

# **Solidarity in EU's Asylum Policy: a Difficult But Necessary Pathway**

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*In 2015 the European Union (EU) experienced an unprecedented influx of refugees and migrants (the so-called "the migration crisis"). The European Union and its Member States were not sufficiently prepared to respond effectively. The integrity of both the Common European Asylum System (CEAS) and of the Schengen area of free movement for European citizens were put into question. In the European Agenda on Migration (2015) the European Commission set out both short- and long-term solidarity measures for EU action. The aim of this work is primarily to examine how the principle of solidarity has been understood in the context of the EU's asylum policy (part 2) and how it has been implemented internally – between Member States- (part 3) and externally – with third countries - (part 4). Some essential criteria for the current debate on the future of the CEAS are expounded upon in the conclusions (part 5).*

## 1. Introduction

In 2015 the European Union (EU) experienced an unprecedented influx of refugees and migrants (the so-called “migration crisis”)<sup>1</sup>: 1,255,600 first time asylum seekers applied for international protection in the Member States of the European Union (EU), a number more than double that of the previous year<sup>2</sup>, most of them fleeing from war and terror in Syria and other countries. Migration, asylum and border management systems were put under huge pressure. The EU and its Member States were not sufficiently prepared to respond effectively<sup>3</sup>. The integrity of both the Common European Asylum System (CEAS) and of the Schengen area of free movement for European citizens was put into question. In the European Agenda on Migration (“Agenda”) the European Commission stated that the EU needed

«to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance with the principles of solidarity and shared responsibility»<sup>4</sup>.

The Agenda set out both short- and long-term measures for EU action. Immediate measures based on solidarity were proposed to respond to the human tragedy in the whole of the Mediterranean. It also set out a comprehensive approach addressing all aspects of migration based on the four areas of (1) irregular migration, (2) border management, (3) asylum policy and (4) legal migration as key for delivering an effective and sustainable EU migration policy<sup>5</sup>.

The aim of this work is primarily to examine how the principle of solidarity has been understood in the context of the EU's asylum policy (part 2) and how it has been implemented internally – between Member States- (part 3) and externally –

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1 - EC, *The EU and the migration crisis*, July 2017, p. 1, available at <https://publications.europa.eu/en/publication-detail/-/publication/e9465e4f-b2e4-11e7-837e-01aa75ed71a1/language-en> (11/06/2018)

2 - Eurostat, *Newsrelease*, 44/2016, 4 March 2016 available at <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> (15/06/2018)

3 - See EC, *Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, COM (2016) 197 final, 6.4.2016.

4 - EC, *A European Agenda on Migration*, COM (2015) 240 final, Brussels, 13.5.2015, p. 2.

5 - In 2018 “A New Policy on Migration” is the Priority 8 of the Juncker Commission's Legislative Programme, *The Juncker Commission's ten priorities. State of play in early 2018. In-Depth Analysis*, January 2018. See the Legislative Train Schedule 0.5 2018, available at <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration> (8 June 2018)

with third countries - (part 4). Some essential criteria for the current debate on the future of the CEAS are exposed in the final conclusions (part 5).

## 2. Solidarity in the EU's asylum policy

Solidarity is among the cardinal values of the EU and is even among the foundations of the EU<sup>6</sup>. The European Court of Justice ("the Court") stated that solidarity is at the basis of the whole of the EU system<sup>7</sup>. And that a failure in the duty of solidarity accepted by Member States by the fact of their adherence to the EU strikes at the fundamental basis of the EU legal order<sup>8</sup>. More specifically, solidarity is both a pillar and at the same time a guiding principle of the EU's policies on border checks, asylum and immigration<sup>9</sup>. In this context, the principle of solidarity is intended to ensure that support is given to those Member States, which, on account of geographical and demographic factors, carry a heavier burden of responsibility than others<sup>10</sup>. It is usually linked with the general principle of sincere cooperation established in Article 4 (3) TEU («to assist each other in carrying out tasks which flow from the Treaties») that applies to all policy areas<sup>11</sup>. Additionally, Article 67(2) TFEU states that the EU is to «frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards nationals of third countries»<sup>12</sup>.

6 - See Opinion of Advocate General BOT delivered on 26 July 2017, Cases C-643 and C-647/15 par. 17. "It is therefore appropriate to emphasise at the outset the importance of solidarity as a founding and existential value of the Union", par. 18; "Already asserted in the Treaty of Rome, the requirement of solidarity remains at the heart of the process of integration pursued by the Treaty of Lisbon", par. 19.

7 - Judgment of the Court of 10 of December of 1969, *Commission v. France*, Joined cases 6 and 11/69, par. 16.

8 - Judgment of the Court of 7 of February of 1973, *Commission v. Italy*, Case 39/72, par. 5.

9 - Opinion..., *cit.*, par. 20.

10 - EP, LIBE Committee, 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)*, 17.5.2015, p. 3. At the international level, solidarity is also a cardinal value of asylum policy. The fourth recital of the Preamble to the Convention of 1951 relating to the Status of Refugees, of 28 July 1951, provides that "the grant of asylum may place unduly heavy burdens on certain countries, and ... a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be obtained without international cooperation".

11 - EP, Study of the Policy Department C: Citizens' Rights and Constitutional Affairs, *The Implementation of Article 80 TFEU, on the principles of solidarity and fair sharing of responsibility, including financial implications, between Member States in the field of borders checks, asylum and immigration*, 2011, p. 31.

12 - At the international level, solidarity is also a cardinal value of asylum policy. The fourth recital of the Preamble to the Convention of 1951 relating to the Status of Refugees, of 28 July 1951, provides that "the

On this basis (mutual trust and assistance), solidarity in the EU's asylum policy has at least two cardinal components: the respect for the fundamental rights of asylum seekers (human rights-based solidarity) and the fair sharing of responsibilities<sup>13</sup>.

### *2.1. Human rights-based solidarity*

Asylum seekers have the right to seek and enjoy asylum according to Article 14 (1) of the Universal Declaration of Human Rights and the right to asylum according to Article 18 of the EU Charter of Fundamental Rights ("the Charter")<sup>14</sup>. Even those who are irregularly present and liable to removal are human rights bearers. Their human rights should not be violated, nor should they be treated as mere objects of state power<sup>15</sup>. The EU and the Member States have human rights commitments such as the requirement to use detention sparingly, and procedural rights such as the right to be heard and the right to effective judicial protection. Rightly, the LIBE Committee observes, «this basic value [human rights] can be overshadowed when asylum seekers are reified as a burden to be dealt with»<sup>16</sup>. In *N.S.* the Court made it clear that

«To ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' ... where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being sub-

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grant of asylum may place unduly heavy burdens on certain countries, and ... a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be obtained without international cooperation".

**13** - According to the Commission, the objective of the EU's policy on asylum is to develop and establish a Common European Asylum System (CEAS), consistent with the values and humanitarian tradition of the EU and governed by the principle of solidarity and fair sharing of responsibility, COM (2016) 271 final, 4.5.2016. In LIBE Committee's view this means that the *ultima ratio* of using solidarity and responsibility-sharing measures must be to enhance the quality and functioning of the (CEAS) in full respect for fundamental rights, *Working document*, p. 4.

**14** - (OJ C 363, 18.12.2000).

**15** - *Working Document*..., cit., p. 19.

**16** - *Id.*, p. 19.

jected to inhuman or degrading treatment within the meaning of Article 4 of the Charter»<sup>17</sup>.

In the EU the right to asylum must be guaranteed with due respect for the rules of the Geneva Convention<sup>18</sup> and in accordance with the TEU and the TFEU. Therefore, the right of asylum is generally guaranteed with the same content and legal scope as the Geneva Convention, and additionally, refers to the development standards adopted by the institutions of the EU based on the competences attributed to them by the treaties. International law does not impose on States the duty to grant asylum to aliens or stateless persons fleeing the country of their nationality or residence, the only obligation that can be extracted is the derivative of the principle of *non-refoulement*. This obligation is included in Article 19 of the Charter, that is, the prohibition to return a person to a situation where he or she has a well-founded fear of being persecuted or runs a real risk of torture or inhuman and degrading treatment or punishment. Likewise, this rule prohibits collective expulsions.

## ***2.2. The principle of solidarity and fair sharing of responsibility***

Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. In the EU's asylum law solidarity can take many forms but falls broadly into two categories: (a) "internal solidarity" relates to the solidarity shown from one Member State to another Member State, or from the EU as a whole towards one of its Member States, or from EU citizens towards third country nationals present in the EU; (b) "external solidarity" refers to solidarity by the EU towards those people, not in the territory of the EU, who are affected by war, persecution, hunger or violent conflicts in their country of origin, those who are at risk of losing their lives in makeshift boats crossing the Mediterranean, and to solidarity with third countries that currently receive in their territories and in their communities huge numbers of refugees fleeing war, persecution and hunger in neighboring countries<sup>19</sup>.

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<sup>17</sup> - Judgement of the Court (Grand Chamber) of 21 December 2011, Joined Cases C-411/10 and C-493/10, par. 94.

<sup>18</sup> - See, G. S. Goodwin-Gill, and J. McAdam, *The Refugee in International Law*, Oxford University Press, Oxford 20073.

<sup>19</sup> - *Working document*, cit., p. 4.

### 3. Intra-EU solidarity

in the last decade EU implementation of solidarity in the field of asylum law – mainly in burden/responsibility sharing – is the subject of intense debate<sup>20</sup>. In the following sections we will briefly explain the main mechanisms established at the EU level to give effect to the principle of solidarity between Member States. As we will see these mechanisms apply only to emergency situations or crises, mainly because the Dublin system fails to provide a structural solidarity and a system to share responsibilities.

#### 3.1. The Common European Asylum System (CEAS)

The CEAS is a legislative framework established by the EU to regulate and set common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU Member States<sup>21</sup>. The CEAS was born out of the recognition that, in an area without internal frontiers, asylum needed harmonised regulation at the EU level<sup>22</sup>. It was considered that a failure to do so would likely result in the “secondary movement” of asylum-seekers. The evolution of the CEAS shows how the effectiveness of the asylum system in the EU depends on the degree of solidarity among Member States. At the moment, the system is fundamentally based on a “reactive solidarity” - responding to emergencies and crises - more than a “structural solidarity” - focused on the establishment of a just and equitable system according to Article 76 (2) TFEU and Article 80 TFEU-.

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20 - See, in particular, on this topic, *Searching for Solidarity in EU Asylum and Border Policies, a collection of short papers following the Odysseus Network's First Annual Policy Conference*, 26-27 February 2016, Université libre de Bruxelles; E. Küçük, *The principle of solidarity and fairness in sharing responsibility: more than window dressing?*, «European Law Journal», 2016, pp. 448 to 469; J. Bast, *Deepening supranational integration: interstate solidarity in EU migration law*, «European Public Law», No 22, Issue 2, 2016, pp. 289 to 304; V. Moreno-Lax, *Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy*, «Maastricht Journal of European and Comparative Law», Volume: 24 issue: 5, 740-762.

21 - EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals. A Judicial Analysis*, August 2016, p. 13.

22 - The harmonization of Member States' asylum law was first pursued through intergovernmental cooperation under the 1992 Maastricht Treaty (Title VI). Under the Treaty of Amsterdam, which came into force in May 1999, asylum and immigration became an area of supranational EU competence thereby establishing the foundations for a CEAS (Article 63 TEC).

### 3.1.1. The First phase (1999 – 2005)

The creation of the CEAS started immediately after the entry into force of the Treaty of Amsterdam (May 1999). During the first phase of the CEAS, the goal was to harmonise Member States' legal frameworks on the basis of common minimum standards and a system of coordination and cooperation of national asylum systems: a) The "Asylum Procedures Directive" (setting out the procedural rules which apply to each asylum-seeker's application)<sup>23</sup>; b) The "Reception Conditions Directive" (setting out the treatment of asylum-seekers as regards education, welfare etc)<sup>24</sup>; c) The "Qualification Directive" (defining the criteria to be a refugee, or to obtain subsidiary protection, in the EU, and the content of that status)<sup>25</sup>; d) The "Dublin Regulation" (determining which single Member State is responsible for each asylum-seeker's application for asylum)<sup>26</sup>; e) The Eurodac Regulation (supporting the application of the Dublin Regulation, by setting up a database of fingerprints of asylum-seekers and others)<sup>27</sup>; the "Temporary protection" (establishing minimum standards for giving temporary protection in the event of a mass influx of displaced persons)<sup>28</sup>.

Notwithstanding the implementation of the minimum standards set out in the first phase instruments, there remained significant disparities between Member States in their reception of applicants, procedures, and assessment of qualification for international protection. This was considered to result in divergent outcomes for applicants, which went against the principle of providing equal access to protection across the EU<sup>29</sup>. They required amendment in order to achieve a higher degree of harmonisation and improved standards. The Commission also agreed there was need of a higher degree of solidarity and responsibility among the Member States, as well as between the EU and third countries<sup>30</sup>. Together with solidarity within the EU, the Commission introduced the idea of "external solidarity", between the EU and third countries, as the basis for a series of interconnected measures to promote the protection of refugees and strengthen the external dimension

23 - Council Directive 2005/85/EC of 1 December 2005 (OJ L 326/13, 13.12.2005).

24 - Council Directive 2003/9/EC of 27 January 2003 (OJ L 31/18, 6.02.2003).

25 - Council Directive 2004/83/EC of 29 April 2004 OJ L 304/12, 30.09.2004).

26 - Commission Regulation (EC) No 1560/2003 of 2 September 2003 (OJ L 222/3, 5.09.2003).

27 - Council Regulation (EC) No 2725/2000 of 11 December 2000 (OJ L 316/1, 15.12.2000).

28 - Council Directive 2001/55/EC of 20 July 2001 (OJ L 212/12, 7.8.2011).

29 - EC, *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, 17 June 2008, COM (2008) 360 final, p. 3.

30 - *Ibid.*, p. 4.

of asylum. After the entry into force of the Treaty of Lisbon (December 2009), EU asylum law was updated as part of the second phase of the CEAS<sup>31</sup>.

### 3.1.2. The second phase (2009 – 2013)

According to the 2009 Stockholm Programme, the objective of the second phase of the CEAS was «establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection on the basis of high protection standards»<sup>32</sup>. Furthermore, the European Council recognized that

«[p]romoting solidarity within the EU is crucial but not sufficient to achieve a credible and sustainable common asylum policy. It is therefore important to further develop instruments to express solidarity with third countries in order to promote and help building capacity to handle migratory flows and protracted refugee situations in these countries»<sup>33</sup>.

The legal basis of EU asylum policy is Article 78 (1) TFEU under which the EU shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention and other relevant treaties. Article 78 (2) TFEU attributes the rank of primary law to the objective of establishing the CEAS.

By June 2013 the second phase of the CEAS was completed with the enactment of amended or so-called recast secondary legislation<sup>34</sup>. In 2016 and 2017 Member States changed their legislation to comply with the (recast) Directives, thus introducing changes to the asylum procedures, reception conditions and the qualification of persons seeking international protection<sup>35</sup>. Nonetheless, the cur-

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**31** - The Hague Programme (2005 – 2009) set as the aims of the CEAS in its second phase (OJ C53, 3.3.2005).

**32** - European Council, *The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens*, 2 December 2009, [2102] OJ C 115/1, Section 6.2.

**33** - *Ibid.*, p. 82.

**34** - Directive 2011/95/EU of 13 December 2011; Regulation (EU) No 603/2013 of 26 June 2013 Regulation (EU) No 604/2013 of 26 June 2013; Directive 2013/33/EU of 26 June 2013; Directive 2013/32/EU of the Council of 26 June 2013; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013.

**35** - *Progress Report...* cit., p. 19.



rent common asylum policy is not yet synonymous with a 'uniform asylum system' across the EU marked by a 'single asylum procedure' or a 'single refugee status' across the EU. In practice, asylum seekers are treated differently and recognition rates vary from one Member State to another. These divergences continue to encourage secondary movements and asylum shopping. As a result, due to the recent migratory crisis, several Member States have put in place temporary internal border controls<sup>36</sup>. The situation does not seem to be improving in the short term. In the recent *Progress Report on the Implementation of the Agenda on Migration*, the Commission has affirmed, «the drivers behind migratory pressure on Europe are structural»<sup>37</sup>. This forces us to rethink the future of the CEAS in the medium and long term so that the two objectives described *supra* are achieved: the protection of the fundamental rights of asylum seekers (and migrants) and the fair sharing of responsibilities between Member States.

### 3.2. *Emergency solidarity measures*

To date major calls for internal solidarity in the EU are either linked to emergency influxes, or to states that are not yet, for whatever reason, fully implementing the content of legislative instruments<sup>38</sup>. Solidarity in emergency cases seems to be somewhat more achievable, particularly when the emergency either faces a number of Member States at the same time or is linked to or part of a globally important humanitarian event<sup>39</sup>. The recent migratory crisis is a good example of that. The following are some of the internal solidarity measures adopted at the EU level to compensate for the deficiencies of the CEAS (structural solidarity).

#### 3.2.1. *Technical and operational solidarity*

The entire CEAS is interlinked with the control of the external borders. The responsibility for the control and surveillance of external borders lies with the Member States. Geography is the decisive factor for where major responsibility for asy-

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36 - See [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en) (12 June 2018)

37 - European Commission, *Progress Report on the Implementation of the European Agenda on Migration*, COM (2018) 301 final, Brussels, 16.5.2018, p. 19. See, for example two publications from the European Commission Joint Research Centre: *Demographic and Human Capital Scenarios for the 21st Century: 2018 assessment for 201 countries, and Many more to come? Migration from and within Africa* (Publications Office of the European Union, Luxembourg, 2018).

38 - See *Study*, cit., p. 93.

39 - *Ibid.*

lum seeker claims, procedures, protection and integration lies<sup>40</sup>. The EU provides technical and operative assistance to Member States facing specific and disproportionate migration pressures.

*(a) Frontex, RABIT, EASO*

On 26 October 2004, the Council and the Parliament established the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) to assist Member States with implementing the operational aspects of external border management, including return of third-country nationals illegally present in the Member States<sup>41</sup>. Frontex was established to promote solidarity between Member States, especially those facing specific and disproportionate pressures<sup>42</sup>. Recently a new mechanism has been incorporated to improve its work: the Rapid Border Intervention Teams (RABIT)<sup>43</sup>. These teams comprise specially trained experts from other Member States on its territory to assist its national border guards on a temporary basis. It is expected «the deployment of the RABIT will contribute to increasing solidarity and mutual assistance between Member States»<sup>44</sup>.

Likewise, the creation of the European Asylum Support Office (EASO) in May 2010 has further strengthened practical cooperation in the field of asylum<sup>45</sup>. The EASO supports Member States in their efforts to implement a more consistent and fair asylum policy, for example by helping to identify good practices, organizing training at the EU level and improving access to accurate information on countries of origin of the asylum seekers. It also provides technical and operational support to Member States facing particular pressures on their asylum and reception systems. Such support is, for instance, channeled through the deployment of asylum expert teams who can help alleviate some of the pressure on the country's asylum systems<sup>46</sup>.

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40 - *Ibid.*, p. 94.

41 - Regulation (EC) No 2007/2004 of 26 October 2004 (OJ L 349, 25.11.2004).

42 - The Agency can: (a) assist on matters of coordination between two or more Member States with a view to tackling the problems encountered at external borders; (b) deploy its experts to support the competent national authorities of the Member State(s) involved for the appropriate duration, (c) deploy border guards from the European Border Guard Teams, Regulation (EC) No 2007/2004 Article 8 (2).

43 - Regulation (EC) No 863/2007 of 11 July 2007 (OJ L199, 31.7.2007).

44 - *Ibid.*, Preamble, recital 6.

45 - Regulation No 439/2010 of 19 May 2010 (OJ L.132, 29.05.2010).

46 - For example, an Operating Plan for the deployment of EU Asylum Support Teams in Greece was signed on 1 April 2011, with the aim of assisting the Greek authorities in setting up a modern and efficient

**(b) “Hotspot approach”**

The “hotspot approach” is a cornerstone of the broad range of measures set out by the Commission in the Agenda<sup>47</sup>. This approach is conceived as a tangible operational achievement and a concrete example of the principles of solidarity and responsibility in responding to the pressure faced by Greece and Italy. According to it, EASO, Frontex, Europol and Eurojust will work on the ground with the authorities of the frontline Member State to help to fulfill their obligations under EU law and swiftly identify, register and fingerprint incoming migrants. It has been incorporated in the new European Border and Coast Guard Regulation<sup>48</sup>. It also contributes to the implementation of the relocation schemes proposed by the European Commission<sup>49</sup>. In March 2018, the Commission informed that despite progress in terms of improving conditions in the existing capacity, reception places available in hot-spots in Greece remain insufficient<sup>50</sup>. In May 2018, it also reported that despite the increase of reception capacity (from 6,292 to 6,338 places) «the reception conditions remain a serious concern»<sup>51</sup>. The main preoccupation is providing adequate shelter for unaccompanied minors. In Italy, the Ministry of the Interior is considering opening three additional hotspot in 2018<sup>52</sup>.

### 3.2.2. Relocation

Relocation has emerged as the measure of solidarity suggested to compensate for the impacts of the Dublin regulation, as well for use in emergencies or situations in which a Member State’s capacities are exceeded<sup>53</sup>. Two different relocation mechanisms have been implemented or proposed at the EU level.

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asylum and reception system. The first team was deployed in May 2011. Several Member States have offered their experts, see [http://europa.eu/rapid/press-release\\_MEMO-11-861\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-861_en.htm?locale=en) (13 June 2018)

47 - COM (2015) 240 final, p. 6.

48 - Regulation (EU) 2016/1624 of 14 September 2016 (OJ L 251, 16.9.2016, p. 1).

49 - *Managing the Refugee Crisis. Balancing responsibility and solidarity on migration and asylum*, 10.02.2016, p. 2.

50 - *Progress Report...* cit., 14.3.2018, p. 5.

51 - *Id.*

52 - *Id.* p. 7.

53 - *Study...* cit., p. 94. Relocation is the transfer of an applicant for international protection, or a beneficiary of international protection, from one Member State to another Member State within the European Union.

**(a) Emergency relocation mechanism**

Article 78(3) TFUE provides a specific legal basis to deal with emergency situations. Based on a proposal by the European Commission, it enables the Council, after consulting the European Parliament, to adopt provisional measures for the benefit of Member State(s) confronted with «an emergency situation characterized by a sudden inflow of nationals of third countries into one or more Member State(s)»<sup>54</sup>. The crisis situation in the Mediterranean prompted the EU institutions to call for concrete measures of solidarity towards the frontline Member States<sup>55</sup>. On 20 April 2015, the Commission presented a *ten-point plan* for immediate action to be taken in response to this crisis, including a commitment to consider options for an emergency relocation mechanism<sup>56</sup>. This proposal was supported by the European Parliament<sup>57</sup>. At its meeting of 25 and 26 June 2015, the European Council agreed, in the light of the emergency situation and the commitment to reinforce solidarity and responsibility, on the temporary and exceptional relocation over 2 years, from Italy and from Greece to other Member States of 40 000 persons in clear need of international protection, in which all Member States would participate<sup>58</sup>.

Based on Commission proposals, the JHA Council adopted in September 2015 two Decisions to relocate asylum seekers from Italy and Greece<sup>59</sup>. Under the emergency relocation scheme up to 160,000 asylum seekers with a high chance of having their applications successfully processed were to be relocated from Greece and Italy, where they had arrived, to other Member States where they would have their asylum applications processed. Member State of relocation would receive a lump sum of EUR 6,000 for each relocated person. This financial support was imple-

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**54** - Since 2009, measures have been undertaken to assist Malta to cope with the pressures of hosting a relatively large number of recognised beneficiaries of international protection. A number of relocation measures have been implemented, both through the Pilot Project for intra-EU Relocation from Malta (EU-REMA1 - phase I and II) and bilateral arrangements among EU Member States, Associated Countries and Malta. See *EASO fact-finding report on intra-EU relocation activities from Malta*, July 2012.

**55** - Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM( 2015) 451 final, Brussels, 9.9.2015.

**56** - See [http://europa.eu/rapid/press-release\\_IP-15-4813\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4813_en.htm) (13/06/2018)

**57** - See Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095 [INI]).

**58** - European Council meeting (25 and 26 June 2015) - *Conclusions*, EUCO 22/15, Brussels, 26 June 2016, p. 3.

**59** - Council Decision (EU) 2015/1523 of 14 September 2015 (OJ 2015 L 239 p. 146) "Relocation of 40,000 applicants"; Council Decision (EU) 2015/1601 of 22 September 2015 (OJ 2015 L 248, p. 80) "Relocation of 120,000 applicants".

mented by applying the procedures laid down in Article 18 of Regulation (EU) No 516/2014<sup>60</sup>. The distribution was based on criteria reflecting the capacity to integrate refugees<sup>61</sup>.

The main controversial feature of the “Emergency relocation mechanism” was its binding nature<sup>62</sup>. It only recognized the Member States’ right to refuse to relocate an applicant where there were reasonable grounds for regarding him or her as a danger to their national security or public order or where there were serious reasons for applying the exclusion provisions set out in the Qualification Directive. The Slovak Republic and Hungary seek annulment of Council Decision (EU) 2015/1601<sup>63</sup>. Both contend, *inter alia*, that Article 78(3) TFEU did not constitute an adequate legal basis for the adoption of the contested decision<sup>64</sup>. The Court ruled that Article 78(3) TFEU does not define the nature of the provisional measures that may be adopted pursuant to it<sup>65</sup> and that it «affords the Council discretion to determine their period of application on an individual basis, in the light of the circumstances of the case and, in particular, of the specific features of the emergency situation justifying those measures»<sup>66</sup>.

In relation to the principle of proportionality –provisional measures to solve structural problems - the Courts found

«the Council ... was in fact required ... to give effect to the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States, which applies, under Article 80 TFEU, when the EU common policy on asylum is implemented»<sup>67</sup>.

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60 - Regulation (EU) No 516/2014 of 16 April 2014 (OJ L 150/168, 20.5.2014).

61 - The distribution key is based on the following criteria: a) The size of the population (40% weighting). This criterion reflects the capacity of a Member State to absorb a certain number of refugees; b) Total GDP (40% weighting). This criterion reflects the absolute wealth of a country and is indicative of the capacity of an economy to absorb and integrate refugees; c) Average number of asylum applications per one million inhabitants over the period 2010-2014 (10% weighting, with a 30% cap of the population and GDP effect on the key). This criterion reflects the existing burden on a Member State in terms of asylum applications; d) Unemployment rate (10% weighting, with a 30% cap of the population and GDP effect on the key). COM (2015) 451 final, Brussels, 9.9.2015, Annexes.

62 - “Member States *shall*, at regular intervals, and at least every three months, indicate the number of applicants who can be relocated swiftly to their territory and any other relevant information” (Article 5.2).

63 - Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic, Hungary v Council of the European Union*, Joint Cases C-643/15 and C-647/15.

64 - Judgment, par. 47 – 56, 85 – 88, 104 – 112.

65 - *Ibid.*, par. 70.

66 - *Ibid.*, par. 92.

67 - *Ibid.*, par. 252.

It understood that, in the circumstances of the case, there was no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take ... provisional measures imposing a binding relocation mechanism, such as that provided for in the contested decision»<sup>68</sup>. Finally, the Court ruled on the legality of the provisional measures<sup>69</sup>. Accordingly, on 7 December 2017, the Commission referred the Czech Republic, Hungary and Poland to the Court for failing to contribute to relocation in breach of their legal obligations<sup>70</sup>.

### ***(b) Permanent relocation mechanism***

On 9 September 2015, the European Commission approved a legislative proposal for a Regulation establishing a (permanent) crisis relocation mechanism<sup>71</sup>. The overall objective of this legislative proposal is to ensure that the EU has at its disposal a robust crisis relocation mechanism to structurally deal with situations of crisis in the asylum area in an effective manner. This proposal amends Regulation (EU) No 604/2013 and should therefore be adopted on the same legal basis, namely Article 78 (2) (e) TFEU, in accordance with the ordinary legislative procedure. The crisis relocation mechanism contained in this proposal entails permanent derogations, to be activated in specific situations of crisis to the benefit of specific Member States, notably from the principle laid down in Article 3(1) of Regulation (EU) No 604/2013 according to which an application for international protection shall be examined by the Member State which the criteria set out in Chapter III indicate as being responsible. In place of this principle, the proposal establishes, for well-prescribed crisis circumstances, a mandatory distribution key for determining the responsibility for examining applications.

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68 - *Ibid.*, par. 253.

69 - *Ibid.*, par. 345.

70 - By the end of March 2018, all eligible applicants had been relocated from Greece and Italy to other Member States. *Progress report on the implementation of the European Agenda on Migration*, COM (2018) 301 final, 16.5.2018, p. 17. In September 2017, given the continuing migratory pressure on Greece and Italy, the Commission called on all Member States to consider continuing relocations on a voluntary basis, beyond the emergency relocation schemes, and committed to provide necessary financial support <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0450> (7 June 2018)

71 - COM (2015) 450 final.

### 3.2.3. Financial aspects of solidarity

Article 80 TFEU expressly states the common policies of asylum and migration and external borders are based on the principle of solidarity and fair sharing of responsibilities between Member States. EU funding provides the concrete financial means to translate this principle into practice<sup>72</sup>.

#### *(a) European Refugee Fund (ERF)*

The European Refugee Fund (ERF) is one of the four financial instruments of the General Programme "Solidarity and Management of Migration Flows"<sup>73</sup>. The general objective of the ERF is to support and improve the efforts of Member States to improve reception conditions, to apply fair and effective asylum procedures and to promote good practices in the field of asylum so as to protect the rights of persons requiring international protection and enable Member States asylum systems to work efficiently. The amount allocated to the Fund for the period 2008-2013 was €628 million. All EU member states, except for Denmark, are beneficiaries of the ERF. Most of the Fund is distributed to member states while about ten percent is earmarked for community actions involving more than one country<sup>74</sup>. In the opinion of the EP, the ERF has not been used necessarily to stimulate solidarity as such, but to offer collective funding for national projects<sup>75</sup>.

#### *(b) Asylum, Migration and Integration Fund (AMIF)*

The Asylum and Migration Fund (AMIF) was established on 16 April 2014<sup>76</sup>. The general objective of the AMIF is to contribute to the efficient management of migration flows and to the implementation, strengthening and development of the common policy on asylum, subsidiary protection and temporary protection and the common immigration policy, while fully respecting the rights and principles enshrined in the Charter. Among the AMIF's specific objectives is to enhance solidar-

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72 - EC, *A Modern Budget for a Union that Protects, Empowers and Defends - The Multiannual Financial Framework for 2021-2027*, COM (2018) 321 final of 2.5.2018, p. 62.

73 - Communication from the Commission to the Council and the European Parliament establishing a framework programme on solidarity and management of migration flows for the period 2007-2013, COM (2005) 123 final.

74 - <http://www.unhcr.org/ceu/173-engeneralpartnerseuropean-unioneuropean-refugee-fund-html.html> (13/06/2018)

75 - *Study*, cit., p. 96.

76 - Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 (OJ L 347, 20.12.2013).

ity and responsibility-sharing between the Member States, in particular those most affected by migration and asylum flows, including through practical cooperation. The AMIF was set up for the period 2014-20, with a total of EUR 3.137 billion for the seven years<sup>77</sup>. For the period 2021-2027 the budget proposed is of €10,415<sup>78</sup>

### 3.2.4. Temporary Protection Directive (TPD)

The Temporary Protection Directive (TPD) was set up to respond to the Kosovo refugee crisis of 1999<sup>79</sup>. The aim of the TPD is to set up a scheme to deal with mass arrivals in the EU of foreign nationals who cannot return to their countries – in particular due to war, violence or human rights violations. Temporary protection is implemented in all EU countries by a Council decision confirming a mass influx of displaced people to the EU and stating the groups of people who need protection. EU countries must give people who are granted temporary protection a residence permit. One of the greatest strengths of the TPD is that it foresaw an in-built form of solidarity mechanism<sup>80</sup>. However, the essentially voluntary nature of the solidarity mechanism is a critical weakness of the TPD<sup>81</sup>.

This solidarity mechanism can «apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons»<sup>82</sup>. The EU's TPD has not been applied during the 2015 migration crisis in order to receive Syrians and other asylum seekers.

### 3.3. Dublin reform: towards a structural solidarity system

On 4 May and 13 July 2016, the Commission submitted seven legislative proposals aimed at reforming the CEAS<sup>83</sup>. This package included the recast of the Dublin Regulation and of the Eurodac Regulation, a proposal for a Regulation on the establishment of the European Union Agency for Asylum (EUAA), a proposal for a Regulation establishing a common procedure for international protection in the EU, a proposal for a Qualification Regulation, the recasting of the Reception Condi-

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77 - Council Regulation (EU, Euratom) 2017/1123 of 20 June 2017 (OJ L 163/1, 24.6.2017).

78 - EC, *A Modern Budget for a Union that Protects, Empowers and Defends - The Multiannual Financial Framework for 2021-2027*, COM (2018) 321 final of 2.5.2018, ANNEX, p. 62.

79 - Council Directive 2001/55/EC of 20 July 2001, Preamble, recital 3 (OJ L 212/12, 7.8.2001).

80 - *Id.*, recital 20.

81 - EC, *Study on the Temporary Protection Directive. Final Report*, January 2016, p. 29.

82 - Joined Cases C-411/10 and C-493/10, par. 93.

83 - EC, *Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, COM (2016) 197 final, 6.4.2016.



tions Directive and a proposal for a Regulation establishing a Union Resettlement Framework<sup>84</sup>. In the Commission's view, the EU is working towards an integrated, sustainable and holistic EU migration policy based on solidarity and fair sharing of responsibilities and which can function effectively both in times of calm and crisis<sup>85</sup>. At its meeting of 15 December 2016, the European Council recognized «[t]he effective application of the principles of responsibility and solidarity remains a shared objective» but expressed that negotiations «have shown some areas of convergence, while other areas require further work»<sup>86</sup>. In June and October 2017 it reiterated, «there is a common understanding that the reformed CEAS needs to strike the right balance between responsibility and solidarity and that it needs to ensure resilience to future crises»<sup>87</sup>. So far no consensus has been reached; negotiations continue.

The EU's rules for determining which Member State is responsible for dealing with each asylum application (known as the Dublin system) were not designed to ensure a sustainable sharing of responsibility across the EU and guarantee timely processing of applications<sup>88</sup>. After consultations with the European Parliament and the Member States, as well as the UNCHR and civil society, the Commission confirmed divergent views on the nature and extent to which the Dublin Regulation should be reformed<sup>89</sup>.

Against this background, the Commission carefully assessed the arguments brought forward and came to the conclusion that the current criteria in the Dublin system should be preserved, while supplementing them with a "corrective allocation mechanism" to relieve Member States under disproportionate pressure<sup>90</sup>. The aim of the mechanism is to complement the current system. It shall be applied for the benefit of a Member State confronted with a disproportionate number of applications for international protection. The European Union Agency for Asylum

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84 - COM (2016) 270 final; COM (2016) 272 final; COM (2016) 271 final; COM (2016) 466 final; COM (2016) 567 final; COM (2016) 465 final.

85 - COM (2016) 197 final, p. 20.

86 - European Council meeting (15 December 2016) - *Conclusions*, Brussels, 15 December 2016, EUCO 34/16.

87 - European Council meeting (22 and 23 June 2017) – *Conclusions*, Brussels, 23 June 2017, EUCO 8/17.

88 - See in particular ECRE, *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe, September 2005*, and *Sharing Responsibility for Refugees Protection in Europe: Dublin Reconsidered*, March 2008 available at [https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Sharing-Responsibility-for-Refugee-Protection-in-Europe-Dublin-Reconsidered\\_March-2008.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Sharing-Responsibility-for-Refugee-Protection-in-Europe-Dublin-Reconsidered_March-2008.pdf) (16 June 2018).

89 - COM (2016) 270 final, p. 4.

90 - *Ibid.*

shall establish the “reference key” on the basis of which the mechanism is applied<sup>91</sup>.

The most critical consider

«a reform which engages only superficially with long-standing and well-documented criticisms of the Dublin system, runs a high risk of perpetuating inefficient and unworkable mechanisms for allocation of responsibility that are unfair to both asylum seekers and Member States»<sup>92</sup>.

And that «the proposal must take into account the lack of fairness underpinning the Dublin system, which creates different incentives for Member States to disregard the responsibility rules»<sup>93</sup>.

#### **4. EU external solidarity**

According to article 21 TUE, the EU's external action – included the external action in migration and asylum policies - shall be guided by the principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The principle of solidarity, in this context, appears as an operational principle. It is related to the mandate «to promote multilateral solutions to common problems» (Article 21. 1 *in fine*) and the realization of the objectives set in paragraph 2, specifically «to promote an international system based on stronger multilateral cooperation and good global governance». The EU shall also ensure consistency between the different areas of its external action and between these and its other policies (par. 3 *in fine*). Furthermore, on the basis of these principles, the European Council «shall indentify the strategic interests and objectives of the Union» (article 22 TUE). This means that the external action of the EU (including interna-

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<sup>91</sup> - The reference key shall be based on the size of the population (50% weighting) and the total GDP (50% weighting). A Member State will also have the option to temporarily not take part in the reallocation. In that case, it would have to make a solidarity contribution of €250,000 for each applicant for whom it would otherwise have been responsible under the fairness mechanism, to the Member State to which is reallocated the person instead, COM (2016) 270 final, p. 19.

<sup>92</sup> - *ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270*, October 2016, p. 4 available at <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf> (18 June 2018).

<sup>93</sup> - *Ibid.*

tional cooperation on asylum) is not only guided by principles and values (like global solidarity) but also by its own "interests" (political, economic, security etc.)

#### 4.1. *The External Dimension of EU Asylum Policy*

The External Dimension of the Asylum Policy constitutes a set of complementary and non-substitutive measures of the CEAS that aim to increase the protection capacity of the regions of origin and transit, and at the same time achieve a more orderly and better-organized entry into the territories of the Member States of the EU<sup>94</sup>. These measures must respect the commitment made by the Member States in the European Pact on Immigration and Asylum (2008) according to which «the necessary reinforcement of controls at European borders should not prevent access to protection systems by those people entitled to benefit under them»<sup>95</sup>.

In Conclusion 26 of the Thessaloniki European Council (2003), the Commission was invited «to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection and to examine ways and means to enhance the protection capacity of regions of origin»<sup>96</sup>. In June 2004 the Commission made proposals for a new EU approach to the international protection regime based on the «principle of sharing responsibility» for managing refugees with third countries and particularly countries of first asylum. More specifically, the Commission identified some elements for achieving more orderly and managed arrival in the EU and the enhancement of the protection capacity of regions of origin, mainly, EU Regional Protection Programmes (RPPs) and the EU Resettlement scheme. Both were included in The Hague and Stockholm Programmes with the intention to promote external solidarity<sup>97</sup>.

In 2011, due to the Arab spring and other events in the Southern Mediterranean, the Commission launched the Global Approach to Migration and Mobility (GAMM)

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94 - M. E. Salamanca, *La dimensión exterior de la política común de asilo: ¿solidaridad internacional o elusión de responsabilidades?*, in J. Martín y Pérez de Nanclares (coord.), *La Dimensión Exterior del Espacio de Libertad, Seguridad y Justicia de la Unión Europea*, Iustel, 2012, p. 283.

95 - Council of the European Union, 13440, 24 September 2008, p. 11.

96 - Thessaloniki European Council, 19 and 20 June 2003, 1 October 2003, 11638/03.

97 - In the "Stockholm Programme" the European Council clearly affirmed that "promoting solidarity within the EU is crucial but not sufficient to achieve a credible and sustainable common asylum policy" and added that "it is therefore important to further develop instruments to express solidarity with third countries in order to promote and help build capacity to handle migratory flows and protracted refugee situations in these countries, The Stockholm Programme - An open and secure Europe serving and protecting the citizens, 2 December 2009, 6.2.3.

for a «coherent and comprehensive migration policy for the EU»<sup>98</sup>. The GAMM reinforces the links between relevant EU policy areas and between the external and internal dimensions of those policies<sup>99</sup>. The framework defines how the EU conducts its policy dialogues and cooperation with non-EU countries, based on clearly defined priorities and embedded in the EU's overall external action, including development cooperation. «Promoting international protection and enhancing the external dimension of the asylum policy» constitutes the third pillar of the GAMM<sup>100</sup>.

Another strategic document adopted at the EU level is the Task Force Mediterranean (TFM)<sup>101</sup>. The TFM Communication called for RPPs to be reinforced and further developed; on the side of resettlement, it invites Member States to increase their commitment, as a long-term solution for preventing and addressing protracted refugee situations. A third priority touched upon in the TFM Communication is the possibility of further exploring the introduction of protected entry procedures (PEPs) in the EU<sup>102</sup>.

The «Strategic Guidelines on the Area of Freedom Security and Justice» approved by the European Council on June 2014 to replace the Stockholm Programme just stresses «the importance of improving and strengthening regional protection programmes and increasing the quantity and the quality of resettlement»<sup>103</sup>. Finally, the European Agenda on Migration includes as a first point further development of Regional Development and Protection Programmes (RDPPs) in the Middle East and North Africa and announces more funds to achieve that aim<sup>104</sup>. The Agenda also briefly touches upon alternative legal avenues to access asylum, by inviting Member States to make full use of private/ non-governmental sponsorships, humanitarian permits, and family reunification clauses<sup>105</sup>.

#### **4.2. The EU's external solidarity mechanisms**

The general objective of the external solidarity mechanisms established by the EU is to increase cooperation with relevant non-EU countries in order to strengthen their asylum and national asylum systems and to ensure compliance with interna-

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<sup>98</sup> - COM (2011) 743 final, 18.11.2011.

<sup>99</sup> - *Ibid.*, p. 3.

<sup>100</sup> - *Ibid.*, p. 17.

<sup>101</sup> - COM (2013) 869 final.

<sup>102</sup> - *Id.*

<sup>103</sup> - See "European Council Conclusions", 26/27 June 2014.

<sup>104</sup> - COM (2015) 240 final, p. 2.

<sup>105</sup> - *Ibid.*, p. 5.

tional standards. The two principal (external) solidarity mechanisms are Regional Development/Protection Programmes and Resettlement<sup>106</sup>.

#### 4.2.1. Regional Protection Programmes (RPPs)/Regional Development Protection Program (RDPP)

Regional Protection Programmes (RPPs) and Regional Development Protection Programs (RDPPs) have consolidated as the key tool within the international protection pillar of the GAMM. RPPs were conceived with the intention of enhancing the protection capacity of the regions involved and better protecting the refugee population there by providing durable solutions: repatriation, local integration or resettlement in a third country if the first two durable solutions are not possible<sup>107</sup>. The Commission conceived RPPs as a “tool box” of measures oriented to protection<sup>108</sup>. Conceptually, they consist of seven types of activities to be implemented mainly in the form of “projects” aiming at improving the general protection situation as well as the reception conditions of refugees; establishing effective refugee status determination procedures; providing training to relevant stakeholders; and bringing the benefits for the hosting communities by addressing wider environmental concerns and by disseminating information on the positive impact of refugees. Registration and resettlement components are two further constituent elements of RPP<sup>109</sup>.

In September 2005 the Commission presented an RPP pilot project with the aim to enhance the capacity of areas close to regions of origin to protect refugees and to create the conditions for one of the three durable solutions to take place – repatriation, local integration or resettlement<sup>110</sup>. Attending not only to humanitarian factors, two priority zones were identified<sup>111</sup>: Western Newly Independent

**106** - We refer in this section to EU mechanisms. At a national level, Member States can fund its national “humanitarian admission programmes” in the context of AMIF. These programmes are ad hoc processes whereby a member state admits a number of third-country nationals to stay on its territory for a temporary period of time in order to protect them from urgent humanitarian crises due to events such as political developments or conflicts (see Article 2 [b] AMIF).

**107** - See EC, *Improving access to durable solutions*, Brussels, 4.6.2004, COM (2004) 410 final.

**108** - *Ibid.*, par. 51.

**109** - EC, *Communication on regional protection programmes*, COM (2005) 388, 1.9.2005, p. 4.

**110** - EC, *On Regional Protection Programmes*, COM (2005) 388 final, par. 5.

**111** - According to the following criteria: assessment of particular refugee situations in third countries; financial opportunities available under existing Community funds; and existing relationships and frameworks for cooperation between the Community and particular countries or regions, *Evaluation of pilot Regional Protection Programmes*, Request 22 – Framework Service Contract No JLS/2006/A1/004 25 June 2009, p. 5.

States (NIS) including Belarus, Moldova and Ukraine as regions of transit and The Great Lakes as a suitable region of origin (Tanzania)<sup>112</sup> which was approved by the Council on 12 October 2015<sup>113</sup>. In 2010, the Commission decided to extend the PRPs in Eastern Europe and Tanzania and to launch two new programs in the Horn of Africa (including Kenya, Yemen and Djibouti) and in North Africa (Egypt, Libya and Tunisia)<sup>114</sup>. In 2012, the Justice and Home Affairs Council approved the Commission's proposal to establish a Regional Development Protection Programme (RDPP) in response to the Syria refugee crisis<sup>115</sup>. The aim of the RDPP is to support Jordan, Lebanon and Iraq to develop sustainable capacities to respond to the crisis in the medium and longer term. It integrates in the existing concept a strong development component. In this regard, two sets of new activities have been added: (i) research on the impact of the presence of a refugee population on the host community; (ii) practical measures aimed at job-creation, education and improved infrastructures<sup>116</sup>.

In practice, RPP/RDPPs have taken the form of projects implemented primarily by UNHCR, together with local NGOs. From the point of view of its effectiveness, the main difficulty in its implementation is due to the fact that a new financial framework has not been foreseen. Initially they were incarnated in the financial programs ANEAS and TACIS and later funded through geographic and thematic instruments<sup>117</sup>. The result has been that the RPPs/RDPPs have been severely underfunded in relation to the scope and objectives they were designed to meet<sup>118</sup>. Furthermore, capacity-building efforts and resettlement commitments, main compo-

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**112** - "In respect of developing a pilot Regional Protection Programme with a country or countries in a region of origin, the prospect of taking further action to better protect refugees from the Great Lakes region presents an opportunity that can correspond to the programming of the available financial instruments, the centrality of resettlement as a possible durable solution and the political priorities expressed by Member States", COM (2005) 388 final, par. 14.

**113** - COM (2005) 388 final, pars. 11 and 14.

**114** - COM (2011) 291 final.

**115** - The conflict in Syria has created the world's largest forced displacement crisis. The UN estimates that 6.3 million Syrians are internally displaced in the country, with 4.5 million in hard-to-reach and besieged areas.<sup>1</sup> Another 5.2 million Syrians have fled the country, primarily to Turkey, Lebanon, Jordan, Egypt, and Iraq. From a pre-war population of 22 million, more than half of the country's population has been forcibly displaced. See <http://www.unocha.org/syria> (14 June 2018).

**116** - EP, *EU Cooperation with third countries in the field of migration*, Study for the LIBE Committee, 2015, p. 43.

**117** - See [https://ec.europa.eu/europeaid/sectors/funding\\_en](https://ec.europa.eu/europeaid/sectors/funding_en) (14 June 2018).

**118** - "EU external cooperation and global responsibility sharing: Towards an EU Agenda for Refugee Protection", *ECRE's Vision of Europe's Role in the Global Protection Regime: Policy Papers 3*, February 2017, p. 14.

nents of RPPs/RDPPs, should be stepped up and carried out in real dialogue with countries hosting large refugee populations<sup>119</sup>. But what is more important, they should be driven by a “rationale of solidarity” with the countries hosting the majority of the world’s refugees, rather than migration control logic<sup>120</sup>.

#### 4.2.2. Resettlement

According to international refugee law resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status<sup>121</sup>. According to UNHCR resettlement serves three equally important functions: it is a tool to provide international protection and meet the specific needs of individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge; it is a durable solution for larger numbers or groups of refugees, alongside the other durable solutions of voluntary repatriation and local integration; it can be a tangible expression of international solidarity and a responsibility sharing mechanism, allowing States to help share responsibility for refugee protection, and reduce problems impacting the country of asylum<sup>122</sup>. In general terms, global resettlement needs are much greater than the resettlement places which are available worldwide<sup>123</sup>. From the perspective of external solidarity an EU resettlement plan needs to offer a meaningful number of places in relation to the global resettlement needs<sup>124</sup>.

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**119** - *EU Cooperation with third countries...* cit., p. 15.

**120** - “EU external cooperation” ... cit. p. 14. For an evaluation of RPPs/RDOPs see also *Regional Protection Programmes: an effective policy tool? Discussion Paper*, DOMAID/ ECRE, January 2015 available at <http://www.ecre.org>; M. Garlick, *EU Regional Protection Programmes: Development and Prospects*, in M. Maes, M.C. Foblets, P. De Bruycker (eds.), *External Dimensions of EU Migration and Asylum Law and Policy*, Bruylant, Bruxelles 2011.

**121** - *UNHCR Resettlement Handbook*, 2011, available at <http://www.unhcr.org/resettlementhandbook> (4 June 2018)

**122** - *Ibid.*

**123** - In 2018, UNHCR estimates the global resettlement needs to be close to 1.2 million persons. Syrian refugees represent for a second consecutive year, 40 % of global resettlement needs, followed by refugees from the Democratic Republic of the Congo (12 %), and the Central African Republic (8 %), UNHCR Projected Global Resettlement Needs 2018, Geneva, 12 – 14 2017, p. 10.

**124** - In ECRE’s view, this could take the form of a fixed percentage of the global resettlement efforts, ECRE, “EU External cooperation and global responsibility sharing: towards an EU Agenda for refugee protection”, *Policy Paper 3*, cit., p. 10.

**(a) *The EU Joint Resettlement Programme (2009 – 2015)***

In the last decade the Commission has always insisted on the need for the EU to be more involved in the resettlement of refugees from third countries and for resettlement to be an integral part of the EU's overall asylum policy<sup>125</sup>. In the Policy Plan on Asylum (2008) the Commission concluded that resettlement should be further developed and expanded into an effective protection instrument to be used by the EU, so as to meet the protection needs of refugees in third countries and to show solidarity with third countries of first asylum<sup>126</sup>. The European Pact on Immigration and Asylum (2008), stated that, among the new initiatives to be taken to complete the establishment of a CEAS, cooperation with the UNHCR should be strengthened to ensure better protection for people outside the territory of EU who request protection, in particular by moving, on a voluntary basis, towards the resettlement within the EU of people placed under the protection of the UNHCR<sup>127</sup>. Despite financial support<sup>128</sup>, in 2009 only ten EU Member States participated in resettlement every year<sup>129</sup>.

On 2 September 2009 the Commission adopted two proposals on resettlement. On the one hand, it proposed the establishment of a Joint EU Resettlement Programme, to involve more Member States in resettlement activities and to provide for an orderly and secure access to protection for those resettled and, at the same time, to demonstrate greater solidarity with third countries in receiving refugees<sup>130</sup>. The Commission underlined that «at the moment there was no structural exchange of information among EU countries on resettlement and no structural coordination of resettlement activities at the EU level». It also noted that «financial support under ERF III applied only with respect to four specific categories of persons»<sup>131</sup>. So, «a mechanism should therefore be put in place to ensure that resettlement efforts

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**125** - COM (2009) 456 final, p. 1.

**126** - COM (2008) 360 final, p. 10.

**127** - European Pact on Immigration and Asylum, 13440/08, Brussels, 24 September 2008, p. 12.

**128** - Since 2008, resettlement receives financial support under the European Refugee Fund (ERF III), Decision No 573/2007/EC of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 (OJ L 144, 6.6.2007, p. 1). See also Commission Decision of 29 November 2007, implementing Decision No 573/2007/EC of the European Parliament and of the Council as regards the adoption of strategic guidelines 2008-2013 (OJ L 326, 12.12.2007, pp. 29 – 31).

**129** - COM (2009) 456 final, p. 4.

**130** - COM (2009) 447 final, Brussels, 2.9.2009.

**131** - 1) Persons from a country or region designated for the application of a regional protection program; 2) Unaccompanied minors; 3) Children and women belonging to a risk group, in particular for being able to be exploited either for psychological, physical or sexual violence; 4) People with serious medical needs that can only be met with resettlement (Decision n° 573/2007/EC, Article 13. 3 and 4).



in the EU are better targeted, on an ongoing and dynamic basis, towards those persons who are most in need of resettlement». In its opinion «this can be achieved by ensuring regular common definition of key priorities for resettlement and providing a financial incentive for Member States to resettle in accordance with those priorities»<sup>132</sup>. On the other hand, the Commission proposed to amend the Decision establishing the EFR III for the period 2008 to 2013 in order to provide additional financial support for the resettlement of those categories of persons which are annually identified as common EU resettlement priorities for the following year through a Decision to be taken by the Commission<sup>133</sup>.

The proposal to set annual common EU resettlement priorities led to a disagreement among the Commission, the Council and the European Parliament concerning the procedure by which the priorities would be established<sup>134</sup>. In March 2012, after more than two years of negotiations, a compromise text was adopted that amended the Council ERF Decision establishing common EU resettlement priorities for 2013 and setting new rules for the financial support that Member States would receive for resettlement activities via the ERF<sup>135</sup>.

### ***(b) Ad-hoc resettlement schemes (2015 – 2017)***

EU Member States currently have several common ongoing *ad-hoc* resettlement schemes, notably: (a) the Conclusions agreed on 20 July 2015 to resettle, through multilateral and national schemes, 22,504 persons in clear need of international protection<sup>136</sup> - this scheme has ended -; (b) the one-to-one and voluntary humanitarian admission schemes set out in the EU-Turkey statement of 18 March

<sup>132</sup> - *Ibid.*, p. 7.

<sup>133</sup> - COM (2009) 456 final, Brussels, 2.9.2009.

<sup>134</sup> - In order to guarantee its prerogatives when defining the annual priorities for resettlement, the European Parliament proposed that the procedure of Article 290 of the TFEU (delegated acts) be followed. The Council did not accept these amendments and considered the decisions of the Commission in this regard acts of execution. This is the reason why the legislative procedure was blocked. See *Report on the establishment of a joint EU resettlement programme* (2009/2240 (INI) ) LIBE Committee (Rapporteur: Rui Tavares), A7-0131/2010, 3.5.2010 and Resolution of the Parliament 18 May 2010 on the establishment of a joint EU resettlement programme (2009/2240 (INI) ).

<sup>135</sup> - See <https://resettlement.eu/page/joint-eu-action-urgent-and-protracted-refugee-situations> (15/06/2018). The AMIF similarly provides resettlement financing under the Union Resettlement Programme. More specifically, EUR 360 million has been designated for resettlement, relocation and other *Specific Actions* for the period 2014-2020. As outlined previously, a lump sum of €6,000 is provided per resettled person, and €10,000 for each person resettled according to the common Union resettlement priorities and for other vulnerable categories.

<sup>136</sup> - 3405th Council meeting – *Conclusions*, 11097/15, Brussels, 20 July 2015.

2016<sup>137</sup>; (c) the recommendation by the Commission from 27 September 2017, calling on Member States to offer places for 50,000 persons to be admitted by 31 October 2019<sup>138</sup>. With the recent decision of the German government to pledge 10,200 new resettlement places, 20 Member States have pledged more than 50,000 resettlement places, making it the largest collective commitment of the EU and its Member States on resettlement to date<sup>139</sup>. Particular focus was placed on resettlement from priority regions such as Turkey, Jordan, Lebanon, and the African countries along the Central Mediterranean route. The scheme is supported by EUR 500 million from the EU budget<sup>140</sup>.

### *(c) Union Resettlement Framework*

In April 2016 the Commission announced its intention to put in place a horizontal mechanism for launching targeted EU resettlement initiatives, by setting out common EU rules for admission and distribution, on the status to be accorded to resettled persons, on financial support, as well as on measures to discourage secondary movements<sup>141</sup>. It added that «[t]his is a shared responsibility of the international community as a whole, and will only be adequately and sustainably addressed by a concerted and determined approach by all international actors»<sup>142</sup>. Accordingly, in July 2016, the Commission proposed a Regulation to establish a Union Resettlement Framework<sup>143</sup>. Under the new framework, the Council will

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**137** - EU-Turkey Statement, 18 March 2016, available at [http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/\(06/06/2018\)](http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/(06/06/2018))

**138** - *Commission Recommendation on enhancing legal pathways for persons in need of international protection*, C (2017) 6504, Brussels, 27.9.2017.

**139** - Belgium, Croatia, Finland, France, Italy, Lithuania, the Netherlands, Portugal, Spain, Sweden, *Progress Report*, cit., p. 19.

**140** - *Ibid.*

**141** - *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. 15.

**142** - *Ibid.*

**143** - COM (2016) 468 final, 13.7.2016, p. 2. The proposal is part of the measures constituting the CEAS. The legal basis is Article 78 (2) (d) in relation to "common procedures" and Article 78 (2) (g) in relation to "partnership and cooperation with third countries". On 19 October 2017, the LIBE Committee adopted the Report on the proposal for a regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, A8-0316/2017. On 15 November 2017, COREPER endorsed, on behalf of the Council, a mandate for negotiations with the European Parliament, for an EU resettlement framework: Council ready to start Negotiations, Press Release, 664/17, 15/11/2017.

adopt a two year «EU resettlement and humanitarian admission plan», on the basis of a proposal from the Commission. This plan will include the maximum total number of persons to be admitted, the contributions of Member States to this number and the overall geographical priorities. Member States will contribute to the EU resettlement plan on a voluntary basis and the plan will be supported by funding from the EU's budget.

At the EU level there is broad convergence on the need for a resettlement scheme and biannual plans. Divergences, however, remain as regards, for instance, the voluntary or mandatory nature of the framework, and the method for the adoption of a plan – Council implementing or delegated acts<sup>144</sup>. But also there are differences in relation to the nature and objectives of the framework. In its report, the Parliament proposes to introduce a new paragraph defining resettlement as «an act of solidarity ... based on humanitarian needs» and underlining that «resettlement has three interrelated and complementary functions: it is a tool for protection, it is a durable solution and it is a responsibility-sharing mechanism»<sup>145</sup>. Accordingly, it proposes to add a new objective of the framework: «to create redistributive mechanisms in order to relieve the pressure on third countries hosting large numbers of displaced people, as a gesture of solidarity and responsibility sharing»<sup>146</sup>. In an opposite way of thinking some Members of the Council consider the new framework «as a strategic instrument to manage migration flows»<sup>147</sup>.

## 5. Conclusions

Asylum is a very sensitive EU policy that affects thousands of people trying to reach Europe in search of refuge. At the same time, it is affected by xenophobic and racist discourse that permeates public opinion. From this point of view, «the tenor of policy and public discourse on migrants and refugees must be shifted from

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<sup>144</sup> - EP, *EU asylum borders and external cooperation on migration. Recent developments*, May 2018, p. 13.

<sup>145</sup> - A8-0316/2017 (Amendment 1).

<sup>146</sup> - *Ibid.* (Amendment 17). According to Article 3, the Union Resettlement Framework shall: (a) provide for the legal and safe arrival; (b) contribute to the reduction of the risk of a large-scale irregular inflow; (c) contribute to international resettlement initiatives.

<sup>147</sup> - Council of the European Union, EU resettlement framework: Council ready to start Negotiations, *Press Release*, 664/17, 15/11/2017. As the Minister of Estonia said “it will help decrease flows to our own external borders, disrupt the business model of smugglers and balance the efforts made in other fields, for example in returns”.

one of threat to one of international solidarity»<sup>148</sup>. The protagonism of host communities cannot be ignored. In EU's asylum policy solidarity goes beyond interstate relations involving EU citizens in relation to third country nationals. As the UN Secretary General has said «personal contact significantly reduces prejudice, more creative ways of fostering contacts between host communities on the one hand and refugees and migrants on the other are urgently needed»<sup>149</sup>. From the point of view of global solidarity the question is not whether the number of asylum seekers has decreased in Europe, that is, if the pressure on EU national asylum systems has decreased, but if the global situation of people who need international protection has been resolved. The emphasis should not be placed on "us" but on "them". This is what solidarity in practice really means.

Primary EU asylum law provides the legal basis to develop a coherent and holistic asylum system based on internal and external solidarity. Solidarity in the EU's asylum policy has at least two cardinal components: respect for the fundamental rights of asylum seekers (human rights-based solidarity) and the fair sharing of responsibilities. So far it seems obvious that the current CEAS has failed to achieve both objectives. At the moment "internal solidarity measures" adopted at EU level are intended to compensate for the deficiencies of the CEAS, mainly the fair sharing of responsibilities, more than the establishment of a "common asylum system" based on structural solidarity. Despite the good intentions with which "external solidarity measures" have been launched, in practice, these are more oriented to prevent asylum seekers access to the territory of Member States than to protect their right to seek asylum according to international refugee law.

In sum, a consensus must be achieved at the national and EU level on how to implement the principle of solidarity in a way that human rights of asylum seekers are guaranteed inside and outside of the EU (extraterritoriality) while sharing responsibility fairly and equitably among Member States. A determining criterion should be the reception capacity of each Member State based on objective criteria. When necessary due to the urgency of the situation, mandatory solidarity measures could be imposed on all Member States according Article 78 (3) TFUE.

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<sup>148</sup> - *Report of the Secretary General, "In safety and dignity: addressing large movements of refugees and migrants"*, A/70/59, 21 April 2016, p. 11.

<sup>149</sup> - *Ibid.*