BORDER CROSSING 2015
No.1-2

But it does move, doesn´t it? The debate on the allocation of refugees in Europe from a German point of view

Petra Bendel*

Border Crossing, Volume 5, No. 1-2

http://www.tplondon.com/journal/index.php/bc/article/viewFile/508

Abstract

This article examines the current debate on the allocation of refugees, based on the principle of "shared responsibility and solidarity among the EU Member States". Arguing that the Dublin system has failed, I discuss alternative proposals, adopting both the perspective of the Member States and the view of the applicants themselves. Whereas most research has centred on the opportunities and risks of these instruments, on their efficiency or cost-benefit-relation, I ask for the political enforceability of the possible alternatives in the light of changed power relations in the European Parliament, the Commission and the Council. I shall argue that particularly the current perception of the German government might represent a window of opportunity for a policy change.

Keywords: Responsibility and solidarity; allocation of refugees; Dublin system; political enforceability; Germany.

SUGGESTED CITATION:

Bendel, Petra (2015). "But it does move, doesn´t it? The debate on the allocation of refugees in Europe from a German point of view". *Border Crossing,* Volume 5, No. 1-2, pp.25-32. Available at: http://www.tplondon.com/journal/index.php/bc/article/viewFile/508.

Author's acknowledgement:

This article represents a slightly modified version of an article published in the German Asylmagazin 11/2014.

* Prof. Dr. Petra Bendel, Zentralinstitut für Regionenforschung, Friedrich-Alexander-Universität Erlangen-Nürnberg, Bismarckstr. 1, D-91054 Erlangen, Germany. E-mail: petra.bendel@fau.de.

e-ISSN 2046-4444 | ISSN 2046-4436

The current debate on "shared responsibility and solidarity between the Member States"

The current public discussion on the allocation of refugees in Europe is based on the "principle of shared responsibility and solidarity between the Member States", a principle the European Union repeatedly laid down in its treaties (Art. 67 Abs. 2 and Art. 80 TEUC) as well as in secondary law (Vanheule et al., 2011), and quoted in many speeches. This principle can explicitly be applied to migration policy. It attributes the competences for a fair redistribution of the administrative and financial burdens caused to the Member States by the admission of refugees and migrants to the European Union.

The recast of the Common European Asylum System (CEAS), too, completed last year with the Dublin system as a core instrument, had aimed at creating more solidarity among the Member States in addition to better harmonization and improvement of the standards for admission and asylum procedures. Although this system established financial compensation mechanisms through the European Fund for Refugees and the new Asylum, Migration and Integration Fund (AMIF), supportive measures for weaker Member States through the European Asylum Support Office (EASO), and early-warning mechanisms in case a Member State does not meet its asylum obligations, no common system for a fairer distribution of refugees to the Member States was accepted in the CEAS negotiations.

The same applies also to sea rescue operations: Even after the shock of Lampedusa in October 2013, any attempt to oblige the Member States to new solidarity mechanisms regarding sea rescue operations fizzled out. After the Italian search and rescue operation "Mare Nostrum" ran out, the Member States could agree on the FRONTEX Operation "Triton", but allocated only very scarce resources to it (FRONTEX Operation Division/Joint Operations Unit 2014). Moreover, the new directives of the European Council for Justice and Home Affairs (European Council, 2014) for the coming six years do not contain a single concrete hint to this direction.

In Germany on the contrary, in the light of remarkably increasing numbers of refugees, the debate at least on a distribution key for asylum seekers seems to become more intense. Recently, the Federal Minister of the Interior, Thomas de Maizière, pleaded in the German Bundestag to relieve "on a voluntary basis" and "for a limited period of time" those countries which admit a disproportionally high number of refugees, "of course in compliance with the current regulations" (Deutscher Bundestag 2014, translation mine) – a demand he also reaffirmed together with his colleagues from France, Spain, Poland and the United Kingdom in a letter to the European Commission.

One may disapprove, as did Amnesty International and the German pro-refugee NGO Pro Asyl of the terms "on a voluntary basis" and "for a limited period of time" used in these statements. However, these conditions have long been essential for the negotiation processes among the EU Member States: Most of them show hardly any interest in developing binding standards. On the contrary, their discourse has been based on the principle of "double voluntary actions" for years: According to this principle, before an asylum seeker can be brought to another Member State, both his or her approval and the approval of the host country are required (Jones & Menon, 2012: 819). After a five-year long negotiation marathon among the Member States, the Commission, and the Parliament on the recast of the Common European Asylum System, the Member States are today less than ever inclined to accept common regulations. A temporarily voluntary solution for a limited period of time, may, thus, offer a chance to open a window of opportunity and to stimulate a debate that has been blocked for many years.

In order to develop this argument, I firstly take a look on those allocation systems which are being presently discussed. In view of a possible window of opportunity opening up in the Council, I take a special interest in how these various options appear to be enforceable in the

light of the present political power relations in Brussels. Before I cursorily examine the various models, I would like to present the current Dublin principle that is nowadays discredited among most of the socio-political actors.

The failure of the Dublin System

The former Dublin, "Dublin-II" and now "Dublin-III" Regulation used in 31 European countries does not even intend to be an allocation system. The regulation rather established the criteria and mechanisms for determining the Member State responsible for examining an asylum application – this should be "one state only" in order to prevent secondary movements within the European Union; in principle, the rule applies that the State an applicant entered first is responsible. All persons in need of international protection should thus be guaranteed effective access to asylum procedures throughout the whole European Union in order to avoid the "refugees in orbit" phenomenon.

The Dublin-III-Regulation determines the transfer of an applicant to another Member State if this State is responsible for the procedure – that is usually the State a person "entered irregularly", unless primary responsibility criteria stand against it. That is the case when a refugee is an unaccompanied minor, has family links or a residence permit in a Member State. The Regulation lays down the time frame, the processing of information within the administrative cooperation, procedure guarantees and the so-called right of sovereignty or sovereignty clause of a State, in case the State is not responsible according to the Dublin criteria, but decides to examine the asylum claim.

Why isn´t this procedure working? From the Member States´ point of view the system causes some countries to bear a disproportionate share of the burden. In principle, countries with external borders are especially concerned. These countries were burdened additionally through the Dublin transfers and tended to lay more emphasis on the processing of as many application claims as possible, than on guaranteeing the quality of the application examination (ECRE, 2013). Empirically and as many refugees do not even claim for asylum in the States with external borders but prefer to travel onto other Member States, Germany (2013: 126,705), France (2013: 64,760) and Sweden (2013: 54,270) are those who receive most asylum claims (Eurostat, 2014).

From the point of view of some Member States the lack of solidarity becomes even more obvious, if we relate the intake figures to the population size: Here we see that the small and medium-sized countries bear the biggest burden (Thielemann & Armstrong, 2013: 148-164). If we compare the acceptance rate per inhabitant, Sweden is on the first place with 5.7 applications per 1,000 inhabitants, second is Malta with 5.3 applications – Germany ranks seventh according to this criterion (Eurostat, 2014).

But if we add the protection rate to that figure, as Dietrich Thränhardt (2014) suggests, i.e. the total number of positive asylum decisions, relate this figure to the population size and include the non-EU States Norway and Switzerland, then Norway, Sweden, Switzerland (with 10.6; 9.6 and 5.5 refugees per 10,000 inhabitants) rank first, second and third respectively. Germany, France and Italy are in the middle with 2.1 and 1.3 refugees, while Greece, Spain and Poland are at the bottom of the list with each 0.1 refugee per 10,000 inhabitants.

This argument turns our view from the perspective of the Member States to that of the people concerned: The Dublin allocation system is based, at least implicitly, on the prerequisite that all Member States guarantee similarly high protection standards. But this is by no means true: It still makes a great difference for the chance to be granted asylum in which Member State the asylum claim is submitted (ECRE, 2013). This fact has, of course, a negative impact on the legal protection of the applicant. Also, the acceptance and living conditions in the Member

States differ to such an extent that in the previous years no immigrants were returned to Greece any more, and several other countries are being heavily criticised for their asylum procedures (comp. UNHCR 2014; ECRE 2014).

Although the recast – Dublin III – includes several improvements with regard to: a) a procedure in case of disturbances in the responsible Member States, b) procedural guarantees and c) the efficiency of the system, the Dublin principle itself, however, has not been touched.

Discussing the alternatives

In the early 1990ies, when Germany was confronted with an unprecedentedly high number of persons seeking shelter, Manfred Kanther, then Federal Minister of the Interior, lobbied for a Europe-wide allocation according to the German Königstein formula, which the German Council Presidency submitted to the Council (German Presidency 1994), yet without success. Exactly twenty years later this proposal is again being discussed in the Council.

The debate had previously been taken up by the European Parliament (Committee on Civil Liberties, Justice and Home Affairs, 2012; Hirsch, 2013), different scientists (for instance: Thielemann & Dewan, 2006; Czaika, 2010; Thielemann et al., 2010; Marx, 2012; Sachverständigenrat deutscher Stiftungen, 2013; Angenendt et al., 2013), the European Commission and the Council of the European Union (Commision of the European Communities, 2003, 2007; European Commission, 2011; European Council, 2012), and non-governmental organisations (for instance: ECRE, 2008). They all have repeatedly called for an equitable and solidarity-based refugee allocation system.

Nevertheless, the proposals differ, first, in the how much "Dublin" is planned to be retained. They vary, second, in their perspectives, depending on the question whether they focus on the applicant or the administration of the respective Member State. And with regard to the political strategy they differ, third, according to the potential political support they can get in view of the power relations in Brussels and Strasbourg.

Dublin minus X: Free choice of refuge

Proposals that emphasize the principle of the asylum seekers´ free choice of Member State, but do not totally abolish the Dublin system were recently made, among others, by Workers´ Welfare Association (AWO), Diakonia Germany, German Bar Association, Jesuit Refugee Service Germany, the Paritätische Welfare Association, Pro Asyl and the Neue Richtervereinigung. A 2013 Memorandum entitled "Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility" is currently debated on an NGO level (AWO et al., 2013). The signatory organisations called for dropping the main criterion for determining the State responsible for an asylum seeker today - the place of irregular border crossing - according to former art. 10 of the Dublin-II, now art. 13 of the Dublin- III-Regulation, and replacing it with the principle of free choice of Member State. It should depend on the place of the asylum seeker´s first application.

This system focusses on the asylum seeker as an actor. It considers the fact that the networks of families and friends have an essential influence on the asylum seekers' favour for a host country and help future integration – thus perhaps even reducing integration costs.

Compared to the quota systems discussed in paragraph 3.2 according to which asylum seekers are allocated to the Member States following a certain key, the "free-choice"-system has the advantage that it keeps already existing structures in place, yet "completing them with regard to human rights aspects" (AWO et al., 2013).

However, such a practice had failed in previous years because Member States feared that networks as well as relatively good reception and asylum procedures might create new pull factors and thus undermine the pursued aim of shared responsibility and solidarity. Conversely, it would not offer any incentives especially for those Member States with a rather rudimentary system to rebuild and extend their asylum systems. The proposal of the "Memorandum" anticipates this argument by financially compensating those Member States which are burdened disproportionately in order to make them improve their reception conditions and asylum procedures. However, corresponding proposals of the Commission and the UN High Commissioner for Refugees have been refused by most of the Member States up to now, except for Italy and Greece.

Quota models

Another logic of proposals favours a quota system. Similar to the German system between the Federal Government and the Länder - which, by the way, is a rather contentious and controversial issue in Germany these days, too -, the refugees are distributed depending on the structural and economic inequalities in the Member States. Currently, two differing principles are being discussed: one model with physical redistribution of asylum seekers based on the German Königstein formula, and one without redistribution but offering financial compensation.

The Königstein formula is calculated every year afresh on the basis of each Land's tax revenues and number of inhabitants, which are weighted two-thirds and one-third respectively; for the EU a factor 1 for the population and a factor 2 for the gross domestic product (GDP) were taken as basis in the proposal made by Hirsch (2013). The devil is in the detail: A subject of controversy is, of course, firstly, the calculation method: Are only the economic power (e.g. on the basis of the gross domestic product) and the number of inhabitants taken as database? Or is, as suggested in the Annual Report of the Expert Council of German Foundations on Integration and Migration (SVR) as well as by Angenendt et al. (2013), a multi-factor model appropriate that considers also the land area and the unemployment rate in addition to these two criteria? How is each of these factors weighed? Shall only asylum applications be considered or additional criteria such as resettlement, humanitarian reception quotas or irregular immigrants? Secondly, how should the distribution be organized? In Germany the asylum seekers are distributed to the Länder according to the allocation system "First distribution of asylum seekers (EASY)", i.e. the applicants concerned are redistributed on the basis of the distribution key. Does the number of asylum seekers exceed the allocation quota fixed for one particular Land, parts of them are distributed to the other Länder. How does this system, thirdly, respect the rights and needs of the people concerned? It becomes apparent here that this approach does not focus on the applicants´ concerns, but the interests of the Member States.

The fact that it is a German "export product" might favour the use of such a key – in addition, other European countries such as Denmark, Italy and the Netherlands have had experiences with similar systems, too. The adaption costs for these countries would thus remain relatively low.

Empirically, on the European level, the only real – physical – redistribution of refugees as "relocation" of already recognized refugees from Malta (Pilot Project for intra-EU Relocation from Malta, EUREMA) rather had symbolic character: In the first phase only 227 persons, in the second phase 356 persons were relocated (EASO, 2012). Moreover: While a redistribution of refugees within Germany could be handled and completed rather quickly, remarkably more administrative and financial efforts would be required within Europe. Finally, especially the countries in the centre of the European Union could claim in the Council that those countries with external borders would have no further incentives to secure their borders after having met

their quota, yet could be tempted to simply "nod the refugees through". The chance that this kind of quota will be approved therefore seems to be rather small.

The EU could avoid such a redistribution if, instead of physically moving the asylum seekers around from one EU Member State to the next, those countries got a financial compensation which fulfil a certain previously determined quota. This could definitely be realized on the basis of the Dublin Regulation.

But here as well, the devil is in the details of negotiating the calculation methods: How is the "burden" calculated? Which criteria determine the calculation of the financial compensation for the accommodation and catering of the refugees and the execution of the asylum procedure? Which kind of sanction measures should be established in case that the financial compensation mechanisms were not used to improve the asylum systems?

The new Asylum, Migration and Integration Fund (AMIF) of the European Union, equipped with 3.1 billion euros for the coming seven years (2014-2020), was established among other reasons to "enhance solidarity and responsibility sharing between Member States". It could be used to fix a flat rate per admission corresponding to the number of asylum seekers received in the previous year. "Net payers" to such a Fund would then be those States that have repeatedly accepted less asylum applicants than the calculated reception capacity according to the fair quota (Angenendt et al., 2013: 6).

Currently, this seems to be the best enforceable proposal: Not only does it avoid an expansion of infrastructure and bureaucracy as would be necessary for quota model 1, but it also follows the Dublin Regulation. As a consequence, the Member States in the Council would not have to move too far away from their present positions to install a totally new system – with the correspondingly high adaption costs. Moreover, this system could indeed start temporarily on a voluntary basis. Provided that it creates sufficiently strong financial incentives, gradually more Member States would join in.

Political enforceability?

In principle, German Federal Minister de Maizière's proposal of a new allocation system obviously meets with the approval of most parties in Germany. The pressure caused by the current situation in the German preliminary reception centres, and the position of the Federal Ministry of the Interior could indeed result in the fact that Germany as main actor together with other big Member States speeds up such a reform in the Council. In view of the well-known debate in the Council on the principle of "double voluntary actions" this reform will, in the first instance, probably be based on voluntariness and definitely also on a time limit.

The election of the designated Commissioner for Migration and Home Affairs, Dimitris Avramopoulos, also supports this view: The uncertainty of the Post-Stockholm guidelines, presented by the European Council for the coming six years (European Council, 2014) leaves the Commissioner much room to manoeuvre for legislative initiatives. Although the President of the EU Commission, Jean-Claude Juncker, assigned tasks to the new Commissioner which give reason to expect that in the future more focus will be put more on the fight against irregular migration (Juncker, 2014) than on a strengthening of solidarity mechanisms, the fact that Mr. Avramopoulos is a native Greek is no coincidence and gives rise to the hope that, in the light of the Greek experiences, he will foster more responsibility sharing and solidarity between the Member States.

Still a lot of research is necessary with regard to coalition building among the various political parties in the newly-elected Parliament. But at least in the past legislative period, the EU Parliament rather insisted on more common policy and stronger compensation mechanisms

(Ripoll Servent, 2012: 55-73). In view of this constellation, one may assume, in spite of the well-known and often used stone-walling tactics in the EU: "Eppur si muove!" – But it does move!

REFERENCES

Angenendt, S., Engler, M. & Schneider, J.(2013). *Europäische Flüchtlingspolitik. Wege zu einer fairen Lastenteilung*. Berlin: Stiftung Wissenschaft und Politik.

AWO Workers` Welfare Association et al. (2013). *Memorandum Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility*. Frankfurt/Main, March.

Commission of the European Communities (2003). *Towards more Accessible, Equitable and Managed Asylum Systems. COM (2003) 315 final*, Brussels, 3rd June 2003.

Commission of the European Communities (2007). *Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final*, Brussels, 6.6.2007.

European Commission (2011). *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum. An EU agenda for better responsibility-sharing and more mutual trust, COM (2011) 835 final*, Brussels, 2.12.2011.

Committee on Civil Liberties, Justice and Home Affairs (2012). *Report on enhanced intra-EU solidarity in the field of asylum* (2012/2032(INI), RDN.33.

Czaika, M. (2009). "Asylum Cooperation among Asymmetric Countries: The Case of the European Union". *European Union Politics*, 10 (1): 89-113.

Deutscher Bundestag (2014). Deutscher Bundestag, Plenarprotokoll 18/49, Stenographischer Bericht, 49. Sitzung. Tuesday, September 9th 2014. Berlin. Retrieved Oktober 10. http://dip21.bundestag.de/dip21/btp/18/18049.pdf.

ECRE, European Council on Refugees and Exiles (2008). *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*. March 2008, Retrieved October 21. http://www.ecre.org/component/downloads/downloads/105.html.

ECRE, European Council on Refugees and Exiles (2013). *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*. Brussels, January.

ECRE, European Council on Refugees and Exiles (2014). *Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System*, Brussels.

European Council (2012). Council Conclusions on a Common Framework for Genuine and Practical Solidarity Towards Member States Facing Particular Pressures Due to Mixed Migration Flows, 3151st JUSTICE and HOME AFFAIRS Council meeting, Brussels, 8th March.

European Council (2014). European Council 26/27 June 2014, Conclusions, EUCO 79/14, Brussels 27 June.

Eurostat (2014). Data in focus: Asylum applicants and first instance decisions on asylum applications: 2013. Author: Alexandros Bitousas, Brussels. Retrieved October 10.

FRONTEX Operation Division/Joint Operations Unit (2014). Concept of reinforced joint operation tackling the migratory flows towards Italy: JOEPN-Triton to better control irregular migration and contribute to SAR in the Mediterranean Sea. 28/08/2014 Reg. No. 2014/JOU.

German Presidency (1994). German presidency draft Council resolution on burden-sharing (1994). Council document 7773/94 ASIM 124.

Hirsch, N. (ed.) (2013). *Asylum. Towards a Common European Responsibility for the Asylum System: A European Distribution Key for Asylum Seekers*. Feldafing: Brehm.

Jones, E. & Menon, A. (2012). *The Oxford Handbook of the European Union*. Oxford: Oxford University Press.

Juncker, J.C. (2014). *Mission letter Dimitris Avramopoulos, Commissioner for Migration and Home Affairs*. Brussels, 10 September 2014, http://ec.europa.eu/about/juncker-commission/docs/avramopoulos_en.pdf.

Marx, R. (2012). „Ist die Verordnung (EG) Nr. 343/2003 (Dublin-II-VO) noch reformfähig?". *Zeitschrift für Ausländerrecht und Ausländerpolitik*, 6: 188-194.

Ripoll Servent, A. (2012). "Playing the Co-Decision Game? Rules' Changes and Institutional Adaptation at the LIBE Committee". *Journal of European Integration*, 34 (1): 55-73.

Sachverständigenrat deutscher Stiftungen für Integration und Migration (2013). *Europäische Flüchtlingspolitik. Wege zu einer fairen Lastenteilung*, Berlin.

Thielemann, E. R. & Armstrong, C. (2013). "Understanding European asylum cooperation under the Schengen/Dublin system: a public goods framework". *European Security*, 22 (2): 148-164.

Thielemann, E.R., William, R. & Boswell, C. (2010). What System of Burden-Sharing Between Member States for the Reception of Asylum Seekers? Study Requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels.

Thielemann, E.R. & Dewan, T. (2006). „The myth of free-riding: Refugee protection and implicit burden sharing". *West European Politics*, 29 (2): 351-369.

Thränhardt, D. (2014). „Europäische Abschottung und deutscher Asylstau: Gibt es Wege aus dem Dilemma?". *ZAR (Zeitschrift für Ausländerrecht und Ausländerpolitik)*, 5-6: 177-212.

Vanheule, D., van Selm, J. & Boswell, C. (2011). The Implementation of Article 80 TFEU on the principle of responsibility, including its financial implications, between member States in the field of border checks, asylum and immigration, Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs. Study, PE 453.167, Brussels, European Parliament.

UNHCR, UN High Commissioner for Refugees (2014). *UNHCR observations on the current asylum system in Bulgaria*, Geneva, 2 January.