing impacts interpretation and requires EUMS to take concrete measures. However, it grants EUMS discretion on what those measures look like. Resettlement as a form of physical solidarity would be a measure to implement this principle.

Even if the implementation of resettlement is based on a discretionary choice, EUMS must conduct resettlement within the limits set by international law. In this light, Art 78 para 1 TFEU requires resettlement to be developed and interpreted in conformity with the Refugee Convention as well as with the ECHR and the Charter (in the European context), and with universal human rights treaties pertinent to the provision of international protection.

Finally, consistency between EU's internal asylum *acquis* and external action demands that the protection standards incorporated in EU asylum law, namely the regulations and directives established as part of the CEAS, including their required interpretation in conformity with international refugee law and international and European human rights, must equally be observed in the resettlement context.

## *4.2 Evolution of an EU resettlement policy*

Over the decades, the EU has shaped the definition of resettlement and gained influence over the resettlement policies of EUMS. Even though

EU law does not oblige EUMS to resettle an imposed number of persons, it sets out priorities on whom to resettle from where, and it offers financial and operational support to EUMS. The following section evinces the evolvement of EU's resettlement policy.[818] It provides the basis for subsequent evaluation in light of the above-elaborated principles of the EU Constitutional Framework (see 4.4).

### 4.2.1 Intergovernmental rapprochement by three Conventions

All EUMS signed and ratified the 1951 Refugee Convention. In addition, the Refugee Convention is incorporated in EU primary law under Art 78 para 1 TFEU (see 4.1.2.2). Hence, this Convention constitutes the common denominator for the evolution of EU legislation to protect refugees and other force migrants. Thereby, the initial focus was on asylum, and resettlement was considered later on (see 4.2.3). The coordination of EUMS' asylum and visa policies began in 1985, when EUMS decided to abolish internal border controls in order to realize a Common European Market, including the free movement of persons. The White Paper on Completing the Internal Market announced in its paragraph one that "[u]*nifying this market* […] *presupposes that Member States will agree on the abolition of barriers of all kinds, harmonisation of rules, approximation of legislation* […]".[819] Moreover, the growing numbers of asylum applications at that time triggered the endeavor to resolve the asylum issue at the EU (at that time EC) level.[820]

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818 In this regard, Ziebritzki referred to the 'emerging EU resettlement law'; see Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 298ff; see also Marie-Claire Foblets and Luc Leboeuf in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 26.

819 Commission, White Paper 'Completing the Internal Market', COM(85) 310 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51985DC0310&from=DE> accessed 21 February 2021; see Ulrich Haltern, *Europarecht: Dogmatik im Kontext* Vol I (Mohr Siebeck 3rd ed 2017) para 284f.

820 See Joanne van Selm, 'European Refugee Policy: is there such a thing?', UNHCR Research Paper nº115 (May 2005) 9f; see also Timothy J Hutton, 'Asylum Policy in the EU: The Case for Deeper Integration' in (2015) 61 CESifo Economic Studies 3, 605 (612).

The 1985 Schengen Agreement[821] anchored the then EC Member States' willingness to "*move the entry checks from the door of the apartment to the door of the building*".[822] The focus on EU's external borders implicated two main issues, namely asylum shopping and refugees *in orbit*. Asylum shopping refers to "*the phenomenon where a third-country national applies for international protection in more than one EU Member State with or without having already received international protection in one of those EU Member States*".[823] A refugee *in orbit* is a refugee "*who, although not returned directly to a country where* [he or she] *may be persecuted, is denied asylum or unable to find a State willing to examine* [his or her] *request, and* [is] *shuttled from one country to another in a constant search for asylum*".[824] Both topics were addressed in the 1990 Dublin Convention.[825]

Under the 1990 Dublin Convention, an asylum claim was supposed to be assessed only once, normally by the country of first entry.[826] This

821 See The Schengen *acquis* – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19-62.

822 First President of the Executive Committee of the 1990 Convention Implementing the 1985 Schengen Agreement, cited in Francesco Cherubini, 'Uniformity, Responsibility and solidarity in the Common European Asylum System (CEAS): A 'Constitutional' Solution' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 236.

823 European Migration Network, 'Asylum and Migration Glossary 7.0' (July 2020) < https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en> accessed 17 August 2021; see Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1024, para 1.

824 European Migration Network, 'Asylum and Migration Glossary 7.0' (July 2020) < https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/refugee-orbit_en> accessed 17 August 2021.

825 See Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community – Dublin Convention [1997] OJ C254/1-12; the Dublin Convention was signed on 15 June 1990 and came into force on 1 September 1997; see also Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability* (Cambridge University Press 2019) 47.

826 Art 3 para 2 Dublin Convention stipulated that only one EUMS should be responsible for examining an asylum application; see Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, 47; see also Timothy J Hutton, 'Asylum Policy in the EU: The Case for Deeper Integration' in (2015) 61 CESifo Economic Studies 3, 612.

Dublin mechanism was not immediately incorporated in Community legislation, instead it was an international treaty (because in 1990, the then European Community was not competent to adopt Community legislation in the field of asylum or migration). From its initial phase,[827] the Dublin system was criticized to be non-effective.[828] The problem with Dublin has been that under this system, the allocation of responsibility for examining an asylum application to a specific EUMS does not take account of the map of Europe. The geographic location of some EUMS entails that they are more exposed to migration flows than others. Dublin has failed to unburden these EUMS.[829] There have been reformational efforts, namely the Commission's proposal to adopt a Dublin IV Regulation[830], as well as

827 "*An evaluation was carried out into the working of the* [...] *1990 Dublin Convention. That showed that in 6.00 percent of asylum cases a request was made to another Member State to take back an asylum seeker for determination procedures. In total of 4.20 percent of all asylum requests, states agreed to take back an asylum seeker as a result of a Dublin claim by the second Member State. In only 1.70 percent of cases did the asylum seeker actually move*", Joanne van Selm, 'European Refugee Policy: is there such a thing?', UNHCR Research Paper nº115 (May 2005) 14.

828 In the 1998/1999 period (ten years after the agreement) 95% of asylum applications took place outside the Dublin system, see Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1024, para 1; recent figures of 2019 show that the failure of Dublin persisted: Germany made about 27,000 take-back requests but only 3,500 transfers actually took place, see Daniel Thym, 'Secondary Movements: Overcoming the Lack of Trust among the Member States?' (*Eumigrationlawblog.eu*, 29 October 2020) <http://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states/> accessed 21 February 2021; see also 2017 figures: "[A]*ccording to Eurostat, 100.254 outgoing requests (across Europe) compare to only 23.670 actual transfers in 2017*", Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, 50; see also Francesco Cherubini in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 238.

829 See Joined Cases C-490/16 and 646/16 *AS v Republic of Slovenia* and *Jafari* [2017] EU:C:2017:443, Opinion of AG Sharpston, paras 3f; see also Marcello Di Filippo, 'The Dublin Saga and the Need to Rethink the Criteria for the Allocation of Competence in Asylum Procedures' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 196 (200).

830 See Commission, Proposal for a Regulation 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.

the currently proposed Asylum and Migration Management Regulation,[831] to ensure just that, but agreement on such a reform has not yet been reached.

### 4.2.2 First attempts on solidarity and responsibility sharing

The EU made its first steps towards solidarity and responsibility sharing in the course of the Kosovo crisis. In 1994, the German Presidency of the Council of the EU suggested a refugee distribution key,[832] inspired by the refugee distribution mechanism among the federal states of Germany.[833] Some members of the Council, however, raised concerns about potential human rights violations when transferring refugees among EUMS without their consent.[834] The French Presidency followed up with the Resolution on burden sharing, where a compulsory distribution mechanism was not mentioned.[835] Instead, it referred to voluntary commitment in mass influx situations. This exemplifies that voluntary *ad hoc* burden sharing remained the limit of what was politically feasible.[836]

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831 Commission, Proposal for a Regulation on asylum and migration management and amending Council Directive 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM(2020) 610 final.

832 See German Presidency, Draft Council Resolution on burden-sharing with regard to the admission and residence of refugees of 1 July 1994, Council Document 7773/94 ASIM 124; the distribution key was based on three criteria of equal weight, i.e. (i) population size, (ii) size of EUMS' territory and (iii) the Gross Domestic Product (GDP).

833 "*Where the numbers admitted by a Member State exceed its indicative figure* […], *other Member States which have not yet reached their indicative figure* […] *will accept persons from the first state*", ibid 8, para 10; see Eiko R Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' in (2003) 16 Journal of Refugee Studies 3, 253 (259); the so-called 'Königsteiner Schlüssel' is currently enshrined in Art 45 of the German Asylum Act as of 8 September 2008, BGBl I 2008, 1798.

834 See Eiko R Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' in (2003) 16 Journal of Refugee Studies 3, 260.

835 See Council Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis [1995] OJ C262/1.

836 See Eiko R Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union' in (2003) 16 Journal of Refugee Studies 3, 260.

The Treaty of Amsterdam[837] revived responsibility sharing discussions.[838] Its Art 63 para 2 proclaimed the promotion of "*a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons*". In addition, the Tampere Conference in 1999 addressed the external dimension of the CEAS and cooperation with countries outside the EU.[839] In particular, the Temporary Protection Directive[840] and the European Refugee Fund (ERF)[841] were adopted to reinforce the principle of solidarity and responsibility sharing.[842] Accordingly, EUMS "*shall receive persons who are eligible for temporary protection in a spirit of Community solidarity*".[843] Until 2022, political disputes and disagreement about 'burden sharing' in mass influx situations, such as in 2015/16, blocked the activation of the Directive.[844] Unprecedently, when facing mass influx of individuals fleeing the Russian invasion of Ukraine, unanimous agreement resulted in a Council Decision to implement the

837 See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1-144.

838 See Ségolène Barbou des Places, 'Burden Sharing in the Field of Asylum: Legal Motivations and Implications of a Regional Approach' (2012) 1, fn 2 <https://hal.archives-ouvertes.fr/hal-01614068/document> accessed 21 February 2021.

839 See Christina Boswell, 'The 'External Dimension' of EU Immigration and Asylum Policy' in (2003) 79 International Affairs, 619-638.

840 See Directive 2001/55 (EC) on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12-23.

841 See Decision 2000/596 (EC) establishing a European Refugee Fund [2000] OJ L252/12-18. Pursuant to Art 24 Temporary Protection Directive, relocation measures are to be funded by the ERF.

842 See Ségolène Barbou des Places, 'Burden Sharing in the Field of Asylum: Legal Motivations and Implications of a Regional Approach' (2012) 3, 11.

843 Art 25 Temporary Protection Directive. This Article also expressly mentions the UNHCR, as it states that EUMS shall indicate their capacity to receive persons eligible for temporary protection and that "[t]*his information shall be passed on swiftly to UNHCR*".

844 See Meltem İneli Ciğer, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022' (*Eumigrationlawblog.eu*, 7 March 2022) <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> accessed 18 July 2022; see also Timothy J Hutton, 'Asylum Policy in the EU: The Case for Deeper Integration' in (2015) 61 CESifo Economic Studies 3, 614.

Temporary Protection Directive.[845] Politically speaking, negotiations on this Implementing Decision were not hampered by disputes over quotas. While the Temporary Protection Directive sets out a basis to specify which EUMS will accommodate how many people (Art 5 para 3 lit c, Art 25 paras 1 and 3 Temporary Protection Directive), EUMS refrained from incorporating such specification in the Implementing Decision. Instead, they relied on the free of choice of the protection seekers.[846]

### 4.2.3 Calling upon resettlement

The Commission made its first reference to resettlement in its Communication of 2000[847]. It referred to resettlement schemes as a means to facilitate refugee arrivals on EUMS' territory and offer rapid access to protection. In this Communication, the Commission made reference to the US and its "*two-tier asylum procedure: one for spontaneous arrivals and one, very different, based on a resettlement scheme*".[848] The US conducts asylum and refugee resettlement in a complementary manner.[849] The Commission followed the US approach in its Communication of March 2003[850] by clarifying that "*resettlement complements a fair and efficient territorial asylum*

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845 See Council Implementing Decision 2022/382 (EU) establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1-6.

846 See Daniel Thym, 'Temporary Protection for Ukrainians: the Unexpected Renaissance of 'Free Choice'' (*Eumigrationlawblog.eu*, 7 March 2022) <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> accessed 18 July 2022.

847 See Commission, Communication 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum', COM(2000) 755 final.

848 Ibid 9; see Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure', 28; see also Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 620.

849 See Statement of L Francis Cissna cited in Nayla Rush, 'The FY 2020 Refugee Ceiling? 15,000 could cover all UNHCR urgent and emergency submissions worldwide next year' (*Center for Immigration Studies*, 27 August 2019) <https://cis.org/Rush/FY-2020-Refugee-Ceiling> accessed 21 February 2021.

850 See Commission, Communication on the common asylum policy and the Agenda for protection (Second Commission Report on the implementation of

*system. However, it is not part of the asylum system: rather both asylum and resettlement are part of a protection system*".[851] The Commission further acknowledged that the complementary function of resettlement implied overall compliance of a comprehensive protection system with international obligations.[852]

It appears that the Commission's original intention was to provide (territorial) asylum and resettlement in a complementary manner. However, the Commission was less clear on complementary protection through (territorial) asylum and resettlement in the 2016 Proposal for a Union Resettlement Framework Regulation, where it pointed to resettlement as "*the preferred avenue to international protection*", which "*should not be duplicated by an asylum procedure*".[853] In the same vein, the Commission stated in the Dublin IV Proposal that refugee resettlement "*should become the model for the future*".[854]

In the following, the Commission initiated a study to evaluate the feasibility of setting up resettlement schemes in EUMS or at the EU level.[855] The evaluation showed that a common approach was necessary as a political and operational basis in order (i) to produce beneficial effects and (ii) to use resettlement for strategic purposes as well as (iii) to attain

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Communication, COM(2000) 755 final of 22 November 2000), COM(2003) 152 final.

851 Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure', 32.

852 See Commission, Communication on the common asylum policy and the Agenda for protection, COM(2003) 152 final, 15; see also Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure', 28.

853 Proposal for a Union Resettlement Framework, 13; see Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 309.

854 See Commission, Proposal for a Regulation 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, 2.

855 See Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure'.

UNHCR's objectives.[856] Notwithstanding these findings, in its 2004 Communication[857], the Commission shifted its focus from a common approach to a situation-specific approach on resettlement, namely *ad hoc* schemes with flexible EUMS participation.[858]

### 4.2.4 Protection in the region

In parallel, the European Council formally introduced the external dimension of the CEAS with the approval of the Hague Program in November 2004. The envisaged externalization involved "*the development of EU-Regional Protection Programmes (RPP) which included a joint resettlement programme for Member States willing to participate in such a programme*"[859]. The first two RPPs "*geared to finding durable solutions for refugees in selected regions that had strategic importance for the EU*"[860]. They were implemented by EUMS on a voluntary basis and located in the Great Lakes Area (Tanza-

856 See Commission, Communication on the common asylum policy and the Agenda for protection, COM(2003) 152 final, 12; see also Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 620.

857 See Commission, Communication on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin 'Improving Access to Durable Solutions', COM(2004) 410 final.

858 See Lyra Jakulevičienė and Mantas Bileišis, 'EU refugee resettlement: Key challenges of expanding the practice into new Member States' in (2016) 9 Baltic Journal of Law & Politics 1, 103; the 2004 Communication resulted from a seminar of the Italian Presidency held in Rome where advantages, such as immediate access to durable solutions, were identified and resettlement became recognized as an indispensable and essential part of the international protection system; see Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 620.

859 Delphine Perrin and Frank McNamara, 'Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames', KNOW RESET Research Report 2013/03, 4.

860 Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 64; see Commission, Communication 'Regional Protection Programmes', COM(2005) 388 final.

nia).[861] The European Refugee Fund III (ERF III),[862] and subsequently the AMIF, provided financial support, which was criticized for being "*insignificant in comparison to the scale of the needs to be addressed*".[863] A 2010 evaluation of RPPs revealed limited flexibility, funding, visibility and coordination with other EU humanitarian and development policies as well as insufficient third-country engagement.[864]

Although the European Council claimed to provide "*better access to durable solutions*"[865], the focus was on migration control, return and readmission. The return issue relates to compliance of third countries hosting RPPs with their human rights obligations. Scholarly writing and ECtHR case law support an obligation under the ECHR and the Charter not to re-

861 See Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European refugee law* (Brill 2016) 481.

862 See Decision of the European Parliament and of the Council (EC) 573/2007 of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' [2007] OJ L144/1-21; "*The EU decision establishing the European Refugee Fund for the years 2008 to 2013 (ERF III)* […] *entailed an EU definition of refugee resettlement and provisions for financial support to EU member-states resettling refugees on the basis of this definition*", Adèle Garnier, 'Narratives of accountability in UNHCR's refugee resettlement strategy' in Kristin Bergtora Sandvik and Katja Lindskov Jacobsen (eds), *UNHCR and the Struggle for Accountability* (Routledge 2016) 64 (72); "*The ERF (EUR 630 million over the period 2008-13) support*[ed] […] *resettlement programmes and actions related to the integration of persons whose stay is of a lasting and stable nature*", Commission, 'Refugee Fund' <https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund_en> accessed 21 February 2021.

863 Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 638; see Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 64; see also Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 485.

864 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 639f.

865 European Council, 'The Hague Programme – Strengthening Freedom, Security and Justice in the European Union' [2005] OJ C53/1 (5); see also Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 619.

turn individuals to RPP countries unless a comparable level of protection is accessible there.[866]

### 4.2.5 Proposal for extraterritorial processing and third-country partnerships

The Stockholm Program[867] of 2009 emphasized legal pathways and access to efficient asylum procedures for those in need of protection. At the same time, it prioritized external border controls to stop irregular migration.[868] This Program triggered the most detailed proposal to date for an EU offshore processing scheme to resolve the migration situations of the Mediterranean and the Eastern migration routes. It was based on US experience, namely the Caribbean Interdiction Program and US agreements with Jamaica and the Turks and Caicos Islands. The suggested approach for the EU was to build partnerships with countries of origin and transit countries, such as Libya and Turkey.[869] In the end, human rights concerns, such as about arbitrary detention, torture and ill-treatment as well as violations of the *non-refoulement* principle in the course of automatic returns to partnership countries, prevented the establishment of reception centers.[870] In 2018, similar concerns led to the rejection of setting up so-called regional disembarkation platforms, including the possibility of resettlement to the EU.[871]

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866 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 642f; see also *Amuur v France* App No 19776/92 (ECtHR 20 May 1996) para 48.

867 See European Council, 'Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/1-38.

868 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 617.

869 The proposal included two alternatives, i.e. (i) either *ad hoc* protection in Libya with the participation of the UNHCR, the IOM and financial support by the EU or (ii) the possibility of lodging asylum applications at EUMS' embassies there; see ibid 655ff.

870 See ibid 659f; see also UNHCR, 'Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing' (November 2010) <https://www.refworld.org/docid/4cd12d3a2.html> accessed 21 February 2021.

871 See European Council meeting of 28 June 2018 – Conclusions EUCO 9/18 (28 June 2018) para 5 <https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf> accessed 21 February 2021; see also Cathari-

### 4.2.6 A Joint EU Resettlement Program

In 2009, only ten EUMS had regular annual resettlement schemes[872] with limited contributions in comparison to traditional resettlement countries such as the US or Canada.[873] Against this backdrop, the Commission responded with a Communication on the establishment of a Joint EU Resettlement Program.[874] This was a voluntary program that "*did not determine any common European resettlement quota or other mechanisms for coordinating MS actions*".[875] During the subsequent period from 2009 to 2014, resettlement to the EU still failed in large parts. In 2012, EUMS accounted for "[…] *just above 5% of the total number of refugees resettled in the world and 9% of the number of asylum applicants that were granted refugee status in the EU that year*".[876] Moreover, the Joint Resettlement Program was criticized for focusing on cooperation with selected partner countries instead of actual protection needs.[877] The focus on selected partners was further pursued in the GAMM (see 4.2.7) and the later Proposal for a Union Resettlement Framework (see 4.2.11).

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na Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 297f; see also Francesco Maiani, '"Regional Disembarkation Platforms" and "Controlled Centres": Lifting Drawbridge, Reaching out Across The Mediterranean, or Going Nowhere?' (*Eumigrationlawblog.eu*, 18 September 2018) <http://eumigrationlawblog.eu/regional-disembarkation-platforms-and-controlled-centres-lifting-the-drawbridge-reaching-out-across-the-mediterranean-or-going-nowhere> accessed 21 February 2021.

872 The Czech Republic Denmark, Finland, France, Ireland, the Netherlands, Portugal, Romania, Sweden, and the United Kingdom.

873 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 622.

874 See Commission, Communication 'Establishment of a joint EU resettlement programme', Communication 'Establishment of a joint EU resettlement programme', COM(2009) 447 final.

875 Lyra Jakulevičienė and Mantas Bileišis, 'EU refugee resettlement: Key challenges of expanding the practice into new Member States' in (2016) 9 Baltic Journal of Law & Politics 1, 103.

876 Jesus Férnandez-Huertas Moraga and Hillel Rapoport, 'Tradable Refugee-admission Quotas and EU Asylum Policy' in (2015) 61 CESifo Economic Studies 3, 638 (644).

877 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 624.

### 4.2.7 Global Approach to Migration and Mobility (GAMM)

The EU has benefited from cooperation with third countries to strengthen external border control and readmission of irregular migrants. In turn, the EU has offered resettlement, trade benefits and financial support.[878]

In 2011, the Global Approach to Migration and Mobility (GAMM)[879] fostered the partnership between the EU and Africa. On this basis, a new Partnership Framework followed in 2016. It prioritized solutions for irregular and uncontrolled movement. Under this Framework, the Commission considered returns to Africa and resettlement to Europe for an integrable part of third-country nationals or stateless persons.[880]

A progress report of 16 May 2018[881] showed intensified cooperation with several African partners, including Morocco and Libya.[882] In 2018, the EU supported increased funding to Morocco, Spain's preferred partner in migration management.[883] Major criticism pointed to insufficient assessment of the human rights situations in the partner countries,[884] with a lack of respective monitoring.[885] In fact, the situation required resettlement efforts, as migrants and refugees complained about lacking durable prospects in Morocco.[886] Especially, Lesbian, Gay, Bisexual, and Transgender (LGBT) refugees depend on resettlement since they can neither repatriate nor stay in Morocco, where homosexuality is criminalized and refugee cards for LGBT refugees are refused, depriving them of their core refugee

878 See Tineke Strik, 'The Global Approach to Migration and Mobility' in (2017) 5 Groningen Journal of International Law 2, 310.
879 See Commission, Communication 'The Global Approach to Migration and Mobility', COM(2011) 743 final.
880 See Tineke Strik, 'The Global Approach to Migration and Mobility' in (2017) 5 Groningen Journal of International Law 2, 323.
881 See Commission, Communication 'Progress report on the Implementation of the European Agenda on Migration', COM(2018) 301 final.
882 See ibid 13f.
883 See Sabrina Ardalan in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 295.
884 Afghanistan, Algeria, Bangladesh, Eritrea, Ethiopia, Ghana, Ivory Coast, Mali, Morocco, Niger, Nigeria, Pakistan, Senegal, Somalia, Sudan, Tunisia; see Commission, Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 8.
885 See Tineke Strik, 'The Global Approach to Migration and Mobility' in (2017) 5 Groningen Journal of International Law 2, 310.
886 See ibid 301.

and human rights.[887] Also in the cooperation between Libya and Italy,[888] actual resettlement efforts remained scarce while on-site assistance to the Libyan coast guards was emphasized. This facilitated push-back operations, and raised concerns about *non-refoulement* violations (see 3.3.1).

### 4.2.8 The Lisbon Treaty, mutual trust, and Dublin III

The 2009 Lisbon Treaty consolidated EU law in the Area of Freedom, Security and Justice (Art 67 TFEU). Its goal was to further develop a CEAS based on solidarity and responsibility sharing, including external asylum and migration policy as well as border control.[889] In furtherance of the proclaimed goals, the Commission issued a package of proposals, including the revision of Eurodac, Dublin II, the Reception Conditions Directive and the proposal to establish EASO.[890] The lack of agreement on the revision of Dublin II initially blocked the envisaged reform.[891] Eventually, the Dublin III Regulation[892] was adopted,[893] whereas its Art

887 "[F]*ew refugees are resettled to each year from Morocco, since refugees are generally expected either to integrate or repatriate, not resettle*", ibid 305.

888 See Commission, Communication 'Progress report on the Implementation of the European Agenda on Migration', 10.

889 See Art 67 para 2 TFEU.

890 See Patricia Van de Peer, 'Negotiating the Second Generation of the Common European Asylum System Instruments: A Chronicle' in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 55 (56); see also Kris Pollet in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the common European asylum system: The New European Refugee Law*, 82.

891 See Council Regulation No 343/2003 (EC) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1–10; see also Patricia Van de Peer in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 59f.

892 See Regulation 2013/604 (EU) establishing the criteria and mechanisms for determining the Member State responsible for examining and application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31-59.

893 "*Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within*

3 para 2 accounts for derogation in case of systemic deficiencies in the asylum procedure and the reception conditions in the responsible EUMS. This provision was a necessary response to ECtHR and CJEU rulings that some EUMS did not comply with human rights standards.[894]

Systemic deficiencies in EUMS also impact resettlement to the EU. First, divergent protection standards impede a fair distribution of resettlement beneficiaries among all EUMS. Second, resettlement to a receiving EUMS with serious systemic deficiencies runs counter the purpose of resettlement, since a resettlement beneficiary would face (a threat of) human rights violations in the receiving EUMS – possibly similar to the situation in the country of (first) refuge. Such circumstances likely lead to secondary migration from EUMS with systemic deficiencies to EUMS with higher protection standards. Thus, diverging protection standards, namely systemic deficiencies in some EUMS, are not only Dublin issues. Systemic deficiencies implicate that a durable solution might not be available in certain EUMS, and thereby exert a negative impact on resettlement to the EU.

### 4.2.9 The 2015 European Resettlement Scheme

The 2015 Recommendation on a European Resettlement Scheme[895] was referred to as "*the first attempt to develop an EU-wide resettlement scheme based on common criteria*".[896] The Commission recommended to resettle "*20,000 people in need of international protection on the basis of the condi-*

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*the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible*."

894 See *MSS v Belgium and Greece*; see also *Tarakhel v Switzerland*; see also Joined cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] EU:C:2011:865; see also Case C-578/16 PPU *CK, HF and AS v Republic of Slovenia Reform* [2017] EU:C:2017:127.

895 See Commission, Recommendation on a European resettlement scheme, C(2015) 3560 final.

896 Lyra Jakulevičienė and Mantas Bileišis, 'EU refugee resettlement: Key challenges of expanding the practice into new Member States' in (2016) 9 Baltic Journal of Law & Politics 1, 104; see Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' in (2018) 56 Journal of Common Market Studies 1, 7.

*tions and the distribution key laid down in this Recommendation*".[897] The Recommendation set out the following definition of resettlement, which resembles the UNHCR definition (see 2.2.1) – with the exception of not explicitly addressing refugees:[898]

> *'Resettlement' means the transfer of individual displaced persons in clear need of international protection, on request of the United Nations High Commissioner for Refugees, from a third country to a Member State, in agreement with the latter, with the objective of protecting against refoulement and admitting and granting the right to stay and any other rights similar to those granted to a beneficiary of international protection.*

Accordingly, the scope of resettlement beneficiaries was not limited to refugees but also allowed for resettlement of other forcibly displaced persons, including IDPs.[899] What status the beneficiaries would receive remained vague, as the Commission only defined that they should receive similar rights as beneficiaries of international protection. Also, the Commission did not distinguish between resettlement and other forms of (shorter-term) humanitarian admission.[900]

Moreover, the Commission intended the scheme to cover all EUMS.[901] Their contributions should be based on a formal procedure following the EU asylum *acquis*.[902] Yet, EUMS refused to define a binding distribution key and opted for voluntary pledging instead.[903] In their Conclusions of July 2015, the Representatives of the Governments of the EUMS did not mention the conducting of formal procedures in accordance with the EU asylum *acquis*.[904]

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897 Commission, Recommendation on a European resettlement scheme, para 1.

898 Ibid para 2.

899 The Commission specified its attempts to include IDPs in the scope of resettlement beneficiaries in the 2016 Proposal for a Union Resettlement Framework (see 4.2.11.4).

900 This remained a contentious point in the negotiations on the Proposal for a Union Resettlement Framework Regulation.

901 See Commission, Recommendation on a European resettlement scheme, para 3.

902 See ibid para 8; see also Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 531.

903 See Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 532.

904 See Council of the EU, 'Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through mul-

Still, the Council of the EU agreed on the admission of 22,504 people from the Middle East, the Horn of Africa, and Northern Africa during the period 2015-2017.[905] The 2015 resettlement scheme achieved 19,432 resettlements to Europe, i.e. 86% of the initial pledge.[906] Upon the expiration of the Scheme covering the period from 2015 to 2017, the Commission recommended a second *ad hoc* scheme for at least 50,000 refugees.[907] By March 2018, 19 EUMS pledged 40,000 places.[908] Due to the missing agreement on a permanent EU resettlement framework before the European Parliament elections in May 2019, the second *ad hoc* program was prolonged[909] and EUMS increased their pledges to 50,039 places. The second scheme actually achieved 43,827 resettlements in total, i.e. 88% of the increased pledge.[910] A new pledge followed for 2020 (see 4.2.12).

### 4.2.10 EU-Turkey Statement

The EU-Turkey Statement of 18 March 2016 constituted an agreement between the EU and Turkey to address migratory pressure by means of

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tilateral and national schemes 20,000 persons in clear need of international protection', Council Doc 11130/15 (22 July 2015) <https://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf> accessed 21 February 2021; see also Philippe de Bruycker and Evangelia (Lilian) Tsourdi in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law*, 533.

905 See for the exact participation of EUMS, ibid 532f, fn 239-244.

906 See Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 2, Recital 8; see also Commission, 'European Agenda on Migration: Continuous efforts needed to sustain progress' (*Press release*, 14 March 2018) <http://europa.eu/rapid/press-release_IP-18-1763_en.htm> accessed 21 February 2021.

907 See Commission, Recommendation (EU) 2017/1803 on enhancing legal pathways for persons in need of international protection [2017] OJ L259/21-24 [notified under the document C(2017)6504].

908 See Commission, 'European Agenda on Migration: Continuous efforts needed to sustain progress' (*Press release*, 14 March 2018).

909 See Commission, 'Delivering on resettlement' (16 October 2019) <https://ec.europa.eu/commission/presscorner/detail/en/FS_19_6079> accessed 21 February 2021; see also Janine Prantl, ''Lessons to be learned' für ein zukünftiges, gemeinsames EU Resettlement' in (2020) Europarecht Supplement 3, 117 (130).

910 See Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 2f, Recital 9.

resettlement.[911] Originally, it was agreed that irregular migrants crossing from Turkey into Greek islands should be returned to Turkey. For any Syrian returned to Turkey from Greece, the EU would, in turn, resettle another Syrian from Turkey to the EU. The major purpose was to prevent Syrian migrants from taking dangerous boat journeys between Turkey and Greece.[912]

The EU-Turkey Statement made resettlement dependent on returns of those refugees who reached the Greek border to Turkey. It thereby implemented the 'safe third country' principle. Greece could only refrain from full examination when returning applicants for international protection if Turkey met the requirements of a safe third country. This is problematic because it has been disputed whether Turkey qualifies as a safe third country.[913] The Asylum Procedures Directive sets out the thresholds for the determination of a safe third country. It thereby distinguishes between safe third countries under Art 38 and European safe third countries under Art 39 Asylum Procedures Directive. It remains questionable whether Turkey satisfies Art 39 Asylum Procedures Directive because this Article demands ratification and observation of the Refugee Convention without any geographical limitations. While Turkey is party to the Refugee Convention, it does not apply the geographical changes introduced through the Protocol to the Convention. This means that Turkey has maintained the initial geographical limitation of the Refugee Convention,[914] i.e. "*only people from the*

911 See European Council, 'EU-Turkey statement, 18 March 2016' (*Press Release*, 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 21 February 2021.

912 See Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' in (2018) 56 Journal of Common Market Studies 1, 8.

913 See Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' in (2017) 31 Journal of Refugee Studies 2, 216 (221); see also Sergio Carrera, *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?* (Centre for European Policy Studies 2018) 35; see also Mattia di Salvo et al, 'Flexible Solidarity: A comprehensive strategy for asylum in the EU', MEDAM Assessment Report (15 June 2018) 32.

914 Turkey made the following declaration: "*The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights*

*Council of Europe are allowed to seek refugee status in Europe*".[915] Although, theoretically, non-European asylum seekers could have access to alternative forms of protection in Turkey, those forms of protection are more limited than the refugee status accessible to people from the Council of Europe.[916]

As an example of reference, the 2011 refugee swap agreement between Australia and Malaysia, deserves mentioning.[917] The Australian High Court invalidated this Agreement "*due to inadequate legal guarantees that refugees in Malaysia would receive the protection required by Australian law*".[918] As opposed to the Australian High Court, the CJEU avoided to rule on whether the legal guarantees for protection seekers in Turkey are adequate in light of the requirements under EU law. Both the General Court[919] and the Court of Justice[920] confirmed that the EU-Turkey Statement qualified as an 'extra Treaty' instrument. The General Court denied jurisdiction to hear and determine the actions against the EU-Turkey Statement, since the Statement was not an 'EU-product' but rather emerged under authorship of the Heads of Government and State of EUMS.[921] Con-

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*than those accorded to Turkish citizens in Turkey.*" UN Treaty Collection, Chapter V Refugees and Stateless Persons: Protocol relating to the Status of Refugees (as of 19 September 2020) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5#EndDec> accessed 21 February 2021.

915 Evelien Wauters and Samuel Cogolati in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 123.

916 See ibid 123f.

917 See Nikolas Feith Tan in Satvinder Singh Juss (ed), *Research Handbook on International Refugee Law*, 175: "*In July 2011 the Australian government signed a non-binding agreement with Malaysia to resettle, on an annual basis 4,000 refugees in exchange for Malaysia accepting 800 asylum seekers intercepted at sea*".

918 Ibid 175; see Naoko Hashimoto, 'Refugee Resettlement as an Alternative to Asylum' in (2018) 37 Refugee Survey Quarterly, 178f; see also *M70 v Minister for Immigration and Citizenship*, 244 CLR 144 (2011).

919 See Cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v European Council* [2017] EU:T:2017:128, Orders of the General Court.

920 See Joined Cases C-208/17 P to C-210/17 *P NF and Others v European Council* [2018] EU:C:2018:705, Order of the Court (First Chamber).

921 See ibid para 23f; see also Sergio Carrera, *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?* (Centre for European Policy Studies 2018) 33; see also Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice' in (2017) 31 Journal of Refugee Studies 2, 223.

sequently, the EU institutions could not be held accountable for human rights violations while implementing this Statement.[922]

For the implementation of the EU-Turkey Statement, the Commission trusted in EUMS' willingness to resettle "*once the irregular flows from Turkey have come to an end*".[923] Actually, the implementation of the resettlement targets happened very slowly. "*At this pace, it would take the EU around 13 years to resettle all the Syrians it promised to.*"[924] Against the backdrop of 3.7 million Syrian registered refugees in Turkey as of December 2019,[925] the actual mid-September 2020 resettlement number of 27,000[926] justifies doubts on the Commission's promotion of the EU-Turkey Statement as a success and role model.[927]

### 4.2.11 The Proposal for a Union Resettlement Framework

Beyond the EU-Turkey Statement, resettlement was used as a major tool to address the migration crisis of 2015/16. The Commission put resettlement on its 'European Agenda on Migration'.[928] Consequently, its legislative

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922 See Ulrich Haltern, *Europarecht: Dogmatik im Kontext* Vol I, para 315; see also Daniela Vitiello in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 143.

923 Lyra Jakulevičienė and Mantas Bileišis, 'EU refugee resettlement: Key challenges of expanding the practice into new Member States' in (2016) 9 Baltic Journal of Law & Politics 1, 103.

924 Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' in (2018) 56 Journal of Common Market Studies 1, 9.

925 See UNHCR, '2020 Planning Summary' (20 December 2019) <http://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2020-Turkey-eng.pdf> accessed 21 February 2021.

926 See Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, Recital 11.

927 See Darla Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' in (2018) 29 European Journal of International Law 4, 1193.

928 See Commission, Communication 'A European Agenda on Migration', COM(2015) 240 final; see also Kay Hailbronner and Daniel Thym in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law: A Commentary*, 1026, para 4; see also Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 295f.

reform packages of July 2016[929] comprised the Proposal for a Regulation establishing a Union Resettlement Framework (Proposal). The proposed Regulation signifies a remarkable step towards the harmonization of resettlement policy because it would introduce a common resettlement definition, criteria to determine (potential) non-EU countries from where resettlement would occur, as well as eligibility criteria to select resettlement beneficiaries.[930]

#### 4.2.11.1 The legal nature of the Proposal

The Commission chose to harmonize resettlement through a regulation, i.e. a legal instrument binding in its entirety and directly applicable in all EUMS (see Art 288 TFEU). At the same time, the Commission refrained from making resettlement mandatory. Instead of a mandatory resettlement mechanism, the proposed Regulation would introduce a two-stage procedure (Arts 7f Proposal), that means voluntary pledging by EUMS followed by the Commission's adoption of an implementing act.[931] According to this procedure, the Council would first adopt an annual Union resettlement plan under Art 7 Proposal, including the total number of persons to be resettled, the contributions to this number by each EUMS, and overall geographical priorities. As a second step, the Commission would adopt implementing acts under Art 8 Proposal consistent with the Council's annual Union resettlement plan under Art 7 Proposal.

Besides, the discretion of EUMS is reflected in the fact that refugees would not have a subjective right to be resettled under the proposed Regulation (Recital 19).[932]

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929 See Commission, 'Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy' (*Press release*, 13 July 2016) <http://europa.eu/rapid/press-release_IP-16-2433_en.htm> accessed 21 February 2021.

930 See Sergio Carrera, *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?* (Centre of European Policy Studies 2018) 24.

931 See Janine Prantl, ''Lessons to be learned' für ein zukünftiges, gemeinsames EU Resettlement' in (2020) Europarecht Supplement 3, 129.

932 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 60.

#### 4.2.11.2 Resettlement definition

The Commission did not explicitly refer to the role of resettlement as a durable solution in the Proposal's resettlement definition (see 2.2.2). In addition, the Council urged for the inclusion of (temporary) humanitarian admissions "*on an equal footing to resettlement*".[933] The determination whether a refugee is considered for resettlement or for humanitarian admission impacts the legal status of the refugee in the receiving EUMS. Regularly, the rights and length of residence of those admitted through the channel of humanitarian admissions are more limited.[934] While resettlement aims at offering a durable solution to refugees, EUMS have adopted humanitarian admission programs under the expectation that the beneficiaries would return to their home country after the end of the conflict, war, or crisis.[935] During the negotiations, the European Parliament accepted the Council of the EU's demand to include humanitarian admission in the Proposal under the condition of separate quotas for resettlement and humanitarian admission.[936]

#### 4.2.11.3 Criteria to determine countries of (first) refuge

The Commission followed up on the approach taken in the GAMM to prioritize and foster partnership with selected third countries. To that effect, the proposed Art 4 Union Resettlement Framework Regulation would set out criteria for regions or third countries from which resettlement is to occur. Decisive factors would be, amongst others, overall relations between the third country and the EU as well as a third country's effective cooperation with the EU in the area of migration and asylum, including the reduction of irregular migration.

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933 Katharina Bamberg, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?', Discussion Paper European Migration and Diversity Programme (26 June 2018) 7.

934 In Germany, for example, refugees who are admitted by means of humanitarian admission receive fewer rights than resettlement refugees.

935 See Eva Lutter, Vanessa Zehnder and Elena Knežević, 'Resettlement und humanitäre Aufnahmeprogramme' in (2018) Asylmagazin, 29 (30).

936 See Katharina Bamberg, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?', Discussion Paper European Migration and Diversity Programme (26 June 2018) 7.

In this regard, the most contentious point is that the protection of vulnerable individuals would depend on the effective cooperation of the country of (first) refuge or the home country of that individual. In its comments from November 2016, the UNHCR expressed concerns about blurring the distinction between resettlement as a protection and migration management tool.[937] UNHCR's comments highlighted that "*resettlement is, by design, a tool to provide protection and a durable solution to refugees rather than a migration management tool*".[938] Also, civil society actors denounced the management control approach.[939]

#### 4.2.11.4 Eligibility criteria

Regarding the eligibility criteria to select resettlement beneficiaries, the proposed Regulation would not limit resettlement to Convention Refugees. Compared to the 2015 Scheme, which did not literally rule out resettlement of IDPs, the proposed Regulation would expressly allow for resettlement of third-country nationals in need for international protection "*from a third country to which or within which they have been displaced*" (Art 2 Proposal). This means that the scope of the proposed Regulation would include the resettlement of IDPs.[940] Generally, the proposed Regulation would recognize the UNHCR resettlement submission criteria for the assessment of resettlement needs (see 5.2.1).

In addition, the proposed Regulation would count "*family members of third-country nationals or stateless persons or Union citizens legally residing in*

937 See UNHCR, 'Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final 2016/0225 (COD): UNHCR's Observations and Recommendations' (November 2016) <https://www.refworld.org/pdfid/5890b1d74.pdf> accessed 21 February 2021.

938 Ibid 1; see Sergio Carrera, *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?* (Centre of European Policy Studies 2018) 25.

939 See Caritas Europa, Churches' Commission for Migrants in Europe, ECRE, International Refugee Committee and Red Cross EU Office, 'Recommendations on a Union Resettlement Framework' (14 November 2016) <https://redcross.eu/positions-publications/recommendations-on-a-union-resettlement-framework> accessed 27 February 2021.

940 See European Parliament, 'Resettlement of refugees: EU framework' (*Briefing*, April 2017) 11.

*a Member State*" among the persons eligible for resettlement (Art 5 lit b point ii Proposal). During the negotiations, the European Parliament critically pointed out that family reunification should take place irrespective of the inclusion of family members as a category of persons eligible for resettlement. Finally, the institutions agreed that close family members shall form a category of individuals to be resettled (see 5.2.3.4).[941] Criticism remained due to a problematic overlap between the legal schemes of resettlement and family reunification:[942]

> *For example, both pieces of legislation target the spouse or partner of the applicant and their minor unmarried children. The family reunification directive already covers these cases. Their mention in the Resettlement Framework proposal would enable member states to select candidates for resettlement that would have had a right to come to the EU under the family reunification directive anyway. The resettlement spaces allocated to family reunification would be taken away from individuals that do not have family links in the EU, which would limit the overall number of people eligible for resettlement*.

Furthermore, similar to the EU-Turkey Statement, Art 6 para 1 lit d Proposal states that persons who have irregularly stayed in or attempted to irregularly enter the territory of an EUMS "*shall be excluded*". Critically speaking, this Article would open up a source of discrimination among refugees, and it would run counter to Art 31 Refugee Convention, which prohibits Contracting States to penalize refugees on account of their illegal entry or presence.[943] Against the backdrop of the above elaborations on the reference to the Refugee Convention in Art 78 para 1 TFEU (see 4.1.2.2), Art 6 para 1 lit d Proposal would be in contradiction with EU primary law.

Another issue in the context of the proposed scope of resettlement beneficiaries was the inclusion of the beneficiaries' integration potential, namely their "*social or cultural links, or other characteristics that can facilitate integration in the participating Member State*" (Art 10 para 1 lit b Propos-

941 See Katharina Bamberg, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?', Discussion Paper European Migration and Diversity Programme (26 June 2018) 7.

942 Ibid 7 (emphasis added).

943 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 68.

al).[944] While the EU has not been in a position to condition the access to international protection on the potential to integrate, some EUMS have applied the potential to integrate either as a formal or implicit selection criterion (see 5.2.3.5). For instance, *Bamberg* criticized this approach to rely on integration related selection criteria as a potential source of discrimination:[945]

> *Including this as a criterion could give preference to certain individuals over some of the most vulnerable in resettlement processing, especially since it is not clearly defined in the Commission proposal how this would relate to vulnerability and other eligibility criteria. In the end, the integration potential criterion could lead to discriminatory practices in selecting candidates for resettlement and potentially undermine member states' need to resettle those that are the most vulnerable.*

### 4.2.12 Current resettlement policy

The new Commission, led by President *Ursula von der Leyen*, is expected to further spur the development of a more harmonized EU resettlement policy:[946]

> *We need to allay the legitimate concerns of many and look at how we can overcome our differences. We need a new way of burden sharing, we need a fresh start.*

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944 Art 10 para 1 lit b Proposal for a Union Resettlement Framework refers to social and cultural links; "*The Council was in favour of including a lack of integration prospects, such as a refusal to participate in pre-departure orientation, as a reason for ineligibility for resettlement in Article 6. The Parliament has vigorously opposed this, stressing the universality of the right to asylum and arguing that protection should not be made conditional on one's integration potential*", Katharina Bamberg, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?', Discussion Paper European Migration and Diversity Programme (26 June 2018) 8.

945 Ibid 8 (emphasis added).

946 Ursula von der Leyen, 'A Union that strives for more: My agenda for Europe' (Political guidelines for the next European Commission 2019-2024) 15 <https://ec.europa.eu/info/sites/info/files/political-guidelines-next-commission_en_0.pdf> accessed 20 March 2021.

In the agenda for Europe, *von der Leyen* announced a New Pact on Migration and Asylum and expressed commitment to resettlement:[947]

> *We need diplomacy, economic development, stability and security. This would help stop smugglers and bring a stronger commitment to resettlement, as well as pathways for legal migration to help us bring in the people with the skills and talents we need.*

For the year of 2020, EUMS collectively pledged more than 30,000 resettlement places at the first Global Refugee Forum in Geneva. The Commission offered them financial support, i.e. EUR 10,000 per resettled refugee will be provided from the EU budget.[948] In fact, the outbreak of the COVID-19 pandemic impeded the implementation of the 2020 target. Several EUMS, the UNHCR and the IOM temporarily suspended their resettlement operations.[949] Countries of (first) refuge, in turn, responded with access restrictions for refugees and other forced migrants. The Commission was alarmed that the impact of COVID-19 on the countries of (first) refuge could render resettlement needs even more pressing. It released a Communication to provide guidance and to encourage EUMS "*to continue showing solidarity with persons in need of international protection and third countries hosting large numbers of refugees*". In terms of the 2020 pledges, the Commission declared to "*be flexible as regards the implementation period beyond 2020 to ensure that Member States have enough time to implement fully the pledges made under the 2020 pledging exercise*".[950]

In September 2020, the Commission launched the previously announced New Pact on Migration and Asylum,[951] including a recommenda-

947 Ibid 14 (emphasis added); see Commission, 'Delivering on Resettlement', 2.

948 See Commission, 'Resettlement: EU Member States' pledges exceed 30,000 places for 2020' (*Press release*, 18 December 2019).

949 See IOM, 'UNHCR announce temporary suspension of resettlement travel for refugees' (*Press release*, 17 April 2020) <https://www.iom.int/news/iom-unhcr-announce-temporary-suspension-resettlement-travel-refugees> accessed 27 February 2021; see also UN, 'COVID-19: Agencies temporarily suspend refugee resettlement travel' (17 March 2020) <https://news.un.org/en/story/2020/03/1059602> accessed 27 February 2021.

950 Commission, Communication 'COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement', OJ [2020] C126/12 (22).

951 See Commission, Communication on a New Pact on Migration and Asylum; see also Commission, 'A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity' (*Press release*, 23 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/i

tion to formalize the 2020 target and to extend it to the two-year period 2020-2021.[952] According to IOM, 16 states in the European region resettled and admitted 21,828 refugees in 2021, which is still low compared to 30,264 resettlements in 2019.[953]

At the time of writing, the Union Resettlement Framework Regulation has not been adopted.[954] A partial provisional agreement on the 2016 Proposal between the Council of the EU and the European Parliament was reached on 13 June 2018. However, COREPER did not finally endorse it, and subsequent negotiations remained at the technical level within the Council. In December 2022, the European Parliament and the Council made progress and agreed on an updated text of the Resettlement Framework Regulation. The updated text of the EU Resettlement Framework Regulation is much more diluted than the text of the 2016 Proposal in terms of the degree of establishing a common approach on resettlement to the EU. The link between resettlement and the reduction of irregular migration, through collaboration with third countries, became less obvious in the updated text. Still, there is no change in the approach that resettlement remains voluntary and that EUMS only have few obligations under the proposed Regulation towards the resettlement beneficiaries.[955]

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p_20_1706> accessed 27 February 2021; see also Daniel Thym, 'Mehr Schein als Sein?: Legislative Unklarheiten und operative Fallstricke des EU-Asylpakets' (Verfassungsblog, 24 September 2020) <https://verfassungsblog.de/mehr-schein-als-sein/> accessed 27 February 2021.

952 See Commission, Communication on a New Pact on Migration and Asylum, 22; see also Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 8, para 2.

953 See IOM, 'Resettlement' <https://eea.iom.int/resettlement> accessed 11 September 2022.

954 See Petra Bendel, 'Neustart oder Fehlstart? Zum neuen EU-Pakt für Migration und Asyl' (*Fluchtforschungsblog*, 26 September 2020) <https://blog.fluchtforschung.net/neustart-oder-fehlstart-zum-neuen-eu-pakt-fur-migration-und-asyl/> accessed 27 February 2021.

955 For an analysis of the updated text, see Emiliya Bratanova van Harten, 'The new EU Resettlement Framework: the Ugly Duckling of the EU asylum acquis?' (*EU Law Analysis*, 3 February 2023) <http://eulawanalysis.blogspot.com/2023/02/the-new-eu-resettlement-framework-ugly.html> accessed 2 May 2023.

### 4.2.13 Preliminary conclusion

As of today, the EU has shaped some aspects of EUMS' resettlement policies, which has led to increased contributions by EUMS to the global resettlement needs. EU's share of global resettlement increased from below 9% before 2016 to 41% in 2018.[956] This increase mainly traces back to the increase in the number of EUMS contributing to resettlement in the course of the refugee crisis in 2016.[957] How sustainable and significant the increase in EU contributions to global resettlement needs will actually be remains unclear.

Despite EU involvement in national resettlement policies, the voluntary nature of resettlement has been preserved. Resettlement from third countries to the EU has remained a voluntary act under the discretion of states. While the Commission introduced a permanent resettlement framework in the form of a regulation, the proposed Regulation would not impose binding resettlement quota.

The Proposal for a Resettlement Framework Regulation as well as the EU-Turkey Statement reveal two major contentious points where EU resettlement policy has departed from international refugee law and human rights. Potential violations of the principle of non-discrimination constitute the first issue. For instance, the EU-Turkey Statement only covered the resettlement of Syrians. Furthermore, the proposed Resettlement Framework Regulation would prioritize resettlements from selected countries of (first) refuge, whereas those countries are chosen on the basis of specific criteria that do not reflect actual resettlement needs. In addition, the proposed Regulation would support the application of the integration potential as a selection criterion, which again prioritizes certain individuals for resettlement irrespective of their vulnerability or actual need to be resettled. This is not prohibited *per se*, but it could result in a violation of international human rights law, namely discrimination between and among (groups) of refugees, and thus result in an EU primary law violation of Art 78 para 1 TFEU. The second issue traces back to the focus on penalizing those who tried to enter the EU in an irregular manner by excluding them

956 See Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 2, Recital 7.

957 See Hanna Schneider, 'Implementing the Refugee Resettlement Process: Diverging Objectives, Interdependencies and Power Relations' in (2021) Frontiers in Political Science, 4.

from resettlement eligibility. Specifically, the EU-Turkey Statement and the Proposal for a Resettlement Framework Regulation introduced such approach, albeit running counter to Art 31 Refugee Convention.

However, the Proposal for a Resettlement Framework Regulation not only unveiled restrictions, but also an expansion of the scope of resettlement beneficiaries. The Commission committed to the resettlement of IDPs.

Beyond the addressed discrepancies with international law, EU resettlement policy raises more general issues of effective protection for those in need, such as (i) managing migration flows externally, (ii) favoring resettlement over territorial asylum and (iii) mixing up humanitarian admission with resettlement.

The focus on external migration management is rooted in the policy approach to prevent irregular migration through co-operation with selected third countries. The EU has offered resettlement together with on-site assistance to persuade third countries to hold back migrants in their territory. Such approach can be found in the GAMM, the EU-Turkey Statement and the Proposal for a Resettlement Framework Regulation. The conditions in selected partnership countries are, however, regularly incomparable to the conditions in the EU. This raises questions about the notion of a safe third country and concerns about potential *refoulement* violations resulting from automatic returns, namely returns without taking into account the actual conditions that the individual would face upon return.

The prevention of irregular migration is closely related to the preference of resettlement over (territorial) asylum. In its first Recommendations dealing with resettlement, the Commission recognized that resettlement and (territorial) asylum should be used in a complementary manner, but it then departed from this position in the Resettlement Framework Regulation. Neglecting (territorial) asylum overlooks the reality that the offered resettlement places do not cover the global resettlement needs. Merely relying on resettlement would therefore not amount to effective international protection for those in need, which is the proclaimed goal of the EU asylum *acquis* (see Art 78 para 1 TFEU).

Lastly, the analysis showed that EU resettlement policy failed to make a clear commitment towards resettlement as a durable solution. Instead, the proposed Resettlement Framework Regulation would include humanitarian admission besides resettlement. With this comes the risk of blurring the line between resettlement as a durable solution and humanitarian admis-

sion, a measure perceived as temporary because beneficiaries are expected to return to their home countries in the foreseeable future.

## 4.3 Institutional involvement in resettlement

It has already been clarified that under the current Constitutional Order, EU's institutional involvement cannot amount to centralized conduct of resettlement procedures at EU level (see 4.1.1.1). Notwithstanding, the EU has gained increasing influence over EUMS' resettlement policies through financial and operational support. Indeed, the funding of resettlement under the AMIF and the operational support provided by the EUAA (and the former EASO) deserve attention. Moreover, with the EU's increased influence on EUMS' resettlement policies comes increased responsibility for the EU. It is therefore necessary to take into consideration the accountability mechanisms.

### 4.3.1 Support through funding

Since 2014, financial incentives for resettlement have been provided under the AMIF Regulation.[958] The initial total amount for the seven-year period from 2014 to 2020 was EUR 3.137 billion. The largest share (88%) of the AMIF was channeled through shared management, i.e. the implementation of EUMS' multiannual national programs. Thereof, around 11% were allocated to actions implemented under EUMS' national programs responding to specific EU priorities and to EU resettlement programs.[959] In total numbers based on the initial EUR 3.137 billion, these 11% amount to about EUR 0.304 billion.

Concretely, the 2014 AMIF Regulation influenced national resettlement policies by (i) introducing a binding definition of EU-funded resettlement

958 See Regulation 2014/516 (EU) establishing the Asylum, Migration and Integration Fund [2014] OJ L150/168-195. At the time of writing, the most current version of the AMIF Regulation is the consolidated version of 12 April 2022 of Regulation 2021/1147 (EU) OJ [2022] L112/1.

959 See Commission Directorate-General Home Affairs, 'Asylum, Migration and Integration Fund (AMIF)' <https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en> accessed 28 February 2021.

(Art 2 lit a of the 2014 AMIF Regulation;[960] see also 2.2.2 for a comparison with other resettlement definitions introduced by the Commission) and (ii) making funding dependent on the implementation of EU resettlement priorities and adherence to certain requirements.

Art 17 of the 2014 AMIF Regulation set out the resources for the Union Resettlement Program. It addressed "*common Union resettlement priorities*" such as the admission of persons identified to be in need for resettlement by the UNHCR and the implementation of RPPs (see 4.2.4).[961] EUMS received funding every two years "*on the basis of their pledges, and in accordance with EU resettlement priorities*".[962]

Furthermore, the 2014 AMIF Regulation imposed requirements that had to be upheld by EUMS in order to receive the lump sum. For example, an EUMS had to ensure that a resettlement beneficiary qualifying for refugee or subsidiary protection status was granted such status upon arrival. Apart from these requirements, the 2014 AMIF Regulation did not include procedural or substantive rights for individuals in the resettlement process. It could merely be inferred from the resettlement definition in Art 2 lit a AMIF Regulation, which demanded residence based either on refugee status, subsidiary protection status or "*any other status which offers similar rights and benefits under national and Union law*", that post-resettlement rights of resettlement beneficiaries should not significantly differ from the rights of those who crossed the border irregularly and were accepted by virtue of their application for international protection.[963] In the future, equal legal status for refugees admitted through resettlement and other refugees could be stimulated by making funding dependent on granting such status without discrimination (for elaborations on equal treatment among refugees see 3.3.4).

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960 The current definition of resettlement can be found in Art 2 lit 8 of the 2021 AMIF Regulation. Accordingly, resettlement means "*the admission following a referral from the UNHCR of third-country nationals or stateless persons from a third country to which they have been displaced, to the territory of the Member States, and who are granted international protection and have access to a durable solution in accordance with Union and national law*".

961 See European Parliament, 'Resettlement of refugees: EU framework' (*Briefing*, April 2017) 3.

962 Ibid 3.

963 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 65.

The new budget for 2021-2027 significantly increased compared to the 2014-2020 budget. The Commission under *von der Leyen* committed to "*reinforcing the Asylum and Migration Fund and Integrated Border Management Fund to reach a level of EUR 22 billion*",[964] compared to EUR 12.4 billion of the previous period 2014-2020.[965] Eventually, the Multiannual Financial Framework (MFF) Regulation was adopted on 17 December 2020,[966] and allocated EUR 25.7 billion to the category Migration and Border Management, as well as EUR 110.6 billion to the category Neighborhood and the World, which can also be used, amongst others, for migration purposes.[967]

Notably, the Commission amended the 2018 Proposal for the MFF Regulation 2021-2027 in response to the COVID-19 crisis.[968] The amendment introduced an enhanced Solidarity and Emergency Reserve that may be used as a response to specific emergency needs "*within the Union or in third countries*"[969], including "*situations of particular pressure at the Union's external borders resulting from migratory flows, where circumstances so require*". The COVID-19 crisis underpinned the relevance of funding to ensure continued resettlement efforts and immediate responses in emergency situations. Continued resettlement in exceptional circumstances is crucial to avoid exposure of vulnerable forced migrants in countries of (first) refuge to worsened and even life-threatening conditions, as these countries likely face greater difficulties to cope with the crisis than prospective receiving EUMS. As an example, in September 2020, Lebanon hosted 900,000

964 Commission, Communication 'The EU budget powering the recovery plan for Europe', COM(2020) 442 final, 12.

965 See Commission, Communication 'A Modern Budget for a Union That Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027', COM(2018) 321 final, 14f; see also Philippe de Bruycker, 'Towards a New European Consensus on Migration and Asylum' (*Eumigrationlawblog.eu*, 2 December 2019) <http://eumigrationlawblog.eu/towards-a-new-european-consensus-on-migration-and-asylum/> accessed 28 February 2021.

966 Council Regulation 2020/2093 (EU, Euratom) laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L433/11-22.

967 Commission, 'Headings: spending categories' <https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en#heading-6-neighbourhood-and-the-world> accessed 23 June 2021.

968 "*The enhanced reserve will be able to reinforce swiftly EU action, as and when needed, through EU instruments which provide for such emergency mechanisms, such as* […] *the Asylum and Migration Fund*", Commission, Amended proposal for a Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM/2020/443 final, 3f.

969 Emphasis added.

refugees among 6.8 million nationals, with half of the local population living below the poverty line. COVID-19 exacerbated this dire situation.[970]

Furthermore, an extended EU budget for resettlement would offer the opportunity to reinforce the function of resettlement as a *durable* solution. In this regard, an acknowledgement of resettlement as durable solution can now be found in the resettlement definition set out in Art 2 para 8 of the current 2021 AMIF Regulation (see 2.2.2). Resettlement beneficiaries and receiving EUMS would both benefit from the funding for pre-departure and post-arrival assistance (see 5.3), as well as assistance for community sponsorship programs (see 2.5.3), and for resettlement beneficiaries to enter the labor market in the receiving EUMS. Initially, the Commission refrained from including 'integration' in the 2018 Proposal for an Asylum and Migration Fund Regulation,[971] indicating an exclusion of integration measures. These measures would have had to be covered by other budget lines instead.[972] The Commission adopted an Action Plan on integration and inclusion[973] in 2020, with support for EUMS to ensure the provision of "*meaningful opportunities* [...] *for all*"[974] to participate in economy and society, thereby promoting a European way of life. In particular, the Commission pointed out that EUMS should "*set up and expand pre-departure integration measures (e.g. training, orientation courses), and effectively link them with post-arrival measures to facilitate and speed up the integration process, including in the context of resettlement and community sponsorship*".[975]

### 4.3.2 Support through agencies

Operational cooperation and support in resettlement have been strengthened through the EUAA (and former EASO). EU agencies are generally involved in cooperative or joint administrative interactions between

970 See International Rescue Committee et al, 'Joint Resettlement: Resettlement Can't Wait' (23 September 2020).
971 See Commission, Proposal for a Regulation establishing the Asylum and Migration Fund, COM(2018) 471 final 2018/0248 (COD).
972 See Evangelia (Lilian) Tsourdi in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects*, 222f.
973 See Commission, Communication 'Action plan on Integration and Inclusion 2021-2027', COM(2020) 758 final.
974 Commission, Communication on a New Pact on Migration and Asylum, 27.
975 Commission, Communication 'Action plan on Integration and Inclusion 2021-2027', 7.

EUMS.[976] Hence, they are crucial actors to spur harmonization in future EU resettlement.

EU agencies are not mentioned in the EU Treaties. They are established on the basis of separate regulations.[977] Within the Area of Freedom, Security and Justice, three core EU agencies were established, namely the European Border and Coast Guard (EBCG)[978] (border management), EUAA (asylum), and Europol (police cooperation).

The EUAA is tasked to assist EUMS with their actions on resettlement (Art 2 para 1 lit s EUAA Regulation). Already the EUAA's predecessor, the EASO, provided a hub for cooperation of EUMS in resettlement matters. Specific resettlement-related activities of EASO included, amongst others, selection and fact-finding missions, pre-departure orientation programs, medical screenings, travel or visa arrangements, joint training, reception and integration tools, identification of best practice and the launch of pilot projects.[979]

The mandate of EASO was, however, limited. Art 12 para 2 EASO Regulation stated that EASO "*should have no direct or indirect powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection*".[980] Consequently, the Commission proposed to expand EASO's mandate, including its decision-making powers.[981] The result was the establishment of the EUAA, operational since

976 See Maïté Fernandez in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, 241.

977 See ibid 241; see also Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' in (2014) 41 Legal Issues of Economic Integration 4, 389 (402).

978 See Regulation 2016/1624 (EU) on the European Border and Coast Guard and amending Regulation (EU) 2016/399 and repealing Regulation (EC) No 863/2007, Regulation (EC) No 2007/2004 and Decision 2005/267/EC [2016] OJ L251/1-76.

979 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 625.

980 Art 12 para 2 Regulation 2010/439 (EU) establishing a European Asylum Support Office [2010] OJ L132/11-28 (emphasis added).

981 See Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final; see also Amended Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010: A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 COM/2018/633 final; national Greek law already granted EASO powers that

19 January 2022.[982] Upon request or with the consent of the competent EUMS, the EUAA is empowered to, among others, decide on applications for international protection (Art 16 para 2 lit c EUAA Regulation). Furthermore – most relevant for resettlement selection –, the EUAA can engage in vulnerability assessments. It may "*assist Member States in identifying applicants in need of special procedural guarantees or applicants with special reception needs, or other persons in a vulnerable situation, including minors, in referring those persons to the competent national authorities for appropriate assistance on the basis of national measures and in ensuring that all the necessary safeguards for those persons are in place*" (Art 16 para 2 lit k EUAA Regulation). In addition, for the purpose of resettlement procedures, the EUAA may transfer the personal data of identified third country nationals to third countries, third parties or international organizations (subject to the individual's consent; Art 30 para 5 EUAA Regulation). Furthermore, the EUAA shall analyze the situation and reception capacities in third countries (Art 5 EUAA Regulation), which can in turn impact resettlement priorities of EUMS and resettlement eligibility.

Against the backdrop of this extended mandate, the EUAA could conduct personal interviews[983] to determine the vulnerability (and eligibility)

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exceeded its mandate; see Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 516f; see also Evangelia (Lilian) Tsourdi, 'The New Pact and EU Agencies: an ambivalent approach towards administrative integration' (*Eumigrationlawblog.eu*, 6 November 2020) <http://eumigrationlawblog.eu/the-new-pact-and-eu-agencies-an-ambivalent-approach-towards-administrative-integration/> accessed 28 February 2021. In terms of the proposed expansion of decision-making powers, see Art 21 para 2 lit b Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, which refers to operational and technical enforcement, including "*the registration of applications for international protection and, where requested by Member States, the examination of such applications*".

982 See EUAA, 'New EU Agency for Asylum starts work with reinforced mandate' (19 January 2022) <https://euaa.europa.eu/news-events/new-eu-agency-asylum-starts-work-reinforced-mandate> accessed 19 July 2022.

983 See Joanne van Selm et al, Study on 'The Feasibility of setting up resettlement schemes in EU Member States or at EU Level, against the background of the Common European Asylum system and the goal of a Common Asylum Procedure', 172, 175; e.g., in 2018 and 2019 EASO's involvement in interview-tasks as part of Greek border procedures was significant: "*EASO conducted 8,958 interviews in the fast-track border procedure during 2018. During the first half of 2019, EASO conducted 2,955 interviews in the fast-track border procedure, mainly covering applicants from Afghanistan, Palestine, Iraq, Syria and Cameroon*", Evangelia (Lil-

of prospective resettlement beneficiaries, and, by transferring the respective data of identified individuals, e.g. to the UNHCR, it could play a role as referral entity.

From a constitutional perspective, the extended mandate of EUAA implies that binding decision-making powers over individuals can be delegated, or rather conferred to an EU agency. Prominently, the *Meroni* doctrine[984] sets out criteria for the delegation or conferral of executive powers. These criteria are that (i) no one can delegate more rights than he or she possesses, (ii) delegation can never be presumed but must be explicit, (iii) only clearly defined executive powers can be delegated; and (iv) the principle of conferral of powers must be respected.[985]

While the first two criteria are largely undisputed, the third criterion that only clearly defined executive powers can be delegated remains unclear. The Court of Justice made the following distinction in *Meroni*:[986]

> *The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.*

Clearly defined executive powers that do not entail a large margin of discretion can in principle be subject to delegation. Conversely, unrestricted discretionary decision-making powers should not be delegated. Yet, the Court did not clarify the demarcation line between restricted and unrestricted decision-making powers in *Meroni*.[987]

What is more, there was a long debate about whether the *Meroni* criteria applied to EU agencies. The *Meroni* case concerned a body governed by

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ian) Tsourdi, 'The New Pact and EU Agencies: an ambivalent approach towards administrative integration' (*Eumigrationlawblog.eu*, 6 November 2020).

984 See Cases C-9/56 and C-10/56 *Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] EU:C:1958:7; for subsequent case law see e.g., Case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981] EU:C:1981:104.

985 See Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen* (Mohr Siebeck 2017) 230.

986 Cases C-9/56 and C-10/56 *Meroni & Co, Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, 173.

987 See Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen*, 232f.

private law without any basis in EU legislation.[988] In contrast, EU agencies are based on individual EU regulations, but without being expressly mentioned in EU Treaties.

In greater detail, it has been argued that the *Meroni* case concerned the delegation of powers from the Commission, while vesting competences in the EU agencies constitutes a conferral of powers by the EU legislators. To be clear, in the case of *Meroni,* the explicit powers of the Commission were formally delegated to bodies governed by private law, instead of by EU law.[989] In contrast, EU legislators conferred powers to the EUAA on the basis of a regulation. However, *Orator* argued that in both cases practically the same results were achieved.[990] Without the establishment of an agency, the Commission would be exceptionally responsible for the direct implementation of […] at the EU level (see Arts 17 para 1 TEU and 291 para 2 TFEU) within the limits of rules laid down by EU legislation (Art 291 para 3 TFEU). If the Commission then delegated this power, we would face a situation similar to *Meroni*. So, it is irrelevant for the application of the *Meroni* criteria whether the origin of the power is understood as power conferral (by the EU legislator) or delegation (by the Commission). As a result, the *Meroni* judgement has been interpreted to apply to EU agencies.

The Court of Justice confirmed the application of the *Meroni* criteria to EU agencies.[991] In its reasoning in *ESMA-short selling*,[992] the Court applied the *Meroni* criteria for the first time to EU agencies.[993] It concluded that the powers conferred to the European Securities and Markets Authority (ESMA) "*comply with the requirements laid down in Meroni v High Authori-*

988 See ibid 229; see also Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' in (2014) 41 Legal Issues of Economic Integration 4, 394.

989 See Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union* [2014] EU:C:2014:18, para 43.

990 See Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen*, 265f.

991 See ibid 243.

992 See Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union*, paras 41ff.

993 See Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' in (2014) 41 Legal Issues of Economic Integration 4, 390.

*ty*"[994] because ESMA's exercise of powers "*is circumscribed by various conditions and criteria which limit ESMA's discretion*".[995] In the case of ESMA, decision-making powers did not undermine the rules governing the delegation of powers, namely Arts 290 (delegated acts) and 291 TFEU (implementing acts). The provision equipping ESMA with decision-making powers formed part of a series of rules designed to uphold financial stability and market confidence within the EU, and ESMA's empowerment was necessary to follow an essential objective of the EU financial system.[996]

What is more, the Court pointed to Arts 263[997] and 277 TFEU,[998] stating that the competence of EU legislators to empower EU agencies to issue acts of general application could implicitly be derived from these provisions that ensure the reviewability of EU agencies' decisions.[999]

With its liberal decision in ESMA, the Court of Justice did not actually depart from the core findings of the *Meroni* judgement, i.e. the delegation of powers could not go so far as to alter policy choices, bringing about an actual transfer of responsibility.[1000] The Court rather suggested a more flexible approach to the conferral of powers, on the basis that unlike in *Meroni*, the exercise of powers in ESMA's case was circumscribed by various conditions and criteria which limited ESMA's discretion.[1001]

It cannot automatically be inferred that the liberal approach regarding ESMA, an agency within the EU financial system, equally applies to cases where binding decision-making powers would be conferred upon the EU-

994 Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union*, para 53.

995 Ibid para 45.

996 See Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union*, paras 73, 85.

997 "*It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties*."

998 "[A]*ny party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act*."

999 See Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union*, para 65; see also Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' in (2014) 41 Legal Issues of Economic Integration 4, 401.

1000 See Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and the Council of the European Union*, paras 41f.

1001 See ibid para 45; see Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen*, 244.

AA, an EU agency active in the field of migration and asylum.[1002] Still, essential requirements for the delegation or conferral of executive powers on the EUAA can be derived from the rulings of the Court of Justice in *Meroni* and ESMA. First, any conferral of such powers must be based on an explicit decision of the EU legislators. In this regard, the EUAA Regulation can be considered as sufficient.[1003] Second, the restriction not to confer executive powers that would allow for policy alterations by EU agencies does not preclude the EUAA from making decisions that affect an individual's legal position, as long as there are sufficient conditions and criteria that define EUAA's decision-making power. In this light, *Tsourdi* pointed out that "*executive discretion to decide, for example, whether an individual fulfils criteria of the legal definition of a refugee, does not amount to the prohibited discretion of formulating policy*".[1004] In addition, in the case of the EUAA, such power remains contingent on the consent of the competent EUMS. Ultimately, any delegated power must be subject to judicial review and other accountability mechanisms, which will be elaborated in the following.

### 4.3.3 Accountability and legal protection

The EU operates in the resettlement process through the EUAA. Therefore, the following elaborations focus on accountability mechanisms addressing actions of the EUAA.

*Tsourdi* examined the accountability processes in the former EASO Regulation in greater detail.[1005] She thereby identified several political accountability processes, not only before EASO's own Management Board (Art 29 EASO Regulation), but also before the Council of the EU, the Commission and the European Parliament (Arts 7 para 1, 12 para 2, 30

1002 The questions remain "*what powers (and how much discretion) can be conferred upon an entity, when and how the conferral takes place (within what procedural and substantive limits) and who holds the recipients of the conferred powers to account and how*", Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' in (2014) 41 Legal Issues of Economic Integration 4, 402.

1003 See Andreas Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen*, 231.

1004 Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 521.

1005 See ibid 523ff.

para 1 and 31 para 3 EASO Regulation). Regarding social accountability, civil society preferences influenced the establishment process of EASO.[1006] However, beyond the establishment process, EASO did not have to report or explain its conduct to the civil society.[1007] Similar provisions can be found in the EUAA Regulation, for example Art 47 EUAA Regulation deals with accountability to the Management Board. The EUAA Regulation introduced significant additional accountability developments. Most notable are the EUAA's obligations to appoint a Fundamental Rights Officer (Art 49 EUAA Regulation) and to establish and implement a complaints mechanism (Art 51 EUAA Regulation). In that respect, EUAA's compliance with fundamental rights is currently under review by the European Ombudswoman.[1008] Eventually, social accountability is fostered through EUAA's Consultative Forum (Art 50 EUAA Regulation) where civil society organizations have gained an enhanced role.

With regard to legal accountability in the form of judicial review, the essential question is whether EUAA's mandate comprises measures that have legal effects vis-à-vis third parties as required under Art 263 TFEU para 1. It remained contested if, for example, (non-binding) advisory opinions of EASO produced such effects.[1009] By contrast, EUAA's extended mandate implicates binding decisions with legal effect upon individuals (upon request or with consent of the EUMS that would otherwise have the final decision-making power). With regard to such decisions, Art 263 TFEU can serve as a basis for CJEU review. In addition, for the sake of transparency in the form of public access to documents, Art 63 para 5 EUAA Regulation states that decisions taken by the EUAA "*pursuant to Article 8 of Regulation (EC) No 1049/2001 may give rise to* […] *action before the CJEU, under the conditions laid down in Articles 228 and 263 TFEU respectively*". Another avenue to achieve judicial review would be a preliminary ruling under Art

1006 See Satoko Horii, 'Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis' in (2018) 37 Refugee Survey Quarterly 2, 204 (211f).

1007 See Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 523.

1008 See European Ombudsman, 'How the EU Asylum Agency complies with its fundamental rights obligations and ensures accountability for potential fundamental rights violations', Case SI/4/2022/MHZ (opened on 11 July 2022) <https://www.ombudsman.europa.eu/en/case/en/61991> accessed 19 July 2022.

1009 See Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 525 (with further references).

267 TFEU. In the course of a preliminary ruling, the CJEU can also review the validity of non-binding acts.[1010] This, however, depends on whether a national court makes a referral to the CJEU. It results that overall, EU law remains limited when it comes to legal accountability.

Moreover, Art 67 EUAA Regulation read in combination with Art 228 TFEU offers the possibility to hold the EUAA accountable for its actions before the European Ombudswoman.[1011] Somewhat difficult in this context is that the Ombudswoman's jurisdiction *ratione personae* excludes non-EU citizens not having their residence in the EU. This, however, does not render the Ombudswoman ineffective in the resettlement context since she can initiate inquiries (Art 228 para 1 TFEU). Indeed, the Ombudswoman "*has used this tool to circumvent the restrictions on its complaints-based jurisdiction*",[1012] meaning that "*the Ombudsman has formally dismissed the complaint for lack of jurisdiction ratione personae and then immediately opened an own-initiative inquiry into the same facts*".[1013] Moreover, the Ombudswoman's jurisdiction *ratione materiae* covers the entirety of EU's actions, thus is not limited to the enforcement and review of legally binding acts. Despite the non-binding nature of her decisions, the Ombudswoman has made a substantial contribution to good governance, namely "*a strong track-record in getting Union bodies and agencies to comply*".[1014] For that reason, her involvement could have a positive impact on the hitherto legally undefined resettlement process.

1010 See ibid 525f; for the reviewability of non-binding acts see Case C-322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] EU:C:1989:646, para 8.

1011 See Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 523.

1012 Stian Øby Johansen, 'Human Rights Accountability of CSDP Missions on Migration' (*Eumigrationlawblog.eu*, 8 October 2020) <http://eumigrationlawblog.eu/human-rights-accountability-of-csdp-missions-on-migration/#more-2839> accessed 28 February 2021.

1013 Ibid.

1014 Ibid; see Evangelia (Lilian) Tsourdi, 'Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?' in (2020) 21 German Law Journal, 528.

### 4.3.4 Preliminary conclusion

The EU has financially supported resettlement operations of EUMS, and support by means of EU funding has increased. The AMIF makes funding dependent on certain status requirements, but it does not comprehensively address refugee and human rights. In the future, EU funding could be structured to foster those rights in the resettlement process. Furthermore, funding could reinforce the character of resettlement as a durable solution if funds were restricted to those EUMS offering meaningful opportunities for resettlement beneficiaries to participate in the economy and society of the receiving EUMS.

Besides, the EU has provided operational support through the EUAA (and the former EASO). The limited mandate of EASO was expanded through the establishment of the EUAA. The conferral of powers by the EU legislator that made the EUAA competent to take binding decisions upon individuals are covered by the criteria set out by the Court of Justice in the *Meroni* case. The powers are based on an explicit decision of the EU legislators in the form of an EUAA Regulation. In addition, EUAA's decision-making power is subject to the consent of the competent EUMS. Furthermore, discretion to decide whether an individual fulfills the criteria of eligibility for resettlement, such as the qualification for refugee or subsidiary protection status, does not amount to the prohibited discretion of formulating policy.

In terms accountability mechanisms to address potential misconduct, the means for individuals to take judicial action have significantly increased with EUAA's expanded mandate. EASO was limited to generating non-binding advisory opinions, and it was difficult to claim that such opinion produce legal effects, which is required for a review under Art 263 TFEU. By contrast, the mandate of the EUAA includes the potential competence to take binding decisions upon individuals, meaning that Art 263 TFEU has become a viable means for the individuals concerned to have these decisions reviewed by the CJEU.

In addition, the European Ombudswoman could take up a substantial role to unveil misconduct in the resettlement process by initiating inquiries pursuant to Art 228 para 1 TFEU. Her decisions are, however, not binding, rendering them less effective than court decisions.

## 4.4 Analysis: Status quo of EU resettlement

The above elaborations on EU's institutional involvement in resettlement have raised various questions about potential developments, which can only be answered by first assessing the *status quo* of EU resettlement. Therefore, the following analysis addresses the *status quo* of EU resettlement policy from three perspectives: The first perspective shows where we stand in terms of EU involvement in processing resettlement cases. Second, the analysis evinces the degree of national commitment to implement the principle of solidarity and responsibility sharing through resettlement. Finally, it puts resettlement in the context of EU's proclaimed goal to offer effective protection to those in need.

### 4.4.1 Resettlement processing – national or EU level?

The EUAA Regulation ingrains elements of common processing, including the possibility for EUAA deployed experts to decide upon applications for international protection. Eventually, the expanded EUAA mandate could also cover decisions on resettlement selection that have legal effect upon potential resettlement candidates, as the EUAA might take over the function of a (pre-)referral entity. In 2016, the Commission even contemplated one step further towards EU-level processing by announcing (as a long-term goal) an "*EU-level first-instance decision-making Agency, with national branches in each Member State, and establishing an EU appeal structure*".[1015] So far, this idea has not been taken up in legal reforms.[1016]

As elaborated in 4.1.1.1, centralized assessment at the EU level would require a Treaty amendment under Art 48 TEU, which demands, among others, a 'Convention' and 'common accord' (intergovernmental conference), as well as ratification by all EUMS in accordance with their respective constitutional requirements. From a political perspective, the high requirements for a Treaty amendment make the shift to EU-level processing difficult to achieve. On the other hand, *Cherubini* considered a shift of re-

1015 Commission, Communication 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe', COM(2016) 197 final.

1016 See Francesco Cherubini in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*, 247.

sponsibility from EUMS to the EU to be favorable for EUMS.[1017] Through such responsibility shift, EUMS "*would be alleviated from the burden*",[1018] while the EU would be internationally responsible, and its actions could be challenged directly before the CJEU.[1019]

Another issue in terms of centralized EU assessment concerns funding. Realizing the (necessary) substantial allocation of resources from EUMS to EU bodies would be linked to strict procedural rules. The process to decide on the MFF requires, amongst others, unanimity in the Council (Art 311 para 3 TFEU states that "[t]*he Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision*").

While legally speaking, the Treaty amendment process as well as decisions on funding could introduce centralized EU assessment, the political hurdles likely hamper such development.

### 4.4.2 Implementation of the principle of solidarity and fair sharing of responsibilities – discretion or mandatory quota?

In the long term, the EU can only ensure continuing resettlement contributions by creating a permanent framework beyond *ad hoc* responses. Likewise, the Commission asserted in its Recommendation of September 2020 that the EU "*needs to move from ad hoc resettlement schemes to schemes that operate on the basis of a stable framework that ensures that Union resettlement schemes are sustainable and predictable*".[1020] Scholarly debate in political science remains divided on whether such permanent resettlement framework should be based on mandatory quotas or whether the voluntary nature of resettlement should be preserved. *Thielemann* emphasized that Europe would need a clear, binding legal framework to strengthen resettlement.[1021] In contrast, *Suhrke* considered that a binding resettlement quota would only be accepted by receiving countries if it did not require them

1017 See ibid 248f.
1018 See ibid 249.
1019 See ibid 249.
1020 Commission, Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways, 3, Recital 12.
1021 See Eiko R Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' in (2018) 56 Journal of Common Market Studies 1, 63-82.

to do more than they were already doing.[1022] From a legal perspective, CJEU case law on mandatory *intra*-EU relocation suggests that Art 80 TFEU prevents EUMS from generally refusing admission on the basis of responsibilities with regard to the maintenance of law and order and the safeguarding of internal security concerns when implementing a quota-based resettlement framework (Art 72 TFEU). Instead, such refusal would be limited to temporary suspension and case-by-case assessments.

Eventually, the aforementioned concept of 'flexible solidarity' could be a way out of the political deadlock. Flexible solidarity militates against mandatory resettlement quotas, thus confirming the current approach in the 2016 Proposal for a Union Resettlement Framework Regulation. A cynical note nevertheless lingers in flexible solidarity, considering, among others, the position of the Visegrád states in the relocation infringement proceedings. This experience leads to AG *Sharpston*'s prediction that, for at least some EUMS, 'flexible' could be taken to mean "*if we think there may be a problem then we don't need to show solidarity*".[1023] Whether EUMS will finally understand that flexibility does not imply free riding remains pie in the sky.

### 4.4.3 A comprehensive CEAS – protection or migration management tool?

Pursuant to Art 78 para 1 TFEU, the EU shall develop a CEAS with a view to offering international protection to those in need in conformity with international refugee law and international and European human rights. However, it seems that the current EU resettlement policy is not in line with this legally anchored goal. Recent EU policy trends, i.e. initiatives such as the GAMM (see 4.2.7), the EU-Turkey Statement (see 4.2.10), and the Proposal for a Union Resettlement Framework Regulation (see 4.2.11), have raised doubts about the protection focus. From a legal perspective, these initiatives show contradictions with international human rights and refugee law and (thus) EU primary law.

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1022 See Astri Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action' in (1998) 11 Journal of Refugee Studies 4, 412f; see also Adèle Garnier, Kristin Bergtora Sandvik and Amanda Cellini, 'The COVID-19 Resettlement Freeze: Towards a Permanent Suspension?' (14 April 2020) <https://www.kaldorcentre.unsw.edu.au/publication/covid-19-resettlement-freeze-towards-permanent-suspension> accessed 28 February 2021.

1023 Email from Eleanor Sharpston (10 June 2020).

In the course of partnerships under the GAMM, and also along with the EU-Turkey Statement, the EU followed a 'return for resettlement' policy, namely cooperation with countries of (first) refuge to avoid irregular migration flows to the EU. For example, under the EU-Turkey Statement, the EU departed from international refugee law because those who had not previously entered or tried to enter the EU irregularly were prioritized for resettlement to the EU. This runs counter the prohibition of penalties for illegal entry or the presence of refugees pursuant to Art 31 Refugee Convention.[1024] Such policy focus is retrieved in the Proposal for a Union Resettlement Framework Regulation, where the Commission set out criteria for selected partnership countries from where resettlement should preferably take place.

Regarding returns of irregular migrants to partnership countries, regularly forming part of the political deal in exchange for resettlement, concerns were, among others, raised by *Peers et al.* They claimed that automatic returns could result in violations of EU law and international obligations, most prominently the *non-refoulement* principle. The EU and EUMS could not shift responsibility for violating obligations under the ECHR and the Charter[1025] to third countries and/or the UNHCR, the IOM or Frontex[1026] on the basis of cooperation agreements.[1027]

In terms of the GAMM, *Moreno-Lax* pointed out that "*Italian (and EU) authorities have invested vastly, to establish a Libyan SAR* [search and rescue] *and interdiction capacity so they can assume responsibility for rescue*

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1024 See Tom de Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' in (2020) 32 International Journal of Refugee Law 1, 67; see also European Council, 'EU-Turkey statement, 18 March 2016' (18 March 2016) para 2; see also Daniela Vitiello, 'Legal Narratives of the EU External Action in the Field of Migration and Asylum: From the EU-Turkey Statement to the Migration Partnership Framework and Beyond' in Valsamis Mitsilegas, Violeta Moreno-Lax and Niovi Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill 2020) 130 (147f).

1025 See Steve Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law*, 659f.

1026 See *Bosphorus v Ireland*, para 154.

1027 See *TI v UK* App No 43844/98 (ECtHR 7 March 2000) 15; "*Where States establish* […] *international agreements to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the* [ECHR] *if Contracting States were thereby absolved from their responsibility under the Convention in relation to the activity covered by such* [agreements]", *KRS v UK* App No 32733/08 (ECtHR 2 December 2008) 16.

*(and disembarkation) and stymie irregular migration across the Central Mediterranean*".[1028] It was argued that the Libyan Coast Guard brought migrants back to Libyan camps where they faced inhuman and degrading treatment. From there, they were usually not resettled but rather "*returned to Nigeria after agreeing to 'voluntary repatriation' as the only alternative to indefinite detention they were offered*".[1029]

The example of Libya demonstrates a reality that the EU has not reached its proclaimed political objectives to re-establish a more stable situation and reduce human rights abuses in third countries. To say it in *Agamben*'s[1030] words, the EU and its MS aimed at saving lives of migrants but at the same time suspended them.[1031] The problem seems to be that the EU has promoted two sets of contradicting objectives. On the one hand, the EU announced in the GAMM and its subsequent Partnership Framework to pursue foreign policy objectives such as the promotion of peace, human rights and the rule of law. On the other hand, EU's migration policy aimed at strengthening external borders through migration control. These objectives apparently clash with each other. For instance, withholding funds to sanction a country of (first) refuge for non-cooperation in terms of border control exacerbates poverty, conflicts, and human rights abuses in this country.[1032]

The departure from international law is also relevant in the light of the principle of consistency. Applying the principle of consistency entails that a violation of international refugee law or international and/or European human rights law in EU's external action in the course of resettlement operations also violates EU primary law, namely Art 78 para 1 TFEU. This Article demands that development and interpretation of the (internal) EU asylum *acquis* be in compliance with the Refugee Convention as well as the ECHR and pertinent universal human rights treaties. Against this

1028 Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS and Others v Italy*, and the "Operational Model"' in (2020) German Law Journal, 390f.

1029 Ibid 390.

1030 See Giorgio Agamben, *Homo Sacer Sovereign Power and Bare Life* (Stanford University Press 1998).

1031 See Giorgio Agamben cited in Darla Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' in (2018) 29 European Journal of International Law 4, 1181; see also Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' in (2018) 56 Journal of Common Market Studies 1, 4.

1032 See Tineke Strik, 'The Global Approach to Migration and Mobility' in (2017) 5 Groningen Journal of International Law 2, 323.

backdrop, consistency means that the same must hold true for the external CEAS, including resettlement.

Moreover, the proclaimed goal to effectively offer international protection to those in need is linked to the relationship between resettlement and (territorial) asylum. Effective international protection suggests balancing these two distinct policy tools in order to establish a comprehensive refugee policy. The UNHCR addressed "*the concern that some countries exhibited a tendency to control their total refugee intake by balancing between refugees who arrive through resettlement and those who apply directly for asylum*".[1033] Accordingly, resettlement should not be used to block admission of those who seek international protection on shore, "*since this would undermine the right to seek asylum*".[1034]

Commentators affirmed that it was a misconception to assume that resettlement could replace (territorial) asylum. For instance, *Hashimoto* argued against a one-sided approach because resettlement would never be able to replace asylum.[1035] *Ziebritzki* also raised concerns about an EU approach where resettlement would replace asylum. She concluded that such approach would contradict the political goals underlying the EU asylum *acquis*, since at that point in time, effective international protection for those in need could not be ensured by merely relying on discretionary resettlement offers.[1036] Evidently, the global protection needs cannot be covered by resettlement only. In addition, *Ziebritzki* pointed to international law as the benchmark for the EU asylum *acquis* and warned that abolishing territorial asylum could result in serious *non-refoulement* violations.[1037] Notwithstanding, when the Commission promoted resettlement as the preferred avenue in its 2016 Proposal for a Union Resettlement Framework Regulation, that reality was neglected.

Overall, only if EU resettlement policy complied with international and European human rights and international refugee law, it could serve to achieve a comprehensive CEAS in line with Art 78 para 1 TFEU. This must

1033 Haruno Nakashiba, 'Postmillennial UNHCR refugee resettlement: New developments and challenges', UNHCR Research Paper nº265 (November 2013) 7.

1034 Ibid 7.

1035 See Naoko Hashimoto, 'Refugee Resettlement as an Alternative to Asylum' in (2018) 37 Refugee Survey Quarterly, 184.

1036 See Catharina Ziebritzki in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe*, 310; see also ibid 330: "[T]*he 'replacement argument' is a hypothetical scenario in which global resettlement needs would be met by global resettlement capacity*".

1037 See ibid 332f.

not lead to a replacement of (territorial) asylum since such replacement would undermine EU's proclaimed political – and legally anchored – goal to offer effective international protection to those in need.