High Commissioner’s Dialogue on Protection Challenges, 2014 - Protection at Sea

Breakout session 1 - Saving lives: search, rescue and disembarkation

Submission from the IIHL to the attention of the Co-Chairs
(The Hon. Anne C. Richard and Mr. Alex Aleinikoff)

DELINKING DISEMBARKATION AND ASSUMPTION
OF RESPONSIBILITY FOR ASYLUM SEEKERS
Proposal for an EU Pilot Project not Requiring
an Amendment of the Dublin Regulation

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1. Background
As abundantly witnessed by the debate carried out during the Session, international practice and discussions around the follow up of rescue operations at sea clearly show how the SAR regime is under pressure, due to the fact that the State accepting disembarkation is subsequently bound to assume responsibility of asylum seekers and to manage the presence of other migrants, with an irregular status as far as entry and stay are concerned. This position of the disembarkation State may be alleviated only in presence of relocation schemes voluntarily subscribed by other countries (for asylum seekers) or of bilateral agreements with sending or transit countries accepting transfer of migrants (for other persons rescued at sea). The relocation scheme is not so popular among States, while bilateral agreements on return of irregular migrants may raise problems for the respect of non refoulement principle or of other international rules.

In the Mediterranean additional factors complicate the framework. It is one of the most used routes to get to European States, while current EU legislation substantially places the burden on the disembarkation States. This is particularly evident for asylum seekers, due to the formulation of the criteria spelled in the Dublin Regulation III:

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2. See the Hirsi judgement of the European Court of Human Rights.

3. Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).
minors) and other cases not usually relevant in the context here examined, this regulation establishes a jurisdictional link with the first entry country, i.e. the one accepting disembarkation.

The prompt identification of a safe place of disembarkation is of vital importance for the effectiveness of SAR regime, for not placing unnecessary burdens on rescuing ships (be them State’s vessels or private boats), for the safeguard of human rights and dignity of migrants. In order to avoid disincentives for the State accepting disembarkation or for the (prospective) rescuing ships, some innovative formulas must be explored, with a pragmatic approach. As proposed by the same UNHCR, new solutions must be envisaged pointing at delinking, in some instances, the acceptance of disembarkation and the assumption of responsibility for rescued persons (especially for asylum seekers). This proposal is thus conceived as being in line with the relevant approach advanced by the UNHCR on the appropriate responses to mixed flows by sea.4

This proposal refers to the EU and to events taking place in the Mediterranean Sea, even though nothing impedes that the basic elements of it might be adapted to other regional contexts. Moreover the proposal focuses on asylum seekers and might be seen as a laboratory for similar solutions to apply even to other categories of migrants with specific features (for example, unaccompanied minors, not qualifiable as asylum seekers).

With specific reference to the EU, the pilot project here proposed is conceived to give substance to the principle of solidarity among Members States enshrined in Article 80 TFEU.5

Some elements of this proposal builds upon a report jointly drafted in November 2014 by the International Institute of Humanitarian Law (IIHL), the Mediterranean Universities Union (UNIMED) and by the Centro Studi Politica Internazionale (CeSPI), and commissioned by the Italian Ministry of Foreign Affairs.6

2. Basic assumptions of the proposal

The first assumption inspiring this proposal is that asylum seekers must face a process of integration in the hosting State that may prove extremely complicated and difficult, due to the trauma already suffered and the possible absence of any substantial link with the local environment. This might have a higher financial impact on the host State (costs for language courses, assisting the protected persons in integrating and finding a job, counteracting probable social exclusion etc.) and also negatively reflecting on the same capacity of the protected person to reach independence from State aid in a short time, to stimulate self-empowerment, and to positively contribute to the cultural and social development of the country concerned.7 A frustrated, poorly integrated and under-employed refugee is a problem not only for the same person involved, but also for the host community: such a situation is a lose-lose one, both for the refugee and the host State.

The second assumption is that, in the context of European Union, such lose-lose situation negatively reflects on the entire EU. Firstly, the European funds given to the single Member State to manage processing of asylum claims may prove ineffective, given that they may be unable to secure a satisfactory integration of

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

6 IIHL, UNIMED, CESPI, Il contributo dell’Italia nella governance internazionale ed europea delle politiche migratorie e per la tutela dei diritti umani, November 2014.

the persons entitled to international protection. Secondly, isolated persons in one Member State are isolated and marginalized persons for the entire EU, with negative side effects on the whole European society. Thirdly, the allocation to a State with no substantial links with the asylum seeker may favour elusive behaviors by the latter, like avoiding to contact the competent authorities and trying to reach in an irregular way the desired country (or one of the desired countries), this way creating a problem of public order and probably fuelling the smuggling industry.

3. Key elements of the proposal

1) Under Article 5 of the Dublin Regulation the EU Member State accepting disembarkation must conduct a personal interview with the asylum seeker, in order to facilitate the process of determining the Member State responsible. Nothing impedes that the competent authorities of the Member States concerned are assisted by a team including representatives of other Member States, EASO,\(^8\) UNHCR and other actors (such as specialized NGOs). Moreover, the interview could not only aim at assessing the existence of *prima facie* protection needs under the Geneva Convention and the EU Qualification Directive and the presence of the links referred to by the Dublin Regulation, but could also serve to ascertain the existence of additional *substantial links* with another EU Member States (or more than one, if applicable).

2) *relevant substantial links* with other Member States might include:\(^9\)

- presence of relatives other than the ones taken in consideration by the Dublin Regulation;
- knowledge of the language;
- evidence of past experiences of work or other activities deployed in such country;
- professional qualifications obtained in one country, or particularly required in that country;
- other social ties, such as regular stay of friends coming from the same origin country, or presence of associations of exiles or nationals of the same country, or existence of a local sponsor (individuals, companies, other entities) showing willingness to take care of the asylum seeker.

3) the occurrence of substantial links with another Member State should be substantiated by the asylum seeker (at least partially) and followed by an appropriate verification. In other terms, here it is not proposed to establish a criterion of free choice by the asylum seeker, but rather a mix of subjective preference and other objective factors.

4) the second Member State would accept the transfer of the asylum seeker (through simplified and quick procedures)\(^10\) and receive a financial contribution by the EU Asylum, Migration and Integration Fund (AMIF) in order to face the initial costs of reception.\(^11\) Even the costs of the transfer should be covered by the AMIF.\(^12\)

5) the second Member State will complete the examination of the asylum claim and, if proved to be genuine, will afford the relevant rights to the concerned persons, under the refugee status or the qualification of beneficiary of subsidiary protection.\(^13\)

\(^8\) See in particular Regulation (EU) No. 439/2010 establishing the EASO, in particular under Articles 5, 8, 10, 13-20.

\(^9\) The list proposed is not exhaustive, but might be expanded or better refined. The order is not necessarily expression of a priority among those criteria.

\(^10\) This would be done exerting its discretionary power under Article 17 Dublin Regulation.

\(^11\) See Article 18 Regulation (EU) No. 516/2014 establishing the Asylum, Migration and Integration Fund.

\(^12\) See Article 20 Regulation (EU) No. 516/2014 establishing the Asylum, Migration and Integration Fund.

\(^13\) As an alternative, it might be conceived that the country of disembarkation will complete the evaluation of the asylum
6) only as a residual solution, the State of disembarkation would assume responsibility for the asylum seeker.

4. Legal basis of the proposal

This proposal does not contradict any existing rule under EU law. On the contrary, it may be qualified as a pilot project to implement Article 17 of the Dublin Regulation (sovereignty clause and humanitarian clause), having the dimension of a Union action under Article 20 of the AMIF Regulation. A preliminary arrangement involving the various actors above mentioned would be necessary, but this does not imply unsurmountable obstacles. The arrangement detailing the pilot project might be accompanied by appropriate non-binding guidelines by the European Commission and/or the EASO on simplified procedures and definition of substantial links.

If associated to a Frontex led operations, this project could be part of (or referred to in) the operational plan agreed by the participating States and the State hosting the Frontex mission, under Article 10 Regulation No. 656/2014.

5. Foreseeable impact of the project

This project could lead to reduce tensions among Member States on the debated topic of burden sharing, purporting a rational and pragmatic way to establish a balance between the needs and aspirations of the asylum seekers and the needs of Member States.

It also could reduce disincentives towards the conduct of SAR operations by States or private ships, especially in the central Mediterranean.

The proposal is able to reduce costs for hosting States and to maximize the output of European funds, securing in the same time much better chances of integration and self-empowerment of the asylum seeker, and his/her contribution to the hosting community and to the whole EU.

Finally, the project could constitute a benchmark for future modifications of the Dublin Regulation.

claim. In this way, however, a heavy burden could be put on the few States interested by disembarkation. Moreover, during the evaluation period of the claim and the possible supplementary period of decision of the legal recourse against a possible denial, the asylum seeker would be obliged to stay in a country where he/she does not have any substantial links, with the inconveniences above mentioned.

In the perspective of the mutual recognition of the positive decision of the authorities of the competent Member States and subsequent move to another Member State, see ECRE, *Discussion Paper: Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU*, November 2014.

14 Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

The qualifying element of the pilot project would be that participating Member States will undertake in advance to take in examination with a favorable stance the exercise of discretionary clauses under Article 17. Of course, it is evident that a wide participation by Member States is a key element of success of the proposal.

15 See, again, Regulation (EU) No. 439/2010 establishing the EASO, in particular under Articles 5, 8, 10, 13-20.