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## ***From Dublin to Athens: A Plea for a Radical Rethinking of the Allocation of Jurisdiction in Asylum Procedures***

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### ***Abstract***

The so called refugee crisis of 2015 had several effects, among which the definitive demonstration of the unsustainability of the Dublin system and the need of a radical change in the modalities of allocation of the competence for the exam of asylum claims in the EU. The same credibility of the EU is at stake, as well as the capacities of national governments to manage the relevant flows reaching the Schengen area.

This Policy Brief provides sound arguments both for supporting the demand for a new legal framework, and for the determination of new criteria which combines fairness, realism, solidarity, cooperation. A quota approach would be combined with a “genuine link” approach, thus trying to find a proper balance between the States’ interests and the point of view (and related behaviors) of asylum seekers, and also between the objections of human rights defenders and the concerns of European public opinion.

The need to turn the page with the Dublin age warmly suggests to choose, for the new proposed regulation, a nick name which evokes the features of the current historical (and dramatic) passage of European integration and our deep sense of belonging to a place where much part of our way of thinking and of being a society is rooted: Athens.

Having regard to the lessons learnt from decades of regulation of the determination of jurisdiction in civil, commercial and criminal matters, a first step to take is the adoption of a new conception for the role of the asylum seeker, who should be allocated to the State with which he/she holds a substantial link: the configuration of the relevant connecting factors (family relations; economic or social ties) should pay due regard to the empirical dimension of the phenomenon and to the need to avoid unnecessary sufferance and waste of public funds and time. If the asylum seeker has genuine links with more States, a certain relevance to his/her free choice should be awarded. Lacking any connection with a given country, the State with the lowest performance in fulfilling its reference quota should be the competent one.

In the same time, an already overburdened country should be afforded the possibility to refuse responsibility, provided that some basic family ties are safeguarded. In such cases, a less connected country should be responsible, or the one less engaged in hosting asylum seekers and refugees, or as *extrema ratio* the country of first entrance or where the application is lodged.

Whether an asylum seeker is allocated to a country where he/she does not have any substantial link and his/her asylum claim receives a positive outcome, the possibility of accepting a genuine job offer in another Member State should be admitted. This way, a partial freedom of circulation for work purposes could be recognized, but its exercise would relieve the first Member State by protection duties.

As an accompanying measure, a system of financial incentives/disincentives for Member States should be conceived.

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## SINTESI (IT)

La “Convenzione sulla determinazione dello Stato competente per l'esame di una domanda di asilo presentata in uno degli Stati membri delle Comunità Europee” – firmata a Dublino l'ormai lontano 15 giugno 1990 e comunemente conosciuta come **Convenzione di Dublino** – ha dato origine al quadro normativo europeo riguardante i criteri ed i meccanismi di determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale. La Convenzione di Dublino è stata poi sostituita dal regolamento CE 343/2003 (**Regolamento Dublino II**) e successivamente dal regolamento UE 604/2013 (**Regolamento Dublino III**).

Le norme di Dublino perseguono l'obiettivo primario di **stabilire quale Stato membro è competente ad esaminare la richiesta di protezione internazionale** (asilo) da parte di un cittadino di un paese terzo (o da un apolide) e, nel caso in cui la procedura abbia esito positivo, farsi carico della protezione internazionale del richiedente in una prospettiva di lungo periodo.

Assunto alla base di questo sistema è l'equivalenza dei sistemi nazionali per il trattamento delle domande di asilo, possibile grazie all'applicazione, da parte degli Stati membri, di norme comuni in materia di accoglienza dei richiedenti asilo, di gestione dell'esame delle richieste, di definizione degli status e del relativo trattamento per i beneficiari. Tuttavia, la realtà dei fatti è ben diversa. In primis, la sostanziale e rilevante differenza ancora esistente nella pratica dei diversi Stati membri per quanto riguarda le condizioni di accoglienza, la lunghezza e le modalità delle procedure, la qualità dei processi di integrazione e le opportunità di lavoro. In secondo luogo, viene messa in discussione, in alcuni casi, la piena aderenza da parte di alcuni Stati membri agli standard europei ed il rispetto dei diritti umani.

La prassi applicativa e il dibattito a vari livelli sulle norme di **Dublino** mostrano chiaramente come la disciplina originariamente incarnata nella Convenzione del 1990, ed in seguito recepita nel diritto UE, è per gran parte **inefficace** ed, inoltre, produttrice di **effetti collaterali indesiderati**. Le tensioni politiche continuano a crescere, sia tra i governi che all'interno delle società dei paesi più esposti o più generosi: tali tensioni sono spesso fomentate in maniera disinvolta da movimenti nazionalisti e populistici, ma sarebbe un errore sottovalutare le inquietudini che pervadono l'opinione pubblica europea nel suo complesso e che spinge i governi a repentini cambi nelle proprie strategie. Molti richiedenti asilo e migranti sono stati (e continuano ad essere) esposti a situazioni pericolose e umilianti, allo sfruttamento di trafficanti, a forme di violenza generalizzata. Molte risorse pubbliche (nazionali ed europee) sembrano essere impiegate in modo poco efficiente e tutt'altro che efficace. Da ultimo, i profili di sicurezza associati alla minaccia terroristica rendono il quadro ed il dibattito politico-giuridico ancora più complesso.

Nel settembre 2015 è stato adottato, evento senza precedenti, un regime temporaneo di ricollocazione dei richiedenti asilo (in deroga ai criteri di Dublino) per sostenere gli sforzi di Grecia e Italia, tra i paesi più esposti al crescente ed incontrollato flusso di richiedenti asilo e migranti. I risultati ottenuti finora sono deludenti, ma preme enfatizzare che lo schema di relocation ha messo al centro del dibattito la questione dell'equa ripartizione delle responsabilità e degli oneri tra gli Stati membri, aprendo la strada ad un approccio basato su quote calcolate in funzione delle capacità dei vari paesi.

In questo scenario sembra piuttosto **irrealistico pensare di tornare ad applicare il sistema di Dublino** così com'è stato concepito. Le profonde radici degli attuali flussi di persone sono destinate a durare per anni, mentre altri ulteriori flussi potrebbero paventarsi nel breve-medio termine per diverse cause: lo scatenarsi di nuovi conflitti, il peggioramento di altri già in corso, il cambiamento climatico. Inoltre, la posizione in prima linea di alcuni dei paesi dell'UE li espone costantemente e sistematicamente ad una pressione aggiuntiva, mentre è un dato incontestabile che altri Stati, dotati di una politica di apertura e di sistemi di asilo all'avanguardia, hanno assistito ad una saturazione delle proprie capacità di accoglienza. Allo stesso tempo, i richiedenti asilo non hanno un approccio collaborativo con la logica di Dublino poiché la ritengono irrazionale ed ingiusta nei loro confronti. La recente relocation, infine, è stata concepita come una mera eccezione transitoria a un quadro giuridico generale i cui elementi portanti rimangono invariati.

D'altronde, l'applicazione ad intermittenza delle norme di Dublino (da parte di Stati in prima linea o di transito o di destinazione finale) non può essere una soluzione, come dimostra l'attuale crisi della cooperazione europea. Non sono solo la vita e la dignità dei richiedenti asilo e dei migranti ad essere a rischio, non sono solo gli obblighi internazionali di natura umanitaria ad essere violati: è l'intero progetto di unità ed integrazione europea ad essere messo radicalmente in discussione. L'idea di uno spazio comune

di libera circolazione e di civiltà può essere irrimediabilmente compromessa. Alcuni osservatori e leader politici affermano che “Dublino” è congelato (o forse morto): ciò che è certo è che l'intero spazio Schengen e l'idea stessa di Unione Europea è messa attualmente a dura prova sotto il peso della retorica, del nazionalismo, della paura, della sfiducia, della xenofobia.

In un tale contesto è doveroso pensare a **soluzioni ambiziose e al tempo stesso realistiche**, che possano essere ampiamente ed apertamente dibattute. È più che mai necessario un profondo ripensamento del sistema di Dublino che sembra, oggi, finalmente auspicato anche dalle stesse istituzioni europee.

La proposta delineata in questo paper intende inquadrare un **approccio di nuova concezione**, che porti ad **abbandonare il termine “Dublino”**, inventando qualcosa di nuovo in grado di **ricostruire un clima di fiducia e di cooperazione tra i richiedenti asilo, gli Stati membri, le istituzioni europee e tutti i vari attori coinvolti** (domestici ed internazionali). La proposta qui formulata inoltre deve essere accompagnata da un'azione **concomitante e complementare su altri piani** (piena attuazione delle regole europee da parte di tutti gli Stati membri; credibile e robusto piano di resettlement da Stati terzi; sperimentazione di altre procedure di ingresso protette; riforma in senso più liberale del ricongiungimento ecc.). L'espressione “approccio olistico” è spesso abusata in molti contesti: qui non lo è. Senza un **approccio olistico** ed una **visione globale** delle diverse problematiche interconnesse, qualsiasi tentativo di revisione delle attuali regole si rivelerà solo uno sterile esercizio di marketing politico o, peggio ancora, un compromesso di basso livello e di breve se non brevissimo periodo.

Atene è un luogo simbolico per la cultura mondiale ma anche, più recentemente, per la drammatica crisi che l'UE si trova ad affrontare: la saggezza del passato potrebbe ispirare un **futuro quadro normativo**, per questo si propone un **nuovo “Regolamento Atene”**, che si spera possa contribuire alla formulazione di un sistema più efficace ed equo per quanto riguarda la determinazione dello Stato membro competente per l'esame di una domanda di protezione internazionale.

La proposta si basa su **quattro presupposti fondamentali**.

- 1) Il primo è che per avere un sistema funzionante ed efficace che ripartisca la giurisdizione tra gli Stati membri in tema di asilo non è possibile ignorare quanto acquisito finora grazie a decenni di costruttiva cooperazione internazionale nella determinazione della competenza giurisdizionale in materia civile, commerciale e penale. In tale ambito, è scontato che i titoli di giurisdizione siano calibrati sulla ricorrenza di un collegamento tra uno Stato e i soggetti o gli interessi coinvolti.
- 2) Il secondo presupposto è che nell'elaborazione di una serie di criteri miranti a stabilire una giurisdizione in un certo specifico ambito, un'attenta valutazione delle dinamiche materiali degli attori interessati deve essere necessariamente considerata. Nella redazione e nelle successive modifiche delle norme di Dublino è stata data insufficiente rilevanza alle reali dinamiche di insediamento ed integrazione dei richiedenti asilo che spesso cercano il sostegno dei familiari o di reti sociali nella scelta di un luogo dove iniziare un progetto di ricostruzione di vita e di rapporti umani.
- 3) Il terzo presupposto è che in ambito UE, i fondi europei dati al singolo Stato membro per gestire e processare le domande di asilo e le successive fasi di integrazione delle persone aventi diritto alla protezione internazionale può rivelarsi inefficace. Lo stesso vale per i fondi destinati ad affrontare specifiche emergenze causate da flussi di natura straordinaria. Inoltre, le persone isolate in uno Stato membro sono isolate ed emarginate nell'intera UE, con ripercussioni negative su tutta la società europea (non essendo possibile escludere l'attrazione verso forme di criminalità, di radicalismo o di fanatismo). Infine, la collocazione di un richiedente asilo in uno Stato – che non abbia collegamenti sostanziali con il richiedente – può favorire dei comportamenti elusivi da parte di quest'ultimo, come ad esempio tentare di evitare il contatto con le autorità competenti (identificazione, impronte digitali, etc.), oppure cercando di raggiungere in modo irregolare il paese desiderato (o uno dei paesi desiderati).
- 4) Un quarto e ultimo presupposto ha a che vedere con un approccio fondato sulle quote, spesso evocato nel dibattito sulla riforma del sistema di Dublino. Una valutazione della capacità di accoglienza e delle azioni intraprese dai diversi Stati membri è necessaria e utile: tuttavia, sarebbe controproducente ridurre questo esercizio a un calcolo di cifre di persone da trasferire da uno Stato all'altro con un approccio burocratico e senza tener conto di altri fattori. I richiedenti asilo non devono essere meri oggetti di procedure, ma piuttosto devono assurgere al ruolo di co-protagonisti attivi.

*I contenuti della proposta sono così sintetizzabili:*

- 1) *Formulare i criteri di allocazione della competenza con un primario riferimento all'esistenza di un collegamento sostanziale tra il richiedente asilo e lo Stato membro, privilegiando relazioni familiari, parentali e sociali, obiettivamente verificabili.*
- 2) *Elaborare un meccanismo di quote, da aggiornare periodicamente, e di incentivi/disincentivi che persegua lo scopo di tutelare i paesi che sono stati più generosi nell'accoglienza (o nel resettlement da paesi non membri); di esercitare una robusta pressione sugli Stati finora più chiusi; di segnalare situazioni di emergenza che richiedono l'adozione di piani straordinari di relocation.*
- 3) *Ove siano presenti collegamenti sostanziali con più paesi, riconoscere un certo ruolo alla libera scelta del richiedente asilo (con le dovute cautele per i minori).*
- 4) *Laddove non sussista un legame con alcuno degli Stati membri, assegnare il richiedente asilo al paese che ha il minor tasso di soddisfacimento della propria quota di riferimento. Ove la procedura di asilo si concluda positivamente, il soggetto in questione potrebbe vedersi riconosciuto il diritto di rispondere a un'offerta di lavoro effettiva proveniente da un datore avente la sede in un altro Stato membro: l'esercizio di una tale forma di libertà di circolazione per motivi economici avrebbe tuttavia come conseguenza che il primo Stato membro sarebbe sollevato da obblighi di protezione.*
- 5) *Sfruttare le potenzialità dell'intervista iniziale con il richiedente asilo (e di un approccio cooperativo da parte del medesimo, dovuto alla rivoluzione "copernicana" derivante dalla riformulazione dei criteri di collegamento), della cooperazione interstatale attraverso una rete stabile di ufficiali di collegamento in tema di asilo, dell'EASO, di eventuali squadre composite di supporto laddove ciò si riveli necessario.*
- 6) *Codificare lo strumento della relocation con alcuni correttivi rispetto alle due decisioni del settembre 2015.*

*Questa nuova impostazione del "Regolamento Atene" potrebbe portare ad una riduzione delle tensioni tra gli Stati membri sul dibattuto tema del burden sharing e stabilirebbe il necessario equilibrio tra le aspirazioni dei richiedenti asilo e le esigenze degli Stati membri (sia quelli in prima linea che gli altri). Il richiedente asilo diventerebbe un co-protagonista della procedura, e sarebbe quindi scoraggiato dal tenere comportamenti elusivi. In alcuni casi, poi, le sue preferenze o il suo protagonismo economico assurgerebbero al rango di elementi giuridicamente rilevanti.*

*Il nuovo sistema non renderebbe le cose più complicate né più onerose per i sistemi nazionali: al contrario, porterebbe un po' di ordine in una situazione a dir poco caotica, riducendo il terreno per sterili recriminazioni tra Stati membri. Inoltre, l'approccio qui proposto consentirebbe di rassicurare l'opinione pubblica e di contrastare argomentazioni faziose o in mala fede. Infine, potrebbe incentivare la condotta di operazioni SAR da parte di Stati o enti privati, soprattutto nel Mediterraneo centrale, in quanto sarebbe scardinato l'assunto secondo cui lo Stato che autorizza lo sbarco deve anche necessariamente farsi carico della gestione del richiedente asilo sul lungo periodo. Diversamente, il persistere della logica di Dublino, o un uso differente di un sistema di quote ripeterebbe i difetti e le cattive pratiche del quadro normativo vigente, per la gioia di due categorie di stakeholders direttamente interessati: i trafficanti e i populistici.*

*È auspicabile che il Governo italiano si faccia promotore di un approccio nuovo alla disciplina dell'individuazione dello Stato competente, non avendo riguardo alle esigenze unilaterali contingenti, alla "specialità" geografica del nostro paese o a presunte ingiustizie patite in passato ad opera dei partner o delle stesse istituzioni europee. La necessaria costruzione del consenso intorno a idee capaci di ovviare all'attuale situazione (per molti versi insostenibile) può e deve fondarsi su argomenti capaci di incontrare positivo apprezzamento da parte degli altri governi, delle istituzioni europee (quali Commissione e Parlamento europeo), della comunità degli operatori specializzati, dell'opinione pubblica italiana e degli altri Stati europei. È tempo di nuove regole, destinate a durare, che siano ambiziose e realistiche al tempo stesso; è tempo che l'Italia giochi un ruolo propositivo di primo piano.*

## ***1. Background***

The so called Dublin system dates back to the Convention signed in Dublin on 15 June 1990 by several Member States of the (then) European Economic Community. Contrary to what is often said in the public debate in Italy or elsewhere, the rules currently in force are no longer the ones originally spelled in that international agreement. The Convention was replaced by EC Regulation No. 343/2003 (the so called Dublin II Regulation). Later a new discipline was enacted, namely EU Regulation No. 604/2013<sup>3</sup> (the so called Dublin III Regulation).<sup>4</sup>

Dublin rules pursue the primary goal to establish which member State is competent to examine the asylum claim of third country national and, if the procedure leads to a positive conclusion, to take charge of international protection of such person in a long term perspective.<sup>5</sup> If the asylum seeker lodges the application in the “wrong” country he/she will be transferred to the “right” one, except the case where the former State’s authorities discretionally accept to treat the case, according to the special cases spelled in Article 17 of the Dublin III Regulation (sovereignty clause and humanitarian clause).<sup>6</sup>

The formulation of the criteria spelled in the Dublin III Regulation combines elements of adherence to the personal situation of the asylum seekers (whereas well identified family situations – to the benefit, especially, of unaccompanied minors – acts as relevant factors for affirming the competence of a given State) with others conceived in a pure objective and formalistic view: the State having issued a stay permit or an entry visa, or by default the first entry country, whether regular or irregular, or the country where the claim is presented.

An underlying assumption of this scheme of allocation of jurisdiction for the treatment of asylum claims is that the national protection systems are equivalent, thanks to the implementation of common rules on reception of asylum seekers,<sup>7</sup> managing of the procedure to assess the claim,<sup>8</sup> definition of substantial notions and treatments standards for recognized beneficiaries of international protection.<sup>9</sup> Nevertheless,

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<sup>3</sup> [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).

<sup>4</sup> All Member States are bound by Dublin III Regulation, with the exception of Denmark, still bound by Regulation Dublin II as a consequence of the conclusion of a dedicated agreement with the (then) European Community, entered into force on 1 April 2006: see Council Decision No. 2006/188/EC, of 21 February 2006, on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 and Council Regulation (EC) No 2725/2000.

As far as non-Member States are concerned, dedicated agreements have been concluded extending the scope of the Dublin II Regulation to Iceland, Norway, Switzerland and Liechtenstein.

<sup>5</sup> It must be taken into account that currently the holder of international protection will receive a residence permit valid only in the State having recognized the relevant status. As for circulation in the EU, only a short term freedom of travel is recognized (up to three months) under Articles 19-24 of the Convention implementing the Schengen Agreement (CISA). With regard to the taking up of stable residence in another Member State, the Directive No. 2003/109/EC on long term residents (as amended by Directive No. 2011/51/EU) applies, with its various requirements.

<sup>6</sup> “1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation. The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. [...]

2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing. [...] The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request [...] Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it.”

<sup>7</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

<sup>8</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

<sup>9</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

reality is extremely diversified. Firstly, relevant differences still exist among Member States as far as quality of reception conditions, length of procedures, positive integration measures and work opportunities are concerned: from the asylum seeker's viewpoint, some Member States are inherently more attractive than others. Secondly, in some instances an overall compliance by some States with EU standards and human rights law is called into question. Following a judgement of the European Court of Justice,<sup>10</sup> the Dublin III Regulation specifies under Article 3, para. 2, that no transfer can be executed where the Member State primarily designated as responsible is affected by systemic flaws in the asylum procedure and in the reception conditions for applicants, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union. On the same point, an abundant case law of the European Court of Human Rights<sup>11</sup> and of national tribunals<sup>12</sup> has developed.

## ***2. Dublin in action and the unsustainability of the current system***

Actual practice and discussions around the contents and the implementation of the Dublin system clearly show how the discipline originally embodied in the 1990 Convention and later transposed into EU secondary legislation is by and large ineffective and productive of undesirable side effects.<sup>13</sup> To sum up:

- As for the member States, the availability of regular channels to seek asylum in the EU have been constantly reduced, following the tightening of visa legislation, the imposition of carriers' sanctions and other pieces of ancillary legislation (including the reinforcement of controls in departure countries thanks to the secondment of liaison officers).<sup>14</sup> This way, growing flows of asylum seekers – far from disappearing or pointing to non EU destinations – are opting for irregular channels, thus placing a significant pressure on the States geographically more exposed. The recent mass movements originated by the so called Arab Springs and by the Syrian conflict exacerbated the recourse to irregular channels and put additional pressure on the countries placed at the external border of the Schengen area (mainly Greece, Italy, Hungary, Malta, Poland, Slovakia, Slovenia, and Spain).
- As for the asylum seekers, the jurisdictional links elaborated by the system are excessively rigid, given that they do not take into proper account the whole familiar situation and the existence of other substantial links able to identify the State more properly equipped to host the asylum seeker and secure his/her quick integration and self-empowerment. Moreover the system is inherently coercive, providing for forced returns to the competent State and the adoption of custodial measures. In particular, it should not be forgotten that the place of first entrance in the European Union, far from being fruit of a rational choice by the prospective asylum seeker, is in most cases determined by geography, smugglers' tactics, cumulated effects of related EU measures and of enforcement actions of specific frontline countries.<sup>15</sup>
- Some States on the external border of the Schengen area are or have been for a long time unable or unwilling to secure an adequate reception of asylum seekers. In the same time, many asylum seekers have refused to cooperate to their identification and fingerprinting, and tried to reach through secondary (and irregular) movements other States, deemed preferable for various reasons (family or social connections; better welfare or working opportunities; more efficient asylum system). This phenomenon created in the

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<sup>10</sup> Judgment of the Court (Grand Chamber) of [21 December 2011](#), *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

<sup>11</sup> See for instance the relevant factsheet elaborated by the same Court on "[Dublin cases](#)".

<sup>12</sup> See among others the news reported in the [ECRE Weekly Bulletin](#).

<sup>13</sup> See inter alia M. Mouzourakis, '[We Need to Talk about Dublin](#)'. *Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union*, December 2014, Refugee Studies Centre (Oxford Department of International Development); E. Guild, C. Costello, M. Garlick, V. Moreno-Lax and M. Mouzourakis, '[New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection](#)', CEPS Papers in Liberty and Security in Europe, No. 77/ January 2015; S. Fratzke, '[Not Adding Up: The Fading Promise of Europe's Dublin System](#)', March 2015, Migration Policy Institute Europe; E. Guild, C. Costello, M. Garlick, V. Moreno-Lax and S. Carrera, '[Enhancing the Common European Asylum System and Alternatives to Dublin](#)', Study PE 519.234 for the LIBE Committee of the European Parliament, July 2015.

<sup>14</sup> On the subject, see inter alia M. Di Filippo, 'La circolazione dello straniero nel diritto dell'Unione europea: una geometria variabile dei diritti e delle garanzie', in A.M. CALAMIA, M. DI FILIPPO, M. GESTRI (a cura di), *Immigrazione, Diritto e Diritti: profili internazionalistici ed europei*, Padova, 2012, 159, at 256-258; Consiglio Italiano dei Rifugiati, '[Access to Protection: Bridges not Walls](#)', Roma, 2014.

<sup>15</sup> The evolution of the routes employed by migrants and smugglers is often due to the closure of some route previously used and/or by the reinforcement of controls and of cooperation with transit countries.

past and is still creating a climate of tension among the various interested Member States, rendering also evanescent the inter-state cooperation envisaged in the Dublin rules for the management of the “Dublin transfers”. The number of actual transfers is definitely inferior to the actual amount of irregular movements, while costs and length of the procedures are manifestly disproportionate to the supposed benefit of making the Dublin system working and credible. The most recent events (2013-2016) only exacerbated an already unsatisfactory setting.

- Due to geographical and logistic reasons, or to the “closure” of certain terrestrial routes, the vast majority of irregular arrivals of asylum seekers used and is using the maritime route, leading to a worrying increase of tragedies. The conduct of search and rescue (SAR) operations has been conditioned in a negative way by the current state of affairs, whereas usually 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. Coastal States have sometimes refused disembarkation from rescuing ships (no matter if private or public vessels), while on some occasions the commercial ships preferred avoiding to intervene in order to avoid loss of time and money. In order to avoid disincentives for the State accepting disembarkation or for the (prospective) rescuing ships, the UNHCR underlined that new solutions must be envisaged pointing at delinking, in some instances, the acceptance of disembarkation and the assumption of responsibility for rescued persons.<sup>16</sup>
- The worsening of the economic and social situation in Greece led to the suspension of Dublin transfers to that country by other EU States (due to the systemic flaws of its asylum system), while the increase of arrivals from the Turkish route led hundreds of thousands of people to move irregularly<sup>17</sup> through the Balkan route to Germany, Sweden and other northern European countries. The intermediate countries placed on that route usually do not accept competence, while more willing States such as Austria, Germany, Netherlands and Sweden have, in 2015, adopted an *accueil* policy, later abandoned due to the ongoing pressure on their domestic asylum policies. Restrictive asylum policies (often coupled with reinstatement of controls at internal borders and heavy enforcement of controls at external borders) have been adopted or announced by a growing number of Member States’ governments.
- In September 2015, a temporary and unprecedented scheme of relocation of asylum seekers (derogating to the Dublin criteria of allocation of competence) has been agreed in order to support the efforts of Greece and Italy, but its scope is quite narrow and so far results are disappointing.<sup>18</sup> Nevertheless, a positive aspect of such (cautious and partial) development is to have put at the center of the debate the issue of the measurement of the actual effort undergone (or not) by the various Member States.

Against this background, political tensions arise, both among governments and inside European societies. Such tensions are often instigated in an interested way by populist and nationalist movements, or are motivated by ignorance or distortions in the way mass media portrait the situation: however, it would be a mistake to underestimate the apprehension currently affecting the whole European public opinion and leading national governments to sudden changes in their strategies.

To this it must be added that many asylum seekers and “ordinary” migrants are and have been exposed to dangerous and humiliating situations, safety risks, exploitation by smugglers and traffickers, violence: this is

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<sup>16</sup> See UNHCR, *Refugees and Asylum-Seekers in Distress at Sea - how best to respond? Summary Conclusions (“Djibouti Summary Conclusions”)*, 5.12.2011, and subsequent documents. See also A. Klug, ‘Strengthening the Protection of Migrants and Refugees in Distress at Sea through International Cooperation and Burden-Sharing’, 26 *International Journal of Refugee Law* (2014), 48, at 60-61. For a concrete proposal, see M. Di Filippo, *‘After Mare Nostrum: delinking the acceptance of disembarkation and the assumption of responsibility for asylum seekers rescued at sea’*, Position Paper submitted on behalf of the International Institute of Humanitarian Law to the UNHCR High Commissioner’s Dialogue on Protection Challenges, 2014 - Protection at Sea.

The deployment of multinational SAR missions such as Triton does not alter in substantial way the framework, for several reasons. First, they cover only a part of mixed flows reaching in an irregular way the Schengen area. Second, the contribution of naval assets by Member States others than the one geographically closest is made conditional upon the prevision (in the operational plan) that rescued people will be disembarked in the territory of the latter State: this means the relevant frontline State (Italy in the case of Triton). Third, the disembarkation State will be obliged by Dublin rules to exercise competence on asylum claims, unless some of primary criteria are applicable (a rather rare occurrence). The relocation scheme (see below, in the text) is just a partial (in scope) and limited (in time) exception to this state of affairs.

<sup>17</sup> This happened irrespective of having undergone or not the procedure of identification and fingerprinting in Greece.

<sup>18</sup> See [here](#) for the latest state of play (12 January 2016).

in total contradiction with the values which the EU and its Member States are obliged to respect and to pursue in every policy managed by them.

Many public funds (both national and European) seem to be ill employed.

Finally, security risks associated with the terrorist threat fuel even more an already hot debate.

### ***3. Time for a new approach: ambitious choices and (why not?) a new name***

The strength of facts renders totally unrealistic to think that a return to the Dublin orthodoxy is possible. The root causes of the current flows are destined to last for many years, while others might appear on the background (new wars, collapse of some governmental authorities, increase of climate change drivers etc.). The geographical position of frontline EU States will constantly expose them to an additional burden (at least for first reception, if compared to the one formally lying on other States), while in the meantime the asylum systems of countries traditionally more generous have reached a saturation point. Furthermore, it may not be excluded that the non-entry policy enforced by Spain in Ceuta and Melilla will soon be declared incompatible with the ECHR by the Strasbourg Court,<sup>19</sup> thus re-opening the Western African route for mixed flows and positioning Spain again in the middle of this hot debate.

At the same time, asylum seekers do not cooperate with the Dublin logic, deemed irrational and unfair towards them. The relocation approach cannot be a *panacea*, as it has been conceived as a mere transitory exception to a general legal framework which bears structural defects. Additionally, the same relocation rules are not exempt from defects and deadlocks.<sup>20</sup>

The informal disapplication of the Dublin rules or their intermittent activation (by frontline States or by transit or final destination countries)<sup>21</sup> is not a solution, as the current crisis of European cooperation is demonstrating, and produces an even more confused framework if viewed from the asylum seekers' perspective, in total contradiction with legal certainty (one of the pillars of the rule of law and of the democratic State). Not only the lives and dignity of asylum seekers are at risk, not only our international obligations towards human rights and dignity are infringed: it is the very European project to be under severe attack, it is the idea of a common area of free circulation and of civilization to be jeopardized. Some observers and political leaders state that Dublin is frozen (or even dead): this assumption might be questioned, but what appears certain is that the whole Schengen area and the same idea of European Union is currently under severe strain, as a consequence of the growing weight of rhetoric, nationalism, fear, mistrust, xenophobia.

Against this background, ambitious solutions must be conceived, and discussed in a frank and open debate. Since April 2015, with the publication of the Agenda for Migration of the European Commission, a no return point has been crossed on the taboo of the revision of the Dublin system.<sup>22</sup> The European Parliament, truly, never hid its strong discontent with the Dublin logic.<sup>23</sup> What is interesting is the spreading of a common understanding on the need of a profound rethinking. The European Council supported the idea of a debate<sup>24</sup> and the Commission came back to the issue in January 2016.<sup>25</sup>

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<sup>19</sup> See applications Nos. 8675/15 and 8697/15, N.D. and N.T. v. Spain. See also the submission by a [group of NGOs](#) (AIRE Centre, Amnesty International, ECRE, and International Commission of Jurists) and by the Council of Europe Commissioner for Human Rights [doc. [Comm DH \(2015\) 27](#) of 9 Nov. 2015].

<sup>20</sup> See M. Di Filippo, 'Le misure sulla ricollocazione dei richiedenti asilo adottate dall'Unione europea nel 2015: considerazioni critiche e prospettive', in *Diritto, immigrazione, cittadinanza*, 2015, forthcoming; UN High Commissioner for Refugees (UNHCR), [Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively](#), January 2016.

<sup>21</sup> Reference can be made to the low record of identification procedures, to the refusal to take responsibility for persons in need of protection inviting or obliging them to prosecute their journeys or rejecting them at the borders, to the suspensions of some Dublin transfers, to the reactivation of the same transfers, to the variable enforcement of discretionary clauses etc.

<sup>22</sup> See COM (2015) 240 final, at 15.

<sup>23</sup> Lately, see the [draft Report](#) on "The situation in the Mediterranean and the need for a holistic EU approach to migration" (2015/2095(INI)), doc. PE575.215v01-00 of 18.1.2016, at 15-16.

<sup>24</sup> See the Conclusions of the meeting of 15 October 2015, doc. EUCO 26/15, § 3; the Conclusions of the meeting of 17 December 2015, press release 943/15, § 2.

<sup>25</sup> See press release IP/16/65 of 13.1.2016.



What is here proposed is a newly conceived approach, so different from the one so far pursued to justify the preliminary proposal to abandon the term “Dublin” and to invent something new, able to rebuild a climate of trust and cooperation, among asylum seekers, Member States, EU and the community of NGOs and specialized operators. Athens is a symbolic place for the world culture and, in the same time, for the dramatic crisis that the EU is facing: the wisdom of the past might be inspiring a new approach for a future normative framework, and for this reason here is proposed to conceive a new “Athens Regulation” on the allocation of jurisdiction for treating asylum claims. The proposals here spelled are conceived in a setting where the mutual recognition of positive asylum decisions and the recognition of a generalized freedom of movement for holders of international protection are deemed not feasible or politically practicable: however, the proposed Athens system would pave the way for subsequent, and even more ambitious, developments.

Another preliminary point must be made clear. Any discourse about the reform or (better) the abandonment of the Dublin logic must be accompanied by a serious and concomitant action on other points. Beside the recognized need for a renewed effort to fully implement the internal dimension of the CEAS and to sustain specific countries which undergo systematic difficulties (such as Greece), more attention is needed to the sometimes neglected external dimension of such system: a credible and robust plan of resettlement from non EU countries of first asylum; the testing on the ground of other avenues for protected entry in Europe;<sup>26</sup> a pragmatic and intelligent reform of the requisites for family reunification and for other kinds of regular migration (such as the one motivated by work purpose); a real cooperation with the purpose of stabilization, democratization and economic development of a good number of origin or transit countries of asylum seekers (and other migrants);<sup>27</sup> a constant lobbying in international fora aimed at eradicating or reducing some major drivers of forced displacement (including natural disasters and climate change).

“Holistic approach” is sometime an abused expression in many contexts: here it is not.<sup>28</sup> Without a holistic approach and a comprehensive vision of many connected problems, any revision of current rules will be only a sterile exercise of political marketing or a short term low-level compromise.

#### ***4. Basic assumptions of the proposal***

The first assumption inspiring this proposal is that a workable system of allocation of competence among a wide range of States cannot ignore the acquisitions of decades of international cooperation in the determination of jurisdiction in civil, commercial and criminal matters. Notwithstanding the peculiarities of any form of jurisdiction and the relevance of different values and public needs to satisfy, some basic trends may be clearly identified: both in treaty rules and domestic statutes, a primary consideration is given to the material connection of a situation or person with the State’s legal order and territory, and to the need to ensure an efficient and speed development of the legal procedure. The State best situated in order to properly manage a legal procedure and/or the country having an objective link with the situation, interests or legal rights at stake: they are usually considered entitled to assert exclusive or primary jurisdiction in civil claims or criminal proceedings. It is true that the procedure for asserting the entitlement to international protection (to which Dublin applies) is quite peculiar and lies in a grey area between an administrative procedure and a judicial (or quasi-judicial) proceeding. Two elements should not be overshadowed however: 1) the status determination procedure has a declarative nature of the entitlement to precise subjective rights, so it cannot be deemed so distant from usual civil proceedings and from the logic underlying the proper allocation of jurisdiction; 2) the purpose of the Dublin III Regulation is to establish a “clear and workable method for

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<sup>26</sup> See for instance C. Hein, M. De Donato, [Exploring avenues for protected entry in Europe](#), A report from the Italian Council for Refugees, 2012; E. Guild, C. Costello, M. Garlick, V. Moreno-Lax and M. Mouzourakis, [New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection](#), CEPS Papers in Liberty and Security in Europe, No. 77/ January 2015.

<sup>27</sup> Less inspiring seems to be a vision which gives prominence to the construction of a sort of buffer zone around the EU, through the transfer of high amounts of money to specific countries, with the purpose to stop and keep asylum seekers there, irrespective of the real standards applied by the relevant host country. The current policy towards Turkey requires a careful evaluation and, even in the best scenario, may constitute only a part of an overall and holistic approach. See European Commission, press release [IP/15/6162](#) of 24 November 2015; Amnesty International, [Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey](#), 16 December 2015.

<sup>28</sup> To this respect, the European Parliament and the European Commission show an encouraging stance: see for instance the [draft Report](#) on “The situation in the Mediterranean and the need for a holistic EU approach to migration” (2015/2095(INI)), *supra* note 18; the [Commission’s Agenda for Migration](#) of May 2015 and the subsequent implementation packages.

determining the Member State responsible for the examination of an asylum application, a method “based on objective, fair criteria both for the Member States and for the persons concerned” and able to “determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection”:<sup>29</sup> if these are the declared aims of EU legislation and if one looks at the deadlocks in the application of the rules currently in force, a thorough attention should be paid to the established factors of connection (above mentioned), which have been tested and developed in areas dealing with similar problems of allocation of jurisdiction (i.e. civil matters; criminal cooperation).

The second assumption is that in the elaboration of tailored criteria for establishing jurisdiction in a certain domain, a careful assessment of material dynamics of interested actors cannot be avoided. In the drafting and subsequent modification of Dublin rules, little and insufficient relevance has been given to the real dynamics of settlement and integration of asylum seekers, who often look for the support of familiar or social networks in order to select a place for starting a project of rebuilding of their life and human relations. In the sector covered by our discussion, it must be taken into account that asylum seekers have to face a process of integration in the hosting State, which may prove extremely complicated and difficult when there are not substantial links with the local environment. This might have a high financial impact on the host State (costs for language courses, assisting the protected persons in integrating and finding a job, countering 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. 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.<sup>30</sup>

The third assumption is that, in the context of the 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 and subsequent integration of the persons entitled to international protection may prove ineffective. The same goes for the funds devoted to face emergencies caused by extraordinary flows. 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 (not being possible to exclude the attraction towards forms of criminality or radicalism). Thirdly, the allocation to a State with no substantial links with the asylum seeker may favour elusive behaviors by the latter, like avoiding the contact with the competent authorities (identification, fingerprinting etc.) and trying to reach in an irregular way the desired country (or one of the desired countries). This way many side effects arise: problems of public order and of proper managing of aliens’ presence; business opportunities for the smuggling industry; exposure of asylum seekers and other migrants to violence,<sup>31</sup> extortions and dramatic living conditions; additional waste of public funding.

A fourth and final assumption has to do with a quota approach, which is frequently invoked in the debate on the reform of the Dublin system and has been embodied in the relocation scheme. Let’s be clear about it. All depends on the purpose that quotas are meant to pursue. An evaluation of reception capacities and of the efforts undergone (or not) in the last years by the different States is necessary and useful. But it would be dangerous to turn this exercise into the pre-determination of rigid numbers of persons, to be transferred from one State to another according to a bureaucratic approach (being sufficient the consent of the destination country and the temporary availability of some places) and without taking into account other factors, thus treating the asylum seekers like mere objects of the procedures, rather than active co-protagonists. Instead, a

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<sup>29</sup> See recitals Nos. 4-5 of the Dublin III Regulation.

<sup>30</sup> On these aspects, see *inter alia* ECRE, [Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered](#), March 2008, at 25-29; Amnesty International, [Lives adrift. Refugees and migrants in peril in the central Mediterranean](#), September 2014, p. 60; Jesuit Refugee Service, [Rescued What Next? Protection Seekers Stranded In Sicily](#), October 2014; S. Fratzke, [Not Adding Up: The Fading Promise of Europe's Dublin System](#), cit, pp. 20 e 25. For a wider perspective, see also T.A. Aleinikoff, [From Dependence to Self-Reliance: Changing the Paradigm in Protracted Refugee Situations](#), Policy Briefs, Migration Policy Institute, Washington DC, May 2015; C. Favilli, *Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell’Unione Europea*, in *Rivista di diritto internazionale*, 2015, 701, at 725-728.

<sup>31</sup> See for instance UNHCR, United Nations Population Fund and Women’s Refugee Commission, [Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis \(Greece and the former Yugoslav Republic of Macedonia\)](#), January 2016.

calculation of quotas under the view of the assessment of reception capacities, to be regularly updated, may be useful for three purposes: a) constituting a moderating factor of the ordinary functioning of genuine links criteria (see below, under 5.3 and 5.7) or to the choice of an asylum seeker among different countries to which he/she is closely connected (see below, under 5.6); b) in the absence of genuine links with one particular Member State, establishing a connecting factor with the country having the lowest degree of compliance with its quota; c) representing a reference value for assessing the existence of extraordinary flows, calling for the activation of an emergency relocation scheme to the benefit of the affected State (or States: see below, under 5.8).

## 5. Key elements of the proposal for a new “Athens Regulation”

- 1) Under a provision similar to Article 5 of the current Dublin III Regulation, any Member State which enters into contact with a person in need of international protection must identify him/her and conduct a personal interview. The interview should pursue to aims: a) to assess the existence of *prima facie* protection needs under the Geneva Convention and the EU Qualification Directive; b) to verify the presence of connecting factors (or genuine links or substantial links: see below, point 3) with one or more EU Member States. Contrary to what often happens with Dublin III Regulation, in the proposed Athens Regulation cooperation to identification and to the mentioned evaluations is to be expected, thanks to the advantages for the asylum seeker (see below). In the same time, the length of procedures will be reduced, and so the associated costs (now present) of hosting persons whose identity or status is far from clear.
- 2) As a general rule, a stable and robust network of liaison officers in asylum matters should be established in close cooperation with EASO and UNHCR.<sup>32</sup>  
Based upon an assessment of the asylum trends and the main routes followed (by land, sea, air) by prospective asylum seekers, where deemed necessary<sup>33</sup> the hotspot approach should be taken into consideration. In this case, in order to avoid loss of time and to assure juridical and practical quality of the activities deployed, the competent authorities of the Member State where the application is lodged should be assisted by an asylum support team including liaison officers and specialized staff of other Member States, EASO,<sup>34</sup> UNHCR and other actors (such as specialized NGOs).  
In any case, full and verifiable compliance with legal standards in treating asylum seekers and their claims must be ensured, as well as access to justice.
- 3) The connecting factors, able to establish the competence of one Member State, should be listed with a primary attention to the occurrence of relevant substantial links. Such links might include, in decreasing order of importance:<sup>35</sup>
  - presence<sup>36</sup> of family members or relatives, in a wider definition with respect to the current Dublin Regulation. The categories of persons to be taken into account should include parents, children, spouses or registered partners, siblings, grandparents, nephews, cousins, aunts or

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<sup>32</sup> The establishment of a central and European agency entrusted to treat and decide asylum claim might be another option: see for instance, E. Guild, C. Costello, M. Garlick, V. Moreno-Lax and S. Carrera, [Enhancing the Common European Asylum System and Alternatives to Dublin](#), Study PE 519.234 for the LIBE Committee of the European Parliament, July 2015, at 58-59.

To my view, it seems to be more appropriate to put it as a longer term strategy, which might be launched building upon a *previous* experience of the above proposed forms of integrated cooperation among States' authorities and the EASO.

<sup>33</sup> Frontline States particularly exposed to incoming flows of asylum seekers; countries on whose territory a consistent number of asylum seekers is present (irrespective of how they arrived there).

<sup>34</sup> See in particular [Regulation \(EU\) No. 439/2010](#) establishing the EASO, in particular under Articles 5, 8, 10, 13-20. In the context of a supposed Athens Regulation, EASO should be strengthened, in terms of mandate, human resources, and financial means: to this end, targeted amendments to the EASO Regulation should be envisaged.

<sup>35</sup> The list proposed is not exhaustive, and might be expanded or better refined.

<sup>36</sup> The term here intended as referred to persons possessing a residence permit, having applied for asylum, or enjoying the nationality of the host country.

uncles. Contrary to what happens now with the Dublin III Regulation, such wide sample of family members and relatives should work as connecting factor to any asylum seeker (and not only to unaccompanied minors) and would result in attributing automatic competence of the concerned State (and not just lead to a discretionary assumption of responsibility).

- evidence of past experiences of work, training, study or other activities deployed in such country;
  - professional qualifications obtained in one country, or particularly required in that country and easily recognizable according to the relevant domestic rules or bilateral agreements;
  - knowledge of the language of a certain Member State;
  - other social ties, such as regular presence of friends coming from the same origin country, or of a diaspora and of associations of exiles or nationals of the same country;
  - existence of a local sponsor (individuals, companies, other entities), where these subjects show willingness to take care of the asylum seeker (i.e. through accommodation, facilitation of integration process and search for job) and give a financial guarantee and other evidence of credibility;
  - in absence of any substantial link, the country with the lowest degree of compliance with its quota should be obliged to accept the transfer. A refusal could be admitted only for specified and reasoned grounds (such as public order, for instance) and would be closely monitored by the Commission. In such instance, the following country with a low degree of compliance with its quota should be selected. In any case, such States should present a solid and credible program of reception and integration for asylum seekers and refugees, with the possibility of receiving incentives *via* the AMIF (under the national plan procedure);
  - only by default (for instance, in case of impossibility to find a country for practical lack of cooperation or for a sequence of refusals based on the public order clause), criteria such as the release of a stay permit or a visa, the first point of entry, or the presence in the territory might be taken into consideration. In this case, the need to avoid a protracted situation of uncertainty for the asylum seeker should prevail, but the uncooperative Member States should face financial consequences for their behavior.
  - where an asylum seeker is allocated to a country with which he/she does not have any substantial link and where he/she successfully completes the asylum procedure, it should be explored the possibility to afford him/her the chance to respond to genuine job offers in another Member State, thus recuperating some consideration for the self-determination of the refugee and recognizing legal value to his/her economic proactivity (where present). This possibility would also relieve the host Member State of assistance expenses.<sup>37</sup> The legal basis for this (limited) freedom of movement for work purposes would derive from Article 79 TFEU, para. 2 (b) and Article 45 EU Charter on Fundamental Rights, para. 2, and might be translated into an extension of the scope of some provisions of the Directive 2004/38/EC (valid for EU nationals), or in the enactment of *ad hoc* provisions, which might be inspired (with some adjustments) to Articles 14-23 of the Directive 2003/109 on Long-Term Residence for third country nationals.
- 4) The occurrence of genuine links with another Member State should be substantiated by the asylum seeker (at least partially) and followed by an appropriate verification by the concerned State(s). In other terms, here it is not proposed to establish a criterion of free choice by the asylum seeker, but rather a balanced mix of subjective preference and objective factors. The authorities of Member States would be called to cooperate in order to conduct the appropriate verification in the quickest possible time (even exploiting the possibilities offered by modern technologies and existing tools) and to this end the support of EASO and of liaison officers would be decisive.
- 5) The Member State which is genuinely connected with the asylum seeker will accept the allocation of the asylum seeker (through simplified and quick procedures).<sup>38</sup> As to the cost, a proper interpretation

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<sup>37</sup> It should be put clear, in fact, that such voluntary mobility would release the first Member States from protection and assistance duties, at least for all the time in which the recognized refugee is economically independent and lives in another country (contributing to the latter's welfare system through taxes).

<sup>38</sup> Liaison officers and EASO would play the role to assure the expediency of the procedure and the settlement of dubious cases.

or a targeted amendment of the rules governing the EU Asylum, Migration and Integration Fund (AMIF) should allow the coverage of the travel expenses and of the initial costs of reception.<sup>39</sup> The selected Member State will complete the examination of the asylum claim and, if it proved to be founded, will afford the relevant rights to the concerned persons, under the terms of the Qualification Directive refugee status or beneficiary of subsidiary protection.<sup>40</sup> What is to be considered is that a burdensome part of any procedure of claim's assessment (identification and preliminary assessment) has already been completed with the highly probable cooperation of the interested person. Moreover, the existence of family and/or social ties in the host country makes it easier and quicker the management of the rest of the procedure.

- 6) In case of presence of genuine links with several Member States, the choice of the asylum seeker might constitute a criterion to guide the selection of the destination country.<sup>41</sup> Only if the preferred country is already fulfilling its quota and the relevant link is not represented by the presence of a family member (see below, No. 7), the asylum seeker should choose another country to which he/she is connected.
- 7) Where the designated State is already hosting a number of beneficiaries of international protection and of asylum seekers exceeding its reference quota, this country should be allowed to refuse the transfer of new asylum seekers.<sup>42</sup> However, a safeguard clause with respect to the family ties (at least the one concerning parents, children, spouses or registered partners, siblings)<sup>43</sup> should be inserted: in other terms, the country connected to the asylum seeker for the presence of one or more of these family members will always be obliged to accept the transfer, and should receive an extra financial contribution from the AMIF, following a proper interpretation or modification of the Regulation No. 516/2014.<sup>44</sup> The following reference period for the calculation of quotas would take into account these "extra" transfers.
- 8) In the occurrence of extraordinary flows affecting one or more Member States and putting under unusual pressure its/their asylum system,<sup>45</sup> an emergency relocation scheme to the benefit of the affected State (or States) should be activated. The determination of destination countries should follow the same logic of substantial links above described.<sup>46</sup> Moreover, the procedure should equally

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<sup>39</sup> See Article 18 and 20 [Regulation \(EU\) No. 516/2014](#) establishing the Asylum, Migration and Integration Fund.

As an alternative, the possibility of a financial contribution by the same asylum seeker or of a social loan (to be reimbursed in the future, as a form of assumption of responsibility by the same asylum seeker, his/her family or sponsors) might be explored, with the due caution (in order to avoid heinous discriminations) and with the attention being paid to the fact that in most cases displaced persons are traumatized. Some inspiration may be drawn from Article 17 (3) and (4) of the recast Reception Conditions Directive 2013/33. Voices about an initiative discussed in the last weeks in Denmark raise serious concern: see K. Groenendijk, S. Peers, [Can Member States seize asylum-seekers' assets?](#), EU Law Analysis, 24 January 2016.

<sup>40</sup> As an alternative, it might be conceived that the country where the claim is lodged will complete the evaluation of the asylum claim. Were a positive decision be awarded, it would gain automatic recognition in the country of destination. In this way, however, a heavy burden could be put on the few States interested by first entry (or disembarkation), which are already under a severe strain. 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 could have no substantial links, with the inconveniences above mentioned (§ 4).

<sup>41</sup> For minors, an exam of the best interest of the child would be necessary.

<sup>42</sup> The possibility to accept in a discretionary way the allocation of the asylum seeker would remain, however. That State should receive, in this case, an extra financial contribution from the AMIF, following a proper interpretation or modification of the Regulation No. 516/2014.

<sup>43</sup> As for other relatives, such links could attract compulsory competence only if it were proved that family members are dead, or are not present in the EU's territory.

Another option might be to consider also links such as past experiences of work or study as able to attract a compulsory competence even in case of numbers exceeding the national quota.

<sup>44</sup> A financial contribution should be given also if the tie were of different nature and the concerned State accepted voluntarily to host the asylum seeker exceeding its quota.

<sup>45</sup> The quotas would serve as reference parameters for establishing the occurrence of an extraordinary flow and for distributing the persons among Member States.

<sup>46</sup> For a thorough examination of this topic with reference to the two relocation Decisions of September 2015 and to the [proposal](#) for

recognize an active role to the asylum seeker and should aim at conducting a preliminary credibility assessment and at ascertaining the presence of genuine links with one or more Member States. The limitations to some nationalities of beneficiaries should be avoided, given the presence of a credibility filter and its management in hotspots by tailored asylum support teams (see above, No. 2). If a threshold based on recognition rates of specific nationalities were maintained, it should at least take into account the rate of recognition in second instance decisions too.

## **6. Foreseeable impact of the proposal and costs of non-action**

The approach here proposed (a newly conceived “Athens Regulation”) 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 (both the frontline ones and the others).

It would render the asylum seeker a co-protagonist of the procedure, discouraging elusive conducts and promoting a cooperative behavior. The asylum seeker will have no need to abscond and conduct a *de facto* rebellion against the system in force. On the contrary, he/she will have all the interest to enter into contact as soon as possible with the authorities of the first country of arrival and to cooperate to identification and preliminary assessments. Additionally, it would reduce the demand for smuggling services and the recourse to administrative invisibility, with a secure improvement both for asylum seekers and Member States.

The new approach would not make the things more complicated or burdensome for national services: entirely the contrary, it would bring some order in a chaotic situation and would reduce the grounds for sterile recriminations between Member States. Besides, the scarce public funds might be better addressed and used, without unnecessary waste of money and time. This way, the proposed Athens Regulation would also be a useful tool to address the relevant concerns of public opinion, to dismantle specious arguments and to rebuild confidence in the governance abilities of the EU and of its Member States.

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

Differently, the maintenance of the Dublin logic, or another use of the quotas approach (according to which a newly State-centered vision would put again asylum seekers in the uncomfortable position of objects, more than subjects, of the system) would reproduce the defects and bad practices of the current legislative framework, for the joy of two categories of interested “stakeholders”: smugglers and populists.

## **7. Recommendations for the Italian Government**

It is suggested to construe a consensus around the new approach here spelled, acting both on frontline States *and* countries of current preferred destinations. Insisting on quotas as an exclusive way of distributing asylum seekers from one place to another would lead to unsatisfactory solutions. Neither is it viable to insist too much on the “special” geographical position of Italy or on supposed injustices suffered in the past: more comprehensive and sound arguments should put forward in order to obtain support from other governments and from EU institutions.

The lessons learnt from the first (and scarce) implementation of the relocation scheme and from the 2015 refugee crisis illustrate the need of a completely new system of allocation of jurisdiction in asylum procedures, where the inspiring principles are fairness, good faith cooperation and saving of unnecessary humanitarian sufferance and financial and human resources costs.

In order to show credibility and to build consensus, Italy should swiftly prosecute on the roadmap agreed with the Commission in the context of the relocation scheme and, in the same time, put forward a proposal to the Commission for drafting a new Athens regulation, underlining its added value for the *whole* community of Member States, for the EU *and* national budgets, for the effective compliance by asylum seekers, for the

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amending Dublin III Regulation, see M. Di Filippo, ‘Le misure sulla ricollocazione dei richiedenti asilo adottate dall’Unione europea nel 2015: considerazioni critiche e prospettive’, in *Diritto, immigrazione, cittadinanza*, 2015, forthcoming; S. Carrera - E. Guild, [Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU](#), CEPS Policy Brief, No. 332, October 2015. See also S. Peers, [Relocation of Asylum-Seekers in the EU: Law and Policy](#), in *EU Law Analysis*, 24.9.2015; P. De Bruycker and E. Tsourdi, [In search of fairness in responsibility sharing](#), in *Forced Migration Review*, No. 51, January 2016.

credible fight against smugglers and traffickers. In the meanwhile, a holistic approach should be supported, with special reference to credible resettlement programs and assistance projects for the stabilization and the development of relevant transit and origin countries.

In the long term, the experience gained with the proposed Athens Regulation would serve as a benchmark for conceiving a further step: a single European asylum procedure, managed by a central agency in cooperation with local authorities, leading to a protection status valid in the whole territory of the EU (or of the Schengen area).