Part 4.
Some Future Prospects on Humanitarian Admission to Europe

Chapter 9:
The Objective of Resettlement in an EU Constitutional Perspective

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Introduction

Resettlement means the organised movement of pre-selected refugees from the State where they initially sought protection to a destination country in which their settlement is expected to be permanent.[2] In the EU context, resettlement more specifically refers to the transfer of persons in need of international protection from a third country to an EU Member State.[3]

Global resettlement needs are increasing in accordance with the continuous rise of the number of forcibly displaced persons. UNHCR estimates that in 2020, about 1.4 million persons will be in need of resettlement, which represents a 20 per cent increase from 2018.[4] Nevertheless, global resettlement has decreased in the past years, both in absolute numbers as well as in proportion to the needs.[5] Traditionally, Europe is considered a side stage for global refugee resettlement. In the past decades, EU Member States have continuously offered less than ten per cent of global resettle-

2 J Van Selm, 'Refugee Resettlement' in E Fiddian-Qasmiyeh, G Loescher, K Long and N Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 512.

3 Art 2 lit. a Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund [hereinafter: *AMIF Regulation*], see however n 17712. The organised movement of pre-selected asylum seekers from one Member State to another member state is termed *relocation* and differs fundamentally from resettlement. The Relocation Programme was established by Council Decision (EU) 2015/1523 of 14 September 2015 and Council Decision (EU) 2015/1601 of 22 September 2015 resp. establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. The Relocation Programme expired in September 2017.

4 UNHCR, Projected Global Resettlement Needs 2020, published in the context of the 25th Annual Consultations on Resettlement (2019), available online: https://www.unhcr.org/protection/resettlement/5d1384047/projected-global-resettlement-needs-2020.html [all links last accessed on 02 Sept 2019].

5 While in 2016, about 125,000 persons were resettled globally with the assistance of UNHCR, in 2018 only about 80,000 persons benefitted from resettlement through UNHCR. Cf UNHCR, Resettlement Data, available online: https://www.unhcr.org/resettlement-data.html; M Engler, 'Versprechen gegeben, Versprechen gebrochen – Resettlement-Zahlen seit 2016 mehr als halbiert' (2019) *Fluchtforschungsblog* 28 Feb 2019. This coincides with a sharp reduction of the US resettlement programme due to its recent anti-migration politics. UNHCR data, referred to here, however, only includes resettlement with assistance by UNHCR, and the US programme much less relies on UNHCR, see J Van Selm (n 2) 512.

ment capacity.[6] Since the early 2000s however, a renewed European interest in resettlement has been noted.[7] Resettlement not only provides protection and a durable solution to refugeehood, it is also a means of sharing international responsibility for refugee protection.[8] The 2018 UN Global Compact on Refugees, hence, explicitly calls on the emerging destination countries to intensify their efforts.[9] And, indeed, Europe is slowly becoming more important for global resettlement in terms of numbers.[10] But not only Europe as a region, also the EU as an actor is becoming increasingly relevant for resettlement.

EU resettlement policy has gained new momentum, in particular since the crisis of the Common European Asylum System. The EU-Turkey Statement of March 2016 prominently provides for the resettlement of Syrian nationals through the '1:1 scheme'.[11] In the same year, the Commission put forward a proposal for a comprehensive Union Resettlement Framework.[12] The emphasis on resettlement in the context of crisis might be explained by the fact that resettlement is particularly well suited to deal with

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6 The USA, Canada and Australia together provided for the other about ninety per cent. Even though Sweden, Finland, Denmark, Netherlands, and the UK have well-established resettlement programmes, their capacity is relatively small in the global context, see J Van Selm (n 2) 512; A Cellini, 'Annex: Current Refugee Resettlement Program Profiles' in A Garnier, LL Jubilut and KB Sandvik (eds), *Refugee Resettlement. Power, Politics, and Humanitarian Governance* (Berghahn, 2019) 253 ff.

7 J Van Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection?' (2004) 22 *Refuge* 39.

8 J Van Selm (n 2) 512. Further, resettlement is generally understood as one of the three durable solutions to refugeehood alongside local integration in the first host state and voluntary return to the country of origin, see BN Stein, 'The Nature of the Refugee Problem' in AE Nash (ed) *Human Rights and the Protection of Refugees under International Law* (Montreal Institute for Research on Public Policy, 1988) 47, 50 ff.

9 UNHCR Report, Global compact on refugees, A/73/12 (Part II), affirmed by the UN General Assembly on 17 December 2018, 73rd Session Supplement No. 12, [in the following: *2018 Global Compact*], para 90 ff.

10 However, the decline of US resettlement capacity can by far not be balanced out, see M Engler (n 5).

11 European Council, Press Release of 23 April 2015, available online: https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/ [in the following: *EU-Turkey Statement*].

12 European Commission, 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, 13 July 2016, COM(2016) 468 final [in the following: *Union Framework Proposal*].

the challenge of complying with contradicting demands of different political groups, which are increasingly drifting apart.[13] Some appreciate resettlement as a means of providing international protection to third country nationals and preventing loss of life, or severe harm to life, during attempts to irregularly cross borders.[14] Others praise resettlement rather as a means of enhancing state control in the realm of forced migration, as an immigration management tool, or even as a foreign policy instrument serving the political and economic interests of the EU beyond the realm of migration.[15] While both positions agree on increasing the use of resettlement, the respective answers to the question of 'why' are obviously quite different. This question is far from being only conceptual. Quite to the contrary, addressing the question of why – the objective of resettlement – is a precondition for answering the equally contentious questions of how and whom to resettle.[16] In other words, defining the objective of resettlement has direct practical implications for the concrete design of a resettlement scheme.

The controversies over the objective of resettlement in particular concern two issues: *First*, is the purpose of resettlement to complement the traditional territorial asylum procedures, or can it be understood as eventual-

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The Proposal extends the definition of resettlement so as to include internally displaced persons as eligible for resettlement, see Art 2, 5 Union Framework Proposal.

13 *cf* M Savino, 'Refashioning Resettlement: from Border Externalization to Legal Pathways for Asylum' in S Carrera, L den Hertog, M Panizzon and D Kotsakopoulou (eds) *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill, 2019) 81, 94 similarly refers to the 'Commission's attempt to reconcile humanitarian goals with the deterrence of irregular immigration'; similarly: Forschungsbereich beim Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR), 'Die Zukunft der Flüchtlingspolitik? Chancen und Grenzen von Resettlement im globalen, europäischen und nationalen Rahmen', authored by K Popp (2018) 4.

14 *cf* Caritas Europa, Churches' Commission for Migrants in Europe (CCME), European Council for Refugees and Exiles (ECRE), International Catholic Migration Commission (ICMC Europe), International Rescue Committee (IRC), Red Cross EU office (2016) Joint Comments Paper on the [Union Framework Proposal], available online: https://www.asylumlawdatabase.eu/en/content/ngo-comments-european-commission-proposal-regulation-establishing-union-resettlement.

15 The renewed European interest in resettlement can indeed be traced back, at least inter alia, to 'security concerns'. See J van Selm (n 7) 43 who notes that, while European politics understand resettlement as a way to control forced migration, the US reduced its resettlement capacity due to 'security concerns'.

16 *cf* J Van Selm (n 2) 514 who identifies the questions of who, why and how to resettle as the central issues of global resettlement.

ly replacing them in the long term? *Second*, should resettlement ensure fair sharing of international responsibility for refugee protection, or is it an instrument which may as well be used for the purpose of externalising responsibility to third States? While the Common European Asylum System has for long not taken a position on these questions due to its traditional silence on legal access to protection, the increasing EU involvement in the regulation of resettlement requires answers.[17] However, and despite these pressing questions, resettlement is currently surprisingly underrepresented in the almost omnipresent public debate on asylum in Europe.[18] Legal scholarship on resettlement to Europe is emerging slowly.[19] Nevertheless, the discussion on resettlement still seems to be characterised by a certain

17 *cf* J Van Selm (n 7) 44 who already observed that 'the relationship […] between asylum and resettlement is perhaps one of the most confusing points for European policy making.'; SVR (n 13) at 5, 9 ff. stresses that the relation between territorial asylum and resettlement is one of the principal questions with regard to a common EU resettlement policy; M Savino (n 13) 95 identifies as 'the crucial question […] whether the proposed Union resettlement mechanism is meant to create a stable and meaningful legal pathway [...] or whether, by contrast, it is rather meant to become a new piece of the EU non-entrée strategy'.

18 Even the term 'resettlement' seems, generally, not to be very well known, a not irrelevant detail, since words matter, and particularly so in the current debate on migration and asylum. The picture changes when turning to the more specialised policy discourse, in particular since the Union Resettlement Framework was proposed in 2016: Caritas et al. (n 14); Amnesty International, European Institutions Office (2016) Position Paper: The Proposed EU resettlement framework, available online: https://www.amnesty.eu/news/amnesty-international-position-paper-on-the-proposed-eu-resettlement/; European Council on Refugees and Exiles (ECRE) (2016) Policy Note: Untying the EU Resettlement Framework, available online: https://www.ecre.org/policy-note-untying-the-eu-resettlement-framework/; 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 of the Council. UNHCR's Observations and Recommendations' (2016), available online: https://www.refworld.org/docid/5890b1d74.html. For an overview of the policy debate see: European Parliament Research Service (2016) Briefing EU Legislation in Progress. Resettlement of refugees: EU Framework, available online: http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-eu-resettlement-framework.

19 See P De Bruycker and EL Tsourdi, 'Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension' in V Chetail, P de Bruycker and F Maiani (eds) *Reforming the Common European Asylum System* (Brill, 2016) 473, 516; M Savino (n 13). The emerging (legal) scholarship on resettlement to Europe seems to be influenced by scholarship on resettlement to established resettlement countries such as Aus-

scarcity of legal arguments. Due to the absence of an international legal framework on resettlement, it is generally understood as an entirely discretionary act, qualifying the questions of why, how and whom to resettle as subject to political preference solely.[20] The discussion, therefore, generally speaking, refers to the international policy framework as the normative yardstick.[21] The international policy framework on resettlement is shaped mainly by UNHCR and consists of non-binding guidelines and recommendations to States.[22] Accordingly, resettlement has been described as 'at law's border'.[23] With regard to the international level, this might be an ap-

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tralia, *cf eg* J McAdam, 'Extraterritorial Processing in Europe. Is 'regional protection' the answer, and if not, what is?' (2015) Policy Brief, Kaldor Centre for International Law.

20 European Commission, 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 (2003), carried out by the Migration Policy Institute, authored by J Van Selm [hereinafter: *COM Resettlement Feasibility Study*] 112.

21 See UNHCR, Observations and Recommendations on the Union Framework Proposal (n 18) passim; SVR (n 13) 9 ff; Caritas et al (n 14) 4 ff.; Amnesty International (n 18) 3 ff; ECRE (n 18) 1 ff; K Bamberg, 'The EU Resettlement Framework: From a humanitarian pathway to a migration management tool?' *European Policy Center Discussion Paper* (2018) passim; SVR (n 13) 9 ff. The EU constitutional framework, again, generally speaking, is mainly referred to concerning questions of competences: COM Resettlement Feasibility Study (n 20). However, with reference to the EU constitutional framework concerning the complementarity of resettlement to traditional asylum procedures: B Kowalczyk, 'Resort to Resettlement in Refugee Crisis in Europe' in J Jurníková and A Králová (eds) *Společný evropský azylový systém v kontextu uprchlické krize. Sborník z konference* (Masaryk University, 2016) 135, 147. However, with reference to the EU constitutional framework concerning the relevance of fundamental rights relating to the procedure: UNHCR Observations and Recommendations on the Union Framework Proposal (n 18) 8 ff; M Savino (n 13) 95.

22 The international policy framework on resettlement is considered here as consisting of: The UNHCR Resettlement Handbook (2011), available online: https://www.unhcr.org/protection/resettlement/46f7c0ee2/unhcr-resettlement-handbook-complete-publication.html); UNHCR position and policy papers including those adopted by the UNHCR Executive Committee (ExCom) or its Standing Committee (overview available online: https://www.refworld.org/docid/4607d5072.html); the positions of the Annual Tripartite Consultations on Resettlement ('ATCR', *cf* https://www.unhcr.org/annual-tripartite-consultations-resettlement.html2017); the UNHCR Projected Global Resettlement Needs (n 4); and the 2018 Global Compact (n 9).

23 S Labman, *At Law's Border: Unsettling Refugee Resettlement* (2012), available online: https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0071854.

propriate characterisation. In the context of the EU, however, EU constitutional law cannot be disregarded.[24]

The EU is increasingly regulating resettlement and can only do so in compliance with its constitutional framework. This article thus explores the objective of resettlement from an EU constitutional perspective. To be sure, EU constitutional law does not contain explicit rules on resettlement. And yet, the relevance of its constitutional framework is undeniable: Depending on whether resettlement forms part of EU asylum law, or, for instance, of EU immigration policy, or even EU foreign policy, its rationale is governed by the constitutional framework of the respective area of EU law. This article thus proceeds as follows: *First*, it describes and defines the emerging EU resettlement law (1). *Second*, it shows that the objective of resettlement is controversial and that the conceptualisation of the objective as reflected in the emerging EU resettlement law partly contradicts the international policy framework (2). *Third*, it argues that the emerging EU resettlement law is governed by the constitutional framework of the Common European Asylum System, and that therefore, the objective of resettlement is to provide international protection to third country nationals, thereby complementing territorial asylum and ensuring fair sharing of responsibility with third States (3).

1. The emerging EU resettlement law

For decades, granting asylum has been conceptualised as an expression of State sovereignty.[25] This understanding has been based on the 'undisputed

24 For the understanding of the EU primary law as EU constitutional law see M Zuleeg, The Advantages of the European Constitution in A von Bogdandy and J Bast (eds) *Principles of European Constitutional Law* (Hart Publishing & C.H. Beck, 2nd edition, 2010) 763. The increasing relevance of the EU constitutional framework for the external dimension of EU migration policy is often referred to as 'constitutionalisation', see S Carrera, JS Vara and T Strik (eds) *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Elgar Publishing, 2019); L Leboeuf, 'La Cour de justice face aux dimensions externes de la politique commune de l'asile et de l'immigration. Un défault de constitutionnalisation?' (2019) *55 Revue trimestrielle de droit européen* 55.

25 GS Goodwin-Gil and J McAdam, *The Refugee in International Law* (Oxford University Press, 3rd edition, 2007), 357: 'From the point of view of international law, therefore, the grant of protection to its territory derives from the State's sovereign competence, a statement of the obvious.'.

rule of international law' that every State has exclusive control over its territory.[26] In Europe, more specifically in the EU, both are changing.[27] The consolidation of a genuine Union territory has advanced to a certain extent.[28] The Common European Asylum System is a highly integrated regional system in which access to and content of protection status are mainly determined by the EU.[29] EU asylum law sets common standards,[30] including on eligibility and status accorded to persons in need of international protection,[31] and provides for an internal allocation mechanism,[32] as

26 F Morgenstern, 'The Right of Asylum' (1949) 26 *British Yearbook of International Law* 327; P Kirchhof, 'Staatliche Souveränität als Bedingung des Asylrechts' in G Jochum, W Fritzemeyer and M Kau (eds), *Grenzüberschreitendes Recht - Crossing Frontiers Festschrift für Kay Hailbronner* (2013) 105.

27 Clearly reflected in the Opinion of Advocate General Cruz Villalón, delivered on 11 July 2013 in the case C-394/12, Shamso Abdullahi v Bundesasylamt, para 41.

28 Cf U Jureit and N Tietze 'Postsouveräne Territorialität. Die Europäische Union als supranationaler Raum' (2016) 55 *Der Staat* 353; J Bast 'Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts' in *Grenzüberschreitungen: Migration. Entterritorialisierung des Öffentlichen Rechts. Referate und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Linz vom 5. bis 8. Oktober 2016*, 76 (2017) 227.

29 E Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *International Journal of Refugee Law* 630. For the Europeanisation on legislative level, see eg J Bast, 'Ursprünge der Europäisierung des Migrationsrechts' in G Jochum, W Fritzemeyer and M Kau (n 26) 201. For the Europeanisation on administrative level see J Bast, 'Transnationale Verwaltung des europäischen Migrationsraums: Zur horizontalen Öffnung der EU-Mitgliedstaaten' (2007) 46 *Der Staat* 1; C Costello, 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy' in HCH Hofmann and AH Türk (eds) *EU Administrative Governance* (Elgar Publishing, 2006) 287; EL Tsourdi, 'Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2017) 1 *European Papers* 997.

30 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [hereinafter: *Asylum Procedures Directive*]; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [hereinafter: *Reception Conditions Directive*].

31 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [hereinafter: *Qualification Directive*].

32 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Mem-

well as an increasingly integrated administration.[33] However, in accordance with the constitutional tradition of most Member States, EU asylum law has long been characterised by relative silence on *legal access*.[34] Legal access instruments, such as humanitarian visa or resettlement, in contrast to the traditional territorial asylum procedures, do not require irregular border-crossing as a pre-condition for access to protection.[35] The traditional 'legal access gap' of the Common European Asylum System is slowly being closed by the increasing involvement of the EU in regulating and implementing resettlement, a development confirming and reinforcing the evolution of the notions of asylum, sovereignty and territory in the EU.[36]

In the following, the developments leading to the EU's focus on resettlement as legal access instrument will be shortly set out (1.1), before the elements of the emerging EU resettlement law will be defined (1.2).

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ber 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 [hereinafter: *Dublin III Regulation*].

33 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [hereinafter: *EASO Regulation*]; AMIF Regulation.

34 M Savino (n 13) 81; FL Gatta, 'Legal Avenues to access to international protection in the European Union: past actions and future perspectives' (2018) *European Journal of Human Rights* 163, 185 ff, 199 with further references.

35 This article is limited to legal pathways, which are based on the need for protection as central eligibility criterion and refers to these as '*legal access instruments*'. Legal pathways further include various instruments such as visa for the purpose of family reunification, education, or employment in particular. The status accorded to persons who are admitted under those instruments is not based on the need for protection as central eligibility criterion. Such legal pathways are, therefore, usually referred to as '*complementary pathways*', see 2018 Global Compact, para 90 ff.

36 In order to comprehensively understand resettlement to Europe, the national resettlement programmes would have to be analysed in addition, since the emerging EU resettlement law is indeed mainly implemented through national schemes. The emerging EU resettlement law together with the national resettlement programmes could be described as 'European resettlement law'. As this would, however, go beyond the scope of this article, see on the national schemes D Perrin and F McNamara, Refugee Resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames, *KNOW RESET Research Report* 2013/03; E Bokshi, Refugee Resettlement in the EU: The capacity to do it better and to do it more, *KNOW RESET Research Report* 2013/04, both studies carried out by the Migration Policy Centre, EUI, in cooperation with ECRE, co-financed by the EU.

1.1. Emphasis on resettlement in the context of crisis

The EU policy debate on resettlement dates back to the early 2000s.[37] The European Commission advocated for increased resettlement to the EU,[38] and the UK and Germany proposed establishing extraterritorial processing centres.[39] In response, beyond launching a study on the feasibility of extraterritorial processing of asylum claims,[40] the Commission also ordered an extensive study on the feasibility of resettlement on EU level.[41] While the first study focused on the international and EU legal framework,[42] the second study, by contrast, characterised resettlement as a discretionary measure with little legal stipulation.[43] In 2004, the Commission concluded that the concept of resettlement should be explored with a view to creating a common EU scheme.[44] The Hague Programme, adopted by the Council

37 For a comprehensive overview of the policy debate on legal access on EU level, see: FL Gatta (n 34) 184; P De Bruycker and EL Tsourdi (n 19) 473, 512 ff.

38 European Commission, Communication to the Council and the European Parliament 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum', 22 Nov 2000, COM(2000) 755 final, p 9.

39 In 2003, the UK proposed extraterritorial centres including a 'screening' system with the possibility of resettlement. In 2004, Germany proposed to intercept potential applicants in international waters in order to transfer them to extraterritorial centres where a 'screening process' would be carried out, with the exceptional possibility of resettlement through 'humanitarian admission programmes'. The European Commission explored these proposals in its Communication 'Towards more accessible, equitable and managed asylum systems', 3 June 2003, COM(2003) 315 final. On these discussions and the ensuing legal questions, see: G Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centers and Protection Zones' (2003) 5 *European Journal of Migration and Law* 30; M Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 *International Journal of Refugee Law* 601, 623 ff.

40 European Commission, Study on the Feasibility of Processing Asylum Claims outside the EU against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure (2002), carried out by the Danish Centre for Human Rights, authored by G Noll, J Fagerlund and F Liebaut [hereinafter: *COM Protected Entry Procedures Feasibility Study*].

41 COM Resettlement Feasibility Study (n 20).

42 COM Protected Entry Procedures Feasibility Study (n 40) 30 to 60, and 212 to 252.

43 COM Resettlement Feasibility Study (n 20) viii, 146, passim.

44 European Commission, Communication to the Council and the European Parliament, 'On Managed Entry in the EU of Persons in Need of International Protection and Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions', 4 June 2004, COM(2004) 410 final. The

in the same year, reinforced the political emphasis on resettlement.[45] Since then, resettlement has incrementally become the politically most relevant means of providing legal access to the Common European Asylum System. In 2009, the Commission put forward an initiative for a Joint Resettlement Programme.[46] Even though this proposal was not adopted, the idea was taken up in the Global Approach on Migration and Mobility of 2011.[47]

The focus on resettlement has gained new momentum in the context of the crisis of the Common European Asylum System.[48] In April 2015, the European Council emphasised that resettlement would be an option to cope with the tragedy in the Mediterranean and prevent further loss of life at sea.[49] This impetus is clearly reflected in the European Agenda on Migration of May 2015, which is the overarching document guiding EU poli-

idea of 'protected entry procedures' was not further pursued by the Commission due to a lack of Member State commitment, *cf* M Den Heijer, Europe and Extraterritorial Asylum (Oxford University Press, 2012) 187; M Savino (n 13) 90.

45 Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005) OJ No C 53/01, in particular proposed 'Regional Protection Programmes', which would include strengthening protection capacity of third countries on the one hand, and limited voluntary resettlement schemes on the other hand. The Proposal was further elaborated by the European Commission: Communication from the European Commission to the Council and the European Parliament on Regional Protection Programmes, 1 Sept 2005, COM(2005) 388 final.

46 European Commission, Communication from the Commission to the European Parliament and the Council. On the Establishment of a Joint EU Resettlement Programme, 2 September 2009, COM(2009) 447 final, and accordingly: European Commission, Proposal for a Decision of the European Parliament and of the Council, 2 Sept 2009 COM(2009) 456 final.

47 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Global Approach to Migration and Mobility, 18 November 2011, COM(2011) 743 final [hereinafter: *GAMM*]. The Global Approach on Migration – adopted by the European Council in 2005, confirmed by the Council in 2006, and then further elaborated on by the European Commission in the following years – already mentioned the need for legal pathways to the EU, without, however, putting an emphasis on legal access to protection yet, *cf* European Commission, Global Approach to Migration, 5 December 2007, MEMO/07/549 [hereinafter: *GAM*].

48 B Kowalczyk (n 21) 141; M Savino (n 13) 82 ff.

49 European Council, Press Release of 23 April 2015, available online: https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/.

cy since the crisis.[50] Drafted as a response to the intolerable situation in the Mediterranean, resettlement was designed as a policy for immediate action, but not yet as long-term strategy. In the same year, the European Union Agency for Fundamental Rights (FRA) called upon the EU and its Member States to increase their efforts in providing legal access to international protection in the EU.[51] In April 2016, the European Parliament expressed its view that resettlement is one of the preferred options for granting safe and lawful access for those in need of protection.[52]

Two developments were particularly relevant for the development towards a common EU resettlement policy: *First*, the EU-Turkey Statement was published as press release in March 2016,[53] and represents the EU's immediate response to the crisis.[54] The objective of the Statement is to 'end irregular migration from Turkey to the EU'.[55] In order to achieve this goal, several measures were agreed upon, inter alia the provision of considerable financial support to Turkey, the return of applicants who entered the EU

50 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, 13 May 2015, COM(2015) 240 final [hereinafter: *EAM*].

51 European Union Agency for Fundamental Rights, 'Legal entry channels to the EU for persons in need of international protection: a toolbox' (2015) FRA Focus 02/2015.

52 European Parliament, Resolution of 12 April 2016, available online: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0102+0+DOC+XML+V0//EN&language=EN.

53 See n 11.

54 According to the General Court, the Statement cannot be attributed to the EU. *Cf* General Court, orders of 28 Feb 2017, T-192/16, T-193/16 and T-257/16, NF, NG and NM v European Council: 'the EU-Turkey statement [….] cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union' (T-192/16, para 71). The judgment, however, disregards the jurisprudence of the Court of Justice, in particular: European Court of Justice, judgment of 31 March 1971, 22/70, Commission v Council, 'AERT', para 5. See E Cannizzaro, 'Denialism as the Supreme Expression of Realism. A Quick Comment on NF v European Council' (2017) 2 *European Papers, European Forum* 251; J Bast, 'Scharade im kontrollfreien Raum: Hat die EU gar keinen Türkei-Deal geschlossen?' (2017) *Verfassungsblog* 03 March 2017. The EU-Turkey Statement is therefore considered here as reaction of the *EU* to the crisis.

55 EU-Turkey Statement (n 11): 'the EU and Turkey today decided to *end the irregular migration from Turkey to the EU*. *In order to achieve this goal*, they agreed on the following additional action points. […]' [emphasis added].

irregularly via the Greek Aegean islands,[56] and the resettlement scheme providing for legal access to Member States.[57] *Second*, the Commission proposed a Regulation on a Union Framework on Resettlement in July 2016.[58] This proposal is part of the endeavour to comprehensively reform the Common European Asylum System, in the context of which establishing a structured resettlement system is one of the main strategies.[59]

In March 2017, the Court of Justice decided in the case 'X and X' that the grant of humanitarian visa with a view to applying for international protection upon arrival falls solely within the scope of national law,[60] which can be seen as a confirmation of the traditional 'legal access gap' of the Common European Asylum System. The following attempts by the European Parliament to include a provision on humanitarian visa in the Visa Code seem to have failed for now.[61] At least for the time being, the discussion on harmonised rules on humanitarian visa has come to a standstill. The focus of the legal access debate clearly lies on resettlement.[62] And, indeed, the proposal by the European Council of June 2018 to establish ex-

56 EU-Turkey Statement (n 11) points 1 and 6. Less explicitly agreed upon was the effective increase of departure-preventing measures by Turkey, which, in fact, seems to be crucial for the substantial and sustainable decrease in arrivals. *Cf* European Commission, Sixth Report on the Progress made in the implementation of the EU-Turkey Statement, 13 July 2017, COM(2017) 323 final, p 4: '*On its side, the Turkish Coast Guard has continued active patrolling and prevention of departures* from Turkey.' [emphasis added].

57 EU-Turkey Statement (n 11) points 2 and 4.

58 European Commission, 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, 13 July 2016, COM(2016) 468 final [hereinafter: *Union Framework Proposal*].

59 The Union Framework Proposal relies on the comprehensive reform proposal of April 2016: European Commission, Communication from the Commission to the European Parliament and the Council. Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, 6 April 2016, COM(2016) 197 final.

60 European Court of Justice, judgment of 7 March 2017, C-638/16 PPU, X and X v Belgium, para 44. See E Brouwer, 'The European Court of Justice on Humanitarian Visa: Legal integrity vs. political opportunism?' (2017) *CEPS Commentary*, 16 March 2017; see the contributions of Dirk Hanschel, Stephanie Law and Sylvie Sarolea in this volume.

61 See the contribution of Eugenia Relano Pastor in this volume.

62 M Savino (n 13) 82, 90 ff; FL Gatta (n 34) 175 ff.

traterritorial processing centres foresees possible resettlement to the EU, without considering other legal access instruments as an option.[63]

1.2. Elements of the emerging EU resettlement law

These developments are geared towards establishing a comprehensive EU resettlement framework, which, to be sure, is not in place as of yet. There are, however, already several legal and non-legal instruments regulating resettlement on the EU level. Taken together, they consolidate EU regulation of resettlement to an extent that they represent a new component of the Common European Asylum System and can be described as the 'emerging EU resettlement law'.[64]

As will be shown in the following, the emerging EU resettlement law, as it currently stands, is defined firstly by the Regulation on the Asylum, Migration and Integration Fund (AMIF), the Regulation on the European Asylum Support Office (EASO), and several 'common resettlement goals' laid down in different legal and non-legal instruments. Secondly, the EU-Turkey Statement provides for a crisis-driven ad hoc implementation of a certain approach to resettlement currently under discussion. Indeed, the Standard Operating Procedures regulating the implementation of the '1:1 resettlement scheme' under the EU-Turkey Statement represent the more

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63 European Council, Conclusions, 28 to 29 June 2019, available online: https://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/; European Commission, Factsheet 'Migration: Regional Disembarkation Arrangements', available online: https://europa.eu/rapid/press-release_IP-18-4629_en.htm. Note the similarity to the 2003 and 2004/5 proposals (n 39), and that those proposals were based on the Australian example, see O Lynskey, 'Complementing and completing the Common European Asylum System: a legal analysis of the emerging extraterritorial elements of EU refugee protection policy' (2006) 31 *European Law Review* 230, 240 note 51.

64 M Savino (n 13) 9 ff. similarly refers to the 'The Evolution of the EU Legal Framework', and analyses 'the current legal framework as defined by [the AMIF Regulation]' in close connection with the 'July 2015 scheme' and the '50,000 scheme' as well as resettlement under the EU-Turkey Statement. In the same vein, the European Parliament describes the current EU regulation of resettlement as defined by the AMIF Regulation, the relevant Commission Recommendations and Council Conclusions, and refers to the EU Turkey Statement in addition, *cf* European Parliament, European Parliamentary Research Service, 'Briefing. EU Legislation in Progress. Resettlement of refugees: EU framework', 29 March 2019, available online: www.europarl.europa.eu/RegData/etudes/BRIE/2016/589859/EPRS_BRI%282016%29589859_EN.pdf.

recent developments of the emerging EU resettlement law. The implementation of the '1:1 scheme' has served as a blueprint for the Union Framework Proposal.[65] The practical implementation of resettlement under the EU Turkey Statement is, hence, particularly useful for understanding the emerging EU resettlement law.[66] The Union Framework Proposal in turn, thirdly, provides a model of what a codification of such an approach could look like and shows the direction in which the emerging EU resettlement law is potentially evolving.[67]

The EU asylum *acquis*, in a strict sense, contains a definition of resettlement, sets priorities on from where and whom to resettle, and provides for financial and operational support to the Member States. A binding definition of resettlement in EU law is found in the *AMIF Regulation*: '[R]esettlement means the process whereby, on a request from […] "UNHCR" based on a person's need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside with […] [either] "refugee status" […] "subsidiarity protection status" […] or any other status which offers similar rights and benefits […]'.[68] The Regulation further lays down the Union re-

65 Union Framework Proposal, p 7: 'The Proposal is 'building on the experience with existing resettlement initiatives in the EU framework and existing resettlement practices of the member states, in particular the Standard Operating Procedures guiding the implementation of the resettlement scheme with Turkey set out in the EU-Turkey Statement of 18 March 2016'. The reform paper of April 2016 (n 59) already mentions that future initiatives should build on the 'July 2015 scheme' and resettlement under the EU-Turkey Statement.

66 In order to understand the practice of resettlement under the EU-Turkey Statement, the following interviews were conducted via phone, in the form of qualitative semi-structured interviews, and are on file with the author: (1) interview with a former staff member of a German representation in Turkey, conducted on 18 February 2019, (2) interview with a staff member working for an NGO in Germany in the camp Friedland where all persons resettled from Turkey arrive, conducted on 20 February 2019, (3) interview with a staff member working for another NGO in Friedland, conducted on 26 February 2019, (4) interview with a high-level staff member of UNHCR in Ankara, Turkey, conducted in two sessions on 13 and 22 March 2019, (5) interview with a staff member of a NGO supporting resettlement procedures from Turkey, conducted on 13 March 2019, (6) interview with another staff members of the same NGO supporting resettlement procedures from Turkey, conducted and 22 March 2019. All information purely based on these expert interviews is indicated as such. I would like to thank all interview partners for their time and openness.

67 *cf* M Savino (n 13) 92 ff.

68 Art 2 lit. a AMIF Regulation.

settlement priorities, which may be amended by the Commission.[69] On the administrative level, the AMIF provides for financial incentives to the Member States, which shall implement the Union priorities through their respective national schemes.[70] In addition, the *EASO Regulation* provides for a rather limited mandate of the agency to coordinate exchanges of information and other actions on resettlement taken by Member States.[71]

While there is currently no binding EU law obliging Member States to resettle a certain number of persons, several instruments which can be classified as EU soft law do provide for targets in terms of common resettlement capacity.[72] *First*, in July 2015, the Council endorsed a Recommendation by the Commission providing for a single European pledge of 20,000 resettlement places in a timeframe of two years.[73] This '*July 2015 scheme*' was the first common EU resettlement capacity goal. Even though it was obviously based on voluntary participation by the Member States, implementation has effectively been monitored by the European Commission,

69 The Commission is empowered to adopt delegated acts to amend the priorities, and implementing acts concerning implementation conditions, see Art 17 para. 4, 8 and 10 AMIF Regulation, recital 40 AMIF Regulation.

70 The AMIF Regulation provides 'resources for the Union Resettlement Programme' including a lump sum for resettlement under national schemes, and an increased lump sum for resettlement in accordance with the Union priorities, see Art 7, and Art 17 para. 1 and 2 in conjunction with Art 15 para. 1 lit. b and para. 2, Art 17 para. 3, Annex III, and Art 17 para. 5 AMIF Regulation.

71 Art 7 EASO Regulation, see recital 12 AMIF Regulation. *See* P De Bruycker and EL Tsourdi (n 19) 491 ff.

72 EU soft law is understood here as 'rules […] which, in principle, have no legally binding force but which nevertheless may have practical effects', following the definition of F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *The Modern Law Review* 19, 32; F Snyder, 'Soft Law and the Institutional Practice in the European Community' in S Martin (ed) *The Construction of Europe* (Kluwer Academic Publishers, 1994) 197, 198. *Cf* J Schwarze, 'Soft Law im Recht der Europäischen Union' (2011) 46 *Europarecht* 3, 6 ff; F Terpan, 'Soft Law in the European Union – The Changing Nature of EU law' (2015) 21 *European Law Journal* 68, 70.

73 European Commission, Recommendation on a European resettlement scheme, 8 June 2015, C(2015) 3560 final; Council, Conclusions of the Representative of the Governments of the member states meeting within the Council on resettling through multilateral and national schemes 20,000 persons in clear need of international protection, 22 July 2015, available online: https://www.consilium.europa.eu/media/22985/st11097en15.pdf. This scheme constitutes the immediate action under the EAM (n 49).

and the scheme has been completed in the meanwhile.[74] *Second*, in the context of the EU-Turkey Statement, the Relocation Programme has been amended with a view to re-assigning 18,000 places from relocation to resettlement. The relevant Council Decision ('*Amending Council Decision*') allowed Member States to fill their remaining obligation concerning intra-EU relocation through resettlement from Turkey instead.[75] Even though the Decision has already expired,[76] it is worth taking note of it, because it arguably legally obliged Member States to resettle: The Decision is a non-legislative measure imposing a binding mechanism under Art. 288 TFEU.[77] *Third*, because the Union Framework Proposal was not adopted as swiftly as expected, the Commission in 2017 put forward another ad hoc scheme in the form of a Recommendation, providing for the aim of resettling 50,000 persons in need of international protection within two years ('*50,000 scheme*').[78] The Commission is monitoring the implementation, and as of June 2019, about 30,000 persons were resettled under this scheme.[79] The Recommendation focuses on resettlement from Turkey, which means that resettlement under the '1:1 scheme' is now counted under the '50,000 scheme'.[80]

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74 European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Progress Report on the Implementation of the European Agenda on Migration, 16.5.2018, COM(2018) 301 final, Annex 4 – Resettlement, State of Play as of 4 May 2018; European Commission, 'Factsheet: Delivering on Resettlement', on the occasion of the World Refugee Day 20 June 2019, available online: https://ec.europa.eu/commission/presscorner/detail/sl/statement_19_3056.

75 Council Decision 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [hereinafter: *Amending Council Decision*].

76 The Amending Council Decision expired in September 2017 according to its Art 2.

77 However, its binding effect is limited since it leaves member states the choice whether to engage in relocation or in resettlement instead, Art 1 Amending Relocation Decision. *Cf* European Court of Justice, judgment of 6 Sept 2017, C-643/15 and C-647/15, Slovak Republic and Hungary v Council, 'Relocation Judgement', para 66, 244 to 253. The reasoning applies accordingly.

78 European Commission, Commission Recommendation of 27 September 2017 on enhancing legal pathways for persons in need of international protection, 27 September 2017, C(2017) 6504.

79 European Commission, 'Factsheet: Delivering on Resettlement', on the occasion of the World Refugee Day 20 June 2019 (n 74).

80 European Commission, 'Factsheet: Delivering on Resettlement', on the occasion of the World Refugee Day 20 June 2019 (n 74); European Commission, Commission Recommendation of 27 September 2017 on enhancing legal pathways for

The *EU-Turkey Statement* of March 2016, hence, does not amend the common resettlement capacity goal, but simply shifts the priority towards resettling Syrians from Turkey.[81] The Statement provides for two resettlement schemes. *First*, the '1:1 scheme', which provides that 'for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled to the EU […]'.[82] Remarkably, the '1:1 scheme' has never been implemented as such. To date, only about 2,400 persons have been deported from the Greek islands to Turkey, while about 20,000 persons have been resettled from Turkey to EU Member States under the '1:1 scheme'.[83] The scheme is, however, still referred to as such by the relevant actors.[84] The *second* resettlement mechanism is the Voluntary Humanitarian Admission Scheme ('V-HAS'), which shall be activated in the event 'irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced'.[85] Even though this condition was met immediately after the Statement entered into force,[86] the V-HAS has not yet been activated. The legal nature and the legality of the EU-Turkey Statement are disputed.[87] Insofar as resettlement is concerned, the stronger arguments support the conclusion that the Statement provides for legally

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persons in need of international protection, 27 September 2017 (n 78), para (3)(a).

81 The EU-Turkey Statement does not increase EU resettlement capacity but determines that the existing schemes focuses on resettlement of Syrians from Turkey. The capacity of the '1:1 scheme' was set at 72,000 persons: This number consists of 18,000 places which are taken from the original relocation programme (*cf* Amending Council Decision) as well as 'an additional 54,000 persons'. The latter places are, however, not additional in a strict sense either but are counted under the 'July 2015' or the '50,000 scheme' respectively, see European Commission, Recommendation establishing the '50,000 scheme' (n 78) p 5.

82 EU-Turkey Statement (n 11) point 2.

83 European Commission, 'Factsheet. The EU-Turkey Statement, Three years on', March 2019, available online: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en.

84 Information based on expert interviews (n 66).

85 EU-Turkey Statement (n 11) point 4. The V-HAS is based on the at the time unsuccessful Commission Recommendation for a voluntary humanitarian admission scheme with Turkey, 15 December 2015, C(2015) 9490.

86 While the daily average of arrivals on the Greek islands at the end of 2015 was between 6,000 and 3,000 persons, the daily average since 21 March 2016 when the Statement 'entered into force' is consistently about 80 arrivals. European Commission, Factsheet. The EU-Turkey Statement, Three years on, March 2019 (n 83).

87 See UNHCR, 'Legal Considerations on the Return of Asylum Seekers and Refugees from Greece to Turkey as Part of the EU–Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asy-

binding international obligations.[88] Nevertheless, it is difficult to consider the EU-Turkey Statement as part of the emerging EU resettlement law in a strict sense because, according to the European Court, the Statement cannot be attributed to the EU.[89] Nevertheless, resettlement, as implemented under the EU-Turkey Statement, is key to understanding the emerging EU resettlement law, as explained above.[90] The details of the implementation of the '1:1 resettlement scheme' are laid down in the *Standard Operating Procedures* ('SOP Resettlement-EuT'), which were drafted by the Commission, subsequently endorsed by the Council, and then 'formalised' by way of an exchange of letters between the Commission and the Turkish authorities in May 2016.[91] The SOP Resettlement-EuT contains rules on eligibility criteria and on the procedure. The scheme is implemented through national programmes, the respective design of which differs. Operational support for the resettlement procedure is still mainly provided by UNHCR, and by IOM with regard to travel arrangements. A pilot project providing for enhanced operational support through EASO is envisaged.[92]

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lum Concept' (2016), available online: https://www.refworld.org/docid/56f3ee3f4.html; D Thym, 'Why the EU-Turkey Deal is Legal and a Step in the Right Direction' (2016) *Verfassungblog* 09 March 2017; R Hofmann and A Schmidt, 'Die Erklärung EU-Türkei vom 18.3.2016 aus rechtlicher Perspektive' (2016) 11 *Neue Zeitschrift für Verwaltungsrecht* 1. The dispute on the legal nature and the legality was not solved by the orders of 28 Feb 2017, T-192/16, T-193/16 and T-257/16, NF et al (n 54). The appeal to the European Court of Justice was rejected as inadmissible: European Court of Justice, order of 12 Sept 2018, Joined Cases C-208/17 P to C-210/17 P, NF and Others v European Council.

88 Convincingly in favour of an international obligation on resettlement: R Hofmann and A Schmidt (n 87) 5.

89 European Court, orders of 28 Feb 2017, T-192/16, T-193/16 and T-257/16, NF et al (n 54).

90 See n 65 ff. Another reason why the implementation of resettlement under the EU-Turkey Statement is key to understanding resettlement on EU level, is that almost all elements of the emerging EU resettlement law are of relevance to the implementation of the '1:1 scheme': The procedures are guided by the 'Standard Operating Procedures', the capacity is counted under the 'July 2015 scheme' and the subsequent '50,000 scheme', and the relevant provisions of the AMIF Regulation and the EASO Regulation are obviously applicable.

91 Council of the European Union, Annex to the Note from the Presidency to the Representatives of the Governments of the member states, Subject: Standard Operating procedures implementing the mechanism for resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016 – Endorsement, Brussels, 27 April 2016, 8366/16.

92 Information based on expert interviews (n 66).

Finally, the Commission's *Proposal for a Union Resettlement Framework* of 2016 provides a model codification of resettlement as implemented under the EU Turkey Statement.[93] The Proposal must be seen in context of the proposals addressing a comprehensive reform of the Common European Asylum System, in particular, the proposal for a European Union Asylum Agency (EUAA) and the AMIF reform proposal,[94] providing for enhanced administrative support to Member States. The proposal aims at the establishment of common rules on admission through resettlement, including rules on eligibility criteria and exclusion grounds, standard procedures, the status to be accorded to the resettled person, and conditionality clauses towards third States.[95] With regard to the administrative level, the Proposal still focuses on financial support to the Member States. It thus not only upholds the central role of UNHCR, but also provides for the possibility of enhanced operational support through the EU agency.[96] The Proposal – which, as explained, reflects the recent EU approach to resettlement, as implemented in an ad hoc manner under the EU-Turkey Statement – has been met with widespread criticism, including from UNHCR, academia and the relevant policy actors.[97] The European Parliament has proposed numerous amendments to generally realign resettlement with the international policy framework.[98] Interestingly, however, it mainly seems to be due to the lack of a common political position concerning internal allocation that the Proposal has not yet moved forward.[99]

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93 See n 12.

94 European Commission, Amended Proposal for a Regulation of the European Parliament and of the Council 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, 12 September 2018, COM(2018) 633 final; European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund, 12 July 2018, COM(2018) 471 final.

95 Union Framework Proposal, p 9.

96 In particular, Art 10 para 8 Union Framework Proposal.

97 FL Gatta (n 34) 184 ff provides a good overview of the criticism. See in more detail below, n 123 and n 150.

98 European Parliament, Report on the 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, 19 October 2017. The amendments proposed by the Council are much less numerous: Council of the European Union, Note from the Presidency to the Delegations on the [Union Framework Proposal], Brussels, 22 Feb 2017, 5332/17.

99 M Savino (n 13) 89. It seems somehow ironical that what is blocking international responsibility-sharing is the disagreement on EU internal solidarity.

The emerging EU resettlement law, as it currently stands, shows that most aspects of resettlement are increasingly provided for on EU level, in particular, resettlement capacity, eligibility criteria, procedure and conditionality clauses. While there is a tendency towards a binding harmonisation of eligibility criteria, procedure and conditionality, this seems to not be the case when it comes to capacity. Even though Member States are implementing the EU schemes through their respective national programmes, the relevance of the EU on the legislative level is clearly on the rise. On the administrative level, however, the role of the EU has not increased at the same pace. The latter becomes clear from the fact that the EU support continues to focus on financial incentives, while operational support is still mainly provided by UNHCR, which indeed is the global key actor, and the decade-long partner of Member States for implementing resettlement. It does not seem clear yet whether attempts to strengthen EU operational support through the responsible EU agency would be practically and politically feasible.

2. *The controversies on the objective of resettlement*

While there seems to be a broad agreement that the emergence of an EU resettlement law is a welcome development, the rationale and the very objective of resettlement is subject to debate. Undoubtedly, resettlement provides legal access to international protection. However, is this the main objective of resettlement? Or can the provision of international protection be considered as the side effect of a policy that pursues first and foremost other objectives, such as 'managing migration' or even strengthening the bargaining position of the EU with regard to the achievement of foreign policy goals in other areas? The answer to this question has repercussions on two more specific controversies concerning the purpose of resettlement. *First*, the relation of resettlement to territorial asylum procedures is contentious: Should resettlement complement or, in the long term, eventually replace territorial asylum? *Second*, the purpose with regard to the concerned first host countries is disputed: Should resettlement primarily ensure fair sharing of international responsibility for refugee protection, or can it instead be used to achieve the externalisation of such responsibility? Defining the objective of resettlement is of practical relevance, since it has direct implications for the concrete design of a certain resettlement

scheme, including eligibility criteria, procedure and conditionality clauses.[100]

In the following, the objective underlying the emerging EU resettlement law will be analysed. It will be shown that the emerging EU resettlement recently seems to reflect a certain tendency towards the controversial conceptualisation of resettlement as eventually replacing territorial asylum procedures (2.1) and that it increasingly seems to reflect the contentious understanding that resettlement may be employed to externalise responsibility for refugee protection to third countries (2.2). Such an approach stands in contradiction to the international policy framework and has accordingly been met with harsh criticism.[101]

2.1. Towards replacing territorial asylum procedures?

The relation of resettlement to territorial asylum is controversial. The question is whether resettlement as a form of extraterritorial status determination in the long term has the objective of eventually replacing traditional territorial asylum procedures, which require spontaneous, and hence usually irregular, arrival.[102]

The international policy framework conceives resettlement and territorial asylum as complementary parts of an effective protection system, as

100 See below 2. To give an example: If the objective of resettlement is to eventually replace territorial asylum, this could be reflected in corresponding incentives for the individuals and the Member States, such as an exclusion clause precluding from resettlement those who have attempted to irregularly cross the border, and a conditionality clause, making resettlement dependent upon the Member State's effective prevention of border-crossings towards the destination State.

101 See n 97 and n 98, as well as in more detail n 123 and n 150.

102 The term 'territorial asylum' is being used here as abbreviation of 'territorial asylum procedures', ie in the sense of 'granting protection to persons who have arrived spontaneously' – thus referring to the *means of access* to protection; for the use of the term in this sense, see: J Van Selm (n 7) 43 ff. The term 'territorial asylum' is hence not used here in the sense of the Draft Convention on Territorial Asylum; for the use of the term in that sense, see: R Plender, 'Admission of Refugees: Draft Convention on Territorial Asylum' (1977) 15 *San Diego Law Review* 45 and further P Weis, 'Territorial Asylum' (1966) 6 *Indian Journal of Refugee Law* 173. The term 'asylum' is hence also not used to refer to the *content* of protection; for the use of the term in that sense, see: GS Goodwin-Gil and J McAdam (n 25) 355 ff; S Meili, 'The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?' (2018) 41 *Fordham International Law Journal* 383.

stressed by UNHCR as well as by scholarship.[103] The understanding of resettlement as complementary even represents the very argumentative basis for its generally accepted conceptualisation as discretionary act.[104]

In order to identify the provisions reflecting the conceptualisation of the relation between resettlement and territorial asylum, it is useful to have a closer look at the argument underlying the idea of resettlement as eventually *replacing* traditional territorial asylum procedures.[105] The Australian protection system is the most prominent example of a consistent implementation of the 'replacement approach' to resettlement, resulting in a system which is in breach of international refugee and human rights law.[106] Indeed, the 'replacement argument' is central to the Australian discussion on resettlement.[107] The Australian discourse shows that the 'replacement argument' actually appears in two variations.[108] On the one hand, the 'wait-in-the-line argument' suggests that persons irregularly arriving are 'illegitimately jumping the queue' instead of waiting in the country of first

103 UNHCR, Observations on the Communication from the European Commission to the Council and the European Parliament on Regional Protection Programmes (COM (2005) 388 final, 1 Sept 2005), 10 Oct 2005; J Van Selm (n 7) 44 ff; SVR (n 13) 4.

104 COM Resettlement Feasibility Study (n 20) v, xxiii, passim.

105 Similarly, SVR (n 13) 20 ff identifies the arguments underlying the Australian 'replacement approach' and shows that this approach is reflected in the Union Framework Proposal. *Cf* J Van Selm (n 2) 517 ff who identifies the question as crucial on the global level.

106 *cf* S Kneebone, 'The Australian Story: Asylum Seekers Outside the Law', in S Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge University Press, 2009) 17; J McAdam and F Chong, *Refugees: Why seeking asylum is legal and Australia's policies are not* (University of New South Wales Press, 2014).

107 See Parliament of Australia, Department of Parliamentary Services, Research Paper Series, 2014-15, 3 February 2015, 'Refugee Resettlement to Australia: what are the facts?', available online: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/RefugeeResettlement.

108 The potential 'export value' of the Australian discourse has already been noted before the crisis of the Common European Asylum System, see J van Selm (n 2) 516. The 'export value' of certain discourses on resettlement can be noted more generally because, in the absence of an international binding framework, States justify their practice with reference to practice of other States, *cf* D Ghezelbash, 'Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum Seekers in the United States and Australia' in J-P Gauci, M Guiffré and EL Tsourdi (eds) *Exploring the Boundaries of Refugee Law* (Brill, 2015) 90.

refuge for their time to be resettled.[109] The first variation of the argument is thus: 'there should be a preference for resettlement'. On the other hand, the 'see-saw hypothesis' assumes that the overall number of persons who are 'legitimately' entitled to receive protection by a particular country is stable.[110] The second variation of the argument is thus: 'the more resettlement, the less territorial asylum'. Quite apart from the fact that both variations of the argument lack an empirical basis and that the assumptions about what is 'legitimate' do not seem to be substantiated with any arguments,[111] it should be noted from a conceptual point of view that the combination of both variations amounts to an argument in favour of abolishing territorial asylum.[112]

In the early 2000s, the European Commission, in line with the international policy framework, still stressed that 'any resettlement scheme must be complementary to and not alternative to the processing of spontaneous asylum claims'.[113] Both the EU asylum *acquis* in a strict sense, in particular the AMIF Regulation and the EASO Regulation, as well as the legal and non-legal instruments providing for common EU resettlement goals, remain silent on the issue.[114] The more recent developments in the emerging EU resettlement law, in particular the EU-Turkey Statement and the Union Framework Proposal, however, do address the relation of resettlement to territorial asylum both explicitly and implicitly.

The explicit references in the respective elements of the emerging EU resettlement law are not entirely consistent in this regard. On the one hand, the SOP Resettlement-EuT underline that the implementation of resettle-

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109 J Van Selm (n 7) 40; M O'Sullivan, 'The ethics of resettlement: Australia and the Asia-Pacific Region' (2016) *The International Journal of Human Rights* 241, 246, 249.

110 J Van Selm (n 7) 40; M O'Sullivan (n 109) 246 with different terminology.

111 M O'Sullivan (n 109) 246: 'there is no 'resettlement queue'' with reference to J McAdam, 'Editorial: Australia and Asylum Sekers' (2013) 15 *International Journal of Refugee Law* 435, 439; J Van Selm (n 7) 41: 'No country that carries out resettlement in significant numbers has seen spontaneous arrivals of asylum-seekers disappear or dwindle as a result'.

112 Giving preference to resettlement, while at the same time reducing territorial asylum proportionally, amounts to aiming at reducing territorial asylum to zero. As exemplified by the Australian example, this is actually the practical consequence of an approach based on the 'replacement argument', *cf* n .

113 European Communication, 2004 Communication on Managed Entry (n 44) para 12; COM Resettlement Feasibility Study (n 20) v.

114 Even though it stresses the complementary function of, for instance, voluntary and forced return as two forms of return management, *cf* AMIF Regulation, recital 28.

ment under the EU-Turkey Statement is 'without prejudice to apply for asylum'.[115] The Union Framework Proposal along the same lines stresses that it is 'without prejudice to the right to asylum and the protection from refoulement'.[116] On the other hand, however, the EU-Turkey Statement explicitly conceives resettlement as a measure which has been agreed upon in order to 'end irregular migration from Turkey to the EU', and thus reflects the 'wait-in-the-line argument'.[117] The Union Framework Proposal for the first time explicitly states that 'resettlement should be the preferred avenue to international protection in the territory of the Member States'.[118]

This latter understanding indeed seems to be reflected in the concrete design of resettlement, as conceived by the EU-Turkey Statement and the Union Framework Proposal. First, both contain 'punitive exclusion clauses', precluding from resettlement those who have attempted to irregularly cross the border towards the EU.[119] These clauses reflect the 'wait-in-the-line argument'.[120] Second, the emerging EU resettlement law increasingly tends towards conditionality clauses, reflecting the 'replacement argument'. The '1:1 scheme', as conceived under the EU-Turkey Statement, is a clear reflection of the 'see-saw hypothesis'. In the same vein, the activation of the V-HAS was made dependent upon the ending, or at least a substantial and sustainable reduction, of irregular border-crossings from Turkey to the EU. To be sure, neither of those schemes has been implemented as

115 SOP Resettlement-EuT, Step 5.

116 Union Framework Proposal, p 8.

117 EU-Turkey Statement (n 11). It could only be understood differently if, at the same time, policies to reduce visa requirements or carrier sanctions were pursued, this is, however, not the case.

118 Union Framework Proposal, p 13: 'Resettlement should be the preferred avenue to international protection in the territory of the member states and should not be duplicated by an asylum procedure.' It seems that the last part of the sentence cannot be understood as limiting the content of the first part so as to mean that territorial asylum should only be de-prioritised for those who have already benefitted from resettlement, since the Proposal – in contrast to earlier policy documents of the early 2000s – does not mention anywhere that resettlement is to be understood as 'complementary' to territorial asylum.

119 SOP Resettlement-EuT, 'Selection Criteria': 'Priority will be given to eligible persons who have not previously entered or tried to enter the EU irregularly'; Art 6 Union Framework Proposal, 'Grounds for Exclusion': '[…] shall be excluded […] persons who have irregularly stayed, entered, or attempted to irregularly enter the territory of the member states during the five years prior to resettlement'.

120 *cf* O'Sullivan (n 109) 242, 247 ff.

foreseen in the letter of the Statement itself.[121] The argument underlying these schemes, however, seems to have had a lasting effect on the understanding of resettlement, as it is taken up in the Union Framework Proposal. The Proposal namely makes resettlement dependent upon several factors, including the third country's effective 'cooperation with the Union' in terms of reducing the number of irregular border-crossings towards the EU.[122] This condition determines that an increase in resettlement capacity depends on a decrease in numbers of persons applying for territorial asylum, in other words, it reflects the 'see-saw hypothesis'.

To conclude, the emerging EU resettlement law recently seems to be tending towards the 'replacement approach'. This approach seems to underlie the EU-Turkey Statement and the Union Framework Proposal in particular. The international policy framework, however, conceives resettlement as complementary to territorial asylum procedures. The provisions of the Union Framework Proposal reflecting the 'replacement approach' have accordingly been criticized by the relevant policy actors with reference to the international policy framework.[123]

2.2. Towards externalising responsibility?

In analysing the objective underlying a resettlement scheme, not only the relation of the destination state to the concerned individuals, but also the relation of the destination State to the first host country must be taken into account. In this regard, the function of resettlement for the allocation of international responsibility is controversial.

The international policy framework clearly conceptualises resettlement as a tool for ensuring fair sharing of international responsibility for refugee

121 See n 85 and 86.

122 Art 4 lit d Proposal Union Framework Proposal.

123 Caritas et al. (n 14) at 2 specifically stressing that resettlement must be regarded as complementary to territorial asylum procedures and at 5 recommending to remove the punitive exclusion clauses; ECRE (n 18) 3 and Amnesty International (n 18) at 2 ff criticising the 'punitive exclusion clause'; SVR (n 13) 19 ff, 25, clearly identifying the 'replacement approach' and stressing the complementary function of resettlement.

protection.[124] The 2018 Global Compact puts even greater emphasis on resettlement as a way of ensuring international responsibility sharing.[125]

Before analysing which conceptualisation underlies the emerging EU resettlement law, the meaning of responsibility for refugee protection and its externalisation must be briefly clarified. States have recognised that the responsibility to protect refugees is common to all States.[126] This seems consequential, given that the situation of refugeehood is characterised by the loss of protection by the home country, and that this situation should be remedied by another State.[127] Which State is to be held responsible, however, is not that obvious. And indeed, the question of the allocation of responsibility for refugee protection remains, to a large extent, unsolved on the international level.[128] In the absence of an international allocation mechanism, one can distinguish between State policies primarily aiming at ensuring fair sharing of international responsibility,[129] and those designed to avoid the concerned State's own responsibility.[130] The former policies are increasingly referred to as an expression of international solidarity.[131] The latter policies can be described as externalisation policies.[132] Indeed,

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124 UNHCR, Observations and Comments on the Union Framework Proposal (n 18) 1 ff; UNHCR, Position Paper on the Strategic Use of Resettlement, Annual Tripartite Consultations on Resettlement, Geneva, 4 June 2010, available online: https://www.refworld.org/docid/4c0d10ac2.html, passim; J Van Selm (n 7) 40 ff.

125 2018 Global Compact (n 9) para 90 ff.

126 2018 Global Compact, v: 'The predicament of refugees is a common concern of humankind.', *cf* A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009). This kind of 'common responsibility' is not to be confused with 'shared responsibility' in the legal sense, *cf* on the question of shared responsibility in the legal sense A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2012) 34 *Michigan Journal of International Law* 359, 362.

127 *cf* J Hathaway and H Storey, 'Opinion. What is the Meaning of State Protection in Refugee Law? A Debate' (2016) 28 *International Journal of Refugee Law* 480 ff.

128 GS Goodwin-Gil and J McAdam (n 25) 149.

129 Yet another question is what could be considered 'fair' in this context, see n 233.

130 These are obviously rough categories.

131 2018 Global Compact, 1: 'The global compact emanates from fundamental principles of humanity and international solidarity […]'. For the purpose of this paper, however the less ambitious understanding as international responsibility-sharing is sufficient.

132 J Hyndman and A Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' 43 *Government and Opposition* 249; T Gammeltoft-Hansen, 'Outsourcing Asylum: The Advent of Protection Lite' in L Bialasiewicz (ed) *EU Geopolitics and the Making of European Space* (Routledge, 2011) 129.

not all externalisation policies in this sense entail the transfer of *legal* responsibility for protection.[133] Externalisation policies can rather be understood as encompassing both policies aiming at the prevention of the emergence of legal responsibility, in particular so-called non-entrée policies,[134] as well as policies aiming at the transfer of legal responsibility, in particular, so-called protection-elsewhere policies.[135] As States currently generally seem to have an interest in reducing the number of persons in need of protection present on their territory,[136] resettlement policy gives political leverage to the destination State, which can make resettlement dependent

133 Legal responsibility for protection, generally speaking, emerges in case of territorial or jurisdictional contact, *cf* ECtHR, Grand chamber judgment of 23 Feb 2012, Hirsi Jamaa and Others v Italy, Application No 27765/09; *cf* Art 31 of the 1951 Convention Relating to the Status of Refugees [hereinafter referred to as: *Geneva Convention*]. In the case of the EU however, legal responsibility for protection might arise due to Art 4, 18, 19 ChFR under less demanding preconditions, *cf* V Moreno-Lax and C Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in S Peers, T Hervey, J Kenner and A Ward (eds) *The EU Charter of Fundamental Rights. A Commentary* (Oxford University Press, 2014) 1658; cf M Savino (n 13) 88.

134 See on the notion of non-entrée policies: J Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refuge* 40; J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) 8 *University of Michigan Law School, Law and Economics Working Papers*. The effective application of non-entrée policies seems to consist of visa requirements and carrier sanctions, increasingly combined with externalization of entry-preventing border control to third states, cf. V Moreno-Lax, Accessing Asylum to Europe. Extraterritorial Border Control and Refugee Rights under EU Law (Oxford University Press, 2017), 39ff.

135 See on protection-elsewhere policies M Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25 *Refuge* 64; C Costello (2005) 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' 7 *European Journal of Migration and Law* 35. The effective application of protection-elsewhere policies requires two components: First, a situation in the third country with regard to which the 'safe third country concept' or the 'first country of asylum concept' as laid down in eg Art 35, 38 Asylum Procedures Directive can be applied ie, cooperation of the third State with regard to the 'creation of a protection elsewhere situation', and second, the willingness of the third country to accept the forced transfer of persons who do not have the nationality of the state to where they are transferred ie, cooperation of the third State with regard to readmission.

136 As, for instance, reflected in the language of '*burden*-sharing'. *Cf* 2018 Global Compact, v: 'There is an urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world' refugees […]'; in the

upon the cooperation of the first host State, for instance, with regard to the destination State's externalisation policies. As such, this approach has the consequence that resettlement is conceived as a measure for supporting externalisation of responsibility, and can thus be described as 'externalisation approach' to resettlement.

The explicit references in the emerging EU resettlement law, as it currently stands, seem to reflect, in line with the international policy framework, the objective of ensuring fair sharing of international responsibility. The EASO Regulation explicitly refers to the support of resettlement 'with a view to meeting the international protection needs of refugees in third countries and showing solidarity with their host countries.'[137] The AMIF Regulation is not entirely clear on this point as it differentiates between 'responsibility-sharing between member states' and 'cooperation with third countries' without clarifying what is meant by cooperation.[138] The 'July 2015 scheme' more clearly refers to the aim of a more equitable sharing of responsibility, and at the same time puts an emphasis on the objective of resettlement to admit and grant rights to those in need of interna-

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same vein already New York Declaration for Refugees and Migrants, Resolution adopted by the General Assembly on 19 September 2016, A/RES/71/1 [hereinafter: *2016 New York Declaration*], para 68: 'We underline the centrality of international cooperation to the refugee protection regime. We recognize the burdens that large movements of refugees place on national resources, especially in the case of developing countries […] we commit to a more equitable sharing of the burden and responsibility of hosting and supporting the world's refugees […].' The situation was entirely different during the Cold War, when resettlement was rather seen as economic and ideological advantage by 'Western' destination states. See on the ensuing shifts in the 'hierarchy' between the three durable solutions in the aftermath of the Cold War: TA Aleinikoff, 'State-Centered Refugee Law: From Resettlement to Containment' (1992) 14 *Michigan Journal of International Law* 120. However, it must be noted in this context that Turkey, while party to the Geneva Convention, maintains the geographical limitation ie, is bound by the Convention only with regard to persons originating from Europe. Therefore, resettlement is still considered the preferred durable solution for refugees in Turkey arriving due to events occurring outside of Europe, see UNHCR, 'Refugees and Asylum Seekers in Turkey', available online: https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey; and in more detail M Ineli-Ciger, 'Protecting Syrians in Turkey: A Legal Analysis' (2017) 29 *International Journal of Refugee Law* 555, 564.

137 Art 7 para 2 EASO Regulation.

138 See recitals 2, Art 3 para 2 lit d, Art 18 para 1 and 4 AMIF Regulation for 'responsibility-sharing between member states' and 'cooperation with third states' and see recital 7 for 'sharing responsibility and strengthening cooperation with third countries'.

tional protection.[139] Similar references are made in the '50,000 scheme'.[140] Remarkably, the EU-Turkey Statement is silent on the issue of international responsibility sharing. The Union Framework Proposal again stresses the objective of 'international solidarity and responsibility sharing with third countries'.[141]

Nevertheless, the concrete design of the resettlement schemes under the EU-Turkey Statement, as well as under the Union Framework Proposal, seem to increasingly reflect the understanding that resettlement might be used for the purpose of externalising responsibility. This is suggested by the factors determining which third countries or regions EU Member States shall focus on with regard to resettlement. These factors increasingly require the third country's effective cooperation on the prevention of irregular border-crossing towards the EU, on the creation of conditions which allow for the application of 'protection elsewhere clauses' such as, in particular, the 'safe third country concept',[142] and on readmission to the third country.[143] The EU-Turkey Statement, for the first time, comprehensively relies on externalisation through this combined conditionality in the context of resettlement.[144] The '1:1 scheme', as implemented in practice, seems to be based on an implicit conditionality clause, making resettlement dependent upon cooperation in terms of entry-preventing border control

139 European Commission, Recommendation establishing the 'July 2015 scheme' (n 73), point 2 referring to the 2016 New York Declaration.

140 European Commission, Recommendation establishing the '50,000 scheme' (n 78), recital 6 ff referring to the 2016 New York Declaration.

141 Union Framework Proposal, 1, 2, 6, 8.

142 See M Savino (n 13) 84 ff.

143 See M Garlick (n 45) 603 who already in 2006 identified these three elements. Concerning the 'creation of a protection elsewhere situation' she notes that with regard to 'EU's expressed desire […] to help states improve their refugee protection record […] a link is sometimes made to the EU's emphasis on [safe third country] rules'.

144 Even though the 'July 2015' scheme already aimed at externalisation through resettlement, it still relied on a slightly different approach, focusing on the application of so-called 'Regional Development and Protection Programmes', see GAMM (n 47). *Cf* UNHCR, 'Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of asylum Seekers and Migrants, 10 March 2016' (2017) 29 *International Journal of Refugee Law* 492, criticising at 493 with regard to the EU Turkey Statement that '[s]uch arrangements would be aimed at enhancing the sharing, rather than shifting of burdens and responsibilities', however, at 495 not noting the reflection of the externalisation approach in the design of the resettlement scheme.

and readmission.[145] At the same time, since, at least conceptually, resettlement is made directly conditional upon returns,[146] and return is conditional upon the application of 'protection elsewhere clauses',[147] resettlement is made indirectly conditional upon the 'creation of a protection elsewhere space'.[148] The Union Framework Proposal, for the first time, explicitly lays down this approach of externalisation through the combined conditionality. It provides that the criteria to be taken into account when determining from which countries or regions resettlement is to occur include 'the number of persons in need of international protection […] within a third country', but puts a clear emphasis on 'a third country's effective cooperation with the Union in the area of migration and asylum', including effective entry-preventing border control, 'creating conditions for the use of the first country of asylum and safe third country concepts for the return of asylum applicants' and 'increasing the capacity for reception and protection', as well as effective cooperation in terms of readmission.[149]

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145 As already mentioned, the '1:1 scheme' has never been implemented as such. According to information based on expert interviews (n 66), the reason for EU Member States to nevertheless engage in resettlement independent of the return numbers is the 'symbolic value' of resettlement: Resettlement is apparently politically relevant, regardless of the fact that resettling 20,000 refugees can hardly be considered effective 'international responsibility sharing' by a country hosting 3.6 million Syrian refugees along with over 365,000 persons of concern for UNHCR from other nationalities, *cf* UNHCR, 'Refugees and Asylum Seekers in Turkey', available online: https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey. The 'symbolic value' of resettlement according to information based on expert interviews consists in serving to show the 'goodwill' of EU Member States, which is in turn perceived as necessary for ensuring Turkey's continuous cooperation in terms of border control and readmission.

146 However, only on a conceptual level, under the '1:1 scheme'. As to the implementation, see n 145.

147 Since, obviously, the implementation of the return policy in the EU Hotspots in Greece depends on the recognition of Turkey as 'safe third country' or 'first country of asylum'. C Ziebritzki and R Nestler, 'Hotspots an der EU-Außengrenze. Eine rechtliche Bestandsaufnahme. Arbeitspapier' (2017) 17 *MPIL Research Paper* 28 ff.

148 However, as the financial support provided to Turkey has not led to the creation of conditions that make it possible to recognise Turkey as such, the return policy has failed. *Cf* O Ulusoy and H Battjes, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement' (2017) 15 *VU Migration Law Series*; M Gkliati, 'The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committee' (2017) 10 *European Journal of Legal Studies* 81.

149 The 'focus regions' shall be determined through an 'annual Union resettlement plan' adopted by the Council upon proposal from the Commission, on the basis

To conclude, the emerging EU resettlement law more recently seems to reflect the 'externalisation approach'. The EU-Turkey Statement and the Union Framework Proposal in particular reflect this trend towards employing resettlement for the purpose of externalisation. The international policy framework, however, conceives resettlement as an instrument ensuring international sharing of responsibility for refugee protection. The provisions of the Union Framework Proposal reflecting the 'externalisation approach' have thus been met with strong criticism, including from academia, the relevant policy actors, and UNHCR.[150]

3. *The constitutional objective of resettlement*

As shown, the emerging EU resettlement seems to be tending towards the controversial conceptualisation of resettlement as eventually replacing territorial asylum, while at the same time increasingly using resettlement as a tool for externalisation of responsibility for refugee protection through combined conditionality. This approach to resettlement in particular underlies the EU-Turkey Statement and the Union Framework Proposal, which have accordingly been described as reflecting a 'paradigm shift'.[151]

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of which the Commission shall adopt 'targeted Union resettlement schemes', see Arts 7 and 8 Union Framework Proposal. These targeted schemes shall include the 'specification of the regions or third countries from which resettlement is to occur' in line with the mentioned criteria provided for in Art 4 lit. a and d Union Framework Proposal.

150 M Savino (n 13) at 92 ff speaks of a 'complete subjugation of resettlement to the priority of border control', and at 94 ff criticises 'the instrumentalisation of resettlement as an additional migration management tool and an exchange currency in negotiations with third countries'; UNHCR, Observations and Recommendations on the Union Framework Proposal (n 18) at 5 stressing that resettlement is not a migration management tool and therefore strongly objecting the conditionality clauses making resettlement dependent upon return or readmission; Caritas et al. (n 14) 3 ff, criticising the conditionality clauses towards third countries as transforming resettlement primarily into a migration management tool; ECRE (n 18) 1 ff, criticising the use of resettlement for the purpose of migration control, deterrence and readmission; Amnesty International (n 18) 1 ff, objecting to the conceptualisation of resettlement as instrumental to the objective of migration deterrence and return; K Bamberg (n18), arguing in favour of the conceptualisation as 'humanitarian pathway' instead of as a migration management tool; SVR (n 13) 7.

151 M Savino (n 13) 92 speaks of a 'paradigm shift' from the 'traditional humanitarian conception' to an 'instrumental conception' of resettlement. In the same

The Union Framework Proposal, modelling a possible codification of this resettlement practice, has therefore been met with strong criticism. The reaction to the Proposal is indeed only marginally concerned with the increasing EU involvement as such, but rather focuses on some specific provisions. As shown above, the contentious provisions can be identified as reflecting the 'replacement approach', respectively the 'externalisation approach'.[152] Surprisingly, however, resettlement under the EU-Turkey Statement is still not subject to much debate, even though it already implements, in an ad hoc manner, the approach codified in the Union Framework Proposal.

The criticism, generally speaking, refers to the international policy framework as the normative yardstick. The international *legal* framework is referred to only in some instances, while the EU *constitutional* framework seems to serve as an auxiliary yardstick concerning specific questions.[153] Referring primarily to the international policy framework as a normative benchmark, however, has certain disadvantages since this framework is binding only to a limited extent, and is to a certain degree unstable.[154] These disadvantages would be remedied by an increased reference to the EU constitutional framework as the normative yardstick.[155] And in any case, as the EU is increasingly regulating resettlement, it can only do so in compliance with its constitutional framework. The debate on the objective of resettlement, therefore, should take greater account of the EU constitutional framework.

The central question thus concerns what EU constitutional law says on the objective of resettlement.

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vein, C Tometten, 'Resettlement, Humanitarian Admission, and Family Reunion' (2018) *37 Oxford Refugee Survey Quarterly* 187, 190, 199 notes that the 'EU Turkey Deal […] transforms resettlement from a mechanism of protection into an instrument of containment. […] Resettlement is thus perverted into a tool for effective […] management and, concomitantly, containment of refugee flows instead of responsibility-sharing […].'.

152 See n 123 and n 150.

153 See n 21. For an assessment of the 'replacement approach' from an *ethical* perspective see M O'Sullivan (n 109) 247 ff, 258 who concludes that the approach is 'ethically unacceptable'.

154 As UNHCR is financed by the states, economic and political interest of potential destination states may lead to UNHCR adapting its positions. In particular, state practice during 'refugee crisis' seems to have a lasting influence on the positions of UNHCR, as shown by T Bessa, 'From Political Instrument to Protection Tool? Resettlement of Refugees and North-South Relations' (2009) 26 *Refuge* 91, 93.

155 Which could be seen as a beneficial side effect of the perspective of this article.

In order to answer that question, it is *firstly* necessary to understand where to locate the emerging EU resettlement law within EU law, in other words, to define the relevant constitutional framework and to identify into which area of EU law the emerging EU resettlement law is integrated. The more recent conceptualisation of resettlement, as eventually replacing asylum and as a tool supporting the externalisation of responsibility, could be understood as reflecting the view that the rationale of resettlement is governed by immigration policy or even foreign policy. However, as will be shown in the following, the emerging EU resettlement law is firmly integrated into the Common European Asylum System and therefore governed by the constitutional rationale of EU asylum law (3.1). This follows from the legal basis and the content of the emerging EU resettlement law, and is confirmed by explicit statements of the EU institutions.

Secondly, it is necessary to understand what the constitutional framework says on resettlement, that is, to analyse the relevant constitutional framework in regard to resettlement. To be sure, EU constitutional law does not contain explicit rules on resettlement. Nevertheless, as laid out in the following, the constitutional framework of the Common European Asylum System is indeed relevant to resettlement. In particular, Art. 78 TFEU and Art. 18 CHFR, which define the constitutional objective of the Common European Asylum System and provide for the incorporation of the international refugee law into the EU constitutional framework, are pertinent to the objective of resettlement.[156] As will be shown in the following, the constitutional framework of the Common European Asylum

156 *Further*, and going beyond the scope of this article, the pertinence of the constitutional framework to the emerging EU resettlement law is not limited the definition of its objective, *cf* n 21. In particular concerning the pertinence of the constitutional framework with regard to fundamental rights in the realm of resettlement, further analysis is required: On the one hand, it would have to be assessed whether the Charter of Fundamental Rights is applicable to resettlement, taking into account in particular European Court of Justice, judgment of 7 May 2013, C-617/10, Åklagaren v Hans Åkerberg Fransson, para 21; European Court of Justice, judgment of 20 Sept 2016, C-8/15 to C-10/15 P, Ledra Advertising Ltd and Others v European Commission and ECB, para 66 ff; European Court of Justice, judgment of 13 June 2017, C-258/14, Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others. If so, the debate on fundamental rights in extraterritorial asylum procedures cannot be circumvented simply by labelling a procedure as 'resettlement' instead of 'extraterritorial asylum procedure' or 'humanitarian visa'. On the other hand, the consequences of the external human rights commitment as arising from Art 3 para 5, Art 21 para 1 TEU would have to be assessed, taking into account in particular the human right to leave any country; see on the latter N Markard, 'The Right to Leave by Sea: Legal Limits

System defines that the principal objective of resettlement is to provide international protection to third country nationals (3.2), thereby complementing territorial asylum (3.3) and ensuring fair sharing of international responsibility with Member States (3.4). The constitutional perspective, thus, comes to the same conclusion as the positions criticising the approach recently underlying the emerging EU resettlement law. In other words, this criticism is undergirded by constitutional arguments.

3.1. Resettlement as a component of the Common European Asylum System

The question about the area of EU law into which the emerging EU resettlement law is integrated can be answered by assessing its legal basis and content, while taking into account the view of the EU institutions.[157]

First, the competence of the EU to adopt common rules on resettlement and to support national administrations with regard to implementation is found within the Common European Asylum System, namely in Art. 78 para 2, Art. 74 TFEU.[158]

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on EU Migration Control by Third Countries' (2016) 27 *The European Journal of International Law* 591. As the aim of this article is, however, limited to the definition of the *objective* of the emerging EU resettlement law in a constitutional perspective, the constitutional requirements concerning fundamental rights will not be further examined within the scope of this contribution.

157 If the EU relies, for instance, on its broad competences in the Common European Asylum System in order to adopt common rules on resettlement, these rules must comply with the rationale of EU asylum law. In the same vein: If the content of the emerging EU resettlement law closely refers to the EU asylum *acquis*, it must be understood as forming part of the Common European Asylum System. If the EU institutions explicitly state that the emerging EU resettlement law forms part of the Common European Asylum System, this should imply the understanding that its rationale is governed by the constitutional framework of that system.

158 In light of the scope and content of the emerging EU resettlement law, it is no longer required to discuss 'whether or not a legal basis as such is even necessary' as was still discussed in the COM Resettlement Feasibility Study (n 20) 139. As a shared competence, EU legislation on resettlement must comply with the principles of proportionality and subsidiarity, see Art 5 TEU, Art 4 lit j TFEU. In cases of doubt, the objective of Art 78 para 1 TFEU speaks for harmonisation, see K Hailbronner and D Thym, 'Legal Framework for EU Asylum Policy' in K Hailbronner and D Thym (eds) *EU Immigration and Asylum Law. A Commentary* (CH Beck, 2nd edition, 2016) 1030 ff.

Art. 78 para 2 TFEU confers upon the Union the competence to harmonise resettlement rules.[159] Art. 78 para 2 lit. g TFEU allows the Union to adopt measures concerning 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'.[160] Resettlement is a measure enhancing State control in the realm of forced migration through extraterritorial activities and is hence generally understood as falling under Art. 78 para 2 lit. g TFEU.[161] The provision contains an internal competence, even though it implies the external competence to conclude international agreements in order to achieve this objective.[162] The emerging EU resettlement law, however, mainly consists of common rules for the Member States, and insofar, Art. 78 para 2 lit. g TFEU is not sufficient as such. Common rules on resettlement procedures can be adopted on the basis of Art. 78 para 2 lit. d TFEU.[163] It becomes clear from the wording as well as from the drafting history of Art. 78 para. 2 lit. d TFEU that the competence is not limited to procedures conducted on the territory of the Member States. More generally, Art. 78 para 2 TFEU does not differentiate between the territorial and the extraterritorial dimensions of the Common European Asylum System and hence covers both. In other words, it is 'silent on the geographical scope'.[164] In the same vein, Art. 78 para 2 lit. a, b and e TFEU provide for the competence to adopt common rules on eligibility criteria, the status to be accorded to the person, and the internal allocation

159 See COM Resettlement Feasibility Study (n 20) 139 ff with regard to the corresponding provisions.

160 Note the limits of this competence, as 'managing forced migration' is per se only possible to a very limited extent due to the very nature of the phenomenon, see A Farahat and N Markard, 'Forced Migration Governance: In Search of Sovereignty' (2016) 17 *German Law Journal* 907.

161 V Moreno-Lax, 'Chapter 10. External Dimension' in S Peers, V Moreno-Lax, M Garlick and E Guild (eds) *EU Immigration and Asylum Law (Text and Commentary), Volume 3: EU Asylum Law* (Brill, 2nd edition, 2015) 617, 629; P De Bruycker and EL Tsourdi (n 19) 484; B Kowalczyk (n 21) 136; M Den Heijer (n 44) 206.

162 Following the 'AERT' jurisprudence (n 54), as codified in Art 216 para 1 TFEU. See G De Baere, 'The Basics of EU External Relations Law: An Overview of the Post-Lisbon Constitutional Framework for Developing the External Dimensions of EU Asylum and Migration Policy' in M Maes, M-C Foblets, and P de Bruycker (eds) *External Dimensions of EU Migration and Asylum Law and Policy* (Bruylant, 2011) 121, 168.

163 K Hailbronner and D Thym (n 158) 1037.

164 To be sure, the current EU secondary law does not contain rules on extraterritorial asylum procedures, see Art 3 para 1 Asylum Procedures Directive, as emphasised by the European Court of Justice, 'X and X' (n) para 49.

mechanism, regardless of whether the concerned persons have arrived spontaneously or through resettlement programmes.[165]

Art. 78 para 2, Art. 74 TFEU allow the Union to support the implementation of resettlement through financial or operational means.[166] Due to the mentioned parallelism between the EU's competences in the territorial and the extraterritorial dimensions, the questions concerning the administrative level pertaining to each of those dimensions seem not to fundamentally differ.[167] The EU does not have the competence to decide on individu-

165 See COM Resettlement Feasibility Study (n 20) 139 ff with regard to the corresponding provisions. Yet another question is whether the EU has the competence to set a binding resettlement capacity, which arises quite apart from the question of the political feasibility of such a scheme. An internal allocation mechanism, currently provided for in the Dublin III Regulation, obliges Member States to accept responsibility for a certain group of applicants. As the discussion on the Dublin reform confirms, an internal allocation mechanism may include obligations in terms of numbers. This is politically controversial but raises no issues with regard to the EU's competence. The overall number of applicants in this case cannot be regulated due to the very nature of spontaneous arrivals. In the context of the external dimension, however, the determination of the overall capacity is a precondition for the internal allocation due to very nature of extraterritorial admission procedures. Art 78 para 2 lit. e TFEU would hence be irrelevant with regard to the external dimension if it did not cover the competence to set the overall capacity as well. *Cf* COM Resettlement Feasibility Study (n 20)163 ff which also proposes that the EU could determine the overall capacity, even though without referring to a possible legal basis.

166 *cf* M Den Heijer (n 44) 206; F Comte, 'A New Agency is Born in the European Union: The European Asylum Support Office' (2010) 12 *European Journal of Migration and Law* 392 ff, 399.

167 The 2004 Hague Programme called for a study on 'the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory', see Hague Programme (n 45) para 1.3. However, this study was never published, in contrast to the study on the internal dimension of 2013: European Commission, Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU, HOME/2011/ERFX/FW/04, authored by H Urth, MH Bausager, H-M Kuhn, and J Van Selm, available online: https://www.refworld.org/docid/524d5ba04.html [hereinafter: *COM Joint Processing Feasibility Study*]. Yet another question is whether national law sets limits to the extraterritorial administrative competences of the EU, see on this question eg Deutscher Bundestag, Wissenschaftliche Dienste, 'Extraterritoriale Verwaltungskompetenzen der Europäischen Union für Asylverfahren. Zu den rechtlichen Vorgaben aus nationaler Sicht' (2016) Ausarbeitung WD 3 – 3000 – 066/15.

al claims for international protection in territorial asylum procedures.[168] Therefore, it seems that 'replacing' UNHCR with the EU agency with regard to the assessment of the individuals' eligibility for resettlement would be compatible with Art. 78 para 2, Art. 74 TFEU only as long as the 'assessment' is not legally binding upon Member States, which must retain the competence to decide on admission in individual cases.[169]

Hence, the legal basis of the emerging EU resettlement law is found in Art. 74, Art. 78 TFEU. This is in line with the understanding of the institutions: The EASO Regulation is based on Art. 74 and Art. 78, para 1, 2 TFEU. Even though the AMIF Regulation is based not only on Art. 78, but also on Art. 79 para 2 and 4 TFEU, which form the legal basis for EU immigration policy, its relevant provisions explicitly state that resettlement is considered part of EU asylum policy.[170] The Amending Council Decision was adopted on the basis of Art. 78 para 3 TFEU. The Commission based

168 F Comte (n 166) 373, 392; EL Tsourdi, 'Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' 1 *European Papers* 997, 999; K Hailbronner and D Thym (n 158) 1037.

169 Resettlement procedures under the emerging EU resettlement law, as it currently stands, can – in a simplified manner – be described as consisting of three steps: *First*, the 'assessment' by UNHCR, *second*, the 'decision' by the Member State, and *third* pre-departure arrangements by IOM. Art 10 para 8 Union Framework Proposal foresees that the EU agency would 'replace' UNHCR with regard to the first step. This would be in line with the Art 78 para 2, Art 74 TFEU. In the same vein, the third step could be conducted by an EU agency. Transferring the responsibility for the second step, the decision, to an EU agency would not be possible under Art 78 para 2, Art 74 TFEU. However, as can be observed in the practice in the EU Hotspots in Greece, the line between a 'non-binding decision' which is almost all the times followed by the Member States' authorities, and a 'binding decision' is rather difficult to draw: In the context of the implementation of the return policy under the EU-Turkey Statement, EASO is 'supporting' the national asylum administration by conducting interviews and issuing 'legal opinions' in which it assesses the individual's need for international protection in the EU. Even though these 'opinions' are not legally binding, the national asylum administration usually issues an according decision; this practice oversteps the competences provided for in the EASO Regulation; *cf* EL Tsourdi, 'Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2017) 1 *European Papers* 997; C Ziebritzki and R Nestler (n 147) 48 ff; European Ombudsman, 'EASO's involvement in applications for international protection submitted in the 'hotspots' in Greece', Case 735/2017/MDC, decision of 05 July 2018; COM Joint Processing Feasibility Study (n 167) 78. Concerning a similar practice in extraterritorial resettlement procedures, this would have to be taken into account.

170 Art 2, 3 para 2 lit a, 7 AMIF Regulation, and its recitals.

the Union framework on Art. 78 para 2 lit. d and lit. g TFEU.[171] Even though the legal basis invoked by the Commission for the Union Framework Proposal can be considered incomplete, as has been shown, and invoking Art. 78 para 3 TFEU for the Amending Council Decision is not convincing for other reasons,[172] the invoked legal basis nevertheless confirms that the EU institutions consider the emerging EU resettlement as forming part of the Common European Asylum System.[173]

Second, and accordingly, the content of the emerging EU resettlement law is firmly integrated into the Common European Asylum System on a material level.

The definition of the status accorded to the resettled person is increasingly congruent with that accorded to persons who have been granted international protection in a territorial asylum procedure, and is, hence, increasingly defined by reference to the EU asylum *acquis* on the internal dimension. The AMIF Regulation already defines resettlement with refer-

171 Union Framework Proposal, p 17.

172 The provision allows the Council to adopt provisional non-legislative measures 'for the benefit of the member states concerned' in the event of an 'emergency situation characterised by a sudden inflow of nationals of third countries', *cf* European Court of Justice, 'Relocation Judgement' (n 77) para 66. Unless a resettlement scheme would somehow be conceived so as to relieve the member states under particular pressure due to a high number of asylum applications, Art 78 para 3 TFEU, hence, does not seem to be the appropriate legal basis.

173 As has been shown, this is convincing, but remarkable against the background that the Court of Justice in its judgement on *X and X* seemed to assume that 'the conditions governing the issue by member states of long-term visas and residence permits to third country nationals on humanitarian grounds' could only be based on Art 79 para 2 lit a TFEU, see European Court of Justice, *X and X* (n) para 44. Art 79 TFEU confers upon the Union rather limited competences in order to develop a 'common immigration policy'. However, as soon as extraterritorial procedures have the function of determining the need for international protection, these rules would not serve to 'develop a common immigration policy' as required by Art 79 para 2 TFEU, but would rather be conducted 'with a view to offering appropriate status to […] third-country nationals requiring international protection' in the sense of Art 78 para 1 TFEU, and would accordingly have to be based on Art 78 para 2 TFEU. Therefore, if the EU institutions decided to adopt a legal migration scheme which was not based on the central eligibility criterion of international protection, and which was accordingly not integrated into the EU asylum law *acquis*, Art 79 TFEU might indeed be the appropriate legal basis for such a scheme. These kinds of legal migration schemes are, however, not referred to as 'resettlement'. The statement of the Court is hence puzzling to the extent that it suggests that legal access based on 'humanitarian grounds' would fall under Art 79 TFEU. The analysis rather suggests that such schemes, forming part of resettlement, would be based on Art 78 para 1 TFEU.

ence to the status, namely the refugee status or the subsidiary protection status, as defined in the Qualification Directive, or any other status offering similar rights.[174] In the same vein, the 'July 2015' scheme provides that irrespective of whether international protection status or a national status is granted by the Member States, the 'resettled person [...] should enjoy […] the rights guaranteed to beneficiaries of international protection by the [Qualification Directive] or similar rights'.[175] The '50,000 scheme' lays out its objective as being to 'admit […] persons in need of international protection'.[176] The Union Framework Proposal provides for the same objective, and specifies that if a positive decision is taken, the Member State shall 'grant refugee status […] or subsidiary protection status' and even that this decision 'shall have the same effect as a [corresponding] decision' in a territorial asylum procedure.[177]

The general references of the emerging EU resettlement as to its purpose are, however, not entirely unequivocal. Certainly, the emerging EU resettlement law does not contain any references suggesting that it forms part of EU foreign policy.[178] However, the AMIF Regulation and the Union Framework Proposal do include references to the 'management' of migration.[179] These could be understood either as references to the management of immigration in the sense of Art. 79 TFEU, or of *forced* migration in the sense of Art. 78 TFEU. The Common European Asylum System indeed encompasses instruments aimed at increasing state control in the realm of forced migration. This clearly follows from Art. 78 para 2 lit g TFEU.[180] A closer look at the emerging EU resettlement law reveals that the references to 'management' of migration indeed refer to the attempt to

174 Art 2 lit. a AMIF Regulation.

175 European Commission, Recommendation establishing the 'July 2015 scheme' (n 73) para 9.

176 European Commission, Recommendation establishing the '50,000 scheme' (n 78) para 1.

177 Art 10 para 7 lit. a Union Framework Proposal, recital 11 with regard to the objective of harmonisation of the status in resettlement procedures. Differently in the expedited procedure as foreseen under Art 11 Union Framework Proposal, in which only subsidiary protection status is assessed and can be granted.

178 To the best of the author's knowledge.

179 AMIF Regulation, recital 17, 25, 58, Art 3 para 1; Union Framework Proposal, pp 2, 5.

180 As this provision is a competence of the EU to achieve the objective laid down in Art 78 para 1 TFEU, the objective of 'managing migration' – the feasibility of which in the realm of forced migration is very doubtful anyways – can however not prevail over the objective to provide international protection to third country nationals. In other words, it seems that Art 78 para 2 lit. g TFEU can be un-

increase state control in the realm of *forced* migration.[181] The explicit references to the Common European Asylum System confirm this: The 'July 2015 scheme' refers to the resolution of the European Parliament in which it 'stressed the need to ensure safe and legal access to the Union asylum system'.[182] The '50,000 scheme' serves as ad hoc mechanism until the adoption of the Union Resettlement Framework and, accordingly, forms part of the Common European Asylum System.[183] The EU-Turkey Statement, along with the SOP Resettlement-T and the Amending Council Decision, confirm this understanding.[184] In the same vein, on the administrative level, support for the implementation of resettlement schemes is clearly defined as encompassed in the support for the implementation of the Common European Asylum System: Both the AMIF Regulation and the EASO Regulation explicitly define resettlement as subsumed under its external dimension.[185]

Third, the EU institutions explicitly take the position that the emerging EU resettlement law forms part of the Common European Asylum System, as becomes clear from the relevant policy documents.

While some of the early policy papers were not entirely unambiguous yet as to whether EU resettlement policy would form part of EU foreign policy or of EU asylum law,[186] policy documents, at the latest since 2009, have made clear – consistently, and indeed increasingly – that the emerg-

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derstood as containing an auxiliary objective, which can, however, not prevail over Art 78 para 1 TFEU in case of conflict since the former serves the latter.

181 AMIF Regulation, recital 17, 58, Art 3 para 1; Union Framework Proposal, pp 2, 5.

182 European Commission, Recommendation concerning the 'July 2015 scheme' (n 73) recital 2, 12, 14 as well as point 12, 13. The term 'Union asylum system' can only be understood as referring to the Common European Asylum System.

183 European Commission, Recommendation concerning the '50,000 scheme' (n 78) recital 10 to 12, 13.

184 It is irrelevant in this regard that the EU-Turkey Statement cannot be attributed to the EU – at least according to the judgement of the General Court (n 54). Even if the argument was made that the EU-Turkey Statement as such, therefore, does not form part of the Common European Asylum System, this would not be an argument against resettlement forming part of it. This is indeed unquestioned with regard to the return policy under the EU-Turkey Statement, which is implemented by application of the safe third country concept, and which uncontroversially forms part of the Common European Asylum System.

185 See Art 7 para 1 and Art 5 para 3 subpara 1, respectively referring to Art 3 para 2 lit a and d AMIF Regulation; Art 7 EASO Regulation.

186 Even though the GAMM itself is a foreign policy document and advocates for the strategic use of resettlement under the so-called Regional Protection Pro-

ing EU resettlement law must be understood as part of the Common European Asylum System. To be sure, the initiative of establishing 'new Partnership Frameworks' aims at achieving the goals of the European Agenda on Migration through EU external action and conceives resettlement as part of the then envisaged 'compacts' with third States. Nevertheless, resettlement is explicitly understood as part of asylum policy.[187] The Commission's reform proposal of April 2016 accordingly proposes that 'a structured resettlement system' is necessary for 'moving towards a more managed approach to refugee protection in the EU'.[188] The Union Framework Proposal explicitly considers resettlement as 'part of the measures *constituting* the Common European Asylum System' and as an 'essential part' thereof.[189] In the same vein, the European Parliament states: 'A Common European Asylum System must have several safe and legal pathways. Our common asylum system cannot continue to exclusively focus on making it as hard as possible for people fleeing to reach the territory of the European Union. Safe and legal pathways, […], [are] absolutely vital for a functioning European asylum system. […] A robust Union Resettlement Framework […] is one *fundamental part* of such a system […].[190]

To conclude, the emerging EU resettlement law forms part of the Common European Asylum System.[191] It is firmly integrated into this system both formally, ie, in terms of its legal basis, as well as materially, ie, in

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grammes, resettlement was already back then defined as 'promoting international protection and enhancing the *external dimension of asylum policy*', see GAMM (n 47) p 17.

187 Asylum policy might then – alongside eg trade policy, development aid, energy, security and digital policy – be considered as providing political leverage to the Union in its external relations, *cf* European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 7 June 2016, COM(2016) 385 final, pp 2, 8. This would however not imply that eg asylum policy or digital policy is therefore entirely governed by the rationale of EU foreign policy.

188 European Commission, comprehensive reform proposal of April 2016 (n 59).

189 Union Framework Proposal, p 4 and 6 [emphasis added].

190 European Parliament, Report on the 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, 19 October 2017 (n 98) 66 [emphasis added].

191 The COM Resettlement Feasibility Study (n 20), vi argued that, due to the complementarity of territorial asylum and resettlement, a 'Common European *Resettlement* System' should be established, which together with the 'Common

terms of its content. The EU institutions have explicitly adopted this view. More specifically, the emerging EU resettlement law is part of the external dimension of the Common European Asylum System.[192]

3.2. *Objective I: Providing international protection*

In order to understand the objective of the emerging EU resettlement law as part of the Common European Asylum System, it seems useful to begin with analysing the constitutional objective of that system more generally, and then to explore the consequences with regard to resettlement more specifically.[193]

The constitutional objective of the Common European Asylum System becomes apparent from the wording of Art. 78 para 1 TFEU: 'The Union shall develop a common policy on asylum, subsidiary protection and tem-

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European *Asylum* System' would make up the 'Common European *International Protection* System'. Even though the advantage of this terminology in terms of clarity is obvious, it has not been established. The reason is the inconsistent terminology of the EU constitutional framework itself: Art 78 TFEU refers to a Common European 'Asylum' System with a view to offering 'international protection', at the same time makes clear that 'international protection' at least covers 'refugee status' in the sense of the Geneva Convention and 'subsidiary protection', but then refers to 'asylum' in Art 78 para 2 lit. a TFEU; Art 18 ChFR grants the right to 'asylum', which shall be guaranteed with due respect to the Geneva Convention and in accordance with the treaties.

192 The notion of the 'external dimension' is not clearly defined. The broad definition, which is adopted here, encompasses the 'international dimension' – requiring an external competence of the EU – as well as the 'extraterritorial dimension' – requiring an internal competence of the EU with regard to extraterritorial activities, see L Leboeuf (n 24) 57. In favour of distinguishing the 'international' dimension: M Maes, D Vanheule, J Wouters and M-C Foblets, 'The International Dimension of EU Asylum and Migration Policy' in M Maes, M-C Foblets, and P de Bruycker (n 162) 9. Following the broad definition adopted here, resettlement forms part of the 'external dimension' already because it regulates extraterritorial activities of the EU and its Member States. Resettlement is, however, not necessarily part of the 'international dimension', since even though concluding international agreements can be beneficial to resettlement, resettlement does not presuppose an international treaty.

193 See on this approach in the context of EU asylum law: Opinion of Advocate General Cruz Villalón delivered on 11 July 2013 in the case C-394/12, Abdullahi (n 27) para 40. See in more detail on this approach in the context of EU competition law: R Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102* (Oxford University Press, 2011) 107 ff.

porary 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.'[194] This is in line with the understanding developed by General Advocate Cruz Villalón in his Opinion on the case 'Abdullahi', in which he described the Common European Asylum System as a 'normative system devised by the European Union to enable the fundamental right to asylum to be exercised. That system [is] informed today by recognition of the right enshrined in Article 18 ChFR and the mandate to develop a common policy in this area established in Article 78 para 1 TFEU […].'[195] The wording, as well as systematic and historical considerations speak in favour of reconsidering whether Art. 78 TFEU and Art. 18 ChFR can indeed be understood as being limited to 'asylum' specifically, or whether these provisions should not rather be understood as referring to 'international protection' in general.[196] For the purpose of this article, however, it is sufficient to conclude that the objective of the Common European Asylum System is 'to provide international protection to third country nationals'. To be sure, identifying the objective of an EU legal system does not mean that the interpretation can be one-sided, or that auxiliary or even conflicting objectives of the same system cannot be taken into account.[197] But, certainly, the fact that a constitutional objective is 'political', in the sense that it is based on certain historically grown

194 Emphasis added. The French, Spanish and Italian versions even more clearly express that the provision of international protection is the 'objective' of the Common European Asylum System (resp. 'visant à', 'destinada a', 'volta a'). From a systematic perspective, it seems that the formulation of the objective should be refined in two regards: On the one hand, it should reflect that the Member States, through this system, commonly comply with their obligations under international refugee and human rights law. On the other hand, it should reflect that Art 78 TFEU must be read in light of Art 18, 19 ChFR. This is in line with the understanding suggested by General Advocate Cruz Villalón (n 27).

195 Opinion of Advocate General Cruz Villalón delivered on 11 July 2013 in the case C-394/12, Abdullahi (n 27193) para 40 [emphasis added].

196 *cf* J Bast, 'Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff' (2018) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 41, 42, 46 who analyses a 'broad European definition of refugeehood' ('erweiterter europäischer Flüchtlingsbegriff') relating to the status of 'international protection'. Remarkably, the UNHCR Resettlement Handbook indeed refers to a 'broad European refugee definition' in the same vein: UNHCR Resettlement Handbook (n 22) Chapter 3.1, 3.4: 'Refugee Status as a Precondition for Resettlement Consideration […] Eligibility under the Broader Refugee Definition'.

197 R Nazzini (n 193) 133 ff; similarly, T Müller, *Wettbewerb und Unionsverfassung* (Mohr Siebeck, 2014) 135, 164 ff.

ideas, is not an argument against its definition. Quite to the contrary, as has been shown in the context of competition law, this is rather usual.[198]

However, one might wonder whether the EU constitutional objective is limited to the internal dimension of the Common European Asylum System, or whether it indeed also applies to its external dimension. The question arises against the background of international refugee law and the Member States' constitutional traditions, according to which the physical presence in the territory of the concerned State is a precondition for the possibility to seek protection in that State.[199] The apparently underlying concern that the EU can quite clearly not be constitutionally required to provide international protection to the world's refugees regardless of where they are present, does not persist, because the understanding of the objective, as proposed here, does not even imply such a conclusion. It only follows from the constitutional objective that if the EU decides to establish an external dimension, including an extraterritorial dimension, the objective of this dimension is to provide international protection, more specifically and due to the nature of the extraterritorial dimension, to provide legal access to international protection.

The constitutional definition of the objective of the Common European Asylum System entails that the secondary law instruments which constitute that system – hence also the emerging EU resettlement law – must be understood in light of this objective. This follows from the structure of the Treaties: the aim of the Union is enshrined in Art. 3 para 1 TEU,[200] the objectives of the specific areas of EU law are defined in Art. 3 para 2 to 6 TEU respectively, and the objectives of the more specific sub-areas are provided

198 R Nazzini (n 193) 107 ff; O Andriychuk, *The Normative Foundations of European Competition Law. Assessing the Goals of Antitrust through the Lens of Legal Philosophy* (Elgar Publishing, 2017) 35 ff; KK Patel and H Schweitzer, *The Historical Foundations of EU Competition Law* (Oxford University Press, 2013).

199 P Endres de Oliveira, 'Legaler Zugang zu internationalem Schutz – zur Gretchenfrage im Flüchtlingsrecht' (2016) 49 *Kritische Justiz* 167; G Noll, 'Seeking Asylum at Embassies: A Right to Enter under International Law?' (2005) 17 *International Journal of Refugee Law* 542.

200 This explicit reference to the aim of the Union is remarkable in comparison to State's constitutions. The reason might be precisely that the EU is not a State: The very existence of the EU and its legal order as normative system does therefore not seem self-evident, and is hence explicitly justified in its constitutional framework by reference to its objective.

for in the respective provisions of the TEU and the TFEU.[201] This structure of objectives and its implications have been analysed in detail in the context of EU competition law.[202] The objective of a certain subsystem of EU law is relevant because 'all […] provisions which together […] make up the system […], must […] be understood ultimately as […] instrument[s] operating in the service of that [objective] […]', as has been explained by Advocate General Cruz Villalón with regard to the Common European Asylum System.[203] This, in turn, has two implications: On the one hand, the judiciary must interpret EU secondary law in line with the relevant objective, by using the derivative method as described above, as confirmed by the European Court of Justice.[204] On the other hand, the EU legislator must design EU secondary law in line with the relevant objective. This follows a fortiori from the former and is indeed explicitly provided for in Art. 3 para 6 TEU in a general manner and in Art. 78 para 2 TFEU specifically with regard to the Common European Asylum System.[205]

To conclude, the emerging EU resettlement law, as part of the Common European Asylum System, serves first and foremost the constitutional objective of that system, namely, to provide international protection to third country nationals, and must therefore be designed and interpreted in light of this objective.

3.3. Objective II: Complementing territorial asylum procedures

The understanding that resettlement primarily serves to provide international protection to third country nationals does not as such answer the

201 In conjunction with the relevant further provisions: The objective of the area of freedom, security and justice is defined in Art 3 para. 2 TEU, Art 67 TFEU; the objective of the internal market is defined in Art 3 para 2 TEU, Art 26 TFEU; the objective of the economic and monetary union is defined with particular clarity in Art 3 para 4 TEU, Art 119 TFEU; etc.

202 R Nazzini (n 193) at 113 for the identification as sub-system of internal market, and at 119 on the interpretative method. *Cf* European Court of Justice, judgement of 11 Feb 2011, C-52/09, Konkurrensverket gegen TeliaSonera Sverige AB, para 20 ff.

203 Opinion of Advocate General Cruz Villalón delivered on 11 July 2013 in the case C-394/12, Abdullahi (n 27) [emphasis added].

204 European Court of Justice, judgement of 11 Feb 2011, C-52/09, TeliaSonera (n 202) para 20 ff.

205 Art 78 para 2 TFEU explicitly states that the competences are conferred upon the EU 'for the purpose of paragraph 1'.

controversies on the objective of resettlement. In order to assess whether the EU constitutional framework conceives resettlement as complementary to territorial asylum procedures or, rather, as eventually replacing them in the long term, a closer look needs to be taken at the principal constitutional objective of the Common European Asylum System, and at the consequences of the incorporation of international refugee law into that system, in order to assess the constitutional relation between the internal and external dimension of the system.

First, the principal objective of the emerging EU resettlement law speaks in favour of its conceptualisation as complementary to territorial asylum.

As shown above, the emerging EU resettlement law has the principal objective of providing international protection to third country nationals. The EU law on territorial asylum has the same principal objective, as it forms part of the same system. To argue that the emerging EU resettlement law should eventually replace territorial asylum, would thus amount to playing off one element of the same system against another, and thus hinder the achievement of the objective of the system as a whole. Conceptualising both elements as complementary, by contrast, facilitates the achievement of the objective of the system. As the components of the Common European Asylum System serve the objective of that system, or one might even say, as the very existence of these components is justified by the objective of that system, only understanding them as complementary to each other can be reconciled with the principal constitutional objective.

Second, the incorporation of international refugee law into the Common European Asylum System also suggests that resettlement is conceived as complementary to territorial asylum.

Art. 78 para 1 TFEU provides that the 'common policy on asylum, subsidiary protection and temporary protection […] 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,[206] and other relevant treaties.' Art. 18 ChFR provides that 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.' It follows therefrom that 'international refugee law in a broad sense' – ie, the Geneva Convention and the relevant human rights

206 1951 Convention and 1967 Protocol Relating to the Status of Refugees [in the following: *Geneva Convention*].

treaties, at least insofar as they are relevant to protection[207] – can be understood as 'international supplementary constitution' of the Common European Asylum System.[208] Therefore, in the following, it will be examined whether international refugee law says anything on the function of resettlement, as this would be of relevance to the definition of the objective of resettlement under the constitutional framework of the Common European Asylum System.

The absence of an international binding framework on resettlement cannot lead to the premature conclusion that international refugee law would be irrelevant to resettlement. Quite to the contrary, it is indeed the cardinal principle of international refugee law, namely the *non-refoulement* principle,[209] which provides guidance on the function of resettlement in relation to territorial asylum. The *non-refoulement* principle requires States to examine an application for protection, which is lodged on the State's territory, at its borders, or anywhere within its jurisdiction.[210] Even though

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207 In the international law context, protection ensuing from human rights obligations is usually referred to as 'complementary protection', see GS Goodwin-Gil and J McAdam (n 25) 285 ff. The argument can be made that refugee rights should be understood as human rights, see V Chetail: 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights law' in R Rubio-Marín (ed) *Human Rights and Immigration* (Oxford University Press, 2014) 19 ff. However, at least in the context of the Common European Asylum System, in favour of understanding protection-relevant human rights as refugee rights, see n 196 and more generally: R Alleweldt, 'Preamble to the 1951 Convention' in A Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Procotol. A Commentary* (Oxford University Press, 2011) 232.

208 J Bast (n 196) 42: 'völkerrechtliche Nebenverfassung'; R Uerpmann-Witzack, 'The Constitutional Role of International Law' in A von Bogdandy and J Bast (n 24) 177, 178 ff, 210 who for the notion of 'Nebenverfassung' ('supplementary constitution') refers to C Tomuschat, 'Der Verfassungsstaat im Geflecht der internationalen Beziehungen' in *Der Verfassungsstaat im Geflecht der internationalen Beziehungen. Gemeinden und Kreise vor den öffentlichen Aufgaben der Gegenwart. Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Basel vom 5. bis 8. Oktober 1977*, 36 (1978) 5, 71 ff.

209 As enshrined in Art 33 para 1 Geneva Convention, on the one hand, and as derived from Art 3 ECHR in particular, on the other hand. The latter follows from the jurisprudence of the ECtHR and has been explicitly codified in Art 19 para 2 ChFR. See W Kälin, M Caroni and L Heim 'Article 33, para 1' in A Zimmermann (n 207) 1334; GS Goodwin-Gil and J McAdam (n 25); UNHCR ExCom, Conclusion No. 65 (1991), (c).

210 This is of course a very simplified explanation of the non-refoulement principle. In detail see: W Kälin, M Caroni and L Heim 'Article 33, para 1' in A Zimmermann (n 207).

only to a very limited extent, the *non-refoulement* principle thus attenuates the 'paradox' of international refugee law, namely that, due to the absence of a general right to enter under international law,[211] a person is required to irregularly cross a border in order to have access to protection.[212]

Indeed, resettlement goes much further in attenuating this paradox, as it provides a legal pathway to protection. At first glance, this seems to favour the argument that 'there should be a preference for resettlement'. However, while the observation that resettlement attenuates the paradox certainly entails that international refugee law is generally in favour of the existence of resettlement as such, no conclusion can be drawn from this observation with regard to the relation between resettlement and territorial asylum. The observation supports neither the 'wait-in-the-line-argument' nor the 'see-saw hypothesis'. This is because those claims would presuppose another argumentative element – namely either that the overall number of persons a country should 'legitimately' accept is stable, or that seeking territorial asylum is 'illegitimate', regardless of whether the option of resettlement is legally and realistically available for the concerned person. As already shown above, neither of these arguments persists. The only scenario in which the argument that 'there should be a preference for resettlement' might entail the 'replacement argument' is a hypothetical scenario in which global resettlement needs would be met by global resettlement capacity – which is, however, far from becoming a reality any time soon.[213]

As resettlement needs actually by far exceed the global resettlement capacity, international refugee law rather suggests that the function of resettlement is to *complement* territorial asylum. The reason is that the understanding of resettlement as eventually 'replacing' asylum in its consequence amounts to an argument aiming to abolish territorial asylum procedures.[214] Abolishing territorial asylum procedures is, however, in contradiction to international refugee law because completely preventing sponta-

211 See, however, on the right to entry under specific circumstances: G Noll (n 199).

212 *cf* P Endres di Oliveira (n 199) 171 ff.

213 In other words: The argument of complementarity of resettlement is convincing as long as resettlement capacity does not meet resettlement needs. Otherwise, the objective of the Geneva Convention, namely, to remedy the situation of refugeehood, would be achieved without the de facto need for territorial asylum procedures. However, as this is far from becoming reality, the above argument persists.

214 Giving preference to resettlement while at the same time reducing territorial asylum proportionally amounts to aiming at reducing territorial asylum to zero. As exemplified by the Australian example, this is actually the practical consequence of the 'replacement approach', *cf* n 106.

neous arrival is not possible without violating the *non-refoulement* principle. Even assuming that prevention of border-crossing could be entirely outsourced to other States,[215] a complete prevention of irregular border-crossing would not be feasible without violating the *non-refoulement* principle.[216] And even if assuming that a complete prevention of spontaneous arrivals was possible without violating the *non-refoulement* principle, one would come to the same conclusion because the 'replacement argument' would then amount to voiding international refugee law of its scope of application.[217] Ascribing a 'replacement function' to resettlement – which in its consequence either aims at abolishing the very foundation of international refugee law or at entirely depriving it of its relevance – can therefore not be reconciled with international refugee law.[218] Accordingly, the incorporation of the international refugee law as 'international supplemen-

215 This would probably neither politically nor practically be feasible in the context of the EU anyways.

216 The Australian example confirms this from an empirical perspective. From a legal perspective: See on the one hand concerning outsourcing processing: G Goodwin-Gil, 'The extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations' (2016) 9 *UTS Law Review* 26; see on the other hand concerning outsourcing entry-prevention: N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *The European Journal of International Law* 591. See further: V Moreno-Lax and M Guiffré, 'The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows' (2017), available online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331.

217 Already because irregular arrival is a precondition for applying for refugee status under the Geneva Convention.

218 Further, and more specifically, M Savino (n 13) 92 comes to conclusion that Art 31 para 1 Geneva Convention prohibits 'punitive clauses' such as the ones provided for in the emerging EU resettlement law. As the essential purpose of Art 31 para 1 Geneva Convention is to, at a minimalist level, 'remedy' the 'paradox' created by the international refugee law itself, the notion of 'penalty' cannot be confined to 'punishment' or even 'criminal sanctions', but must be interpreted as encompassing even mere procedural disadvantages in a territorial asylum procedure, see J Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 408 ff; however in favour of a more narrow interpretation: G Noll, 'Article 31' A Zimmermann (n 207) 1246 ff. Following the former argument: A fortiori, a denial of legal access to protection due to a prior attempt to irregularly enter the destination country could constitute a violation of Art 31 para 1 Geneva Convention. Nevertheless, two further questions arise: First, whether Art 31 para 1 Geneva Convention is extraterritorially applicable, see on this question R Bank, 'General Provisions. Introduction to Article 11. Refugees at Sea' in A Zimmermann (n 207) 833; and second, whether Art 31

tary constitution' of the Common European Asylum System speaks in favour of the conceptualisation of resettlement as complementary to territorial asylum procedures.

Third, the constitutional framework more generally conceptualises the internal and the external dimensions as complementary parts of the Common European Asylum System, which confirms that resettlement should be understood as complementary to territorial asylum.

As has been argued, Art. 78 para 2 TFEU remains silent on the geographical scope and, hence, covers both the internal and the external dimensions. Yet, the constitutional framework of the Common European Asylum System assumes the existence of its internal dimension as a precondition for the existence of its external dimension. This follows from the existence of Art. 78 para 2 lit. f TFEU defining standards concerning the reception conditions for applicants for international protection, and Art. 78 para 3 TFEU regulating the possible event of Member States being confronted by an 'emergency situation characterised by a sudden inflow of nationals of third countries'. Both provisions would be irrelevant if the Common European Asylum System were limited to its external dimension, which demonstrates that the drafters of the Treaties assumed the existence of the territorial dimension as a precondition for the – optional – existence of the external dimension.[219] This view is indeed confirmed by EU secondary asylum law, which almost exclusively concerns the internal dimension in line with the traditional 'legal access gap'.

To conclude, the constitutional framework of the Common European Asylum System conceives the emerging EU resettlement law as complementary to territorial asylum procedures.

3.4. Objective III: Sharing international responsibility

Finally, the function of resettlement with regard to the allocation of responsibility on the international level must be assessed from an EU constitutional perspective. In order to answer whether the constitutional framework conceives resettlement as a tool for ensuring fair sharing of international responsibility or for externalising such responsibility, it is again use-

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para 1 Geneva Convention applies in such a situation despite its wording requiring that the person must have 'directly entered'. Addressing these questions would go beyond the scope of this article.

219 In a similar vein, see B Kowalczyk (n 21) 147; K Hailbronner and D Thym (n 158) 1039 ff with further references.

ful to analyse the consequences of incorporating international refugee law into the Common European Asylum System.

First, the 'international supplementary constitution' of the Common European Asylum System entails that resettlement serves the objective of ensuring fair sharing of international responsibility.

Even though the Geneva Convention law does not regulate resettlement, it implicitly confirms its existence and defines its purpose as the fair sharing of international responsibility. The Final Act of the Geneva Convention specifically recommends that 'governments continue to receive refugees in their territory and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement'.[220] The principle of fair responsibility sharing is indeed accepted more generally,[221] as reflected inter alia in the preamble of the Geneva Convention, which provides that 'the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot therefore be achieved without international co-operation'.[222]

Second, the 'international supplementary constitution' also leads to a 'strengthening of the normative quality' of the international policy framework, which in turn stresses the function of resettlement as ensuring responsibility sharing.[223]

The Court of Justice has consistently found that, since EU asylum law must comply with international refugee law, 'documents from the […] UNHCR are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention'.[224] Even though the Court has made this statement with regard to the interpretation of secondary law, the same reasoning applies with regard to the enactment of secondary law. This becomes clear from the argument of the Court itself: The reason for the particular relevance of UNHCR guidelines is derived from the function of the

220 Final act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (1951), III.D. [emphasis added].

221 R Alleweldt, 'Preamble to the 1951 Convention' A Zimmermann (n 207) 236 ff. See further: D Schmalz, 'The principle of responsibility-sharing in refugee protection. An emerging norm of customary international law' (2019) *Völkerrechtsblog* 6 March 2019.

222 Preamble of the Geneva Convention, recital 4, 5.

223 For the definition of the 'international policy framework' see n 22.

224 European Court of Justice, judgement of 23 May 2019, C-720/18, Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl, para 57 ff. with reference in particular to its judgment of 30 May 2013, C-528/11, Halaf, para 44.

Common European Asylum System as implementing the Geneva Convention.[225] If the requirement of compliance even establishes the necessity of respecting UNHCR guidelines when interpreting secondary law, this must a fortiori hold true when enacting secondary law. In other words, the EU legislator must conceive the objective of resettlement in compliance with the international policy framework.

And the international policy framework clearly states that the function of resettlement is international responsibility sharing. The purpose of resettlement policy is traditionally considered to be threefold: providing protection to refugees, offering a durable solution to refugeehood, and sharing responsibility with host countries.[226] Since 2003, UNHCR has been promoting the 'strategic use' of resettlement, and has further refined this notion since 2009.[227] Even though it seems that the notion of 'strategic use' is prone to being invoked by States as a justification for the use of resettlement in order to externalise responsibility,[228] the international policy framework indeed clearly defines that the notion of 'strategic use' cannot be interpreted in such a manner. According to UNHCR, the strategic use of resettlement means 'the planned use of resettlement in a manner that maximises its benefits, directly or indirectly, other than those received by the refugee being resettled. Those benefits may accrue to other refugees, the hosting State, other States or the international protection regime in general.'[229] UNHCR further underlines that these benefits must consist of

225 European Court of Justice, judgement of 23 May 2019, C-720/18, Bilali (n 224), para 53 ff.

226 J van Selm (n 7) 41; UNHCR Resettlement Handbook (n 22) 36 ff. In order to de-politicise resettlement in the aftermath of the Cold War, UNHCR had emphasised its function as protection tool, see UNHCR ExCOM, Conclusion No. 67 (XLII): 'Resettlement as an Instrument of Protection', UN Doc. 12A, A/46/12/Add.1 (1991).

227 The introduction of the notion was an attempt to maintain resettlement at least at a lower level in the context of post-9/11 politics in the US and another 'refugee crisis' in Europe at the beginning of the twenty-first century, see J van Selm, 'Strategic Use of Resettlement. Enhancing Solutions for Greater Protection?' in A Garnier, LL Jubilut and KB Sandvik (n 6) 31 ff.

228 J van Selm (n 227) 31, 38.

229 UNHCR, Working Group on Resettlement, Discussion Paper on the Strategic Use of Resettlement, 3 June 2003, WGR/03/04.Rev 3, available online: https://www.refworld.org/docid/41597a824.html; UNHCR, Working Group on Resettlement, Discussion Paper on the Strategic Use of Resettlement, Geneva, 14 October 2009, available online: https://www.refworld.org/docid/4b8cdcee2.html; UNHCR, Position Paper on the Strategic Use of Resettlement, Annual Tripartite Consultations on Resettlement, Geneva, 4 June 2010 (n 124).

'protection dividends to the rest of the refugee community (for example, through improved access to asylum)'.[230] The notion of 'strategic use' can therefore not be understood as supporting the 'externalisation approach' to resettlement. This is confirmed by the 2018 Global Compact on Refugees, which endorses the 'strategic use' and, at the same time, unequivocally puts an emphasis on the function of resettlement as a tool for international responsibility sharing.[231]

To conclude, the constitutional framework of the Common European Asylum System conceives the objective of the emerging EU resettlement law as ensuring the fair sharing of international responsibility for refugee protection.

Conclusion

EU resettlement law is slowly emerging as a new component of the Common European Asylum System (1). The objective of resettlement is subject to controversial debates. The emerging EU resettlement law recently seems to increasingly reflect the view that resettlement could, in the long term, eventually replace territorial asylum procedures, and that it may be used for the purpose of externalising responsibility for protection to Member States. Such an understanding is, in particular, reflected in resettlement as implemented under the EU-Turkey Statement in an ad hoc manner, and laid down in the form of a model codification in the Union Framework Proposal. However, such a conceptualisation of the objective of resettlement would contradict the international policy framework. The Union Framework Proposal has accordingly been met with fierce criticism (2). The analysis of the objective of the emerging EU resettlement law from an EU constitutional perspective confirms the validity of this criticism.

The emerging EU resettlement law forms part of the Common European Asylum System and is hence subject to its constitutional framework. The rationale of resettlement is thus governed by EU asylum law (3.1), and not by the rationale of EU immigration policy, or even EU foreign policy. Accordingly, the principal objective of the emerging EU resettlement law is to provide international protection to third country nationals (3.2). The constitutional framework further conceives resettlement as complementary to territorial asylum procedures (3.3) and as an instrument ensuring

230 UNHCR (n 18) p 2.
231 2018 Global Compact (n 9) para 90 ff.

fair sharing of international responsibility for refugee protection (3.4). The emerging EU resettlement law should hence be realigned entirely to its constitutional objective.

While the future of the Commission's Union Framework Proposal of 2016 is uncertain, it seems quite likely that the development of the emerging EU resettlement law towards harmonised rules and increasing EU administrative support will continue. In any case, resettlement seems to be in the political focus of the legal access debate on EU level, as shown not least by the regularly recurring proposals to establish extraterritorial processing centres from which resettlement ought to occur.[232] The very objective of resettlement should hence be discussed.

The constitutional framework leaves broad leeway to the EU legislator in designing resettlement schemes. At the same time, however, constitutional law draws a few clear limits. Certainly, an 'Australian version' of resettlement policy would not be compatible with EU constitutional law. Resettlement as an emerging component of the Common European Asylum System is rather to be conceived as an instrument allowing for legal access to international protection in the EU, thereby complementing traditional pathways. At the same time, the emerging EU resettlement law is an opportunity for the EU to assume its share of the international responsibility for refugee protection by providing an appropriate status to those in need of international protection.[233] The emerging EU resettlement law, if entirely realigned with its constitutional framework, thus offers great potential for enhancing refugee protection in the EU.

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232 See the European Council's Proposal of June 2018 to establish 'Regional Disembarkation Platforms' (n 63).

233 According to UNHCR, 'Figures at a Glance', available online: https://www.unhcr.org/figures-at-a-glance.html (as of Sept 2019), UNHCR, 'Global Trends. Forced Displacement in 2018', available online: https://www.unhcr.org/globaltrends2018/, and UN DESA, 'International Migrant Stock 2019: Wall Chart' (Sept 2019), https://reliefweb.int/organization/un-desa (as of Sept 2019): Out of the approx.70.8 million forcibly displaced people worldwide, approx. 25.9 million are refugees. EU member states together host approx. 3.6 million refugees. Turkey hosts the largest number of refugees worldwide with approx. 3.7 million refugees. While states have recognised with the 2018 Global Compact that 'there is an urgent need for more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States', the question what this means and how to operationalise this aspiration requires further discussion.