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Challenging the principle of solidarity in the Common European Asylum System

- *Towards a more comprehensive approach to sharing asylum
responsibilities*

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Summary

This thesis touches upon solidarity and the sharing of responsibility on asylum as enshrined in article 80 TFEU. The principle is purposed to govern all asylum, immigration and border check policies in the EU, but the actual meaning of the principle and what it entails has never been established. Nevertheless, the principle has been important as an underlying guiding principle in the development of a Common European Asylum System (CEAS) and its internal and external dimension; a framework with the aim of harmonizing common standards on asylum in order to maintain a high level of protection. This framework and solidarity has been put to the test during the last couple of years due to a significant increase in applicants of international protection that arrives at the EU borders. However, the actions taken by the union and the member states have been insufficient in order to comply with fundamental rights and their international obligations.

This thesis seeks to challenge solidarity within CEAS and its internal and external dimension, towards a more comprehensive approach in sharing asylum responsibilities. The meaning of solidarity and what it entails will be elaborated upon as well its legal enforceability. The scope of the thesis is limited to discuss and analyze the functions and objectives of two mechanisms, the Dublin regulation and resettlement, and how they relate to solidarity and the fair sharing of responsibilities. These are two distinct mechanisms in two different dimensions of CEAS, but nevertheless intrinsically inter-linked, as the activities in one will ultimately affect the other. This thesis essentially argues that a holistic approach where the recognition of the inter-linkage between the internal and external dimension of the CEAS framework is crucial in order to promote genuine and practical solidarity and safeguard the compliance with individual rights.

Sammanfattning

Denna uppsats berör solidaritet och rättvis ansvarsfördelning på asylområdet inom EU, principer som fastslås i artikel 80 i fördraget om Europeiska unionens funktionssätt. Solidaritetsprincipen är ämnad att genomsyra asyl-, immigrations- och gränspolitiken inom EU, men en definition eller innebörd av principen har aldrig fastslagits eller antagits. Trots detta har principen spelat stor roll som en vägledande princip i utvecklingen av ett gemensamt europeiskt asylsystem och den interna och externa dimensionen inom detta ramverk. Det övergripande syftet med detta ramverk är att harmonisera gemenskapsrätten och etablera gemensamma standarder på asylområdet för att säkerställa en hög skyddsnivå för de som är i behov av internationellt skydd. Det gemensamma asylsystemet och solidaritetsprincipen har utsatts för stor prövning de senaste åren då oroligheter i omvärlden har skapat stora flyktingströmmar in till EU. De åtgärder som EU och medlemsstaterna har vidtagit har visat sig vara otillräckliga för att tillgodose grundläggande rättigheter och leva upp till internationella åtaganden.

Syftet med uppsatsen är att utmana solidaritetsprincipens nuvarande förhållande till det gemenskapsrättsliga asylsystemet och dess interna och externa dimension mot ett mer övergripande synsätt gällande ansvarsfördelningen på asylområdet. I uppsatsen kommer solidaritetsprincipen och dess betydelse att behandlas, även principens verkställbarhet kommer att beröras. Uppsatsens omfattning är begränsad till att diskutera syftena med och funktionerna av två mekanismer, Dublinförordningen och vidarebosättning, samt hur dessa förhåller sig till principerna om solidaritet och rättvis ansvarsfördelning. Detta är två distinkta verktyg som verkar i olika dimensioner av regelverket men som i grunden är sammanlänkade då effekterna vid tillämpningen av det ena slutligen kommer påverka det andra. Uppsatsen argumenterar för ett holistiskt synsätt där kopplingen mellan den interna och externa dimensionen av den gemenskapsrättsliga asylpolitiken ska beaktas. Detta synsätt är essentiellt för att främja genuin och praktisk solidaritet och därmed garantera och säkerställa att individens grundläggande rättigheter tas tillvara.

Preface

This thesis marks the end of six years of studies at the Faculty of Law in Lund. Words cannot describe what an incredible time I have had throughout my years and how thankful I am for all the wonderful people I have had the pleasure to meet. My time in Lund and Canada has given me unforgettable memories and friends for life. I have learnt some invaluable lessons that I will carry with me as I now leave the student life behind and take a step out into the real world. It has truly been a journey, a journey that I have made with some amazing people. Therefore I would like to take this moment and thank my family and my friends for all the support throughout the years. A special thanks to Eva Löndahl, Madeleine Hedenblad, Klara Käll and Emelie Rexelius who has been by my side every step of the way and turned Lund into some of the best years of my life.

I would also like to give a special thanks to my supervisor, Eleni Karageorgiou, who has been of great assistance with her knowledge and expertise in this field. She has been a true inspiration during the process of writing this thesis.

This thesis is dedicated to someone who meant a lot to me but sadly is not around to see me graduate:

My grandfather

Lund, 25 May 2015

Nicole Ohlsson

Abbreviations

AFSJ	Area of freedom, security and justice
APD	Asylum Procedures Directive
CEAS	Common European Asylum System
CJEU	Court of Justice of the EU
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPS	Early warning and Preparedness System
EU	European Union
FRA	European Union Agency for Fundamental Rights
NGO	Non Governmental Organization
RCD	Reception Conditions Directive
RPP	Regional Protection Programme
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TCE	Treaty establishing a Constitution for Europe
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protection Directive
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Since the Arab spring of 2011 Europe has experienced a significant increase in the number of asylum seekers arriving at the European borders. In 2014 the total number of applicants reached a peak of more than 625.000 out of which 20% came from Syria.¹ In need of international protection these people try to find a way to make it to Europe in order to start a new life. However, with no legal channels to enter the EU these people are forced to enter in an irregular manner by taking dangerous routes, one of the most common ones is the crossing of the Mediterranean Sea. Over the past years many of these hazardous journeys have had fatal outcomes. Only in the last month of April 2015, more than 1000 people lost their lives while making the perilous crossing over the Mediterranean Sea.² According to regional and international instruments the EU and its member states are obliged to assist and offer international protection to those in need. It is time for the member states to step up and take further actions in the EU's external migration policies and to make the protection system in member states accessible.

The arrival patterns of asylum seekers who enter by an irregular manner are unpredictable and it calls for a more coordinated approach by the member states in order to fulfill fundamental rights obligations. Over the past 15 years the EU has developed a Common European Asylum System (CEAS) in order to harmonize common minimum standards on asylum and to offer fair treatment and high level of protection to asylum seekers. However, the shortcomings of this legal framework have become apparent in recent years when the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR) have established that the principle of mutual trust between Member States should not be taken for granted and that the presumption of safety across Europe can be rebutted. This largely has to do with ongoing operational problems in the implementation of common standards and the reception conditions in certain member states have shown to be inadequate and incompatible with fundamental rights. In the field of EU migration policies many unresolved issues remain both in the internal and external dimension.

Since the entering into force of the Lisbon Treaty in 2009 the principle of solidarity and fair sharing of responsibility has been introduced in article 80 TFEU as the guiding principle on asylum, immigration and border check policies in the EU. Various mechanisms and instruments have been suggested and some adopted in order to promote solidarity and an equal sharing of responsibility. However, the way solidarity has been conceptualized regarding these issues in the European legal framework, it appears to focus on the rela-

¹ Eurostat news release, "Asylum in the EU", 53/2015, 20 March 2015

² IOM, "IOM Welcomes EU Council Decision on Migrants in Mediterranean", April 24, 2015

tions and interests of member states, rather than on the individual rights of the asylum seeker or refugee.

The recent alarming events in the Mediterranean and the neighboring countries call for an evolution of EU migration policy. They call for a drastic change in how solidarity is conceptualized within the EU and point to a more comprehensive approach in order to fill gaps and to respond to international protection needs. An efficient and proper functioning of the existing mechanisms designed to distribute responsibilities both internally, such as the Dublin regulation and externally, resettlement, is crucial for the observance of solidarity and the compliance with fundamental rights. This points us to the core of this contribution, namely the interlinkage of the internal and external dimension of CEAS and its significance in promoting solidarity.

1.2 Purpose and research questions

Solidarity on European asylum policy is a rather complex issue, due to the lack of a common understanding of what it entails for states. Nonetheless it is a topic of great importance for the future functioning of the internal and external dimension of CEAS and states' compliance with fundamental rights and international obligations. The purpose of this thesis is therefore, on the basis of CEAS, to challenge the notion of solidarity on asylum as enshrined in article 80 TFEU and the way it has been conceptualized. Furthermore, an underlying purpose throughout this thesis is to explore how a comprehensive approach to CEAS instruments that operates in different dimensions further promotes solidarity.

In order to fulfill the purpose of this thesis, some research questions can be borne in mind as they highlight the core issues that have to be explored:

- What does the principle of solidarity entail and how has it been conceptualized in the European legal and political debate?
- What are the respective functions and rationales behind the mechanisms adopted to implement solidarity and reinforce CEAS both internally and externally? Have they been successful in achieving their objectives?

1.3 Method and material

In the process of writing the present thesis, a traditional legal dogmatic method has been used in order to seek the answers to the research questions mentioned above. This method, in an EU context, entails the establishment and analysis of current law that is found in primary sources, i.e. treaties, and secondary sources, which includes regulations, directives, decisions, communications and green papers, and finally, supplementary sources such as case law and international law. The chosen method can be motivated by the fact that in

order to challenge the principle of solidarity, it is important to understand how it is conceptualized and what it entails in its present state.

The thesis also has an exploratory aspect in the sense that current law is not only presented. Rather the thesis seeks to explore, on the basis of its historical background and development, how the internal and external dimension of CEAS are interlinked and how a comprehensive approach could further promote solidarity and sharing of asylum responsibilities. The topic of this thesis, solidarity on asylum, is rather analytical and complex. Therefore, the thesis lends itself to have an underlying analytical perspective throughout the study, rather than saving it to last. This method is purposed to enhance the reading and understanding for the reader of the issues at hand.

The thesis has a clear EU perspective and hence the material has mainly been based on legal instruments and various documents from different EU institutions. Case law, foremost from the European Courts has furthermore served as a valuable source to demonstrate the inadequacies of the Dublin regulation in creating a fair sharing of responsibility and safeguarding fundamental rights. Some international instruments and principles have also been referred to when appropriate in order to provide for a broader perspective on the core issues of solidarity and asylum policy. Furthermore, resettlement is a policy with an international character and carried out under mandate of the United Nations High Commissioner for Refugees (UNHCR), the UNHCR handbook from 2011 therefore served as a great tool in introducing this topic and in providing useful information in how the procedure of resettlement is carried out.

The core topic of this thesis, solidarity on asylum policy, is a relatively new area and hence not much material can be found in doctrine. Rather several journals and papers have served as a basis to provide for an understanding of this complex issue. A study which was requested by the European Parliament in 2011: “The Implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration” has been very useful and has served as a foundation and inspiration for this thesis.

1.4 Delimitations

There is a vast of ways in which the concept of solidarity can be understood in the European legal framework and it is in itself a broad topic. Due to the limited nature of this thesis the aim is not to provide an exhaustive presentation of the background and normative functions of solidarity in all areas of law. Rather the thesis will present the main features of the principle of solidarity and the way it has been conceptualized on asylum in the EU.

Article 80 TFEU covers solidarity within the area of asylum, immigration and border check policies. The author acknowledges that immigration and border check policies play a role on how policies on asylum are shaped and

thus, do have an impact on the protection system. However, their primary goal is to prevent irregular migration and sustain a controlled migration regime, rather than corresponding to protection needs. Accordingly and as the thesis focuses on solidarity in refugee protection, these two policy areas will not be explored. Instead the thesis will discuss asylum policies and their relation to the principle of solidarity within CEAS and their implications in the internal and external dimension of this framework. Furthermore, in order to keep a narrow focus the thesis delimits the discussion to two mechanisms and explores how they interact.

As regards the internal dimension of CEAS, the thesis focuses on the Dublin regulation. The thesis therefore does not lend itself to a discussion on other forms of solidarity measures such as mutual recognition of asylum decisions, joint processing or relocation. In regards to the external dimension of CEAS the thesis elaborates on resettlement and thus will not confer upon other regional protection programmes, protected entry procedures such as the issuance of humanitarian visas or readmission agreements as ways to promote the functioning of solidarity.

As the thesis takes on a rights-based approach to solidarity, reference to the rights afforded to asylum seekers and refugees will be made. An exhaustive presentation of refugee rights found in various legal instruments is beyond the scope of this study. There has also been a growing debate on whether or not solidarity could be a third generation of human rights. The thesis does not explore this topic, rather it seeks to argue how solidarity and its implementation is a requirement for a full compliance with fundamental rights.

Furthermore, financial solidarity, which is explicitly expressed in article 80 TFEU will not be elaborated upon, as it is probably one of the most tangible and effective measures of solidarity to date and has not been as controversial as those measures the thesis will seek to address.

Lastly, the thesis will not discuss or suggest for distribution keys designed to promote a fair sharing of responsibility across the EU and its member states. This issue has been addressed recently in a working paper by the International Centre for Migration Policy: “An effective Asylum Responsibility Sharing Mechanism”, which was carried out in August 2014.

1.5 Outline

Seeking to provide answers to the research questions and sub-questions mentioned earlier, the thesis is divided into four sections.

Section *two* begins by introducing international solidarity in order to put the core tasks of the thesis into a broader perspective. A brief note is also given on some of the rights and obligations in refugee protection. The section moves onwards and presents the Common European Asylum System and the background and discussions leading up to its establishment. The evolution of

the framework will be presented, both its internal and external dimension and how solidarity has become a fundamental principle underlying this framework. At the end of the section, an attempt is made to further introduce the concept of solidarity and the way it has been conceptualized in the European legal framework. The thesis further elaborates on the meaning of solidarity and its legal enforceability.

Section *three* goes more in depth regarding the internal dimension of CEAS and the different instruments comprising it. The focus is on providing an assessment of the Dublin regulation, its functions, objectives and its relation to solidarity and fair sharing of responsibility. The section also explores the jurisprudence by the ECtHR and the CJEU in order to see how effective this instrument has been and how it interferes with member states' obligations to protect individual rights.

Section *four* explores the external dimension of EUs' migration policies and its relation to CEAS. The mechanism in focus is resettlement and its functions and objectives. The section discusses how member states should be encouraged to participate more in resettling refugees as a way to promote solidarity and a fair sharing of responsibility and compliance with international obligations.

Finally Section *five* seeks to summarize the findings and give some concluding remarks on the most important issues that have been presented throughout the thesis. It shows how the principle of solidarity has been conceptualized in the internal and external dimension of CEAS and proposes for a possible future approach.

1.6 Terminology

When the term *refugee* is used in the text it refers to a person who is fleeing persecution and has already been officially recognized as a refugee according to the 1951 Refugee convention or as a beneficiary of subsidiary protection according to EU law. The term *asylum seeker* on the other hand is used to refer to a person who has lodged an application for international protection but a final decision on his claim is still pending before the competent authorities.

The term *international protection* refers to the recognition of a non-EU national or a stateless person as a refugee or as a person eligible for subsidiary protection. *Subsidiary protection* refers to protection given to a non-EU national or a stateless person who does not qualify as a refugee but there are substantial grounds to believe that the person, if returned to the country of origin, faces a real risk of suffering serious harm.³

³ European Commission, Glossary, http://ec.europa.eu/dgs/home-affairs/e-library/glossary/index_a_en.htm

The term *fundamental rights* is most commonly used within the EU legal order whereas *human rights* is more frequently used within international law. Although they both to a large extent refer to the same set of rights they will be used in accordance with their traditional usage. Thus fundamental rights will be used as a term when referring to rights within the EU constitutional framework and the term human rights will be used when referring to rights within the international legal order.

The *internal dimension* of CEAS refers to the legal instruments, policy discussions and actions on asylum that pertain to the creation of a common area of protection and solidarity within the EU. The *external dimension* of CEAS refers to the policy discussions, activities, cooperation and partnerships that promote solidarity and sharing of responsibility with third countries.

The thesis explores the process of *resettlement*. It should be noted that this process is different from that of *relocation*. Resettlement from an EU viewpoint refers to the transfer of a person from a country outside the union to one of the EU member states. Relocation on the other hand refers to the transfer of a person from one EU member state to another and is thus an intra- EU process.

2 Solidarity on European asylum policy

2.1 Influence from international law – a brief overview

Solidarity is a broad and complex concept that exists in various fields of law. Some insight into the international law sphere will be provided for before entering into the realm of EU law. This allows for a more comprehensive understanding of solidarity and the different features it may represent. Furthermore, as will be argued for in the thesis, the functioning of solidarity is essential for states to comply with fundamental rights and international obligations. The EU and its member states are bound by the 1951 International Refugee Convention (hereinafter the refugee convention) and its 1967 Protocol⁴, therefore its most essential provisions and principles will be presented before moving onwards to solidarity within the European legal and policy framework.

2.1.1 Solidarity in international law

The concept of solidarity can be traced back many years and it has been argued by scholars that it is an established structural principle within international law.⁵ The principle can be found in various branches of international law such as environmental law, trade law, humanitarian law and human rights law.⁶ As an arguably value-driven principle with strong moral implications it has gained high level of implementation in certain areas of law whereas in other areas it remains an aspiration.⁷ This could have to do with what kind of solidarity is at issue. In a tribute made to the renowned scholar Rüdiger Wolfrum, the basis for the discussion is that solidarity in international law is a trait of a system that protects community interests, however these interests can be of different types.⁸ The interests could be based on issues affecting each and every state bringing states together to cooperate in order to achieve a common goal i.e. ‘self-centered solidarity’. The interests could also be those of developing countries where the benefits to those countries are clear and direct and perhaps long term for developed countries, in these situations solidarity can be referred to as ‘altruistic solidarity’.⁹ Ultimately, Wolfrum

⁴ Convention relating to the Status of Refugees, Adopted on 28 July 1951 | Protocol Relating to the Status of Refugees, 31 January 1967

⁵ Wolfrum, R., and Kojima, C., (eds.), “Solidarity: A Structural Principle of International Law”, 2010

⁶ Wolfrum, R., “Solidarity” in “Oxford handbook of international human rights law”, 2013, p. 401-418

⁷ Hestermayer, H., et al., “Coexistence, Cooperation and Solidarity”, 2011, p. 63

⁸ Ibid p. 50

⁹ Ibid p. 51

himself sees the acknowledgement of inequalities between states to be the core of solidarity as a structural principle in international law.¹⁰

However, solidarity is not merely a concept that should be based on the interests of states. Populations and individuals constitutes a significant part of the international community and the fact that the solidarity principle has been introduced in several legal regimes, it has furthered the development of the principle and also broadened the scope of whom the addressee may be.¹¹ In the human rights law regime the population is the primary addressee of any actions taken in the light of solidarity rather than a state, as Wolfrum argues this is in line with the modern view of statehood and states are there to serve the well-being of its population rather than being a means of themselves.¹² The awareness of different ways in which solidarity can be regarded and the different objectives it may serve is of outermost importance when arguing what approach is the most desirable and necessary in different fields of law.

The international legal instruments and documents where the principle of solidarity is referred to are still rather limited, yet the concept has been mentioned several times within the UN. In the UN Millennium Declaration solidarity was defined as a fundamental value and it stated, “Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most”¹³. The UN General Assembly has also reaffirmed the principle in its resolutions and referred to solidarity both as a concept regarding cooperation among states and international solidarity as a right of the peoples and individuals.¹⁴ This further shows the different dimensions that the concept of solidarity may embody.

In regards to international refugee law sources the principle of solidarity can be found indirectly in the preamble of the refugee convention where it is recognized that the pressures that migration flows put on certain countries calls for a joint action. Documents and resolutions by the UN General Assembly regarding refugee related issues also refer explicitly to the principle of solidarity.¹⁵ The legal implications of the principle have been controversial at the international level and although it may not yet have reached a level where it has a legally binding force it still serves an important function as a guiding principle when interpreting other international norms.¹⁶ Furthermore, the abovementioned documents and resolutions might not be legally binding but

¹⁰ Wolfrum, R., supra note 6, p. 402

¹¹ Ibid p. 417

¹² Ibid p. 418

¹³ UN General Assembly resolution, United Nations Millennium Declaration, September 2000, p.6

¹⁴ UN General Assembly resolution, Promotion of a democratic and equitable international order, 18 December 2009, para. 4 (e) (f)

¹⁵ E.g. Executive Committee of the high commissioner’s programme, International Solidarity and Burden Sharing in all its aspects: National, regional and international responsibilities for refugees”, 7 September 1998 | UN General Assembly resolution, Office of the United High Commissioner for Refugees, 12 February 1997

¹⁶ Wolfrum, supra note 5, p. 42-45

they can indicate the existence of solidarity as a principle within international law and they can help to inform the meaning of solidarity within EU law.¹⁷

2.1.2 Refugee protection in international law

State sovereignty entails that states determine who is allowed to enter and remain on their territory. However, this right is not absolute and states' obligations to comply with international treaties can impose limitations.¹⁸ These limitations can be found in both refugee law and human rights law and it should be noted that these two legal regimes for a long time have been regarded as two distinct branches of international law. During the development of these regimes there has however been a growing debate on the actual connection between the two. Chetail argues that they are now merged together and are interrelated to an extent that they are virtually impossible to separate from one another. He further argues that nowadays, most of the refugee protection is found in human rights law sources. The basis for his argument is twofold. Firstly, the personal scope in human rights law is broader as it not only covers refugees but also asylum seekers and other people in need of protection. Secondly, the material scope in human rights law is also greater as it encompasses a wide range of rights that are not included in the refugee convention, such as certain civil, political and cultural rights. In summary, he points out that human rights law essentially is more extensive in its scope than refugee law, but that the latter in substance is a subset of the former.¹⁹ The thesis will not further discuss the various human rights that can be found in international instruments. It rather suffices here to argue that there is a set of human rights that can be accorded to refugees and asylum seekers and states have to comply with their international obligations.

The significance of the refugee convention should not be undermined as it is still regarded as the cornerstone of international refugee protection and it poses a quite distinct and unique standard of protection. The convention establishes criteria for granting refugee status and envisages protection for any person unable to return to his/her country of origin due to "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".²⁰ The definition of refugee is one of the important parameters in the convention with regard to protection; the other one is the principle of non-refoulement. This principle, found in article 33 of the convention is one of the most fundamental principles regarding refugees in refugee law. The principle sets out the prohibition of forced returns, which means that no state shall on the grounds set out in article 1 (A) (2) "expel or return ("refouler") a refugee in a manner whatsoever

¹⁷ McDonough, P., & Tsourdi, E., "Putting solidarity to the test: assessing Europe's response to the asylum crisis in Greece", January 2012, p. 8

¹⁸ Goodwin-Gill, G., "The Dynamic of International Refugee Law", *International Journal of Refugee Law* Vol. 25 No. 4 pp.651-666, 2013, p. 655

¹⁹ Chetail, V., "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", 2014, p. 68-69

²⁰ Refugee Convention, *supra* note 4, article 1 (A) (2)

to the frontiers of territories where his life or freedom would be threatened”. According to article 42 (1) of the convention, the provision of non-refoulement is absolute and may not be derogated from.

The territorial scope of this principle has been subject to discussions and it appears to be rather controversial to what extent the principle of non-refoulement can be breached outside a states’ territory and on the frontiers of states. In the case of *Sale v Haitian Centers Council, Inc. et al.*, a decision by the US Supreme Court, the obligation of non-refoulement was not rendered to have been breached when the US Coast Guard decided to return a vessel with people seeking protection back to the country of origin before examining whether or not they would qualify as refugees.²¹ This judgment was criticized due to its ignorance of international obligations and according to an advisory opinion by the UNHCR the principle of non-refoulement can be applied to any form of forcible removal, including the non-admission at the border.²² It has further been noted that the principle of non-refoulement, like many other human rights obligations, is applicable regardless where states exercise jurisdiction, the application can reach beyond the borders, to the high seas and even on to the territory of another state.²³ The principle of non-refoulement is a well established principle for safeguarding individual rights and it can be found in other international and regional legal instruments such as the European Convention on Human Rights (ECHR) and the EU *acquis*.²⁴

While discussing the essence of international refugee protection, the Universal Declaration of Human Rights (UDHR)²⁵ adopted by the General Assembly also deserves a brief comment. Article 14 UDHR declares: “everyone has the right to seek and to enjoy in other countries asylum from persecution”. It has been contested what added value this provision has in regards to the established principle of non-refoulement, as it is not legally binding upon states and it has been stated that the ‘right to seek asylum’ does not afford a ‘right to access the territory’ of another state.²⁶ The Charter of Fundamental Rights of the EU (hereinafter the EU Charter) has a similar provision in article 18,

²¹ *Sale v Haitian Centers Council Inc.* 509 U.S. 918, 113 S Ct 3028, 28 June 1993, para 2563

²² UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relation to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 7

²³ Goodwin-Gill, G., “The Right to Seek Asylum: Interception at Sea and the principle of *Non-refoulement*”, 16 February 2011, p. 2

²⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, article 3 | Council Directive 2011/95/EU (recast) 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 protection granted, recital 48 (hereinafter: the Qualification Directive) | Council Regulation (EU) 604/2013 (recast) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, recital 3 (hereinafter: the Dublin III regulation)

²⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948

²⁶ Noll, G., “Seeking Asylum at embassies: A right to entry under international law?”, *International Journal of Refugee Law*, vol. 17, no. 3, p. 546-547

providing for a ‘right to asylum’.²⁷ The EU Charter became legally binding in 2009 after the entering into force of the Lisbon treaty and its provisions gained treaty rank within the EU legal framework. Although the actual substance of this provision has been subject to debate, it has been argued that the compliance with this right is essential as it validates the secondary EU legislation such as directives and regulations on asylum.²⁸

Solidarity and sharing responsibility is essential to safeguard refugee protection and to meet refoulement obligations. Moreover, monitoring mechanisms can play a crucial role in supervising the compliance with international obligations and fundamental rights. At the time when the refugee convention was adopted, no mechanism with a supervisory function was established in order to monitor the compliance with the provisions in the convention. When the UNHCR was established by the General Assembly it was given the primary task of providing international protection and supervising the application of international conventions.²⁹ However, as Goodwin-Gill notes, this perhaps suggests that the UNHCR can provide for guidance in regards to the application of the refugee convention but the advice cannot be considered binding upon states.³⁰ Nonetheless, article 35 of the convention stresses that states must cooperate with the UNHCR when it carries out its tasks, including the monitoring of the application of the convention. Thus, it is essential that states assist the UNHCR and make sure that the provisions of the convention are complied with. Within the EU, the European Commission (hereinafter the Commission) has an important role in monitoring the application of treaties and may take action if a member state fails to comply with EU law.³¹ Moreover, the CJEU has the vital function of interpreting union law and making sure that its application is uniform throughout the union and the member states.³² The monitoring mechanisms are essential in safeguarding that member states comply with obligations that they are bound by.

2.2 A Common European Asylum System

The concept of solidarity has marked the policy discussions in the creation of a common European asylum system for the past 15 years. A system where the protection of fundamental rights is its primary objective in bringing about EU-wide convergence in asylum matters by implementing common asylum standards across the union and its member states. This part is set out to pre-

²⁷ Charter of Fundamental Rights of the European Union, 26 October 2012

²⁸ Noll, G., supra note 26, | Gil-Bazo, María-Teresa, ”The Charter of Fundamental Rights of the European Union and the right to be Granted Asylum in the Union’s Law”, Refugee Survey Quarterly, vol. 27, no. 3, 1 October 2008, p. 34

²⁹ UN General Assembly resolution 319 (IV), ”Refugees and Stateless Persons”, 3 December 1949, Annex para. 4 (a)

³⁰ Goodwin-Gill, G., supra note 18, p. 655

³¹ Consolidated Version of the Treaty on European Union, OJ C326/01, article 17 (hereinafter: TEU) | Consolidated Version of the Treaty on the Functioning of the European Union, OJ C326/47, article 258 (hereinafter: TFEU)

³² Ibid TEU, article 19

sent the development of this framework and the evolution of solidarity as an important principle for the functioning of CEAS and its internal and external dimension.

2.2.1 First phase: Tampere Conclusions

The European Council held a meeting in Tampere in 1999 where they wanted to take full advantage of the opportunities offered by the Amsterdam treaty, namely the creation of an area of freedom, security and justice (AFSJ).³³ In giving effect to this provision the aim was to create an “open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity”³⁴. The compliance of human rights law and refugee law in the light of solidarity has thus been a core value of AFSJ since its establishment and has throughout its development been reflected in the programmes adopted. On the other end of this policy spectrum is the need for states and the union to control borders in order to combat illegal immigration and those who operates it. This demands a careful arrangement in how the borders can be controlled in a way that does not deprive people from accessing protection in the EU.³⁵

In the creation of an area without internal borders where freedom of movement is upheld, a need for harmonization and development of common policies on asylum and immigration became evident. The idea and long-term vision of a community with a common asylum procedure and a uniform status for those who are granted asylum throughout the union was hence established. The European Council called for the development of common minimum standards in the asylum procedures and reception conditions in the member states as well as measures offering subsidiary protection. Furthermore, the development of a system to determine the state responsible to examine an asylum application was also to be carried out.³⁶ As a result of the first phase in the development of CEAS, several directives and regulations were adopted.³⁷ Although AFSJ is mainly an internal project intended to maintain a union with no internal borders, the external dimension is equally important for its full realization. The European Council (hereinafter the Council) has repeatedly acknowledged the importance of coherence in the external asylum policies.³⁸

³³ European Council, Presidency Conclusions, 15-16 October 1999 | TFEU, supra note 31, article 3 (2)

³⁴ Ibid Tampere conclusions, para. 4

³⁵ Ibid para. 3

³⁶ Ibid para. 14-15

³⁷ These regulations and directives have been under development for many years, the amended versions will be presented in section three.

³⁸ European Council, Presidency Conclusions, supra note 33, para. 59

2.2.2 Second phase: the Hague Programme

In 2005 a second multi-annual programme was set out in Hague where the objectives of AFSJ and the future development of CEAS was established. The basic layout of CEAS as agreed upon in Tampere was confirmed but proposals were made to considerably strengthen the framework.³⁹ One important proposal, which was later adopted, was the creation of a European Asylum Support Office (EASO) that has played an important role during the development of CEAS. The core task of this office is to monitor the cooperation and actions taken between member states that relate to the common asylum system, it should further promote solidarity in the union.⁴⁰ The Hague Programme also called for an evaluation of the regulations and directives that were adopted during the first negotiating meeting in Tampere. After the completion of that evaluation the member states were urged to implement the instruments no later than 2010.⁴¹

Moreover, it was acknowledged that needs arising from migration and seeking asylum are a continuous issue and a comprehensive approach is required based on solidarity and fair sharing of responsibility in order to meet the demands. In regards to solidarity, the Council called for a more practical cooperation. Member states were encouraged to exchange information, give technical assistance, and continue the harmonization of legislation.⁴² In the view of the Council, solidarity thus appear to be a concept with many components that mean more than only distribution of ‘burdens’.

The significance of the external dimension of asylum and migration was again highlighted in the Hague Programme as an important part of the EU common external policies and was given a separate heading as ‘the external dimension of asylum’.⁴³ It was further emphasized that EU policy should aim at assisting third countries in full partnership to improve refugee protection. The development of durable solutions at the earliest possible stage was suggested as a mean to assist third countries and thereby prevent further humanitarian disasters and instead safeguard the protection of fundamental rights.⁴⁴ Resettlement is one such durable solution and will be elaborated more upon in section four.

After the closing of this meeting, the Commission and the Council of the European Union (hereinafter the EU Council) set up an Action Plan on the implementation of the Hague Programme and how to strengthen the freedom, security and justice in the European Union.⁴⁵ The intention of the plan was to

³⁹ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/01, 3 March 2005, para. 1.2

⁴⁰ EASO was adopted in 2010 by Regulation (EU) No 439/2010 of the European Parliament and of the Council, 19 May 2010

⁴¹ The Hague Programme, supra note 39, para. 1.3

⁴² Ibid para. 1.2

⁴³ Ibid para. 1.6

⁴⁴ Ibid para. 1.6.1

⁴⁵ Council and Commission, Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198/01, 12 August 2005

set out the agenda of the work that was to be carried out for the next five years. The Commission had prior to setting this action plan, identified ten different priority areas out of which setting up a common European asylum system was one.⁴⁶

The surroundings in which a framework such as CEAS is operating in is constantly changing and as the development of CEAS continued, issues emerged during the next few years. The Commission wanted to define a new road map in what the next steps of the development of a common asylum system would be. In 2008 the Commission adopted a new action plan in order to assess the current state and which direction the development should go. The objectives were clarified and it was emphasized that the protection system in the EU must be accessible to those in need and it was stressed that it is equally important that the union help in facilitating access to protection outside EU territory. It was furthermore stressed that solidarity mechanisms have to be implemented both between member states and third countries.⁴⁷

The political debate and the adoption of legal instruments during the two first phases in the development of CEAS thus demonstrated the importance of establishing uniform asylum standards in the union as a way to safeguard the protection of fundamental rights. Moreover, throughout the development it has become clear that solidarity plays a vital role, both as an intra-EU regulatory tool and as a basis for cooperation with third countries.

2.2.3 The solidarity principle in article 80 TFEU - Background and history

Solidarity as an emerging principle on EU asylum policy has undergone two main development stages. These two will briefly be presented below in order to provide for some insight in how the discussions went in introducing solidarity as a principle in this particular policy area. This will serve as a basis in reaching an understanding of how the solidarity principle has been conceptualized in the European legal framework.

2.2.3.1 Pre-Lisbon

Solidarity on asylum, immigration and border control policies in the EU has its origins from the discussions in the European Convention that took place when negotiating the establishment of a Constitution for Europe.⁴⁸ The for-

⁴⁶ European Commission, The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM (2005) 184 final, para. 2.3

⁴⁷ European Commission, Policy Plan on Asylum, an integrated approach to protection across the EU, COM (2008) 360 final, para. 1.1, 2

⁴⁸ For an extensive report on solidarity and its implications on asylum, immigration and border check policies; Vanheule, D., van Selm, J., Boswell, C., "The Implementation of article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its finan-

mation of the European Convention was a result of a declaration adopted pursuant to the presidency conclusions in Laeken in December 2001. It was acknowledged that the enlargement of the European Union required an improved democracy and an effective and transparent system and therefore the EU leaders called for a Convention on the future of Europe in order to lay down the foundation of a common constitution that would replace the existing treaties.⁴⁹

During the negotiations that took place at the European Convention solidarity in regards to asylum, refugees and displaced persons was brought up in the working group covering the area of “Freedom, security and justice” and it was questioned whether or not solidarity should be made a general principle purposed to govern all asylum, immigration and border control policies.⁵⁰ During the discussions and meetings that were held in the development of a potential provision on solidarity, there were disparities as to what the wording of this new article should be. There were several suggestions for an amendment that would exclude the specific insertion of financial solidarity and there were suggestions proposing that solidarity should not apply to immigration policies, as it did not seem practical in that area.⁵¹ Some also called for a complete omission of solidarity as it was considered an imprecise and vague concept, which was difficult to interpret judicially.⁵² However, none of these amendments were adopted and in the final report the working group agreed to give solidarity a specific legal basis and article III-169 of the Draft Treaty establishing a Constitution for Europe (TCE) was given the following wording:

“The policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Section shall contain appropriate measures to give effect to this principle.”⁵³

This provision was thus expanded in its scope from previously having addressed only asylum policies to now governing also immigration and border check policies across the European Union.⁵⁴ The TCE was signed by 25 member states in Rome on 29 October 2004.⁵⁵

cial implications, between the Member States in the field of border checks, asylum and immigration”, 2011

⁴⁹ European Council, Presidency conclusions, 14 and 15 December 2001, p.21-24

⁵⁰ The European Convention, Working Group X, Working Document 05, “Police and Judicial Co-operation in Criminal Matters, Asylum and Immigration, Judicial Co-operation in Civil Matters: Instruments, Procedures and other Institutional issues, Possible ways forward for the working group”, p.3

⁵¹ Suggestion for amendment of article 13 by G.M. de Vries and T.J.A.M. de Bruijn [1], suggestion for amendment of article 13 by Poul Schlüter [2], suggestion for amendment of article 13 by Lena Hjelm-Wallén *et al.* [3]

⁵² Suggestion for amendment of article 13 by David Heatcoat-Amory and The Earl of Stockton [4]

⁵³ Draft Treaty establishing a Constitution for Europe, OJ C 169, 18 July 2003

⁵⁴ See Treaty Establishing the European Community, OJ C 325, 24 December 2002, article 63(2)(b) stating that EU legislative bodies should adopt measures “promoting a balance of

2.2.3.2 The rejection of a constitution and the emergence of a reform treaty

In order for the constitution to enter into force it had to be ratified by all member states and according to the final version of the TCE the ratification process would last for two years, it was expected to have entered into force by 1 November 2006.⁵⁶ However, the ratification process came to a halt as some member states encountered ratification problems.⁵⁷ The Heads of state and Government adopted a declaration in the European Council on 16 and 17 June 2005 and called for a ‘period of reflection’. The purpose was to create a broad debate and to generate interest among the citizens and institutional bodies in Europe whom had expressed concerns regarding the adoption of a constitution.⁵⁸

The period of reflection was overall considered a success as some of the concerns that had been raised could be assessed.⁵⁹ However, after a two-year period the presidency gave a report on the future of the constitution and it was decided that a new conference would convene to adopt a reform treaty for the EU that would amend existing treaties rather than a constitution that would repeal them.⁶⁰ A few months after the final draft of the treaty was agreed upon by the member states in Lisbon, the treaty was finally signed on 13 December 2007 and entered into force on 1 January 2009.⁶¹

With the Lisbon treaty the former TEC became the Treaty on the Functioning of the European Union (TFEU)⁶² and the principle of solidarity on asylum, immigration and border check policies was formally introduced in the European primary law for the first time. Overall, article 80 TFEU kept the same wording as article III-169 that had been negotiated and agreed upon earlier in the European Convention on the future of Europe:

“The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.

efforts between Member States in receiving and bearing the consequences of receiving refugees”.

⁵⁵ The Gateway to the European Union, Summaries of legislation, A constitution for Europe, www.europa.eu

⁵⁶ Treaty establishing a Constitution for Europe (final text), OJ C 310, 16 December 2004, article IV-447

⁵⁷ The Gate way to the European Union, supra note 55

⁵⁸ European Council, Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, 18 June 2005

⁵⁹ Council of the European Union, Presidency Conclusions, 17 July 2006, para. 45

⁶⁰ Council of the European Union, Pursuing the Treaty Reform Process, 14 June 2007; This thesis will not elaborate further on the differences between a constitution and a reform treaty.

⁶¹ Informal European Council, Presidency press release, 18-19 October 2007 | Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17 December 2007, final provisions article 6

⁶² Consolidated version of the Treaty on the Functioning of the European Union, OJ C 115/01, 9 May 2008

Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”

The negotiating of an EU constitution and the debates on the introduction of solidarity as a principle on asylum thus created disagreements among the legislators in the beginning. In the end however, solidarity as a principle purposed to govern asylum policies was successfully implemented in treaty law.

2.2.4 Post-Lisbon and the Stockholm Programme

After the entering into force of the Lisbon treaty in 2009 the development of CEAS took another leap forward. CEAS was incorporated in article 78 TFEU, which falls under the scope of article 80 TFEU. Thereby, CEAS was given a legal basis on treaty level and solidarity and fair sharing of responsibility was to be the guiding principle underlying this framework.

In light of the entering into force of the Lisbon treaty, the Stockholm Programme was adopted in 2009 to replace the Tampere and Hague Programmes.⁶³ Besides reiterating the foundations and objectives, which CEAS is built upon and putting measures into its full completion before 2012, the Stockholm Programme emphasized the importance of the rights of the individual. While recognizing the need of effectiveness of the system in order to prevent abuse it was also stated that the primary aim is the maintaining of high protection standards.⁶⁴

The Stockholm Programme also put greater emphasize on the external dimension of the union’s asylum policies than its predecessors. It was acknowledged that solidarity within the union is essential but not sufficient in developing sustainable common policies on asylum. The establishment of common measures and tools intended to show solidarity with third countries is important in order to reach a full realization of the common policies and the protection of fundamental rights.⁶⁵

2.2.5 The completion and future of CEAS

The regulations and directives that make up CEAS have throughout the years undergone several amendments. The recast versions of these instruments were adopted in 2013 and their respective most important features will be presented below in section three. One of the main criticisms has been that they only demand for the implementation of minimum standards, which are set too low. They have also failed to address the most fundamental problem; the creation of legal routes to Europe to trigger and make the protection sys-

⁶³ European Council, The Stockholm Programme – an open and secure Europe serving and protecting citizens, OJ C 115/1, 4 May 2010

⁶⁴ Ibid para. 6

⁶⁵ Ibid para. 6.2, 6.2.3

tem accessible to those in need.⁶⁶ Whether or not the revised versions will successfully address the core issues and point the development of CEAS in the right direction in order to comply with its objectives and aims remain to be seen.

Furthermore, when the period covered by the Stockholm Programme came to an end the Council, in accordance with article 68 TFEU, adopted new strategic guidelines on the future of AFSJ for the period 2015-2020. The way forward calls for a comprehensive approach in the creation of a well-managed migration based on solidarity with an effective completion of CEAS as the main priority. Having common standards will provide guarantees to the asylum seekers that they receive the same procedures and reception conditions throughout the union regardless where their application will be examined. The strategic guidelines also state that all migration policies in the union must be more integrated as the internal and external policy dimensions are interlinked, the success and failure in one will ultimately affect the other, therefore the bond must be improved.⁶⁷

2.3 The conceptualization of solidarity on asylum in the European legal framework

With the introduction of solidarity within EU primary law, its role as a principle underlying asylum policies and the CEAS framework is uncontested. Nevertheless, the meaning of solidarity seems to be somewhat unclear and this part seeks to establish how solidarity has been conceptualized in the legal framework and explore the potential meaning and scope of this principle as articulated in article 80 TFEU.

2.3.1 Solidarity – More than mere cooperation and fair sharing of responsibility?

Solidarity can play different roles in different fields of EU law and it can serve different functions and objectives.⁶⁸ The way solidarity has been articulated in article 80 TFEU it emphasizes solidarity *between* the institutions in the EU and the member states, i.e. it plays an institutional role.⁶⁹ The principle of solidarity has thus become a concept chiefly designed to regulate the relations and interests between member states. However, the interests and

⁶⁶ Peers, S., Statewatch, "The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig", 8 April 2013, p.1, 15-16

⁶⁷ European Council, Conclusions, 27 June 2014, para. 2, 5, 8

⁶⁸ For more about solidarity in different areas of EU law; Ross, M., "Solidarity: A New Constitutional Paradigm for the EU?" in "Promoting Solidarity in the European Union", 2010, p.23-45

⁶⁹ Vanheule, D. et al., supra note 48, p. 28

goals might vary between the member states and also differ from those of the EU institutions. As the motivations for common migration policies might vary between member states it has been stressed by the Migration Policy Institute Europe that a common understanding of the solidarity concept is required in order to strengthen the operation of migration policies at EU level.⁷⁰ A definition on what the principle of solidarity on asylum policies in the EU entails and a consensus among member states is however yet to be found. The amendment proposals that were presented when negotiating a constitution for Europe shows that there were disagreements in the formulation of the provision and concerns about its legal implications already at the outset.

Regardless of the actual meaning of the principle of solidarity it must have been intended to have some added value when being explicitly expressed in article 80 TFEU, thereby intended to mean something more than ‘sincere cooperation’ which is referred to in article 4 (3) of the common provisions in the Treaty on the European Union (TEU).⁷¹ The principle of solidarity has also been connected to trust between member states as a way to further promote the functioning and resilience of the asylum system in each member state.⁷² Furthermore, it has been emphasized that the important aspect, irrespective of its exact meaning, is that the prominent use of the solidarity in article 80 TFEU implies that it is a guiding principle intended to underlie all asylum immigration and border check policies.⁷³

The EU Council has also given some guidance in its conclusions from March 2012, noting that solidarity and responsibility go hand in hand. As the current migration flows has shown to put more pressure on the borders of certain countries and their systems, a fairer sharing of responsibility has been called for and the EU Council adopted measures in order to remedy the situation. The EU “affirmed that the framework for genuine and practical solidarity is a flexible and open ‘tool box’ compiled of both existing and possible new measures”⁷⁴. Thus there can be room for interpretation and a more comprehensive approach could be taken in regards to article 80 TFEU and the measures that can be adopted thereunder. The term *including* in the provision when referring to financial solidarity furthermore indicates that the provision is not exhaustive and other measures can be adopted in order to promote solidarity.

It can be argued that with the possibility to take a comprehensive approach to article 80 TFEU it could potentially also apply to the EU’s external relations.

⁷⁰ Garlick, M., Migration Policy Institute, policy brief, “Strengthening refugee protection and meeting challenges: The European Union’s next steps on asylum”, June 2014, p.1

⁷¹ TEU, supra note 31, article 4 (3) reads as follows; “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”

⁷² European Commission, on enhanced intra-EU solidarity in the field of asylum. An EU agenda for better responsibility-sharing and more mutual trust, COM (2011) 835 final, p.11

⁷³ McDonough, P., supra note 17, p. 7

⁷⁴ Council of the European Union, Council conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, 8 March 2012, para. 4-6

The article has a relatively broad scope and covers asylum, immigration and border check policies in articles 77-79 TFEU. Article 78 (2) (g) states that measures in the creation of common asylum policies shall include “ partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.” This could indicate that the union can and shall take further actions in its external relations and policies on the basis of solidarity as expressed in article 80 TFEU.⁷⁵

In the development of shared asylum policies and in the evolution of solidarity, the notion and perspective of ‘burden-sharing’ have been dominating the discussions, implying that offering protection to asylum seekers is a “burden” to the host state.⁷⁶ This negative connotation has to some extent been replaced throughout the years and as enshrined in article 80 TFEU many of the debates are nowadays centered on a ‘fair-sharing of responsibility’. Mitsilegas argues that a burden-sharing perspective on migration flows will contribute to a concept of solidarity that is state-centered, securitized and exclusionary. It is state-centered as the interest of the state prevails over the interest and position of the individual, it is also securitized in a sense that it focuses primarily on emergency situations and comprises a crisis mentality. Lastly, Mitsilegas argues that the concept is exclusionary as it has a limited application beyond EU citizens, third country nationals and those outside are not included. The concept is thus theorized in such a way that it does not take into consideration the fundamental rights of the asylum seekers, neither those on EU territory nor outside.⁷⁷

The incentives for sharing the responsibility have often been based on the interests of the states and in order to even out the distribution of asylum seekers, Noll has founded three different approaches to address the issue: ‘sharing people’, ‘sharing money’ and ‘sharing norms’.⁷⁸ The thesis is primarily focusing on the latter, the harmonization and implementation of common migration policies and norms in light of the solidarity principle, with the safeguarding of individual rights being the primary objective rather than the interests of the state. “Sharing people” practices are discussed in section four of this thesis when elaborating on resettlement as a mechanism addressing solidarity to individuals in need on the one hand and solidarity to countries experiencing particular migratory pressures on the other.

⁷⁵ For a comprehensive study on the external dimension of the entire AFSJ; Monar, J., “The External Dimension of the EU’s Area of Freedom, Security and Justice, Progress, potential and limitations after the Treat of Lisbon”, SIEPS, May 2012

⁷⁶ For burden-sharing; Thielemann, E., “Between Interests and Norms: Explaining Burden-Sharing in the European Union”, *Journal of Refugee Studies*, vol. 16, Issue 3, pp. 253-273, 2003

⁷⁷ Mitsilegas, V., “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, 2014, pp. 186-187

⁷⁸ Noll, G., “Negotiating Asylum, the EU Acquis, Extraterritorial Asylum and the Common Market of Deflection”, 2000, p.270

2.3.2 The relation to other general EU principles

As formulated in article 80 TFEU, actions should be adopted in order to give effect to the principle of solidarity ‘whenever necessary’. This stipulates that the provision and its scope is secondary to fundamental principles of EU law; the subsidiarity principle and the principle of proportionality. A brief note on these principles and their meaning will be presented to further demonstrate how solidarity has been theorized and how its application may relate to other core EU principles.

The principle of subsidiarity is found in article 5 (3) TEU and requires that, in areas which does not fall under the exclusive competence of the union, “the Union shall only act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the propose action, be better achieve at Union level”. The AFSJ falls under the shared competence under article 4 (2) (j) TFEU. The mechanisms and actions explored in this thesis suggest that activities taken on a national level are not sufficient for states to comply with their protective obligations under international law as well as with international solidarity. Instead, a comprehensive and coordinated approach by the union is required in order to promote genuine solidarity on a large scale and fulfill fundamental rights of the individual.

In article 5 (4) TEU the principle of proportionality is stated: “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” In regards to solidarity it can be difficult to assess proportionality since the measures it consists of to a large extent remains undefined.

However, the preamble of the Dublin regulation, which will be explored further in section three, states that in order to achieve the objectives of the regulation, actions have to be taken on union level and the regulation fulfills the criteria according to the principles of subsidiarity and proportionality.⁷⁹

2.3.3 Solidarity and its legal enforceability

Although the principle of solidarity as enshrined in article 80 TFEU primarily regulates the relation between member states and EU institutions, the effects of the measures taken will to a large extent affect individuals and they are also a large part of the European community. It could thus be explored whether or not article 80 TFEU would have direct effect in order to see if the provision entitles an individual to make a claim before a national court regarding rights that the member state is obliged to protect. The doctrine of direct effect of primary EU law was for the first time formulated by the CJEU

⁷⁹ Dublin III Regulation, *supra* note 24, preamble recital 40

in the landmark case, *Vand Gend & Loos*⁸⁰. In the judgment the court laid down criteria that had to be met in order for the provision to have direct effect. It was established that in order for a treaty provision to be effective it has to be sufficiently clear and precise and it must also be unconditional. Lastly, the provision should not call for additional measures to be taken, either national or European.⁸¹

Reading article 80 TFEU in the light of the doctrine of direct effect as established by the CJEU jurisprudence, the provision would most likely not fulfill the required criteria. Article 80 TFEU is generally formulated and the effectiveness of solidarity and fair sharing of responsibility are contingent upon other actions to be taken, both on national and union level. As Hartley asserts, the test that has been established in order to determine the direct effect of a provision boils down to a matter of feasibility. He underlines that a provision that can be applied judicially likely will attain direct effect whilst in cases where a provision would cause serious practical problems it would simply not be feasible to declare it directly effective.⁸²

The doctrine of direct effect is also based on the interpretative tool of ‘useful effect’ (*effet utile*) used by the CJEU. In the interpretation of a provision, *effet utile* requires that not only the objective of the particular provision is taken into account, but also that due regard is taken in how to maximize the effective integration of EU law into national legal systems. The interpretative method used in case of *Vand Gend & Loos* could be viewed as an early form of a teleological method where the interpretation of the text was done in a way as to promote and further the underlying aims of the entire community.⁸³ If article 80 TFEU is clear, precise and unconditional but a member state has failed to implement it in the national legislation, the direct effect would allow the individual to rely directly on article 80 TFEU before the national court and this would further promote *effet utile* of EU legislation. The interpretative authority of the CJEU is invested to it through article 19 (1) TEU stating that the court “shall ensure that in the interpretation and application of the Treaties the law is observed”. Furthermore, in article 19 (3) (b) TEU the court shall give preliminary rulings on the interpretation of union law. Thus the CJEU would be the final arbitrator of whether or not the provision could be considered to have direct effect.

⁸⁰ Case 26/62 *Van Gend & Loos*, ECR 1, European Court of Justice, 5 February 1963

⁸¹ Hartley, T.C., “The Foundations of European Community Law”, 2007, p 192-197

⁸² *Ibid* p. 197

⁸³ P. Craig & G. De Burca, “EU law, Text, Cases and Materials”, 2003, p.185

3 The internal dimension of CEAS

3.1 An introductory note

In section two it was presented how a common European asylum system has developed over time, with the objective of protecting fundamental rights through solidarity and fair sharing of responsibility. In this section the legal instruments that constitutes CEAS will be accounted for in order to provide for an understanding of the structure and substance of the protection system in the EU and how they relate to solidarity. To begin the section, an important solidarity mechanism, which relate to activities towards the external dimension will be presented, namely that of offering temporary protection. Some of the other legal instruments, the asylum directives that operate in the internal dimension, will then be presented briefly. Lastly, at the end of this section the thesis will seek to explore the functions and objectives of the Dublin regulation⁸⁴ the core instrument of CEAS, which throughout its implementation has been subject to heavy scrutiny due to its violation of fundamental rights and its effects that arguably have lead do an unfair sharing of responsibility between member states.

3.2 Temporary Protection Directive

The first legislative instrument to be adopted within the protection system was the Temporary Protection Directive (TPD).⁸⁵ The directive was adopted pursuant to a communication presented by the Commission in 2000.⁸⁶ After years of failed negotiations regarding a temporary protection mechanism, the Commission acted on the undertakings that were concluded in Tampere and recognized the need for a council directive in the event of a mass influx of displaced persons to the union. The directive would serve as a third form of protection measure, beside refugee and subsidiary protection. It was stated that in the event of a mass influx, the asylum system would be put under heavy pressure and it was essential to reach an agreement on how to provide rapid protection to those who need it without blocking up the whole system. A bottleneck on the system “would be against the interests not only of States

⁸⁴ Dublin III Regulation, supra note 24

⁸⁵ Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

⁸⁶ European Commission, Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, COM (2000) 303 final, 24 May 2000

but also of other persons seeking protection outside the mass influx”⁸⁷. It was furthermore recognized that the implementation of minimum standards for temporary protection would promote a balance of efforts between the member states on the basis of solidarity and it was considered an important tool in supporting the viability of CEAS and the refugee convention. The link between temporary protection and solidarity was hence recognized early on.⁸⁸ Although temporary protection was established in the former TEC under article 63 (2) (a), it was formally recognized that solidarity is the guiding principle when temporary protection was incorporated under article 78 (2) (c) TFEU, thereby falling within the scope of article 80 TFEU. The EU Council has also recognized temporary protection as an important mechanism in promoting genuine and practical solidarity.⁸⁹

A mass influx, according to article 2 (d) TPD, means the “arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme”. Consequently, there are several ways in which temporary protection can be of assistance in protecting fundamental rights and it can provide for a legal entry to the protection system in the EU. It is clear that the interest of the individual to enjoy protection is the essential objective of this directive. As can be inferred from the term ‘temporary’, the protection offered is limited in time. Article 4 TPD sets out the duration of the period that temporary protection can be offered, which is normally one year but it may be extended. Once a person has been guaranteed temporary protection, the directive furthermore states in chapter III, the obligations that the member state have to fulfill towards this person. However, in order for the directive to be triggered, the Council in accordance with article 5 TPD has to establish the existence of a mass influx upon a proposal from the Commission.

The effectiveness of the directive has been questioned, as it has never been activated in practice. The CJEU has confirmed the restrictive nature of the directive’s application and stated that the directive can only be applied in very exceptional situations.⁹⁰ The European Parliament on the hand has tried to open up for the possibility to implement the directive and suggested in 2012 that it should be considered whether or not the directive could apply in situations where only one member state is experiencing a large influx, rather than the union as a whole.⁹¹ There have also been other situations where the application of the directive has been considered. Already in 2011 the UNHCR suggested that the directive should be applied in order to handle

⁸⁷ Ibid para. 1.4

⁸⁸ Ibid para. 6.1

⁸⁹ Council of the European Union, Council Conclusions, supra note 74, para. 17

⁹⁰ Joint cases C-493/10 and C-411/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 93 (hereinafter N.S case)

⁹¹ European Parliament, on enhanced intra-EU solidarity in the field of asylum, (2012/2032(INI)), 11 September 2012, para. 52

displacements from Libya.⁹² The Commission replied and stated that it could consider an application if the conditions in the directive were met, i.e. if people were in need of international protection and the number of people was sufficiently great.⁹³ Furthermore, in 2013 the European Parliament also considered the directive as a potential measure to deal with the Syrian crisis.⁹⁴ Despite these proposals, the directive has not been implemented. Due to the recent events in April 2015 in the Mediterranean Sea, the need for emergency measures are greater than ever in order to meet protection needs. The European Parliament has therefore made the proposal to activate the Temporary Protection Directive for the first time and by the end of May 2015, the Commission will propose a temporary distribution mechanism for those in need of international protection.⁹⁵ It remains to be seen whether or not the directive will successfully be implemented.

3.3 The Asylum Directives

After the conclusions in Tampere, different legal instruments were adopted in order to harmonize minimum standards on asylum in the EU and further the development of CEAS; these have been amended throughout the years. The recast directives regarding the granting of subsidiary protection, asylum procedures and reception conditions will be commented on briefly below.

The Qualification directive⁹⁶ establishes criteria for the granting of refugee status and the standards to be met in order for individuals to qualify as refugees or beneficiaries of subsidiary protection. The need for a uniform status of refugee and subsidiary protection is incorporated in article 78 (2) (a) and (b) TFEU. According to the preamble of the directive the objective is to ensure that member states apply the common criteria as established in the directive when identifying the persons in need of international protection. Furthermore the aim is also to ensure that there is a minimum level of protection that can be offered in every member state. However, there is nothing that prevents member states from introducing more favorable standards than the ones set out in the directive, as these are purely minimum requirements. It was also hoped that a harmonization of the criteria for granting refugee status and subsidiary protection would prevent secondary movements of asylum seekers within the union, at least those that were caused by differences in the legal frameworks.⁹⁷

⁹² UNHCR, "UNHCR calls on States to uphold principles of rescue-at-sea and burden sharing", press release, 8 April 2011

⁹³ European Commission, "The European Commission's response to the migratory flows from North Africa", Press release, 8 April 2011

⁹⁴ European Parliament, Resolution of 9 October 2013 on EU and Member States measures to tackle the flow of refugees as a result of the conflict in Syria, para. 14

⁹⁵ European Commission, "Managing migration better in all aspects: A European Agenda on Migration", Press release, 13 May 2015

⁹⁶ Qualification Directive, *supra* note 24

⁹⁷ *Ibid* preamble, recitals 12-14

The EU Asylum Procedures Directive (APD) sets out detailed rules on common procedures for granting and withdrawing international protection.⁹⁸ It was the first measure to be adopted regarding asylum procedures in the EU and the legal basis for this is now found in article 78 (2) (d) TFEU. It is a measure set out to reinforce and to further the development of CEAS.⁹⁹ The objective of the recast directive was well defined in the Stockholm programme where it was reaffirmed that the common European asylum system had to be able to offer efficient and rapid access to asylum procedures and that all member states should be able to offer the same standard of procedures and status determination.¹⁰⁰ It is furthermore stated in the preamble of the directive that it is essential that states comply with the international obligations, which they are bound by in regards to the treatment of persons who are seeking international protection.¹⁰¹

The directive sets out rules for the whole asylum process, including how to apply and get access to the procedure. The directive furthermore includes provisions regarding guarantees and the opportunity for a personal interview, how the application should be examined, the support that can be provided for and rules on appeal.¹⁰² One provision that deserves more attention is article 38 APD, which lay out the elements of the third country concept. According to this provision a country may be designated a safe country if certain pre-conditions are met. A member state may only apply this concept in cases where they are certain that the state in question are complying with international obligations such as the principle of non-refoulement and that refugee protection can be offered if needed in accordance with the refugee convention.

Another important directive that was implemented as a result of the discussions in Tampere when laying the foundations of CEAS was the reception conditions directive (RCD).¹⁰³ The need to adopt measures regarding the reception of individuals in need of protection is reaffirmed in article 78 (2) (f) TFEU. The directive is important in the harmonization of the reception conditions for those seeking international protection. The directive stipulates that in order to guarantee the equal treatment of applicants, the conditions set out in the directive shall apply during all stages of the procedures, for the whole duration that the applicant is allowed to remain on a state's territory as an applicant.¹⁰⁴ Furthermore, the directive contains several articles that are relevant when the applicant has made an application that lay down rules regarding information, documentation, residence and the free movement.¹⁰⁵ Other aspects such as access to employment, health care and education for minors

⁹⁸ Council Directive 2013/32/EU (recast) on common procedures for granting and withdrawing international protection

⁹⁹ Ibid preamble recital 12

¹⁰⁰ The Stockholm Programme, supra note 63, para. 1.1

¹⁰¹ APD, supra note 98, preamble recital 15

¹⁰² Ibid articles, 6, 12, 22, 31, 46

¹⁰³ Council Directive 2013/33/EU (recast) laying down standards for the reception of applicants for international protection

¹⁰⁴ Ibid preamble recital 8

¹⁰⁵ Ibid articles 5-7

are also regulated in the directive.¹⁰⁶ A further important aspect of the RCD is the rules regarding detention. No person applying for international protection may be detained unless it is deemed necessary in a particular case, e.g. the identity cannot be verified, if there is a risk of absconding while establishing the grounds for seeking asylum or the person awaits a decision to be granted a right to enter the territory.¹⁰⁷

The recast directives have strengthened and furthered the development of CEAS and through the treaty of Lisbon they have formally been established in treaty law. They have all been incorporated under article 78 TFEU, thereby falling within the scope of article 80 TFEU and the principle of solidarity. The recast directives have explicitly recognized solidarity and its importance in their preambles and they are a constituent part of CEAS, as their functions are essential for the realization of its objectives.¹⁰⁸ However, although the recast directives have reinforced CEAS by now harmonizing standards rather than minimum standards, they still leave a margin of appreciation to the states in how to transpose them. This is the inherent nature of Council directives, they regulate and bind states regarding the result, but the means by which the directives and its provisions are incorporated into domestic law are left to the states to decide.¹⁰⁹ Furthermore there are some states that are not bound by the recast directives and therefore are not subject to their application.¹¹⁰ This creates divergences between different systems and the ultimate goal within CEAS, the creation of a uniform status for asylum and subsidiary protection and the establishment of a common asylum procedure, still seem to be rather distant after more than 15 years of negotiations.

3.4 The Dublin Regulation

The Dublin regulation has been regarded as the cornerstone of the whole CEAS and the effectiveness of its functions are vital for solidarity and the whole protection system to function properly.¹¹¹ During its implementation, there have been ongoing debates on whether or not the mechanism is effective and its compliance with fundamental rights has been questioned. This chapter will address and explore these issues.

This thesis will primarily focus on the recast, the Dublin III regulation and the important changes that have taken place. Although the case law and most

¹⁰⁶ Ibid articles 14-15, 19

¹⁰⁷ Ibid article 8

¹⁰⁸ Qualification Directive, supra note 24, preamble recital 2, 9 | APD, supra note 98, preamble recital 2 | RCD, supra note 103, preamble recital 5

¹⁰⁹ E.g. ibid RCD article 31

¹¹⁰ Qualification Directive, supra note 24, preamble recital 50-51 | APD, supra note 98, preamble recital 58-59 | RCD, Ibid, preamble recital 33-34

¹¹¹ COM (2011) 835 final, supra note 72, p.7

of the critique has been based on the former Dublin II regulation¹¹², the general notions on the functions and objectives are the same and will be accounted for. Relevant reasoning by courts based on the previous regulation will also be presented, as it will continue to affect the future jurisprudence by the courts on EU as well as national level.

3.4.1 Functions and objectives

It was stated early on in the development of CEAS that the Dublin regulation was not established as a solidarity mechanism intended to further promote the fair sharing of responsibility between member states. Instead it has been suggested that it was designed as an administrative tool purposed to determine the state responsible to examine an asylum application.¹¹³ Yet, on the one hand, many of the discussions have evolved around the effects of the workings of the Dublin regulation and that it leads to an unduly heavy burden on the states in the southern and eastern periphery. On the other hand it has been suggested that when looking at the number of actual transfers, some of the countries in the north are greater receivers of applications.¹¹⁴ Not only has it been posited that the asymmetrical outcome in the division of responsibility has a negative impact on the functioning of the principle of solidarity but it could potentially also encourage the member states to implement interceptive migration measures.¹¹⁵ It has furthermore been advocated that the Dublin regulation in fact counteracts the principle of solidarity and the sharing of responsibility.¹¹⁶ The solution may perhaps not be found in statistics and absolute numbers. Rather the rationales behind the regulation and the functions and effects must be explored in order to assess its level of success and whether or not it in fact reinforces the CEAS and its aims.

The Dublin regulation is essentially a tool addressing the allocation of responsibility of examining asylum applications from third country nationals. As an important measure within the CEAS and incorporated in the treaty of Lisbon in article 78 TFEU it must also respect fundamental rights and the refugee convention. There are two other important objectives of the Dublin regulation that are often mentioned and that is the prevention of ‘asylum shopping’ and the avoiding of ‘refugees in orbit’. The first objective refers to the rationale of determining a single member state that is responsible for examining an application for international protection, thereby preventing asylum seekers to make multiple asylum claims in different countries and pre-

¹¹² Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

¹¹³ European Commission, Green Paper on the future Common European Asylum System, COM (2007) 301 final, para. 4.1

¹¹⁴ Garlick, M., *supra* note 70, p. 9

¹¹⁵ Langford, Lillian M., ”The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU solidarity”, *Harvard Human Rights Journal*, 2013, pp. 217-264, p. 218

¹¹⁶ ECRE, Enhancing intra-EU solidarity tools to improve quality and fundamental rights protection in the common European asylum system, January 2013, p. 9

vent secondary movements.¹¹⁷ This objective aims at preventing applicants to choose a state that offers more favorable reception conditions and asylum procedure standards. By eliminating the possibility to choose freely, the hopes were that it would distribute the applications more evenly among the states.¹¹⁸ The second objective refers to the avoiding of having asylum seekers circulating between member states without having their application examined. This guarantee to an effective access to the protection procedures is acknowledged in the regulation, but it also stipulates that this aim should not compromise the objective of rapid processing of applications.¹¹⁹ Here, the need for balance between the interests of the member states and the persons seeking protection becomes apparent.

The Dublin regulation provides for a range of provisions on how to allocate the responsibility of member states to assess applications for international protection. The common understanding or belief has been that the state responsible is the first EU state that an applicant enters, ‘the first country rule’, but there are several other factors that have to be considered. Article 7 in chapter III of the regulation sets out a hierarchy of criteria that has to be adhered to when determining the responsible state. The first factor to be considered is whether or not the applicant in question is an unaccompanied minor as special provisions are laid out for this category of persons in article 8. Due regard must also be given to whether or not there are any family members or relatives of the applicant present in an EU state. Articles 9-10 regulates where the application should be examined in family situations and it depends on whether or not the family members are already beneficiaries of international protection or if they are themselves applicants seeking international protection. If an entire family is lodging an application in a member state there are rules laid out in article 11 of the regulation in order to safeguard that their applications are examined by the same member state. The hierarchy of criteria could potentially otherwise have required them to be tried separately in different states. For those who have valid documentation to enter the territory of a member state, e.g. a visa or residence permit, there are rules set out in article 12.

If none of these provisions are applicable to a particular case, then article 13 states that it is the EU state of first entry that shall examine the application, the irregular entry could be either by land, sea or air. It is essential that these criteria, as established in the regulation, are followed by every member state that receives applications for international protection in order for the Dublin regulation to be well-functioning. In the event that a responsible state cannot be determined according to the established criteria in the regulation, then the country where the application for international application was lodged first will be deemed the responsible state for examining it.¹²⁰ The criteria essen-

¹¹⁷ Dublin III Regulation, supra note 24, article 3.1

¹¹⁸ Moreno-Lax, V., "Dismantling the Dublin system: M.S.S. v. Belgium and Greece", *European Journal of Migration and Law*, 2012, p. 2

¹¹⁹ Dublin III Regulation, supra note 24, preamble recital 5

¹²⁰ Ibid article 3.2

tially imply that the state, which has the most significant role in the entry of an asylum seeker, is the responsible state to examine the application.

If a state deems another state to be responsible for examining an application, then the former state can make a request for the latter state to take charge of the applicant. This request must however be made within three months, otherwise the responsibility lies with the first state where the application was lodged.¹²¹ The state that receives the request must act rather promptly; within the timeframe requested by the sending state if possible, otherwise two months. A failure to respond to the take charge within the set time frame will be viewed as accepting the request.¹²² There are other provisions in the regulation that regulates the transfer of an applicant and the procedural guarantees that must be complied with during such a procedure, these will however not be presented further.¹²³

One of the main obstacles in the well-functioning of the Dublin regulation is the identification process of applicants as many protection seekers arrive without documentation or identification. The identity is important to establish in order to be able to apply the criteria and decide which country is responsible to examine the application. The Eurodac regulation¹²⁴ was adopted as a system intended to assist in an effective application of the Dublin regulation by comparing fingerprints. The system consists of a central database where data is stored and through which transmission of fingerprint data can be made between member states.¹²⁵ According to the Eurodac regulation each member state must as soon as possible take fingerprints of every applicant, over the age of 14, of international protection and transmit the data to the central system within 72 hours after that the application has been lodged.¹²⁶ Through the Eurodac system it can be deduced from the sharing of data whether or not an applicant has been in multiple member states and if the Eurodac regulation is correctly applied it can be deduced where the applicant first entered EU territory.

The Dublin regulation was thus implemented as a mechanism intended to allocate the responsibility of assessing asylum applications and thereby guarantee the access to protection procedures. The actual impacts however appears to lead to an asymmetrical responsibility sharing when applying the

¹²¹ Ibid article 21

¹²² Ibid article 33

¹²³ Ibid articles 22-26

¹²⁴ Council Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice Eurodac regulation recital

¹²⁵ Ibid preamble recital 5-6

¹²⁶ Ibid article 9

established set of criteria under the Dublin regulation. This puts greater pressure on certain states' protection systems that have negative effects on the protection of fundamental rights, which will be shown in the next part.

3.4.2 Principle of mutual trust and safe third country concept

The principle of mutual trust is based on the rationale of having one responsible state to assess an asylum application. This principle implies that the member states establish a mutual trust in regards to the quality and lawfulness of each other other's laws. In regards to the Dublin regulation the principle of mutual trust would imply that all the member states comply with EU and international law, including fundamental rights and the principle of non-refoulement.¹²⁷ Through the assumption of compliance with international obligations and the principle of mutual trust, the states also assume in the event of a transfer that member states are safe third countries in accordance with the rules laid out in the APD.¹²⁸

In regards to mutual trust, both the CJEU and the ECtHR have stated in its jurisprudence that the principle can be rebutted and that the 'the first country rule' cannot always be assumed as it has shown to breach fundamental rights of the individual. It can also be inferred from cases that the uneven distribution of applications in the union and the heavy pressure that is facing certain countries must be addressed, as it will contravene the solidarity principle and the fair sharing of responsibility. In the landmark case of *M.S.S. v. Belgium and Greece*¹²⁹, concerning the transfer of an asylum seeker to Greece by Belgian authorities under the Dublin regulation, the ECtHR ruled that the transfer would be in violation of article 3 ECHR as the person faced a real risk of being subject to inhuman and degrading treatment due to the poor conditions in the detention center and the poor living conditions for asylum seekers in Greece.¹³⁰ The court reaffirmed from previous cases that before a transfer takes place, the state has to be assured that the person will not be subject to treatment contrary to article 3 ECHR. States can therefore not rely on the automaticity of the Dublin regulation and the principle of mutual trust.¹³¹ The case itself has been thoroughly presented in numerous articles and will not be presented in more detail here.¹³² Worth mentioning is that the court acknowledged the heavy pressure that certain states are under due to the increasing influx of asylum seekers but the court further stated that this fact does not exonerate the states from complying with fundamental rights such as article 3

¹²⁷ Brouwer, E., "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", *Utrecht Law Review*, January 2013, p. 138

¹²⁸ *Supra* note 24, Dublin III, article 3.3

¹²⁹ ECtHR, *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011

¹³⁰ *Ibid* para. 365-368

¹³¹ *Ibid* para. 359 | *supra* note 77, p. 191

¹³² See e.g., Mallia, P., "Notes and comments, case of *M.S.S. v. Belgium and Greece*: A catalyst in the re-thinking of the Dublin II regulation", *Refugee Survey Quarterly*, Vol. 30, No. 3, 2011, pp. 107-128

ECHR.¹³³ Moreover, it should be noted that Judge Rozakis in his concurring opinion emphasized the lack of regard taken to the realities that countries such as Greece are facing. Rozakis stressed that a comprehensive reconsideration is required of the legal regime and the Dublin system in order to address the reality of an uneven distribution of responsibility as well as the need to maintain an effective protection regime.¹³⁴

The CJEU followed the jurisprudence by the ECHR in the joint cases of N.S. and M.E., when giving its preliminary ruling on the application of the ‘safe third country concept’ in regards to the Dublin regulation.¹³⁵ Both cases concerned the transfer of persons back to Greece. The court acknowledged that a state may not presume that another state complies with the provisions of a convention on the basis that the state previously ratified it. This case thus affirmed that the principle of mutual trust can be rebutted.¹³⁶ It should further be noted that the high pressure that a large number of applicants put on certain countries was again raised in regards to this case. Attorney General Trstenjak acknowledged the absence of a provision in the Dublin regulation that recognizes this reality. It was hence established that the access to protection, and satisfying reception conditions could not be guaranteed as the system was overloaded due to high migratory inflows.¹³⁷

The case law demonstrates an apparent flaw within the framework of a common European asylum system and it shows that the objective of full harmonization of the standards in the member states has not been fully achieved, with severe consequences for the individual. It is essential that member states actively work on implementing the common standards as agreed upon within the framework of CEAS, as it will otherwise lead to further mistrust and resentment between the member states.¹³⁸

3.4.3 Dublin after Lisbon

The need for common migration and asylum policies was included in article 78 TFEU when the Lisbon treaty entered into force. The Dublin regulation, as a measure to further the development of this framework was incorporated in article 78 (2) (e) TFEU, thereby falling within the scope of article 80 TFEU and the principle of solidarity enshrined therein. It should be emphasized that the Dublin III regulation introduced an explicit reference to solidarity in its preamble. This further demonstrates that regardless the previous uncertainty on its relation to the solidarity principle there is now a direct connection that has been acknowledged by the legislators.

¹³³ M.S.S. v. Belgium and Greece, supra note 129, para. 223

¹³⁴ Ibid Concurring opinion of Judge Rozakis

¹³⁵ N.S. case, supra note 90

¹³⁶ Ibid para. 99, 103

¹³⁷ N.S. case supra note 90, Opinion of A.G. Trstenjak, delivered on 22 September 2011, para. 99-100, 105

¹³⁸ Langford, Lillian M., supra note 115, p. 218

From the relevant case law mentioned above, it becomes apparent that there are several shortcomings in the Dublin system that the courts have recognized and acted upon. Their rulings are pointing the development into the right direction; more has to be done in order to protect fundamental rights. More must also be done in regards to the heavy pressure that some states encounter due to the large number of protection seekers arriving to the union as a whole. There are potential measures provided for by the Dublin regulation, that if applied, could potentially further remedy the situation.

In the Dublin III regulation, a new mechanism, referred to as the Early warning and Preparedness System (EPS), was introduced in article 33. The provision essentially entails that in order to prevent the complete deterioration or collapse of an asylum system, the member state will together with EASO set up a preventive action plan on how to overcome the pressure while complying with fundamental rights. EASO has a key role as it monitors and gathers information from all the member states and analyzes any data that may suggest that a particular pressure will impact the asylum system and reception conditions in a certain state.¹³⁹ In the EASO work programme for 2015, one of its core tasks is to further develop the EPS by collecting regular data from member states and produce regular reports.¹⁴⁰ Hence, EASO has an important function within CEAS as a mechanism designed to promote solidarity through the sharing of information and expertise. It should further be noted that mutual trust and solidarity go hand in hand and by enhancing that trust, mechanisms such as the EPS can further the development of measures that promote genuine solidarity as articulated in article 80 TFEU.¹⁴¹ The EU Council has also recognized the importance of the EPS in relation to promoting genuine and practical solidarity. It was noted that it is essential to actively respond to situations where a member state is under a particular pressure due to deficiencies in their asylum systems or due to the mixed migration flows.¹⁴²

There is also the option of applying the ‘sovereignty clause’ and the ‘humanitarian clause’ in articles 17 (1) and (2). These discretionary clauses asserts that any state may assume responsibility of an asylum application even though the responsibility would fall on another state if the hierarchy of criteria were applied. The provisions are not new to the Dublin system but with the recast regulation the Commission pointed out and made its application more clear, it should be applied mostly for humanitarian and compassionate reasons.¹⁴³ In the abovementioned case of N.S. and M.E. the CJEU stated that the sovereignty clause could be used in situations where the fundamental rights of an applicant have been infringed.¹⁴⁴ Furthermore, in the Halaf

¹³⁹ EASO Regulation, supra note 40, article 9

¹⁴⁰ EASO Work Programme 2015, September 2014, p. 26

¹⁴¹ Dublin III Regulation, supra note 24, preamble recital 22

¹⁴² Council of the European Union, Council Conclusions, supra note 74, para. 9-11

¹⁴³ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person, COM (2008) 820, p.9

¹⁴⁴ N.S. case, supra note 90, para. 98

case¹⁴⁵, the referring court specifically asked about the connection between the sovereignty clause and solidarity in article 80 TFEU.¹⁴⁶ The question that was referred to the CJEU by the national court essentially inquired whether or not the sovereignty clause must be applied in the light of solidarity as stated in article 80 TFEU in order for a state, in a situation where the set hierarchy of criteria does not apply, to assume responsibility for the examination. The court concluded that the application of the sovereignty clause does not require any condition to be fulfilled.¹⁴⁷ The court appears to be rather terse in explicitly referring to article 80 TFEU in its judgment and how it should be applied in terms of states obligations. It has been suggested though, that with the courts reasoning it seems to imply that the sovereignty clause can be viewed as a solidaristic measure when receiving states are facing particular refugee pressures. States could thus choose to give priority to the principle of solidarity over the set of criteria stated in the Dublin regulation and thereby assume responsibility for assessing an asylum application.¹⁴⁸

The effects of the amended regulation and whether or not it will remedy the inadequacies of the regulation that have dominated the discussions since its implementation remain to be seen. It has been stressed that the complete harmonization of the legal instruments constituting the common asylum policy framework has not reached its finalization and notable differences remain in the reception conditions and asylum systems throughout the union. These shortcomings invalidate the functioning of the Dublin regulation and the assumptions, which it is built upon: the principle of mutual trust and safe third country concept. It has been advocated that a drastic change in how the EU is allocating the responsibility of application is perhaps needed and that the Dublin regulation potentially need to be changed further in a more comprehensive manner.¹⁴⁹

There are many components within the internal dimension of CEAS and if implemented effectively, a union with uniform status for asylum and subsidiary protection could be achieved. However, the apparent shortcomings in the application of the Dublin regulation and in the implementation of the asylum directives leave the union with an uneven responsibility sharing with negative impacts for the individual. It is essential that a more comprehensive approach is taken towards solidarity and the various intra-EU mechanisms, their functions potentials must be seen in the view of one another in order to comply with fundamental rights and international obligations.

¹⁴⁵ CJEU Judgment in case C-528/11, Halaf, 30 May 2013,

¹⁴⁶ Ibid para. 25.1

¹⁴⁷ Ibid para. 36

¹⁴⁸ Karageorgiou, E., "Refugee Protection, Solidarity and Dublin: The European Court's stand", Paper prepared for the Workshop on: The Meaning of Solidarity for Refugee Protection in the EU, 27 April 2015, p.14

¹⁴⁹ Fratzke, S., "Not Adding Up: The Fading Promise of Europe's Dublin System", MPI, March 2015, p. 2

4 Resettlement - the external dimension of CEAS

4.1 An introductory note

In the preamble of TFEU the importance of the external dimension is emphasized and solidarity is confirmed as an essential element in creating a bond between the union and third countries. However, in regards to extraterritorial asylum, and more specifically, resettlement and its relation to CEAS, has been less clear during its development. Yet, the importance of the external dimension in EU asylum policy has been expressed as an integral part of the framework since its establishment and its importance has been emphasized more over the years, in particular after the Stockholm Programme. Although it has not been fully clear, there are several indicators that resettlement today indeed is a part of a common European asylum system. The aim of this section is to account for resettlement as an integral part of the external dimension of CEAS and as an important measure to ensure the functioning of solidarity and the compliance with fundamental rights. Different aspects and the functions and objectives of resettlement will therefore be explored.

4.2 Resettlement- functions and objectives

Resettlement is an operation, which is carried out under the mandate of the UNHCR. Its mandate was given by the General Assembly in 1950 in the after-math of World War II and was intended to last for a three-year period.¹⁵⁰ The mandate was however continuously extended and with no ending of the refugee crisis in sight, a mandate was given in 2003 that would last until solutions could be found. The core objectives of the UNHCR are to provide international protection to those in need and to find durable solutions to their problems. Resettlement, which essentially is a tool of protection, has a vital function in fulfilling these objectives. A third objective is the sharing of responsibility and showing solidarity with the countries of first asylum that are facing problems with integration and lacking the means to offer sufficient protection.¹⁵¹

According to the definition by UNHCR, 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

¹⁵⁰ UN General Assembly resolution, supra note 29

¹⁵¹ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, A/res/428(v), 14 December 1950, para. 1, 8a | UN General Assembly Resolution, Implementing actions proposed by the United Nations High Commissioner for Refugees to strengthen the capacity of his Office to carry out its mandate, A/res/58/153, 24 February 2004

residence status”.¹⁵² The UNHCR has an intermediary role in this procedure. The granting of refugee status is also important for the protection seekers, as it will ensure the protection against refoulement. However, the success of resettlement and the offering of international protection is highly dependent on the cooperation with, in particular resettlement states but also NGO’s and other international organizations. No countries are legally obliged to commit to the resettlement of refugees and in the end the political will of states to cooperate will thus be the decisive factor.¹⁵³

Although the main objective of resettlement is offering protection to refugees, there are also other positive results that can be achieved. Through strategic planning the benefits can be maximized and be beneficial not only to other refugees but also the host state and the international community as a whole. A strategic use of resettlement can be more effective and predictable and it often includes mutually negotiated agreements and partnerships with the first asylum country. These agreements can include undertakings for resettlement that involves a larger group of people and with a planned approach, the resettling country can be more prepared and provide for better integration once the refugees reach the territory. Moreover, these negotiated agreements could also have multi-annual commitments that potentially could increase the number of beneficiaries of international protection throughout the years. A multi-annual approach is also important in the creation and development of other forms of protection frameworks. A further aspect is that strategic planning can have the effect of preventing irregular movements of protection seekers and it also helps to achieve the objective of sharing the responsibility and promote solidarity among states. Overall there is a lot to be gained by resettlement as a strategic use can lead to both direct and indirect benefits.¹⁵⁴

4.3 Who is eligible for protection?

There are certain preconditions that have to be met in order for someone to be able to enjoy international protection through resettlement. In order to be eligible for protection through a resettlement scheme the protection seeker must have been granted refugee status according to the 1951 Refugee Convention by the UNHCR. Resettlement must also have been found to be the most appropriate durable solution in each particular case.¹⁵⁵ Some exceptions in the status determination can be made in regards to stateless persons or reasons relating to maintaining family unity.¹⁵⁶

¹⁵² UNHCR, UNHCR Resettlement Handbook, 2011, p. 3

¹⁵³ Ibid p. 4

¹⁵⁴ UNHCR, The Strategic use of Resettlement (A Discussion Paper Prepared by the Working Group on Resettlement), WGR/03/04/Rev3, 3 June 2003 paragraph 6, 17-18 | UNHCR, Position paper on the strategic use of resettlement, 4 June 2010

¹⁵⁵ Resettlement is one of three durable solutions mandated by the UNHCR, for more on local integration and voluntary repatriation, see UNHCR, Framework for Durable Solutions for Refugees and Persons of Concern, EC/53/SC/INF.3, 16 September 2003

¹⁵⁶ UNHCR Handbook, supra note 152, p. 36

When these preconditions have been met, the person must further fall under one of the submission categories set out by the UNHCR. These can be individuals or groups of individuals that are considered particularly vulnerable. The categories include persons who are in need of protection due to legal/physical reasons, survivors of torture, medical reasons, vulnerable women and children and also if there is a lack of other acceptable and durable solutions.¹⁵⁷ Resettlement is often carried out in situations where the refugee cannot return to the country of origin or in situations where the protection in the first country of asylum is insufficient.

Although the UNHCR considers certain persons to be eligible for resettlement there is no guarantee for an individual to be resettled by a resettling country. There is no right to resettlement that can be claimed by protection seekers and therefore the states are left with a broad discretionary power. Each participating state sets its own admission criteria in the selection process and therefore an acceptance depends on these national criteria.¹⁵⁸ This can be regarded a limitation of resettlement as a protection mechanism.

The UNHCR has earlier on put forward a request for countries to have flexible systems and to be more lenient in their selection criteria for resettling people. The request asked countries not to be confined to those persons who qualify for protection under the 1951 Refugee Convention, with a more flexible system, the number of beneficiaries of international protection could increase. The usage of group resettlement methodology was also highlighted as a way to secure protection for a larger number of refugees. The process of group resettlement methodology is more efficient and the determination process can be accelerated as the refugees are offered protection based on shared characteristics.¹⁵⁹

4.4 Resettlement as an EU policy

The European Commission recently acknowledged that tools and measures that operate in the external dimension are essential for the functioning and realization of CEAS objectives.¹⁶⁰ However, the vital role that resettlement plays has been recognized many times throughout the years and eventually led to the establishment of an EU-wide resettlement programme.¹⁶¹ This re-

¹⁵⁷ Ibid p. 243-287

¹⁵⁸ Ibid p. 36

¹⁵⁹ UNHCR, Multilateral Framework of Understandings on Resettlement, FORUM/2004/6, 16 September 2004, p. 3

¹⁶⁰ European Commission, fact-sheet, "Towards a Comprehensive European Migration Policy: 20 years of EU action", MEMO/15/4544, 4 March 2015

¹⁶¹ Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows'

settlement scheme and the possibilities on its placement within the EU legal framework will be explored below.

In a communication from 2000 the Commission expressed its thoughts on the objectives that were set out in Tampere in regards to the creation of CEAS and its instruments. Already at this time, the Commission noted the benefits of a potential resettlement scheme and it was said that it would secure a safe arrival to the EU and thereby provide rapid access to international protection. It would prevent refugees from being forced to take irregular and dangerous routes and being exposed to the operations of smuggling gangs. The Commission furthermore noted that a resettlement scheme should not be looked upon in isolation from other protection mechanisms but rather have a complementary function and it should not be regarded as a substitute for mechanisms and operations that manage spontaneous arrivals at the EU borders.¹⁶²

Upon a request by the Commission, a feasibility study of setting up a resettlement scheme within the EU was carried out.¹⁶³ The study highlighted the main differences in the impacts of those people who are selected for a resettlement procedure and those who arrive spontaneously. The confusion that earlier existed in the terminology regarding these procedures was also addressed.

It was noted that resettlement constitutes an organized pre-selection procedure where a person is granted refugee status and long-term residence permit from outside EU territory and does not have to go through asylum procedures upon arrival. Those who arrive in an irregular manner however, have to seek asylum and go through the different stages of the asylum process once they reach EU soil. Both procedures have the same purpose of providing refugee protection and the end result of the procedures are the same but the way the connection between the protection seeker and the member state is established differ between the two methods. In the view of the authors of the study, resettlement could not be considered to be a part of an asylum system as that system would then be the only way that refugee protection could be provided for in the EU. It would not be in compliance with the objective of managing an orderly arrival of protection seekers, as the system would then only be open to those who make applications spontaneously. Rather it was argued that resettlement and CEAS should be viewed as a part of a larger protection system. On the basis of the separate features of resettlement and seeking asylum, the study argued and suggested the creation of a Common European International Protection system of which a Common European Asylum System and a potential resettlement scheme would be considered two distinct elements.¹⁶⁴

¹⁶² European Commission, towards a common asylum procedure and a uniform status, valid throughout the union, for persons granted asylum, COM 2000 755 final, para. 2.3.2

¹⁶³ Selm, van J., Woroby, T., Patrick, E., Matts, M., ”*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*, MPI, 2003

¹⁶⁴ *Ibid* p. 144-153

However, the Commission has in several other communications, besides in 2000, pointed out that resettlement is one of the goals in the creation of a larger common asylum system and the policies that comprises it.¹⁶⁵ But according to the authors and their comprehension, the term asylum traditionally implies that a person, on the territory of a state or at an embassy, seeks asylum from persecution in his own country. They thus argue that the Commission departed from this traditional interpretation of the term asylum in its communications. It was claimed that the Commission used the term asylum and implied that it means protection in a broader sense including all refugee protection and subsidiary or temporary protection. If this was the intention, the authors stated that it should have been made more explicit.¹⁶⁶

Throughout the development of CEAS it has been recognized that it is a flexible system and all measures promoting fundamental rights and ensuring the compliance with international obligations must be considered and potentially implemented.¹⁶⁷ This, based on previous statements in the thesis regarding the interrelation between the internal and external dimension of EU asylum policies, indicates that measures in the external dimension are also called for if they promote the rights afforded to refugees. Thus it wouldn't be improper to view asylum in a broader sense when establishing a common asylum system, which essentially has the aim of being an efficient system and maximizing the amount of protection offered. As the Commission has noted, resettlement and other measures should be regarded as complementary to one another and not treated as substitutes.

Furthermore, after the publication of the study, resettlement has multiple times resurfaced as a part of the goal in establishing a larger common asylum system. As a response to the communication from the Commission in 2003 on 'towards more accessible, equitable and managed asylum systems' the European Parliament called for new approaches in the field of asylum that are complementary to the existing asylum system. It specifically urged the EU that the new approach must be based on the managed arrival of protection seekers into the EU through a community-wide resettlement scheme.¹⁶⁸ In the green paper on the future of the Common European Asylum System in 2007, resettlement was incorporated as one of the components in the external asylum policy and essential as a durable solution and promoting a fair sharing of responsibility.¹⁶⁹ In the Hague Programme it was further emphasized by the Council that partnerships with third countries are essential as a part of the external asylum dimension and that it welcomed the previous proposal made by the Commission in developing EU- Regional Protection Programmes

¹⁶⁵ European Commission, on the common asylum policy and the Agenda for protection, COM (2003) 152 final, p. 6 | European Commission, towards more accessible, equitable and managed asylum systems, COM (2003) 315 final, p. 3, 12

¹⁶⁶ Resettlement feasibility study, *supra* note 163, p. 149

¹⁶⁷ European Council, Presidency Conclusions, *supra* note 33, para. 13

¹⁶⁸ European Parliament resolution on the Communication from the Commission to the Council and the European Parliament entitled "towards more accessible, equitable and managed asylum systems" (COM (2003) 315 - C5-0373/2003 - 2003/2155(INI)), 1 April 2004, para. 27, 29 (a)

¹⁶⁹ COM (2007) 301 final, *supra* note 113, para. 5.2

(RPPs), including a EU joint resettlement scheme.¹⁷⁰ Lastly, in the newly adopted strategic guidelines that sets the priorities within the AFSJ for the next five years, it was emphasized that migration policy must become more integrated in the external policies of the union and cooperation with third countries is key in fulfilling international obligations. It was also emphasized that the way forward is a comprehensive approach to migration and asylum as many parts of the world remain unstable and the migration trends and needs change frequently.¹⁷¹

4.5 EU resettlement programme

In 2004 the Commission proposed the establishment of RPPs as a new comprehensive EU approach to the international protection regime and as a mean to provide for durable solutions.¹⁷² Roughly a year later an action plan was presented and it suggested for the implementation of pilot resettlement programmes under close cooperation with the UNHCR. The purpose was to enhance the conditions and capacity of the regions close to the country of origin in order to make it possible for any of the durable solutions to take place and provide protection. It was furthermore emphasized that resettlement is essential in demonstrating the partnerships with third countries that RPPs are founded on.¹⁷³

It has been noted above that a EU resettlement scheme reappeared in policy discussions during the years to come but it was not until 2009 that the Commission issued a complete proposal for an EU-wide resettlement programme.¹⁷⁴ It was again highlighted that resettlement is an integral part of EU asylum policy and that it has filled an important role in the development of CEAS. The shortcomings in the development of resettlement on EU level were emphasized and it was recognized that the global resettlement needs were greater than could be provided for with the number of places states had made available. Only a few of the member states resettled at the time and they set the priorities on a national level. The objective of an EU-wide resettlement scheme was to encourage more member states to engage in the resettlement activities in order to provide for protection to those in need. It was noted that resettlement not only promotes a sharing of responsibility but also can make it less attractive for some protection seekers to try to enter the EU in an irregular manner. The proposal set out several guiding principles that the programme should be based on. The first one to be noted was that resettlement should continue on to be carried out on a voluntary basis as there are

¹⁷⁰ Hague Programme, supra note 39, para. 1.6.2

¹⁷¹ European Council, Conclusions, supra note 67, para. 5, 8

¹⁷² European Commission, on the Managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin – "improving access to durable solutions", COM (2004) 410 final, para 49-51

¹⁷³ European Commission, on regional protection programmes, COM (2005) 388 final, para. 3, 5-7

¹⁷⁴ European Commission, on the establishment of a Joint EU resettlement programme, COM (2009) 447 final

a number of differences between member states and their resettlement systems that can be difficult to harmonize.¹⁷⁵ It has however been posited that the resettlement programme gradually should develop into a truly joint resettlement programme based on a common procedure and criteria.¹⁷⁶ It was further suggested that by familiarizing member states with the activities it should extend the resettlement engagements and enhance their capacity. It was also stated that the resettlement expert group that at the time worked on an ad hoc basis would be made into a body and meet regularly in order to set up common annual priorities. All the member states would be expected to participate in these meetings. Furthermore, it was emphasized that the countries already involved in resettlement activities received considerable financial support from the European Refugee Fund.¹⁷⁷ Lastly, it was expected that EASO would play a vital role and enhance the practical cooperation in the resettlement process.¹⁷⁸ When EASO was established in 2010, supporting the external dimension of CEAS in resettling refugees was formally introduced as one of its tasks in promoting solidarity.¹⁷⁹ There thus appear to be a direct link between the activities in the internal and external dimension of CEAS.

In March 2012 the EU Council adopted a Joint EU resettlement programme and the decision explicitly referred to article 78 (2) (g) TFEU in its preamble.¹⁸⁰ As mentioned in section two, this provision refers to partnerships with third countries. This indicates that resettlement indeed can fall under this provision and would hence fall under the scope of solidarity in article 80 TFEU. As regards solidarity, the EU Council had earlier in March 2012 recognized resettlement and its significance for promoting practical solidarity.¹⁸¹ Lastly, in the decision adopting a EU resettlement scheme, it was declared that financial support is important as encouragement for new member states to engage in resettlement activities.¹⁸²

Although there has been great emphasize on the importance and vital role of resettlement and its impact on the compliance with human rights, countries seem to be reluctant to engage in the activities. According to UNHCR there is an estimated need for resettlement in Europe of approximately 150 000 persons under the year of 2015 but only approximately 26 000 persons will be

¹⁷⁵ Ibid para. 1.1, 2.1, 3.1

¹⁷⁶ ECRE, Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System (COM (2007) 301), AD5/9/2007/Ext/RW, September 2007, para 5.2

¹⁷⁷ Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme "Solidarity and Management of Migration Flows"

¹⁷⁸ COM (2009) 447 final, supra note 174, para. 3.2, 3.2.1

¹⁷⁹ EASO Regulation, supra note 40, article 7

¹⁸⁰ Joint EU- resettlement programme, supra note 161

¹⁸¹ Council of the European Union, Council Conclusions, supra note 74, para. 20 (v)

¹⁸² This decision was later repealed by Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, however an extensive presentation of financial solidarity is outside the scope of this thesis

able to achieve protection through this procedure.¹⁸³ It is an increase of 610% from the previous year and according to UNHCR the large increase partly has to do with the continuing need of protection by the Syrian population. This calls for further measures in order to meet the demands.¹⁸⁴ The European Union Agency for Fundamental Rights (FRA) has also acknowledged the imminent need for the creation of legal avenues to enter the union. In the suggested toolbox to combat the disquieting pattern at the EU borders, FRA emphasized resettlement as an effective and important measure in order to protect fundamental rights.¹⁸⁵ An EU-wide resettlement scheme has very recently been on the agenda in the union due to the upsetting events happening on the borders to the EU. The Commission will propose a resettlement scheme with 20.000 places distributed in every member state by the end of May 2015, as an immediate response to the needs for international protection.¹⁸⁶

Regardless of how resettlement is being applied in practice, the fact that resettlement has undergone an important development shouldn't be undermined. Although, it could be argued that it is not clear where resettlement falls under the EU policy regime there are instances suggesting that resettlement has evolved as a critical component of the EU asylum policies and as a tool empowering the proper functioning of CEAS.

4.6 Discretion as an obstacle for addresseing solidarity and protection

There are international obligations that states have to comply with, however the measures by which they can be fulfilled have to some extent been left with the discretionary power of states. Throughout the development of resettlement in the external dimension of CEAS it has never imposed a direct obligation, rather it has remained a voluntary measure.

The voluntary nature of resettlement has been debated throughout the years and the effectiveness of the procedure has been questioned. Hurwitz stated that, "resettlement will always be a solution which only a very small minority of refugees will benefit from".¹⁸⁷ It has also been argued that a voluntary basis for responsibility sharing has negative impact on the amount of protection

¹⁸³ UNHCR, "Projected Global Resettlement Needs", 20th Annual Tripartite Consultations on Resettlement Geneva, 24-26 June 2014, p.9

¹⁸⁴ Several NGOs have jointly called for increased resettlement commitment in regards to Syrian refugees, see e.g. ECRE, "EU member states must increase pledges to resettle and admit more refugees fleeing Syria", 9 December 2014

¹⁸⁵ FRA, "Legal entry channels to the EU for persons in need of international protection: a toolbox", FRA Focus February 2015, p. 7

¹⁸⁶ European Commission, Press release, Supra note 95

¹⁸⁷ Hurwitz, A., "The collective responsibility of states to protect refugees", 2009, p. 152 Oxford: Oxford University Press. 2009, p. 152

offered and the protection offered is unreliable.¹⁸⁸ However, resettlement has gained a lot of support by NGO's as a durable solution in order to make the protection in the EU accessible and they have encouraged the EU and its member states to consider developing a more legally binding approach to resettlement.¹⁸⁹ In the feasibility study that was carried out in 2003 it was suggested that a directive would be the most appropriate measure, if any, as it leaves some flexibility for the state in the implementation.¹⁹⁰ In a research projected carried out in 2013, aimed at developing the resettlement cooperation and capacity in the EU, suggested that all member states should have a legal framework for resettlement and that a directive should be implemented in order to standardize the procedure and other fundamental elements.¹⁹¹ It was suggested that these could have included equal treatment of resettled refugees as convention refugees, granting of permanent residence permit and that cooperation should take place with the UNHCR. No proposal for a legal instrument on resettlement by the Commission has so far been adopted.

In EU's Global Approach to Migration and Mobility it has been recognized that access to protection must be guaranteed at an early stage.¹⁹² A study by the European Parliament carried out in 2013 however, recognizes the current issues in the EU and that there are no legal channels to enter the territory.¹⁹³ The study presents the main problem that protection seekers face today; they have to find their own way to enter the EU in order to enjoy refugee protection. The recast regulations and directives of the asylum *acquis* have not changed this issue as they contain territorial restrictions in their application and they can only be triggered on EU territory. Article 3 (1) in the Dublin regulation states that it applies to all applications made in the territory of a state or on the borders or transit zones. The RCD has a similar provision in article 3 (1) stating that it applies to applications made within the territory, including the border, territorial waters or transit zones. Article 3 (1) of the APD is equivalent to that of RCD. The only directive not containing an explicit territorial restriction is the Qualification directive. However, it has been argued that the absence of such a limitation does not mean that it is intended to apply to extraterritorial activities, although a strict literal interpretation would imply that. It would not be in line with the consistency of the development of CEAS and it seems unlikely that the legislator had the intention of obliging states to grant refugee status to persons outside their territory. It has furthermore been noted that the directive by itself does not provide practical value as once the status is granted it does not provide for further provisions

¹⁸⁸ Gray, H., "Surveying the Foundations. Article 80 TFEU and the Common European Asylum System", *Liverpool Law Review* (2013) 34:175–193, p. 182

¹⁸⁹ PERCO, "Position on the Need to Create Legal Avenues to Access International Protection within the European Union", November 6th 2012, p. 7

¹⁹⁰ Resettlement feasibility study, *supra* note 163, p. X

¹⁹¹ Perrin, D., McNamara, F., "Refugee resettlement in the EU: Between Shared Standards and Diversity in Legal and Policy Frames", *Know Reset Research Report 2012/03*, p. 42

¹⁹² European Commission, *The Global Approach to Migration and Mobility*, COM (2011) 743 final, 18 November 2011, at 5-7

¹⁹³ Guild, E., Moreno-Lax, V., "Current challenges for international refugee law, with a focus on EU policies and EU-cooperation with the UNHCR", *European Parliament*, December 2013, p. 12

on how to proceed with a claim, no procedural safeguards or right to have an application examined.¹⁹⁴ Maarten de Heijer has reasoned that the potential rights that can be afforded to those refugees who are present in the ambit of the external dimension of EU will rely on the meaning and interpretation of article 18 (right to asylum) and 19 (prohibition of refoulement) of the EU Charter. The scope and application of the EU Charter must correspond to the refugee convention and other human rights instruments. It could thus arguably have a broader application than secondary EU law instruments. According to De Heijer, the reference to the right to asylum as proclaimed in article 18 allows for an interpretation not only containing the principle of non-refoulement, which is separately mentioned in article 19, but also rights associated to gaining access to the protection mechanisms. Lastly, it is also noted by De Heijer that the new provision in article 78 (2) (g) TFEU, in contrast to the previous article 63 TEC that had a territorial restriction, allows for extra-territorial measures to be adopted. For instance, the installment of alternative measures that would provide protection to refugees in third countries was suggested.¹⁹⁵

It has moreover been argued that there seem to be some inconsistency in the internal and external dimension of CEAS in respect of the compliance with human rights obligations.¹⁹⁶ According to article 7 TFEU the union is required to maintain consistency in its policies and activities, in relation to external activities article 21 (3) TEU states that “the Union shall ensure consistency between the different areas of its external action and between these and its other policies.” The divergence between the internal and external dimension of CEAS could thus be considered a breach of this provision, however the requirement of consistency does not extend the application of the asylum *acquis* but rather sets a minimum level that the extraterritorial activities must respect. But as the authors of the study from 2013 points out, “pursuant to Article 3(5) TEU, in its external action, the EU must ‘uphold and promote its values’ and contribute to the ‘strict observance and the development of international law’. This includes fundamental rights, as recognized in the EU Charter, and meaningful cooperation with UNHCR in relation to refugee law standards.”¹⁹⁷

¹⁹⁴ De Heijer, M., ”Europe and Extraterritorial Asylum”, 2012, p. 203-204

¹⁹⁵ Ibid p. 205-206

¹⁹⁶ Guild, E., supra note 193, p. 23

¹⁹⁷ Ibid

5 Findings and concluding remarks

During the evolution of a common European asylum system, solidarity has become an integral principle underlying the framework, which has been reflected in the political debate as well as the adopted legal instruments. The actions taken by states have however been inadequate in order to protect fundamental rights and safeguard the compliance with international obligations. There are clear insufficiencies in the implementation of asylum policies, both internally and externally. As been demonstrated, the Dublin regulation and resettlement as two distinct measures in two different dimensions have failed to successfully 'share norms' and 'share people' as fundamental rights and international obligations have been neglected. The alarming events that have taken place close to the EU borders and neighboring countries the last couple of years call for further measures by the union and the member states. The implementation and reconceptualization of solidarity as enshrined in article 80 TFEU has become more important than ever.

As been presented in this thesis the concept of solidarity is a complex issue in different areas of law, unless it is specified as to what it entails for different actors. In the field of asylum law in the EU it clearly remains an undefined principle and with uncertainty in regards to its enforceability and substance, it perhaps has created further questions and more issues than it has provided solutions on how to distribute asylum responsibilities in a fair and just way. However, regardless of the precise meaning of solidarity and fair sharing of responsibility on asylum there may still be room for its implementation, not least from a moral standpoint but also in order to comply with international obligations and fundamental rights which states are bound by. It has to be recognized that solidarity is not one-dimensional but rather have several potential addresses whose interests must be taken into account.

Asylum policy, an area that have developed from traditionally being inter-governmental with a strong focus on national sovereignty to a policy area with supranational governance through the creation of an AFSJ, calls for a common understanding of the how the policies should be formed, what governs them and what they require from member states. In the field of asylum, actions are required on union level in a cooperative manner in order to fully meet the needs for international protection. The creation of a common area of protection and solidarity has been an important step to further the cooperation between member states by harmonizing standards for reception conditions, asylum procedures and standards for granting refugee status and providing subsidiary protection. However, the attempt to level out the playing field regarding the effects of high migratory inflows and the responsibilities that stems therefrom, have shown to have certain setbacks since the cornerstone of the framework, the Dublin regulation, have had shortcomings in its implementation. Although the aim has been to secure access to the protection process, the focus has been on an effective and rapid assessment, hence prior-

itizing the interest of the state. The obligatory hierarchy of criteria designed to allocate the responsibility between member states has further resulted in an unfair distribution across the EU, whether it is the hierarchy itself that is unfair or whether it is states that fail to apply them correctly is not certain. What is clear, is that certain member states are under greater migratory pressure than other states due their geographical location. The geographical location should however not be determinative in how the responsibility is shared. Rather, measures have to be taken that promotes a more even distribution than is the reality today.

The shortcomings of the Dublin system have also been apparent in the jurisprudence by the European Courts. It has become clear that the underlying principles of mutual trust and safe country concept cannot be relied upon unconditionally, as fundamental rights and the principle of non-refoulement would be breached in certain cases where member states have failed to implement common standards. The case law is pointing us in the right direction in recognizing the importance of safeguarding the individual rights but more preventive actions have to be taken to fully remedy the impacts the Dublin system has as it stands today. As a mean to promote greater solidarity there has been suggestions of applying the sovereignty clause in order to remedy the uneven distribution. This discretionary provision is purposive when applied in order to prevent refoulement but if applied extensively, as a way of promoting solidarity and fair sharing of responsibility, it can be questioned if it in fact undermines the Dublin system, as states are left with such discretionary power and may derogate from the otherwise obligatory set of criteria. However, this might be the suitable or only option in order to fully safeguard the protection of fundamental rights and to mitigate the asymmetric responsibilities resulting from the application of the Dublin regulation.

The legal instrument constituting CEAS are interrelated and are all part of a larger protection framework. An efficient implementation and application of the asylum directives and the Dublin regulation is important for the system to function properly as a whole. The intra-EU solidarity mechanisms and their different functions have to be viewed in the light of one another. EASO plays a crucial part in the functioning of CEAS and has great potential in its monitoring function and by sharing information and expertise to further promote solidarity. EASO further has the important role in encouraging states to participate in resettlement activities as a mean to promote solidarity. Hence, EASO is directly involved in activities, internally as well as externally. This suggests that a comprehensive approach is required, taken into account the interlinkage between the two dimensions, in order to achieve practical solidarity and to reinforce CEAS and its objectives.

CEAS and the importance of the actions taken in regards to the external dimension were recognized early on by adopting the temporary protection directive. The directive essentially regulates the relations and solidarity with third countries by alleviating heavy pressures and offering international protection to those in need. There thus appear to be a similar rationale between temporary protection, which was adopted as a measure within the CEAS

framework, and resettlement as two protection mechanisms operating in the external dimension, but with great impact on how responsibilities are shared internally.

Although the importance of the external dimension has been emphasized multiple times as a way of achieving the goal of establishing a common European asylum system, resettlement and whether or not it would fall under this framework has been subject to debate. Largely due to its inherent procedural difference and its discretionary nature compared to the regular asylum procedure offered within CEAS. However, as been declared in this thesis, there has been support that resettlement in fact is a part of this system. It boils down to how one perceives and understands the terms ‘system’ and ‘procedure’ within CEAS. The resettlement procedure and the regular asylum procedure have the same aim in granting protection and is as such part of a larger protection mechanism. They both also form a part of EU’s common migration policies, which underlies the CEAS framework and its objectives. It thus seems as if they very well could be a part of a larger asylum system serving the same purpose while maintaining their different procedures in providing access to EU territory. This suggests for a comprehensive approach in how CEAS and its dimensions and the underlying principle of solidarity is perceived.

If resettlement can be considered to fall under the framework of a common European asylum system it can also be argued that it potentially could fall within the scope of article 78 TFEU. As was mentioned under section two of the thesis, article 78 (2) (g) TFEU provides for a potential basis for external action stating that “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.” It has been acknowledged that partnerships with third countries in the form of resettlement schemes are essential in sustaining a comprehensive approach and fulfilling international obligations. Article 78 TFEU furthermore initially states that the EU should adopt common migration and asylum policies; the external dimension has clearly become an important part during its development. Therefore resettlement could arguably fall under this provision. As the scope of article 80 TFEU and the solidarity principle therein covers article 78 TFEU it could very well be argued that the solidarity principle shall apply not only between member states but also between member states and third countries. This can be deduced from the statement made in the policy plan in 2008 on the future development of CEAS and the completion of the second phase. In a reference to solidarity in article 80 TFEU and the provision under article 78 (2) (g) TFEU it was underlined that solidarity must be shown within EU and between the union and third countries.¹⁹⁸ The relation between resettlement and solidarity in TFEU can also be inferred from documents concluded by the EU Council. In the conclusions from March 2012, the EU Council called for genuine solidarity and made an explicit reference to solidarity in article 80 TFEU, member states were encouraged to participate in resettlement. Although still on a vol-

¹⁹⁸ Policy Plan, *supra* note 47, para. 5

untary basis, resettlement was here articulated as an important measure in order to achieve real and practical solidarity.¹⁹⁹ The way solidarity has been articulated in article 80 TFEU further leaves room for a comprehensive approach and additional measures to be adopted through the wording of ‘including’; it asserts that the provision is not exhaustive. It should further be noted that resettlement activities partly are funded by European funds in order to create an incentive for states to participate. This indirectly indicates that resettlement is a part of ‘sharing money’ policies within the EU. It thus appears as if there is a great potential basis for resettlement in TFEU as an action in the external dimension of CEAS, which shall be guided by the principle of solidarity and be in compliance with fundamental rights and the refugee convention.

However, resettlement is to date a purely discretionary measure. There is nothing in article 78 (2) (g) TFEU or article 80 TFEU that would suggest that resettlement is an obligatory measure to be implemented. Nonetheless, article 80 TFEU and the word ‘shall’ indicates that once a measure has been chosen, which indeed could be resettlement, it has to be governed by the principle of solidarity.

The Dublin regulation and resettlement, two already established mechanisms, have great potential in promoting solidarity and offering international protection but have failed in their implementation due to states inability to adopt common and fair standards and their unwillingness to commit to resettlement activities. The respective nature of the measures, the Dublin regulation being directly enforceable, and resettlement remaining discretionary does not seem to affect the final result. Although they both essentially have the aim of providing protection and ultimately have the same effect of sharing asylum responsibilities, they have been shown to be inadequate. It is important that these two measures are not viewed in isolation from each other but rather that resettlement is complementary to CEAS and its functions without making the reception of spontaneous arrivals obsolete. This calls for a systemic approach to the different dimensions of CEAS and the mechanisms that operate thereunder.

To conclude, the present thesis has shown that solidarity as enshrined in article 80 TFEU leaves room for a more holistic approach that could pave the way for greater sharing of asylum responsibilities between member states as well as third countries. The different ways in which solidarity can be understood and the different addresses that may be beneficiaries of actions taken must be viewed upon in a broad sense. This thesis argues that the internal and external dimensions of CEAS are intrinsically connected as the policies and actions taken in one area will ultimately affect the other. The insufficiency of member states to address solidarity internally and protect fundamental rights calls for an evolution of solidarity towards a more comprehensive approach by recognizing the value and effect of the actions taken externally; solidarity measures taken externally are essentially the starting point to increase solidarity internally.

¹⁹⁹ Council of the European Union, Council conclusions, *supra* note 74, para. 20 (v)

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