FACULTY OF LAW
Lund University

Ebba Ahlgren

In the Spirit of EU Burden-Sharing – Past and Present challenges to respond to humanitarian crises

Kosovo and Syria in Focus

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Supervisor: Eleni Karageorgiou

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Contents

Summary

Providing protection and assistance to refugees is a permanent challenge for the international community. In 2014 EU created a New Agenda on Migration as a immediate response to the increasing inflow of third country nationals who risked their lives when crossing the Mediterranean Sea. The first part of the agenda stipulates that Europe should continue to be a safe haven for those fleeing persecution, but also addressing the urgent need to bring EU together and collectively respond to the migration situation in accordance with the principles of solidarity and fair sharing of responsibility that was incorporated into EU primary law through article 80 TFEU.

There is currently a reform of the Union's existing legislation governing asylum and immigration policies in progress to ensure a humane and efficient framework. The massive influx of third country nationals to Europe in 2014 and 2015 has revealed significant structural weaknesses and shortcomings in the current framework. Burden-sharing that relates to the reception of asylum seekers in the internal dimension of EU can be divided in three categories; sharing money, sharing people and sharing norms. This thesis will primarily focus on the sharing of people. Several attempts have been made throughout the years to create a people sharing mechanism within the Union without much success. In the fall 2015, a temporary relocation system was put in place with the aim to relieve the extreme pressure put on Italy and Greece as a result of the current migration crisis.

The EU Temporary Relocation System also lays the foundation for a proposal of including a permanent relocation mechanism into the EU framework for future situations of mass influx of asylum seekers. The European Commissions proposal is based on article 78 (2) TFEU, which is the the precursor of a lasting solution on relocation, that should be triggered in crisis situations. The purpose is to create a mechanism that should be rapidly triggered in respect of any Member State that experiences a crisis situation of such a magnitude as to put under significant strain, even for well prepared and functioning asylum systems. The proposal aims at ensuring a fair sharing of responsibilities and upholding solidarity between Member States. By evaluating the people sharing mechanism put in place as a response by the international community to the Kosovo refugee crisis more than a decade ago, and todays EU Temporary Relocation System, the purpose of this thesis is to draw conclusion from the past, identifying the characteristics to keep and lessons to be learned in order to create an effective intra-EU people sharing mechanism.

Sammanfattning

Att ge skydd och stöd till flyktingar är en ständig utmaning för det internationella samfundet. Under 2014 skapade EU en ny Migrationsagenda som en omedelbar reaktion på det allt mer ökande inflödet av flyktingar och immigranter. Den första delen av den nya agendan fastställer att Europa ska fortsätta att vara en fristad för de som flyr krig och förföljelse. Å andra sidan finns också ett brådskande behov att föra samman EU och gemensamt adressera situationen i enlighet med solidaritetsprincipen och genom rättvis ansvarsfördelning. Solidaritetsprincipen och principen om rättvis ansvarsfördelning inkorporerades i unionens primärrätt genom Lissabonfördraget i artikel 80 Föredraget om Europeiska unionens funktionssätt.

Det pågår för närvarande en reform av unionens nuvarande lagstiftning på asyl-, och immigrationsområdet för att säkerställa en humanitär och effektiv tillämpning. Det massiva inflödet av asylsökande och immigranter till Europa under 2014 och 2015 har visat på betydande brister och strukturella svagheter i det nuvarande regelverket. Den del av ansvarsfördelningen (burden-sharing) som innefattar det faktiska mottagandet av asylsökande kan delas in i tre kategorier; finansiell ansvarsfördelning, normdelning och omfördelning av asylsökande. Denna avhandling kommer framförallt att fokusera på omfördelning av asylsökande. Det har gjorts flera försök inom unionen genom åren att skapa ett omfördelningssystem av asylsökande utan större framgång. En tillfällig omfördelningsmekanism skapades under hösten 2015 för att avlasta Italien och Grekland från den extrema flyktingkrisen i länderna.

Unionens tillfälliga omfördelningsmekanism ligger till grund för ett förslag om att införa en permanent omfördelningsmekanism i unionens regelverket. Förslaget är baserat på artikel 78 (2) i Funktionsfördraget och syftet är att skapa en hållbar mekanism som kan användas i krissituationer. Mekanismen ska triggas igång när ett medlemsland upplever en krissituation av sådan omfattning att även väl förberedda och fungerande nationella asylsystem ställs inför betydande påfrestningar. Genom att utvärdera de två omfördelningsmekanismerna som skapades av det internationella samfundet i samband med Kosovokriget för mer än tio år sedan, och Unionens tillfälliga omfördelningsmekanism, kan generella slutsatser dras för att identifiera de egenskaper som är värda att behålla, samt vilka lärdomar som kan dras för att skapa en effektiv mekanism för framtiden.

Preface

More people fled in 2015 than at any other time. Around the world, almost 60 million people are displaced by conflict and persecution. Nearly 20 million of them are refugees, and more than half are children. Their number are growing and accelerating, every single day, on every continent. In 2014, an average of 42,500 people became refugees, asylum-seekers or internally displaced persons, every single day – that is four times more than just four years ago.

- Former United Nations High Commissioner for Refugees António Guterres, World Refugee Day 2015

This thesis is dedicated to my greatest role model who thought me the importance of human dignity and high morals, he is unfortunately not around to se me graduate but I bare him with me at heart and in spirit.

≈ Medicine Doctor Sven Arne Ahlgren, my grandfather ≈

Malmö, 26 May 2016

Ebba Ahlgren

Abbreviations

AMIF	EU Asylum, Migration, Immigration Fund
CEAS	Common European Asylum System
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ERF	European Refugee Fund
EU	European Union
GDP	Gross Domestic Product
HEP	Humanitarian Evacuation Programme
KLA	Kosovo Liberation Army
LDA	League for a Democratic Kosovo
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
TFEU	Treaty on the Functioning of the European Union
TPD	Temporary Protections Directive
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Providing protection and assistance to refugees is a permanent challenge for the international community. The burden put on developing countries is notably heavier than the burden put on industrialized states. Most refugees today are found in developing states and richer countries are increasingly tightening their boarders to prevent refugees from seeking asylum.[1] Many developing states are neighbours to the conflict that generate refugees and receive intense pressure to provide protection. Host states often call for assistance but there is a disagreement in the international community over the amount and form of assistance. Over the past decade, Europe has experienced a significant increasing number of asylum seekers arriving at the borders. First as a result of the wars in the former Yugoslavia, peeking through the war in Kosovo. Refugees from Kosovo fled primarily to the neighbouring states Albania, Macedonia and Montenegro. Macedonia was at that time fragile and the sudden influx of protection seekers put an increasingly heavy burden on the state. The North Atlantic Treaty Organisation (NATO) offered direct help to Macedonia, both in building refugee camps and through financial assistance, but also through the Humanitarian Evacuation Programme (HEP), serving as a people sharing mechanism.

Over the past couple of years, as a result of the war currently taking place in Syria, in addition to other places faced with armed conflicts, Europe has been faced with an increasing number of refugee arrivals. In 2014, the number of asylum seekers who manage to reach European territory was over 600,000. That number peaked even more in 2015, where over one million protection seeker came to Europe of which the main part came from the war in Syria.[2] The current refugee regime in Europe creates unequal burdens put on different Member States. Through the Dublin Regulation[3], front line

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[1] Banulescu-Bogdan, Natalia & Fratzke, Susan, "Europé's Migration Crisis in Context: Why Now and What Next?", Migration Policy Institute, September 24, 2015

[2] Eurostat, Statistics Explained, "File: Number of (non-EU) asylum seekers in the EU and EFTA Member States, 2014 and 2015 (thousands of first time applicants)"
Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_(non-EU)_asylum_seekers_in_the_EU_and_EFTA_Member_States,_2014_and_2015_(thousands_of_first_time_applicants)_YB16.png,
Dare Accessed: 22.5.2016

[3]Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection

states, primarily Greece and Italy, is faced with an unmanageable heavy burden in providing protection. The mass influx of protection seekers over the last couple of years has revealed the shortcoming of the legal framework regulating the issues. Solidarity and burden-sharing in regard to providing protection has been a heavily debated issue since the mid-1990 without reaching much success. Burden-sharing has been conceptualised as taking three forms; sharing money, sharing people and sharing norms. This is how solidarity and sharing is seen in Europe too, with a focus on sharing financial resources. The European Union (EU) has developed a Common European Asylum System (CEAS) as an attempt to harmonise national legislation relating to both reception conditions and asylum processes (sharing norms). The European Refugee Fund (ERF)[4] was created as a funding mechanism to support Member States under particular pressure (sharing money). Several attempts have been made in order to agree on a burden sharing mechanism relating to actual relocation of individual protection seekers and in the fall of 2015, an intra-EU relocation scheme was put in place through two Council Decisions[56], particularly targeting protection seekers arriving massively in Greece and Italy (sharing people). All these measures are governed by the principles of solidarity and fair sharing of responsibilities as stated in Article 80 of the Treaty on the Functioning of the European Union (TFEU)[7]. EU sharing mechanisms has faced several obstacles in the implementation process and a more comprehensive approach towards solidarity and a fair sharing of responsibilities between Member States within the Union is needed in order to respond to protection needs and compliance with fundamental human rights.

1.2 Purpose and Research Question

The purpose of this thesis is to give a comprehensive overview of the present legal framework within the Union context from a burden-sharing perspective. As suggested above, burden-sharing within the EU can be divided into three categories; sharing money, sharing people and sharing norms. Sharing of

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lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter the Dublin III Regulation)

[4] Decision No 573/2007/EC of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme ´Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC of 23 May 2007, (hereinafter the ERF Decision)

[5] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 239/146, 15.9.2015, (hereinafter Decision on EU Temporary Relocation System I)

[6] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80 24.9.2015, (hereinafter Decision on EU Temporary Relocation System II)

[7] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326/47 26.10.2012 (hereinafter TFEU)

money and sharing norms through harmonisation within the Union has come a long way when compared to the sharing of people in need of international protection. In this thesis I analyse and assess two mechanisms which distribute people amongst different states as a response to a humanitarian crisis, from a game theoretical approach.

The first scheme is the Humanitarian Evacuation Programme (HEP) where displaced people from the war in Kosovo was evacuated from Macedonia to other Western States outside of the Balkan Region. The second scheme is the two EU Relocations Decisions, from September 2015, to distribute individuals in clear need of international protection from Italy and Greece to other Member States of the EU. My aim is to investigate challenges and lessons learned from the past experiences as regards people sharing practises and suggest ways towards a more effective and comprehensive mechanism for the future.

In the light of the above my overarching research question could be formulated as follows:
- How can the burden-sharing mechanisms taken as response to the Kosovo and Syria refugee crisis be explained and assessed under the light of a game theoretical approach?
- What obstacles can be identified from previous people sharing mechanisms and what do they suggest for the way forward?

1.3 Method and Material

A traditional legal dogmatic method is used in the process of this work[8]. The method entails the establishment and analysis of current law as it is found in primary sources, which in a EU context consists of Treaties, and secondary sources, including regulations, directives, decisions, communications and reports. Supplementary sources include international law, different forms of academic writing and other sources. The thesis draws highly on the development of the Union framework on burden-sharing, solidarity and fair sharing of responsibility in regard to refugee and migration policies. Thus it applies a legal historical approach. In order to conceptualise and explain the rationale behind burden-sharing practises I am using a game theoretical approach, heavily inspired by Gregor Noll's writing on the matter.

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[8] Dahlberg-Larsen, Jorgen, "On the Relevance of Habermas and Theories of Legal Pluralism for the Study of Environmental Law", in the book: "Law, Morality and Legal Positivism", edited by: Himma, Kenneth Einar, Franz Steiner Verlag, Germany, 2004, p. 167

To answer the research questions, I undertake a comparative method of two distributive mechanisms that occurred in different contexts and with more than a decade apart. The systems have several similarities but I find it important to highlight their differences. First of all, the systems were not created by the same participants, HEP was created between Western States and overseen by NATO, the intra-EU relocation scheme on the other hand was created by EU and is an intra-EU burden-sharing system between Member States. HEP evacuated individuals outside of their region of origin, while the EU system divides asylum seekers already within the territory of the Union between its Member States. Finally, HEP only covered an identified group of individuals from a specific conflict, in order to relieve the pressure on a specific host state, while the EU system does not identify a specific group, even though the majority of beneficiaries through the programme are Syrian nationals, and host states a currently Italy and Greece, but the scope can be expanded if another Member State find themselves in a situation of mass influx of asylum seekers that put extreme pressure on their national systems.

The research is based on written material and no empirical studies have been undertaken. The thesis mainly focuses on a EU perspective, hence most material used include legal instruments and other sources from various EU institutions. The principles of solidarity and fair sharing of responsibility was incorporated into EU primary law through the Lisbon Treat which is relatively new, hence not much material can be found in the doctrine. To provide for an understanding of the concept I have used journals and EU documents. International instruments have been referred to in order to provide for a broader concept on the notion of burden-sharing. This thesis is based on different supplementary sources, drawing from a variety of academic disciplines. Predominantly this thesis is based on material written from a judicial perspective, but in addition there is academic material included from other disciplines such as social science.

There is not much academic coverage analysing the process and implementation of HEP. I will describe the refugee situation mainly using material produced by the United Nations High Commissioner for Refugees (UNHCR) and a independent report. HEP is mentioned and briefly discussed by several scholars, but rarely analysed in length. The major exception is Astri Suhrke, who has research the international community's response and burden-sharing comprehensively in regard to the Kosovo crisis. There is not much researched on the EU Relocation Decisions, I would assume because the mechanism is less than one-year-old. To this date, there has been three evaluation report carried out on the implementation process which will serve as the basis when evaluating the EU mechanism. To my knowledge, a comparative analysis has not been carried out between HEP and the EU relocation mechanism previously and this is where I see the contribution of this study lying on.

1.4 Delimitations

Burden-sharing, solidarity and fair sharing of responsibilities is a broad topic and the notion and principles is used in a number of areas in international law. Article 80 of TFEU covers the principles of solidarity and fair sharing of responsibility in the area of asylum, immigration and border check policies within the EU. This thesis focuses on the area of refugee protection whereas the two other areas, immigration and border checks, will not be further explored even if it is important to notice that they interact with each other. The thesis will focus on asylum policies within Europe adopted on the basis of the principle of solidarity and fair sharing of responsibilities.

This thesis focuses on the burden-sharing that occurs between states. Burden-sharing between states can occur in many forms, sharing the burden of preventing and resolving refugee crisis, burdens of preventing arrivals and grading external borders, and sharing the burden of reception, which is the focus of this thesis. The overall aim of the thesis is to evaluate mechanisms of people sharing and draw some conclusions on their function. When it is appropriate this also includes some dimensions of sharing of money and sharing of norms, but those forms of sharing are not the primary objective of this thesis. The thesis does not include all forms of legislation composing the EU acquis on asylum and immigration, nor does it include an analysis of rights offered to refugees included in various legal instruments.

Regarding the issue of resettlement and relocation, this thesis focuses on relocation as a burden-sharing mechanism within the Union. HEP is a resettlement mechanism that is used as a comparative phenomenon in order to evaluate how people sharing can be effectively conducted even at an intra-EU level. With that said, other forms of people sharing through resettlement is not the aim of this thesis to explore. The new agreement between EU and Turkey will be briefly mentioned, but resettlement through bilateral agreements or through UNHCR are not included.

1.5 Outline

In order to provide answers to the research questions, the thesis is divided into three main parts. The first part consists of chapter two and three. Chapter two describes the notion of burden-sharing in the international refugee regime and the theoretical framework that is going to be used in order to explain the motives for burden-sharing, namely game theory. A brief overview is also presented as an

introduction to refugee protection in international law is also included here. Chapter three covers the EU internal dimension of burden-sharing, explaining the three forms of sharing; sharing money, sharing people and sharing norms. The chapter then moves on to explore the evolution of the EU legal framework in order to explain how solidarity and fair sharing of responsibilities has become fundamental principles within the Union framework and how different legal instruments can be categorised and explained from a burden-sharing perspective. I also elaborate on the meaning of the principles of solidarity and fair sharing of responsibility in the Union context.

The next part of this thesis consists of chapter four and five, which explains the two systems created in order to resolve two refugee crises situation through the sharing of people. Both chapters start by explaining the origins of the war and the refugee crisis in their specific context. Subsequently they move on to explain the process of adoption of the corresponding burden-sharing schemes, followed by the implementation and evaluation of the mechanisms. The final part provides an analysis of the situations from a game theoretical standpoint and the political motivations behind it.

The third part of this thesis is chapter six, starting with the comparative analysis between HEP and the EU Relocation Decisions both in regard to the creation process and the implementation process. The last part summarizes the lessons learned from past experiences and draw some conclusions on how the proposal for a permanent people sharing mechanism within the Union for future cases of mass influx of third country nationals could be improved.

1.6 Definitions

People who experience involuntary displacement are commonly referred to in different ways. The term *refugee*, as used in this thesis, refers to a person who is outside his/hers country of origin, fleeing persecution and it would be to dangerous for them to return home, which mean that they need protection elsewhere. In other words I make use of the term as defined and protected under international law, in accordance with the 1951 Refugee Convention[9]. The term *Asylum seeker* refers to a person who claims to be a refugee, has or is intended to lodge an application for international protection but without a final decision of the application. The term *Displaced person* is a broader term referring to persons who have been forced or obliged to flee their country of origin as a result of armed conflict, indiscriminate violence or serious violations of human rights and who has crossed a

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[9] Convention Relating to the Status of Refugees, Adopted on 28 July 1951 (hereinafter the Refugee Convention)

international border. *Migration* is also a broader term that refers to people who is outside their country of origin, not dependent on the length or the cause, but the term can include both refugees, asylum seekers and displaced persons, and also people moving for other purposes such as economic migrants and family reunification.

The phrase *complementary protection* is the protection offered from refoulment for individuals who fall outside the scope of the 1951 Refugee Convention within the international community. In a regional context of EU, the term corresponds with the term *subsidiary protection,* which is protection offered to people who does not qualify as refugees but if returned, faces a real risk of suffering serious harm in accordance with the Qualification Directive[10]. *International protection* refers to the protection offered to individuals who fall within the scope of the 1951 Refugee Convention and also to beneficiaries of subsidiary protection as enshrined in the EU Qualification Directive. Another type of protection offered in the context of EU is *temporary protection,* for individuals falling within the scope of the Temporary Protection Directive.

Within the scope of this thesis there is a distinction that should be noted between the terms relocation and resettlement. *Resettlement* refers to transfer of beneficiaries from a state outside of European Union to the territory of EU. *Relocation* on the other hand refers transfer of asylum seekers currently within EU territory, who are transferred from one Member State to another.

The phrase *mass influx*, refer to a situation where a considerable number of people cross an international border in a rapid rate and there is inadequate response capacity in the host state.

Finally, the phrase *EU Temporary Relocation System* refers to both Decisions from September 2015[11], with the aim to distribute asylum seekers from Greece and Italy to other Member States within the Union.

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[10] 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 content of the protection granted (hereinafter: Qualification Directive)
[11] Decision on EU Temporary Relocation System I & Decision on EU Temporary Relocation System II

2 The Notion of Burden-Sharing in the Refugee Regime

2.1 Refugee Protection in International Law

Societies have over centuries welcomed victims of violence and persecution, that humanitarian tradition forms is a part of the worlds history. Protection of refugees is primarily the responsibility of the state, and the legal framework that support the international refugee protection regime was built by states. In every region of the world, governments offer protection to refugees and allow them to remain on their territory until conditions in their country of origin has improved and they are able to return in safety and with dignity.[12] This section gives a brief overview of the international refugee regime and main obligations for states as to protect refugees and ensure them certain rights. The Refugee Convention[13], and the additional protocol from 1967[14] can be regarded as the centrepiece of international refugee protection. The Convention is grounded in article 14 of the Universal Declaration of Human Rights[15], which recognises the right of persons to seek asylum from persecution in other countries. The Convention establishes a definition of the term refugee in article 1 as any person who is unable to return to his or hers country of origin due to a well-funded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

The Refugee Convention is both a status and right-based instrument, and it is underpinned by several fundamental principles, such as the principles of non-refoulment, non-discrimination and non-penalization. Non-penalization stipulates that refugees should not be penalized for illegal entry or stay in a state and recognizes that refugees may breach immigration rules.[16] Another important feature in the Convention is the principle of non-refoulment found in article 33. In accordance with the principle, no state shall on the grounds set out in article 1 (A) (2) expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened. However, the second part of the article makes an exception towards a individual for whom there are reasonable ground for regarding as a danger to the security of the country he currently finds himself in, or a

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[12] UNHCR, "Refugee Protection: A Guide to International Refugee Law", Geneva, 2001, p. 5-6
[13] The Refugee Convention
[14] Protocol Relating to the Status of Refugees, 31 January 1967
[15] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948
[16] The Refugee Convention, article 31

individual who has been convicted of a particularly serious crime that constitutes a danger to the community of that country. Article 42 of the same Convention states that the principle of non-refoulment is absolute and may not be derogated from. Non refoulment is well established in international law and can be found in other international and regional instruments, such as the European Convention on Human Rights.[17]

Under EU law and in accordance with the Qualification Directive, those who qualify as beneficiaries for international protection have the right to receive a qualification status. Individuals who do not qualify to receive refugee status can still be eligible for subsidiary protection. Subsidiary protection shall be granted people who, on substantial grounds, have been shown for believing that the person concerned, if returned to the country of origin, would face a real risk of suffering serious harm, and is unable, or owning such risk, unwilling to avail himself/herself of the protection of that country.[18] Serious harm is defined as death penalty, execution, torture or other inhumane or degrading treatment or punishment, or serious and individual threat to a civilian´s life or person by reason of indiscriminate violence.[19]

State sovereignty entails that state determine who enters their territory, but states also have a duty to comply with their international obligations. Lord Birmingham argues in Court that *"like most international conventions, the Refugee Convention represented a compromise between competing interests, in this case between the need to ensure humane treatment of the victims of oppression on the one hand and the wish of sovereign states to maintain control over those seeking entry to their territory on the other."*[20] The purpose of the Convention is to provide refugees their rights, and the underlying objective of it is the international communities commitment to assure those rights and provide protection for those who cannot receive that protection in their own countries.[21] Goodwin-Gill argues that it cannot be excluded that states may be required, as a matter of obligation, to allow individuals to enter their territory for the purpose of protection.[22] This is also reaffirmed by Chetail, who states that

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[17] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950
[18] Qualification Directive, Article 2 (f) & Article 18
[19] Qualification Directive, Article 15
[20] Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others, House of Lords, Session 2004-05, 2004UKHL 55 on appeal from 2003EWCA Civ 666, on Thursday 9 December 2004, (n 61) para. 15 Lord Birmingham of Cornhill
[21] Zimmermann, Andreas, "The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary", Oxford, 2011, p. 92
[22] Goodwin-Gill, Guy S, "The Dynamic of International Refugee Law", International Journal of Refugee Law, Vol. 25, No. 4, 2013, p. 655

states no longer enjoy an unconditional and uncontrolled discretion to refuse admission to their own territory and territorial sovereignty is both the foundation and the limit of international refugee law.[23]

Besides the protection granted in the Refugee Convention, and subsidiary protection as presented above, protection for individuals can also be found in various human right instruments. Refugee law and human rights law were initially seen as two different branches of international law, but the interaction between them is nowadays well acknowledged. A human rights based approach to the Refugee Convention is implied in the preamble which refers to the Charter of the United Nations[24] and the Universal Declaration of Human Rights. Some arguments regarding the interaction between the regimes is that the Refugee Convention should be seen as lex specialis, while general human rights treaties should be seen as lex generalis and as a result the Refugee Convention prevails. Although, lex specialis presupposes a conflict of norms between the two branches that is rare. Another view is that human rights law is the primary source of refugee protection.[25] Human rights are applicable to everyone because of the dignity inherited by every human, but the beneficiaries receiving refugee status depend on the identification of a predetermined category of protected individuals.

The structure in the refugee definition is composed of three levels of requirements namely inclusion, exclusion and cessation clauses. The inclusion clause is the one presented above, the individual need to be outside his country of origin, be unable or unwilling to avail himself of the protection of his country, attributed to a well-founded fear of persecution that is based on one of the five grounds race, religion, nationality, membership of a particular social group, and political opinion. The exclusion clause excludes individuals who already benefits from other national or international protection, and excludes those individuals who are responsible for the persecution which creates refugees, they do not enjoy the benefits of the Refugee Convention. Finally the cessation clause clarifies that refugee status is conceived of as temporary protection and is determined when such protection no longer can be justified.[26]

Human rights law has two essential characteristics, it is inclusive and it is universal. Provisions of international human rights law are more extensive than the specifics in refugee law. Some argue that

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[23] Chetail, Vincent, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", From the book: "Human Rights and Immigration" Edited by:. Ruth Rubio-Marin, Oxford Scholarship Online, 2014, p. 30 & 71
[24] Charter of the United Nations, signed on 26 June 1945 in San Francisco
[25] Chetail, 2014, p. 20-22
[26] Chetail, 2014, p. 23-25

human rights law can be viewed as a safety net and a secondary source to refugee law, while others hold the opinion that human rights law has become the primary source of refugee protection.[27] The material scope of human rights law sets out a wide range of rights which are not covered by the Refugee Convention, but they are rights applicable to all humans, also refugees and asylum seekers and without distinction between citizens and non-citizens.

2.2 Protection through International Cooperation

The Preamble to the Refugee Convention states that the grant of asylum may place a heavier burden on certain states, and a solution to the problem cannot be achieved without international co-operation.

"States have a duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination is based on such differences."[28]

The notion of burden-sharing are derived from the duty to cooperate within the international community and the importance of cooperation is mentioned in several international instruments.[29] The 1967 UN Declaration on Territorial Asylum,[30] article 2 (2) stipulates that when a state find it difficult to grant asylum or continue to grant asylum, other states shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden. Several regional instruments also include similar implications, such as article 2 (4) of the 1969 OAU Refugee Convention[31], which states that when a Member State find it difficult to grant asylum, it may appeal to other states and they shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden. The Council of Europe's Resolution on Asylum to Persons in Danger of Persecution[32] emphasises that where difficulties arise for a Member State, Governments of other states should, in

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[27] Chetail, 2014, p. 68-69
[28] UN Resolution A/RES/25/2625, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970.
[29] Hurwitz, Agnés, "The 1990 Dublin Convention: A Comprehensive Assessment", International Journal of Refugee Law, Vol. 11, Issue 4, October 2009, p. 8
[30] 1967 UN Declaration on Territorial Asylum, no. 2312
[31] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969
[32] Council of Europe, Resolution (67) 14: Asylum to Persons in Danger of Persecution, 29 June 1967, § 4

the spirit of European solidarity and of common responsibility in this field, consider appropriate measures to overcome such difficulties. Other instruments that highlights the relevance of the principle is the Cartagena Declaration[33] and the 1970 Addendum of the Asian-African Legal Consultative Committee[34]. It should be noted that the instruments use the word "may" which avoids stipulating an obligation upon states, and as a result there is no systemic pressure behind the implication.[35]

Where a collective of states shares the burden of refugee protection, the beneficiaries are both the host states and the refugees. The core of any burden sharing arrangement should be to create predictability, and predictability is dependent on the distribution that is agreed upon before a refugee crisis materialises. Negotiations regarding burden sharing after a crisis appears leave states the opportunity to remain passive while other states have to bear the burden of refugee protection.[36] It should be noted that there is no obligation to share the burden of reception in international law. Although, there is a debate regarding if states are obliged under customary international law to share the burden. According to Noll, this assumption falls short because there is no binding instrument under international law explicitly stipulate that, and state practise during crisis show inconsistence. In those cases, where a burden sharing scheme has been put in place, it has been contingent on specific political constellations. Other scholars argue that defining burden-sharing as an obligatory norm would weaken the protection because front-line states would use it as an excuse to refoule refugees if assistance from other states does not materialize.[37] International law does not contain a obligation to to share the burden of refugee protection among states but, as mentioned above, international law proclaims cooperation to achieve a fair sharing of responsibilities which results in better protection for the individual in need of it.

2.3 Definition of Burden-Sharing

For the purpose of this thesis, responsibility is to be understood as a legal responsibility to admit and protect refugees, and the sharing of that responsibility is equated with burden-sharing. The term burden-sharing appears to suggest that protection of refugees and asylum seekers solely puts a burden upon the host state. This is somewhat a misleading assumption depending on the time frame looked

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[33] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984

[34] Addendum to the Principles Concerning Treatment of Refugees, Asian-African Legal Consultative Organisation, New Delhi, 27 January 1970

[35] Noll, Gregor, "Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection", The Hague, 2000, p. 279

[36] Noll, 2000, p. 265-266

[37] Noll, 2000, p. 284-285

upon. Looking at the first time after arrival of an asylum seekers, cost may outweigh the benefits from a state perspective. On the other hand, looking at a longer time frame, the opposite might as well be true when the person is integrated into society, working and making tax contributions to the state. In this regard, short term cost can turn into long term benefits for the host state, and the burden turns into a resource.[38] The concept of burden-sharing within the field of refugees protection is often linked to mass influx of protection seekers where a numerically large inflow occur in a short period of time.[39] The logic of burden-sharing rest on an anticipation that equal distribution of costs and responsibilities will generate fairness among states, and also openness toward protection seekers. A burden-sharing scheme benefits both the host state and individual protection seekers.[40]

Burden-sharing can take many forms, including both internal and external dimensions. Cooperation in fields of anti-terrorism and and border management is examples of burden-sharing and cooperation within the international community. NATO is another form of alliance allocating burdens and responsibilities among those state parties to the organisation. Burden-sharing can be divided into several categories in relation to the field of refugee protection, sharing the burden of preventing and resolving refugee crises, preventing and deflecting arrivals, and sharing the burden of reception.[41] The refugee crisis, as a result of the wars in former Federal Republic of Yugoslavia (hereinafter Yugoslavia) brought the concept of burden-sharing into light. Sharing the burden in resolving that refugee crisis included physical protection of displaced people, financial assistance, development of infrastructure and other crucial facilitates in order for the largest host states of refugees to be able to bear the burden of offering protection.[42]

Within the category of sharing the burden of reception, the main form used is financial distribution to major host states of refugees. A secondary form of distribution is trough resettlement. Resettlement implies that persons, who cannot find adequate protection in the country of first arrival, are moved to another state willing to receive them. Obtaining refugee status is a precondition to be eligible for resettlement, and the receiving state agrees to permit the beneficiaries refugee status including permanent residence status.[43] Some states regularly offer quotas of resettlement places trough

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[38] Noll, Gregor, "Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field", Journal of Refugee Studies, Vol. 16, No. 3, 2003, p. 237
[39] Noll, 2003, p. 237
[40] Noll, 2003, p. 249
[41] Noll, 2003, p. 242
[42] Selm-Thorburn, van Joanne, "Refugee Protection in Europe: Lessons of the Yugoslav Crisis", The Hague, 1998, p. 125-126
[43] UNHCR, "UNHCR Resettlement Handbook", Geneva, 2011, p. 28, 73-75

UNHCR. This arrangement typically involves industrial states as receivers of refugees and developing states as senders. This type of arrangement offer a limited degree of predictability and is oriented towards the needs of individual refugees rather than states.[44]

Burden-sharing relates to the principles of *solidarity* and *fair sharing of responsibilities* in the European context. Burden-sharing in the European context corresponds to the phrase fair sharing of responsibilities. The principle of fair sharing of responsibilities is state-centred in the sense that it seeks to even out the distribution of protection seekers. Solidarity, on the other hand, is a broader concept that can be understood in two dimensions, the first being the interstate dimension and the allocation of responsibilities between Member States in the Union. The second governs the relationship between the state and the refugee, relating to the protection offered to individuals. Interstate solidarity is assistance offered between states in order to cope with the presence of refugees and migrants within the territory of EU. Solidarity between states takes its form in cooperation in sharing the burden of a certain responsibility, which can include border management, reception, asylum processes and integration or return.[45]

2.4 Theoretical Framework seeking to explain Burden-Sharing

In this part of the chapter I am going to present different interpretive approaches that could be used to explain burden-sharing related to international protection and reception of asylum seekers. States participation in different forms of burden-sharing scheme can be motivated from two major approaches. The first motivation to burden-sharing builds on the notion of equity and the distribution of burdens is linked to the actual capacity of states participating, including a distribution of the responsibility based on objective features such as GDP or population size. The second motivation is explained as states commitment to norms that are related to the burden, such as upholding a human rights approach. If so, the distribution scheme should include subjective values in order to safeguarding certain norms which relates to the states commitment to upholding that norm.[46] This constitutes a norm-based perspective. According to Thielemann, when looking at patterns o burden-sharing, one or

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[44] Noll, 2000, p. 275

[45] Karageorgiou, Eleni, "Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees", European Politics and Society, Vol. 17, Issue 2, 2016, p. 4

[46] Thielemann, Eiko R, "Between Interests and Norms: Explaining Burden-Sharing in the European Union", Journal of Refugee Studies, Vol. 16, No. 3, 2003, p. 258

both of those motivations can be identified and serve to explain states willingness to participate in a distribution scheme.[47]

The motives of burden-sharing can be explained as acting in solidarity under the *principle of universalization*. The principle of universalization promotes actors to act as they would wish others to act as well to achieve burden-sharing based on the norm of fairness.[48] Mason explained two ways in which solidarity can be seen as motivation for burden-sharing. The first being when a specific community makes a collective decision, and afterwards abide to the outcome of that decision. Secondly, solidarity can also be a concern for other members of the collective, and the unwillingness to receive a benefit that will not be gained by other members, or even harm them. So, solidarity can be conceptualized as either the commitment among a group to abide by the outcome of collective decision-making, or to promote the wellbeing of other members of the group, even if it results in costs for themselves.[49] From a universalists perspective, a legal obligation of burden-sharing can be constructed based on the normative logic behind it.[50] Although, this theory only capture part of why burden-sharing is so difficult to achieve based on a hypothesis that states would act purely out of normative values instead of from a cost-benefit approach.

The following sections of this chapter presents a theory that will serve to explain the logic behind the difficulty in cooperation in order to achieve a fair sharing of responsibilities. States who are faced with little pressure from refugee protection, lack the immediate incentive to share the responsibility put on other states. This prevents those states to take part in a burden-sharing mechanism and hinders the aim of a fair distribution of responsibilities. This relationship can be explored through a game-theoretical model, which explains why burden sharing today cannot be seen as a binding norm of law.[51] Through the use of game theory, this thesis will explore principal factors that influence the emergence and maintenance for the purpose of achieving international cooperation and burden-sharing.

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[47] Thielemann, Eiko R, "Towards a Common EU Asylum Policy: The Political Economy of Refugee Burden-Sharing", paper prepared for the conference 'Immigration Policy after 9/11: US and European Perspectives' University of Texas, Austin, 2-3 March 2006, p. 7
[48] Thielemann, 2003, p. 257
[49] Mason, Andrew, "Community, Solidarity and Belonging: Levels of Community and their Normative Significance", Cambridge, 2000, p. 257-258
[50] Noll, 2000, p. 344-346
[51] Noll, 2000, p. 325

2.4.1 The Game Theory

A game is defined as the interaction between players governed by a set of rules that sets the context for possible moves by each party, resulting in a outcome dependent on every players move. The basic elements included is the players, the strategy space including moves available for a player in a given situation, and the payoff which is the outcome generated from the players strategy choice. [52] Game theory can be used as an interpretive device where actors in the burden-sharing game pursue different goals. Noll defines game theory as a branch of mathematics used to draw attention to certain apparent dilemmas which emerge when interdependent decision-making is studied from a rational choice perspective, with an assumption that individuals will choose the action that maximise their welfare.[53] Thus the theory has its drawbacks, it views actors as being rational and maximizing utility, but do not take into account normative values and symbolic actions based on other perspectives.[54] Co-operational burden-sharing is hard to achieve in the international community without a central enforcement institution.[55] The international framework limits the possibility for states to diminish certain rights. Individuals has minimum rights that needs to be obtained, if the state wants to avoid breaching international law. As a result, states attempts to prevent protections seekers from reaching their territory, since they then need to be granted, at least, their minimum rights. This creates an interest for the states to control the number of beneficiaries within their territory. In order to reach cost reduction, a state will either need the consensual involvement of other states to share the burden, or create policies preventing refugees and asylum seekers from reaching their territory.[56]

In regard to burden-sharing and refugee protection, Noll present several different games that could be played in his theory, which states can use to achieve their goals. The first one is that trough burden-sharing shift parts of the costs to other states which presupposes consensus between the states involved. Mutual cooperation and burden-sharing relating to refugee protection is then preferred. The second game he presents is the one where states collectively engage in "pushing back" protection seekers to other safe countries with the presumption that other states will deliver the protection. This results in a burden-shift from the collective to not participating states and if other states start to act according to the same logic, a chain of push back and refoulment is the result. The third game occurs when states

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[52] Hirsch, Moshe. "Game Theory, International Law, and the Future Environmental Cooperation in the Middle East", Denver Journal of International Law and Policy, Vol. 27, Issue 1, 1998, p. 79
[53] Noll, 2000, p. 333 & note 1001
[54] Noll, 2003, p. 238
[55] Noll, 2000, p. 334
[56] Noll, 2003, p. 239-240

try to prevent migration altogether and protection seekers is prevented from shifting risk onto a potential state. Fourthly, states could choose to try to withhold minimum rights granted protection seekers on their territory in order to make the state unattractive for protection seekers.[57]

Burden-sharing can be viewed as a multi-level game, including strategic actions among states, as well as a game played between states and individuals seeking protection as shown through those games presented above. The theory can be divided into cooperative and non-cooperative games. The cooperative game assumes the existence of an institution that is capable of enforcing the outcome which changes the strategy of the players. The outcome of a non-cooperative game cannot be enforced by such a institution which in turn changes the dynamic of the game.[58] One non-cooperative game from the toolbox of the game theory is the Prisoners Dilemma.

2.4.2 The Prisoners Dilemma

In the original Prisoner's Dilemma from 1965 two prisoners who where accused of the same crime was interviewed separately by the police and each of them was offered a deal to a milder sentence if he confessed. If only one of them confessed, he would be released and the other would be sent to a harsh sentence. If both of them confessed, they would both receive an intermediate sentence, and if both refused to confess, they would get a milder sentence for a different crime that could be proven independently of their confession. If each of the prisoners is concerned solely on their own interest, the rationale thing for them to do would be to confess, but if each is unwilling to receive the benefit and at the same time harm the other, then both of them will be better off.[59]

The Prisoner's Dilemma points in the direction where actors who acts solely with the aim of maximizing their own utility produces a result in contradiction with their best interest. There are dissimilarities between the classic Prisoners Dilemma and burden-sharing in the international community. Burden-sharing is a communicative process including negotiation and reassessing decisions on co-operation or defection. When co-operation is not stable and predictable, the player faced with a situation of mass influx of protection seekers may be tempted to resort in deflection in ways that maximise their own benefits but could potentially harm other players.[60]

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[57] Noll, 2003, p. 240-241
[58] Hirsch, 1998, p. 80
[59] Rapoport, Anatol & Chammah, Albert M, "Prisoner's Dilemma: A Study in Conflict and Cooperation", Michigan, 1965, p. 1-30
[60] Noll, 2000, p. 337-338

Zeager has refined the Prisoner´s Dilemma in an attempt to understand the strategic interaction between the parties involved in burden-sharing, and ways to influence that behaviour in regard to refugee crisis. A country could have several motives for providing protection or assistance, security interests in the region or cultural ties can be motives. Relevant actors in the game are those who care about the outcome and and are able to influence it.[61] The classic Prisoners Dilemma has each party choosing between cooperation and defection without knowledge of the other party's choice. The problem is that the parties have incentives to defect if they are not aware of the others choice, since they are often made simultaneously. In reality, there is often a process of negotiation between the parties. Imagine a situation including a host state who is receiving refugees and providing the protection, and a donor state who is providing financial assistance as the playfield of the game. The donor has the possibility to threats to withhold assistance if the host does not keep the boarder open for refugees as a negotiation strategy. There could also occur a scenario where the host state refuses to open their boarders to more refugees if the donor do not provide more effective assistance in form of resettlement of refugees who already has received protection in the host state but where the burden have grown because of mass influx of refugees. It is important to notice that there is no present power to enforce cooperation among the international community on this issues, the cooperation needs to be voluntary from all participating states. The illustrated examples above show the strategic interaction that can emerge in refugee negotiation and that matching threats from host states to withhold protection if donor states fail to cooperate, and from donor states to withhold assistance if host states fail to cooperate. The game suggests that threats enables the parties to find a cooperative solution on voluntary basis despite the absence of a international mechanism for enforcing the cooperation in regard of providing protection and assistance for refugees.[62] When games include mutual cooperation over a period of time, the players are not sure when the last play will occur, this results in a situation where players strategy in the present does not only determine the outcome in that stage, but can also have effect on future rounds.[63]

[61] Williams, John H. P. & Zeager, Lester A, "Macedonia Border Closing in the Kosovo Refugee Crisis: A Game-Theoretical Perspective", Conflict Management and Peace Science, Vol. 21, Issue 4, 2004, p. 236
[62] Zeager, Lester A, "Reconsidering the Prisoner's Dilemma: Strategic Interaction in Refugee Negotiations" Georgetown Journal of International Affairs, Vol. XV, Number 2, 2014, p. 29-31
[63] Hirsch, 1998, p. 87

2.5 Conclusion

Above mentioned approaches serves as interpretive tools when explaining why individual states would agree to burden-sharing without immediate benefits for themselves, and what objectives and interest states pursue when negotiating initiatives of burden-sharing. Viewing international refugee law and the notion of burden-sharing from a game theoretical approach, with focus on the Prisoners Dilemma, serves as the analytic framework I will use in order to explain contextual problems in the evolution of cooperation mechanisms. A distribution mechanism is likely not offering a clear "win-win" situation, but rather winners and potential losers. Under the existing protection regime, some states naturally bear a heavier burden while other states are free to participate in, or refrain from, refugee protection efforts. The game theory is going to serve as an analytical tool when seeking to explain why those states, facing a easier burden, would accept burden-sharing obligations that is likely to be both costly and create political tensions. In the European context, regional agreement, can often create "win-win" situation, such as market integration that is positive to all participating in its nature. On the other hand, redistributive burden-sharing arrangements that creates both winners and losers, needs interpretive tools to be properly explained.[64] The Prisoners Dilemma is a non-cooperative game as mentioned above, without authority to enforce the agreements which best explains how intra-EU burden-sharing can be conceptualised in the present context.

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[64] Thielemann, 2006, p. 9-10

3 The Notion of Burden-Sharing in the EU Context

This chapter explains the notion of burden-sharing in the Unions legal framework governing asylum and refugee protection. The term burden-sharing is rarely used in the EU context, instead the dominant terms used is solidarity and fair sharing of responsibilities as defined in the former chapter.

The interest of Member States in the Union to participate in a burden-sharing scheme can be explained through a game theoretical approach.

Internal solidarity relates to the solidarity shown between Member States towards each other, or from the European Union as a whole towards one or a few Member States, and between people currently within the territory of the EU.[65] The first part of this chapter presents three categories of burden-sharing in the intra-EU relations. As this thesis in a later stage will focus on two distinct situation resulting in massive refugee movements and burden-sharing schemes among Western States, burden-sharing in the context of reception will be presented. The second part of the chapter describes the evolution of burden-sharing through the emergence of different legal instruments, proposals and programmes in order to get a better understanding of the shift towards increased burden-sharing, solidarity and a fair sharing of responsibilities.

3.1 Intra-EU Burden-Sharing

When Noll has conceptualised burden-sharing and co-operation in connection to the actual reception of refugees and asylum seekers on state territory, he distinguish between three forms of sharing; sharing norms, sharing money and sharing people.[66] I will use this conceptualisation in order to diverse between the different legislative frameworks in the EU that governs asylum and migration policies.

Sharing norms can be viewed through harmonising domestic refugee and asylum legislation among Member States in an attempt to neutralise inequalities in distribution due to differences in the protection offered. The sharing of norms limits the choice of risk-decreasing strategies from individual

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[65] European Parliament, "Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration" Committee on Civil Liberties, Justice and Home Affairs, PE564.907v01-00, 15.7.2015, p. 3-4

[66] Noll, 2003, p. 243

states. It can also affect the individual's choice of final destination and unequal distribution of refugees and asylum seekers based on differences is the domestic legislation. The Council has launched several instruments in order to promote harmonisation.[67] It should be noted that national legislation is not the single factor for individual refugees choosing a specific destination, but other factors such as geographic location, family ties and social economic context may have greater influence on the final decision of destination for the individual.[68] Harmonisation of norms is a preventative mechanism in order to avoid unequal distribution.

Sharing money or relocating funds seeks to level out inequalities trough different forms of financial transactions as a reparative mechanism. The presumption is that costs for the reception is quantifiable. This is a problematic approach, on the one hand costs for food and housing is measurable costs, but on the other hand costs for integration is almost impossible to measure. Furthermore, it is important to distinguish between costs related to applicants for protection, and costs for individuals actually granted protection. UNHCR could be partly described as a reallocation mechanism who distributes money between states. Although, it could also be criticised as a monetary burden-sharing mechanism, since there is inequality in the distribution between regions and crisis, as well as the predictability of funding dependent on the preference of the donor state.[69] Monetary burden-sharing can also include states directly supporting other states and funding going trough various non-governmental organisations (NGOs) to support protection of refugees. The dominant position within the internal dimension of EU has been to limit financial burden-sharing to situations of mass influx of displaced persons and temporary protection.[70]

Sharing people or distribution of protection seekers is more intrusive towards the individual than the above mentioned forms of burden-sharing. Redistribution of people can lead to an undesirable second uprooting and it can lead to breaking family and network ties, which creates a longer prospect of integration for the individual. From a state perspective, redistribution of people means that states share the responsibility of protection seekers, both fiscal, social and political rather then mere costs. It is preferable that the redistribution should be established trough a distribution key. [71]

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[67] Noll, 2003, p. 243
[68] Noll, 2000, p. 270-271
[69] Noll, 2000, p. 272-273
[70] Noll, 2003, p. 244
[71] Noll, 2003, p. 244

One form of people distribution is trough offering temporary protection which is an exceptional measure in order to provide displaced people, which are unable to return to their country of origin, with immediate and temporary protection. It should be viewed as complementary to the refugees protection regime.[72] Having the above in mind, in the following paragraphs I will dive into the institutional processes through which sharing in its three forms evolved in the EU.

3.2 The Evolution of Burden-Sharing in EU

In June 1985, an agreement where put in place between Belgium, France, Germany, Luxembourg and the Netherlands to remove border control between the states, the agreement was called the Schengen Agreement and is known as the beginning of that later should be the European Union. First the Agreement only covered gods, but soon after the establishment, it was expanded to the free movement of people. This raised questions of security and illegal immigration. In June 1990, a Convention on the Application of the Schengen Agreement[73] was signed, which included provisions for handling asylum applications and covering the state responsible, similar to the Dublin Convention.[74]

The debate about European burden-sharing took a new development in the late 1980s. Governments reacted to the termination of immigration control at internal boarders of Europe by enhancing co-operation with the aim of strengthening control at external boarders. The first Balkan crisis resulted in a large number of displaced persons seeking protection within EU in the early 1990s and the question of burden-sharing moved to the top of the agenda.[75] Burden-sharing was mentioned for the first time in 1992 , and again in 1993 when Sweden launched a proposal for a burden-sharing mechanism including distribution of protection seekers.[76] After negotiations between the Member States, a proposal to a burden-sharing scheme was presented again by Germany in 1994. The proposal suggested a redistributive mechanism regarding burden-sharing relating to refugees and asylum seekers. The mechanism were suppose to be based on three key criteria; population size, size of the states territory and GDP.[77] The proposal did not attract the necessary support in the Council. Burden-sharing continued to be a debated issue causing dissent. The proposed distribution key in the proposal from Germany was causing controversy. The key was based on Member States percentage of the total EU

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[72] Tessenyi, 2006, p. 493-501
[73] The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22/09/2000
[74] Selm-Thorburn, 1998, p. 61
[75] Thielemann, 2003, p. 259
[76] Noll, 2000, p. 289-290
[77] Draft Resolution on burden-sharing, German Presidency document 7773/94 ASIM 124, November 1994

population, percentage of total EU territory, and percentage of the total GDP of the Union. Each criterion should be given equal weight. Although, there was also two reduction mechanism included in the proposal, the first was based on military expenditure triggered by the crisis and the second on number of refugees already present in that Member State. The proposal introduced compulsory resettlement of refugees within EU.[78]

Another proposal was presented in 1995 by France. It was a resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.[79] This resolution did not include any compulsory redistributive mechanism as the German proposal did, it was rather based on soft and non-binding principles with the role to guide Member States in future events of mass influx of refugees and asylum seekers. This non-binding resolution included phrases such as "the spirit of solidarity", "equity in distribution" and "harmonisation of response".[80] In order to specify those procedural steps that are necessary for the implementation of the resolution, it holds that the presidency, a Member State, or the Commission can call for a urgent meeting to alert a emergency procedure on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis.[81] Suhrke states that this idea of a voluntary resolution can be regarded as a backlash in order to facilitate a quick and automatic burden-sharing response in the case of mass influx of displaced persons.[82] Noll argues that such a framework falls short in providing the predictability that is necessary for constituting fair burden-sharing, and consequently, states would rather block access for refugees than trust the outcome of such arrangements.[83] As became evident during the war in Kosovo, the instrument was not called upon by the Member States which can be seen as a result for its ineffectiveness.

3.3 The Dublin Regime

The Dublin Regime was originally established through the Dublin Convention, signed in 1990 and entered into force in 1997.[84] The Convention established a system determining the Member State responsible for examining an asylum application. The objective of the Dublin Convention was to

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[78] Noll, 2000, p. 292-294
[79] Council Resolution of 25 September 1995 on the burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, Official Journal of the European Communities No C 262/1, 7 October 1995
[80] Thielemann, 2003, p. 260
[81] Thielemann, 2003, p. 260 and note 7
[82] Suhrke, Astri, "Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action", Journal of Refugee Studies, Vol. 11, No. 4, 1998, p. 411
[83] Noll, 2000, p. 295-296
[84] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (hereinafter the Dublin Convention), 97/C 254/01 19.8.97

ensure freedom of movement for people and gods within EU in accordance with the Schengen Agreement.[85] The basic principle enshrined in Dublin was that states mutually recognised each other as safe countries. The Convention sets out criteria for the responsible state to complete the examination of the application for asylum, called the authorisation principle.[86] The state who the individual first enter into is primarily the one responsible for processing the asylum claim. Asylum seekers who move on to another Member State should be sent back to the state of first entry. The Convention include a hierarchy where responsibility of examining an individual claim includes family ties. The priority for family ties can be understood from a human rights perspective, it may although be noted that inequitable sharing of protection seekers may be aggravated by family reunion, which increase the burden in Member States already carrying a heavier burden of reception. Another aspect regarding burden-sharing and the Dublin Convention is that Member States whose geographical position makes them more exposed to illegal entry will automatically be subjected to more asylum seekers.[87] It can be argued that the principle of authorisation maintains an imbalance in burden-sharing between Member States where states with external boarders of EU, such as Italy and Greece, bear a heavier burden than other Member States. It can also be said that the Dublin criteria lay the foundation for a burden concentration rather than burden-sharing.[88]

As part of CEAS (see next subchapter), the Dublin Convention was replaced in 2003 with the Dublin Regulation II.[89] The Dublin Regulation II clarified the criteria for determining responsibility compared to the Dublin Convention. It was also accompanied by the EURODAC Regulation[90], a database for recording fingerprint data in asylum cases, which increased the implementation of the Dublin system. In 2013, The Dublin Regulation II was reviewed and the Dublin Regulation III[91] was established,

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[85] Hurwitz, Agnés. The 1990 Dublin Convention: A Comprehensive Assesment. International Journal of Refugee Law (1999) p. 646-647
[86] The Dublin Convention article 3,4 & 9
[87] Noll, 2000, 315-316
[88] Hurwitz, 1999, p. 667 and 676
[89] 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 (hereinafter The Dublin Regulation II) OJ L 50/1 25.2.2003
[90] 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 (recast) (hereinafter the EURODAC Regulation)
[91] The Dublin III Regulation

which further clarified the hierarchy of criteria determining the state responsible for a asylum claim. It also included a new warning mechanism of potential problems in a individual states asylum system.[92]

The Dublin regime was not designed to ensure a sustainable sharing of responsibility, and the current refugee crisis has highlighted that shortcoming. The current regime places responsibility for a majority of asylum seekers on a limited number of Member States, mostly states with accessible external borders. This has resulted in secondary movements and many asylum applications are made in states which are not those of first entry, a situation which in the current context of massive refugee movements has led several Member States to reintroduce internal border controls.[93] Another problem facing the current Dublin regime that should be noted is that Member States avoid to register asylum applications and let individuals pass through their territory. That wave through policy was until recently well established in Europe and in contradiction to the purpose of the Dublin regime. Furthermore, even if the Dublin regime do not offer a sharing mechanism, suspensions of a transfer through Dublin from one Member State to another might be seen as a gesture of solidarity.[94]

3.4 Towards a more Common European Asylum System?

The Treaty of Amsterdam, amending the Treaty of the European Union, was signed in 1997. The aim was to incorporate cooperation on justice and home affairs and create an area of freedom, security and justice[95]. The Treaty regulated procedures and competence on visa, asylum, migration and other policies relating to free movement of people. It is binding upon Member States as primary law.[96] The Treaty granted EU institutions new power to create common legislation in the area of asylum. Article 63 (2) of the Amsterdam Treaty states that the Council shall adopt measures that promote a balance of effort between Member States in receiving, and bearing the consequences of receiving, refugees and other displaced persons. There was no time frame for when consensus should be reached which makes

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[92] Fratzke, Susan. "Not Adding Up, The Fading Promise of Europe´s Dublin System – EU Asylum: Towards 2020 Project", Migration Policy Institute Europe. March 2015 p. 3
[93] European Commission, "Communication from the Commission to the European Parliament and the Council. Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe", COM (2016) 197 final. Brussels 6.4.2016. p. 4
[94] Karageorgiou, 2016, p. 14
[95] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam, 2 October 1997, 97/c 340/01 (hereinafter the Amsterdam Treaty)
[96] Noll, 2000, p. 298

the content more of a reminder that burden-sharing should be part of the agenda rather than imposing an obligation upon states or the Council to reach consensus.[97]

3.4.1 The First Phase

The Union recognised that common challenges where including challenges relating to asylum and immigration issues. The European Council held a meeting in Tampere in 1999 on the creation of an area of freedom, security and justice in the EU by making full use of the possibilities offered by the Treaty of Amsterdam.[98] Part of the conclusion included issues of asylum and migration and the development of a common EU policy. They agreed to work towards establishing a Common European Asylum System, including common standards for asylum procedures and minimum standards for reception conditions. In accordance with the Refugee Convention, they would also create common rules for determining refugee status or beneficiaries qualifying for subsidiary protection. EU should increase efforts to reach an agreement on temporary protection and the establishment of a financial reserve for emergency measures in the event of mass influx of protection seekers.[99]

The Yugoslavian refugee crisis culminated to the war, and the massive movement of refugees, from Kosovo (see next chapter) and demonstrated the need for a special procedure in such a situation. The Union responded with introducing the Temporary Protection Directive (TPD) in 2001[100], as part of the decisions taken in Tampere. The Commission recognised the need for a council directive in the event of mass influx of displaced persons to the Union. The TPD is based on solidarity between Member States and it has not yet been triggered. Temporary protection is defined as a procedure of exceptional character to provide immediate and temporary protection in cases of mass influx of displaced persons.[101] The Directive establishes reception conditions for those within the scope of the Directive.[102] Temporary protection serves as a third form of protection status in the EU context, and should not be confused with beneficiaries of refugee status or subsidiary protection. The term mass influx is not precisely defined in numerical terms, but those displaced persons needs to come from a specific country or geographic area in order for the Directive to be applicable.[103] The TPD further does not

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[97] Noll, 2000, p. 299
[98] European Parliament, Tampere European Council 15 and 16 October 1999, Presidency Conclusions
[99] European Parliament, Tampere European Council 15 and 16 October 1999, Presidency Conclusions para. 2
[100] Council Directive 2001/55/EC of 20 July 2001 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, (hereinafter the Temporary Protection Directive), L 212/12 7.8.2001
[101] The Temporary Protection Directive, article 2 (a)
[102] The Temporary Protection Directive, article 8
[103] The Temporary Protection Directive, article 2 (d)

include an obligation put on Member States, they are to inform the Commission about their reception capacity prior to a decision.[104] Finally, in accordance with article 26, the individual who are to be transferred from one Member State to another, need to consent to the transfer, and article 15 of the Directive includes measures of family reunification.

3.4.2 The Second Phase

A second phase in the the development of an area of freedom, security and justice was The Hague Programme in 2005, following after the Tampere Programme. The foundation of a common asylum and immigration policy had been laid down and the second phase in the development should be based on solidarity and fair sharing of responsibilities between Member States. The Hague Programme set a new course for the next five years with the ambition to complete CEAS. Apart from the focus of new legislation to further harmonise national asylum procedures, beneficiaries of a protection status and reception conditions, the programme also included financial implications and practical cooperation between Member States[105], and a European Support Offices that would serve in the cooperation.[106]

ERF[107] was established in 2007 and came into force in 2008, with the purpose to allocate recourses proportionately based on the burden put on each Member State by reason of their effort in receiving refugees and displaced persons. ERF regulated financial burden-sharing. According to paragraph 21 in the Decision, the rationale was to demonstrate solidarity between Member States by achieving a balance in the efforts made in receiving refugees and displaced persons and bearing the consequences. The financial distribution was based on two elements, the first one was a fixed amount distributed to each participating Member State.[108] ERF financially supported measures of reception, integration and voluntary returns of refugees and asylum seekers. The second amount was distributed both in regard to number of people applying for refugee status, subsidiary protection and temporary protection, and number of people who were granted a protection status. In regard to the total costs of reception, ERF played a small practical role in creating predictability and even out inequalities between the Member States.[109] People sharing among Member States is hard to achieve but ERF represented a innovative approach of institutional burden-sharing with the Union.[110] In 2014, the ERF was replaced by the

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[104] The Temporary Protection Directive, article 5 (3) (c)
[105] Council of the European Union, 16054/04 JAI 559, "The Hague Programme: strengthening freedom, security and justice in the European Union", Brussels, 13 December 2004 p. 8
[106] The Hague Programme: strengthening freedom, security and justice in the European Union, 2004, p. 9
[107] The ERF Decision
[108] The ERF Decision, article 13
[109] Noll, 2003, p. 245
[110] Noll, 2000, p. 311-312

Asylum, Migration and Integration Fund (AMIF) [111]. The new fund was set up to promote efficient management of migration flows, and the implementation, strengthening and development of a common Union approach on asylum and immigration.

The Commission presented a Policy Plan on Asylum in 2008, identifying three pillars that should underpin the development of CEAS. The first pillar was bringing more harmonisation to standards of protection by further harmonisation of national legislation. The second pillar was effective and well-supported practical cooperation, and the final pillar was increased solidarity and a sense of responsibility among Member States, and between EU and other states outside of the Union. Several regulations and directives has been set out in order to harmonise norms and common standards to ensure that asylum seekers are treated equal, irrespectively of in which country they choose to apply for asylum.[112] After the Policy Plan was presented, five legal instruments were revised. The Asylum Procedure Directive[113] that regulates the minimum quality of the asylum procedure. The Reception Conditions Directive[114],which ensures minimum standards of material reception conditions, and ensures that detention is only applied as a last resort. The revised Qualification Directive also includes access to rights and integration for beneficiaries of international protection. Finally, The Dublin Regulation, which establish the state responsible for examining the application, that further also should include a system to detect problems in national asylum systems or reception conditions. Through the EURODAC Regulation, national law enforcement was also given access to the EU database of asylum seekers fingerprints under limited circumstances.[115] CEAS consists of a comprehensive legal framework covering all aspects of the asylum process, including AMIF to financially support the implementation of a harmonised legal framework and facilitate practical cooperation between Member States.[116]

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[111] Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (hereinafter the AMIF Regulation) OJ L 150/168 20.5.2014

[112] Commission of the European Communities. Communication from the Commission to the European Parlament, the Council, the European Economic and Social Committee and the Committee of Regions, "Policy Plan on Asylum an Integrated Approach to Protection Across the EU", (SEC(2008)2029) (SEC(2008)2030), COM(2008) 360 final, Brussels 17.6.2008

[113] Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast), 2013/32/EU, 26 June 2013 (the Asylum Procedure Directive)

[114] Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 2013/33/EU, 26 June 2013 (The Reception Directive)

[115] European Commission, Migration and Home Affairs, Common European Asylum System, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm, Date accessed 22.5.2016

[116] European Commission, Communication from the Commission to the European Parliament and the Council, Towards a reform of the common European asylum system and enhancing legal avenues to Europe, COM (2016) 197 final, Brussels 6.4.2016, p. 3

In 2009, the European Commission proposed the creation of a European Asylum Support Office (EASO) as was proposed by The Hague Programme in order to ensure practical cooperation between Member States on matters relating to asylum. EASO is promoted as a solidarity mechanism and has been successful despite its limited mandate. The purpose of the institution is to provide expertise and sharing information but they are not involved in decision making processes. EASO became operational in 2011 and their first operating plan was signed to support the reconstruction of the Greek asylum system.[117]

3.4.3 The Lisbon Treaty

The Lisbon Treaty amends the two treaties which constitutes the basis of the European Union, and entered into force in 2009. Introduced into TFEU (former TEC) was the principles of solidarity and fair sharing of responsibilities on asylum, immigration and border check policies in European primary law for the first time. Policies on border checks, asylum and immigration and their implementation should be governed by the principle of solidarity and fair sharing of responsibilities, including financially, between Member States.[118] TFEU also states that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection and ensure compliance with the principle of non-refoulment. It shall furthermore set out criteria for determining the state responsible for an applicant, reception conditions and cooperation with third countries for the purpose of managing massive inflows. The Council, on a proposal from the Commission and after consultation with the European Parliament, may adopt provisional measures in favour of a Member State faced with massive inflow of displaced people.[119] The result is that those provisions gets incorporated into EU primary law through the Lisbon Treaty.

There is an absence of a concrete understanding of what solidarity and fair-sharing under article 80 TFEU entails. The article presents two principles that are intertwined, and fair sharing is a necessary part in receiving solidarity. Fair sharing can be understood as sharing of responsibilities to alleviate unduly heavy burdens falling on certain states within a solidarity arrangement. This requires a mean of recognising unduly heavy burdens, which in turns demand a calculation of states individual capacity for refugee protection. That in turn requires capacity indicators when estimating the capacity of an

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[117] European Asylum Support Office, EASO History, https://www.easo.europa.eu/about-us/easo-history, Date accessed 22.5.2016
[118]TFEU, article 80
[119] TFEU, article 78

individual state which can result in different assessments. Because of that, states has preferred to operate in solidarity on voluntary basis rather than fairly-shared responsibilities.[120] Schuck argues that within a burden sharing norm, the principle of proportionality demands that states share of the burden be limited to it's capacity relative to that of other states.[121] Fair sharing of responsibility is considered to be part of the principle of solidarity. The alternative to fair-sharing is states voluntary contribution or assumptions of responsibility. Solidarity mechanisms based on voluntary assumption of responsibility results in uneven contributions and unequal distributions among participating states.[122]

The concept of solidarity is defined by the European Parliament as a *"unity or agreement of action that produces or is based on community of interests, objectives and standards"*.[123] The principle is intended to be used as a tool in order to give support to Member States that carry a heavier burden of responsibility than others in the context of asylum and refugee protection. Under the principle of sincere cooperation, states are obliged to assist each other and take any appropriate measures to ensure fulfilment of their obligations. As a result, Member States have a duty to assist each other in the field of asylum and immigration.[124]

The Stockholm Programme replaced the Tampere and Hague Programmes, and was adopted in 2009.[125] The newly established Lisbon Treaty brought significant changes to the provisions relating to the area of freedom, security and justice and Stockholm established a framework and policy on asylum, immigration and visas. The Programme set priority for solidarity and partnership in migration and asylum matters and stated that effective solidarity with Member States facing particular pressure should be promoted. It was further stipulated that mechanisms for the voluntary and coordinated sharing of responsibility should be analysed and developed. The newly established EASO was mentioned to have a central role to support Member States in building sufficient capacity in their national asylum systems in accordance with CEAS.[126]

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[120] Gray, Harriet, "Surveying the Foundations: Article 80 TFEU and the Common European Asylum System," Liverpool Law Review, 2013.34, 7 December 2013, p. 180
[121] Schuck, Peter H, "Refugee Burden-Sharing: A Modest Proposal" Faculty Scholarship Series, Paper 1694, 1.1.1997, p. 277
[122] Gray, 2013, p. 180-182
[123] European Parliament, "Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean) and the need for a holistic EU approach to migration", PE564.907v01-00, 15.7.2015, p. 3
[124] Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean) and the need for a holistic EU approach to migration, 2015, p. 3
[125] European Council, "The Stockholm Progamme – An open and secure Europé serving and protecting citizens", 2010/C 115/01, 4.5.2010
[126] The Stockholm Progamme – An open and secure Europé serving and protecting citizens, 2010, note 6.2

3.5 Conclusion and a New Agenda on Migration

The European Union is an area of open boarders and freedom of movement. States within the Union share the same fundamental values and a joint approach in order to guarantee high standards for persons in need of international protection is needed. States have a shared responsibility to grant protection in dignified manners and make sure that asylum procedures are carried out in uniform manners. Going back to the beginning of this chapter, the instruments presented can be divided in above mentioned three burden-sharing norms.

Sharing money through the development of ERF and later AMIF provides the strongest resemblance to a fair-sharing of responsibilities within the Union. Furthermore, sharing money is the only form of responsibility-sharing especially referred to in article 80 TFEU. AMIF provides for the distribution of financial resources between Member States in accordance with the number of protection seekers present at their territory. As emphasised in the Preamble to the AMIF Decision, the fund expresses solidarity through financial assistance to Member States, and the solidarity objective acknowledges a need for fair-sharing in order to alleviate disproportionate pressure put on certain states.[127]

The sharing of people within CEAS demonstrates the weakest resemblance to the fair-sharing of responsibilities. The Dublin regime, as explained above, provides for a responsibility sharing mechanism that contradicts burden-sharing. The notion of state of first entrance results in that a limited number of states with external borders is responsible for the vast majority of protection seekers. Other mechanism, such as family ties in a specific state also create a disproportionate share of protection seekers to certain states. The regime does not attempt to receive a fair burden-sharing of people to alleviate disproportionate burdens put on individual states. Another regulation of people sharing is through the Temporary Protection Directive as mentioned above where allocation of responsibility to provide protection is based on capacity in each state. The Directive has so far never been used but there is a potential to alleviate disproportionate pressure put on certain states. Sharing responsibility for the physical reception is the hardest to receive. People sharing from a EU approach is dependent on voluntary assumption of responsibility by each Member States. Attempts have been made and proposed to create a compulsory and predetermined scheme, including a fixed distribution key prior to the adoption of the TPD, but all attempts so far have failed.[128]

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[127] Gray, 2013, p. 186-187
[128] Gray, 2013, p. 187-191

The comprehensive collection of harmonisation measures lands in the category of sharing norms, alongside with the creation of EASO. EASO is a important tool in developing and implementing CEAS, they also have an operational capacity to assist individual states. One can argue that Article 80 and the inclusion of the principles of solidarity and fair-sharing of responsibilities do not offer further guidance as to the content and nature of these principles. Although, through the adoption of the principles into EU primary law, EU commits itself to develop the whole refugee and migration regime and framework grounded in those principles. CEAS might be seen as a solidarity arrangement, but it is based on a voluntary assumption of responsibility which is hard to achieve, involving political negotiations of state based capacity.[129]

In 2014 EU created a New Agenda on Migration as an immediate response to the increasing inflow of third country nationals who risked their lives when crossing the Mediterranean Sea. The first part of the agenda stipulates that Europe should continue to be a safe haven for those fleeing persecution but there is a urgent need to bring EU together and collectively address the migration situation in accordance with the principles of solidarity and shared responsibility. No Member State can effectively address the migration situation alone, and EU needs a new, collective approach to manage the situation.[130] The immediate actions presented in 2014 included a emergency relocation mechanism based on article 78 (3) TFEU.[131]

There is currently a reform of EU´s existing legal framework in progress to ensure a humane and efficient asylum policy. There are significant structural weaknesses and shortcomings identified as a result of the current situation. The key to regain control of the present situation is, according to the Commission, to improve the functioning of existing tools and mechanisms within current rules.[132] Five priorities have been identified where CEAS need structural improvements, the first is establishing a fair system determining the state responsible for the application. The second is reinforcing the Eurodac system. The third is strengthen and harmonise CEAS rules to ensure equal treatment. The fourth is preventing secondary movement within EU and ensuring the functioning of the Dublin mechanisms. The last is enlargement of EASO's mandate to include a policy implementing role.[133] The following

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[129] Gray, 2013, p. 191-192
[130] European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration", COM (2015) 240 final, Brussels, 13.5.2015, p. 2
[131] COM (2015) 240 final, p. 4
[132] European Commission, "Communication from the Commission to the European Parliament and the Council. Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe", COM (2016) 197 final. Brussels, 6.4.2016. p. 2
[133] COM (2016) 197 final, p. 6

section is going to describe how burden-sharing has functioned in times of massive refugee movements caused in a certain context and where EU Member States has been involved in burden-sharing through distribution of people to solve specific situations.

4 Burden-Sharing in the case of Kosovo

The 1998-1999 Kosovo crisis generated more than one million refugees. Many refugees from the war fled into the neighbouring countries Macedonia and Albania. When the refugee flow peeked, almost 350,000 people arrived in nine week and afterwards the refugees represented 20 percent of the total population in Macedonia.[134] Macedonia closed their borders three times during the mass influx of refugees with the aim of getting the international community to provide effective assistance and burden-sharing.

4.1 The origins of the war

Kosovo, together with Serbia, Croatia, Slovenia, Montenegro, Macedonia and Bosnia-Herzegovina created the Yugoslavia. Kosovo was populated mainly by Albanians, but it was seen as a holy symbol by both Serbs and Albanians. The population also included other minorities, such as Roma and Jews. The history of Kosovo has been bloody throughout the twentieth-century. In the 1970s and 1980s, a new wave of nationalism led to the rise of an extreme Serbian nationalist agenda which became government policy. After the Second World War and under the rule of Tito, Islam was suppressed and Kosovar Albanians experienced severe persecution. Albanians and Slav Muslims were encouraged to emigrate to Turkey.[135] In 1974, Kosovo was declared an autonomous province of Serbia, which was almost the same as the status of republic. Albanians were classified as a nationality but not a nation, supposedly because their nation had its territory elsewhere. The difference is that nations has the right to their own republic but nationalities do not.[136] After Tito´s death in the early 1980s, there was a political uncertainty and several demonstrations in Kosovo with a growing polarisation between the Albanian and Serbian communities. Kosovo was the poorest region in Yugoslavia and with a high unemployment rate. In the wave of political uncertainty, Albanian activists started to arise, claiming that their underdevelopment, unemployment, and poverty was a result of insufficient economic control in Kosovo. At the same time, the Albanian population grew due to a high birth rate among the population, and outmigration of Serbs. It was indicated that the Serbs who left was afraid of violence and discrimination by the Albanian population. In the mid-1980s, the Serb population of Yugoslavia

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[134] Barutciski, Michael & Suhrke, Astri, "Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing", Journal of Refugee Studies, Vol. 14, No. 2, 2001, p. 96

[135] Independent International Commission on Kosovo, "The Kosovo Report: Conflict, International Response, Lessons Learned", (hereinafter the Kosovo Report), Oxford University Press, Oxford, 2000, p. 33-36

[136] The Kosovo Report, 2000, p. 36-37

began to discuss the persecution and discrimination against Serbs in Kosovo and in 1989, the Serbian Assembly took direct control over Kosovo's security, judiciary, finance and social planning. The Serbian government also created policies in an attempt to change the ethnical composition of Kosovo.[137]

After the Slovene and Croatian declaration for independence in 1991, the demand for a republic in Kosovo was changed to a demand for independence. The Albanians had created the League for a Democratic Kosovo (LDK) and established a parallel system of self-governance for Albanians. The situation began to deteriorate and a new Albanian establishment rose called the Kosovo Liberation Army (KLA).[138] KLA was at the beginning a small group without a clear leadership structure. The members conducted individual operations, considered to be terrorist attacks conducted towards the Serbian police. The situation changed in 1997, the collapse of the Albanian state system made it possible for KLA to organise training facilities in Albania near the borders of Kosovo. There was also an organisation of supply routes into Kosovo put in place, as well as regional and local fighting groups. The Serbian government proclaimed the KLA as a terrorist organisation, thereby justifying their search and detention of KLA members. Police officers was responsible for abuse, torture and even killing of alleged members.[139]

In February 1998, a new governing coalition in Serbia was formed who had a vested, both political and economic, interest in an escalation of the violence. The beginning of the war came when the Serb forces arrested Adem Jashari, an important KLA member, and killed him and his family. Villages all over Kosovo armed up to be able to defend their properties.[140] Early reports conclude that a wide range of civilians, including women and children, were dying in the villages due to Serb forces escalating violence. In addition to killing Albanian civilians, the reports also chronicles a range of other human rights violations committed, including attacks on humanitarian workers, restriction on the media and forced disappearances.[141] The Yugoslavian government characterized the situation as an internal conflict, that was under control but the region remained sealed of and the 5000 internally displaced people remained without food or medical assistance. On March 31, the UN Security Council passed a resolution imposing an arms embargo on Yugoslavia and calling for autonomy and self-administration

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[137] The Kosovo Report, 2000, p. 36-44
[138] The Kosovo Report, 2000, p. 53
[139] The Kosovo Report, 2000, p. 51-54
[140] The Kosovo Report, 2000, p. 55-56
[141] Human Rights Watch Report, "Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo", October 1998, p. 1-74

for Kosovo. The Council also warned that additional measures would be possible if no progress was made towards a peaceful solution to the conflict.[142]

By the end of April in 1998, Yugoslavia started to target the civilian population of Albanians in rural villages. By the end of May, approximately 12,000 refugees had fled over the border to Albania. The increased violence against civilians led to the first public consideration by NATO to conduct a military intervention in June.[143] The civilian population suffered substantially in the conflicts. In the beginning of August, as many as 460,000 Kosovar Albanians had been displaced as a result of the ongoing conflict, 260,000 internally displaced and 200,000 outside of Kosovo.[144] On September 23, the UN Security Council passed a resolution which demanded a ceasefire. Three days later, Yugoslavian forces attacked a village, killing both women, children and elderly people.[145] In October, NATO authorities voted to authorize air strikes if Yugoslavian forces was not withdrawn from Kosovo within 96 hours and after negotiations, large numbers of forces was withdrawn. The UN Security Council passed the third resolution, including the withdrawal of forces and that a series of steps towards autonomy for Kosovo were to be initiated.[146]

In violation of the agreement made in October, the Yugoslavian army positioned 12,000 soldiers around the Kosovo borders and in January they moved into Kosovo. This turned out to be part of a plan of strategic ethnic cleansing with the purpose of emptying it of Albanian civilians at a chosen time.[147] UNHCR estimated that some 200,000 new refugees where driven from their homes in the beginning of 1999.[148]

The government maintained throughout the conflict that they were only conducting military activities against KLA and not civilian Kosovar Albanians. Others describe the campaign as ethnic cleansing that intended to drive away Kosovar Albanians from the territory, destroying their society and prevent them from returning. U.S. reported that the systematic campaign on ethnic cleansing included forcible displacement of civilians, looting of homes and businesses, widespread burning of homes, use of

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[142] United Nations Security Council, Resolution 1160 (1998), S/RES/1160, 31 March 1998
[143] The Kosovo Report, 2000, p. 72-73
[144] Organisation for Security and Co-operation in Europe (OSCE), "Human Rights in Kosovo: As Seen, As Told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission October 1998 to June 1999", Published by OSCE office for Democratic Institutions and Human Rights, Poland, 5 November 1999, part 3, chapter 14
[145] United Nations Security Council, Resolution 1199 (1998), S/RES/1199, 23 September 1998
[146] United Nations Security Council, Resolution 1203 (1998), S/RES/1203, 24 October 1998
[147] The Kosovo Report, 2000, p. 80-81
[148] The Kosovo Report, 2000, p. 82-83

human shield, exhumation of mass graves, rape and detention.[149] On March 24, NATO started their bombing campaign by aircraft against Yugoslavia, and did not end until June 10. NATO began their campaign with the expectation that the Yugoslav government would propose ceasefire and start negotiating. During the first phase of the bombing, NATO only struck military targets. After the first month, they further intensified the campaign, including military-industrial infrastructure to target, such as bridges, highways and airports. Consequences of the actions was suffering of the Serbian civilian population. NATO made substantial efforts to avoid civilian casualties.[150] At the Security Council meeting in Cologne, there was an agreement on a peace plan to put the war to an end, calling for an immediate end to the repression and violence in Kosovo. The plan stated that the people of Kosovo would enjoy autonomy within Yugoslavia but there was no timeline or other mechanism of resolving the status of the territory included in the agreement.[151]

4.2 Refugee crisis

This emergency was an unusual event in the history of refugee movement.[152] The combination of size and speed created a refugee movement difficult to respond to. Nobody questioned if the people arriving to the borders of the neighbouring countries Macedonia, Albania and Montenegro where in need of international protecting, but the question of who had the responsibility to provide protection remained. For NATO, being a party to the war, the refugee issue was important in several aspects. It was important to contain the humanitarian crisis in order to minimise criticism of the war and it was important to demonstrate that NATO was actively helping to solve the issue, and the refugee situation was not to be allowed to jeopardise the military operation going on in Kosovo.[153]

Europe was concerned to avoid mass influx of refugees to the region since the refugee situation was already stressed as a consequence of previous wars in Yugoslavia.[154] There was an initial reluctance from all European states, except Norway, to offer assistance and Member States of the EU preferred that the refugees stayed in neighbouring countries in Balkan. At a meeting of the EU Member States justice and home affair ministers in Luxembourg it was stressed that the main principle should be to

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[149] U.S. State Department Report, "Ethnic Cleansing in Kosovo: An Accounting", Second Report December 1999, Washington DC, 1999, p. 3-4
[150] The Kosovo Report, 2000, p. 92-95
[151] United Nations Security Council, Resolution 1244 (1999), S/RES/1244, 10 June 1999
[152] Suhrke Astri, Barutciski, Michael, Sandison, Peta, Garlock, Rick, The Kosovo Refugee Crisis: An independent evaluation of UNHCR's emergency preparedness and response, UNHCR Evaluation and Policy Analysis Unit, EPAU/2000/001, February 2000, p. 6
[153] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 37
[154] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 40 & 42

give the Kosovo refugees protection in the immediate region rather than them being admitted into EU states.[155] UNHCR held the position that Macedonia was obliged under international law to provide refugees protection since not doing so would drive people back to hostile forces and that would constitute a breach of international refugee law.[156]

The two frontline asylum states Macedonia and Albania had fundamentally different approaches towards the refugees. The Albanian government on the one hand made it clear that gaining asylum in Albania was not going to be a problem for refugees from Kosovo.[157] For the government of Macedonia on the other hand, the situation with a mass influx of refugees raised fundamental issues of national security. Only a few months before the war, a new coalition government had been formed including both the majority Slav population and the ethnic Albanian minority. It was also not clear if and when the refugees would be able to return. Although, Macedonia realized the importance to work in co-operation with the UN, NATO and EU. Macedonia held the position that the international community had some responsibility in creating the refugee flows, and also an obligation in resolving it.[158] The government of Macedonia had generally admitted refugees from Kosovo until 30-31 of March 1999. During those days, border guards at the Blanc border started slowing the entry down and finally closed the boarder for refugees. 25,000 refugees found themselves trapped at the Blanc border without shelter and receiving minimal assistance for four days between 1-4 of April. The situation at the boarder deteriorated rapidly with a constant flow of new arrivals in combination with rain and cold weather. After the burden-sharing scheme were put in place, the Blanc field was empty by April 6. NATO forces built refugees camp overnight and several thousand people was evacuated in relocation operations to initially Turkey, Greece and Albania.[159]

By the end of the war, approximately 863,000 civilian refugee was displaced outside of Kosovo and another 590,000 were internally displaced. Together, that is over 90% of the Kosovar Albanian population which were displaced from their homes. Many of them were forced from their homes, loaded on busses and driven to the Macedonian boarder, others fled by car or train, some of them even walked.[160] It is suggested that there was substantial planning and coordination of the deportation to the

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[155] Bartuciski & Suhrke 2001 p. 112 note 4
[156] Bartuciski & Suhrke 2001 p. 99
[157] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 60-61
[158] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 52-58
[159] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 167-168
[160] Human Rights in Kosovo: As Seen, As Told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission October 1998 to June 1999, 1999, p. 111

border by the Yugoslavian armed forces, the police and other paramilitary units.[161] Within nine week from the air strike, as much as 860,000 Kosovo Albanians fled to Macedonia (344,500), Albania (444,600) and Montenegro (69,900).[162]

4.3 The Burden-Sharing Scheme

After the first border closing, the government of Macedonia initially only allowed refugees into their territory on a transit basis and their status and later location had to be clarified prior entrance to Macedonian territory. The government of Macedonia wanted international assistance and guarantees that some of the refugees would be transferred to other states.[163]

The United States started the negotiation by promising they would take 20,000 refugees, followed by Norway who offered to take 6,000 and Turkey who offered to take 25,000 refugees from Macedonia.[164] The Blanc border was unblocked as a result of the burden-sharing scheme combined of assistance to build refugee camps, evacuation of refugees to other states and economic assistance. UNHCR held the position that Macedonia where obliged under international law to admit refugees unconditionally and that burden-sharing schemes should come in a later phase. To have a sharing-scheme in place before admitting refugees into the territory of Macedonia would undermine UNHCR´s efforts to promote unconditional asylum. There was also concerns that the situation and solution would constitute precedence and eventual repatriation.[165] UNHCR had in recent years prior to the refugee crisis stressed that keeping refugees within their region of origin would allow for the preferred solution of voluntary repatriation and their position was reaffirmed in the first protection guideline relating to the burden-sharing scheme.[166]

After the initial burden-sharing arrangement were put in place and the Blanc border had been opened, UNHCR formalised a policy statement, stipulating that burden-sharing of refugees was a possible solution to the first asylum problem in Macedonia[167]. Later, UNHCR ended up supporting extra-regional evacuations and they also took on the mission of producing guidelines for the humanitarian

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[161] The Kosovo Report, 2000, p. 91
[162] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 31
[163] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 169
[164] Bartuciski & Suhrke, 2001, p. 98
[165] Bartuciski & Suhrke, 2001, p. 99
[166] Bartuciski & Suhrke, 2001, p. 100
[167] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 183

evacuation programme including the development and coordination.[168] UNHCR identified the purpose of coordination as setting standards, identifying and filling gaps in the assistance programmes, preventing overlaps of activities and promoting the most cost effective interventions.[169] NATO forces built refugee camps, as mentioned above, in combination with NGOs that installed water and sanitation facilities, and provided health care. In the middle of April, the camps sheltered almost 50,000 refugees and host families sheltered nearly 70,000. In the third week of April, it was reported that additionally 100,000 refugees were moving towards the Blanc border which placed additional pressure to increase the capacity of the refugee camps.[170] By the first period of the crisis, 90,000 refugees had been removed out of the region.[171]

UNHCR's has a well established policy regarding situations where host states are facing a large burden of the international community's response to mass influx of refugees. A solution cannot be reached without international co-operation and states shall within the framework of international solidarity and burden-sharing, take all necessary measures to assist. Primary consideration should be given to finding solutions within the regional context.[172] Two parallel burden-sharing schemes where put in place in short time, the first was HEP, which evacuated refugees outside the region, and the second was the Humanitarian Transfer Programme (HTP). HTP was constituted in order to deal with the initial crisis in Macedonia and involved transfer of refugees to Albania and Turkey. This thesis will focus on HEP and evacuation of refugees outside of the region to other Western states.[173]

4.3.1 Humanitarian Evacuation Programme

Within the HEP, 29 host states shared almost 92,000 refugees from Kosovo.[174] The justification and purpose of HEP involved some lack of clarity. UNCHR distinguished HEP from other programmes because the lines and concept between resettlement, humanitarian evacuation and temporary protection was not clear.[175] The concept was not clear due to inconsistence in national states implementation of the programme. Contributing European states saw HEP as a emergency form of temporary protection. Other contributing states outside of Europe rather saw the programme as a resettlement operation and

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[168] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 187
[169] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 373
[170] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 338
[171] Bartuciski & Suhrke, 2001 p. 101
[172] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 451
[173] Bartuciski & Suhrke, 2001, p. 105-107
[174] Bartuciski & Suhrke, 2001, p. 101
[175] Bartuciski & Suhrke, 2001, p. 102

as a consequence, replaced their resettlement quotas with HEP. Because of that, UNHCR staff also included some resettlement cases into HEP. [176]

The 1951 Refugee Convention does not necessarily require refugee movement to be voluntary as long as the principle of non-refoulment is respected. Although, general human rights law suggest that forced evacuation to other states is highly dubious in legal terms. The primary objective of HEP was to evacuate refugees from Macedonia territory. There is evidence suggesting that UNHCR did not adequate inform refugees about the arrangement within HEP, the existence of a variety of destination states and varying reception conditions along with other vital information such as socio-economic conditions was not offered the refugees prior to departure. [177] UNHCR stipulated refugee rights and obligations through The Protection Guidelines [178], providing minimum standards of treatment in the state of destination.

There was a difference in reception conditions between the host states as well as questions of which protection status that should be granted to beneficiaries from HEP. This became especially problematic for states who was both receiving individual refugees from Kosovo and beneficiaries trough HEP. [179] Another aspect of HEP relates to confusion regarding the criteria of selection within the programme and voluntariness from the refugees. Actors where unsure if the selection procedure was based on "first in – first out" procedure, vulnerability or family ties in the country of destination. The confusion built on a statement from UNHCR on the one hand, stipulating priority for vulnerable refugees and refugees with special needs, and the purpose with HEP, emphasising that the scheme did not address individual protection needs. HEP was on that account twofaced, both addressing the issue of vulnerable cases, and at the same time quickly evacuating a large number of refugees. HEP was criticised for targeting refugees in the camps, discriminating those in host families. [180]

There was evidence suggesting that refugees had both bought and sold places on departing planes, falsified their identities and choosing their preferred country of destination. [181] In universal refugee protection standard, evacuation outside the region may harm refugees in the sense that they encourages governments to develop selection systems and quotas which could undermine, and even replace, the

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[176] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 458
[177] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 461
[178] UNHCR Protection Guidelines : the Kosovo Situation, Geneva, 9 April 1999
[179] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 462-463
[180] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 464
[181] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 466-467

availability of protection for individual asylum seekers.[182] As noted, the implementation of HEP was problematic from several aspects, but the programme contributed positively to the protection of refugees by alleviating the burden on Macedonia. UNHCR´s report concludes that programmes, such as HEP, is a political option that will probably rarely present itself. There is limited public support for receiving refugees from distant continents and it is unlikely that Western states will be implicated to the same degree in other conflicts creating mass refugee movement in the future.[183]

4.4 A Game-Theoretical perspective

Applying the Prisoners Dilemma mentioned in chapter two to the situation, three categories of players can be identified. The first is Macedonia as the host state. The second is NATO as facilitator and the donor states participating, and the third group includes UNHCR and other NGOs such as Amnesty International helping to reveal the burden. The strategic game starts when a large number of Kosovo refugees arrived at the border to Macedonia only to find it closed. The immediate concern for the players was to solve that issue. Macedonia was faced with two options while the refugees were massing up at the border, either to open it and offer protection, or to keep it closed. The two main concerns were the financial burden put on the host state and the the ethnic balance and fragile government in Macedonia at that time, and Macedonia preferred to keep the borders closed until effective assistance was ensured. That left NATO and the donor states with two options, either providing only financial assistance, or to also include assistance in the form of resettlement. To offer resettlement would create both additional expenses and a heavier burden put on the donor states which made the preferable choice for category two to only provide financial assistance. For the broader category three, UNHCR and other players, would the preferable choice be the same as for category two, but for the reason that humanitarian evacuation could undermine the core principles of international refugee law and could also set a precedence for future situations of mass influx of protection seekers.[184] The international community, over a couple of days, manage to organise resettlement for the refugees and used that leverage in order to convince Macedonia to open the borders. A host states threat to deny protection may deter donors from withholding assistance. The Macedonia government used the threat of keeping the borders closed and denying the refugees protection in order to make the donor states offer assistance in the form of resettlement. The parties rapidly reached the cooperative solution.[185]

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[182] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 469
[183] Suhrke, Bartuciski, Sandison, Garlock, 2000, note. 470
[184] Williams and Zeager, 2004, p. 238-239
[185] Zeager, 2014, p. 31

Over the weekend of April 2-4, when Macedonia had closed its borders, the agreement was put in place. Afterwards between 1000 and 2000 refugees were transferred daily to receiving states participating in HEP. Although there was an ongoing problem with more and more refugees arriving to Macedonia and in May of 1999, over 10.000 refugees arrived daily. On the 5 of May, Macedonia once again closed its borders to ensure that the donor states would continue to provide more assistance and share the burden of refugees. Amnesty International accused Macedonia of playing politics with refugees, and that the border closing was used as a tool to quicker the action in evacuation.[186] By the end of June, over 90.000 refugees had been transferred trough HEP to other states. It can be assumed that Macedonia closed the boarders in order to get a greater leverage for eliciting assistance before the refugees entered into their territory.[187] Another aspect to the conflict is the fact that NATO intensified their bombing campaign, facing the prospect of yet another humanitarian disaster in the region. The intense bombing of Serb forces also triggered the refugee flights which made NATO partly accountable for the situation and more willing to reach an effective solution.[188]

HEP distinguishes the response from the international community to the refugee situation in Macedonia compared to the situation in Albania during the time of the war. Both countries received financial assistance but only Macedonia received assistance trough resettlement of refugees.[189] This analysis explains how a fragile nation such as Macedonia can exercise leverage over the international community. The Macedonia border closing turned out to be an effective way of spreading the burden of refugee protection. Although, it is important to distinguish between a state behaving uncooperative on the one hand, from those using a strategic threat as part of the negotiation to implement a cooperative outcome on the other.[190]

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[186] Amnesty International, "Kosovo: Playing politics with refugees in Macedonia", AI Index: EUR70/71/99, Amnesty International, International Secretariat, London, Published on 19 May 1999
[187] Williams and Zeager, 2004, p. 249-250
[188] Williams and Zeager, 2004, p. 251
[189] Williams and Zeager, 2004, p. 250
[190] Williams and Zeager, 2004, p. 251

5 Burden-Sharing more than a decade later: The case of Syria

Since 2011, the Syrian Arab Republic (Syria) has experienced destruction. The Syrian civil war currently taking place has lead to massive death and suffering, a massive movement of refugees and a substantial growth of extremism and terrorism. Several actors play a part in the complex situation. To this day, the international community is faced with a gross humanitarian and protection crisis.

5.1 The nature of the war

In the beginning of 2011, Syria had experienced four years of drought, with the result that more than a million farmers from the country side had fled into the cities. During this time Syria was also home to several hundred thousand refugees from Iraq (more than one million), Lebanon (100.000) and Palestine (500.000).[191] The refugees represented 12% of the total population in Syria before the war.[192] There are 13 different ethnic groups in Syria that have local geographic areas of which they are the majority population. The largest is the Arab Sunni Muslims with 60% of the total population, followed by Arabic speaking Alawites (Shia Muslims), Arabic speaking Christians (Levanties), Kurds, Druze, Ismailis, Nusaries, and Imamis. The total population of Syria had increased from less than three million in 1946 to almost 23 million in 2011.[193] The ethnical composition in Syria is a central reason for the large number of participants in the conflict. The violence in Syria includes conflict between many parties; the government and its forces, ISIS, other rebel groups, other states (Saudi Arabia, Turkey, Iran, Russia and U.S. to name a few) and non-state actors (Hezbollah, Druze and Kurdish groups).[194] Due to the complexity of the conflict, various actors frame the war differently, some frame it as a war between opposition and Assad and other frame it as a battle against ISIS. The Assad family ruled Syria under absolute dictatorship and the country had experienced a stable political environment for more than a century. Compared to other Arabic states, Syria was viewed as a liberal society.[195]

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[191] Gupta, Ranjit, "Understanding the War in Syria and the Roles of External Players: Way Out of the Quagmire?", The Round Table: The Commonwealth Journal of International Affairs, Vol. 105, Issue 1, 25 January 2016, p. 29
[192] UNHCR, Protecting and Supporting the Displaced in Syria: UNHCR Syria end of Year Report 2015, (hereinafter Syria end of year report 2015), Published 22 February 2016, p. 70
[193] Parens, Raphael & Bar Yam, Yaneer, "Step by Step to Peace in Syria", New England Complex Systems Institute, Cambridge, February 9, 2016, p. 2
[194] Parens & Bar Yam, 2016, p. 1
[195] Gupta, 2016, p. 30

In March 2011, after Friday prayers, in the city of Daraa in southern Syria, several hundred protestors gathered to protest against the abuse of local security, and other social structures such as female teachers wearing niqab, imprisonment of children drawing graffiti against the government and to make it easier to buy and sell land. These were local concerns connecting to life in Deraa. The police opened fire against the protestors and three young men were killed. This was the beginning of a war that so far have cost at least 300,000 lives.[196]

The following days, government forces intervened with the funerals of the three killed men, resulting in new clashes between the government and the protestors. As the local conflict escalated, military units was sent to Deraa from Damaskus in order to break up the conflict. Surrounding cities and villages rose up against the government and solidarity demonstrations were taking place across Syria, the protestors was demanding political reforms. The demonstrations were put down using extreme military forces but they kept coming. In spite of the governments attempt of repression, a civil rebellion with tens of thousands participants was shaped.[197]

By summer of 2011, the conflict changed to a more religious character. The regime and the Assad family had long been dominated by Alawites, while the Sunni Muslim majority resisted this regime as well as the political order in Syria.[198] Sunni identity politics emerged as a guiding framework for the rebellions as a result of the lack of organised leadership. The beginning of the war was not triggered by religious radicalism but it thrived in that context. From the start the violence was sporadic and unorganised but in the summer of 2011, the violent movement started coalesce into militant cells. There was several clashes reported between the cells and government forces and checkpoints started to emerge along the Sunni countryside.[199]

Turkey and Saudi Arabia supported the armed movement steaming from the resistance, called the Free Syrian Army, both with arms and sending Islamist fighters.[200] The peaceful demonstrations continued in many areas, but violence slowly started to displace the demonstrations. During this time, the violence was primarily between Alawites and Sunni Muslims. By the end of 2011, parts of cities in the Homs region and the northern countryside had been completely taken over by Sunni Muslims.[201]

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[196] Lund, Aron, "Syria: The First Five Years" posted in: Carnegie Endowment for International Peace, March 18, 2016, Available at: http://carnegieendowment.org/syriaincrisis/?fa=63076 Date Accessed: 22.5.2016
[197] Lund, 2016
[198] Gupta, 2016, p. 30
[199] Lund, 2016
[200] Gupta, 2016, p. 30
[201] Lund, 2016

The government was able to resist the violence without major damage until mid-2012 when the violence and brutal attacks increased due to growing desertions of Sunni soldiers who started to be well organised, and a large inflow of arms and foreign Islamist fighters.[202] Several states was now supporting the fight against Assad, both Qatar, Saudi Arabia and Turkey as well as US and other Western states supported the Islamic fighters with military arms and funding.[203]

IS can be tracked back to 2004, when the group was closely connected to al-Qaeda in Iraq. The group has had several names, The Islamic State (IS), the Islamic State of Iraq and Levant (ISIL), the Islamic State of Iraq and Syria (ISIS) and DAESH (Arab for ISIL). The organisation made great progress in 2006 when it built an organisation together with other Sunni Muslim groups. In 2014, al-Queda cut all ties with IS and IS started combating the al-Queda supported Al Nusra front in Syria.[204] IS has been proclaimed a terrorist organisation by most countries in the world.[205] By the end of 2014, IS controlled large territories in both Iraq and Syria, including most of the oil-producing areas.[206]

The Kurds in Syria stand for approximately 10% of the population in Syria and most of them are Sunni Muslims but they fight for themselves and are not allied with either the government nor ISIS. Their objective is to attain autonomous status.[207] IS changed its tactic and has lunched several terrorist attacks outside the territory them aim at controlling; Libya, Yemen, Turkey, the Russian airplane, Beirut, Paris and in 2016 the attacks in Brussels. In August 2014, the U.N. Security Council condemned in the strongest terms the terrorist acts of IS, its violent extreme ideology, and its continuous gross, systematic and widespread abuse of human rights and violations of international humanitarian law.[208]

U.S. has been the single largest contributor to airstrikes against the IS. Russia did not intervene military in the conflict until September 2015 with a massive military intervention. After the terrorist attack in Paris, France started to coordinate attacks in Syria with Russia.[209] The war in Syria has lasted for almost six years, resulting in enormous deaths and suffering, both among the civilians as well as the

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[202] Gupta, 2016, p. 31
[203] Gupta, 2016, p. 31
[204] Van der Vyver, Johan D. "The ISIS Crisis and the Development of International Humanitarian Law", Emory International Law Review, Vol. 30, Issue 3, March 17, 2016, p. 535
[205] U.S (2004), Australia (2005), Canada (2012), Turkey (2013), Saudi Arabia, U.K, Indonesia, United Arab Emirates, Israel, Malaysia, Egypt, India, Russia Federation (2014) and several more in 2015 and 2016
[206] European Parliament, "The international coalition to counter ISIL/Da'esh (the Islamic State)", Briefing by the European Parliament Research Service, PE 551.330, 17 March 2015, p. 2
[207] Gupta, 2016, p. 30
[208] United Nations Security Council, Resolution 2170 (2014), S/RES/2170, 15 August 2014
[209] Gupta, 2016, p. 34

fighters. Several attempts to put and end to the hostilities and constitute peace agreement has been made without result. The complexity of the conflict, with many actors and local conflicts makes a national process of resolving the conflict difficult.[210]

5.2 The Refugee Crisis in Context

In UNHCR's Syria End of Year Report 2015 they conclude that the war in Syria so far has resulted in 4,2 million refugees and another 6,5 million internally displaced persons, along with 13,2 million persons in need of humanitarian assistance. They also conclude that grave violations of international humanitarian law and human rights law continue to cause casualties and displacement, insecurity and danger to the local population as well as hinders humanitarian assistance.[211] The primary purpose of UNHCR is to safeguard the rights and well-being of refugees, but in 2012, when the crisis in Syria started to escalate, UNHCR expanded its scope to also include humanitarian needs of the increasing number of internally displaced persons.[212]

With a large number of people displaced inside Syria, and another several million Syrian refugees, of which a major part is in the neighbouring countries Jordan, Lebanon and Turkey, and many that have been displaced multiple times, the situation in Syria is the largest and fastest evolving displacement crisis in the world.[213] Many norms regulating social behaviour has been weakened and there is an increased level of sexual and gender-based violence, including child marriage and domestic violence.[214] The number of refugees from Syria in Lebanon exceeded one million people in April 2014. Lebanon already faced a large number of refugees before, hosting a very large refugee population from Palestine. Refugees from Syria comprises one quarter of the total population in Lebanon. Lebanon is not party to the 1951 Refugee Convention or its protocols, but they are party to other human rights instruments which incorporate some of the norms in the Convention and form the states obligations towards the refugees from Syria including the principle of non-refoulment. UNHCR aids the refugees and make individual status determinations. The government of Lebanon officially terms the Syrian refugees as displaced people and maintain an open border policy even though the massive influx of refugees creates a significant strain on the society and economy.[215] Jordan has historically hosted many

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[210] Parens & Bar Yam, 2016, p. 5
[211] Syria end of year report 2015, 2016, p. 9-11
[212] Syria end of year report 2015, 2016, p. 15
[213] Syria end of year report 2015, 2016, p. 39
[214] Syria end of year report 2015, 2016, p. 20
[215] Akram, Susan M. et. al. "Protecting Syrian Refugees: Laws, policies, and Global Responsibility Sharing – Report Summary", Middle East an Law and Interdisciplinary Governance Journal, 2015, p. 292-295

refugee populations, most recently from Iraq and Palestine. They have an open-boarder policy in effect for Syrian refugees. Jordan is not party to the 1951 Refugee Convention and they do not permit integration of refugees. The refugee status determination is linked to a durable solution for refugees to other countries, either troughs resettlement or voluntary repatriation. Applicants for status determination are legally considered asylum seekers in Jordan and receive the status of refugees upon securing a place of resettlement in another state. UNHCR facilitates the resettlement but it is pursued on limited basis due to lack of available resettlement places. The government has agreed to respect the principle of non-refoulment, although there have been reports of of Syrian nationals being deported for reasons of violating law or posing a security problem. Approximately 100,000 individuals have returned voluntarily from Jordan to Syria for reasons including intolerable conditions in the host state.[216] According to UNHCR, 24,374 refugees was resettled from Jordan in 2015, making it the largest resettlement operation carried out that year.[217] Turkey also maintain an open-boarder policy with Syria and host two and a half million Syrian refugees making it the largest Syrian refugee population in the world. UNHCR assist authorities to manage and care for the refugees.[218] The relationship between Turkey and EU regarding refugees from Syria will be viewed more in the next part of this chapter. Egypt has historically welcomed refugees but due to over-population, underemployment and transition to a new government they have prompted limitations on the rights of refugees, with the result that the refugee flow from Syria has essentially been stopped.[219]

Internally displaced people have limited possibilities of durable solutions within Syria. According to UNHCR resettlement is the only durable solution in order to handle the refugee crisis. In 2015, 1,485 especially vulnerable refugees were resettled from Syria to Australia, Canada, Germany, New Zeeland, Sweden, Switzerland, USA and Finland. In the UNHCR resettlement programme within the territory of Syria, priority was given to people with medical needs, women at risk, unaccompanied minors and people with legal and physical protection concerns. In 2016 UNHCR aim to resettle 17,000 refugees from Syria.[220] A total amount of 53,305 refugees from Syria was resettled trough UNHCR, mainly to the U.S., Canada and Australia.[221]

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[216] Akram et. al.,2015, p. 297-301
[217] UNHCR, ”Resettlement Fact Sheet 2015” Available at: http://www.unhcr.org/524c31a09.html, Date Accessed: 22.5.2016
[218] UNHCRPress Release, ”Statement on the Situation in Turkey”, Geneva/Ankara, 9 February 2016
[219] Akram et. al., 2015, p. 301-302
[220] Syria end of year report 2015, 2016, p. 70-71,76
[221] UNHCR, Resettlement Fact Sheet 2015

5.2.1 European Perspective

In 2015, over one million protection seekers arrived by sea to Europe and most of them came from Syria (43%), Afghanistan (23%) and Iraq (14%). Most refugees reached Europe trough Greece, Italy and Spain.[222] Despite the fact that most refugees from the war in Syria is currently in the neighbouring countries and just a small amount has entered into Europe, the EU is struggling to respond effectively to the situation of mass influx of protection seekers and many Member States see the situation as overwhelming. When comparing the figures with the responsibility put on the neighbouring countries to Syria, even the largest of quotas that individual EU Member States accept pails. The number of refugees from Syria that enters into EU has increased every year since the beginning of the war in 2011. The top three Member States of asylum seekers in EU in 2014 and 2015 was Germany, Hungary and Sweden, according to Eurostat[223].

All European embassies are closed in Syria and several countries has imposed airport transit visas on Syrian nationals. No state within the EU use protected entry procedures, allowing Syrian refugees located in neighbouring countries to Syria to apply for asylum trough their embassies and be granted entry permit. Access to European territory has been increasingly difficult for the refugees and legal entry channels are almost non-existing, except the UNHCR resettlement programme mentioned above. The vast majority of refugees enter Europe trough the Mediterranean Sea and only a small number has managed to enter by land. The seaway entry is one of the most dangerous and many refugees has lost their lives trying to reach European territory. [224]

Refugees who manage to reach EU territory are generally protected from refoulment. Although, there has been reports of refugees being pushed back or returned to third country. In states of first entry, there has been report of refugees put into detention, lack of appropriate reception conditions, refugees facing criminal charges for illegal entry, differences in national asylum procedures and delays in examination of asylum claims. The consequence being that refugees chose to travel further into the northern part of Europe, towards states that offer more effective asylum systems and a reasonable level

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[222] UNHCR, "Refugee/Migrants Emergency Response – Mediterranean", Data Available at: http://data.unhcr.org/mediterranean/regional.php, Date Accessed: 22.5.2016

[223] Eurostat, Statistics Explained, "File: Number of (non-EU) asylum seekers in the EU and EFTA Member States, 2014 and 2015 (thousand of first time applicants)" Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_(non-EU)_asylum_seekers_in_the_EU_and_EFTA_Member_States,_2014_and_2015_(thousands_of_first_time_applicants)_YB16.png, Dare Accessed: 22.5.2016

[224] Karageorgiou, 2015, p. 6

of reception conditions. This results in a shift of responsibility from the states of first entry to states which are considered to have functional asylum systems and better reception conditions.[225] The main responsibility is granting protection to those qualifying for a certain protection status, although differences has been observed in asylum decisions. The protection status granted differs between Member States towards Syrian asylum seekers and according to the European Asylum Support Office, they are often granted subsidiary protection, rather than refugee status.[226] This is important because Member States can apply less favourable protection regimes to beneficiaries of subsidiary protection than to beneficiaries granted refugee status.[227]

5.3 Burden-Sharing Scheme

As mentioned above internal burden-sharing within the Union can be divided into three forms; sharing money, sharing people and sharing norms. Sharing of norms can be questioned as a result of the current refugee crisis facing Europe. EASO operate to contribute and enhance the quality of individual states asylum system as well as enhance a common area of protection within the Union.[228] Another cooperation organ in the field of external boarder management is Frontex, which also is a solidarity mechanism, addressing the need of strengthening external boarders and carry additional responsibility in safeguarding the region[229].

The sharing of money as a form of burden-sharing appears trough AMIF. Funds are divided between Member States first by a fixed sum and in addition consist of a various amount depending on the proportion of protection seekers within the state. Italy and Greece are currently the main beneficiaries of allocated funds through AMIF, who also finances the EU Temporary Relocation System with a fixed amount distributed to the receiving state for every individual relocated.[230]

Sharing of people is the most complex form of cooperation in Europe. The Dublin Regime has the aim of allocating responsibility for the refugee primarily to the states of first arrival. That notion contradicts a burden-sharing ambition and centralises the responsibility to states with accessible external boarders. The current refugee crisis has revealed weaknesses in the system and there is a common practise of

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[225] Karageorgiou, 2015, p. 6-7
[226] Karageorgiou, 2015, p. 7
[227] Family reunification possibilities, residence permits and access to social security and health care in accordance with the Qualification Directive
[228] Karageorgiou, 2015, p. 9
[229] Karageorgiou, 2015, p. 10
[230] Decision on EU Temporary Relocation System II, article 10

suspension of transferring refugees through the Dublin system due to lack of harmonised protection standards within the Union.[231] All states has suspended transfers to Greece since 2011 due to severe shortcomings in their asylum system, several more states are currently suspended from transfer under the Dublin regime.[232] Suspension of the Dublin regime towards states with doubtable reception conditions or faced with a heavy burden of mass influx of protection seekers can be viewed as a solidarity gesture. Many states has also, on voluntary basis, suspended the transfer of Syrian nationals through Dublin.[233]

The TPD, constitutes a possibility to relocate individuals from a Member State being confronted by an emergency situation characterised by a sudden inflow of third country nationals. The Directive has not been applied so far, but it could ensure Syrians to be granted protection on a temporary basis[234] Under the Directive, the Commission has to define a specific group of individuals that is suppose to be targeted based on the country and situation they are fleeing from. The TPD also covers consent and preference for the individual to be located.[235] According to the Parliament, as a answer to the question of why the Directive has not been evoked towards Syrian refugees, they stated that *"In view of the scale of the mass influx and the manner in which these persons´ asylum applications have been handled, the Commission considers that a proposal to trigger the EU-wide temporary protection regime provided by the Directive would not be justified in the present circumstances"*.[236] Those Decisions that constitute the the EU Temporary Relocation System is based on Article 78 (3) TFEU which differs in the approach compared to the TPD.

5.3.1 EU Temporary Relocation System

Relocation is an expression of the internal dimension on solidarity and fair sharing of responsibilities, in particular to those states with external boarders that receive a high number of refugees. The first European relocation programme was the Intra-EU Relocation from Malta Project (EUREMA) in 2011. The programme was established by EU and 227 beneficiaries granted international protection was relocated from Malta to ten receiving Member States. In 2012, seven Member States offered 86 places

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[231] Karageorgiou, 2015, p. 10
[232] European Commission, "Implementing the European Agenda on Migration: Progress on Priority Actions", Press Release, Brussels, 10 february 2016
[233] COM (2016) 197 final, p. 4
[234] Karageorgiou, 2015, p. 12
[235] Temporary Protection Directive, article 15
[236] Parliamentary Questions, 28 January 2015, Available at: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-008507&language=EN, Date Accessed: 22.5.2016

to the programme, and another 233 places were offered refugees trough bilateral agreements with Malta. Some EU Member States allocated places from their annual resettlement quotas with the relocation programme. [237]

In a Council Decision dated 14 September 2015, EU established measures in the area of international protection for the benefit of Italy and of Greece.[238] In accordance with article 78(3) and article 80 of the TFEU, in the event of an emergency situation characterised by a sudden inflow of third country nationals, there may be adopted provisional measures for the benefit of the Member State concerned in order to govern the principle of solidarity and fair sharing of responsibilities between Member States. There were many discussions over whether the system should be mandatory or not for Member States and the system does not oblige states to participate. Although, the Decision lay down specific rules limiting the option to not participate.[239] As a result, it may be concluded that the first decision is a binding system for those Member States participating. The original proposal included a provision regulating non-participation by a Member States, including financial penalty or contribution to the EU budget but the adopted version did not. Although, there is a possibility for the Commission to apply financial responsibility in cases of non-participation.[240] The emergency relocation mechanism should be carried out on voluntary basis.[241] Over two years 40,000 persons in clear need of international protection should be relocated to other Member State from the frontline states Greece and Italy since the sudden inflow has generated in significant pressure on their migration and asylum systems. That represents 40% of the total number of people in clear need of international protection currently in those states.[242] The relocation programme is funded trough AMIF which provides financial support for both the host state and the receiving state in order to finance the transfer of the individual.[243] The threshold for the applicant to be eligible is "clear need of international protection" in order to prevent relocation of individuals who are likely to receive a negative decision on their asylum application and prolonging their stay in the Union. The threshold is 75% positive decisions from the country of origin applicants ti be considered to be in clear need of international protection.[244] This expands the scope from the TPD

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[237] Council of the European Union, EU Pilot Project for the relocation of beneficiaries of international protection from Malta, endorsed in the European Council Conclusions of 18-19 June 2009, doc. 11225/2/09 CONCL 2, Brussels, 10 June 2009, note 36-39
[238] Decision on EU Temporary Relocation System I
[239] Decision on EU Temporary Relocation System I, Article 4 (5)
[240] Carrera, Sergio & Guild, Elspeth, "Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU", CEPS Policy Brief, No. 334, October 2015, p. 3
[241] Decision on EU Temporary Relocation System I, (1) - (2)
[242] Decision on EU Temporary Relocation System I, (4), (6) (9) & (21)
[243] Decision on EU Temporary Relocation System I, (23)
[244] Decision on EU Temporary Relocation System I, (20) & (21)

which targets a specific group, such as Syrian, to include several nationalities and groups of protection seekers. National security and public order should be taken into consideration throughout the procedure.[245] Priority should be given to vulnerable applicants, which includes health and best interests of children. Further should specific account be given to language skills and demonstrated family, cultural and social ties which could facilitate the integration in the receiving state, integration is a cornerstone for a functioning system.[246] United Kingdom, Ireland and Denmark did not take part in the decision and are not bound by it.[247]

The next Decision on the matter came only a couple of week later, on the 22 of September 2015, stating an increased migration flow to Italy of 20% and to Greece of 250%, and whereas a significant proportion of those protection seekers meet a high Union-level recognition rate of 75% putting them in the category of clear need of international protection.[248] The decision determines that within the first year, 54 000 applicants should be relocated from Italy and Greece to other Member States (an increase from the former decision with 14 000 individuals) and a total number of 120 000 applicants shall be relocated which represents 43% of the total number of applicants. This is considered to constitute a fair burden sharing between the Member States participating.[249] It should be noted that the first decision on relocation was agreed upon by the Member States of the Union, and other Dublin Associated States by recommendation from the Commission. The second decision was adopted by the Council without voluntary participation by all Member States. Hungary and Slovakia has lodged actions before the Court of Justice of the EU in order to review the legality of the second Council Decision on relocation.[250]

Including both Council Decisions, a total number of 160,000 applicants are to be relocated within two years from Italy and Greece. In the event of another emergency situation of mass influx, a Member State may suspend their participation and obligations in the relocation programme if it is to be considered appropriate in accordance with article 78 (3) TFEU. Such exceptional circumstance include when the influx of applicants place extreme pressure even on well prepared asylum systems otherwise functioning in the line with relevant Union acquis on asylum.[251] The proposal to the second decision

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[245] Decision on EU Temporary Relocation System I, (26)
[246] Decision on EU Temporary Relocation System I, (27) & (28) and Decision on EU Temporary Relocation System II, (34)
[247] Decision on EU Temporary Relocation System I, (39) & (40)
[248] Decision on EU Temporary Relocation System II, (13)
[249] Decision on EU Temporary Relocation System II, (20) , (26) & article 4
[250] European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council – First Report on Relocation and Resettlement", COM (2016) 165 final, Brussels, 16.3.2016, p. 2-3
[251] Decision on EU Temporary Relocation System II, (27) & article 9

included Hungary as a host state from which individuals was suppose to be relocated to other Member States of the Union. But surprisingly, Hungary was left out from the final decision. The Hungarian government clearly expressed opposition to the proposal and voted against the adoption.[252]

5.3.2 Evaluation of the System

The first report came in March 2016. When the report was presented, only 937 people had been relocated from Italy and Greece. The unsatisfactory level of implementation depends on a variety of factors, including lack of political will to deliver in a full and timely manner on their obligation to relocate. The situation along the Western Balkan route, until recently, created an additional obstacle as most eligible applicants travelled onwards trough Europe by themselves instead of staying and applying for a spot in the relocation programme. This also made Member States reluctant to relocate applicants within the programme since people continued to arrive to their territory in irregular ways.[253] Ireland expressed a willingness to participate in the relocation programme in October 2015 and Switzerland, Norway and Liechtenstein also expressed interest in participating as soon as possible. On the other hand, Hungary and Austria has not pledged any places and the pressure put on Austria and Sweden due to mass influx of refugees has led these state to request temporary suspension of their obligations under both decisions on relocation.[254]

 The report identifies main trends for the initial stage in order to implement the programme. At start in 2015 there was a slow implementation rate but the pace of relocation significantly increased in March 2016, although the pace was still insufficient in order to meet the objectives set out, which are emergency measures intended to relieve the significant asylum pressure put on Greece and Italy.[255] The number of applicants rapidly increased as a consequence of the restrictions imposed at the boarder between Greece and Macedonia. There was also an increased number of nationalities eligible for relocation in the beginning of 2016, since the programme only allies to individuals in clear need of international protection belonging to a nationality with an average recognition rate of more than 75% as mentioned above.[256] The programme includes priority for vulnerable applicants, including unaccompanied minors which have proven hard to implement, until March 2016, only one or two minors had been relocated from Greece to Finland. Experience on the ground show that many

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[252] Carrera & Guild, 2015, p. 3-4
[253] COM (2016) 165 final, p. 2
[254] COM (2016) 165 final, p. 3
[255] COM (2016) 165 final, p. 5
[256] In March nationalities eligible was Burundi, Central African Republic, Eritrea, Costa Rica, Saint Vincent and the Grenadines, Bahrain, Iraq, Maldives, Syria and British oversea countries and territories; COM (2016) 165 final p. 6-7

applicants belong to the category of vulnerable applicants, including pregnant women, disabled people and elderly.[257]

The report further identifies main obstacles to be addressed by participating states. The first being insufficient and limited numbers of pledges in order to meet the obligations under the programme. There is also an expressed concern that states use the preference clause in irregular manners. Member States has expressed long list of preferences for the profile of the applicants. Some states have even expressed reluctance to receive individuals of certain nationalities, single applicants or unaccompanied minors, other stipulates that they only accept families. States have shown to use the preference clause in order to exclude candidates rather than allow for the intent of better integration.[258] The response time to relocation requests by the receiving countries generally exceed the two-month limit set out, resulting in failure to reach the constant pace which is required in order for the programme to be fully operational and meet the urgent need.[259] Another obstacle in the implementation of the programme occurred after the terrorist attack in Paris in November 2015, when several states started conducting security checks on applicants prior to reply the relocation request. Other states has used a general reference to national security and public order to reject applicants without providing specific justification for their decision, which is contrary to the spirit of loyal cooperation.[260] There is a lack of pre-departure information which is crucial in order to ensure an cooperative attitude of the applicant participating.[261]

The report concludes that the relocation process involves several stakeholders and different factors has contributed to the low implementation rate. There are several problems presented that needs to be addressed by the receiving states in order for a full implementation of the programme. The willingness of states to fully implement their obligations is crucial for the objective of providing emergency support effectively.[262]

The second report was published in mid-April. The report concluded that the closure of the boarder between Greece and Macedonia has resulted in between 50,000 and 60,000 individuals stranded in the northern part of Greece, and between 60-70% of those would be eligible for relocation. The migration

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[257] COM (2016) 165 final p. 7
[258] COM (2016) 165 final p. 9
[259] COM (2016) 165 final p. 9
[260] COM (2016) 165 final p. 9-10
[261] COM (2016) 165 final p. 10
[262] COM (2016) 165 final p. 20

flow has also shifted, resulting in more refugees arriving to Italy instead of Greece. The report further states that the overall process since the first report has been unsatisfactory, only 208 additional individuals was relocated between the reports. The main obstacles identified in the first report had not been effectively addressed. The response time to a relocation request was only addressed by four states in order to meet the two-week target. Finland was the only state offering 12 additional places for unaccompanied minors and Belgium devoted ten of their places for the category of vulnerable applicants. 14 states started sending pre-departure information to the applicants.[263] The Commission sets out the way forward by urging Member States to implement their obligations in the relocation programme and show willingness to make the relocation work and act together.[264]

5.4 Current debate in EU

The latest major development in the area of refugee and asylum policy within the Union is the agreement between EU and Turkey.[265] On 18 March 2016, the Union and Turkey made an agreement on steps to be taken in order to end the irregular migration from Turkey to Europe. The statement foresees that all those arriving in Greece are to be returned to Turkey. The statement also lays down a mechanism, according to which for every Syrian being returned to Turkey from Greece, another Syrian would be resettled from Turkey.[266] That agreement is separated from the relocation programme within EU and is designed to prevent irregular migration primarily between Turkey and Greece.[267] Through the Agreement, the burden of refugee protection is shifted outside of EU to a third country. In return, EU are to liberate visa requirement for Turkish nationals.[268]

Alongside the two Council Decisions constituting the temporary relocation system specified to relocation of asylum seekers from Greece and Italy, a proposal was presented for a permanent crisis relocation mechanism. The proposal outlines measures required in order to provide structural solutions for better managing migration. The European Commissions proposal is based on article 78 (2) TFEU, which is the the precursor of a lasting solution and a permanent system for relocation that should be

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[263] COM (2016) 222 final p. 4
[264] COM (2016) 222 final p. 8-9
[265] European Council, "Statement of the EU Heads of State or Government", Brussels 07/03/2016
[266] European Commission, "Report from the Commission to the European Parliament, the European Council and the Council – Second report on relocation and resettlement", COM (2016) 222 final, Strasbourg, 12.4.2016, p. 2
[267] European Council, "Statement of the EU Heads of State or Government", Brussels 07/03/2016, note 2
[268] European Commission, "Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Turkey)", COM (2016) 279 final, 2016/141 (COD), Brussels 4.5.2016 p. 2

triggered in crisis situations.[269] The purpose is a mechanism that should be rapidly triggered in respect of any Member State that experiences a crisis situation of such a magnitude as to put under significant strain, even for well prepared and functioning asylum systems. The proposal aims at ensuring a fair sharing of responsibilities between Member States within the Union on the one hand and securing a proper application of the Dublin regime on the other.[270] The basis of information would be provided by EASO and Frontex.[271] The proposal introduces a method for determining such a situation including strict conditions for the triggering due to extreme pressure which places significant demands on a states asylum system and jeopardises the application of the Dublin Regulation, and characterised by a large and disproportionate inflow of third country nationals or stateless people, also taking into account the size of the Member State.[272] The distribution key connecting to the mechanism is based on population, total GDP, average number of asylum applications over the 5 last years per million inhabitants and unemployment rate.[273]

Dublin sets out criteria for determining the state responsible for an asylum applicant, and this new initiative would offer a regime for distributing applicants between Member States. The distribution shifts the responsibility for the applicants in contradiction to the Dublin regime and offers a new mechanism to establish responsibility.[274] Another issue that relates to the distribution key is that it is based on numerical and economic terms but fall short in ensuring subjective values to facilitate better and faster integration, such as language and family or cultural ties. It has been argued that such subjective criteria should be included, as well as consideration of the individuals preference as far as possible.[275] The proposal for a permanent relocation system is currently awaiting Committee decision.

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[269] European Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the 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(2015) 450 final 2015/0208 (COD), Brussels 9.9.2015, p. 2

[270] European Commission, "Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the 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(2015) 450 final 2015/0208 (COD), Brussels 9.9.2015, p. 2

[271] Carrera & Guild, 2015, p. 4

[272] COM (2015) 450 final 2015/0208 (COD), p. 3 & 7

[273] COM (2015) 450 final 2015/0208 (COD), p. 10

[274] Carrera & Guild, 2015, p. 9

[275] Carrera & Guild, 2015, p. 10-11

5.5 A Game-Theoretical Perspective

As in the Kosovo refugee crisis in chapter four, the Prisoners Dilemma and a game theoretical perspective can be applied on how Member States of the Union is handling the refugee crisis currently occurring in primarily Italy and Greece. Several players to the game can be identified and put in different categories. The first category should be Italy and Greece as primary host states, states with external boarders towards the Mediterranean Sea and the route into Europe. The second set of players is the EU as the facilitator and Member States currently not facing mass influx of protection seekers of the same magnitude as Italy and Greece. The third category of players include non-governmental organisations such as UNHCR, but more importantly, institutions such as EASO and AMIF. The strategic game starts when more and more refugees from Syria, together with refugees from other conflict zones, and other migrants in a mixed migration flow arrives, on an increasing scale in the last couple of years, and with a peak in 2015, to the territory of the EU. The immediate concern for all players should be to solve the issue. A more and more increasing burden has been put on Italy and Greece, even more since other countries has closed their boarders and stopped the wave-trough policy trough Europe. The relocation programme, decided in September 2015, create heavier expenses and a heavier burden for receiving states even though AMIF finances part of the expenses. The preferable choice for receiving states according to the Prisoners Dilemma should be only to provide financial assistance and not people sharing trough relocation since that would increase their burden. It is obvious that the preferable choice would be the relocation programme for Italy and Greece in order to ease their burden for providing protection. The players in category three, with EASO and AMIF in the front, welcomes the initiative for relocating people in clear need of international protection. They emphasises that this will provide important guidance for the revision of the Dublin system, including a permanent establishment of a solidarity instrument with the aim of a more equal sharing of responsibilities among Member States.[276] Relocation is an expression of solidarity that requires mutual trust among states. They observe that in order to reach the ambitious result originally envisaged, the cooperation needs to be intensified. The overall objective is to ensure that individuals in need of international protection have access to quality asylum and reception systems throughout the Union.[277] The preferred choice for category three would be the same as for category one in order to ensure effective protection for individuals currently within a overwhelmed system. One motivation for players in category two to participate is to ensure the sustainability of the mobility throughout EU and without internal boarders,

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[276] UNHCR Recommendations, "Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively", Geneva, January 2016 p. 4-5

[277] Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively, 2016, p. 9

in accordance with the Schengen agreement. Faced with a reality of internal boarder controls occurring between several states in Europe during the fall of 2015[278] and building of new fences along boarders between Member States[279], the motivation that was needed in order to put such a scheme in place was occurring. Internal boarder controls put a danger to the mobility across the Union through the Schengen Agreement as is evidenced by the communication from the Commission "Back to Schengen – A Roadmap".[280] The Commission states that Schengen is one of the major achievements of European integration where persons and goods can circulate freely. The system has been shaken to its core as a result of the refugee crisis arriving to the Union. The wave-through approach applied by some states has resulted in routes trough Western Balkan heading up to the northern states with the result that states resorted to reintroducing temporary internal boarder controls.[281] They address several steps that needs to be taken in order to make the Schengen area work again, including that the relocation scheme must deliver concrete results in terms of meaningful volumes of persons relocated.[282]

Another motivation for players in category two, receiving states of the people sharing scheme is the fact that they do not want to loose the Dublin system. Individuals in need of international protection makes their own destination choices based on calculations including a desire to evade instability, social ties and prospect of the best future offered. The Dublin system assigns responsibility for the individual primarily to the state of first arrival. In practise, the concept gets undermined when individuals determine their destination based on best personal outcome alongside the wave-trough policy that was put in place by some Member States. The Commission emphasises that the full application of the existing Dublin system must be progressively resorted, but they also need to be improved for the future based on the objective of solidarity and fair burden-sharing between Member States.[283]

To conclude the Prisoners Dilemma interpretive approach to the refugee relocation scheme put, one can suggest that it is an innovative approach and a rare solution to a refugee crisis situation within the international community. The Union has responded to the crisis emerging in Italy and Greece and the result can be an effective way of spreading the burden of protection of refugees within EU. Although now the biggest problem most likely is the ineffective implementation phase occurring as a result of

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[278] Germany, Austria, Slovenia, Hungary, Sweden, Norway, Denmark and Belgium in European Commission Report "Annexes 1 to 2 to the Communication from the Commission to the European Parliament, the European Council and the Council – Back to Schengen – A roadmap", COM(2016) 120 final, Brussels 4.3.2016
[279] Hungary, Austria, Macedonia
[280] European Commission, "Communication from the Commission to the European Parliament, the European Council and the Council – Back to Schengen – A Roadmap". COM(2016) 120 final, Brussels 4.3.2016
[281] COM (2016) 120 final, p. 2
[282] COM (2016) 120 final, p. 3
[283] COM (2016) 120 final, p. 3

non-existing political leverage from Greece and Italy, the confusion about the legality debated by Hungary and without adequate enforcement mechanisms or consequences for states who fail to complying effectively with the decisions on relocation.

6 Game Theoretical Analysis to EU Sharing Practises

6.1 Lessons Learned from a Game Thoretical Standpoint

- **How can the burden-sharing mechanisms taken as response to the Kosovo and Syria refugee crisis be explained and assessed under the light of a game theoretical approach?**

The purpose and overall objective in the agreements was to urgently evacuate protection seekers from specific host states carrying a heavy burden of offering protection as a result of massive influx of protection seekers that generated in significant pressure put on that state. HEP was conducted with both speed and scale and contributed positively to provide protection with the effective burden-sharing scheme. Between 1000 and 2000 refugees was daily transferred from Macedonia to other states. Macedonia closed the borders on several occasions throughout the war in order to ensure that participating states would continue to provide assistance and share the burden of refugee reception in an effective manner. The EU Temporary Relocation System show has an unsatisfactory level of relocation cases. 160,000 individuals are due to be relocated within a two-year time frame and during the first six mounts less than thousand individuals was relocated. The difference in political motives for creating a burden-sharing scheme including distribution of protection seekers differ to a large extent between the two situations. Both mechanisms were created through an intergovernmental organisation (NATO and EU) and the implementations are partly facilitated by an non governmental institution (UNHCR and EASO). From a game theoretical standpoint, the motivation, or lack of motivation, to effectively participate can be explained first through the difference in the host states negotiation leverage. Italy and Greece does not have the same leverage as Macedonia to ensure the effectiveness of the mechanism due to lack of actual tools to use in order to put pressure on other participating states. The receiving states also lack political motivation for participating efficient since most of them do not take direct part in the hostilities, at least not until recently. I would argue that the primary political motivation for the receiving states to participate is to uphold the Schengen Agreement. The Agreement is a cornerstone in order to uphold a Union where people and gods can circulate freely without internal borders. The Commission has noted that in order to make the Schengen Agreement work again, the the EU Temporary Relocation System needs to deliver concrete results where a meaningful volume

of individuals, within a short period of time, can be relocated to other Member States to disencumber the pressure and burden put on primary host states. The other political motivation for receiving states would be to uphold the principles established through article 80 TFEU, namely solidarity and fair sharing of responsibilities although this can be argued since there is not a clear understanding on what the principles entail. The reports have identified lack of political will to deliver in accordance with imposed obligations as the primary reason for the slow implementation process in the relocation scheme. That claim is further supported by the response time used by receiving states to a relocation request, which often exceed the time limit of two months and contradicts the overall purpose of a rapid relocation process.

There is also an important difference in the nature of the refugee movements that should be taken into consideration. The composition of the refugee movement from Kosovo consisted of a homogeneous group, mainly Kosovar Albanians, from a specific geographic area. The refugee movement currently facing Europe consist of a mixed inflow including both refugees and other migrants. The relocation mechanism targets beneficiaries in clear need of international protection but it does not further define specific groups. Refugees from Syria are the main beneficiaries but even that group is a mixture of several minorities with different religious and cultural backgrounds. No evidence show that receiving countries participating in HEP stated preference for certain individuals. The first report on the the relocation mechanism in EU reveal another truth. In theory, the selection procedure is more clear, article 5 (3) stipulates that priority should be given to vulnerable individuals including minors, unaccompanied minors, disabled people and elderly people. At the time of the second report, Finland and Belgium was the only states that had offered places for unaccompanied minors. The reluctance of receiving vulnerable applicants can be explained because they are often costlier and often have special needs which puts additional pressure on the state of destination. More alarming is the evidence suggesting that states use preferences in irregular manners. The objective for introducing a preference provision was to facilitate integration, but reality reveals that states express long lists of preference for the characteristics of the applicant in order to exclude individuals of specific nationalities, single applicants and unaccompanied minors, other states clearly expresses that they are only willing to receive families. Member States use the preference possibility to exclude unwanted candidates. Even if expressed preference is not binding, receiving states has used non-respect for preferences as a ground for rejection when the applicant do not meet the set qualifications. Compared to the Kosovo crisis this is a new phenomenon.

The current EU Temporary Relocation System stipulates that national security and public order should be taken into consideration. The reports show that states has used this provision to reject applicants without specifying their justification further. This can be compared to the principle of non-refoulment as found in the Refugee Convention. The exception to the principle can be justified based on danger for the community or the country. The exception refers to specified individuals and to use the exception to exclude a whole group of asylum seekers would be an expansion of the provision beyond the meaning. Such broad interpretations should be used restrictively. When using the security threat as an argument for not receiving asylum seekers through the Temporary Relocation System, the result does not constitute refoulment to the frontiers of the violence, nor does it constitute a violation of the non-derogable human rights regime. Even so, this highlights the sensitive relationship between offering protection for individuals on the one hand and state security on the other. After recent terrorist attacks in Europe, Member States have misused the provision of state security and public order to reject relocation applications which contradicts loyal cooperation and the spirit of solidarity.

Other factors that could explain the insufficient implementation level regarding the current relocation mechanism is that the beneficiaries have, by themselves, managed to travel from the immediate region of the conflict, through neighbouring states before finally arriving to Europe. Many eligible applicants have continued to travel onwards themselves instead of applying for an uncertain place within the relocation system. The number of applicants although increased as a result of restrictions imposed at the border between Greece and Macedonia. This could be explained through insufficient information about the arrangement. Evidence in both cases suggests that there has been a lack of pre-departure information which is crucial in order to ensure a cooperative attitude of the beneficiaries for the to participate voluntarily.

In order to persuade beneficiaries to participate voluntarily and avoid secondary movements harmonisation of national legislation has shown to be of crucial importance. Both arrangement has involved several receiving states with a variety of reception conditions and asylum processes. HEP faced some obstacles as a result of inconsistence, some states that received beneficiaries through the programme replaced those with their resettlement quotas. There was also uncertainty about the justification and purpose, including the protection status granted, and the lines between resettlement, humanitarian evacuation and temporary protection became blurred. Furthermore, difference have been shown regarding the criteria in the selection process between which that was suppose to benefit which actually benefitted. Actors participating in the HEP was unsure if the selection procedure should be based on "first in – first out", family ties in the receiving state, or if priority should be given to the

most vulnerable. This was presumably caused by the rapid creation of the programme. The same problems have not faced the EU Temporary Relocation System, since national legislations within that regional mechanism is more harmonised as a result of CEAS and the work of EASO. Beneficiaries of the relocation scheme are suppose to receive the same treatment irrespective of the receiving state, and the same treatment as refugees and asylum seekers who have arrived by themselves.

6.2 The Emperior´s new Clothes – Introducing a new Sharing Mechanism

- **What obstacles can be identified from previous people sharing mechanisms and what do they suggest for the way forward?**

The current debate within the Union revolves around solving two issues, the first is how to solve the unequal distribution and increase fair sharing of responsibilities among Member States, and the second is how to diminish the increasing number of asylum applications in the Union. An attempt has been made to solve the second issue through the agreement between EU and Turkey. The agreement does not seem to work in practise. I would argue that since intra-EU burden-sharing has faced obstacles in the implementation, at the same time as the rapid escalation of asylum seekers has reached Europe, EU has prioritised outsourcing and burden-shift instead of promoting viable internal solutions. Trading out international obligations to states outside of the Union can not be seen as the main solution. There has also been report regarding serious human rights violations in Turkey. The main solution should be to promote and increase intra-EU viable solutions for burden-sharing instead of trying to diminish the increasing number of asylum applicants. The proposal for a permanent mechanism is an innovative attempt to achieve a fair sharing of protection seekers among Member States and close to unique in its context.

The proposal is formulated in such a way that it would correspond with, and get incorporated to, the Dublin regime and serve as an added emergency mechanism to the established system. This can be seen as a problematic approach since it would serve as an alternative distribution mechanism determining state responsibility in relation to a prepared distribution key triggered by mass influx of asylum seekers. Dublin was not designed to ensure sustainable sharing of responsibility among states but rather to allocate responsibility to states with obligation to protect external borders. Although, it has been shown that effective control of irregular inflow at external borders is dependent on

cooperation with third countries in order to cut of migratory routes, and in addition dependent on cooperation between Member States to protect external borders. The question is if supplementation with a mechanism that contradict the whole purpose of Dublin is the rights way forward, or if the whole regime should be abandoned in favour of a mechanism based primarily on solidarity and fair sharing of responsibilities.

The Temporary Protection Directive was the response offered by EU to the war in Kosovo. The aim with the Directive was to address a situation where a large number of displaced persons arrived to the Union. The Directive has so far not been applied and the definition of mass influx is vaguely formulated without specifying numerical terms. In theory, the Directive could have been used to provide a legal basis for actions in order to cope with the refugee influx from Syria. There is not a specific obligation in the TPD that obliges Member States to receive refugees through relocation, but rather the Directive is based on voluntary assumptions where states through negotiations notify their receiving capacity. The question is if the TPD should be abandoned in favour of a more sustainable mechanism and I would argue that it should be replaced for two main reasons. The first being that todays mixed flow of asylum seekers who seek protection from different conflicts, violence and persecution makes the TDP not effectively applicable in todays context. The second main flaw of the Directive is that it is based on voluntary participation by Member States who, themselves, are to determine their receiving capacity.

The expression the emperor's new clothes comes from Christian Anderson's fairy tail with the same name. The emperor pays a lot of money for new clothes that can only be seen by wise people, but the clothes do not really exist. The expression is used to label fictional items that the viewer has been induced into believing as real but where there still remain questions of whether what they have created is of any actual value, which people are afraid to criticise because everyone else seems to think it is good and important. The proposal for a permanent relocation mechanism is an important contribution to the framework with the aim of receiving a fair sharing of responsibility and promote the principle of solidarity. With that said, if the provision is not filled with important values obligations to ensure the proper effectiveness and applicability, all that remains is a hollowed shell. The proposal includes both a triggering mechanism to determine when such a crisis situation has occurred and a distribution key based on several criteria and indicators.

A crucial feature for a distribution mechanism to work effectively is predictability. To achieve adequate predictability, the mechanism needs to be in place before a crisis strike. That would make

states more reluctant to violate the principles of first entry state and non-refoulment in order to evade their responsibilities. Furthermore, the distribution cannot be dependent on voluntary participation at the discretion of each Member State, nor on self-determination of receiving capacity in order to achieve predictability.

As clearly shown through the comparative analysis above, motivation for participating states to such a scheme is a cornerstone in order to make it work effectively. One approach is to not just understand article 80 TFEU as a moral commitment but rather as a principle carrying legal implications for states. In order to increase the political motivation there need to be a change in the dynamic of the actors. Schengen serves as an important motivation tool. In addition, I would suggest that the proposal also included consequences for states who do not fully comply with their obligations. The original proposal for the EU Temporary Relocation System included a financial penalty or contribution to the EU budget in the event of non participation, but the decisions finally adopted did not include such a penalty. The additional financial contribution would serve to relieve host states of such a systems increased expenses to receive a fair sharing of responsibilities. Put in a game theoretical context, the Prisoner´s Dilemma illustrates a non-cooperative game in the meaning that the outcome cannot be enforced through penalty by a higher institution. When the outcome is not enforceable, the strategy changes. If the mechanism would include a consequence for participants who fail to comply properly, the outcome of the game gets more predictable.

The preference clause should be formulated in such a way that misuse of its aim should not be possible by states. In order to get states to cede from including such a preference clause, a clear distinction needs to be made in todays mixed migration flow between refugees and migrants in the national legislations. Furthermore, as shown above, the provision regarding state security and public order needs to be clarified so that misinterpretation do not halter the effectiveness and adequate implementation of the mechanism. The proposal does not include individual's preference of receiving state, which is problematic in several ways. Firstly, it counteracts the aim to facilitate integration. Secondly, it encourages secondary movements. Thirdly, including a individual preference clause and providing adequate information would make applicants more willing to participate voluntarily. Finally, it is questionable from a human rights approach.

My last suggestion in order to create an effective burden-sharing mechanism built on the principles of solidarity and fair sharing of responsibilities is to increase the work to achieve full harmonisation in national practises. CEAS is characterised by different treatment in both reception conditions and the

asylum processes between Member States. Furthermore, the Qualification Directive sets out standards for the protection status that should be offered, but the recognition rate vary widely between Member States. A proper application of the existing legal framework would consolidate the stability and functioning of CEAS, ensure a humane, fair and effective asylum system for the individual and prevent secondary movements. Harmonisation of norms facilitates mutual trust and cooperation between Member States which is a key for a functioning system.

"The numbers are impressive. For some they are frightening. But now is not the time to take fright. It is time for bold, determined and concerted action by the European Union, by its institutions and by all its Member States."

-    President Juncker, European Commission

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