



ASK THE EXPERT  
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ASYLUM

## SAR and Dublin: ad hoc responses to refusals to disembarkation



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Ask the Expert Policy Brief

## **SAR and Dublin: ad hoc responses to refusals to disembarkation**

By Marina D'Odorico & Erika Colombo

The diversity of national approaches towards asylum - especially between transit countries, such as Italy and Greece, main hosting countries, such as Germany, France and Sweden, and countries belonging to the Visegrad group - and the problem of cooperation inside the CEAS are some of the major issues of European asylum policy under the attention of stakeholders and scholars (Zaun, 2017).

Studies and analyses, such as a work by Estevens (2018), have focused on the role of the European Union, pointing out the EU limited centralisation and leadership in managing immigration and asylum problems. How some researchers remarked, as national politicians have had to confront with increased public scepticism about both European integration and immigration, they have provided less support to the Europeanisation of the migration policy domain and they have preferred immigration control over liberalisation (Hampshire and Bale, 2015). Thus, the politicization of Europe and immigration at the domestic level, connected with the growing fragmentation of na-

tional migration interests in the enlarged EU, has reinforced Member States' resistance to further harmonisation on these aspects. As a result, despite Lisbon's communitarisation of policy-making, the most dynamic areas of European migration policy remain those that concern intergovernmental arrangements: policies directed towards controlling and excluding, rather than enabling, immigration to Europe (Hampshire, 2016; see also: Marin, 2016).

These aspects have also implications in the European Asylum policies management and lead commentators to consider which could be more effective responses to the asylum issues.

## The “SAR” approach

Many experts focus attention on those kinds of responses which put the humanitarian dimension at the center of crisis management: they concern the Search and Rescue (SAR) operations<sup>1</sup>, which are conducted in the Mediterranean to prevent loss of human lives at sea.

Some comments and remarks are related to the individuation of the actors who conduct these rescue activities, that, due to the intensification of the migration crisis, has increasingly become frequent. Panebianco (2016) lists the main protagonists of the SAR operations: the Italian Coast Guard, *Triton* (the Frontex operation, set up to control the EU maritime borders, even if not expressly created to conduct SAR operations), EUNAVFOR Med, NGOs (e.g. Save the Children, Médecins sans Frontières, Sea-Watch, SOS Méditerranée, etc.), charities such as MOAS (Migrant Offshore Aid Station) and merchant vessels.

In this perspective, scholars also try to individuate the role of the European Union in SAR operations, considering that the EU should have no competence to regulate them. Ghezelbash,

Moreno-Lax, Klein and Opeskin (2018) underline how, although the international SAR framework establishes distinct responsibility for rescue at sea falling on individual Member States, the European Union has acquired a central position in managing SAR, because of the perceived implications for border security. Even if the EU Coastguard should only coordinate operational cooperation between the Member States to reinforce the monitoring of the common external frontiers, in practice, it ends up playing a leading role in initiating and approving joint activities. As a result, border control and SAR activity have (operationally) merged with the former gaining (practical) pre-eminence over the latter. Nevertheless, as Panebianco noticed, the border protection approach is inevitably in conflict with the duty to intervene to rescue persons in distress, which is both a consolidated principle regulating the sea navigation regime and a longstanding international norm<sup>2</sup>. Therefore, the European Union can coordinate rescue operations, but the obligation to provide assistance applies regardless of the nationality or

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<sup>1</sup> The Section 3.1.9 of the 1979 Convention on Maritime Search and Rescue (SAR Convention) provides rules concerning the disembarkation of persons rescued at sea. It stipulates that the state responsible for the SAR region (SRR) in which assistance is rendered has the primary responsibility to ensure cooperation and coordination to disembark survivors in a

place of safety. If the authorities in charge of a SRR are unavailable, this responsibility is temporarily transferred to the first Maritime Rescue Coordination Centre (MRCC).

<sup>2</sup> See: *International Convention on Maritime Search Rescue*, adopted in Hamburg in 1979; *United Nations Convention on the Law of the Sea*, adopted in Montego Bay in 1982.

status of the people in distress and regardless of national borders (Panebianco, 2016).

Consequently, another debate raised by SAR operations management is related to the question of how to allocate responsibility between the cooperating actors, in particular where allegations of human rights violations arise. Fink (2016) analyses the topic from an original point of view, exploring the responsibility of “third parties”, namely those states or international organisations that merely contribute to a violation and that are not the principal actors to whom the relevant conduct in breach of human rights is attributable. How the author explains, considering that, even where a conduct may be attributable to multiple states, it is necessary the existence of an “attribution link” with every single cooperating party to allocate responsibility, the complex forms of involvement of states in the acts of others often remain below the threshold of attributability of the primary wrongful. Thus, he reveals how, in practice, third parties rarely incur responsibility for having played a role in a breach of international law.

Moreover, Cusumano and Gombeer (2018) consider this problem in relation to the role of Italy, especially after the

decision of the Italian Interior Minister, Matteo Salvini, to close Italian ports to NGO ships and foreign-flagged merchant vessels carrying migrants rescued off the shore of Libya. The authors point out that, although not illegal under maritime, human rights and European law, this decision has problematic humanitarian implications<sup>3</sup> and may hardly help Italy’s call for structured, long-term solidarity in addressing the challenge of large-scale maritime migrations.

Indeed, since the launching of operation *Mare Nostrum* in October 2013, Italy allowed for the disembarkation in its territory of all the migrants rescued in the Maltese and Libyan SRR. In particular, NGOs took advantage of the possibility to disembark migrants in Italian ports in order to avoid the problems caused by the insufficient presence of European Navy and Coast Guard ships offshore Libya (Cusumano, 2017).

Thus, to address the closure of ports by Italy (and Malta at some point), considering the failure of the reform of the Dublin Regulation, the Commission and EASO start working on ad hoc relocation solutions for disembarkation of migrants rescued at sea by NGO-ships, instead of a ship-by-ship approach<sup>4</sup>. In this perspective, a plan

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<sup>3</sup> Statistics show how, despite the drop in the number of crossings, recorded deaths offshore Libya between June and 19 July 2018 amounted to at least 705, more than the previous six months combined (Villa M., Rob G. and Elias S., 2018).

<sup>4</sup> European Commission, Managing migration in all its aspects: Progress under the European Agenda on Migration, COM(2018) 798, 4 December 2018.

drawn up by around ten Member states, including France, Germany, Spain, Portugal and the Netherlands, would not include quotas, nor pre-judge decisions on the Dublin regulation, but could include EU funds to return refused asylum claimants to their home countries (Rankin, 2019)<sup>5</sup>. This approach is a clear sign of an increasing trend of States and institutions searching for solutions outside of the CEAS framework.

In addition, as explained by Maiani (2018), another solution to the problem would be the creation of "regional disembarkation platforms" outside the European Union, that should provide for rapid processing to distinguish between economic migrants and those in need of international protection and reduce the incentive to embark on perilous journeys (Herszenhorn and Barigazzi, 2018). This approach should include different measures, among which the conclusion of agreements whereby transit-countries undertake to hinder departures and "pull back" persons intercepted or rescued on their way to Europe. If, on the one hand, these arrangements may let EU States evade legal responsibility by avoiding contact with migrants, on the other, they could be an opportunity for a constructive discussion on responsibility-sharing and mutual support in the

EU and in the wider Mediterranean region. Anyway, as Maiani points out, this objective may be achieved only «if "full EU support" could be made into something different than a slogan; if the EU were ready to make credible and commensurate resettlement offers; if EUMS and interested third countries were jointly capable of bringing about safe and dignified conditions for migrants and refugees across the whole region; and if all interested actors proved capable of placing the welfare and security of persons at sea above any real or perceived risks of creating "pull factors"» (Maiani, 2018).

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<sup>5</sup> See also: IOM-UNHCR Proposal to the European Union for a Regional Cooperative Arrangement Ensuring Predictable Disembarkation and Subsequent Processing of Persons

Rescued at Sea  
(<https://www.iom.int/news/iom-unhcr-proposal-european-union-regional-cooperative-arrangement-ensuring-predictable>)



## The reform of Dublin Regulation

The European Agenda on Migration 2015 identified four areas that need immediate action: reducing the incentives for irregular migration, strong asylum policy, saving lives and securing the external borders and a new policy on legal migration. In this perspective, an urgent reform of the Dublin system regulating the entry into the EU seems to be essential. Scholars agree that, while Dublin III was not created as a responsibility-sharing mechanism, procedures that would implement sharing responsibility could possibly be what Dublin III needs to succeed (Fratzke, 2015; Mitchell, 2017).

Thus, on 4 May 2016, the European Commission has published a “Dublin IV Proposal”<sup>6</sup> especially based on a corrective allocation mechanism (a “fairness mechanism”), automatically triggered when a country must handle a disproportionate number of asylum applications (considering the country's size and wealth). However, the normative project provides an option for the Member States of not taking temporarily part in the reallocation, paying, instead, a “solidarity contribution”.

The proposal contains the obligation for applicants for international protection to deposit their asylum claim in the first country they enter and, on the

other side, the obligation for the State of first irregular entry to verify whether the application is inadmissible or whether it is possible to begin an accelerated procedure.

Nevertheless, an article by Progin-Theuerkauf analyses the implication of the “Dublin IV Proposal”, underlining how it seems to be “premature and incoherent” (Progin-Theuerkauf, 2017; see also Van Wolleghem, 2018). How highlighted in this document, the prospected changes would not enhance solidarity between the EU Member States, which should be, on the contrary, the main reason at the base of the new regulation. In fact, simulations show that the proposal still places a disproportionate burden on the countries in charge of the EU's external borders; particularly so for Italy and Greece (Van Wolleghem, 2018). The obligation to introduce a claim for international protection in the Member State of first irregular entry will further contribute to the burden of the Member States at the external borders of the EU. Moreover, Di Filippo and Hruschka focus their analyses on the potential applicability of this new “fairness mechanism”, revealing that it will most likely never be applied, as the reference numbers will never be exceeded. The idea of paying a solidarity contribution to another Member State who is willing to take over the

<sup>6</sup> Proposal for an EU Asylum Agency, Brussels, 4.5.2016, COM(2016) 271 final ([http://www.europarl.europa.eu/RegData/docs\\_autres\\_insti-](http://www.europarl.europa.eu/RegData/docs_autres_insti-)

[tutions/commission\\_europeenne/com/2016/0271/COM\\_COM\(2016\)0271\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_insti-tutions/commission_europeenne/com/2016/0271/COM_COM(2016)0271_EN.pdf)).

asylum seeker will be impossible to execute this provision in practice (Di Filippo, 2016; Hruschka, 2016).

Therefore, the European Parliament has adopted as basis for inter-institutional negotiations the so-called “Wikström report”<sup>7</sup>, a document that is highly critical of the Dublin IV Proposal and that aims to reform Dublin criteria and to create an “incentives-based” model of responsibility allocation (Maiani, 2017). First, the document suggests setting up the hierarchy of Dublin criteria on the “genuine links” that applicants may have with determined Member States, deleting the criterion of irregular entry and introducing criteria such as the family one, the one based on possession of visa or the one based on former studies. Secondly, the report builds an allocation mechanism with two main characteristics: an element of choice, because the applicant has the possibility to choose among the four least-burdened States at the moment of the application, and the faculty for applicants to register as groups of maximum 30 persons (the family would be allocated together in all circumstances). This allocation

mechanism would be attributed to the (future) EU Agency for Asylum, which would be responsible for the execution of the transfer (even if it is not clear where it would find the resources). Finally, the report suggests introducing disincentives – in the form of restricted access to, and use of, EU funds – for Member States who would refuse to cooperate.

According to the commentators, even if this proposal continues to present few critical issues – for instance, the expanded “genuine link” criteria would still probably apply in a minority of cases, the incentives to cooperate with quota-based allocation would be probably inadequate - the “Wikström report” can be considered a step in the right direction in order to realize an efficient system of sharing of responsibilities. Anyway, both the Commission report and the Wikström report would require a huge increase of transfers while this actual transfer rate currently remains so low and therefore it would end up in a logistical and administrative effort (Maiani, 2017; see also: García, 2018)<sup>8</sup>.

<sup>7</sup> See: [http://www.europarl.europa.eu/doceo/document/A-8-2017-0345\\_EN.pdf?redirect](http://www.europarl.europa.eu/doceo/document/A-8-2017-0345_EN.pdf?redirect)

<sup>8</sup> Discussions in the Council of the EU between Member States about this reform have been going on since more than two years and the most controversial aspect in the reform of the Dublin Regulation is the solidarity mechanism and its balance with responsibility. Nevertheless, at the European Council of June 2018, and at each subsequent meeting, in October

2018 and December 2018, EU leaders failed to achieve an agreement on internal aspects of migration and the EU's asylum policy, showing remaining differences among Member States as regards, in particular, the reform of the Dublin Regulation (see: RADJENOVIC A. (2019), *Reform of the Dublin system*, 1 Marzo 2019; [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2016\)586639](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2016)586639)).



Another point of view (Collett, 2018) shows how, rather than focus on how to divide responsibility for asylum claims, the European Union needs to individuate more pressing concerns. First, Member States should consider that if the actual “Schengen crisis” would lead to an entire collapse of the system, the impact on the daily lives of many EU citizens would be immediate. Secondly, it would be essential to find ways to ensure that States meet their existing obligations, building contingent asylum capacity for future uncertainties in flow. Thirdly, Member States should realize a stronger support mechanism for the Common European Asylum System, especially for those States that face larger numbers of arriving asylum seekers. The experience of hotspots needs urgent evaluation, alongside assessments of the fast-track procedures with which some

EU Member States have been experimenting.

However, as Estevens (2018) wrote, the need for better cooperation does not imply that all States must become hosting countries. It rather means that every Member State should participate in a common strategy, either by hosting immigrants and refugees, or by sparing financial, human, and structural resources. In fact, restrictive policies will not stop irregular migration flows in and will not increase internal security in Europe. Therefore, besides border control and agreements with origin and transit countries, what we really need is to create safe routes and easier legal integration options, especially to labor migrants, to speed up the procedures and the coordination between Member States and to create a strategy for relocation and responsibility sharing.

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# ReSOMA

RESEARCH SOCIAL  
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## ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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