

# Memorandum

## Allocation of refugees in the European Union:

## for an equitable, solidarity- based system of sharing responsibility

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**Neue Richtervereinigung**  
Zusammenschluss von Richterinnen und Richtern,  
Staatsanwältinnen und Staatsanwälten e.V.

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## Memorandum

### Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility

#### Abstract

With this memorandum, the signatory organisations would like to contribute to a wide debate on the question of sharing responsibility for refugees in Europe, and they offer a fundamentally new approach. The last few years have revealed the deep-seated crisis of the Dublin system<sup>1</sup>: many asylum seekers remain without protection after entering the EU, but are forced to stay in the country responsible for them, or to return to it. The recent reformatory efforts<sup>2</sup> are not conducive to emerging from the crisis, because they cling to the present system, in particular to the designating of responsibility to the state of entry. This memorandum (see below) indicates an alternative. The signatory organisations hope it will set off a broad discussion about the parameters of a system of sharing responsibility in Europe based on solidarity and the needs of refugees.

#### The crisis of the common European asylum system

The Dublin system is leading to serious human rights violations. Asylum seekers who enter the European Union primarily through Greece are either detained there or forced to live in the streets for lack of accommodation. Even families with children receive no social support, and gaining access to the asylum procedure with subsequent guarantee of protection is generally out of the question. The European Court of Human Rights therefore decided on 21 January 2011 that both the treatment of asylum seekers in Greece and their being taken back there violated the European Convention on Human Rights.<sup>3</sup> In Italy, too, refugees are experiencing the violation of their right to humane

1 Council Regulation (EC) No. 343/2003 of 18 February 2003 (Dublin II Reg.). New: *Commission of the European Communities*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Policy Plan on Asylum – An integrated approach to protection across the EU, COM(2008) 360, 17 June 2008.

2 *Council of the European Union*, 2008/0243 (COD) of 27 July 2012, <http://www.statewatch.org/news/2012/jul/eu-council-dublin-III-12746-rev-2-12.pdf>

3 ECtHR, *M.S.S. vs Greece and Belgium*, judgement of 21.1.2011, 30696/09.

reception conditions. Asylum seekers and recognised refugees are mostly left to themselves and relegated to homelessness. In countries like Malta, Cyprus and Hungary, the detention of asylum seekers is the order of the day. These abuses are being cemented and even reinforced by the existing Dublin system. It is therefore urgent that a solution be found for this humanitarian crisis for asylum seekers that has been worsening over the years.

## Structural deficits of the Dublin system

The weaknesses of the Dublin system are based on three central congenital defects. The first is that the responsibility criterion of “irregular border crossing” is, in practice, placing a disproportionate burden on member states located on the EU borders, primarily Greece. The member states in the centre of the European Union deny this with reference to their own asylum statistics.<sup>4</sup> However, asylum statistics do not give reliable information about the actual situation in the border states – particularly Greece. In 2011 over 55,000 refugees and migrants were detained in Greek detention camps in the area near the Greek-Turkish border,<sup>5</sup> without this high figure appearing in the asylum statistics.

Secondly, neither in the procedure nor in guaranteeing protection are uniform standards a precondition. There is still a disregard for the needs of the refugees and existing ties with certain member states. The recognition numbers for asylum seekers e.g. from Iraq, Afghanistan or Somalia show great discrepancies in the different member states, and the same applies to standards for reception conditions for refugees.

Thirdly, there is the liability effect which runs counter to the principle of solidarity (Art. 80 AEUV). This forces the border states to take responsibility for the asylum procedure, which has led to even stricter border controls. The consequence in practice has been frequent violations of the protection against refoulement enshrined in the 1951 Refugee Convention.

4 In 2011 the most asylum applications were lodged in Germany and France, with a total number EU-wide of approx. 50,000. However, in proportion to the population, Germany is ranked 14th in terms of population and Malta is top of the list. See Eurostat at: [http://www.proasyl.de/fileadmin/proasyl/fm\\_redakteure/Themen/Zahlen\\_und\\_Fakten/Asyl\\_EU\\_2011.pdf](http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Themen/Zahlen_und_Fakten/Asyl_EU_2011.pdf)

5 *Frontex* press release, 2.2.2012, retrieved at: <http://www.frontex.europa.eu/news/greek-turkish-land-border-jo-poseidon-land-situational-update-january-2012-DWvKc6>

## Proposal for a human rights-based remodelling of the European system of determining responsibility for asylum

For the above reasons, the European Union needs an equitable, solidarity-based system of sharing responsibility for refugees. In this Memorandum we therefore propose abandoning the responsibility-defining criterion of “irregular border crossing” and replacing it by the principle of “free choice of member state”. Such a principle is reflected in the development of international law. In 1979 the Executive Committee for the UNHCR programme, in Recommendation 15 (XXX) on “Refugees without an asylum country”, recommended that the states lay down “common criteria” to “identify the country responsible for examining an asylum request”. In its opinion, the refugee’s intentions “as regards the country in which he wishes to seek asylum ... should as far as possible be taken into account”. Such a principle of free choice of member state would broadly correspond to the individual interest of asylum seekers.

Legally speaking, this principle of “free choice of member state” could be implemented by rescinding the criterion of “irregular border crossing” (Art. 10 Dublin II Regulation or Art. 14 Dublin III Regulation).

Consequently the member state responsible would be the first one *with which the asylum application was lodged* (Art. 13 Dublin II Regulation or Art. 3 Dublin III Regulation), unless there were other relevant criteria to define responsibility (protection of unaccompanied minors, family reunion etc.).

In addition to applying the criterion of *the first member state in which the asylum application was lodged* it must be guaranteed that this takes place in the state in which the asylum seeker *voluntarily wishes to apply for asylum*. If an asylum seeker enters the EU irregularly, the member state conducting the immigration control must allow the asylum seeker to continue his or her journey under an orderly procedure, so that he/she can lodge the application in the member state of choice. The first state would certify the registration as asylum seeker and the individual concerned would present this document in the member state of choice to prove his/her point of entry to EU territory. We assume that refugees seek reception in their cultural, social and family networks and are therefore highly motivated to enter the member state of their choice as soon as possible and to apply for asylum there. Naturally the EU can assist them on their ongoing journey, particularly by giving financial assistance. In any case, the member states must not prevent the individual from proceeding on to the member state of their choice.

Since the principle of free choice of member state may sometimes cause unevenly distributed burdens among the member states it should, in addition, be linked to a *financial compensation fund* for the receiving member states – possibly in the context of the new asylum and migration fund – which would also be an incentive to promote the spread of functioning asylum procedures and good reception conditions. In addition, the principle of the free choice of member state would lessen the disproportionate burdens, because the asylum seekers would be received and supported by their cultural and family networks.

### **Forecast: the pressure to reform will rise**

It will only be possible to effectively solve the deficiencies illustrated in the Memorandum by changing the principle of responsibility in the present system.<sup>6</sup> The positions taken by the Commission<sup>7</sup>, Council<sup>8</sup> and European Parliament<sup>9</sup> on the European solidarity mechanism in the Common European Asylum System recognise the continuing need for reform. The Dublin system is to be evaluated and an extensive change of system is envisaged. The Commission's present proposals above all presuppose improved practical cooperation through the European Asylum Support Office (EASO) along with measures such as "relocation" (within Europe) and financial solidarity. These measures are welcome but do not go far enough, in our view. According to the quota model<sup>10</sup> discussed in the European Parliament, asylum seekers are to be distributed to member state on a pro rata basis, either immediately on entering the EU or after the receiving state has filled its quota. The argument against this is that the model would presuppose the establishment of completely new, complex administrative structures and procedural arrangements and that here, too, individuals would have to be taken to a country against their will, in which they had no family or cultural connection or in

which there would be no guarantee of standards of reception, procedure and protection corresponding to European standards.

The current strategies pursued by the member states and the EU are insufficient, in the view of the signatory organisations. If the responsibility criterion of "irregular border-crossing" is not dropped, which is the cause of the present crisis, things will get worse rather than better. Establishing an equitable, solidarity-based system of distributing refugees in the European Union requires changing to a system which would also consider the interests of refugees. The principle of "free choice of member state" for asylum seekers, in combination with a European compensation fund based on solidarity and fairness, offers a solution to reducing the structural deficiencies indicated.

6 The dysfunctional nature of the Dublin system and its impact on the fundamental rights of asylum seekers has been highlighted in the comparative report "The Dublin II Regulation: Lives on Hold" by ECRE, Forum Refugies-Cosi and the Hungarian Helsinki Committee as part of the Dublin Transnational Network project. Further information is available at [www.dublin-project.eu](http://www.dublin-project.eu).

7 *European Commission*, Communication on enhanced intra-EU solidarity in the field of asylum, 2 December 2012 – COM (2011) 835 final, 11.

8 *Council of the European Union*, Council Conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows, Brussels, 8 March 2012

9 *European Parliament*, Resolution on enhanced intra-EU solidarity in the field of asylum, P7\_TA-PROV (2012) 0310, 11 September 2012.

10 <http://www.europahirsch.eu/politisch/ausschusse/ausschuss-burgerliche-freiheiten-justiz-inneres/asylpaket/europaeischer-verteilungsschluesel-fur-asylsuchende/>

## Memorandum

# Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility

### A. Refugee protection based on human rights

In the conclusions of its meeting in Tampere, Finland, in October 1999, the European Council reiterated the commitments from the Treaty of Amsterdam and decided to “work towards establishing a Common European Asylum System based on the full and inclusive application of the Geneva Convention”. The asylum system of the EU is based on the Refugee Convention<sup>11</sup> and the Universal Declaration of Human Rights, to which the preamble of the Convention refers. In it the international community commits itself to a universal *human right to asylum*. This right found general recognition in Article 14 of the Universal Declaration of Human Rights on 19 December 1948, shortly before the Convention was adopted. The Charter of Fundamental Rights of the European Union links the fundamental right to asylum with the Refugee Convention in Article 18, thereby promising individuals seeking protection from persecution that their right to safety and a life in human dignity will be respected. To this end, the Union forms an “area of freedom, security and justice” according to Title V of the Treaty on the Functioning of the European Union (TFEU), which provides for the common European asylum system.

The European Union therefore makes human rights-based refugee protection the basis of cooperation between the member states in their refugee policy. The Preamble of the Refugee Convention sets out the principle according to which refugee protection functions. “The grant of asylum,” it says, “cannot ... be achieved without international cooperation.” For the Union this cooperation among the member states is based on the *principle of solidarity* (Art. 80 TFEU). The international cooperation required for the fundamental right to asylum is subject to the obligation of solidarity among the member states under constitutional law and the obligation – under the fundamental right – to decide on the country responsible for examining the application for asylum on the basis of criteria that are appropriate for the member states *and* for the asylum seeker. Hence the interests of the asylum seeker must be taken into account when sharing out the responsibility for refugees.

11 Geneva Convention relating to the Status of Refugees, 1951 (RCS).

The principle under European law for the sharing of responsibility for refugees in the EU thus rests on the member states’ obligation to comply with the principle of solidarity while considering the interests of refugees. In the system currently practised in the EU of sharing responsibility for the reception of refugees, by contrast, their interests are not considered adequately. Rather, this system is handled like a mere instrument of regulating state relations. In order to realize the obligation to show solidarity while considering the refugees’ interests as stipulated under EU law, we therefore propose a fundamental reform of the Dublin system.

### B. Refugee protection as a common European challenge

Refugee protection is a traditional responsibility of the individual signatory states. The Refugee Convention does not promise a right to asylum that the state to which the refugee is applying for protection is bound to give. This state is merely prohibited from forcibly returning the refugee to his or her country of origin (Art. 33) until refugee status has been negated in a fair and just procedure. This ›single state‹ character of refugee law und international law called forth a serious deficiency in the system of refugee protection in the 1970s in Europe. Since no state is obliged to receive refugees, from the angle of international law, a conflict of negative consequences developed among the European states, to the detriment of the refugees. The resultant problem of *refugees in orbit* prompted the European states in the mid-1980s to develop joint approaches for their territories in order to guarantee refugees secure protection. These approaches were initially administrative, then in the form of intergovernmental cooperation, and were finally developed by the adoption of refugee law in EU law. From the historical standpoint, this striving for coordinated agreements under refugee law was rooted in the increasing integration of national markets from the 1980s. The goal of integration is the single market and the creation of a common area of freedom of movement for all EU citizens. This presupposes the general abolition of border controls between the European states and, on the other hand, common controls at the external borders.

There is no doubt that the refugee question was on the agenda from the start of European integration. A continuation of the conflicts of negative competences would have run counter to European integration. The initial administrative cooperation turned into the starting point for developing European asylum practice, the *Dublin system*. Its underlying principle states that only one member state is responsible for receiving the refugee. Binding criteria for responsibility are laid down in this regard, in order to exclude the former conflicts of competence. To reach this goal, the EU first chose a multilateral treaty, the Dublin Convention of 19 June 1990, which was followed by a community legal act, Council Regulation (EC) No 343/2003. The Dublin Convention took effect on 1 September 1997. Before the name of the Irish capital started to dominate

the Europe-wide discussion on asylum law, a multilateral treaty featuring the name of a small Luxembourg border town played a pioneer role. With the Convention implementing the Schengen Agreement of 19 July 1990, the then five Schengen states – Belgium, Germany, France, Luxembourg and the Netherlands – had implemented their own system for their own area. The agreement took effect on 26 March 1996 and was a prototype for the present Dublin system.

Since 1 September 2003 the determination of member states' responsibility for asylum seekers has therefore been governed by Council Regulation (EC) No 343/2003. The first recital of the Regulation promises those seeking protection that the "area of freedom, security and justice ... open to those who, forced by circumstances, legitimately seek protection in the Community". The Dublin system is thus conceptually premised on the human rights-based principle that the EU undertakes to receive people in need of protection. In stating this, it goes far beyond international law. Before the granting of refugee status, a right to remain is granted, in accordance with Art. 7(1) Asylum Procedure Directive 2005/85/EC, and after the recognition of refugee status the individual is entitled to be granted a residence permit (Art. 24(1) Qualification Directive 2004/83/EC). A renewed application and recognition of status in another member state is fundamentally ruled out, once the member state responsible has rejected the asylum application. The Dublin system thus introduces a new, cooperative element into the traditionally single-state-oriented international law. It is the declared aim of the European Union and, in particular, the Dublin system, to give asylum seekers an opportunity to have their request for asylum examined within the EU and to grant refugees a right to reception and life in human dignity.

### C. Structural deficiencies in the Dublin system

From a conceptual angle, the European asylum system thus replaces single-state solutions as found in the traditional refugee law by integration of single-state interest policies into a unified legal system. Integration in Europe is, of course, a long, laborious process involving joint negotiations on whether, and to what extent, national interests should take a back seat in the interest of the whole. This 'whole' is based on common values such as universal human rights and the system of refugee protection. In contrast to interests, however, values have a hard time. The process leading up to the Dublin system is thus a graphic example of the political weaknesses of such an integration process: frequently the member states are only willing to limit or abandon their own interests to the benefit of the whole if they recognise that insisting on hitherto pursued national interests is a threat to the common system and thus ultimately also jeopardizes their national interests. Only when the process of political realisation has reached this stage can we expect the member states to accept a change in their previous behaviour.

Therefore it is necessary to identify the *systemic* and *historical* trends of the Dublin system in order to become aware that the time for action is now.

The weaknesses of the Dublin system are based on three central congenital defects: the first is that the responsibility-defining criterion, based on irregular entry, is currently placing an undue burden on the member states close to the EU's external borders, particularly Greece. The second defect is that there are no uniform standards for the procedure and granting of status. The two defects lead to irregular secondary movement. The third defect is the liability effect of the designated responsibility, which runs counter to the principle of solidarity (Art. 80 TFEU). The practical consequence is that there are multiple violations of the ban on refoulement.

#### 1. Undue burden on the member states close to the border

The Dublin system was conceived as an abstract procedure for *determining responsibility* with which, in the context of the European asylum system, *exclusively* governs the question of the responsibility of member states for examining a request for asylum. The key factor in the current sharing of responsibility for asylum seekers is the secondary responsibility-defining criterion of "irregular border crossing" (Art. 10 Council Regulation (EC) No 343/2003). This defect characterised the previous multilateral conventions. The member state which the refugee first entered irregularly is responsible for examining his/her application, unless prior criteria for establishing responsibility – the situation of unaccompanied minors, family bonds, possession of a residence permit of a member state – need to be considered or the state being asked for protection makes use of the sovereignty clause. If there is proof of the route taken by the refugee it is generally the secondary criterion of illegal entry that decides on the responsibility of the member state – for lack of relevance of prior criteria and due to the non-exercise of the sovereignty clause. In the last three decades a policy pattern has developed in the EU of reacting to deficiencies in entry controls by stepping up measures at the borders. The introduction of compulsory visas for the vast majority of refugees' countries of origin, in particular, along with extensive controls of coastal and land borders have increasingly forced refugees to try to obtain irregular entry. Refugees are currently entering Europe through Greece, in particular.

The member states in the centre of the European Union deny that this is the consequence of the system, and point to their own asylum statistics. In 2011, for example, most of the asylum applications in the EU were lodged in Germany and France (about 50,000). However an EU-wide comparison, linking the ratio of asylum seekers to the whole population, relegates Germany to 14th place, with Malta top of the list.<sup>12</sup> In any

<sup>12</sup> Eurostat, retrieved at: [http://www.proasyl.de/fileadmin/proasyl/fm\\_redakteure/Themen/Zahlen\\_und\\_Fakten/Asyl\\_EU\\_2011.pdf](http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Themen/Zahlen_und_Fakten/Asyl_EU_2011.pdf)



case, the asylum statistics do not give any reliable information about the actual burdens on the border states, particularly Greece. The reason is that they do not consider e.g. the number of asylum seekers entering irregularly who do not file for asylum in their state of entry. Nor do they count the number of asylum seekers that move on from there. Most of the entries to the EU at present are via Greece. Over 55,000 asylum seekers and migrants were detained in 2011 in Greek detention centres in the Greek-Turkish border area.<sup>13</sup> There are no figures on the number of non-registered persons in Greece, or on how many people continue their journey and apply for asylum in other member states. Those who request asylum in the central countries have mostly entered irregularly via the border states and have continued their journey irregularly. If entry were proven they would be returned to the border states.

The asylum statistics would probably give another picture if the present Dublin system actually worked. It is designed to place a disproportionate burden on the EU's border states. The intended principle does not function properly simply because the route taken to enter the EU and onward journey on EU territory frequently cannot be reconstructed afterwards. Functional disorders in the system have therefore hitherto prevented the border states from bearing the brunt of a consistent enforcement of the responsibility-defining criterion of "irregular border crossing". Consequently, an analysis covering all the relevant factors should not exclusively consider abstract statistical data in order to identify differing burdens on the individual member states. Demographic, economic and other factors must also be taken into account. In addition there are historical factors: the 27 member states were included in the European asylum system during very different time periods and with completely different resources, abilities, institutions, experiences and prior social burdens.

Regardless of the foreseeable consequences of sticking to the criterion of "irregular border crossing" the member states hold to the hierarchy of responsibility criteria. Treaty law, however, contains a clear obligation to create solidarity and a "fair sharing of responsibility ... between the Member States" (Art. 80 TFEU). Neither the Schengen nor the Dublin systems were, however, designed as a *system of solidarity* and thus they cannot be handled as such. The consequence is an arbitrary distribution of refugees in the EU. The place of irregular entry is generally the consequence of escape routes that the refugees cannot influence because they have to use the assistance of organised border-crossing services in order to enter EU territory. In turn, the routes the latter choose vary, depending on the decades of efforts by the EU to prevent asylum seekers and refugees from gaining access to Europe. The EU's system of responsibility becomes purely a matter of accident. The failure of the EU to set up a solidarity-based system of sharing responsibility therefore has dramatic consequences for the refugees.

13 *Frontex* Press release of 2 February 2012, retrieved at: <http://www.frontex.europa.eu/news/greek-turkish-land-border-jo-poseidon-land-situational-update-january-2012-DWvKe6>.

## 2. Lack of uniform standards

Since the Dublin system was designed merely as an abstract *procedure for defining responsibility* its practical implementation presupposes neither a common asylum procedure nor uniform status in all member states. The Lisbon Treaty commits the member states to creating uniform standards in all member states (Art. 78 TFEU). However, Council Regulation (EC) No 343/2003 does not make this a precondition for its application. This process first began after the Regulation took effect and has still not been completed. The Commission criticises the subsisting differences in handling asylum applications among member states. The reason is the lack of practical implementation of the legal acts as well as differing practical approaches.<sup>14</sup> The draft amendment to the Regulation submitted by the Commission in 2008 seeks to improve the Dublin system and guarantee that the individual needs of asylum seekers are considered.<sup>15</sup> The immanent structural defects are not tackled, however. The goal of creating criteria for determining the responsible member state that are understandable and fair for all member states and also for the applicants is therefore undermined by the non-fulfilment of one basic precondition for a functioning Dublin system: asylum seekers are supposed to be fundamentally in a position to encounter an equivalent level of procedural and material protection according to uniform statutory foundations and practice.<sup>16</sup> All member states are obliged to observe human rights standards when setting up their asylum systems. What happens in practice is, however, far removed from this goal.

The Regulation does not contain any express provisions on whether the member state being asked for protection is allowed to take the refugee back to the member state responsible, in the event of serious malfunctioning of the latter's national asylum system involving severe human rights violations. Appealing to the Charter of Fundamental Rights, the European Court of Justice therefore forbade the return to the state that was per se responsible if there were systemic deficiencies in the asylum procedure

14 *Commission of the European Communities*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Policy Plan on Asylum – An integrated approach to protection across the EU, COM(2008) 360, 17 June 2008, 3.

15 *Commission of the European Communities*, Proposal for a Regulation of the European Parliament and the Council establishing the criteria and procedures 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 stateless person, of 3 December 2008 COM(2008) 820 final/2008/0243 (COD).

16 *UNHCR*, Comments on the European Commission's Proposal for a recast of the Dublin II Regulation and the Eurodac Regulation, March 2009, 3.

and reception conditions for asylum seekers.<sup>17</sup> This was considered in the drafting of the amendment to the regulation and phraseology was initially fitted into Article 17(1) that takes this case law into account. This development is a necessary yet insufficient step towards reaching the goal of a just distribution of refugees. The lack of uniform standards plus the retention of the asylum seeker in the state of entry is having consequences that cannot be in the interest of the member states, i.e. the increase in irregular secondary movement on EU territory. If asylum seekers in the state of entry do not find acceptable standards they will go to member states with better standards. In addition, the pressure to remain in the state of entry cuts them off from their cultural, social and family bonds in the member state of their choice. These two factors combined mean that today refugees frequently continue their journey irregularly. The Dublin system therefore runs counter to the political goal of reducing irregular secondary movement. This can thus be best combated by not keeping asylum seekers in the state of entry against their will and thereby permanently cutting them off from their cultural, social and family bonds.

### 3. Legal responsibility and the liability effect

The responsibility-defining criteria of the Dublin system are based on the liability effect by reason of migration measures. The member state that grants a residence permit, or does not effectively check its borders, is responsible for receiving the refugee. This involves the danger that the border states affected might have recourse to measures aiming to prevent access to its territory or to the asylum procedure.<sup>18</sup> They are specifically requested to do so by the other member states and EU institutions.<sup>19</sup> At present, Greece is being criticised by other member states for not building the desired wall at its border with Turkey. In the framework of bilateral agreements with Libya, Italy intercepted refugees on Mediterranean waters and sent them back to Libya without examining whether individual cases were in need of protection. This practice was denounced by the European Court of Human Rights as a grave violation of the refoulement prohibition of Article 3 ECHR.<sup>20</sup>

17 ECJ, NVwZ 2012, 417 (419 f.) para. 86 f. N.S.

18 *European Council on Refugees and Exiles*, Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, March 2008, 16; Weinzierl, *Refugee: Schutz und Abwehr in der erweiterten EU*, 2005, 160; see also *Blake*, The Dublin Convention and Rights of Asylum Seekers in the European Union, in: *Implementing Amsterdam*, *Guild/Harlow* (Hrsg.), 2001, 94 (108 ff.; *Marx*, *European Journal of Migration and Law* 2001, 7 (18 f.); Schröder, *ZAR* 2003, 126 (130).

19 *Pelzer*, *Unsolidarisches Europa*, in: *KJ* 2011, 262 (263).

20 ECtHR, Decision of 23 February 2012 – No 27765/09 – *Hirsi Jamaa*.

The political consequence of the liability effect, or the effect of designated responsibility, is therefore lasting damage to the basic principle of protection against refoulement for refugees (Art. 33(1) RCS), according to which no refugee may be forcibly returned to his or her country of origin. Furthermore, the liability effect causes an anti-refugee attitude and strengthens nationalist and racist movements in the member states: if mistakes during immigration controls lead to responsibility for receiving asylum seekers, society perceives refugees as a punishment for national failure. Nationalist tendencies running counter to human rights, democracy and the integration process are spawned and consolidated. The protection of refugees must thus not be practised on the systemic logic of immigration controls. Instead, it must follow the rules for persons protected by international law. The Dublin system has negated this basic principle of international law from the beginning and led to a European asylum system that primarily follows the systemic logic and constraints of immigration controls. Legally well-founded responsibility and solidarity as required by EU law cannot be produced in this way.

### 4. Conclusions

From the historical lines of development characterising the emergence of the Dublin system it follows that the current responsibility system is causing the member states to stop refugees to enter the EU in a manner that violates international law. The structural cause of this policy is, in particular, the responsibility criterion of irregular entry. This is causing the member states, particularly in the Mediterranean area, with the implicit acquiescence or explicit support of the EU institutions to take defence measures against refugees that are illegal under international law. This way of combating irregular movement has not prevented them from coming, however. Moreover, the containment policy of the 1980s brought forth the standard type of irregularly entering refugee in the first place.

Humanitarian migration takes place today as a consequence of the European containment policy pursued for decades and is almost exclusively in irregular form, creating imbalances within the EU. It stigmatises refugees entering spontaneously as irregular immigrants who have to be combated with police methods and thus also harms the institution of asylum law and its societal acceptance. The longer this structural mistake lasts, the deeper the crisis of the European asylum system will become: there will be an increase of measures contravening international law to ward off refugees, on the one hand, doing serious harm to Europe's value system. The specific kind of European internal distribution of refugees will, on the other hand, probably further heighten imbalance within the EU and thereby do lasting damage to the whole system of European refugee protection. An effective combating of the deficits described does not seem possible if the responsibility principle of the current system is not changed. The



presently discussed reform proposals may alleviate some problems to a certain extent. The cause of the heightened crisis will continue to exist, however, if the responsibility criterion of irregular entry is not abandoned.

The congenital defect of the present Dublin system is based on the states' fixation on the use of responsibility criteria. The Regulation seeks to provide "objective, fair criteria both for the Member States and for the persons concerned" (recital no. 4 Council Regulation (EC) No 343/2003). However, the member states handle the Regulation as though it were in their interests alone and not also designed to be in the interest of the asylum seekers. This becomes crystal clear if we look at the controversy about whether the responsibility provisions of the regulation have subjective legal character in favour of the refugees. With their one-sided focus on state interest and their related negation of subjective rights, the member states not only contravene the common European values of human rights and refugee protection, they also act against their own interests.

## D. The Dublin system needs to be fundamentally reformed

### 1. Current reform efforts

The Commission's proposed amendment to Council Regulation (EC) No 343/2003<sup>21</sup> submitted in 2008, along with the worsening crisis of the Greek asylum system and critical developments in Italy, Malta and Hungary, stimulated the discussion of whether the EU had developed suitable instruments for the fair and humane treatment of refugees with its asylum system. The aim of the proposals is to improve the procedural situation of asylum seekers and they also contain recommendations as to how the EU as a whole can react appropriately to critical developments in a national asylum system. However, they do not propose any change in the responsibility-defining criteria.

In its proposed amendment the Commission had recommended a provision on the *temporary suspension of returns* in order to be able to react appropriately to disorders in the national system of a member state. That would have allowed overburdened member states to be relieved pending the elimination of systemic defects in their national

21 *Commission of the European Communities*, Proposal for a Regulation of the European Parliament and the Council establishing the criteria and procedures 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 stateless person, of 3 December 2008 COM(2008) 820 final/2008/0243 (COD).

systems. However, the majority of member states and the Commission itself now propose an early warning system by way of alternative,<sup>22</sup> that is to fulfil two functions: it is to guarantee a continual observation of the asylum systems of member states and, at the same time, guarantee the immediate implementation of gradual structured measures to prevent a critical heightening of the defects identified.<sup>23</sup> Further, there is talk of introducing EU-wide relocation programmes. There are even thoughts about whether other member states should take on asylum seekers from one member state if it is overburdened. The Commission does not think that this form of sharing responsibilities – that has discussed internationally for decades – is very constructive. Yet it has long been recognised as an effective instrument for sharing responsibility in the context of international standard setting.<sup>24</sup> Instead, recognised refugees are the only ones to be taken over by other member states. Here it refers to the Malta project, in the context of which – from June 2009 to summer 2011 – a total of 227 refugees were received from Malta by six member states.<sup>25</sup> However, the member states reject such arrangements on a binding and lasting basis.<sup>26</sup> Accordingly, relocation cannot be understood as an instrument of the EU with which it could respond to the crisis of the Dublin system, since it has involved very few cases of people seeking international protection and no asylum seekers at all.

The measures proposed certainly make sense in some cases and can help in reacting effectively to crises. However, the discussion about solidarity among member states relates merely to the emergency situations in some member states. By contrast, the EU is not attempting to tackle the structural factors that are the root causes of such emergencies. The principle underlined by the Commission and the Danish presidency that each member state should first "set its own house in order" sounds sensible. Such exhortations from the calm and stable central European standpoint lack the necessary legitimacy, however, if – while admitting that there are imbalances in the

22 *Danish Presidency*, Discussion paper "A common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows", 26-27 January 2012, 3; Council of the European Union, Presidency Note on "A process for early warning, preparedness and management of asylum crises", 5 October 2011 – 15055/11; Council of the European Union, Presidency Note, 14 November 2011 – 16782/11, on the proposed amendments to Regulation (EC) No 343/2003.

23 *European Commission*, Communication on enhanced intra-EU solidarity in the field of asylum, 2 December 2012 – COM(2011) 835 final, 11.

24 *UNHCR*, Note on International Protection, 2 July 2003, para. 12, in: IRLJ 2004, 124 (128).

25 *European Commission*, Communication on enhanced intra-EU solidarity in the field of asylum, 2 December 2012 – COM (2011) 835 final, 8.

26 *Danish Presidency*, Discussion paper "A common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows," 26-27 January 2012, 4.

reception of asylum seekers to the EU – they give no thought to the “highly complex and demanding exercise”<sup>27</sup> required to remove them. As long as the structural causes of the malfunctioning of the Dublin system are not effectively tackled there will be many flashing red lights and fire-fighters rushing around.

In addition, there is lack of a human rights-based reform agenda. It is unacceptable that asylum seekers are detained solely for the purpose of transferring them elsewhere, without the possibility of applying for an injunction to protect them.<sup>28</sup> This detention practice has been excessively expanded in the last few years solely on grounds of efficiency, to guarantee that the transferral takes place.<sup>29</sup>

A just and solidarity-based system of sharing responsibility for refugees must be devised in the European Union. The proposed emergency and other measures start too late and, as a whole, do not effectively tackle the causes of the structural defects. It is therefore high time to develop a responsibility system that can lead to the reduction of the structural defects indicated in the medium to long term. These include the following measures.

## 2. Recognition of the principle of free choice of member state

We propose that the responsibility criterion of “irregular border crossing” be abandoned and replaced by the responsibility criterion of free choice of member state. It is true that, at present, various other fundamentally different models are under discussion, in particular the introduction of a quota system and the model of financial offsetting. All models aim at sharing responsibility for *asylum seekers* entering the EU spontaneously. The conflict that this has caused in the EU has impeded agreement on an equitable, fair asylum system from the start, and can, in our opinion, in the interest of the member states and the asylum seekers be best eliminated by recognizing the principle of free choice of member state. This follows from the analysis of the amendment models currently under discussion and a comparison of their respective advantages and disadvantages. This must not take place unilaterally from the angle of individual member states but must be from a pan-European perspective. Further, such a comparative consideration guarantees that a model is not one-sided but its possible positive and negative repercussions are evaluated in connection with alternatives.

27 So *Danish Presidency*, Discussion paper “A common framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flows,” 26-27 January 2012, 2.

28 Article 27 of the draft of the new Dublin Regulation foresees such possibility of applying for an injunction.

29 *Pelzer*, *Unsolidarisches Europa*, in: *KJ* 2011, 262 (267 f.).

Once the criterion of illegal entry, the basis for defining responsibility, has been removed in the Dublin system, the first member state in which the asylum application is filed will be responsible if the responsibility of another member state cannot be determined on the basis of other criteria (Art. 13 Council Regulation (EC) No. 343/2003). Hence the consequence of abolishing the criterion of irregular entry is the free choice of member state by the refugee. Those who understand irregular entry as a fundamental structural defect of the system but do not want to change the existing system if they do not have to, or do not want to set up new procedures and administrative structures, recognize the principle of free choice of country of asylum. This proposal appears attractive because it is easy to implement in legal terms and merely calls for slight changes, not for any fundamental establishment of new criteria and procedures.

The discussion about linking responsibility to the filing of the asylum application has a long tradition in the EU. In view of the critical development of the Dublin system the time has now come to link up with this tradition. Back in the preliminary phase of Council Regulation (EC) No 343/2003 the Commission presented a working document on 21 March 2000 in which it engaged critically with the principles of the then Dublin system and proposed making the determination of the member state responsible for dealing with the case dependent on the *first place of lodging the asylum application*.<sup>30</sup> This proposal was largely rejected by the member states, not however by the border states Greece and Italy. The Commission then submitted a draft regulation,<sup>31</sup> that basically retained the fundamental principles of the Dublin system to date and no longer upheld the original proposal. Greece and Italy resisted the proposal for a long time but then could not hold their own against the other member states. As early as three years after the regulation took effect, the UNHCR saw itself – due to the wrong turn the system had taken – forced to propose that responsibility should primarily be bound to the member state in which the asylum application was filed, unless the asylum seeker already had connections or a close relationship to another member state.<sup>32</sup>

30 *Commission of the European Communities*, Commission staff working paper. Revisiting the Dublin Convention, SEC(2000)522, 21 March 2000, Conclusion No. 55; see also Marx, *Adjusting the Dublin Convention: New Approaches to Member States Responsibility for Asylum Applications*, in: *European Journal of Migration and Law* 2001, 7.

31 *Commission of the European Communities*, Proposal for a Council Regulation 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, COM(2001) 447 final 2001/0182/CNS), 26 July 2001.

32 *UNHCR*, “The Dublin II Regulation – A UNHCR Discussion Paper” (extracts from the UNHCR Study) April 2006, 5.

The free choice of member state links up with this proposal. This principle is a component of international development of law. In 1979 the Executive Committee for the UNHCR programme, in Recommendation 15 (XXX) on "Refugees without an asylum country", recommended that the states lay down "common criteria" to "identify the country responsible for examining an asylum request". In its opinion, the refugee's intentions "as regards the country in which he wishes to seek asylum ... should as far as possible be taken into account".

### 3. Test criteria for a just and solidarity-based system of defining responsibility

A comparison of advantages and disadvantages of the currently discussed amendment models first calls for the identification of the models that are mutually exclusive. The implementation of *resettlement programmes* and *relocation projects*<sup>33</sup> does not aim at a distribution of asylum seekers in the EU but at acceptance of refugees from transit states outside Europe (resettlement) or of refugees from other member states (relocation). These models, like the extension to refugees of *the EU right to freedom of movement*, describe important instruments of a humane refugee policy. As situation-related reception programmes they may relieve overburdened member states on a voluntary basis, as long as they do not only cover those formally recognized as being in need of protection and, in addition, take far more than the 250 refugees that EU states agreed to take from Malta. The *early warning system* and also *reinforcing support for overburdened member states*, in particular through the European Asylum Support Office, are flanking measures that should be applied with each model. Ultimately that also applies to the proposal of *financial compensation* for overburdened member states. As such, however, these ideas are not suited to providing a just solution to the question of structural distribution of asylum seekers in the EU.

The discussion about the principle of sharing responsibility in the EU thus amounts to an alternative between the current Dublin system, the quota model and the principle of free choice of member state. According to the *quota model*<sup>34</sup> currently being discussed in the European Parliament, asylum seekers are to be distributed to the member states on the basis of a distribution key, either after they have entered the EU or the reception quota of the receiving state has been filled. This model presupposes setting up completely new administrative structures and introducing new, complex procedural arrangements. In view of the heterogeneous diversity of member states, it is difficult

33 See here in detail *Dolk*, Das Dublin-Verfahren, Friedrich Ebert Foundation, October 2011, 10 ff.

34 <http://www.europahirsch.eu/politisch/ausschusse/ausschuss-burgerliche-freiheiten-justiz-inneres/asympaket/europaeischer-verteilungsschluesel-fur-asylum-seeker/>

to agree on criteria for the respective quota, although such a quota could in fact promote the goal of solidarity among the member states (Art. 80 TFEU). Instead, a preferable model would retain existing structures as far as possible, but implement them with respect for human rights and provide financial compensation for overburdened member states. Here the priority criteria of *unaccompanied minors* and *family ties* could be maintained. The secondary criteria of illegal entry and filing an asylum application are disputed. At present, the criterion of "irregular border crossing" *de facto* has top priority, being linked to the travel routes, while the legally speaking prior criteria are regularly not applied. The criterion of applying for asylum has an *interceptive function*, and applies when there is no other criterion (Art. 13 Council Regulation (EC) No 343/2003). However, the deficiencies of the Dublin system provide a compelling argument for not maintaining the criterion of irregular entry, which arose for political reasons. It is leading to unacceptable consequences for international law and EU law, and cannot be justified in terms of human rights.

The three models – the current system, the quota system and a system based on the free choice of member state – are mutually exclusive and therefore cannot be combined. This will be shown in detail below.

#### a) Test criterion of the fair sharing of responsibility

In its resolution of 17 September 2012 the European Parliament criticises the fact that the current Dublin system does not give the member states any opportunity to share the responsibility for asylum seekers among themselves, and that it places an undue burden on the member states providing the entry and exit points of the EU.<sup>35</sup> The quota system would probably produce a relatively fair distribution of asylum seekers throughout the EU if substantive criteria could be found to operate it. This is difficult to imagine, given the different economic and social standards applying in the member states, combined with the difficulties in agreeing on criteria for distribution. The free choice of member state would not lead to a fair sharing of responsibility. Just as in the current system, parallel measures must be taken to relieve the member states suffering a disproportionate burden. On the other hand, disproportionate burdens would be less important because the asylum seekers would be received and supported by their family and cultural networks, while it is those living in isolation that are a disproportionate burden on the national social systems.

35 Resolution of the European Parliament of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)), para. 33.

## **b) Test criterion of considering individual interests**

At present, the individual interests of asylum seekers, except for extremely close family ties, are not considered. The sovereignty clause is not practised in the interest of asylum seekers. The introduction of a quota system would not do much to change this serious deficiency. Asylum seekers would continue to be transferred against their will to member states in which they had to live in isolation from their family and cultural ties. Even if transfers were undertaken only after the respective national quotas were filled, this deficiency would remain. It would not erase the EU's ugly image in the rest of the world nowadays, due to the large-scale deportations and automatic, procedure-related detention.

By contrast, the principle of free choice of member state would be very fair to the individual interests of the asylum seekers. Force would be applied to applicants during the procedure merely in cases in which, after the rejection of their asylum application in the country of their choice, they went to another member state in order to file another application. However, in contrast to the current practice, this would apply to a tiny group of asylum seekers. Possible unevenly filled capacities in the individual member states are also based in European history. Studies have shown that the ties that arose through colonial traditions, the consequent common language, existing national networks in the receiving state and trade relations between it and the countries of origin are a strong motive for the asylum seekers' choice of member state.<sup>36</sup>

## **c) Test criterion of preserving and improving standards of protection**

Despite the EU's efforts to improve procedural and protection standards for asylum seekers, the current system has led to a worsening of standards, at least in the member states suffering undue burdens. With the quota model, this problem would not be as acute as at present because of the relatively fair and equal burden on member states. With the free choice of member state similar symptoms could arise, because there would be a danger of member states claiming to bear a disproportionately high burden and reacting by lowering procedural and protection standards. Member states are, however, also bound by secondary law, so that they can also be required to observe and improve procedural and protection standards. Furthermore, they can rely on effective assistance through the European Asylum Support Office if their asylum system is overburdened. The planned financial compensation mechanism could, in particular, avoid a race to reduce procedural and protection standards.

<sup>36</sup> Collyer, *The Dublin Regulation, Influences on Asylum Destinations and the Exception of Algerians in the UK*, *Journal of Refugee Studies* 2004, 375 (383).

Generally speaking, it must be noted that the quota model does not entail the risk of lowering standards as a reaction to the sense of excessive burden. Quite the contrary, the problem is raised both for the current system and for the principle of free choice of member state. However, under secondary law the member states are obliged to uphold and improve protection standards and not to worsen them. With refugee protection, the phenomenon of the spontaneous entry of asylum seekers normally hampers the receiving countries' ability to keep migration under control. Refugee law aims from the start to guarantee protection for this refugee group, as illustrated in particular by the ban on refoulement. The tension between the interest in protecting the refugees, on the one hand, and the interest of the receiving states to effectively control migration, on the other, thus cannot be removed, but must be constructively taken up. The interest of member states aims to control humanitarian migration through legal provisions. Spontaneously entering asylum seekers attempt to withdraw from the regulations that apply to them because application of these regulations leads in practice to blocking their coming to Europe and the desired entry to their country of destination. These regulations are based on the member states' idea that they are most affected by the asylum seekers desire to enter them. For fear of a pull effect, the focus of the EU's common efforts is primarily on achieving effective border security, while the interests of the persons in need of protection are accorded little priority. However, that does not constructively maintain the immanent tension in refugee law but resolves it one-sidedly in the interest of the member state and at the expense of the spontaneously entering asylum seekers.

We do not accept the objection to alternative models to the current system on the argument that border member states might tire in their efforts to protect the external borders of the EU. Asylum seekers and refugees have a right to the preservation of their procedural and status-law protection in the EU. Mixed grounds for fleeing are not a legitimate reason for extending migration controls beyond the EU's external borders, in particular through defence measures on the Mediterranean. An equitable, fair procedure cannot be guaranteed outside the EU, let alone on the high seas. The European Court of Human Rights made that very clear.<sup>37</sup>

From the standpoint of refugee law, migration control must not aim to ward off asylum seekers and refugees but must guarantee their protection. A regulated secondary movement is therefore in the interest both of member states and of the asylum seekers and refugees. Criticism of the change models under discussion overlooks the fact that the current procedure of irregular further migration and the accompanying lack of rights and protection of asylum seekers is not in the interest of the member states.

<sup>37</sup> ECtHR, *Judgement of 23 February 2012 – No 27765/09 – Hirsi Jamaa*.

Irregular secondary movement within the EU is by now a considerable component of the conditions negotiated between refugees and the border-crossing services, either on when first fleeing their countries or later on.

The current system cannot achieve this goal owing to a lack of consideration of individual, family, social and cultural interests of the asylum seekers. Its impacts run counter to them. That would also apply to an enforced quota for the same reasons. By contrast, the principle of free choice of member state would lead to a system of regulated secondary movement in the EU. This is explained in detail below. The possibility of absconding after the first registration in the EU cannot be excluded, but this exists all the more with the quota model and in current practice.

## **E. Proposal for a remodelling of the European system of asylum responsibility**

Our proposal to recognise the right to free choice of member state and to link it with a system of financial compensation seeks to make a constructive contribution to a European asylum system that guarantees asylum seekers in the EU the chance of a fair and efficient examination of their grounds, based on the rule of law. Since the principle of the free choice of member state will entail unequal burdens among the member states it should be linked to a *financial compensation fund*. The European Parliament points to this in its resolution of 11 September 2012. It recommends that the member states fully exploit the options available in the framework of the European Refugee Fund and welcomes the establishment of a more simple and flexible asylum and migration fund planned for 2014. Sufficient funds should be allocated to support refugees and asylum seekers. The creation of a well-equipped mechanism for a higher number of asylum seekers and refugees in the individual member states was an important concern, according to the European Parliament.<sup>38</sup>

We cannot see why a human rights-based remodelling of the European system of determining responsibility for asylum on the basis of the principle of free choice of member state would run counter to the enlightened self-interest of the member states. On the contrary, it would particularly promote the principle of solidarity among member states (Art. 80 TFEU) and – unlike the present practice of irregular further migration – make available a legal framework for the choice of country of asylum. The integration effects to be expected from the free choice of member state give us good reason to

<sup>38</sup> Resolution of the European Parliament of 11 September 2012 on enhanced intra-EU solidarity in the field of asylum (2012/2032(INI)), para. 20 ff.

assume that the integration of asylum seekers and refugees in their desired receiving country would take place more quickly and effectively than hitherto, and would thereby specifically reduce burdens on the member states. The integration lying in the interests of the member states, which is alleviated through considering individual interests, is considered far too little in the current asylum discussion. An equitable, fair sharing of responsibility for the refugees among the member states is reached less through a mathematically abstract quota calculation than through targeted integration measures. Possible imbalances occurring in the EU as a consequence of the principle of free choice of country of asylum may be evened out through a compensation fund.

## **F. Reception procedure and sharing of asylum seekers in the EU**

The feasibility of all this can only be shown by putting it to the test, admittedly based on a practical procedure with certain rules. We are convinced that our proposal is legally and politically enforceable because it will very probably do much better than the previous systems in promoting the integration of refugees in their countries of reception and limiting irregular entry and secondary movement. It is thereby likely to take away the member states' fear of losing their competence to control migration policy.

The current procedure can in principle be retained: the member states are obliged to identify irregular entry of asylum seekers when they cross the border and to check their identity (Art. 77(1) lit. b) and c) TFEU). If the asylum seeker is checked, he or she must file for asylum under applicable law, in order to have protection against deportation or refoulement. The member state must respect Article 33 RCS and Article 3 ECHR. The effectiveness of protection against refoulement is compelling and thus does not provide for the lodging of an asylum application. Rather, the competent authorities may not refuse entry to the persons crossing the border if they appeal to Article 33 RCS and Article 3 ECHR. The 1951 Refugee Convention does not force refugees to apply for asylum in the first state they enter after fleeing. Rather, Article 31(2) RCS recognises at least in principle the right of refugees to be received in another country. *Announcing themselves to be asylum seekers* therefore suffices for the applicability of compelling protection against refoulement. If the asylum seeker does not wish to apply for asylum he or she cannot be forced to do so by the state of entry. Being forced to apply for asylum, as happens at present, does not comply with the system of international law.

The further procedure is determined by the refugee's right to freely choose the member state in which he/she wants to apply for asylum. The member state carrying out the entry control has to respect this and permit asylum seekers to continue their journey under an orderly procedure, so that they can apply for asylum in the state of their



choice. The state certifies the request for asylum, and the individual can present this paper then as proof of entry in the member state of choice. The fear that asylum seekers will abscond in the EU is effectively taken into account by the existing provisions of the system of sharing responsibility: at the entry control point the asylum seeker is registered in the state of entry. The EU can take suitable precautions in case he/she then does not register in another member state within an appropriate time period. We presuppose, however, that refugees seek to be received into their cultural, social and family networks and therefore are highly motivated to reach the state of their choice as fast as possible and to file for asylum there. Of course, the EU can assist them in their onward journey, particularly with financial assistance. In any case, member states must not prohibit the person's wish to continue their journey to the member state of their choice.

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