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**03/2016**

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# REFUGEE POLICY IN THE EUROPEAN UNION

Protect Human Rights!

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Petra Bendel

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## Protect Human Rights!

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## PRELIMINARY REMARK

The European Union is facing a serious crisis. A common refugee policy based on solidarity, which meets international standards for the reception of asylum seekers and human rights, is not on the horizon. The number of refugees fleeing to the European Union has increased sharply. The countries on the EU's external borders – such as Greece and Italy – but also a number of western and northern countries (such as Germany and Sweden) are taking in a particularly high number of refugees. The so-called Dublin System, which is supposed to regulate responsibilities for the reception and processing of asylum applications, has collapsed. Above all, the countries in which refugees first enter the European Union can no longer cope with the challenges. In the course of 2015 the European Commission issued a European Migration Agenda containing numerous proposals for resolving the refugee crisis. At the heart of this are ideas on the distribution and reception of refugees in accordance with established quotas in the individual Member States. To date, however, no agreement has been reached between the Member States on the permanent regulation of taking in refugees. In the medium and long terms the number of refugees can be reduced only if the reasons for flight are addressed more robustly than heretofore. This requires time and patience for the development of democratic structures and the improvement of living conditions in the refugees' countries of origin and greater international efforts to end civil and other wars.

More than in relation to any other political issue it is crystal clear with regard to refugee and migration policy that European regulations are urgently required. Because of the elimination of internal borders the influx of refugees and the immigration of migrant workers into the territory of the EU have consequences for all the Member States. But also more than in relation to any other issue it is absolutely clear that national self-interest continues to take precedence when it comes to political action. The European Union simply cannot be understood merely as a space in which the internal market leads to increasing prosperity for citizens. The EU is also a community of values that has inscribed in its treaties the protection of people who have to flee their homes and whose lives are threatened. The future of Europe will not be decided solely by whether the euro stands or falls, but also by wheth-

er it manages to reach agreement on a common solidaristic approach to refugee policy.

This report by Petra Bendel gives a comprehensive and detailed overview of the European Union's refugee policy. It serves to provide orientation in this currently very dynamic policy area. Universal human rights offer a compass for evaluating proposed measures and policy ideas.

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## SUMMARY<sup>1</sup>

After the deaths of 800 refugees and migrants in a shipwreck in the Mediterranean in April 2015 the ensuing debates in the European Union initially circled around issues of sea rescue operations, securing the external borders and cooperation with countries of origin and transit states. The drastic increase in the number of those entering since summer 2015 to unprecedented levels pose a further, massive challenge to the European Union. It represented a window of opportunity for new draft legislation and operational measures at the European level and at the level of the Member States, which the European Commission, the Council and the European Council introduced and have partly already implemented.

After the Strategic Guidelines adopted by the European Council in June 2014, which provide general orientation for policymaking in this area, in May 2015 the European Commission presented the European Agenda on Migration. This programmatic document includes proposals for:

- urgent measures in response to the crisis in the Mediterranean: sea rescue operations, fighting trafficking networks, relocation, resettlement, cooperation with the countries of origin and transit and support for Member States on the external borders of the EU;
- structural measures: combating irregular migration, expansion of border management, consolidation of the Common European Asylum System (CEAS), promotion of legal migration; and
- further measures: expansion of the Common European Asylum System, joint management of the EU external borders and a new system of legal migration.

The declared goal is to develop a more coherent migration policy in combination with internal and external development policy. The newly launched and partly already implemented proposals have been made in a fragmented legal framework with regard to visa, border, asylum and immigration policy.

The most recent legislative package, the new version of the Common European Asylum System (CEAS) of 2013, whose implementation is called for in the Agenda, primarily regulates the rights of those refugees and asylum seekers who have already reached the territory of a Member State. The existing asylum system has improved the rights of persons who manage to attain entry to a Member State, especially in the previously underdeveloped asylum systems of some Member States. However, differences still exist between the Member States with regard to the conditions of reception, asylum procedures, acceptance rates and integration prospects. But above all the system awaits regulations that open up legal and safe routes to Europe. Even though the current public debate especially in Germany revolves around limiting access, alternatives must be offered to the uncontrolled and, for refugees highly risky, refugee movements that we are witnessing at present.

The benchmark for a substantive examination of the newly established instruments must be provided by those values and norms to which the European Union committed itself in the Lisbon Treaty: human dignity and the validity of human rights. All Member States are signatories of the Geneva Convention on Refugees and the European Convention on Human Rights. We therefore need consistent, comprehensive human rights assessments of all proposed instruments and measures, which we can only outline in this contribution. Further principles that should guide EU refugee and migration policy in accordance with the treaties are the values of solidarity and fair distribution of responsibility.

From a political science standpoint one might ask whether and to what extent shifts of power and interests are emerging within the European Union and between the Member States within the framework of the new instruments and measures and also what consequences these might have for the transparency, accountability and control of political decision-making.

First of all, however, the Agenda can be measured in terms of its self-defined benchmarks: contrary to the goal proclaimed by the Commission itself of a coherent migration policy the majority of the proposed and already introduced instruments and measures remain in hock to a security policy logic. Already the European Council Guidelines, but all the

<sup>1</sup> This paper is a translation by James Patterson of the study »Flüchtlingpolitik der Europäischen Union. Menschenrechte wahren!« by Petra Bendel, published in December 2015, <http://library.fes.de/pdf-files/wiso/12108.pdf>.

more the developments following on from 2014 with regard to the European Commission's proposals and the rapid succession of meetings of the Council and of the European Council in 2015 point towards further extraterritorialisation and technologisation of borders and border systems, a process that is likely to step up a gear in the wake of the Paris attacks. The military operation EUNAVFOR MED, however, also implies a new military logic. The entanglement of Justice and Home Affairs policy with the Common Foreign and Defence Policy also entails, with new actors coming on the scene, serious consequences for the transparency, accountability and control of political decision-making.

By contrast, there has as yet been no systematic coupling with development-policy measures underpinned by human rights. The Member States are not providing the countries of origin and the bordering states with adequate support. There, asylum seekers face protracted situations with no prospect of integration and ever deteriorating living conditions. On top of that, cooperation with transit states must not lose sight of human rights guarantees when the European Union and its Member States conclude agreements with transit states and build regional protection centres in countries outside the EU.

The system of EU asylum and refugee policy and EU border protection continue to suffer from the fact that it offers asylum seekers no safe and legal options to come to EU Member States. This is one reason why refugee movements are out of control and refugees and migrants choose dangerous escape routes. Here lies the fundamental humanitarian and human rights problem of EU refugee protection, for which there is no remedy even in the new regulations. On its own the European Commission's plan to expand the number of resettlement places is a first, but by no means sufficient step in this direction. Meanwhile, the Dublin System, which is aimed at regulating which State is responsible for a specific asylum procedure, has collapsed. Given this situation the system awaits a solution for a fair and permanent distribution of refugees. The Member States have a key role to play in this, although they are divided concerning an obligatory quota. Their failure to adhere to the Dublin Principle has triggered a chain reaction which cannot be resolved by means of temporary border controls on people. Although these are permitted under the Schengen Borders Code and may slow the rate of entry, domino effects are unleashed in the other Member States which put refugees at risk.

The standards laid down in the Common European Asylum System can scarcely (or even at all) be complied with in the emergency mode in which the European reception system finds itself, not to mention the lack of political will in some EU states. It is, however, imperative that these standards continue to be raised, harmonised and monitored in terms of the Common European Asylum System, from the standpoint of both refugees' interests and the Member States.

In order to cope with the task of an EU refugee policy it will be indispensable to consistently scrutinise all the regulations mentioned below with regard to their conformity with human and refugee rights. For that purpose the whole system has to mesh, inside and out, and its constituent parts be rendered more consistent with one another. This concerns support for countries of origin and transit and the relevant – at present chronically underfunded – international funds and

programmes; the agreements on readmission and mobility; and negotiations with transit states.

This also involves the careful examination of the concept of »safe states of origin« and a review of the Return Directive. It concerns human rights guarantees also extraterritorially, for example, with regard to the establishment of Regional Development and Protection Programmes in transit states, the conclusion of readmission agreements, the establishment of a civilian sea rescue service at the EU level, but also with regard to the military operation in the Mediterranean.

Another relevant issue is access to the territory of Member States in a safe and legal manner and in compliance with the right to »non-refoulement« of asylum seekers to states in which they might again be subject to persecution. Such access routes include: diplomatic asylum, resettlement and return settlement; the flexible use of visa provisions and procedures for safe entry; and common asylum procedures in third countries. Possible recognition of asylum status by the EU, including a European asylum jurisdiction, is under discussion, but requires a human rights orientation and an approach to distribution within Europe.

The revision of the Dublin System announced for 2016 must result in a new, more solidaristic system of distribution among the Member States, which the European Commission is already preparing for in small increments, such as the redistribution of – to date – 160,000 asylum seekers. The increased Asylum and Migration Fund could be used as a basis for a lump sum per admission in such a system, in accordance with the number of asylum seekers accepted in the previous year, and thus relieve those Member States that regularly receive more asylum applicants. Contributors would be those Member States that regularly receive fewer asylum applicants than their quota. This proposal – which, given the constellation of the Council, is only likely to get under way on a voluntary rather than an obligatory basis, if a compromise can be found at all – must then offer financial incentives to gradually persuade other Member States to get on board. Examination should also be made of how far the preferences of refugees themselves could also be taken into account in such a system. Refugees' rights also have to be guaranteed in the Member States by means of a more thorough monitoring of the self-defined standards of the Common European Asylum System. The Commission has made a start on this, introducing a series of infringement procedures; use of the European Asylum Support Office can also be stepped up.

The environment for such comprehensive solutions to the complex problem of the rapid and enormous increase in refugee numbers is not auspicious, given the national egoisms of many Member States and, in many states, an increasingly sceptical, even xenophobic public opinion that is hostile to the EU. The so-called refugee crisis, as my analysis shows, is first and foremost a crisis of international solidarity with the countries of origin and transit, a crisis of existing instruments in the EU and a crisis of solidarity among the Member States. It is also a crisis of trust that the other Member States will comply with their legal standards.

If the European Union wishes to remain at one on this key issue European border, asylum and refugee policy will have to reinvent itself in a series of small steps. It will also have to keep a close eye on human rights concerns as a point of orientation.

## 1

# GOALS AND TRADE-OFFS WITH REGARD TO CURRENT EU MIGRATION AND REFUGEE POLICY

This paper discusses current developments in respect of EU border, refugee and asylum policy, as well as migration policy. Its aim is to provide a first overview and orientation within the multitude of current instruments and measures and also to offer approaches to a more wide-ranging debate. The need for research and consultation in this area is still enormous. While this contribution presents and reflects debates on individual instruments, it also aims to stimulate a deeper analysis of each instrument from a political and legal perspective.

To this end we shall first look at the overall goals and conflicts of goals of EU migration and refugee policy and explore their substantive thrust (Section 1).

The following sections accord less with the priorities of the European Agenda on Migration than with a logic of notional »concentric circles« from the outside inwards, in which EU border, refugee and asylum policy moves, and proposes or already implements new instruments. They begin with the question that is currently occupying many citizens of Europe, namely why at this particular time so many people are so desperate to get into the countries of Europe from their countries of first asylum and what the European Union wishes to do with and for the states bordering the main conflicts (Section 2.1). The second »circle« in this perspective are the transit routes (Section 2.2). In this connection this study examines in particular the measures proposed by the European Union with regard to sea rescue and to combat human trafficking. In an inner circle, on this view, are all those instruments and measures that concern the EU and the Member States themselves (Section 2.3). The closing Section 3 discusses recommendations for action for a refugee policy based on human rights.

## 1.1 GUIDELINES OF THE EUROPEAN COUNCIL

The main programmatic aims of the European Union's home affairs and justice policy – or, in EU terminology, the »Area of Freedom, Security and Justice« (AFSJ, Title V, TFEU, Art. 67 to 89), which hitherto has included border controls, asylum and refugee policy, as well as migration policy – have for the past 15 years been laid down by the European Council, for periods of several years. It is up to the European Commission to turn these guidelines – which to date have been named after the place they were negotiated: Tampere (1999), Den Haag (2004) and Stockholm (2009) – into concrete legislative proposals. At the latest with the Lisbon Treaty the European Parliament and the Council, together and on an equal footing, have participated in legislation on refugee and asylum policy by means of the ordinary legislative procedure (Art. 295 TFEU).

After the Stockholm Programme expired, at the end of June 2014 the heads of state and government reached agreement on the »Strategic guidelines for legislative and operational planning within the area of freedom, security and justice« (initially also known as the »Post-Stockholm Programme«, European Council 2014). On the primary law basis of Art. 78 and 79 of the Treaty on the Functioning of the European Union (TFEU), the following principles were laid down for securing the external borders and migration:

1. implementation of the Common European Asylum System;
2. better cooperation with the countries of origin and transit states;
3. combating irregular migration by improving border management;
4. maximisation of opportunities for legal migration.

In relation to all these measures protection of refugees' rights and of fundamental rights must be protected and data protection maintained. Accordingly, it is incumbent upon the European institutions to implement these guidelines, with the Commission having the right of initiative. The heads of state and government will carry out a mid-term review in 2017.

Underlying this are political goals whose mutual relations are fraught with tension: security, economic interests and protection of fundamental and refugees' rights. Already the guidelines of the European Council, but all the more so developments in respect of the European Commission's proposals since 2014 and especially the series of Council meetings in 2015 show that this notional triangle is far from being an equilateral one. Rather the goal of security is underpinned and even expanded to a much greater extent with instruments and measures, pointing towards growing extraterritorialisation and technologisation of borders and border systems, as will become abundantly clear. In normative terms it has to be ensured that these developments pay attention to human and refugee rights standards, as laid down in the Geneva Convention on Refugees (GCR) and the European Convention on Human Rights (ECHR) and as the judgments of the European Court of Justice and the European Court of Human Rights have called for repeatedly (among others, see Hathaway/Foster 2014; Bendel 2014; Heller/Jones 2014; Jensen 2014; Markward 2015).

One will search the Strategic Guidelines in vain for legal access routes for refugees and enhanced sea rescue obligations after the end of the Italian sea rescue operation *Mare Nostrum*, as called for repeatedly in the past by the European Commission, the European Parliament and also by many human rights and refugee initiatives. Because the 2014 Guidelines remain extremely vague in comparison with the previous Tampere, Den Haag and Stockholm programmes there were initial hopes that they would be given a blood transfusion by a new European Commission.

The »refugee drama« in the Mediterranean in April 2015, in which, as in October 2013 off the Italian island of Lampedusa, a large number of migrants drowned, at first appeared to open up a window of opportunity for boosting such a human and refugee rights dimension. In a declaration in response to the tragedy the Member States committed themselves to urgent action and the European Parliament passed a corresponding resolution a few days later (European Parliament legislative resolution 2015/2660(RSP)). The Foreign Affairs Council and the Justice and Home Affairs Council then presented a 10-point plan (published in European Commission 2015). Its first points concerned the strengthening of Operations Triton and Poseidon in the Mediterranean by boosting their financial and operational resources, the systematic seizure and destruction of traffickers' boats in the Mediterranean, closer cooperation between the agencies EUROPOL, FRONTEX, EASO and EUROJUST. It also called to fingerprint all migrants with the assistance of EASO teams in Italy and Greece (so-called hot-spots). We can discern here the outlines of a plan later worked out by the Commission for the compulsory distribution of refugees within the EU in emergency situations and the voluntary resettlement of refugees from states of first asylum. This 10-point plan was integrated in the Commission's long-planned European Agenda on Migration, another part of which comprised immediate measures to improve the situation in the Mediterranean. The Commission's proposals, too, largely remained in hock to a security-policy understanding of flight and migration, even though they opened at least a few doors for a redistribution of refugees within the EU and a new distribution of additional resettlement refugees.

## 1.2 EUROPEAN AGENDA ON MIGRATION

The European Agenda on Migration (COM 2015/240FINAL), presented on 13 May 2015, is a Communication of the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. It represents the programmatic document of the newly constituted Commission under Commission President Jean-Claude Juncker and the Commissioner responsible for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos. Its primary thrust is policy recommendations, specifying the conclusions of the European Council of 24 June 2014. Substantively, the European Migration Agenda corresponds to the five-point policy plan presented by Commission President Juncker on 23 April 2014 on immigration policy (Juncker 2015) for the implementation of the Common European Asylum System, the expansion of the European Asylum Support Office, cooperation with third countries, especially in North Africa, the promotion of legal migration and the securing of the EU's external borders. Besides emergency measures concerning the crisis in the Mediterranean it also contains proposed medium- and long-term measures for a comprehensive and improved management of migration »in all its aspects«. Based on this Communication the Commission will, over the coming years, present draft directives and resolutions for a common EU migration policy and submit proposals for closer coordination of policies between the Member States. Within this framework the Council presidencies, beginning with Luxembourg in the second half of 2015, are of particular importance as agenda setters.

In order to achieve more coherence in EU and Member State refugee and immigration policy, measures are to be brought together from several policy areas: measures concerning trade, employment, foreign and domestic policy. Key to this will be better harmonisation of the various policy areas, especially development cooperation. The Commission takes the view that a cohesive migration policy is the common task of all EU actors. In substantive terms, cohesion means concurrent tackling of irregular migration, smuggling and human trafficking, securing the external borders, implementation of the common European asylum policy and a new policy for legal migration. At the same time, it is in accordance with European values to help people who have taken up residence in the territory of the EU Member States to integrate and to protect them from hostility. On the other hand, unsuccessful asylum applicants, overstayers<sup>2</sup> and people who are permanently resident but on an irregular basis are to be consistently sent back. The Commission will also submit plans to enhance the communitarisation of EU labour migration policy.

<sup>2</sup> »Overstayers« are people who enter with a valid travel document, but who remain in the country longer than they are permitted



**Emergency measures include;**

1. **Sea rescue operations** (tripling of resources for the FRONTEX operations Triton and Poseidon by means of an amending budget; deployment of new ships and aircraft by the Member States);
2. **Combating criminal smuggling networks** (track down, capture and destroy smugglers' boats within the framework of CSDP with a mandate of the UN Security Council; pooling of information and deployment of EUROPOL task force JOT MARE; cooperation between authorities and agencies);
3. **Relocation** in response to the large number of refugees arriving by activating the emergency clause in accordance with Article 78 para 3 TFEU, (Commission proposal on the relocation of people in clear need of international protection on the basis of a mandatory distribution key in accordance with GDP, size of population, unemployment rate, existing number of asylum applicants and resettlement places: preliminary stages of a permanent solution, with a Commission proposal by the end of 2015);
4. **Resettlement as a common strategy for the protection of displaced persons in need of such protection** (international obligation with regard to people still in the bordering states, 20,000 people with an additional budgetary allocation of 50 million euros for 2015 and 2016; possibly a proposal for legislative steps; support in the Member States for people and organisations dealing with resettlement);
5. **Cooperation with the countries of origin and transit, support for the Member States on the external borders** (establishment or expansion of regional protection programmes in the Horn of Africa and North Africa; a pilot project of a »multifunctional centre« in Niger: protection on the ground, resettlement programme, information and repatriation; migration as a component of CSDP: tackling the causes, combating smuggling and human trafficking; measures to promote stability, for example, in Syria and the neighbouring states; measures to help Member States on the external borders: »hotspot« concept for EASO, FRONTEX and EUROPOL concerning identity screening, registration and fingerprinting at the external borders; coordinated repatriation; emergency programme involving 60 million euros to support Member States shouldering a particularly heavy burden in reception and medical care on the basis of needs assessment).

**Besides these emergency measures the Commission set out four key focus areas:**

1. **Reducing incentives for irregular migration by**
  - **tackling the root causes in the countries of origin**, cooperation with third states (partnerships with countries of origin, enhanced role of EU delegations, dispatch of migration representatives in EU delegations; long-term development cooperation, short- and medium-term crisis management on the ground);
  - **combating smugglers and human traffickers** (cf. European Commission action plan: use of agencies to identify, apprehend and destroy possible smuggling boats, closer cooperation with reporting offices with regard to suspicions concerning financial flows, cooperation with financial institutions, use of the European security agenda's exchange of information; improvement of the legal framework for tackling smuggling; beefing up the strategy against human trafficking; review of the directive on employer sanctions; priority treatment of treaty violation procedures against this directive);
  - **improvement of the repatriation system** (pilot project for Bangladesh and Pakistan; development of capacities for repatriation management, information and awareness-raising campaigns, reintegration measures; readmission agreements with the main countries of origin of irregular migrants; stricter monitoring of the implementation of the Return Directive in the Member States; best practice manual on repatriation).
2. **Common European Asylum System**
  - strengthening of FRONTEX (new deployment rules; risk trends);
  - EU-wide border standard 2016 (including smart borders system);
  - strengthening of investment and rescue capacities in the countries of origin and transit.
3. **Legal migration**
  - **implementation of the CEAS** (new systematic control mechanism for the implementation and application of asylum provisions; guidelines on the improvement of standards; treaty violation procedure);

&gt;

&gt;

- **improvement of cooperation via EASO** (network of host-country authorities as a basis for some kind of pooling of reception centres);
- **tackling abuses** (beefing up the principle of safe countries of origin in the asylum procedure directive);
- **revision of the Dublin System** (network of national Dublin offices to support the responsible Member States; Commission guidelines on fingerprinting; review of the possibility of using more biometric data via EURODAC; evaluation of the Dublin System in 2016 including relocation and resettlement measures).

#### 4. Legal migration

- **Governance of regular visa and immigration policy** (Horizon 2020, Erasmus +; directive on students and researchers, at present under negotiation; revision of the Blue Card: involvement of foreign companies, improvement of mobility for Blue-Card holders; legal certainty for service providers with regard to reciprocity clauses in free trade agreements; better dialogue between the Member States; platform for the social partners and companies; improved exchange of information; improvements in visa policy: revision of the Visa Code 2014, roundtrip visa, revision of the list of countries for which visas are required; integration: promotion of exchange among the Member States, AMIF, EFRD, ESF; sustainable development: support of the UN Agenda for the inclusion of sustainable integration of migrants; building capacities for the management of labour migration with regard to South-South mobility; second payment services directive to make return transfers easier).

#### The Commission also proposes a number of long-term measures:

1. consolidation of the Common European Asylum System (EU-wide asylum status; common asylum code; reciprocal recognition of asylum decisions; EU-wide standards in asylum procedure);
2. common management of the EU's external borders (European system of border guards; common equipment and resources for coastguards; possible transition to a European coastguard);
3. new system of legal migration (expression of interest by the Member States, EU-wide pool of qualified migrants).

## 2

# DISCUSSION OF THE AGENDA

## 2.1 OVERVIEW OF THE AGENDA

### 2.1.1 LACK OF LEGAL ACCESS ROUTES

Generally speaking, the central human and refugee rights problem of the system of European border, refugee and immigration policy is clear and recent plans have only exacerbated it: Access to protection is hindered or even prevented by a system of concentric circles of defence: existing visa provisions hold up legal access. Protection of the external borders, the lack of effective sea rescue and the deployment of the military to tackle smugglers hinder asylum seekers' access to Member States. The Member States are »increasingly outsourcing their border protection to the countries of origin and transit, which violate the human right to emigration by preventing them from leaving or repatriations ... The Dublin System puts pressure on the Member States at the external borders to patrol their coasts and to get third countries to hinder departures« (Markward 2015, translated from German). Readmission agreements oblige the transit states to accept those whose asylum applications are not accepted; push-backs on land or sea prevent people from entering EU Member States and thus potentially violate the right to non-refoulement in a state in which a refugee faces serious harm (cf. Grenz et al. 2015).

### 2.1.2 SECURITY-POLICY FOCUS AT THE EXPENSE OF COHERENCE

The aim that the European Commission has established to promote a coherent migration policy is by no means new. It has repeatedly been formulated since 2005 by the Commission in the Global Approach to Migration (GAM) and the Global Approach to Migration and Mobility (GAMM), revised in 2011. The GAMM framework lays down four key objectives: (i) better organisation of legal migration and mobility, (ii) prevention and combating of irregular migration and eradicating human trafficking, (iii) maximising the development-policy impact of migration and mobility and (iv) promoting international protection and enhancing the external dimension of asylum. Within this basic framework the EU

has developed a series of – to be sure, barely coherent and only loosely related (García Andrade/Martín 2015) – instruments, the most important of which are the mobility partnerships with countries of origin and transit and readmission agreements. The new institutional structure of the European Commission, with its vice presidents, could in principle offer an opportunity to attenuate the previous departmentalised thinking and to interlink DGs more closely with one another. To date, however, that has not happened.

Even before the 2015 proposals Jensen (2014: 11), among others, assessed the system as follows: »strong emphasis has been placed on security and migration control issues, and little attention has been paid to the mixed flows of migration and the refugee and human rights responsibilities of the Member States flowing from the EU Charter of Fundamental Rights, the Refugee Convention and the ECHR«. This tendency has been confirmed: the proposed measures generally correspond to an overwhelmingly security-policy understanding of migration, with, to boot, a stronger emphasis on military intervention than ever before.

Measures to secure and monitor the borders have been put centre-stage. They are underpinned by the continuing criticism of the Member States concerning the lack of protection of the external borders and the corresponding declaration of intent by the European Commission that it would present proposals for a further strengthening of the mandate of the European border protection agency FRONTEX and establish a European border and coastal protection provision. Here, too, a common denominator among the Member States, their political will, is difficult to achieve.

The highest outlay also occurs in this area: to support the Member States in building up robust border structures the EU has made available the Internal Security Fund, with over 2.7 billion euros, for the period 2014–2020, topped up with 5 million euros for emergency measures. Given the incessant entries and stronger tendencies to erect controls even at the internal borders, we can assume that the measures concerning the external borders will be beefed up in the not too distant future. It is likely that these components will be given even more weight after the attacks by Islamic State in Paris in November 2015. Needless to say, states have a right and a

duty to control their borders and to regulate access to their territory. However, they must do so in full respect of human and refugee rights.

### 2.1.3 SHIFT OF THE POLITICAL BALANCE OF POWER

Experience shows that the chances of implementation of measures beyond the external borders are especially limited in this policy area when the Member States have to cede sovereign rights and encounter strong domestic political and economic reservations concerning European agreements. At present, that applies in particular to issues of the distribution or redistribution of refugees. In this regard it should be noted that the ministers in the Justice and Home Affairs Council configuration (JHA) in charge of refugee and migration policy also negotiate with an eye on public opinion at home. In many Member States Eurosceptic and anti-migration, even openly xenophobic tendencies are evident, which in recent years have started to find party-political expression.

In this policy area the Council had established the practice of consensus decision-making. In the past that was often detrimental to political progress because the Council tended to settle on the lowest common denominator. For the first time the Council reached agreement in the debate on a distribution of refugees between the Member States in September 2015 using qualified majority voting (QMV), which had not previously been used in this policy area. Thus the states that wanted to reject such a mandatory quota – the Czech Republic, Hungary, Romania and Slovakia – were outvoted. Poland, which at first was against a quota, in the end voted in favour.

Lippert (2015) concluded in this connection: »(E)specially when national interests clash so urgently, as recently in the Council, a decisive and cautious European Commission is needed to monitor the EU rules that it laid down and to adjust its proposals in the general interest of the Union. (...) Then even qualified majority decisions are likely to find broad political acceptance« (translated from German). In contrast to this assessment, reference to the sensitivities and insistence on sovereignty of some Member States, especially in central and south-eastern Europe, would appear to make it more necessary, in my opinion, to apply this decision-making procedure only with strong reservations, because opposition in these central and south-eastern European states could increase all the more as a result (cf. Lang 2015). Future changes in government majorities could precipitate different qualified majorities, too. Furthermore, for those states that are subject not only to a temporary distribution of at least 160,000 persons already resident in the EU, but also to a permanent distribution mechanism – first and foremost Germany, but also Italy and Greece – cooperation with eastern partners remains very important (for details, see Section 2.4).

Similarly, decision-making takes place within the framework of Common Foreign and Security Policy and Common Security and Defence Policy (CFSP/CSDP) without the legislative participation of the Parliament. Expansion to partly military solutions and thus into the domain of CFSP/CSDP thus harbours grave consequences for the transparency and accountability of decision-making. In contrast to the Area of Freedom, Security and Justice (commonly known as the Euro-

pean Union's Justice and Home Affairs policy), whose elaboration is subject to the ordinary legislative procedure, decision-making in defence policy evades public opinion and control. In some circumstances in the end it thus harbours ambiguity with regard to who is responsible for eventual human rights violations (Carrera/den Hertog 2015: 24). In contrast to border control, sea rescue is primarily a Member State competence. This state of affairs hinders agreement on a common civilian sea rescue provision in the EU, as demanded by the European Parliament and many NGOs.

The European Parliament is involved in most other legislative proposals via the ordinary legislative procedure. In the past it has been evident that it takes a robust view of its participation rights. In most instances hitherto it has insisted rather on stronger European regulation than on Member State sovereignty (cf. Bendel 2014; Ripoll Servent 2015; Bendel/Ripoll Servent 2015). Otherwise, not least in the above-mentioned resolution, it has insisted on measures in support of a European search and rescue operation, as well as on possibilities for issuing visas on humanitarian grounds. However, the voting behaviour of the European Parliament in the recent legislative period took place more strongly along factional lines, although it differed sharply depending on sub-policies and even legislative proposals (Bendel 2013; Ripoll Servent/Trauner 2014). In the absence of clear majorities the Parliament is dependent on case-by-case majority building in the current legislative period. The strongest parliamentary group, with 218 MEPs, is the EPP, which can count on ideological agreement with the Commission President and the permanent Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, not to mention a majority in the Council. The party of the High Representative, Federica Mogherini, is a member of the S&D group, with its 198 MEPs. The number of extreme-right and Eurosceptic MEPs has increased to 82 in the recent legislative period; they now form two groups of their own. Even if they do not vote together, they can exert pressure on the democratic groups and reduce their chances of building alliances. In principle, the formation of »grand coalitions« seems most likely. However, this diminishes the likelihood of more substantial policy changes (Bendel/Ripoli 2015).

Given this balance of power the Commission's proposals are explained one by one in what follows and discussed in terms of the application of human and refugee rights and their possible effectiveness.

## 2.2 COOPERATION WITH COUNTRIES OF ORIGIN AND TRANSIT STATES

The European Union has a whole series of forms of international cooperation with countries of origin and transit with regard to migrants and refugees. The main instruments involve the combating of irregular migration, the securing of the external borders and repatriation. With regard to development cooperation in relation to migration policy the instruments are, to be sure, not yet fully developed and legal migration is virtually non-existent in the area of the external dimension of migration (cf. García Andrade/Martín 2015). In geographical terms, GAMM instruments have concentrated on the West Balkans,

eastern Europe and the southern Caucasus, whereas cooperation with the states of the southern Mediterranean, Sub-Saharan Africa and East Africa have recently begun to gain ground (García Andrade/Martín 2015: 10). If the Commission has its way, the EU will now bolster its bilateral and regional or intercontinental cooperation on migration issues (Rabat, Khartoum, Budapest Process, EU–Africa Migration and Mobility Dialogue; [http://europa.eu/rapid/press-release\\_MEMO-15-4832\\_de.htm](http://europa.eu/rapid/press-release_MEMO-15-4832_de.htm)). To that end the roles of EU delegations in the key migration states will be stepped up; they shall not only produce reports, but also participate in mainstreaming between development cooperation and migration. Special migration liaison officers will operate in third countries, initially in Algeria, Morocco, Tunisia, Niger, Senegal, Sudan, Turkey, Pakistan, Lebanon and Jordan.

Other European Commission proposals on cooperation with third states concern tackling root causes in the countries of origin. That corresponds to the fundamental demand that migration be pushed higher up the foreign and development policy agenda. The causes of flight, the real push factors for the decision to migrate, are often not short-term and not easily remediable. What this really requires is to get the individual DGs singing from the same hymn sheet, especially in the area of long-term development cooperation and short- and medium-term crisis management on the ground with the development cooperation of the European Commission, involving the European Commission's Humanitarian Aid and Civil Protection department (ECHO).

The EU also wants to step up its engagement with the transit states (European Commission 2015d). Beginning with Niger and Mali, the main issue is securing border controls. Regional Development and Protection Programmes (RDPPs) are to be beefed up and extended, starting with North Africa and the Horn of Africa. For that purpose the European Union has slated an additional 30 million euros for the period 2015–2016. A so-called multi-purpose centre was due to be built in Niger at the end of 2015. This is to be a centre for information, local protection options and resettlement provided jointly by the International Organisation for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and the Niger authorities. This pilot project is to serve as a model: in the countries of origin and transit potential refugees and migrants are to be given a realistic picture of the chances of success and risks of such a journey. Apart from that they are to be offered a possibility for voluntary return. Extraterritorial asylum procedures are not explicitly envisaged, but are under discussion. This option was already proposed in 2003 by then UK Prime Minister Tony Blair and taken up again in 2005 by then German Interior Minister Otto Schily.

Also scarcely new is the proposal to conclude partnerships with countries of origin and transit states in order to increase the rate of returns. Readmission agreements have been concluded with partner countries for a number of years. They partly regulate the return of the country's own citizens, but also of citizens of third states who do not or no longer meet the conditions for entry, presence or residence in an EU Member State, lay down financial arrangements and set deadlines for repatriation. Some Member States – especially Spain, France, Italy, Germany and Greece – have bilateral readmission agreements; on top of that the European Commis-

sion has concluded joint agreements with third states since 2000. In them, generally speaking, various policy areas are linked to repatriation, for example, with development, trade or labour market issues, in relation to which, however, there are considerable differences in terms of treaty agreements and implementation (Reslow 2012; Dünwald 2015).

In September 2015 the European Council specified a substantial increase in the EU Regional Trust Funds in response to the Syrian Crisis and support for Syrian refugees in the reception states Lebanon, Jordan and Iraq in order to reduce the push factors from these bordering states. Only in response to the »refugee crisis« was the budget again increased to a total of 1.7 billion euros for 2015 and 2016. Besides strengthening the three agencies FRONTEX, EASO and EUROPOL and the asylum and migration funds, an additional focus was now the funding of the European neighbourhood policy, the EU Regional Trust Fund for Syria and an increase in humanitarian aid above all for the UNHCR, the UN's World Food Programme and other relevant organisations concerned with looking after refugees. The Member States are invited to complement the EU's contribution with their own resources. However, by the time of writing in December 2015, in the case of the contribution for the programme of the UN High Commissioner for Refugees and the World Food Programme only two Member States – the United Kingdom and Germany – had met their voluntary commitment. In the case of the Regional Trust Fund for Syria again only two Member States had responded, namely Italy and Germany. With regard to the emergency trust fund for Africa Luxembourg, Spain and Germany recently got involved; in November 2015 this was increased considerably at the EU–Africa summit (European Commission 2015e).

## 2.2.1 EXTERNAL DIMENSION OF MIGRATION OR THE EXTERNALISATION OF BORDER PROTECTION?

Originally a core element of national sovereignty, border management and migration control have gradually moved to the intergovernmental and from there to the supranational level. From home affairs and justice policy these issues now increasingly overlap with other policy areas. The external dimension of migration and migration controls, as the abovementioned Global Approach to Migration and Mobility (GAMM) conceives it, involves the countries of origin and transit when it comes to border management. This tendency is generally referred to in the literature as externalisation (for a critical view, see for example: Buckel 2014; Dünwald 2015).

Under the heading of externalisation, however, a whole range of phenomena can be found: (a) national measures with international effects (for example, the »transit zones« discussed recently by the German government); (b) enhanced attention to securing external borders and combating irregular migration by means of border controls, the building of fences and so on; (c) measures to promote return, readmission agreements, transport back to third states; (d) implementation of asylum procedures outside the territory of an EU Member State; and (e) measures related to tackling the causes of flight, such as the connection between development cooperation and migration (cf. Zapata-Barrero 2013: 6f). This external form

of governance – the application of rights beyond institutional integration – is also characterised as externalisation and envisages the extension of EU borders. This concerns the effort to get third states to prevent their citizens from emigrating, accommodating migrants as near as possible to their countries of origin or preventing them from entering the territory of the EU Member States.

In principle, two approaches can be differentiated here: a »remote control« approach (Zapata-Barrero 2013: 10), which is security-based, reactive (aiming at controlling migration movements) and restrictive; and a »root cause approach« (Zapata-Barrero 2013: 10), which is development-oriented, proactive/preventive and reliant on policy innovation.

The first strategy is supported in European policy by various, albeit only loosely related instruments and is to be expanded institutionally, according to the Agenda, with a focus on diplomatic pressure, the expansion of bi- and multilateral meetings, further readmission agreements and a heightened returns policy, to include the building and extension of external camps and border controls. The second strategy – that of development-related proactive externalisation – on the other hand, appears to feature rather less in the plans of the European Union.

From a human rights perspective the current debate on extraterritorial state obligations has a strong focus on mobility partnerships and readmission agreements (Garlick 2006; Gammeltoft-Hansen 2009; Zapata-Barrero 2013; den Heijer 2011; Taylor Nicholson 2011). It is gaining ground in relation to the European Agenda on Migration and could be germane to its purposes. Extraterritorial action must take account of the fact that international courts in monitoring compliance with human rights – thus for example, the ECHR's Hirsi ruling, discussed below – ascertain whether persons are subject to the jurisdiction of a foreign state if the latter exercises genuine state authority and/or power over the territory or persons. These two perspectives – the development-policy and the human rights perspective – provide an important impulse for the ensuing debate.

## 2.2.2 LACK OF A DEVELOPMENT-POLICY ORIENTATION

Enhanced development-policy approaches that also include NGOs in conception, planning and implementation could well make a key contribution to the containment of flight and migration movements in the countries of origin and transit. They underline the potential and resources of refugees to earn a living if they have the right to study and work (for example, Newland 2015). This access, which goes beyond previous humanitarian approaches (Papademetriou 2015), although ever present in the Commission's plans, can be expanded considerably. Development-policy approaches must not be confined to building up the border regimes of countries of origin and transit, especially not in relation to dictatorial regimes that prevent their own people from leaving the country (for a critical view, see Pro Asyl 2015 based on an ARD-Monitor report).

With regard to readmission agreements it should be mentioned that although third states are becoming active partners in the migration policy of the European Union and its

Member States (Reslow 2012), which their negotiating partners certainly recognise (even if to varying degrees, depending on the position of the partner), the agreements concluded hitherto do not contain effective human rights guarantees. »Although a clause can always be found in accordance with which the treaty parties' international law obligations are not affected by the agreement, that does not represent an effective human rights guarantee, especially not against chain deportations to a persecutor state« (Grenz et al. 2015: 95, translated from German).

Furthermore, development-policy and migration-policy instruments and measures are inextricably linked in this »give and take« logic, in some circumstances problematically:

»Because to date the EU has not come up with sufficiently precise and binding rules for the Member States concerning what standards should apply in the selection of treaty partners and the elaboration of readmission agreements there is a danger that human and refugee rights will be circumvented. Against this background the linking of readmission agreements and development aid is all the more problematic if this leads to development aid being allocated not only in accordance with different criteria, but also to different recipients than before. Consequently, it is not correct that readmission agreements are justified by the fact that the human rights situation in the repatriation states is improved by development aid. Rather there is a danger that readmission agreements delegitimise development aid« (Riebau 2015, translated from German).

## 2.2.3 EXTRATERRITORIAL STATE OBLIGATIONS IN RDPPS

With regard to the new/old instrument of the Regional Development and Protection Programmes there are at present more questions than answers.

The question is whether in the RDPPs asylum options will be reviewed from outside EU borders, as recommended by the European Council in its guidelines of 2014 and at least outlined by the European Commission with its pilot project in Niger.

The attractiveness of such proposals evidently lies in the fact that people with some prospect of being accepted could come to Europe via secure and regular, legal routes. This would at the same time lower the number of those who come without any prospects and reduce the number of repatriations. Occasionally, the debate is extended to include the possibility of opening up prospects not only of asylum but also of migration.

After these proposals had been debated, strongly criticised and ultimately rejected ten years ago EU legislation has developed and new institutions have emerged. For example, the European Asylum Support Office (EASO) has the express task of cooperating with third states and the European External Action Service (EEAS) is supposed to operate in third states also in the areas of migration and asylum policy (Garlick 2015).

However, this debate gives rise to a good many concerns in terms of human and refugee rights: first, the extent to which the European Union and its Member States outsource part of their responsibility to protect and transfer the responsibility for reception and protection to third parties

has to be assessed. The most recent rulings of the European Court of Human Rights (ECHR), in the already mentioned Hirsi ruling not for nothing underlined that the principle of non-refoulement applies also outside one's own national territory, whether in international waters, border areas or on the territory of another state, as long as states exercise effective control over individuals. These persons cannot be sent back to countries in which they are at risk of persecution, torture or inhumane or degrading treatment, or to countries that would send them back to such risky areas. This also includes compliance with procedural protection measures such as access to a hearing, legal council, interpreters, information and access to legal remedies.

Closely linked to this is the issue of which countries are suitable for locating or expanding such centres. Should existing camps in first reception countries be expanded into a kind of deportation centre, for example, with the help of UNHCR? It is rightly criticised that not all host countries are even signatory states of the Geneva Convention on Refugees and its New York protocol. This gives rise to the danger that asylum seekers do not receive adequate protection and even run the risk of having their right of non-refoulement undermined. UNHCR has promised, under certain circumstances, its support for the implementation of multilaterally organised asylum procedures (UNHCR 2015a), although it insists that asylum must be accompanied by other solutions for refugees (such as resettlement). That is a different situation from the early 2000s, when neither the Member States nor UNHCR could be persuaded to accept such a common asylum procedure (joint processing) (Garlick 2006). However, what happens in the country of first reception if an applicant is sent back? What rights does he or she have? What practical consequences arise for their onward or return journey?

The instrument of external asylum procedure in such centres, however, also throws up a whole series of practical and legal problems related to the state of the asylum system within the EU itself. The EU is far from having a uniform asylum system with uniform criteria for the recognition («qualification») of refugee status, reception conditions, the asylum procedure and thus the chances of a positive decision (ECRE 2014), as explained below. Indeed, under current circumstances the gap with regard to granting asylum between the Member States has opened up even further. There is uncertainty not only concerning responsibility for such procedures, but also the question of which Member States a refugee can travel to after acceptance (Garlick 2015). However, in combination with humanitarian visa or protected entry procedures or extended resettlement procedures these instruments do have potential that should be discussed under human and refugee rights provisions. Here, too, there is also a considerable need for research and discussion over the coming years.

### 2.2.4 SHORT- AND LONG-TERM SOLUTIONS FOR BORDERING COUNTRIES

Without corresponding support for the bordering states, entries will not abate for the foreseeable future. The Member States must thus stand by their commitments and indeed expand them, where possible. The intake via resettlement discussed above is an important point of contact for perma-

nent solutions in accordance with the international refugee regime for all people in the camps outside Europe, who are particularly vulnerable. The European Commission's proposal to distribute 20,000 people among the Member States via resettlement over a period of two years may appear too low but it is a good first approach that takes account of this demand and an instrument that the UNHCR has considerable experience in applying.

Furthermore, local integration in first host countries must be urgently improved. As long as refugees are not permitted to work in the countries of arrival, and have little or no access to education and health care it is not surprising that they migrate further, especially because in many cases mixed flows are involved (UNHCR 2015 and 2015a).

Thus there have been efforts ongoing for a number of years at global level to take a long-term look at international refugee and migration law (Long 2015). Labour migration, the argument goes, can ultimately even contribute to improving the international regime of refugee protection. However, at European level growing right-wing populist and other extremist tendencies are opposed to this. On the other hand, humanitarian organisations and NGOs are also often against mixing refugee and migration status because it can water down the criteria for protection and ultimately result in states failing to take in those in need of protection, but rather those likely to represent economic gains. Migrants' rights, however, could prove inadequate for the protection of refugees in need of international protection and migrate by way of legal (labour) migration. However, this debate, possibly in combination with that on legal entry routes, is still in its infancy.

### 2.3 SEA RESCUE AND COMBATING CRIMINAL SMUGGLING NETWORKS

The European Commission has taken up the resolutions of the Foreign Affairs Council on combating smuggling; the Council of the Foreign and Defence Ministers of the European Union agreed to launch the operation in June 2015. Within the framework of the Common Security and Defence Policy (CSDP) the EU with EUNAVFOR MED is thus for the first time actively involved in a military operation to identify, apprehend and destroy smugglers' ships carrying refugees and migrants in order to bust the business model of smugglers and traffickers and at the same time to rescue people in the Mediterranean (cf. European Union External Action 2015).

A three-stage plan was developed with the aim of disrupting the business model of human smuggling and trafficking networks. In a first phase the operation was planned, and maritime patrol aircrafts, drones and satellites were deployed to detect and monitor smugglers' networks. In the second, operational phase, which required the assent of the UN Security Council and the Libyan government, boats are to be boarded outside Libyan waters; smugglers can be arrested and their boats destroyed. In a third phase – again with the assent of the Security Council – smugglers' boats and other infrastructure could possibly be destroyed even on Libyan territory.

In parallel with this the EU has tripled the resources of the common FRONTEX operations Triton and Poseidon, in which

the supply ship *Berlin* and the frigate *Hessen* have participated since May 2015. EUROPOL deployed a task force for naval reconnaissance (JOT MARE). EUROPOL as a focal point for combating smuggling networks is to be expanded into a central focal point for inter-agency cooperation in the fight against smuggling activities. The European Maritime Safety Agency, the European Fisheries Control Agency and EUROJUST are to cooperate with one another more closely.

### 2.3.1 SIGNIFICANCE AND RESOURCING OF SEA RESCUE OPERATIONS

UN Secretary General Ban Ki-Moon has expressed concerns that sea rescue might take a back seat when the mission to counter smuggling is stepped up (Rettman 2015). Given the horrendous situation in the Mediterranean (UNHCR 2015a; Altai Consulting 2015; IOM 2015) a coordinated enforcement of search and rescue operation is urgently necessary. A number of fundamental human rights challenges arise from this: first, the right to life, the right to non-refoulement and the humane treatment of people rescued at sea or redirected (for details, see FRA 2013).

Sea rescue to guarantee the fundamental right to life (Art. 2 of the EU Charter of Fundamental Rights and Art. 2 of the European Human Rights Convention) is – in contrast to border controls, which fall under EU law (Art. 79 TFEU) – laid down in the United Nations Convention on the Law of the Sea 1982. It is an obligation on every state (Art. 98); all coastal nations are obliged to establish search and rescue services. They are coordinated in accordance with the International SAR Convention (cf. International Maritime Organisation) by international control centres for the coordination of sea rescue.

Art. 33 of the Geneva Convention on Refugees also establishes the right to non-refoulement. This refers to the prohibition on expelling or returning («refouler») a refugee in any manner whatsoever to the frontiers of territories «where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion». The principle of non-refoulement also includes return to other states in which there is a risk of further repatriation to the country of origin (so-called indirect refoulement). It also prohibits so-called push-backs on the high sea. The Refugee Convention has been ratified by all Member States and has found its way into European primary law in Art. 78 of the TFEU and in Art. 18 of the EU Charter of Fundamental Rights. In the ground-breaking ruling *Hirsi Jamaa et al. v. Italy* (European Court of Human Rights, Application no. 27765/09) the European Court of Human Rights applied this principle to the interception of boats on the sea.

The Mediterranean is patrolled by national coastguards, private organisations and projects (Watch the Med, Migrants Offshore Aid Station, MOAS, Sea Watch) and, since November 2014, the European border protection agency FRONTEX. Originally, Operation Triton, implemented by FRONTEX, was funded much more modestly and less well equipped than Operation Mare Nostrum carried out by the Italian coastguard. FRONTEX was subsequently better provided for and its resources were tripled. In contrast to Mare Nostrum, the principal purpose of Operations Triton and Poseidon is not sea rescue, but securing the external borders. The Executive

Director of FRONTEX, Fabrice Leggeri, in an interview with *The Guardian* on 22 April 2015, said: «Triton cannot be a search-and-rescue operation. I mean, in our operational plan, we cannot have provisions for proactive search-and-rescue action. This is not in FRONTEX's mandate, and this is in my understanding not in the mandate of the European Union» (cited after Kingsley/Traynor 2015). The German Human Rights Forum (Forum Menschenrechte 2015: 2) considers this self-description to be incorrect. Rather it refers to the agency's own focus. In any case, sea rescue and control operations often tend to blur in practice (Llewelyn 2015: 11) because the boats used for transporting migrants are frequently unseaworthy.

Like other organisations, the Human Rights Forum is thus calling for the EU to set up its own civilian sea rescue service. To date, however, this has foundered on the fears of some Member States that the rescue of shipwrecked people would prove a pull factor enticing even more refugees (Grenz et al. 2015: 103; Altai Consulting 2015: 113). Given the fact that, as explained, the decision lies with the Member States and the constant increase in entries in recent months, at present there is little prospect of such a change of course. However, the Commission was due to present a proposal by the end of 2015. It will depend not least on its negotiating skills to persuade the Member States to get on board.

### 2.3.2 INTERNATIONAL LAW QUESTIONS

Initially, the EU endeavoured to reach agreement with the internationally recognised Libyan government in Tobruk, but the latter categorically refused. The EU High Representative for Foreign and Security Policy, Federica Mogherini, then approached the UN Security Council in May 2015 for a mandate on the basis of Chapter VII of the UN Charter. According to Article 39, in the current situation interference in Libyan sovereignty must concern either «a threat to world peace» or a «danger to international security». Mogherini argued that the events in the Mediterranean, according to her, were not only a humanitarian emergency, but also a security crisis: smuggler networks were, supposedly, tied to terrorist activities and in some cases had funded them. This had contributed, she went on, to making an already unstable region even more unstable (cf. European External Action Service 2015). Already in the cases of Iraq and Somalia (1991/92 and 2008) the Security Council had established that «although refugee and migration flows in themselves do not represent a threat to peace and international security, they may be liable to destabilise a region in such a way that a threat to international security might arise. Above all, terrorists might enter in the slipstream of refugees, using the general chaos for their criminal activities and thereby jeopardising peace» (Hummer 2015, translation from German).

A corresponding resolution (Resolution 2240, 2015) was passed by the Security Council on 9 October 2015 (with Venezuela voting against). Under this resolution, within the framework of Operation Sophia (named after the child born on the German vessel *Schleswig-Holstein*, whose mother had been rescued off the Libyan coast) for the period of one year the Member States are allowed to inspect ships on the high seas off the coast of Libya that they suspect of being used for human smuggling or trafficking. Acting under Chapter VII



of the UN Charter they may also stop, search, seize and, as the case may be, reroute ships if they are demonstrated to be engaged in human smuggling or trafficking (United Nations 2015). Since 7 October EUNAVFOR MED has been operating in the Mediterranean. This is due to continue until 31 October 2016. Besides Germany<sup>3</sup>, France, the United Kingdom, Italy, Slovenia and Spain are participating in this mission.

The German Human Rights Forum takes the view that »refugee movements [do not] represent a threat to peace« and that »smuggling ... is not a state- or state-like action«, and thus the EU would »be playing an active role in further undermining international law« (Human Rights Forum 2015: 3). In my view there is an urgent need for policy and legal research on all these issues.

### 2.3.3 RISKS OF THE EUNAVFOR MED MANDATE

Beyond the international law issue another question concerns the actual feasibility of the EUNAVFOR MED mandate. It is not clear how easily smuggling boats can be identified and destroyed and how it can be prevented that refugees themselves come to harm (Scherr 2015). For military operations there is a risk of confrontation on Libyan territory, among others with militias, extremists and terrorists. Furthermore, there is also the fear that smugglers could arm themselves in response to military operations, thus posing a threat to civilians.

### 2.3.4 LACK OF EFFECTIVENESS DUE TO LACK OF ALTERNATIVES

There is no doubt that smuggling is a profit-oriented business. There is plenty of evidence of human traffickers and smugglers undermining or severely violating the rights of refugees in some instances (for example, Di Nicola/Musumeci 2015; Townsend/Oomen 2015). The backers of this business, however, remain in Libya and are normally not to be found on smuggling boats (Llewellyn 2015: 22f).

However, it is also clear that even the reception states of the European Union undermine the rights of refugees, especially with regard to the abovementioned requirement of non-refoulement: they scarcely make available legal avenues for protection on their territory and have repeatedly been pilloried for illegal repatriations (on this see, among others, Amnesty International 2014).

Against this background there has been no evidence that such an approach to tackling smuggling alone is effective. Rather there is concern that the smugglers are merely being diverted onto even more dangerous and costly routes (Amnesty International 2014) – or rather that, as has become abundantly clear of late, they are taking new and shorter routes with cheaper, but even less seaworthy vessels through the Aegean and the Balkans: smuggler networks are clearly adapting rapidly to the new circumstances (De Bruycker et al. 2013; Townsend/Oomen 2015). Until legal channels of entry

are created refugees will continue to be pushed into the arms of smugglers and set out on such dangerous routes. This is also argued by various position papers issued by human and refugee rights organisations, such as the Brussels NGO network the European Council on Refugees and Exiles (ECRE) (2015).

## 2.4 THE EU AND ITS MEMBER STATES

In the previous section the focus of the discussion was the outward shifting of the borders by means of extraterritorial controls. In the following section the first issue to be addressed will be the border protection of the European Union (anchored in Art. 67 and 77 TFEU). The aim of this policy is to safeguard the Schengen area with its lack of internal borders by establishing and maintaining a common policy on the external borders, a system that in recent months has faltered significantly. In order to shore it up, the European Commission has presented a number of proposals in the European Agenda on Migration.

The Agenda envisages, on the basis of the common asylum policy (Art. 67 para 2 and 78 TFEU and Art. 18 of the EU Charter of Fundamental Rights), to strengthen the »Asylum package« adopted in 2013. Its backbone was the Dublin System, which has collapsed over recent months, having been ailing for a long while. This is discussed in Section 2.4.2. Measures to establish a list of safe countries of origin have given rise to political debates not only in Germany, but also at the EU level; proposals on promoting the repatriation of rejected asylum seekers have provoked a similar response.

Finally, the Commission would like to improve the instruments being deployed in the area of legal migration and integration. In accordance with the Treaty (Art. 79 and 80 TFEU) they can lay down the conditions of the entry and residence of citizens of third countries, also for the purpose of family reunion. However, it is up to the Member States to determine how many people from third countries may be permitted to enter their sovereign territory. The EU can offer incentives and support for the integration of third-country nationals with legal residence. The Member States have not ceded the competence to the EU to harmonise national laws and regulations, however. In this narrower framework, the Commission has made proposals in these two areas for the future against the background of a sharp rise in immigration.

### 2.4.1 BORDER MANAGEMENT: HOTSPOTS AND SMART BORDERS

The EU has at its disposal the Schengen Borders Code for border protection at the external borders. It lays down conditions for crossing the border and – as happened recently – for the reintroduction of controls at the internal borders. For this purpose it has funds to relieve states on the external borders (fund for internal security – borders and visas); databases for control and management (Schengen Information System, SIS; Visa Information System, VIS; and EURODAC); and sanction measures for unauthorised entries, transits or residence. For operational cooperation at the external borders the EU has the border protection agency FRONTEX,

<sup>3</sup> A Bundestag mandate was required for German involvement in accordance with Art. 24 para 2 Basic Law, which was granted on 1 October 2015 by a majority of the government coalition (BT-Drucksache 18/6013). Germany's contribution is a maximum of 950 soldiers.

which we have already mentioned in relation to operations Triton and Poseidon to secure the sea borders in the Mediterranean. FRONTEX has been the focus of reform measures in recent years and the new proposals of the European Agenda on Migration also tackle FRONTEX. The Commission has revived a number of ideas already present in the Stockholm Programme and then included in the European Council's guidelines of 2014: it was due by the end of 2015 to examine what a genuine European border and coastal protection service would look like.

FRONTEX also has an important task in providing relief to states on the external borders: in Italy and Greece so-called hotspots are being established in which migration management support teams assist the Member States that are most under pressure in the registration and relocation of refugees. The agencies FRONTEX, EASO, EUROPOL and – it is planned – EUROJUST have been activated for this purpose. The first hotspot was established on the Italian island of Lampedusa, followed by another one on the Greek island of Lesbos. At the same time, the relocation and resettlement programme got under way. The agencies are to assist national authorities in the registration and control, as well as the repatriation of refugees and migrants. In the hotspots, after screening, people are to be put in one of three categories by regional coordination teams: a) asylum seekers; b) people to be repatriated; and c) people whose situation is unclear. The idea behind this is to provide better support for overburdened states at the external borders and a pooling of competences. Most hotspots were still under development at the time of writing. The outcome for the human and refugee rights situation and the effectiveness of these measures will only become apparent after a few months. Provisionally it can be said that the EU reacted very late in the day. Even in 2014 it was clear that the situation in Italy and Greece would deteriorate massively. Tony Bunyan, director of the British NGO Statewatch, commented that help had come too late. It was also concentrated on registration and fingerprinting (if need be by means of »proportionate coercive measures«) and thus puts control measures before human solutions (Statewatch 2015b).

The EU-wide border standard is to undergo a thorough review in 2016. The Agenda explicitly mentions the so-called Smart Borders system. This is a system that has been in planning since 2008. A first legislative proposal presented by the Commission in February 2012 failed due to the reservations of the European Parliament. The idea behind the Smart-Border package, aimed at all third country nationals, is to simplify, on one hand, border controls for so-called bona fide travellers, that is, frequent travellers (such as business travellers, family members) who have to undergo prior checks. This is to be done by means of the Registered Travellers Programme (RTP). On the other hand, the EU would like to register entries and exits by third-state nationals electronically (instead of by stamping passports), using the Entry-Exit System (EES). The aim here is to register people and spot overstayers, persons who travel with a valid visa, but who remain illegally in a Member State when their travel document expires. Given the massive criticism of these plans the Commission launched a pilot project in 12 countries at 17 land, sea and air border stations under the aegis of eu-LISA.

It also carried out a public consultation that ended in October 2015. On this basis the Commission would like to present a new legislative proposal in early 2016.

While the development of the FRONTEX agency is currently »largely regarded as positive« in the European Parliament »the attitude to intelligent borders ... has become much more distrustful« (European Parliament/Neville 2015). Also academics and representatives of NGOs have voiced serious concerns about the system. Several studies have called into question the efficiency, costs and feasibility of »intelligent borders« (Meijers Committee 2012). The border control system raises questions about data protection (European Data Protection Supervisor 2013; especially prior to the judgment by the European Court of Justice on telecommunications data retention of April 2014), but also about human and refugee rights in general (Bigo/Carrera et al. 2012; Hayes/Vermeulen 2012). The Commission's new legislative proposal for 2016 will thus have to be tested procedurally concerning the likelihood of its passage through Parliament and substantively also in terms of its »human rights fitness«.

## 2.4.2 DISTRIBUTION: RELOCATION AND RESETTLEMENT

Regarding the development of refugee numbers, on 20 June 2015 (World Refugee Day) the UN High Commissioner for Refugees (UNHCR) announced the highest number of refugees every documented by UNHCR in the course of a year (UNHCR 2015). At the end of 2014, 59.5 million people were in flight. By comparison, one year previously the figure had been 51.2 million and ten years ago only 37.5 million. Most of them are internally displaced persons. In 2014 there were a total of 19.5 million refugees (2013: 16.7 million), 38.2 million internally displaced persons (2013: 33.3 million) and 1.8 million asylum seekers still awaiting the outcome of their asylum procedure (2013: 1.2 million). Half of these refugees are children. The main countries of origin are Syria (7.6 million internally displaced persons, 3.88 million refugees), Afghanistan (2.59 million refugees) and Somalia (1.1 million refugees). As a result of the Syrian crisis and major refugee movements in parts of Africa Turkey became the main receiving country, succeeding Pakistan in 2014, which had been the main receiving country for the previous ten years. Turkey, Pakistan, Lebanon and Iran together took over 5.2 million people or 36 per cent of all refugees worldwide. Furthermore, 86 per cent of refugees are to be found in less developed states (14 per cent in LDCs).

The number of asylum seekers in the European Union in 2014 was put at 627,000 by Eurostat. Around one-third of them made their asylum application in Germany (202,800, 173,000 of them being first applications). In the first quarter of 2015 the figures were 185,000 (Eurostat 2015), including 73,100 first applications in Germany (40 per cent of the EU total), 32,800 in Hungary (18 per cent), followed by 15,200 in Italy (8 per cent), 14,800 in France (8 per cent), 11,400 in Sweden (6 per cent), 9,700 in Austria (5 per cent) and 7,300 in the United Kingdom (4 per cent). By head of population Sweden took the highest proportion of asylum seekers, at 8.4 asylum seekers per 1,000 inhabitants. In second place follows Hungary, at 4.3 applications per 1,000 inhabitants. Germany took only sixth place

among EU states, at 2.5 asylum seekers per 1,000 inhabitants, behind Austria (3.3), Malta (3.1) and Denmark (2.6).

More recent and more reliable data on the latest developments are scarcely available. Although Eurostat (2015), the European Asylum Support Office EASO (2015), the European Parliament (2015) and FRONTEX (2015) publish current data, each have their own difficulties. Germany, for example, at the various levels of registration (police, EASY distribution system, Central Register of Foreign Nationals, Federal Agency of Migration and Refugees) has not always been keeping up and the data collected at the different levels are not mutually compatible. On the other hand, some countries simply »wave people through« without registering them or register only some arrivals. FRONTEX, in turn, counts the number of illegal border crossings and thus sometimes counts the same person twice, as the agency explains on its website: »Clarification: FRONTEX provides monthly data on the number of people detected at the external borders of the European Union. Irregular border crossings may be attempted by the same person several times in different locations at the external border. This means that a large number of the people who were counted when they arrived in Greece were again counted when entering the EU for the second time through Hungary or Croatia« (FRONTEX 2015a).

Given these worldwide refugee figures and their global and regional distribution, in its European Agenda on Migration the Commission submits proposals for a redistribution. The distribution between Member States currently under discussion refers for the time being only to relocation and resettlement of refugees. In this context, relocation means only the redistribution of persons who are already in Member States in large numbers, while resettlement means the entry and permanent stay of registered refugees from countries of first reception.

Initially, the European Commission made use of Article 78 para 3 of the Treaty on the Functioning of the European Union in its proposals on relocation (the so-called emergency clause): »In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.«

According to the »first package of implementing measures of the European Agenda on Migration« the Commission planned to help the heavily burdened Italy and Greece (although Malta was also mentioned) by relocating asylum seekers in need of international protection in other Member States. The initial plan was to relocate 40,000 people from Italy and Greece to other Member States on the basis of the distribution key envisaged by the Commission. The proposal provided for the distribution of 40 per cent of asylum seekers that would go to Italy and Greece by way of the normal Dublin Procedure to other Member States (except for Denmark and the United Kingdom, possibly with the opt-in<sup>4</sup>

participation of Ireland, including the Dublin states of Norway, Switzerland, Iceland and Liechtenstein). The asylum seekers to be relocated are to be distributed 60:40 between Italy and Greece. They include people with over a 75 per cent chance of a positive asylum decision (initially, primarily Syrians and Eritreans), with preference given to vulnerable people within the meaning of the reception directive. To this end reception states receive an emergency relocation subsidy of 6,000 euros per relocated person.

The quota was calculated as follows (cf. COM 2015(240) FINAL, Annex 1): 1. size of population (40 per cent), 2. total GDP (40 per cent), 3. average number of spontaneous asylum applications and number of newly located refugees per 1 million inhabitants in the period 2010–2014 (10 per cent), 4. unemployment rate (10 per cent). Accordingly, Germany, with a quota of around 21 per cent, would receive the most refugees from Italy and Greece, followed by France (17 per cent) and Spain (11 per cent). The originally envisaged number of 40,000 people was raised by a further 120,000 in response to the further increase in entries during the summer. Ultimately, the idea behind this quota was to establish an obligatory reception modality that, eventually, could be re-activated as needed as a permanent redistribution mechanism in times of crisis. At the European Council on 15 October 2015, however, the Member States were unable to reach agreement on such a permanent relocation mechanism. Priority operational, financial and implementation activities for the period, initially, of six months were supported by an informal meeting of heads of state and government of 23 September 2015 (COM (2015)490 final) and given a further boost by the Commission Communication of 15 October (COM(2015)510 final). It mainly deals with the immediate implementation of relocation plans for a total of 160,000 people who mostly already reside in the Member States affected.

The European Commission is also applying the above-mentioned quota to resettlement. In contrast to relocation, resettlement does not concern people who are already resident in a Member State of the European Union but people brought from a country of first refuge to a safe third country (here, a Member State of the European Union). This applies in particular to refugees who are at further risk of persecution in the country of first refuge or are particularly vulnerable. They are usually identified and mediated by UNHCR.

For the resettlement and relocation programme and for specific actions the EU has made available a budget of an additional 50 million euros for 2015 and 2016, topping up the fund for asylum, migration and integration (AMIF); to date, 360 million euros have been allocated for that purpose for the period 2014 to 2020, of which 50 million euros have been reserved for »specific activities«. The remainder of the budget is to be used for the existing voluntary Member State resettlement programme.

As explained at the beginning the Member States have the last word in many decisions falling under the proposed measures. This explains the large number of meetings of governments in their different formations at the level of the European Council and the Councils of Ministers since the second quarter of 2015. Divergences of interest may be discerned along various axes. If at first the conflict was between the states on the southern external borders and thus particu-

<sup>4</sup> Opt-out clauses permit a Member State to choose not to apply Community regulations in a particular area. The Republic of Ireland, Denmark and the United Kingdom have chosen to exercise such derogations in the areas of justice and home affairs; Ireland has announced that it will take Syrian refugees from Italy, however (so-called »opt-in«).

larly affected by the Dublin System, this changed along with the shift of migration routes in late summer 2015, becoming an open dispute between the states of west and east/south-east Europe along the Balkan route, with a focus on Germany versus the Visegrad states (Poland, Slovakia, Hungary, Czech Republic).

### **Voluntary or Obligatory?**

Within the EU, experience with relocation already exists, dating from a relocation programme launched in 2010/2011 in response to a high refugee inflow into Malta. For that purpose the EU created an internal relocation mechanism (intra-EU relocation) to assist the Member States that were particularly exposed to migration pressure. EUREMA (EU Relocation from Malta) was implemented as a pilot project in 2011, in which 10 Member States, including Germany, participated. From 255 relocation places 227 people were distributed among six Member States. It was evident that this voluntary mechanism was of limited impact.

The Commission proposal of May 2015 originally concerned a legally binding measure, not a voluntary one. On account of its binding effect, however, this redistribution proposal from the outset came up against the bitter resistance of some Member States, which in the case of the Schengen regulations are still the central decision-making authority (Pascouau 2015). The Visegrad states of the Czech Republic, Hungary, Poland and Slovakia resisted particularly fiercely. The Orbán government in Hungary especially reacted with restrictive measures such as the building of a border fence with Serbia and treated the refugees with a harshness that infringed their human rights, with the clear aim of diverting routes for asylum seekers away from Hungary. But also other central, eastern and south-eastern European states (CEE/SEE) reacted negatively to the Commission's proposals. They regarded the policy of the German government as going it alone: in September the Merkel government had initially sent a signal – in compliance with human and refugee rights – that it would accept the refugees stranded in Hungary by applying the humanitarian clause in the Dublin Regulation. Shortly afterwards, however, the German government put pressure on the Brussels Council of Interior Ministers by means of border controls on the border with Austria, setting aside the Schengen rules. Such going it alone obviously exerted a strong influence on refugee routes, setting in motion a previously unknown domino effect and pressurising Schengen partners, while refugees were hung out to dry. On the other hand, the behaviour of the CEE countries was regarded as flouting solidarity by the countries that were now taking the bulk of the refugees.

Behind the perception of the CEE countries, for all the divergence in point of detail, undoubtedly lies a limited experience on the part of many eastern European states of dealing with migration and flight, a rather sceptical or even hostile attitude in society and the fear »that by introducing [temporary] border controls the Schengen area will be called into question and freedom of movement of persons or even the single market will be affected. Furthermore, they see a risk that the EU will be occupied with the refugee problem for the foreseeable future and thus will pay less attention to such issues as European Ostpolitik and shift the foreign policy emphasis

to the southern Mediterranean and the Middle East« (Lang 2015: 2, translated from German).

Furthermore, experience of a dominant hegemonic power is deep-rooted and self-determination remains a pre-eminent national goal. »Once again«, concludes Pascouau (2015: 2) »member states have illustrated their inability to move away from narrowly defined national interests and embrace a possible solution to the humanitarian crisis at the only viable level, the EU. Instead of providing a common answer to a pan-European challenge, national agendas and decisions continue to prevail.«

In a highly publicised speech on the situation of the European Union on 9 September, Commission President Juncker ([http://europa.eu/rapid/press-release\\_SPEECH-15-5614\\_de.htm](http://europa.eu/rapid/press-release_SPEECH-15-5614_de.htm)) called on the Member States to stand up for the basic right to asylum and to end the mutual recriminations. He declared: »We need more Europe in our asylum policy. We need more Union in our refugee policy.«

Finally, the Justice and Home Affairs Council agreed on a fundamental redistribution of 40,000 refugees on 14 September and on 22 September decided on the relocation of 120,000 asylum seekers from Italy and Greece to other Member States (Resolution of the Council 2015/1523 and Resolution of the Council 2015/1601). This redistribution is taking place with no mention of obligation (or, indeed, of a voluntary response) to accept redistribution and with slight deviations from the Commission's calculations. Hungary, which was offered some relief by way of relocation, refused to participate in the mechanism and thus has to accept asylum seekers. For the first time in this policy area a decision was taken with qualified majority voting (QMV) by 20 Member States in accordance with Art. 16 of the Lisbon Treaty (amending TEU). Twenty Member States voted for the Commission proposal against the votes of the Czech Republic, Hungary, Romania and Slovakia, with Finland abstaining (the United Kingdom, Ireland and Denmark chose an opt-out).

### **Temporary or Permanent?**

This relocation is, in principle, a possible temporary answer to the overload afflicting the Member States on the external borders to ensure asylum seekers reception and asylum procedures as laid down in the guidelines in the Common European Asylum System: the aim of the CEAS is to harmonise and raise standards. Greece has been incapable of guaranteeing these standards in a systematic way. Therefore, it has been exempt from returns under the Dublin system. Also, Italy failed to provide decent accommodation suitable for children. Relocation can temporarily ameliorate the situation at peak periods. However, the Commission's approach refers explicitly to crisis measures that can be activated in emergencies, which will have to be negotiated on a case by case basis by the members of the Council. A qualified majority is needed in the Council; in contrast to the other measures the European Parliament only has to be consulted.

Such a distribution key is indispensable, however, to enable a corresponding redistribution in the future, too. Given the persistence of the crisis in the main countries of origin and some important transit states – especially Libya – relocation can only be a supplementary measure in relation to structural instruments that require a fundamental decision on

»shared responsibility and solidarity among the Member States« (Art. 67 para 3 and Art. 80 TFEU). In this sense an evaluation envisaged for 2016 and a possible (urgently needed) reform of the Dublin System must provide an alternative distribution system for the medium and long term.

The proposal takes the perspective of the Member States. The perspective of the asylum seekers themselves is not addressed: they are merely informed and cannot actively seek a relocation.

### Relocation and Resettlement

In the Commission's proposals relocation is not – as often feared – played off against a system of resettlement from the states bordering the crisis countries, as demanded by UNHCR, but supplemented by resettlement. The European Commission's demand for coordination of the Member States' resettlement programmes has been put forward repeatedly, but without gaining much traction. To date, only Sweden and Germany have participated – in the form, however, of a non-permanent resettlement through the humanitarian reception programmes at the federal and state levels – in such a programme. It lies in the hands of the Member States.

Resettlement is an appropriate mechanism for getting to Europe in a legal and safe way, thus avoiding dangerous escape routes. It is also a permanent form of protection, not merely temporary. It is, however, an instrument that covers only a few refugees because, as a rule, states make too few places available: the Commission now talks of 20,000 places in two years (COM(2015)3560/2). Given the current situation, to which we have already referred, of 19.5 million refugees in the past year alone, this number is tiny. UNHCR, IOM and various NGOs have mentioned a figure of 20,000 persons a year by 2020 (UNHCR 2015a). At the same time, resettlement is an instrument by means of which the Member States of the European Union can relieve countries of first reception, which, as we have shown, take in the bulk of refugees, often without having adequate resources to cope with them.

In contrast to previous programmes the Member States, according to the proposal, would have to surrender part of their sovereignty over the resettlement programme to the European Commission because the refugees are to be received centrally and then distributed among the Member States, in accordance with the abovementioned distribution key. This conflicts with familiar reservations about sovereignty among the Member States, which combined with the distribution quota could lead to a blockade mentality.

### Special Protection Needs

In implementing resettlement it must be ensured that persons in particular need of protection take precedence during the UNHCR selection process. These include refugees who »due to a persistent risk of persecution or because of their personal disposition cannot return to their country of origin for the foreseeable future, but who at the same time also have no prospect of permanent residence in the states to which they have initially fled because their life, their freedom, their safety, their health or other fundamental human rights are endangered or not guaranteed«. Care must therefore be taken to ensure that a given refugee gets particular protection in view of their particular situation. When planning ac-

commodation and medical care countries and municipalities should thus make arrangements, for example, for clearing houses, trauma assistants and so on.

### 2.4.3 IMPLEMENTATION OF THE COMMON EUROPEAN ASYLUM SYSTEM (CEAS)

The recast of the Common European Asylum System adopted in mid-2013 comprises two Regulations – Dublin III (Regulation (EU) No. 604/2013) and EURODAC (Regulation (EU) No. 603/2013) – which determine responsibility for asylum procedures between the Member States and the data collection required for that purpose, as well as five directives (see Bendel 2013). These regulate: who counts as a refugee in the Member States (»Qualification directive«, 2011/95 EU); what rights pertain to those entitled to long-term residence (Directive 2011/51/EU); how reception and processing of asylum seekers and refugees shall be carried out (»Reception directive« 2013/33/EU); and on what basis asylum procedures shall be conducted (»Asylum procedure directive« 2013/32/EU). Also part and parcel of the asylum system are the European Asylum Support Office (EASO) set up in 2010 (Regulation No. 439/2010), a directive that has not yet been applied on temporary protection in the case of a »massive influx« from 2001 (Directive 2001/55EC of the Council) and the Asylum and Migration Fund (COM 2011/751 final; Decision of the European Parliament: 2013/2504 (RSP)).

The aim of the Common European Asylum System was to harmonise the legislation of the Member States and to raise protection standards, as well as to enhance solidarity among the Member States (see Bendel 2013). In fact, the European Union has moved away from the previous minimum standards towards common standards and has raised the protection standards especially of those Member States that hitherto had had only rudimentary systems.

However, reception, asylum procedures and chances of receiving protection still differ widely among the Member States. Furthermore, the solidarity principle as it manifests itself in EU asylum and refugee policy is in a bad way, as not only recent developments show.

In order to enhance its monitoring function and better monitor the rules, the European Commission has begun to develop handbooks that explain the standards more precisely and to apply infringement procedures when standards are not met in the Member States. In September 2015 the European Commission opened up 40 treaty infringement procedures (European Commission 2015c) against 18 Member States.

#### »Fitness Check« for Dublin

Besides the Commission, which is responsible for monitoring the Common European Asylum System, the umbrella organisation ECRE, together with the Forum Réfugiés-Cosí, the Hungarian Helsinki Committee and the Irish Refugee Council, has tried to use the Asylum Information Database to track implementation of the Common European Asylum System in the individual Member States. In its most recent report (ECRE et al. 2015) the organisations concerned repeat their worries that the standards laid down in the Common European Asylum System are not being properly complied with. In particu-

lar, however, they point to the need to replace the current Dublin System, which undermines the rights of refugees in a »protection lottery«. In this sense the relocation decided on by the Council is a first break with the system that attributes the responsibility for a person's asylum procedure in principle to the first Member State he or she has entered. In the subsequent Dublin reforms, family ties, cultural affiliations and prospects of integration have been introduced as criteria to be taken into account in deciding on the responsible Member State (ECRE et al. 2015: 100).

In fact, the Dublin System has long been under pressure, in manifold respects (Bendel 2014a). With the enormous influx of hundreds of thousands of refugees in late summer and autumn 2015 it totally collapsed. The states in the north and the interior of the EU, which had previously been shielded from entries by the Dublin System, now demanded that the states on the southern periphery take more responsibility for the registration and fingerprinting of asylum seekers. Their refusal to fully accede to these obligations can be interpreted as a kind of de-Europeanisation (Pastore 2015: 9). From the standpoint of asylum seekers the system is inaccessible because it is at least implicitly based on the condition that similarly high protection standards obtain in all Member States. That, however, as the abovementioned report reaffirms, is not the case.

A »fitness check« of the Dublin System is now envisaged for 2016. This could provide an opportunity to use the distribution procedure set up for relocation and resettlement for a fundamentally new system – there is no reason to assume anything different with regard to the »salami tactics« of the European Commission. The increased Asylum, Migration and Integration Fund (AMIF) could be used as the basis for a refunding scheme aimed at relieving those Member States that regularly receive more asylum seekers. Contributors would be those Member States that regularly receive fewer asylum seekers than their quota. This proposal, which given the composition of the Council is most likely to proceed only on a voluntary basis, would then have to offer financial incentives to gradually entice more Member States to get involved.

Every issue related to balancing distribution or the relevant burdens, however, must be closely tied to a high quality asylum procedure. On top of that comes the task of taking account of the family ties, personal circumstances and preferences of the refugees themselves. As we have seen, the latter are looking for ways and means of getting to their relatives who already reside in Member States.

#### 2.4.4 »COMBATING ABUSES«: SAFE COUNTRIES OF ORIGIN AND RETURN

A more recent Council proposal of 26 June 2015 (Council Conclusions on Safe Countries of Origin 10833/15 ASIM 55 COWEB 71) called on the Commission to come up with proposals on how the European Asylum Support Office EASO could coordinate implementation of a list of safe countries of origin. The European Commission proposal of September 2015 (COM (2015)452 final) envisaged the drawing up or coordination of a common list of safe third states. The summit of justice and home affairs ministers had already discussed

declaring the Western Balkan states Albania, Bosnia-Herzegovina, Macedonia, Montenegro, Serbia and Kosovo safe countries of origin in June. Asylum seekers from such states can in principle be returned to their homeland more quickly because the reception states assume that they are not under threat from either political persecution or inhuman treatment there. Within the framework of the Commission proposals Turkey was added to the list.

In terms of foreign policy, too, Turkey's key role as transit state has returned to centre-stage in recent months. The Joint Action Plan between the EU and Turkey (European Commission 2015a) lays down, first, support for refugees and the communities in Turkey that receive them; this is backed by 1 billion euros, in particular for immediate humanitarian aid and legal, administrative and psychological support for refugees, as well as access to education and social security. In return Turkey will try to improve its legislation on aliens to ensure that migrants are registered and provided with adequate documents, as well as to beef up its migration management. It is to implement better asylum procedures and make an effort to integrate refugees in Turkish society. The plan, second, envisages closer cooperation in preventing irregular refugee movements to the EU. This includes dialogue and a roadmap on visa liberalisation and a repatriation agreement. The EU wants to inform refugees in Turkey of the risks of irregular migration, support Turkey in preventing human smuggling and promote joint repatriation and reintegration measures. To that end Turkey is to strengthen its coastguard, readmit irregular migrants, strengthen visa conditions and settlement criteria in Turkey for potential irregularly resident migrants and cooperate with the EU Member States, especially Bulgaria and Greece, in preventing irregular migration.

Overall, in accordance with what the Commission has laid down in the Agenda on Migration, the return system is to be improved. This will take place by means of the pilot programme for Bangladesh and Pakistan originally proposed by the Italian Council presidency and the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) in the Council<sup>5</sup>, as well as through strong diplomatic pressure to boost the rate of repatriation to these countries. This shows that foreign policy instruments and actors (including the EEAS) are being used to exert pressure on countries of origin and transit.

The monitoring and review of the Return Directive (2008 (115) EC) adopted in 2008 were aimed at more consistent implementation of returns and compliance with the standards of humane treatment of returnees. Compulsory repatriations are supposed to be »proportionate«, respecting fundamental rights and the principle of non-refoulement. Within the framework of the Schengen evaluation new rules for the return of illegal residents are to be developed. On top of that the Commission aims to develop a returns manual in order to support the Member States with common guidelines, best practice examples and recommendations.

<sup>5</sup> In this committee high ranking officials cooperate at strategic level on immigration, asylum and border policy.

### How Safe Are Safe Countries of Origin; How Safe Is Return?

In accordance with the Agenda on Migration the European Commission is to evaluate for the medium term whether the precautions provided for in Directive 2013/32 concerning safe countries of origin should be strengthened in such a way that they can offer a basis for a binding common list. At present there is no legal basis for this (Engelmann 2015; EASO 2015).

If such a list of safe countries of origin is to be coordinated, then it may be that Albania, Montenegro and Kosovo would be included. That would be a clear instance of venue shopping (cf. Guiraudon 2000; Bendel et al. 2011), with the ministers of home affairs circumventing domestic objections (in Germany, the opposition in the Bundesrat) by offloading decisions to the European level.

### International Law Concerns

Besides this procedural aspect there are also concerns about compatibility with the principles of international law, namely the non-discrimination principle and the Geneva Refugee Convention's principle of non-refoulement (cf. ECRE 2015a: 2). Furthermore, the assumption that applicants for asylum from such countries have no grounds imposes a practically insuperable burden of proof on them (cf. ECRE 2015a: 2).

In particular, the question is to what extent the proposed »list states« in fact may be considered safe (Pro Asyl 2015a). This applies in particular to the list presented by the Commission in September 2015. The Western Balkan states, all of which are among the top 10 countries of origin, in some cases have low, but certainly different acceptance rates, between – EU-wide – 0.9 per cent for the former Republic of Yugoslavia and 7.8 per cent for Albania. It has to be noted here, however, that these countries of origin are already categorised as safe in some Member States – Belgium, Denmark, Luxembourg; Germany in the case of Bosnia-Herzegovina, Macedonia and Serbia – and thus are subject to swifter procedures. ECRE (2015a: 9) also points out that the acceptance rates among the Member States also vary for these states.

Turkey also found itself on the Commission's list in September 2015. With an acceptance rate of 21.3 per cent it ranks twenty-third EU-wide in terms of applications. Not all Member States, including Germany, are convinced that Turkey is safe, pointing among other things to the Commission's progress report, but also the latest measures against Turkish minorities, such as the Kurds. In diplomatic terms, however, Turkey's special role in refugee policy makes it difficult to imagine how it could be removed from the proposed group of safe states (Pascouau 2015a).

According to Commissioner Avramopoulos the return of people whose asylum application has been rejected must be accelerated (EASO 2015a).

### Revision of the Return Directive

The revision of the Return Directive offers an opportunity for the political actors to take another look at the clauses that pose problems from a refugee and human rights standpoint. This includes in particular the possibility of detention for up to 18 months if there is a risk of abscondment or a danger to public safety (Chapter IV, Art. 14). Even unaccompanied

minors, victims of human trafficking and other at-risk groups could be detained under this Directive. Also extremely controversial is a regulation in accordance with which deported persons can be subject to a re-entry ban of up to five years (Bendel 2008; Baldaccini 2009).

### 2.4.5 LEGAL MIGRATION AND INTEGRATION: COMPETENCES AND PROPOSALS

The competences of the European Union in the area of legal immigration are limited according to Art. 79 para 5 TFEU. The Member States alone have the right to establish how many third-country nationals may enter their sovereign territory from third countries in order to seek work there as employees or self-employed. The new Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, was given a mandate, however, to promote a new EU policy for regular migration in order to tackle the lack of skilled workers, among other things by reviewing the Blue Card.

Given demographic change and the pressing shortage of skilled workers, especially in so-called MINT subjects, the European Commission included a chapter on legal migration in the Agenda on Migration. In it, it announces in particular a public consultation on the Blue Card Directive with the aim of making the European Union more attractive to highly qualified third-state nationals. At the same time, it envisages a permanent dialogue with the private sector, the trade unions and other social associations. The idea is to get a better understanding of the various needs of the economy and labour markets and to exchange best practice examples.

The Commission has made a minimum of 30 million euros available to support third-states in developing effective labour migration. This includes boosting the potential and resources of labour migrants and tackling exploitation. Support is given to the recruitment of workers on an ethical basis in those sectors currently suffering from a qualified labour shortage. It also wants to promote faster, safer and more beneficial return remittances. In the medium term the Commission plans, together with the Member States, a system of »expressions of interest« by means of which prospective workers can be put in touch with potential employers throughout the European Union.

The EU's competences are also limited with regard to integration policy: Art. 79 para 4 TFEU lays down that the European Parliament and the Council, in accordance with the ordinary legislative procedure, excluding any harmonisation of the legal provisions of the Member States, can establish measures to promote and support the efforts of the Member States to integrate third-state nationals legally residing in their sovereign territory. De facto convergence of national integration policies takes place by means of non-binding regulations (soft law) on the basis of the Common Basic Principles developed by the Council, a series of funds, manuals, integration indicators and exchange programmes between national decision-makers and NGOs. Convergence of integration concepts and practices with regard to integration takes place through a special, less institutionalised form of coordination, the networking of national contact points and the funding of integration measures on the ground (cf. Bendel 2010).

The current proposals of the European Commission for »effective integration« put the emphasis on project promotion via the AMIF, the ERDF and the EFD. For the funding period 2014 to 2020 it foresees at least 20 per cent of resources for social inclusion measures and measures on the integration of migrants with a special focus on asylum seekers and refugees.

The Blue Card has been scarcely used so far: in 2012 and 2013 just under 19,000 Blue Cards were issued, including more than 14,000 from Germany (89 per cent). Around 300 were prolonged. To date this instrument has been aimed primarily at boosting the European Union's competitiveness; in other words, it has not been used primarily to cover the needs of labour markets. An overhaul of the Blue Card should therefore focus on labour market bottlenecks to address internal European labour mobility.

Up to now the Blue Card has been perceived as too costly, even for those participating. It offers only a few additional incentives for potential interested parties, such as the not yet implemented option of free movement for Blue Card holders in the labour markets of the European Union, the right of family reunion and holding out the prospect of permission to reside permanently in the European Union. The Blue Card is also in competition with national immigration programmes (for example, Austria's Red-White-Red Card). Reforms should start here (Marín et al. 2015). A debate on the linking of migration and refugee policy, of the kind being held at the global level, is currently lacking at the EU level, however.



### 3

## OUTLOOK: TOWARDS A HUMAN-RIGHTS-BASED REFUGEE POLICY

In the current debate it needs to be made clear that human rights standards in refugee policy cannot be diluted arbitrarily if the asylum system comes under pressure. It has to be underlined that refugees are bearers of rights.

The European Agenda on Migration should be used to develop a coherent framework that integrates those policy areas that affect refugee and migration movements. Instead of a comprehensive and substantively coherent framework that encompasses different policy areas, as announced by the Commission, the security orientation has come to the fore again, which in the Mediterranean now has a military component, too. Even though the individual instruments and measures proposed by the European Council and the European Commission under Dimitris Avramopoulos are focused on the various levels of the root causes and the routes taken – which we have presented in terms of concentric circles here – legislation has not become more coherent and comprehensive, but rather more substantively lopsided.

The attacks in Paris in November 2015 suggest that a new window of opportunity has opened up here to further reinforce the security orientation, especially with regard to border security. Undoubtedly, control over the external borders must be re-established. But this must be done in a manner that keeps human rights firmly in view and that at least in the medium term enables legal – and thus controlled – access to the asylum systems of the Member States. For that purpose the EU and its Member States have international and European law norms and values, which they have also laid down in their treaties, but which at the moment do not seem to be guiding their actions sufficiently.

A human rights approach, which UN Special Rapporteur for the Human Rights of Migrants François Crépeau (United Nations General Assembly 2015) is also calling for, ought to subject the relevant measures to renewed evaluation on the basis of the Geneva Refugee Convention and the EHRC. The courts have made a number of important contributions to this in the past. The EU, however, must give thought to these foundations in its own policy right from the start. Academic opinion has also been sought within the framework of policy consultation. Enhanced monitoring by the Commission and

sometimes very competent NGOs must take its bearings from this rights-based approach.

Conceived in terms of concentric circles this contains, for example, the following aspects and alternatives:

One key issue is how in future mixed migration flows are to be tackled. The development of a comprehensive immigration code should be discussed that would bring together the rules and standards that govern access to Europe and the rights of refugees and immigrants (for example, Carrera et al. 2015). The debate is still in its infancy, but undermining standards on refugee rights must be avoided.

The more recent plans concerning regional development and protection programmes, responsibility for protection in the Mediterranean and military deployment on the Libyan coast put the debate on the externalisation of responsibility for protection high on the research and action agenda (Garlick 2015; den Heijer 2011: 306ff). The Hirsi ruling has set standards here. Further research on this topic that takes into account the political context, especially the role of new actors, as well as the legally controversial issues and the consolidation of previously non-binding regulations is urgent. Similarly, human rights standards on the protection of refugees and migrants must be an essential part of the agreements now hastily being concluded with the transit states. The European Union must also establish a clear position on which states it is prepared to conclude treaties with and under what conditions.

Various organisations are calling for the establishment of a European sea rescue agency beyond EU Regulation 656/2014, which allots FRONTEX a role in search and rescue operations. Hitherto, a barrier to such initiatives has been the fact that the actors involved were military units, whose legal framework lies outside the predominantly civilian Schengen regulations. The Member States are also reluctant because they fear possible pull factors. In recent months it has become blatantly obvious, however, that it is not pull factors but push factors that force refugees out of their war-torn countries of origin and get them to take the greatest risks. It will thus not be possible to combat smuggling effectively until controlled, legal and protected routes are opened up.

Since the beginnings of a European refugee policy with the Conclusions of the 1999 European Council in Tampere measures related to legal access to European territory have been put on the agenda time and again. Such measures are only embryonically found in the current proposals, but on humanitarian as well as human rights grounds they should be discussed as a matter of priority. The lack of legal entry options means that the protection possibilities of the EU and its Member States remain unavailable to the people who need it most and that they run the risk, contrary to their right of non-refoulement, of being turned down. It can hardly be more obvious that persons a very high percentage of whom, once arrived in a Member State, receive protection status are forced to take irregular, dangerous and degrading routes, at very high risk to life and limb. The current debate, in particular in Germany, is focused, given the high number of entries, on efforts to establish caps for entries. Granting protection via legal routes and regulated access are not mutually exclusive, at least in the medium term. To provide this in an approach coordinated among the Member States is one of the European Union's most urgent tasks.

Diplomatic asylum, resettlement, humanitarian relocation, flexible application of visa provisions and procedures for protected entry, as well as so-called »offshore« asylum procedures are included among these entry ways (FRA 2015). In the case of national interest or international obligations Schengen visas can also be issued on humanitarian grounds. A visa with territorially limited validity – that is, valid for the issuing state – can certainly be issued by the diplomatic representations in the countries of origin or transit. This is at the discretion of national governments and is not uniform across the EU. An EU-wide solution is not included in either the 2014 Guidelines of the European Council or the European Agenda on Migration. The Schengen visa code, which is currently being revised, could be firmed up in this direction. Although this initiative is supported by some groups in the European Parliament the political will for such reform appears to be lacking (see also Jensen 2014). In the past the European Commission has repeatedly encouraged the Member States to issue humanitarian visas in order to provide a regulated entry option for those in need of protection. Sixteen Member States and one non-Member State have issued such humanitarian visas in the past, but without much public fanfare, in exceptional cases and in very small numbers. UNHCR has also proposed a more generous interpretation of the discretionary clause in Article 17 (2) of the Dublin Regulation, according to which a Member State, even if it is not responsible under the Dublin System, can allow family members to join one another on humanitarian grounds, for example within the framework of a pilot project for Syrian nationals whose asylum application has a good prospect of success.

Only resettlement, which the Commission recommended as early as 2012 in the Joint EU Resettlement Programme (JEURP) as a coordinated task (cf. Bokshi 2013) is specified in the new agenda as a legal entry option from states of first reception. Over the next two years the Commission wants to resettle 20,000 people by means of the multi-factor model for the distribution of refugees. Given the many asylum seekers this is a ridiculously low number. However, it does offer the possibility of giving some people, in cooperation with the

UNHCR, a new start in a host state of the EU. The humanitarian reception programmes set up in Germany and almost all the *Länder* in recent years are another model that, despite difficulties in the details, should be used as an example.

The chances of political implementation of the possibility of applying for asylum extraterritorially through embassy procedures in a consulate or embassy from the country of origin, as Switzerland used to do until a few years ago, are slim at present. Joint processing of asylum procedures outside the territory of the Member States (ECRE 2014: 17f), however, could, even though difficult to implement and associated with the abovementioned major reservations, open up further legal entry options in the medium term. Joint asylum procedures outside EU borders, combined with safe entry, would certainly be an innovative idea.

Indispensable for redistribution within Europe is the revision and safeguarding of self-established standards. This is a long-expressed demand that has already found its way into the work of the Commission. It must also apply to the newly established hotspots.

For Europe, the evaluation of the Dublin System in 2016 – which from the point of view of ECHR needs to be put to the test – at least in theory provides an opportunity for a reorientation in the direction of a long overdue system of solidarity and shared responsibility. In this connection, however, not only are the interests of states to be respected, which are the focus of the political debate mentioned above, but also those of refugees. Without that, a humanitarian and effective distribution cannot be ensured. This also includes enabling freedom of movement for recognised refugees within Europe, as NGOs have long advocated.

Given the growing resentment against refugees and migrants in the Member States the Commission can and must support it through exchange and in the implementation of programmes promoting inclusion. It already has experience of supporting and coordinating measures on combating xenophobia, racism and discrimination. Given the new composition and high numbers of refugees these instruments must be intensified in order to enable European societies to bring about inclusion successfully over the long term.

In light of the massive upheavals between the Member States, the heterogeneous composition of the European Parliament and a largely sceptical public opinion in some Member States these demands may appear fanciful. The current crisis is one of solidarity with the people affected in the countries of origin and with the transit states. It is also a crisis of solidarity among the Member States and a crisis of confidence in acceptance of the law. A return to the fundamental norms that Europe and its Member States have painted on their banners is needed. The task is to take them up again with a clear compass, small steps and tenacity. Human and refugee rights can serve as the compass that Europe has lost in recent years.

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# Abbreviations

TFEU	Treaty on the Functioning of the European Union
AMIF	Asylum, migration and integration fund
EASO	European Asylum Support Office
ECHO	European Commission's Humanitarian Aid and Civil Protection Department
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
EEAS	European External Action Service
EES	Entry-Exit-System
EFD	European Voluntary Service
EFF	European Refugee Fund
EFRD	European Fund for Regional Development
ECHR	European Court of Human Rights
EHRC	European Human Rights Convention
ERDF	European Regional Development Fund
ESF	European Social Fund
EU	European Union
eu-Lisa	European Agency for the operational management of large-scale IT Systems in the area of freedom, security and justice
EUNAVFOR MED	European Union Naval Force – Mediterranean
EUREMA EU	Relocation from Malta
EURODAC	European Dactyloscopy
EUROJUST	is an agency of the European Union (EU) dealing with judicial co-operation in criminal matters.
EUROPOL	European Police Office
Eurostat	European Statistical Office
TEU	Treaty of the European Union
EVP-group	Group of the European People Party
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GAM	Global Approach to Migration
GAMM	Global Approach to Migration and Mobility
CFSP	Common foreign and security policy
CEAS	Common European Asylum System
GG	Basic Law of the Republic of Germany
CSDP	Common Security and Defence Policy
IOM	International Organisation for Migration
JEURP	Joint EU Resettlement Programme
JOT MARE	Joint Operational Team Mare
COM	European Commission
MINT	Mathematics, Informatics, Natural Science and Technology
MOAS	Migrant Offshore Aid Station
MRCC	Maritime Rescue Coordination Centres
QMV	Qualified Majority Voting
RCC	Rescue Coordination Centres
RDPP	Regional Development and Protection Programme
RTP	Registered Travellers Programme
S&D group	Group of the Progressive Alliance of Social Democrats in the European Parliament
SAR Convention	International Convention on Maritime Search and Rescue
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SIS	Schengen Information System
QMV	Qualified Majority Voting
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

Imprint:

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**Friedrich-Ebert-Stiftung**

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**ISBN: 978-3-95861-427-7**

Cover picture: Maja Hitij, picture alliance / dpa  
Design: [www.zumweissenroessl.de](http://www.zumweissenroessl.de)  
Printing: [www.bub-bonn.de](http://www.bub-bonn.de)

