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SHAPING THE FUTURE OF EUROPE – SECOND PART
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SHAPING THE FUTURE TOWARDS A SOLIDARY REFUGEE RESETTLEMENT IN THE EUROPEAN UNION

JANINE PRANTL*

ABSTRACT: Against the background of divergent resettlement policies of Member States of the European Union, the principle of solidarity and responsibility sharing has not been effectively realized in this field. Despite standardization efforts of the United Nations High Commissioner for Refugees, the resettlement process lacks clear binding rules. So far, the EU has developed a common asylum policy rather than a common refugee policy, whereas resettlement forms part of the latter. One challenge consists of defining and consenting on a common EU resettlement framework, which is based on solidarity and responsibility sharing and adheres to international protection obligations. Looking at the US, the 1980 Refugee Act frames a permanent resettlement program, which is attributed to the federal government. Under this framework, the US has conducted extraterritorial selection of resettlement refugees for decades. This contribution argues that the US resettlement experience provides lessons to be learned for the expansion of EU governance in resettlement and establishment of a future EU resettlement framework.

KEYWORDS: solidarity – responsibility sharing – refugee resettlement – refugee policy – US – federalism.

* Doctoral Candidate, University of Innsbruck, janine.prantl@uibk.ac.at. The author thanks the anonymous reviewer and special thanks are due to Advocate General Eleanor VE Sharpston, QC and Professor Markus Kotzur for their constructive comments on the draft of this contribution. The usual disclaimer applies.

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I. Introduction

When Jean-Claude Juncker ran for the presidency of the former European Commission (Commission) in May 2014, he recalled from his experience "that Europe will need more solidarity". His vision was "a prosperous continent that will always be open for those in need".[1] In this light, resettlement constitutes an instrument of international solidarity. By offering resettlement, Member States of the European Union (EUMS) express solidarity towards persons in need and overburdened countries of (first) refuge.[2]

When Ursula von der Leyen, President of the current Commission, expressed aspirations for a Union that strives for more, she stressed the need for a new way of *burden sharing*. Thus, von der Leyen announced to propose a New Pact on Migration and Asylum entailing commitment to resettlement.[3] Consequently, the Commission declared to financially support EUMS' collective pledge of more than 30.000 resettlement places for 2020 at the first Global Refugee Forum in Geneva.[4] This pledge constituted a significant increase compared to 2017, when the (then) Commission complained that the pledge of 14.000 places offered by eleven EUMS in the course of the eighth resettlement and relocation forum were "not enough to contribute to a common effort to save lives and offer credible alternatives to irregular movements".[5] Though, the implementation of the 2020 target has faced substantial challenges in the course of the outbreak of the Covid-19 pandemic. Several EUMS, the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) have temporarily suspended resettlement operations.[6] As a reaction, countries of (first) refuge have hampered refugees' access to their territory. The Commission is alarmed that the impact of Covid-19 on countries of (first) refuge may render resettlement needs even more pressing. Against this background, it released a Communication guiding and encouraging EUMS "to continue showing solidarity with persons in need of international protection and third countries hosting large numbers of refugees".[7]

So far, common efforts have taken place on a voluntary basis, whereby EUMS' individual contributions differ. These heterogeneous responses make it difficult to objectively assess the capacity of each EUMS, and to distinguish between *inability* and *unwillingness*

[1] European Commission, *Migration: A Roadmap, The Commission's Contribution to the Leader's Agenda*, 1 May 2014 ec.europa.eu.

[2] Cf. European Commission, *Delivering on Resettlement*, December 2019 2 ec.europa.eu.

[3] Cf. U von der Leyen, *A Union that Strives for More: My Agenda for Europe, Political Guidelines for the Next European Commission 2019-2024* (Publications Office of the European Union 2019) 14 ff.

[4] Cf. European Commission*, Resettlement: EU Member States' Pledges Exceed 30,000 Places for 2020*, 18 December 2019, ec.europa.eu.

[5] European Parliament, *Resettlement of Refugees: EU Framework*, April 2017, www.europarl.europa.eu.

[6] Cf. ECRE, *UNHCR and IOM Temporarily Suspend Resettlement Travel for Refugees*, 19 March 2020, www.ecre.org.

[7] Communication C(2020) 2516 final of 16 April 2020 from the Commission – COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement.

to contribute. This gives rise to the question whether law can render the principle of solidarity more effective. Scholars claim that increased EU governance "would make objective assessment of calls of solidarity possible".[8] Hence, introducing a legal framework at the EU level could provide avenues to access EUMS' untapped capacities. As a first step in this direction, the Commission proposed a Union Resettlement Framework Regulation,[9] which is subject to ongoing negotiations.

In light of these considerations, this contribution questions whether and how EU governance can achieve a solidary resettlement Union. In doing so, the United States (US) refugee resettlement experience, which is based on (centralized) federal competence, promises to reveal *lessons to be learned*.

II. The concept of refugee resettlement

Resettlement targets particularly vulnerable refugees, who have already left their home countries, seeking for asylum in a country of (first) refuge. However, in this country, the refugees have no prospect to stay because they are facing difficult conditions and serious (threats of) human rights violations. If a third country, *i.e.*, the reception country, admits some of these refugees, they are transferred to this country with prospect of lasting integration.

Refugee resettlement aims at providing a durable solution,[10] namely a "satisfactory situation which enables the refugee to integrate into a society".[11] States are, however, not obliged to offer any durable solution to refugees.[12] It is rather left to their discretion whether to engage in resettlement at all. But if states then conduct resettlement, they must comply with their obligations under international law, particularly international refugee law and international and regional human rights law.[13] For example, in terms of international refugee law, the 1951 Convention Relating to the Status of Refugees (Refugee Convention),[14] applies to all refugees, notwithstanding if they arrive in an uncontrolled or, such as by means of resettlement, in a controlled manner.[15] Along with this

[8] P de Bruycker and EL Tsourdi, 'In Search of Fairness in Responsibility Sharing' (2016) Forced Migration Review 64.

[9] Commission Proposal COM(2016) 468 final for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) n. 516/2014 of the European Parliament and the Council.

[10] Cf. M Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' in V Chetail and C Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014) 577.

[11] KB Sandvik, 'On the Social Life of International Organizations: Framing Accountability' in J Wouters, E Brems, S Smith and P Schmitt (eds), *Accountability for Human Rights Violations* (Intersentia 2010) 296.

[12] Cf. M Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' cit. 562.

[13] Cf. *ibid*. 577.

[14] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Convention Relating to the Status of Refugees of 28 July 195, 189 UNTS 137-220.

[15] Cf. M Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' cit. 578.

comes the question whether the current voluntary nature of resettlement justifies that states may disregard their international protection obligations towards refugees during the resettlement conduct.[16]

Ensuring protection rights of refugees and pursuing durable solutions is part of the mandate of the UNHCR.[17] In its *Resettlement Handbook*,[18] the UNHCR further defined and standardized the concept and conduct of resettlement and provided the following definition:

> "Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country".[19]

As of today, differences in the understanding of resettlement have remained and the UNHCR resettlement definition is considered as soft law, which implies that it has not reached the level of binding international customary law. Nonetheless, the EU and its EUMS as well as the US have acknowledged this definition.[20]

The concept underlying the UNHCR definition was taken up by the Commission. Art. 2 of the Proposal for a Union Resettlement Framework Regulation stipulates that "resettlement means the admission of third-country nationals and stateless persons in need of international protection from a third country to which or within which they have been displaced to the territory of the Member States with a view to granting them international protection".[21]

[16] Cf. T de Boer and M Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) International Journal of Refugee Law 54, 72.

[17] Cf. M Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees' cit. 562.

[18] In 1997, the first UNHCR *Resettlement Handbook* was published. A revised version followed in 2004 and the most recent version dates to 2004. It has been recognized as a useful information tool; cf. J van Selm, P Erin and T Woroby, *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'* (Publications Office of the European Communities 2004) 11; UNHCR, UNHCR Resettlement Handbook (2011) www.unhcr.org.

[19] UNHCR Resettlement Handbook cit. 3.

[20] Cf. A Garnier, KB Sandvik and LL Jubilut, 'Refugee Resettlement as Humanitarian Governance: Power Dynamics' in A Garnier, KB Sandvik and LL Jubilut (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 7; cf. D Perrin, 'Refugee Resettlement in the EU – 2011-2013 Report' (2013) EUI cadmus.eui.eu.

[21] Commission Proposal COM(2016) 468 final cit.

One aspect particularly stands out when comparing the resettlement definition of the Commission with the UNHCR definition. The Commission extended the scope of beneficiaries to internally displaced persons. Albeit internally displaced persons[22] have not left their home countries, they may seek protection for the same reasons as Convention refugees who are – by definition – outside their home country. This means that cases of internal displacement might equally be relevant for resettlement operations. In fact, agreement on and implementation of an extended scope of resettlement beneficiaries have proven difficult because receiving states would have to offer even more places. In comparison, the US selects on the basis of a priority system, whereas priority two ("groups of special humanitarian concern to the US") includes persons who are in their home country – but in exceptional cases only.[23]

Another aspect worth mentioning is that the definition proposed by the Commission does not expressly refer to permanent residence and prospect of naturalization as the UNHCR definition does. These differences regarding the time-aspect exemplify Zieck's claim that resettlement has shifted towards a temporary substitution of the country of (first) refuge "that is not capable of providing the requisite protection for another state"[24] rather than a permanent solution.

More recently, in its factsheet of December 2019, the Commission still refrained from indicating the permanent character of resettlement: "Resettlement means the admission of non-EU nationals in need of international protection from a non-EU country to a Member State where they are granted protection. It is a safe and legal alternative to irregular journeys and a demonstration of European solidarity with non-EU countries hosting large numbers of persons fleeing war or persecution".[25]

It is nonetheless noteworthy that the Commission expressly described resettlement as a demonstration of European solidarity with overburdened countries of (first) refuge. This demonstrates that the Commission has recognized the importance of the interplay between home country, country of (first) refuge and reception country. Unburdening countries of (first) refuge by taking a share can, in turn, stabilize the situation in these countries and spur the integration of refugees there, *i.e.*, a durable solution.

The situation in the country of (first) refuge constitutes the focal point for determining the eligibility for resettlement to the US. The US legislator does not explicitly define

[22] The Guiding Principles on Internal Displacement of 2004 provide the normative framework for protecting and assisting internally displaced persons. Therein, such persons are defined as those "who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border", UNHCR, OCHA Guiding Principles on International Displacement, September 2004 1, www.unhcr.org.

[23] Cf. G Noll and J van Selm, 'Rediscovering Resettlement' (2003) Migration Policy Institute Insight 15.

[24] M Zieck, 'Refugees and the Right to Freedom of Movement: From Flight to Return' (2018) Michigan Journal of International Law 105.

[25] European Commission, *Resettlement: EU Member States' Pledges Exceed 30,000 Places for 2020* cit. 18.

resettlement but refers to the situation where an alien is considered to be firmly resettled. Only individuals who are not firmly resettled qualify for resettlement to the US. In order to be firmly resettled, a refugee must enjoy rights and privileges under the conditions ordinarily available to other residents in the country of (first) refuge. This includes housing, employment, permission to hold property, travel documentation alongside with a right to entry or re-entry, education, public relief, or naturalization.[26] The criterion of firm resettlement in any other country of (first) refuge not only supports the idea of offering durable solutions to refugees, but also responds to the need of preventing and improving situations in those regularly overburdened countries, where fundamental rights of refugees are at risk. At the same token, it diminishes the number of persons who qualify for resettlement to those who have not found a durable solution yet, which at least limits the burden for potential reception countries, who, in turn, fear an overwhelming number of refugees.

These considerations show that the definition of resettlement must respond to the following core question: In whose interest is resettlement? In this light, a definition shall account for the interest of those in need, the interest of their home countries, the interest of the countries of (first) refuge and the interest of the third countries who accept the people.

III. A Union based on solidarity and fair responsibility sharing?

Already in 1979, the Court of Justice characterized solidarity as a general principle of EU law, deriving from the particular nature of the (then) Communities.[27] There are numerous references to solidarity in EU primary law. According to art. 2 TEU, solidarity constitutes one of the common values of EUMS.[28] Specifically, art. 80 TFEU incorporates the principle of solidarity and responsibility sharing. Nevertheless, a precise legal definition of solidarity is missing.[29] The abstract notion of solidarity makes its effective implementation difficult. The issue is mirrored in the multiple facets of solidarity, namely normative (common rules), financial (compensation for overburdened states) and operational (*e.g.*, EU agencies) solidarity.[30]

Notably, in addition to solidarity, art. 80 TFEU refers to "fair sharing of responsibility", as opposed to "burden sharing". The term "burden sharing" has been rejected in favour of "responsibility sharing" because of the problematic connotation of "burden". Despite the sometimes synonymous usage of "burden" and "responsibility sharing", the meaning

[26] Code of Federal Regulations, 1 January 2012, section 208.15 title 8, www.govinfo.gov.

[27] Cf. case 128/78 *Commission v United Kingdom* ECLI:EU:C:1979:32.

[28] Cf. joined cases C-715/17, C-718/18 and 719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2019:917, opinion of AG Sharpston, para. 248 (emphasis as in original).

[29] Cf. P de Bruycker and EL Tsourdi, 'In Search of Fairness in Responsibility Sharing' cit. 64.

[30] Cf. P de Bruycker, 'Towards a New European Consensus on Migration and Asylum, EU Immigration and Asylum Law and Policy' (2 December 2019) EUmigrationlawblog eumigrationlawblog.eu.

of these terms is not exactly the same. In this context, Hathaway and Neve made the following distinction: while burden sharing refers to *contributions* by states to the protection of refugees *on another state's territory*, responsibility sharing refers to the *overall contributions* by states towards ensuring refugee protection.[31] Other scholars, like Zieck, attached a broader notion to international burden sharing by claiming that its intention goes beyond *ad hoc* compensation and "signifies that states would, in addition to the responsibilities they already have under international (refugee) law, be subject to an apportioning system that does not currently exist".[32] Actually, references to (international) burden sharing have been imprecise.[33] For example, conclusions of the UNHCR Executive Committee[34] mentioned burden sharing in the context of (financial) assistance to cope with mass influxes but they have not pointed to any permanent burden sharing mechanism. Indeed, while asylum is "supported by a relatively strong legal sub-regime", burden sharing mechanisms are hardly governed by "norms, rules or decision-making procedures".[35] In the same vein, Kritzman-Amir observed a lack of a specific, clearly determined mechanism for responsibility sharing in international law.[36] The Refugee Convention does not include burden or responsibility sharing in its operative part. A mere reference in the preamble[37] and a recommendation in the Final Act of the Conference adopting the

[31] Cf. JC Hathaway and A Neve, 'Making International Refugee Law Relevant Again: A Proposal of Collectivized and Solution-Orientated Protection' (1997) Harvard Human Rights Journal 144 ff.

[32] M Zieck, 'Doomed to Fail from the Outset? UNHCR's Convention Plus Initiative Revisited' (2009) International Journal of Refugee Law 399.

[33] Cf. *ibid*. 399.

[34] *E.g.*, UNHCR, Conclusions adopted by the Executive Committee on the International protection of refugees, 1994, n. 74 (XLV) *General* lit. h; 1997, n. 81 (XLVII) *General* lit. j; 1998, n. 85 (XLIX) *International Protection* 1998, lit. o; 2000, n. 89 (LI) *General*; 2001 n. 90 (LII) *General* lit. f; 2003, n. 95 (LIV), *General* lit. g; 2003 n. 98 (LIV), *Protection from Sexual Abuse and Exploitation* lit. g; 2004 n. 100 (LV), *International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations* lit. b; cf. UNHCR, Conclusions on International Protection: Adopted by the Executive Committee of the UNHCR Programme 1975-2017 (Conclusion n. 1 – 114), October 2017, UN Doc HCR/IP/3/Eng/REV. 2017, www.refworld.org.

[35] A Betts and JF Durieux, 'Convention Plus as a Norm-Setting Exercise' (2007) Journal of Refugee Studies 510.

[36] For example, responsibility sharing is reflected in arts 55 and 56 of the Charter of the United Nations, in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States as well as in the preamble of the Refugee Convention; cf. T Kritzman-Amir, 'Not in My Backyard: on the Morality of Responsibility Sharing in Refugee Law' (2009) Brooklyn Journal of International Law 376.

[37] "*Considering* 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 recognized the international scope and nature cannot therefore be achieved without international co-operation, [...]" (emphasis as in original).

Refugee Convention[38] prove awareness of uneven burden.[39] Scholars have therefore criticized that the international refugee regime is only partially complete. International refugee law arbitrarily assigns full legal responsibility for protection to whatever state asylum-seekers are able to reach, but there is no parallel international obligation of solidarity, burden or responsibility sharing.[40]

With a view to solidary EU refugee resettlement, the question arises whether normative force can be attributed to the principle of solidarity and responsibility sharing. Even though art. 80 TFEU incorporates this principle in written legislation, the provision's openness leaves doubts about its legislative effectiveness. Scholars have confirmed that, as an attitude of working together, namely an obligation of means, the principle of solidarity compels EUMS to follow a specific course of action and to adopt and implement defined measures.[41] According to Kotzur, art. 80 TFEU includes concrete obligations to act.[42] Also Peers *et al.* confirmed that the principle of solidarity created a series of positive obligations, namely an obligation to adopt legal measures for the management of refugee influx.[43]

But what can EUMS (realistically) expect, and do they have moral obligations?[44] While EUMS are still disputing which number and which kind of refugees to take, already in 2016, the Visegrád group proposed flexible solidarity as an alternative to resettlement and mandatory quotas. Flexible solidarity would enable EUMS to contribute voluntarily based on their experience and potential.[45] In other words, it would allow EUMS to volunteer on the *how* of burden sharing and could thereby be a way out of political deadlock. Nevertheless, a cynical note lingers in flexible solidarity, *i.e.*, a legally non-enforceable scheme. For example, the experience that some EUMS, including Visegrád states, did not comply with *intra* EU relocation obligations in the past (see *infra*, section VI) underpins

[38] "*Recommends* that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement" (emphasis as in original), General Assembly, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, Recommendation D www.unhcr.org.

[39] Cf. M Zieck, 'Doomed to Fail from the Outset?' cit. 400.

[40] Cf. S Barbou des Places, 'Burden Sharing in the Field of Asylum: Legal Motivations and Implications of a Regional Approach' (EUI Working Papers 2012) 8 ff.

[41] H Rosenfeldt, 'The European Border and Coast Guard in Need of Solidarity: Reflections on The Scope and Limits of Article 80' in V Mitsilegas, V Moreno-Lax, and N Vavoula (eds), *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights* (Brill Nijhoff 2020) 173.

[42] M Kotzur, 'Art. 80 TFEU' in R Geiger, D Erasmus-Khan and M Kotzur (eds), *European Union Treaties: Treaty on the European Union, Treaty on the Functioning of the European Union* (C.H. Beck/Hart 2015).

[43] Cf. S Peers, V Moreno-Lax, M Garlick and E Guild, *EU Immigration and Asylum Law (Text and Commentary)* (Brill Nijhoff 2015) 629.

[44] Cf. M Kotzur, 'Flexible Solidarity' (16 November 2016) Völkerrechtsblog voelkerrechtsblog.org.

[45] Cf. *ibid*.; M Nič, 'The Visegrád Group in the EU: 2016 as a Turning-Point?' (2016) European View 286 ff.; Heads of Government of the V4 Countries, Joint Statement of the Heads of Governments of the V4 Countries, 16 September 2016, 3 euractiv.com.

the prediction that for at least some EUMS, "flexible" could be taken to mean that they do not have to show solidarity at all. Ultimately, the interpretation of "flexible" remains a political question that cannot be answered from a legal point of view. In any case, flexible solidarity does not come without legal limits, namely where the conduct of EUMS clashes with international refugee law and human rights.[46]

IV. The EU can spur global refugee resettlement

The EU can only spur global refugee resettlement if EUMS have transferred competences allowing the EU to act in this field (see *infra*, section IV.1). These EU competences may, however, face boundaries that cannot be overcome without Treaty amendment (see *infra*, section IV.2). Furthermore, the very nature of resettlement induces that the EU may have to adopt procedural measures that apply outside EU territory. This is where the question of the extraterritorial applicability of the Charter of Fundamental Rights of the European Union (Charter) arises (see *infra*, section IV.3). Finally, the legal basis for a future Resettlement Framework Regulation needs to be clarified by the Commission (see *infra*, section IV.4).

IV.1. The EU's competence to adopt legislation in the field of refugee resettlement

First of all, it is necessary to reconcile the legal ground and extent of EU's competence to make refugee policy. This, in turn, determines the potential scope of EU governance in refugee resettlement.

So far, the EU has developed a common *asylum policy* rather than a common refugee policy.[47] Asylum policy generally constitutes an internal matter of a state, assigned to the regulatory area of Justice and Home Affairs.[48] Refugee policy, in contrast, "encompasses a broader view of international or foreign affairs".[49] It comprises extended protection tools, such as resettlement and humanitarian admission.[50]

EU primary law does not discuss a common refugee policy at all. Art. 78 TFEU (only) proclaims the development of a "common policy on asylum, subsidiary protection and temporary protection". Hence, for systematic reasons, refugee resettlement in the EU law

[46] Cf. M Kotzur, 'Flexible Solidarity' cit.

[47] Cf. J van Selm, 'European Refugee Policy: Is There Such a Thing?' (UNHCR Working Papers 115-2005) www.unhcr.org.

[48] Cf. *ibid*. 2.

[49] *Ibid*. 2.

[50] Cf. *ibid*. 1.

context has been allocated to the external dimension of the Common EU Asylum System (CEAS).[51]

Since the Treaty of Amsterdam, asylum policy has been communitarized at the EU-level.[52] The EU institutions, including the European Parliament, are called upon to intervene in the asylum policy of EUMS. Still, asylum policy constitutes a *shared competence*.[53] Consequently, the EU legislator must limit its actions to initiatives that cannot be sufficiently achieved at the national level. In terms of regulatory intensity, EU actions must not exceed what is necessary to achieve legitimate policy objectives.[54]

A particularity derives from art. 78(1) TFEU's reference to the Refugee Convention and other relevant treaties. This reference entails that measures adopted by the EU legislator must adhere to the Refugee Convention, although the EU itself is not a contracting party to that Convention.[55] Specifically, the Court of Justice has clarified that art. 78(1) TFEU and art. 18 of the Charter (right to asylum) require the EU to "observe"[56] the rules of the Refugee Convention. The Court has jurisdiction to examine the validity of EU secondary law in light of art. 78(1) TFEU and art. 18 of the Charter. In doing so, the Court is competent to verify whether provisions of secondary law can be interpreted in line with the level of protection guaranteed by the rules of the Refugee Convention.[57] From that follows that a future Union Resettlement Framework Regulation could be subject to examination in light of its compliance with the Refugee Convention.

IV.2. The EU can support but not replace EUMS' administration

Art. 78(2)(d) TFEU states that the EU legislator is competent to adopt measures on common procedures "for the granting and withdrawing of uniform asylum or subsidiary protection status". Being formulated in an open manner,[58] this provision covers procedural rules, governing amongst others "the personal interview, the evaluation by administrative authorities or special rules for vulnerable persons together with guarantees for judicial protection".[59]

[51] Cf. K Pollet, 'A Common European Asylum System under Construction: Remaining Gaps, Challenges and Next Steps' in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: the New European Refugee Law* (Brill Nijhoff 2016) 88 ff.

[52] Cf. TJ Hutton, 'Asylum Policy in the EU: The Case for Deeper Integration' (2015) CESifo Economic Studies 613.

[53] Cf. art. 4(2)(j) TFEU.

[54] Cf. K Hailbronner and D Thym, 'Art. 78 TFEU' in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law: a Commentary* (C.H. Beck, Hart, Nomos 2016) 1030 para 12.

[55] Cf. case C-175/08 *Salahadin Abdulla and Others* ECLI:EU:C:2010:105 para. 51.

[56] Joined cases C-391/16, C-77/17, C-78/17 *M (Revocation of refugee status)* ECLI:EU:C:2019:403 para. 74.

[57] Cf. *ibid*. para. 75.

[58] "[C]ommon procedures for the granting and withdrawing of uniform asylum or subsidiary protection status".

[59] K Hailbronner and D Thym, 'Art. 78 TFEU' cit. 1036 para. 25.

It clearly derives from the wording of art. 78(2)(d) TFEU that this article serves as a legal basis to establish *common* procedures conducted by EUMS, as opposed to *centralized* EU processing solely conducted by EU institutions or agencies. Centralized EU assessment of claims for international protection requires that this competence – which presently lies with EUMS – is transferred to the EU level.[60] From this follows that for constitutional reasons, EUMS' asylum administration cannot be replaced by EU level administration without Treaty amendment in line with art. 48 TEU.[61]

Still, the EU can "sponsor the effective application of the EU asylum *acquis*".[62] Art. 78(2)(d) TFEU enables support of transnational cooperation among EUMS, including the expansion of the European Asylum Support Office (EASO),[63] *i.e.*, the EU agency tasked to assist in resettlement matters.[64] In fact, the Commission has already proposed to better equip EASO and extend its mandate to an EU Agency for Asylum with new competences, such as the examination of claims.[65] But are there constitutional boundaries against empowering a future EU Agency for Asylum to take the lead in conducting eligibility interviews, preparing and eventually deciding upon resettlement cases?[66]

Case-law of the Court of Justice provides guidance if the EU legislator can vest competence into EU agencies to take binding executive decisions upon third parties.

The *Meroni* case[67] first dealt with this issue.[68] It concerned a body governed by private law, without any basis in EU law. In contrast, EU agencies are grounded in individual EU Regulations. Nonetheless, they are not explicitly addressed in the EU Treaties. Hence, the

[60] Cf. Medam Assessment Report, Flexible Solidarity: A Comprehensive Strategy for Asylum in the EU (2018) www.medam-migration.eu 31 ff.

[61] Cf. K Pollet, 'A Common European Asylum System under Construction' cit. 84 ff.; K Hailbronner and D Thym, 'Art. 78 TFEU' cit. 1037 para. 27.

[62] *Ibid*. 1037 para. 27.

[63] Regulation (EU) 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

[64] TJ Hutton, 'Asylum Policy in the EU' cit. 614.

[65] Cf. art. 21(2)(b) of the Commission Proposal COM(2016) 271 final of 4 May 2016 for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) n. 439/2010; cf. also Commission amended Proposal COM/2018/633 final of 12 September 2018 for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) n. 439/2010 A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018.

[66] Cf. J van Selm, P Erin and T Woroby, *Study on The Feasibility of Setting up Resettlement Schemes in EU Member States or at EU Level* cit. 172.

[67] Cf. joined cases 9/56 and 10/56 *Meroni v High Authority* ECLI:EU:C:1958:7.

[68] Cf. M Scholten and M van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants' (2014) Legal Issues of Economic Integration 394; cf. for a detailed discussion on this topic A Orator, *Möglichkeiten und Grenzen der Einrichtung von Unionsagenturen* (Mohr Siebeck 2017).

Meroni judgment has been interpreted in such a way that EU agencies lack "discretionary or legally binding powers".[69]

In the later *Romano* case, the issue arose whether the EU legislator could delegate the power to take legally binding decisions to actors other than the Commission.[70] Then, the Court ruled against the possibility of delegating binding decision-making powers to other actors[71] because the Treaty (before Lisbon) foresaw delegation of such powers only to the Commission.

Eventually, the Court of Justice departed from *Meroni* and *Romano* by adopting a more liberal approach "within the realities of the new treaties"[72] in *ESMA-short selling*.[73] The reasoning of the Court was that the competence of the EU legislator to empower EU agencies to issue acts of general application can implicitly be derived from arts 263[74] and 277 TFEU. These provisions ensure the reviewability of EU agencies' decisions.[75] The Court further stated that in the case of the European Securities and Markets Authority (ESMA), decision-making power did not undermine the rules governing the delegation of powers, *i.e.*, arts 290 (delegated acts) and 291 TFEU (implementing acts) because the delegation provision in the *ESMA*-case aimed at upholding financial stability and market confidence within the EU, an essential objective of the EU financial system.[76]

Even if definite answers for EU agencies in the specific field of migration and asylum are still missing, essential requirements for a delegation, respectively conferral, of powers to EASO can be deduced from the *Meroni*-doctrine and the subsequent judgements. In essence, any delegation or conferral of powers must be based on an explicit decision of EUMS (although an explicit Treaty base is dispensable). In addition, the margin of discretion conferred by such powers must be limited in light of the principle of institutional balance, prohibiting that policy choices are fundamentally altered by an EU agency.[77] This restriction not to alter policy does, however, not preclude the EU legislator from equipping EASO with

[69] M Fernandez, 'Multi-stakeholder Operations of Border Control Coordinated at the EU Level and the Allocation of International Responsibilities' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration* (Routledge 2016) 241.

[70] Cf. case 98/80 *Romano* ECLI:EU:C:1981:104.

[71] Cf. M Scholten and M van Rijsbergen, 'The ESMA-Short Selling Case' cit. 390.

[72] *Ibid*.

[73] Cf. case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18.

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

[75] Cf. *United Kingdom v Parliament and Council* cit. para. 65; M Scholten and M van Rijsbergen, 'The ESMA-Short Selling Case' cit. 401.

[76] Cf. *United Kingdom v Parliament and Council* cit. para. 85.

[77] Cf. J Pelkmans and M Simoncini, 'Mellowing Meroni: How ESMA Can Help Build the Single Market' (18 February 2014) CEPS core.ac.uk; similarly, Chamon concludes that any form of discretion that allows EU agency to alter policy choices is prohibited, M Chamon, 'Granting Powers to EU Decentralized Agencies, Three Years Following Short-Selling' (2018) ERA Forum 603-605.

executive discretion in the sense that EASO's decisions have the capacity to affect an individual's legal position. This was confirmed by Tsourdi who pointed out that "executive discretion to decide, for example, whether an individual fulfils criteria of the legal definition of a refugee, does not amount to the prohibited discretion of formulating policy".[78] Ultimately, the questions remain "what powers (and how much discretion) can be conferred upon an entity, when and how the conferral takes place (within what procedural and substantive limits) and who holds the recipients of the conferred powers to account and how".[79]

IV.3. The adoption of procedural rules that apply outside EU territory

Refugee resettlement comprises extraterritorial processing because EUMS regularly select resettlement beneficiaries outside EU territory in the country of (first) refuge. Art. 78(2)(d) TFEU remains silent on whether the rules on procedures established under this article may apply outside the territory of the EUMS. Discussions on this issue took place during the drafting of the European Constitutional Treaty.[80] Accordingly, extraterritorial processing is covered by art. 78(2)(d) TFEU if conducted in compliance with international Refugee and Human Rights law.[81]

When EUMS apply procedural rules outside EU territory, they may (extraterritorially) be bound to the protection standards in the Charter. Art. 51(1) of the Charter obliges EUMS to uphold the Charter rights "when they are implementing Union law", irrespective of the territory. At present, refugee resettlement is not attributed to binding EU law, though. This leads to the question whether soft law and discretionary provisions can trigger the implementation of EU law.

According to the Court of Justice in *Florescu and Others*,[82] implementation of EU law can be assumed when an EUMS adopts measures and thereby exercises discretion conferred upon it by an act of EU law. This is also reflected in former case-law in the context of the CEAS, namely in *N.S. and Others*.[83] To this effect, de Boer and Zieck pointed out that already according to the current legal situation EUMS were implementing EU law when

[78] EL Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) German Law Journal 521.

[79] M Scholten and M van Rijsbergen, 'The ESMA-Short Selling Case' cit. 402.

[80] Earlier formulations were more restrictive, cf. K Hailbronner and D Thym, 'Art 78 TFEU' cit. 1037, para. 26.

[81] Cf. *ibid*. 1037 para. 26; cf. *e.g.*, Commission Recommendation C(2015) 3560 final of 8 June 2015 on a European resettlement scheme.

[82] Cf. case C-258/14 *Florescu and Others* ECLI:EU:C:2017:448 para. 48.

[83] Cf. joined cases C-411/10 and C-493/10 *N.S and Others* ECLI:EU:C:2011:865 paras 64-69.

conducting resettlement, namely by claiming the lump sum reserved by the Asylum, Migration and Integration Fund (AMIF)[84] – although the AMIF-Regulation does not provide for an obligation to resettle at all.[85]

Still, ECJ case-law has remained blurred; for example, in its order in *Demarchi Gino*,[86] the Court recalled that the application of fundamental EU rights requires that the EU law in the subject area imposes an obligation on EUMS with regards to the situation at issue.

Eventually, strong indications militate in favor of EUMS' obligation to provide Charter rights in the course of the (extraterritorial) resettlement process, namely when exercising discretion conferred upon them by the AMIF-Regulation. This would equally apply to a prospective Resettlement Framework Regulation – even if the Regulation was based on voluntary resettlement commitment of EUMS instead of mandatory *quota*.

IV.4. The legal basis for a Union Resettlement Framework Regulation

The adoption of a future EU resettlement framework implies the challenge of choosing the right legal basis. From a legal policy perspective, it appears plausible to consider the principle of solidarity and responsibility sharing under art. 80 TFEU in the legal basis of a Union Resettlement Framework Regulation. For example, it was disputed in the context of the AMIF-Regulation if art. 80 TFEU (as a reference to the principle of solidarity and responsibility sharing) shall be part of the legal basis. While the European Parliament intended to rely on arts 78(2)(g) and 80 TFEU,[87] the Council opposed any reference to art. 80 TFEU. Therefore, the European Parliament agreed on a compromise, i.e., to include the principle of solidarity and responsibility sharing in Recital 2 AMIF-Regulation. However, this shall (according to a political declaration) not have an impact on future legislation.[88] Hence, the possibility to include art. 80 TFEU in the legal basis of a future solidary EU resettlement framework still exists.

Actually, the Commission based the 2016 Proposal on a future Resettlement Framework Regulation on art. 78(2)(d) (see *supra*, and art. 78(2)(g) TFEU, which refers to partnership and cooperation with third countries). The argument of the Commission is that

[84] Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decision n. 573/2007/EC and n. 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

[85] Cf. T de Boer and M Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees' cit. 80.

[86] Joined cases C-177/17 and C-178/17 *Demarchi Gino* ECLI:EU:C:2017:656 para. 21 ff.

[87] This was in line with Communication COM(2009) 665 final/2 of 2 December 2009 from the Commission to the European Parliament and the Council – Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures.

[88] P Van de Peer, 'Negotiating the Second Generation of the Common European Asylum System Instruments: A Chronicle' in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System* cit. 66 ff.

resettlement concerns international protection, which links it to asylum policy. By contrast, in the decision in *X and X v État belge*,[89] the Court of Justice referred to art. 79(2)(a) TFEU in the context of long-term visas for humanitarian reasons. This article constitutes a legal basis for measures in the field of immigration policy instead of asylum policy. It remains open whether the Commission will follow the Court of Justice in an upcoming proposal or amendment of the 2016 Proposal.

V. The US centralized and permanent resettlement framework

The US permanent refugee resettlement program is governed by federal law and dates back to the Refugee Act of 1980.[90] This Act stipulates that the President sets the annual admission ceiling after consultation with the Congress.[91]

As regards the implementation of the annual admission ceiling, the so-called *Refugee Corps*, employees of the federal agency *US Citizenship and Immigration Services* (USCIS),[92] conduct interviews overseas to assess whether individuals meet the qualifications for resettlement. Upon acceptance by the USCIS, resettlement refugees are dispersed among the individual US states.

Non-state actors have traditionally played a crucial role in the placement process. The 1980 Refugee Act takes account of this by providing a legal basis for public-private partnerships between the government and voluntary non-profit resettlement agencies.[93] The Office of Refugee Resettlement (ORR), located in the *Department of Health and Human Services*, is authorized to fund cooperative agreements with nine voluntary agencies,[94] known as "Volags". The responsible Volag determines where the refugee will live.[95] Beyond placement, affiliates of the Volags help refugees to set up new lives, including "housing, job-training, job-finding, healthcare, and English language classes".[96] They are also in charge of distributing financial assistance to refugees. Since 1981, refugee financial and medical assistance have gradually been truncated down to eight months. If employment

[89] Cf. case C-638/16 PPU *X and X* ECLI:EU:C:2017:173 para. 44.

[90] Refugee Act 1980, Public Law 96-212, 94 stat. 102.

[91] Cf. K Bockley, 'A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise' (1995) North Carolina Journal of International Law and Commercial Regulation 281 ff.

[92] Cf. JY Xi, 'Refugee Resettlement Federalism' (2017) Stanford Law Review 1204 ff.

[93] Cf. A Brown and T Scribner, 'Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States' (2014) Journal on Migration and Human Security 101.

[94] The nine voluntary agencies are: Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, U.S. Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, World Relief Corporation, cf. www.acf.hhs.gov.

[95] JY Xi, 'Refugee Resettlement Federalism' cit. 1205.

[96] G Noll and J van Selm, 'Rediscovering Resettlement' cit. 22.

is not achieved within this period,[97] regular rules of the welfare system, *i.e.*, limited access to health care and cash assistance, apply.[98] The structure of the US resettlement program pressures rapid labour market entry.[99] In case of resistance, legislation foresees sanctions, namely the termination of cash assistance.[100]

Xi took a critical view on (exclusive) federal government decision-making, including insufficient federal funding support for receiving communities. According to Xi, the US framework has largely failed to consider local communities in resettlement decisions.[101] Specifically, he pointed to the issue of reactive federal funding. Given that the number of refugee arrivals over the last two years determined the amount of the federal funding, receiving communities did not get the necessary additional resources in cases of sudden influx. Besides, pre-resettlement information provided by the federal government to the receiving communities prove insufficient according to Xi.[102] The assistance that communities received from federal funds did not consider the education level, health condition or psychological background of refugees allocated in this community. In order to eliminate financial shortfalls impeding the optimal functioning of the US resettlement system, Xi suggested to give local communities more weight in the refugee placement decision taking. Eventually, he drew the conclusion that even allowing states to refuse the admission of refugees for ideological reasons would serve a useful function because it could prevent that refugees face opposition in the receiving environment.[103]

Noteworthy, in the course of the 2015 attacks in Paris, thirty-one US governors expressed the wish to block resettlement for security reasons.[104] On this basis, the Presidential Executive Order of 26 September 2019 announced that "the State and the locality's consent to the resettlement of refugees under the Program is taken into account to the maximum extent consistent with law. […] [I]f either a State or locality has not provided consent to receive refugees under the Program, then refugees should not be resettled within that State or locality […]".[105] With this Executive Order, Trump administration eased the exclusive federal competence doctrine in resettlement matters for the first

[97] Cf. J van Selm, 'Public-Private Partnerships in Refugee Resettlement: Europe and the US' (2003) Journal of International Migration and Integration 169 ff.

[98] Cf *Ibid*.

[99] Cf. JH Darrow, 'Working It Out in Practice: Tensions Embedded in the U.S. Refugee Resettlement Program Resolved Through Implementation' in A Garnier, KB Sandvik and LL Jubilut (eds), *Refugee Resettlement: Power, Politics, and Humanitarian Governance* (Berghahn 2018) 105.

[100] Cf. section 412(e)(2)(C) of the US Refugee Act of 1980; JH Darrow, 'Working It Out in Practice: Tensions Embedded in the U.S. Refugee Resettlement Program Resolved Through Implementation' cit. 104.

[101] Cf. JY Xi, 'Refugee Resettlement Federalism' cit. 1212.

[102] Cf. *ibid*. 1229.

[103] Cf. *ibid*. 1234.

[104] Cf. *ibid*. 1199.

[105] Section 2 US Homeland Security, Presidential Executive Order 13888 of 26 September 2019, Enhancing State and Local Involvement in Refugee Resettlement www.hsdl.org.

time. Remarkably, the vast majority of US governors sidestepped the opportunity to stop accepting refugees and affirmed their continued resettlement commitment, with Texas as only exception so far.[106] Still, due to the ongoing declining commitment of the federal government to admit resettlement refugees since 2017, resettlement agencies have been forced to shut down offices, which has weakened their network and impact.[107]

VI. Failed attempts of solidarity and responsibility sharing in the EU

Attempts to render solidarity and responsibility sharing among EUMS more effective date back to the Balkan crisis in the 1990s. The then German Presidency suggested a refugee distribution key based on three criteria of equal weight,[108] *i.e.*, *i)* size of population, *ii)* size of EUMS' territory and *iii)* Gross Domestic Product (GDP). This key was derived from the refugee distribution mechanism between the federal states of Germany as foreseen in the German Asylum Procedure Act.[109] However, the Proposal did not find the necessary support in the Council. Noteworthy, some Council members expressed concerns about possible human rights violations when transferring refugees without their consent.[110] The French Presidency followed up with a softened Resolution on burden sharing[111] in September 1995. This Resolution failed to mention any compulsory distribution mechanism. It rather referred to mass influx situations, which exemplifies that *ad hoc* commitment remained the limit of what was politically feasible.[112] In the end, the burden sharing attempts of the 1990s showed little effects.[113]

Until then, a satisfactory solution on how to distribute refugees among EUMS has not been achieved. The overall issue is mirrored in the failure of the Dublin system. It lies in the nature of the geography of Europe that some states are more exposed to migration flows than others. However, the Dublin system does not take account of the map of Europe.

[106] Cf. M Chishti and S Pierce, 'Despite Trump Invitation to Stop Taking Refugees, Red and Blue States Alike Endorse Resettlement' (29 January 2020) Migration Policy www.migrationpolicy.org.

[107] Cf. K Mena and CE Shoichet, 'Judge Blocks Trump's Executive Order on Refugee Resettlement' (15 January 2020) CCN edition.cnn.com.

[108] Cf. German Presidency, Draft Council Resolution on burden-sharing with regard to the admission and residence of refugees of 1 July 1994, Council document 7773/94 ASIM 124.

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

[110] Cf. ER Thielemann, 'Between Interests and Norms' cit. 260.

[111] Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.

[112] Cf. ER Thielemann, 'Between Interests and Norms' cit. 260.

[113] Cf. *ibid*. 261.

Another issue is that human beings seeking protection are to be treated "humanely and with respect for their fundamental rights".[114] In essence, any distribution mechanism accounting for the shortfalls of the Dublin system – either in the form of *intra*-EU relocation or resettlement – expects the EU "to provide protection standards and access to welfare on a comparative level".[115] It is the *raison d'être* of an area of freedom, security and justice that EUMS can expect other EUMS to comply with EU law and fundamental rights.[116] Notwithstanding, the ECJ[117] as well as the ECtHR[118] have confirmed that some EUMS fail to provide even basic standards. In its judgement in *Jawo*, the ECJ admitted that the system based on mutual confidence might practically face operational problems in respect of a particular EUMS, *i.e.*, a substantial risk that applicants for international protection may, when being transferred to that EUMS, be treated in a manner incompatible with their fundamental rights.[119]

Another reason hindering political consensus on mandatory (resettlement) quota is the fall-out of the 2015 *intra*-EU relocation scheme. Against the will of Eastern EUMS, a qualified majority in the Council adopted a (short-term) mandatory relocation mechanism to disburden Italy and Greece.[120] The mandatory distribution key was based on a multi-indicator system,[121] including the GDP, the population size, the unemployment rate (capacity to integrate) and the average number of spontaneous asylum applications and

[114] Joined cases C-490/16 and 646/16 *A.S* ECLI:EU:C:2017:443, opinion of AG Sharpston, para. 3 ff.

[115] A Niemann and N Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) JComMarSt 7.

[116] Cf. *A.S*, opinion of AG Sharpston cit. para. 123.

[117] Joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865.

[118] ECtHR *Tarakhel v Switzerland* App. n. 29217/12 [4 November 2014]; "The requirement in this case of an individual assessment in light of the risk that such transfer may result in inhuman and degrading treatment and the need for the Swiss authorities may result in inhuman and degrading treatment and the need for the Swiss authorities to obtain assurances from the Italian authorities that the applicants will be received in facilities and conditions adapted to the age of the children and that family is kept together makes an authomatic application of the Dublin criteria nearly impossible", K Pollet, 'A Common European Asylum System Under Construction: Remaining Gaps, Challenges and Next Steps' in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System* cit. 78.

[119] Cf. case C-163/17 *Jawo* ECLI:EU:C:2019:218 para. 83; Advocate General (AG) Wathelet emphasized "the adoption of a genuine policy on international protection within the European Union [...] by ensuring that the principle of solidarity and the fair sharing of responsibilities between Member States enshrined in Article 80 TFEU [...] for the benefit not only of Member States, but above all of the human beings concerned", case C-163/17 *Jawo* ECLI:EU:C:2018:613, opinion of AG Wathelet, para. 145.

[120] Cf. Council Decision 2015/1601/EU of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; the decision was adopted on the basis of art. 78(3) TFEU, which provides that "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

[121] Cf. L Carlsen, 'An Alternative View on Distribution Keys for the Possible Relocation of Refugees in the European Union' (2017) Social Indicators Research 1147.

of resettled refugees over a four-year period (absorbed refugees in the recent past).[122] Slovakia and Hungary brought actions for annulment against the Council decision, which were dismissed by the ECJ.[123]

Yet, the implementation of the mandatory quota encountered resistance. In particular, the Czech Republic, Hungary and Poland did not fulfill their relocation obligations. In July 2017,[124] the Commission launched infringement proceedings against these EUMS that were brought before the Court in December 2017.[125] The defendant EUMS invoked their exclusive competence under art. 72 TFEU arguing that they could not comply with the relocation obligations because they had to uphold law and order and safeguard internal security.[126]

AG Sharpston recalled that the relocation mechanism itself preserved EUMS' right to refuse to relocate an applicant if there were reasonable grounds that the applicant's relocation could endanger national security or public order.[127] In addition, AG Sharpston pointed out that EU secondary law within the asylum *acquis* adequately accounted for legitimate national security and public order concerns in relation to the particular applicant.[128] Hence, there were less restrictive means for EUMS than absolute refusal to fulfill their relocation obligations. AG Sharpston stressed that other EUMS, such as Austria and Sweden, also faced difficulties to comply with their relocation obligations but they applied for and obtained temporary suspensions thereof. "If the three defendant Member States were really confronting significant difficulties, that – rather than deciding unilaterally not to comply with the Relocation Decisions was not necessary – was clearly the appropriate course of action to pursue in order to respect the principle of solidarity".[129]

Finally, AG Sharpston highlighted the principle of solidarity in her concluding remarks.[130] "Solidarity is the lifeblood of the European project. Through their participation in that project [...], Member States and their nationals have obligations as well as benefits.

[122] Cf. Communication COM(2015) 240 final of 13 May 2015 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.

[123] Cf. joined cases C-643/15 and C-647/15 *Slovakia v Council* ECLI:EU:C:2017:631.

[124] Cf. European Commission, *Relocation: Commission launches infringement procedures against Czech Republic, Hungary and Poland*, europa.eu.

[125] Cf. European Commission, *Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice* europa.eu; S Carrera, 'An Appraisal of the European Commission of Crisis: Has the Juncker Commission Delivered a New Start for EU Justice and Home Affairs?' (2019) CEPS 21.

[126] Cf. *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection),* opinion of AG Sharpston, cit. para. 189 ff.

[127] Cf. *ibid*. para. 205.

[128] Cf. *ibid*. para. 221 ff.

[129] *Ibid*. para. 235.

[130] Cf. *ibid*. para. 238 ff.

[…] Respecting the 'rules of the club' and playing one's proper part in solidarity […] cannot be based on a penny-pinching cost-benefit analysis […]".[131]

In its ruling of 2 April 2020, the ECJ re-emphasized that art. 72 TFEU only allowed derogation to ensure law and order on their territory in exceptional and clearly defined cases. "It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application".[132]

Alike AG Sharpston, the ECJ recalled that the Relocation Decisions sufficiently granted EUMS a right to refuse relocation of a specific applicant.[133] In comparison to the grounds of exclusion from refugee or subsidiary protection status,[134] the reasonable grounds for excluding an applicant from relocation on the basis of national security or public order concerns left state authorities an even wider margin of discretion.[135] In terms of exercising such wide discretion, the Court provided guidance on the threshold for the assessment whether an applicant posed a danger to national security or public order under the Relocation Decisions.

Thereby, it reaffirmed previous case-law[136] by distinguishing between the threshold applied in free movement law (art. 27(2) of the Citizenship Directive[137]) and the threshold applied towards third-country nationals. Notably, the free movement of Union citizens and their family members may only be restricted if the personal conduct of the individual concerned represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The wording of the Relocation Decisions, however, did not impose such strict conditions and had to be interpreted more broadly, also covering potential threats.[138]

[131] *Ibid*. para. 253 ff.

[132] Joined cases C-715/17, C-718/17 and C-719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* ECLI:EU:C:2020:257 para. 143.

[133] Cf. *ibid*. para.150.

[134] Cf. arts 12(2)(b) and 17(1)(b) of the Directive (EU) 2011/95 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.

[135] Cf. *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. paras 156, 158.

[136] Cf. *e.g.*, case C-380/18 *E.P (Threath to public policy)* ECLI:EU:C:2019:1071.

[137] Directive (EC) 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[138] Cf. J Bornemann, 'Coming to Terms With Relocation: the Infringement Case Against Poland, Hungary and the Czech Republic' (17 April 2020) EUmigrationlawblog eumigrationlawblog.eu.

Still, it becomes clear from the judgement that this discretion had to be exercised only in the context of a case-by-case investigation. Invoking art. 72 TFEU for the purpose of general prevention and without relation to a specific case was therefore not justified.[139] Ultimately, the Court confirmed AG Sharpston's view by stating that there "is nothing to indicate that effectively safeguarding the essential State functions [...] such as that of protecting national security, could not be carried out other than disapplying Decisions 2015/1523 and 2915/1601 [the Relocation Decisions]".[140]

VII. Conclusion

Failed past attempts demonstrate that solidary and fair sharing of responsibility towards refugees among EUMS has not been achieved yet.

From a legal policy point of view, the US provides *lessons to be learned* about the involvement of voluntary agencies in the refugee placement process. The staff of recognized voluntary agencies is particularly familiar with refugee profiles and at the same time with the conditions in the receiving communities. They have proven successful to support refugees in becoming self-sufficient. Notwithstanding, US experience exemplifies that even a well-established agency network depends on the willingness of the federal government to admit resettlement refugees.

Furthermore, centralized governing entails the risk to undermine local needs, conditions and concerns. Granting EUMS and/or local communities a right to oppose admission may be justified for several reasons. A right to refuse admission can prevent situations where refugees face opposition in the receiving community. In this regard, the spread of public interest narratives is crucial to overcome present hostility of the receiving environment. Essentially, if EUMS were allowed to absolute refusal of commitment, the action would run counter the principle of solidarity and fair sharing of responsibilities.

The ECJ ruling in the infringement proceedings concerning the 2015 relocation schemes indicates that refusal should be restricted to temporary suspension and/or case-by-case assessment. Yet, the last word has not been spoken since the ECJ has left contemporary issues open. These issues do not only relate to relocation, but also to resettlement. Questions to be tackled include whether and to what extent EUMS are allowed to resort to art. 72 TFEU in order to derogate from Union law in the context of combatting the spread of Covid-19 to the detriment of resettlement commitment or "the disheartening situation of asylum seekers at the Greece-Turkish border".[141]

Moreover, it is noteworthy that national security and public order concerns, as invoked by several EUMS to refuse relocation, do not necessarily contradict an increase in EU governance. As a first step, centralized general assessment of the qualification for

[139] Cf. *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* cit. para. 160.

[140] *Ibid*. para. 170.

[141] J Bornemann, 'Coming to Terms with Relocation' cit.

resettlement, including standardized security checks could be implemented at the EU-level. This involves taking account of the refugee's conditions in the country of (first) refuge, like the US definition of firm resettlement does. Once a refugee has passed the general centralized eligibility assessment, attention to specific national concerns of EUMS could still be afforded in a second step, *i.e.*, in the course of determining the actual placement of the refugee to be resettled.

What is more, as AG Sharpston pointed out in *A.S.*, art. 80 TFEU includes solidarity regarding financial implications between EUMS.[142] Proactive and tailor-sized EU funding is needed to encourage EUMS to look beyond ideology. The EU should draw a lesson from the US experience and avoid deficiencies resulting from a lack and/or misallocation of centralized funding. In particular, reactive funding fails to respond to sudden mass influx.

Lastly, "solidarity […] cannot be based on a penny-pinching cost-benefit analysis […]".[143] Times of lacking political will and consensus require a more flexible approach on solidarity. The members of the club need to listen to each other and accept the respective prevailing democratic opinions. If not willing to admit resettlement refugees, what can an EUMS offer in the alternative?

[142] Cf. *A.S*, opinion of AG Sharpston cit. para. 139.
[143] *Ibid*. para. 253 ff.