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MONTAIGNE



Saving the Right to Asylum



REPORT NOVEMBER 2018

*There is no desire more natural
than the desire for knowledge*

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Preliminary Remarks

*Saving Soldier Asylum.*¹

Although it was codified in its modern form during the early 1950s,² the right to asylum has existed, in various forms, since ancient times. It is a centuries-old tradition, especially in Western Europe. However, it is clearly in danger in the European Union today. This peril is not only the result of the emergence of populist movements that challenge its legitimacy. It also has much to do with the noticeable increase in the flow of migrants, the resulting congestion in national procedures and authorities, and the incapability of EU countries to go beyond their national self-interest to adopt measures for the collective good that would preserve the right to asylum.

While acknowledging the many interactions that exist among migratory phenomena in general³ and the right to asylum in particular, this report focuses on the latter and expresses proposals so it can be saved. It will soon be accompanied by another report that will discuss migratory policies at greater length.

¹ *Saving Private Ryan* is a war film directed by Steven Spielberg. To facilitate the reading of this report, we will generally use the term “asylum” to cover both the right to asylum itself and what is called “subsidiary protection”, which is granted to persons whose situation does not correspond to the definition of the right to asylum but for whom there are serious known reasons to believe that in their countries they would run a real risk of suffering serious violations, such as the death penalty, torture, or inhumane or degrading treatment. Similarly, we will use the term “refugee” for those who have been granted either of these kinds of protection.

² Geneva Convention of July 28, 1951.

³ A second report, also jointly produced by Institut Montaigne and Terra Nova, will soon be published and will specifically tackle the issue of the flow of migrants and the way in which EU countries should address this issue together.

We must protect the people who are requesting asylum and perishing by the thousands at the gates of Europe, the humanist values that were the foundation of the European project, and the future of the EU itself, in its ability to maintain its unity and to make decisions that express its Member States' will to act together. We must do so, not only to preserve the image of Europe as a land of asylum, but also to define a relationship to the world that is not based on withdrawal.

Thierry Pech, Jean-François Rial, Jean-Paul Tran-Thiet
Chairs of the Working Group

INTRODUCTION

“The stranger who resides with you shall be to you as the native among you and you shall love him as yourself, for you were aliens in the land of Egypt.” (Leviticus 19: 34).

Between 2013 and 2017, the EU recorded over 4 million asylum applications — over three times more than in the five previous years (2008-2012). This situation resulted in growing tensions between Member States and an increase in non-cooperative behaviors in the Union, with some countries going as far as to release themselves from their obligations and duties to European law and to their partners. Above all, this situation justifies a growing concern over the Europeans’ ability to fulfill their international commitments and the humanist values that are the foundation of their historic project.

Europe is the continent that saw the birth of the modern right to asylum when, on the ruins of the Second World War, it was necessary to decide the fate of hundreds of thousands of displaced people forced to leave their home due to war, destruction, and post-war reconstruction. It is also the continent that represented these values in the eyes of the world and saw to their expanded application. Can Europe today allow the powerlessness caused by its divisions to threaten the betrayal of these promises?

We are not quite there yet. But, in reality, the Geneva Convention, which constitutes the legal foundation on which the European systems for protecting refugees have been built since 1951, is unequally interpreted and unevenly applied by the EU Member States, although all of them ratified it. These disparities – or even these circumventions – produce numerous wrongs, which are sometimes tragic, for those

who legitimately request protection on our soil. They also result in significant disturbances for European societies: unauthorized camps, increase in foreigners deprived of legal existence (“neither deportable nor regularizable”), security problems in the Mediterranean, the rise of populism, etc.

The Dublin system,⁴ which is at the heart of the European right to asylum, was originally designed to avoid the phenomenon of “asylum shopping.” But today it leads to making the political, administrative, and operational responsibility for significant waves of asylum seekers rest entirely on the countries where they first enter – most often Member States with a Mediterranean coastline. In a context in which the Middle East continues to be torn apart and geopolitical upheaval is increasing, the countries on the northern edge of the Mediterranean have no other choice but to receive, drive back, or let die at sea the waves of migrants who try to reach *their* shores, which are also *our* shores.

If we give national or even nationalist self-interest free rein, the only plan on which they will be able to agree will consist in delegating to third parties (yesterday Turkey, today Libya, and perhaps others tomorrow) the job of receiving asylum seekers, although these countries are not always very vigilant in the defense of human rights or properly equipped to face the logistical and organizational difficulties. Yet they are always ready to charge higher prices for their services so that we can be undisturbed. The decrease in the flow of migrants that has been observed for almost a year is essentially the

⁴ Very generally, the Dublin Convention, which was signed on June 15, 1990, in the context of the expansion of the Schengen Convention on the removal of internal border controls to additional European Community countries, mainly treated issues of asylum and immigration from non-EU countries. It was replaced by the Dublin Regulation (the version that is in effect today called Dublin III).

effect of such stratagems, whose avowed goal is to decrease demand and divert problems instead of resolving them.

It is therefore urgent to accelerate the overhaul of the European asylum system. This should be done with two goals in mind. First of all, to guarantee a dignified, humane, and efficient management of asylum applications in Europe. Secondly, to ensure with firmness and resolve that the principle of solidarity between Member States is observed – a principle without which the EU can only crumble and decay. In addition to substantial reforms of asylum management, this dual goal requires much more integrated application of this policy at the European level. This cannot be attained by settling for generous declarations of principle: if we want to defend the right to asylum, it is just as important to welcome refugees unconditionally as it is to send rejected applicants back to their countries of origin more efficiently.

This report analyzes the causes of the poor functioning of European asylum laws (I), emphasizes the ineffectiveness of the solutions that are planned or have been established since the beginning of the crisis (II), and then proposes an overhaul of the European policy on the right to asylum, in order to restore its meaning and effectiveness (III).

THE UPHEAVALS OF ASYLUM

1.1. The significant increase in asylum applications in Europe

1.1.1. The 2015 crisis: a “refugee crisis”

The explosion in the number of asylum seekers in 2015 and 2016

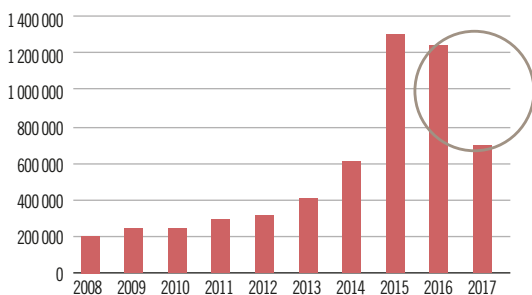
Destabilization in the Middle East, especially the Syrian conflict, has led to a very distinct increase in asylum applications in the EU during the first half of the 2010s. While there were no more than 200,000 annual applications from the early 2000s to 2008, this number doubled between 2010 and 2014, reaching 400,000. It then experienced exponential growth during the following years, with a peak of 1.4 million applications filed in 2015 according to Eurostat (see graph below). A slight ebb was observed in 2016 (1.2 million applications), which became much more distinct in 2017, with an almost 50% reduction in the number of cases filed in a single year. The crisis was thus intense, but relatively brief, with a rapid return to a situation that could almost be called normal. Moreover, many experts have called on public opinion to put these figures into perspective, as they reflect neither the first nor the most significant migratory crisis Europe has experienced.⁵

⁵ For example, see the presentation by researcher Luc Cambrezy at the day-long event called “Crise des Migrants: Décentrer le Regard” (“The Migrant Crisis: Decentering our View”) organized by INED (the French Institute for Demographic Studies) on March 18, 2016.

Nevertheless, this lull is probably deceptive, at least partially. On the one hand, it essentially results from the containment strategy put into place by European countries from the beginning of the crisis. The agreement made with Turkey on March 18, 2016 and the more or less opaque strategies of collaboration with Libya quickly bore fruit by limiting the number of asylum seekers able to reach Europe by the eastern and central Mediterranean migration routes. On the other hand, the risks of seeing the flow of migrants explode once again should not be underestimated, with millions of people already packed into refugee camps on the EU borders or on the other side of the sea, and climate change may gradually become a new factor in addition to traditional factors of emigration.

It would therefore be unwise to rely on the observed reduction of the flow of migrants and conclude that this episode of crisis is over. On the contrary, Member States must work together to confront the next upsurge in migration in a way that is more humane, more united, and more effective, by learning the lessons of the past few years.

Figure 1. Number of asylum applications in the EU



Source: Eurostat.

1.1.2. Contrasting reactions to the flow of asylum seekers

This flow has evolved differently depending on the country. These disparities emphasize both the varying degrees of exposure to the increase in asylum applications and the variety of local reactions to this increase.

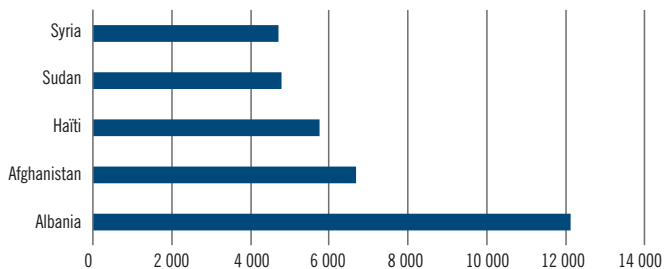
First of all, the variety of exposure is observed in the origin of asylum seekers, which varies greatly from one European country to another. A ranking of the numbers of asylum seekers by country of origin reveals quite a significant heterogeneity depending on the Member State in question. In 2017, amongst the top five countries of origin of asylum seekers in Greece, Italy, France, Spain, and Germany respectively, only Syria was listed in four of these countries. Afghanistan is present in three, and Albania, Pakistan, Bangladesh, and Iraq in two. The origin of the other asylum seekers is extremely heterogeneous.

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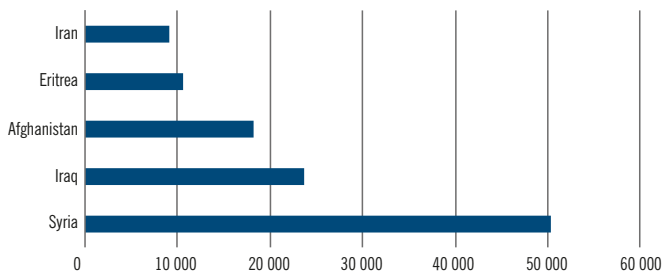
This situation is the result of the strong inertia of history and geography. Asylum seekers often take paths worn by long historical traditions, spatial proximity, cultural or linguistic affinities, etc. Thus Spain receives many applications from Latin America, and France receives many from Albania and Haiti. Italy ultimately receives few Syrians and many more sub-Saharan Africans because of the opening of the Libyan route after the collapse of the Gaddafi regime; Greece and Germany receive many more Syrians and Afghans and are much more affected by the routes that go through Turkey and the Balkans. In short, while the critical situation we experienced in 2015 and 2016 at the EU level had deep roots in the geopolitical disturbances in the Middle East, our various countries were very unevenly exposed to it.

Figure 2. Number of asylum seekers according to nationality in 2017, in the following countries

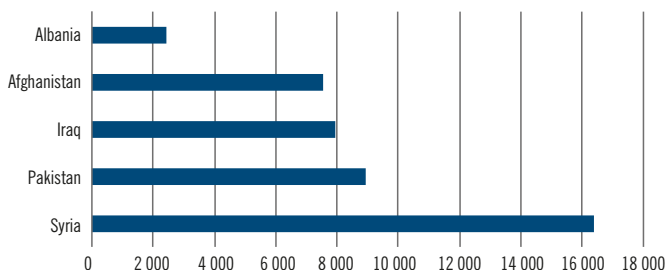
France



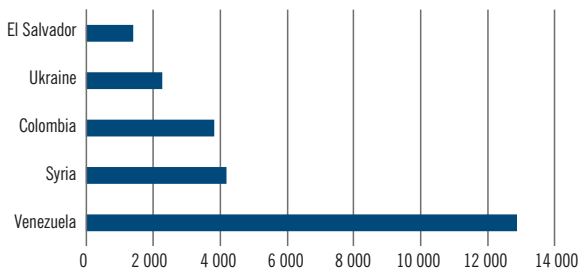
Germany



Greece

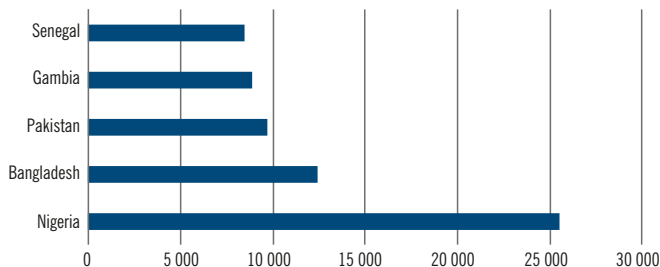


Spain



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Italy



Source: Eurostat.

As for the variety of reactions towards asylum seekers, in France, the number of asylum applications has increased gradually but continuously since 2008, climbing from just over 40,000 in 2008 to almost 100,000 in 2017. On the contrary, Germany experienced a much more noticeable peak than the rest of the European countries for the years 2015 and 2016. But the decrease there is very distinct and abrupt as of 2017, and reflects a closing-off strategy after welcoming over one million refugees in 2015. Other countries that received many refugees at the beginning of the crisis (Austria, Sweden) also experienced a comparable closing-off movement. In the following pages, we will return in more detail to the significant variations in the rates of acceptance of international protection according to the Member States and time period.

Figure 3. Number of asylum applications in France

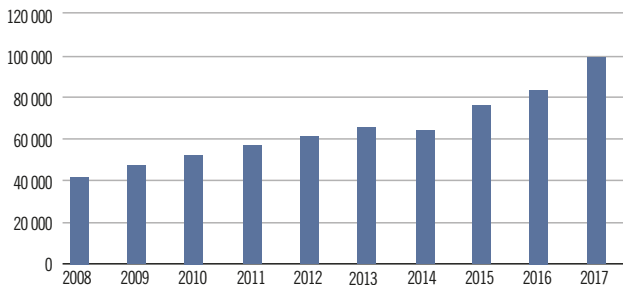
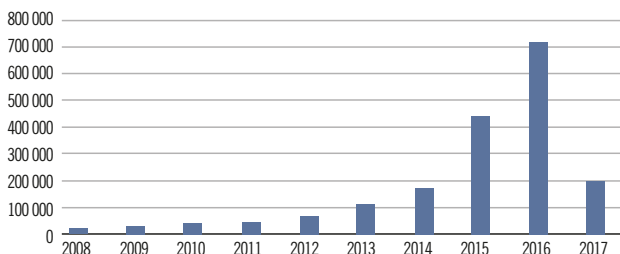


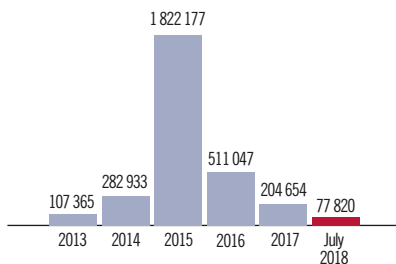
Figure 4. Number of asylum applications in Germany

Source: Eurostat.

1.1.3. The increase in illegal crossings of European borders

Asylum applications can be filed by people who have legally entered EU territory. But they can also be filed by people who have entered illegally. The latter case became very extensive at the height of the crisis. According to data from Frontex, illegal crossings of European borders climbed from approximately 300,000 in 2014 to 1.8 million in 2015. This especially elevated number can be explained in particular by the fact that migrants are counted each time they cross one of the borders of the Union, and thus can potentially be counted several times during their journey. Nevertheless, even after correcting for this, illegal crossings have significantly increased.

An analysis of this data shows that the 2015 crisis is indeed primarily a “refugee crisis” and not a “migrant crisis.” The increase in illegal crossings during the 2015-2016 period is very clearly due to the massive arrival of people coming from war-torn countries, primarily Syria. Almost 600,000 Syrians illegally entered EU territory in 2015, which is almost one third of all the illegal crossings observed in the entire year.

Figure 5. Number of illegal entries into the EU

Source: Frontex.

Table 1. Illegal crossings of European borders, by country of origin

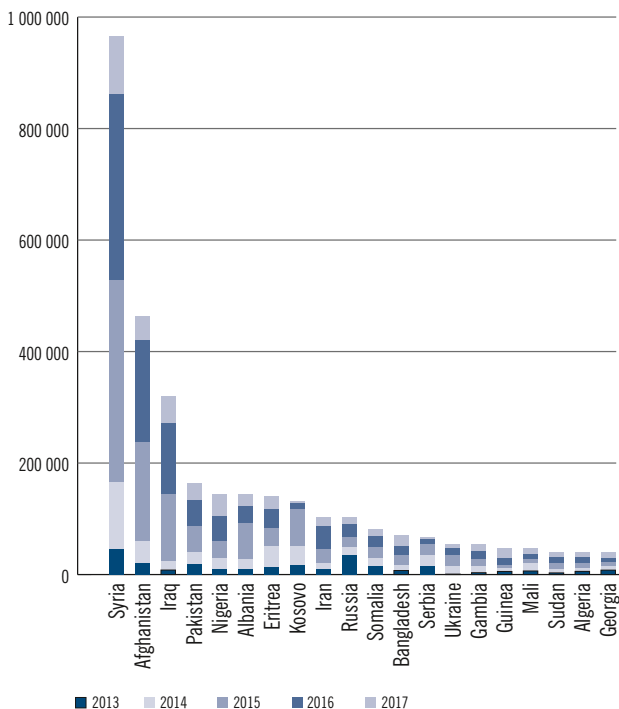
	2014	2015	2016	2017
Afghanistan	22,132	267,485	54,366	7,576
Eritrea	34,586	40,349	21,349	7,304
Mali	10,567	6,526	10,270	7,789
Senegal	4,789	6,352	10,391	6,347
Somalia	7,675	17,694	8,244	3,332
Sudan	3,552	9,661	9,515	6,325
Syria	78,887	594,059	88,551	19,452
Yemen	66	466	239	288
Total	162,254	942,592	202,925	58,413

Source: Frontex

In all, during the period from 2013 to 2017, the Middle East (mainly Syria and Iraq) represented approximately 50% of all illegal crossings, Asia (mainly Afghanistan, Pakistan, and Bangladesh) approximately

20%, and West Africa approximately 15%. We can see the effects of this polarization in the distribution of first-time asylum seekers by country of origin between 2013 and 2017.

Figure 6. First-time asylum seekers, by origin, 2013-2017



Source: Frontex.

Please note: This graph takes into account only the 20 top origins (representing in all 80% of the total numbers since 2013).

The Syrian conflict and the consequences of the conflicts in Iraq and Afghanistan thus indeed appear to be determining factors in the destabilization of the asylum system in the mid-2010s. In other words, the crisis was not fundamentally produced by a “rush to Europe” from sub-Saharan Africa, as we sometimes hear, but was primarily the result of violence that has been causing bloodshed in the Middle East and Afghanistan for around fifteen years.

In the long term, it can be observed that the increase in the flow of migrants is also due to asylum replacing other methods of access to European territory. We will return to this issue later.

The continued increase in illegal entries from sub-Saharan Africa

During the period from 2009 to 2018, we observe a continued increase in illegal entries into European territory from sub-Saharan Africa, even though several countries in this region are not experiencing particular upheaval, or are even considered safe countries of origin by certain Member States (this is the case of Benin, Senegal, and Ghana according to France, for example). Arrivals from Côte-d'Ivoire, considering all migratory routes together, climbed from a monthly average of 43 in 2009 to over 311 per month in 2018, which corresponds to an increase by a factor of 7. During the same period, illegal entries of Cameroonian nationals were multiplied by 10, from Congo by 9, and from Senegal by 7.6 (see table below).

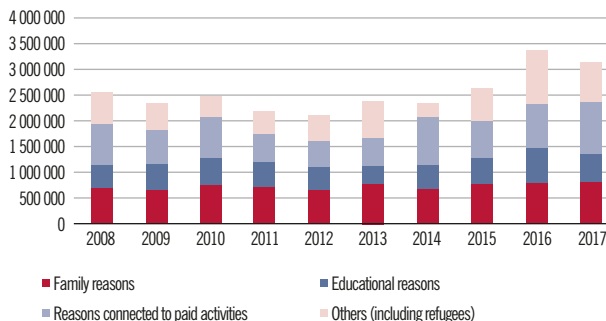
Table 2.

Country of origin	Average number of illegal entries per month, in 2009	Average number of illegal entries per month, in 2018 (p)
Algeria	326,6	173,0
Burkina Faso	25,1	44,7
Cameroon	19,1	203,3
Cape Verde	0,1	0,0
Chad	6,2	15,7
Congo	3,9	36,7
Democratic Republic of Congo	1,8	104,4
Côte d'Ivoire	43,0	311,3
Egypt	47,0	49,3
Eritrea	185,7	449,4
Ethiopia	3,8	21,1
Gabon	6,4	1,4
Ghana	29,8	71,0
Lesotho	0,1	0,0
Liberia	2,5	9,1
Libya	2,4	62,6
Mali	60,7	484,7
Morocco	142,5	651,6
Mauritania	18,8	36,9
Namibia	0,2	0,0
Niger	15,6	12,9
Nigeria	152,0	191,9
Rwanda	7,2	0,4
Senegal	17,2	130,0
Somalia	759,6	122,6
Togo	3,9	11,1
Tunisia	141,8	478,0

These increases are certainly striking. But they remain much more modest than those observed during the same period for arrivals from countries such as Syria. Moreover, the numbers of migrants concerned are, in absolute terms, much lower, as was noted above. Finally, and most importantly, these illegal entries from sub-Saharan Africa have quite different causes.

Illegal crossings seem primarily correlated with the rationing of legal means of access to Europe for certain categories of the population. If we observe the evolution in the number of residence permits issued by EU Member States during the 2008-2017 period, we notice a decreasing trend between 2008 and 2012, followed by an increase between 2013 and 2016, mainly due to the increase in the number of refugees (see graph below).

Figure 7. Residence permits, 2008-2017



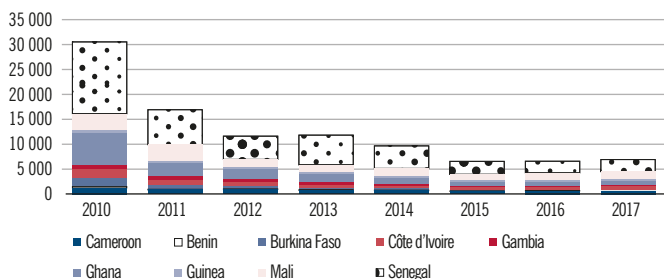
Source: Eurostat.

Nevertheless, we notice that the increase observed since 2013 is not proportional to that of the applications, which is experiencing

much more pronounced growth (see paragraph 1.1.6 for the description of the case of France).

But the picture is very different when we focus on sub-Saharan African nationals and if we set aside, not just asylum, but also the family motive (which is a high-inertia migration by right) and the education motive (which is a temporary, very selective migration). The main remaining reason is the economic motive of employment. Viewed in this way, the evolution of the situation since 2010 expresses a clear rationing of residence permits for nationals from this region (see graph below).

Figure 8. Residence permits in the EU, issued for employment reasons to nationals of nine sub-Saharan African countries



Source: Eurostat.

The possibilities of legal access are thus reduced for many African populations, driving those who want to leave to use illegal means, and then to apply to asylum to be able to stay on European soil at least temporarily.

Moreover, African migration from this region does not correspond to what we commonly imagine. As demographer François Héran has recently shown, basing his research on work conducted by various international teams,⁶ the ability to migrate is not the prerogative of the most destitute, but of those who have a minimum skills and resources base. On the one hand, migration costs money: the vast majority of Africans are, in a certain way, too poor to emigrate a great distance. On the other hand, migrants select their migration destination not only according to expected income disparities, but also according to geographical and linguistic proximity, as well as the existence of a diaspora. These factors explain that Africans primarily migrate to other African countries. For example, 70% of sub-Saharan migrants are settled in another African country, 15% of them in Europe, and the remaining 15% are distributed among the Gulf states and North America. In the medium term, development in Africa will give more financial resources to young people for emigrating, but also for remaining at home. Projections by the UN and research by experts do indicate an increase in the flow of migrants from Africa, but this increase is limited. For example, in France, by 2050, sub-Saharan immigrants will comprise only 3% of the population, versus 1.5% today. This is therefore not at all a “flood.” In contrast, the transformations in Africa in the 21st century highlight that the issues of an effective migratory policy are also those of an ambitious development and cooperation policy geared toward African nations.

⁶ François Héran, “L’Europe et le Spectre des Migrations Subsahariennes” (“Europe and the Specter of sub-Saharan Migration”), *Population et Sociétés*, September 2018.

1.2. Transferring the burden onto asylum

1.2.1. How does the right to asylum work?

The principle of asylum, recognized ever since the earliest antiquity, designates the right for a foreigner who has been the victim of persecution in their own country to request the protection of another State. The Geneva Convention of July 28, 1951, with the 1967 addition of the Protocol Relating to the Status of Refugees, constitutes today the main legal framework for defining the right to asylum in the signatory States. The convention itself implements article 14-1 of the Universal Declaration of Human Rights of 1948: *“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”*

In the terms of the Geneva Convention, the concept of refugee *“shall apply to any person who [...] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or social opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [...] is unable, or, owing to such fear, is unwilling to return to it”* (article 1-A).

Article 1-F specifies that the right to asylum does not apply to persons *“with respect to whom there are serious reasons for considering that”* they have committed a crime (crimes against peace, war crimes, crimes against humanity) or have *“been guilty of acts contrary to the purposes or principles of the United Nations.”*

The right to asylum thus constitutes a right to the examination of an application for protection, for which there exist conditions for exclusion that have been exhaustively listed by international law. Before obtaining a refugee status, migrants must apply individually to the country to which they have immigrated.

However, the United Nations High Commission for Refugees (UNHCR) has been authorized by a series of UN General Assembly resolutions to implement an admission method called *prima facie* for human groups (and not only individual cases) who have been forced to flee their country of origin.

1.2.2. The examination of asylum applications differs according to each European country

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All the EU countries signed the Geneva Convention. Additionally, this text is part of the Treaty of Lisbon, which is also called the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights that is an appendix to it, which places asylum at the heart of European law.

Beyond the principle, it has become necessary to define a common asylum system ever since the countries in the EU began to share (for some of them) the management of their borders and the flow of migrants with the adoption of the Schengen Agreements.⁷ Indeed, without a body of rules specifying which Member State is responsible for handling the application, the lack of border controls can lead to asylum seekers elaborating optimization strategies

⁷ In this respect, we can recall that the Schengen Agreement, which was signed on June 14, 1985 by Germany, Belgium, France, Luxembourg and the Netherlands, made no reference to the Geneva Convention. This flaw was corrected in 1985.

according to their chance of success in one or another State, or even to phenomena of multiple applications. The examination of asylum applications, which constitutes a sovereign decision of the States, has significant variations from one country to another within the EU.

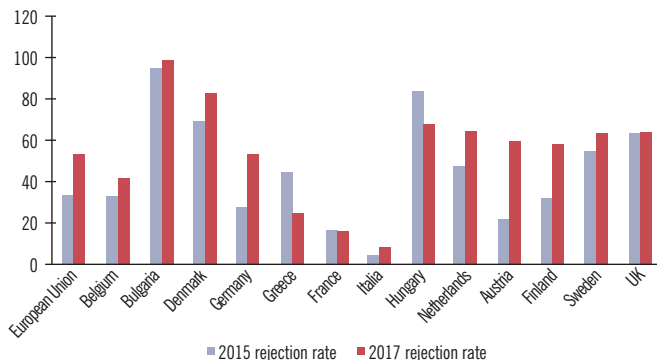
In all, 61% of asylum applications filed in 2017 in the 28 countries of the EU resulted in a positive decision. But in Hungary the rejection rate reached 90%, while it is only 30% in the Netherlands or Germany. The type of protection granted can also vary distinctly, with some countries (such as Sweden) more inclined to grant subsidiary protection than the right to asylum.⁸

These variations are found even for applicants from the same country of origin. The most telling example in this regard is probably that of the Afghans, whose protection rate upon initial application was approximately 50% in Germany in 2017 (which is the European average for these nationals) versus over 80% in France and less than 20% in Denmark (see the graph below, source: Eurostat). One of the consequences of such disparities is that some individuals rejected in one country go to another to try to settle there. For instance, several thousand applicants rejected by Germany went to France in 2017, hoping to combine eighteen months of illegal residence and six months of continuous presence in France so that the Dublin rules would “drop away.”⁹

⁸ In 2017, approximately 20% of applications filed in Sweden resulted in recognition of refugee status, versus 50% of applications for subsidiary protection. In contrast, in France, subsidiary protection is granted more rarely than international refugee status.

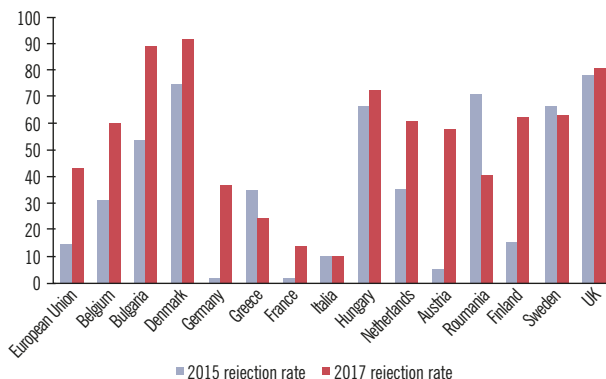
⁹ The Dublin III Regulation includes several provisions that can terminate the responsibility that falls on the country of first entrance into the EU. Without going into these provisions in detail, we can observe that a significant number of illegal immigrants use them to file a new asylum application in another Member State when a time limit that varies between 6 and 24 months has been reached.

Figure 9. Rejection rate of Afghan nationals' asylum applications at the first stage, in 2015 and 2017 (%)



We can add to this that in a short time the same country can move from a situation of openness to a situation of heavy restrictions for asylum seekers from the same country of origin, without any changes in the situation in the country in question seeming to justify it. This type of scenario is clearly seen in the case of Afghan asylum seekers in a country such as Germany where the rejection rate upon initial application climbed in two years from 27% in 2015 to 53% in 2017. Similarly, over the same period, the initial application rejection rate for Iraqi asylum seekers climbed from 2% to 37% in Germany, from 31% to 60% in Belgium, and from 35% to 61% in the Netherlands (see graph below, source: Eurostat).

Figure 10. Rejection rate of Iraqi nationals' asylum applications at the first stage, in 2015 and 2017 (%)



Such clear and rapid variations are difficult to explain by a radical change in the quality of the individual cases of asylum seekers from these countries. In all, the disparities in time and space express what some have called the “asylum lottery,” emphasizing that the application of the Geneva Convention varies not only according to divergent interpretations of its meaning, but also according to local political circumstances that can be welcoming or hostile to migrants in varying degrees.

1.2.3. Why are pressures on the right to asylum so strong today?

As we have seen, the pressure placed on the right to asylum during recent years is partly linked to the influx of individuals fleeing situations of conflict, extreme poverty, or collective violence in the Middle East (Syria, Iraq, etc.), Asia (Afghanistan, etc.), and Africa (Eritrea, Sudan, etc.). Nevertheless, we observe at the same time an increase

in applications for protection from nationals of countries that are stable or considered as “safe”, whose migrants in the past would probably have relied on the classic ways of access to the European territory (economic migrations in particular).

According to data from OFPRA (the French Office for the Protection of Refugees and the Stateless), Albania (7,630 applications) and Haiti (4,934 applications) appear among the main countries of origin for asylum applications in France in 2017. However, Albania is on the list of countries considered as “safe” as determined by the decision of OFPRA's board of directors on October 9, 2015. The protection rates upon initial application for these countries are especially low (6.5% for Albania and 2.8% for Haiti), which shows that asylum is probably not the most appropriate means of access to the European territory for a large number of these migrants.

This transferring of the burden onto the international protection process leads to an overload in the agencies handling the examination of applications (which OFPRA has in large part managed to overcome, since the time frame for examination was restored to 3 months in 2017), but also to difficulties in the management of rejected asylum seekers. Half of them at the European level (and often more in some countries) remain illegally on the territory, in the absence of any effective measures to return them to the border or of any readmission agreements with certain countries, especially in West Africa and the Sahel (Mali) but also in Asia (China), that regularly refuse to recognize their nationals and to issue consular travel documents to allow for their readmission.

As has been observed, this development is linked to immigration policies in EU countries since the late 1980s, which had the general

tendency of proportionately restricting the legal methods of accessing their territory. In France, the figures published by the Ministry of the Interior are relatively meaningful in this regard. Between 2011 and 2016, visa applications climbed from 2.4 million to 3.5 million, i.e. an increase of 45%, while the number of rejections climbed from 220,840 to 390,750, or an increase of 76%. During the same period, short-term visas or transit visas experienced a significant increase of 46%, proportional to the number of applications. In contrast, the number of long-term visas issued almost stagnated, their growth having no relationship to the increased demand.

Finally, the Geneva Convention has the consequence of exempting the applicant from any criminal proceedings due to their illegal entry into the territory of a signatory State while the application is examined. This is the meaning of articles 31-1 and 33-1 of the Geneva Convention that stipulate that *“the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened in the sense of article 1, nor shall they expel or return a refugee in any manner whatsoever to the borders of such a territory.”* Thus the registration of the asylum application allows for a residence permit to be issued while the appropriate agency (for example, OFPRA in France) examines the application.

1.3. The Dublin system is both unfair and ineffective

The Dublin Regulation relies on determining a single country that is responsible for examining and managing asylum applications in order to avoid the phenomenon of “asylum shopping.” The Dublin Convention¹⁰ made the transfer or readmission of an asylum seeker from one State to another obligatory in cases of multiple or successive applications. The European regulation called Dublin II¹¹ aimed at making this mechanism more effective. According to the regulation’s terms (slightly modified in Dublin III), the criteria for determining the responsible country are, in addition to the family situation of the asylum seeker which prevails in any event, the country of initial entrance and the place where the application was filed.¹²

The State recognized as responsible must handle, or renew its handling of, the asylum application. When an application is filed on its territory, the Member State must first verify whether another examination procedure has been initiated in another EU State. After

¹⁰ Signed in Dublin on June 15, 1990, in the context of the expansion of the Schengen Agreement to additional countries, the Dublin Convention was replaced by the Dublin Regulation, and the version currently in effect is known as Dublin III.

¹¹ Regulation CE n°343/2003 of the Council of February 18, 2003 establishing the criteria and mechanisms for determining the Member State responsible for an asylum application.

¹² In the absence of a family member of the applicant in one of the EU States, the country responsible for examining the application is:

- a) The State that issued a residence permit that is valid or expired for less than two years.
- b) In the absence of a residence permit or visa, the State that allowed its border to be illegally crossed, or the State where the asylum seeker has been residing for over five months.
- c) If it is not possible to apply the preceding criteria, the responsible State is, as a final analysis, the one which accepted entrance into its territory and the filing of an asylum application in an international transit area.

consulting the databases, if it turns out that another State is responsible for examining the application, the petitioning State has three months to refer the case to the former. The State of referral then has two months to make a decision on the case.

The transfer of the application must take place during the six months following the acceptance, if there is acceptance, of the handling or rehandling of the case by the petitioned State; twelve months if the asylum seeker has fled or is in detention. After this time limit has expired, the petitioning State becomes once again responsible for examining the application.

In this system, which was initially designed to encourage the Mediterranean States that had recently become parties to the Schengen Agreement to monitor their borders, the responsibility for examining asylum applications weighs entirely on the countries of initial entry. Given the migratory routes that are currently used, which, for obvious geographical reasons, all pass through countries in southern Europe, the burden of receiving and examining asylum applications weighs very heavily on Greece, Malta, and Italy, and to a lesser extent (for now) on Spain.

With a large portion of the flow of economic migration being shifted to asylum, due to a lack of other legal possibilities being adequately open, Dublin has thus become the de facto main tool for managing migratory policy in the European countries along the Mediterranean perimeter.

This mechanism has turned out to be contrary to both the principle of solidarity among Member States and the logic of solidarity that asylum promotes.

1.3.1. This mechanism no longer responds to the realities of today

With the significant increase in the number of asylum seekers and the very concentrated geographical influx along a few routes, the Dublin Regulation has led to placing a disproportionate burden on the countries of initial entry (mainly Italy and Greece). Combined with the other legal “layers,” it locks in a legal mechanism that the “front-line” countries have ended up considering as a hopeless trap that can be summed up as follows: 1) international law orders these countries to save people shipwrecked at sea by opening their ports, 2) having opened their ports, these countries must, in accordance with the Geneva Convention, examine the potential asylum applications of those interested, 3) being the country of initial entry into the EU, according to the Dublin Regulation, they cannot shift the examination of these applications to another Member State and must receive, at least in theory, those who could be returned by other EU countries, 4) as a large number of migrants, including those who have few chances of being considered “true refugees,” henceforth attempt the asylum path due to a lack of legal alternative paths that are adequately open (especially economic migration), these border countries find themselves ultimately in charge of the entire flow of migrants. Thus, the humanitarian imperative results in a series of asymmetrical consequences that are abnormally onerous and numerous.¹³ In any case, such was the plea made by the Italian government at the European Summit in June 2018, a government that has since avoided its humanitarian responsibilities by regularly closing its ports to shipwrecked persons.

¹³ “Migrations, Asile: A Propos du Plan Italien” (“Migrations, Asylum: Regarding the Italian Plan”), <http://tnova.fr/notes/migration-asile-a-propos-du-plan-italien>

Moreover, in the view of many observers, the Dublin measures continue to be both the source of serious harm to certain asylum seekers and considerable costs for the governments called on to implement them. The readmission rates in the states responsible for examining applications are, for example, very low in relation to the total number of transfer petitions. In 2016, out of the 25,963 asylum seekers for whom a “Dublin” procedure was initiated in France, 14,308 resulted in a readmission agreement by another European State, but only 1,320 were effectively transferred, the transfer rate thus being 9% of the applicants for whom a readmission agreement was obtained and 5% of the total number of “Dublinized” applicants.¹⁴ The waiting periods are wasted time that could be spent encouraging effective integration of the applicant or arranging their departure from the territory under better conditions. In 2016 once again, 95% of the “Dublinized” applicants on French soil (24,643 persons) waited for 5 or 6 months for a completely useless and inefficient procedure to be completed.

1.3.2. It goes against the principle of solidarity among Member States...

The responsibility of supervising the borders and managing the arrival of migrants is, as we have seen, borne to a very large extent by front-line countries. Moreover, there is no principle of mutual recognition of positive decisions concerning asylum. This means that the country that granted asylum remains in principle the country of residence. In theory, if the system functioned, these countries would also be responsible for all the benefits funding and other means of

¹⁴ Source: Report n° 218 by François-Noël Buffet on the proposed law allowing for proper enforcement of European asylum laws, produced on behalf of the legal commission of the Senate and filed on January 17, 2018.

subsistence allocated to asylum seekers during the time of their protection.

Currently there is no mechanism in European law for dividing up the handling of asylum seekers in a crisis situation (as can be found, for example, in the convention of the Organization of African Unity (OAU) adopted on September 10, 1969 in Addis Ababa, which stipulates that *“When a Member State experiences difficulties in continuing to grant the right to asylum to refugees, the Member State can make an appeal to the other Member States, either directly or through the intermediary of the OAU”*).

1.3.3. ...and against the logic of integration that asylum promotes

Three-quarters of the articles in the Geneva Convention concern the refugee's right to become a citizen. They are intended to direct the refugees toward the State where they have the most chance of integrating (through language, family, qualifications, etc.). Yet currently the Dublin Regulation leads to an uneven sharing of the duty of examining asylum applications, according to the single criterion of the route taken by migrants, without taking into consideration the factors likely to promote integration or the preferences of the persons requesting protection.

1.4. Its concrete objectives have not been met

For its defenders, however, the Dublin system presents several advantages:

- It functioned until the 2015 crisis, which can be analyzed as a sort of “stress test” imposed on the European asylum system.
- Its goal is to limit the secondary flow of migrants and the phenomenon of “asylum shopping,” to allow for free movement within the Schengen space by encouraging the countries concerned to monitor their external borders, and to avoid conflicts of negative jurisdiction.

Yet an increase in secondary movements is observed within the EU due to the ineffectiveness of the Dublin rules. Thus, transfers by a Member State to the responsible State are to a large degree a failure, for two reasons. The first reason, as has previously been stated, is that the countries of initial entry most often turn a deaf ear to readmission applications from their neighbors and even more so to transfer applications. The second reason is that the majority of “Dublinized” migrants who are sent back to the country of initial entry end up returning to the country that transferred them. Indeed, in reality these migrants are hardly ever sent back to the country that is responsible for examining their application, and, when they are, they are rarely supported and welcomed in an appropriate manner in the State presumed to be responsible. Therefore, they wait, often for several months, in an extra-legal situation regarding their conditions of residence, since the national authorities cannot take care of them.

Moreover, a large number of arriving migrants do not file their asylum application in the country of initial entry, and, managing to avoid verification, do not appear in official statistics. For instance, Italy indicates that 700,000 entries were recorded between 2015 and 2017, but they count only 335,000 asylum applicants. As the number of residence permits has not noticeably increased during the same period for economic, family, or educational reasons, it is justified to conclude that over 300,000 people do not appear in the Italian asylum application system. Thus, subject to the number of cases currently being processed, over half the migrants entering this country during this period disappeared, most likely leaving for neighboring countries.

In all, the Dublin Regulation has ended up producing a highly toxic polarization of Member States. On the one hand, the front-line countries see this regulation as a type of coercion which, combined with the humanitarian obligations of maritime law, leads the flow of migrants with its related responsibilities to be overwhelmingly concentrated on them. On the other, the second-line countries cling to this regulation as a guarantee, not only of making the front-line countries responsible for managing their borders, but also of a kind of internal border between them and the front-line countries, i.e. between them and the Mediterranean countries.

These oppositions have continued to intensify during the 2014-2016 crisis, with the front-line countries accusing the others of selfishness and rejecting European solidarity, while the latter accuse the former of not responsibly monitoring their borders, including the borders they share with Member States. In this back-and-forth, everyone is right and everyone is wrong. The front-line countries are right to criticize the unbearable asymmetry of responsibilities in the EU on

this issue, but it must be acknowledged that the management of their borders has not always been exemplary and that they have sometimes shown indulgence regarding the increase in secondary movements. The second-line countries are thus right to demand a more responsible management of the Mediterranean borders and the registration of migrants, but it cannot be denied that they have shown persistent unwillingness to help the front-line countries to manage the asymmetrical impact of the crisis.

Of course, Dublin should not be entirely discarded. The ban on multiple applications and “asylum shopping” is useful and necessary if we don’t want to encourage secondary movements for “trying one’s luck elsewhere” when one has been rejected by a Member State. But the heart of the Dublin system, i.e. the principle of the “country of initial entry”, clearly must be overhauled.

THE PROPOSED SOLUTIONS ARE INEFFECTIVE AND NOT IN KEEPING WITH EUROPEAN VALUES

2.1. Mechanisms for improved monitoring of the flow of migrants

To deal with the flow of migrants and asylum seekers since 2015, Europeans have put forward a certain number of possible solutions, a large number of which essentially aim to reduce the number of people entering EU territory. Italian Prime Minister Giuseppe Conte clearly emphasized this in the memorandum that he submitted to the European Council in preparation for discussions at the June 2018 summit. According to him, it was appropriate to grant high priority to the problem of entering migrants (upstream regulation) compared with problems linked to managing and distributing asylum cases (downstream regulation). His reasoning was simple: if we reduce the number of migrants entering, we reduce all the ulterior difficulties (secondary movements, readmission applications between Member States in compliance with the Dublin Regulation, the risk of seeing rejected asylum seekers remain on European soil illegally, etc.) and thus reduce at the same time the reasons for division and dispute among neighbors and partners. The same reasoning, in various versions, seems to have won over many other European leaders.

The issue is how to reduce the number of entering migrants. Few European leaders – with the particular exceptions of German chancellor Angela Merkel and French president Emmanuel Macron – have mentioned the efforts that could be made in terms of development and cooperation with the countries of origin. Many more leaders have been interested in ways of “externalizing” the management of the European borders through bilateral agreements with countries on the southern shores of the Mediterranean, or through centers established outside the EU or sometimes on its shores. In the following sections, we will first describe the various solutions that have been proposed for this “externalization” and we will then analyze their limitations and dead-ends.

2.1.1. Bilateral agreements and “safe third-party countries”

Bilateral Agreements

The first strategy of this type consisted in signing agreements with countries where migrants (who may or may not be asylum seekers) settle temporarily or pass through as they attempt to reach European territory, so that these countries improve border controls and retain potential migrants to Europe as long as possible.

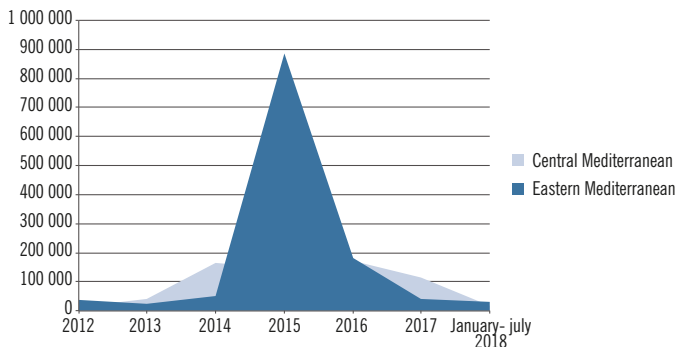
In March 2016, the EU approved an agreement with Turkey, a country that currently hosts 3.5 million Syrian refugees on its soil. In exchange for financial support intended to shore up Turkey’s ability to receive migrants (an initial aid package of three billion euros for 2016 and 2017, followed by a second of a similar amount for 2018 and 2019), Turkey committed to improve border controls in order to end illegal entries into the EU and especially into Greece. Turkey has agreed to take back any migrant who arrives illegally in Greece

from its territory, in exchange for the resettlement on EU soil of a refugee staying in Turkey.

At a summit in La Valette in February 2017, following agreements between Italy and Libya to strengthen the monitoring of the Libyan coastlines and waters, EU Member States also agreed on a package of 200 million euros for Libya, part of which is intended to equip its coastguards with the objective of reducing departures to the EU via the so-called “central Mediterranean” maritime route.

In both cases, the effect seems to have been rapid and massive: the number of migrants arriving by the so-called “eastern Mediterranean” route distinctly dropped in 2016 (see table below), and a similar drop was seen in the number of migrants arriving by the “central Mediterranean” route in 2017 and 2018. Concerning the latter policy, Italian Prime Minister Giuseppe Conte boasted that this policy, which was mainly established by his predecessor, caused the number of departures from Niger and Libya to drop by 80%.

Figure 11. Number of illegal crossings in the eastern and central Mediterranean (2012-2018)



Source: Frontex

“Safe third-party countries”

Inspired by the same reasoning, the Europeans proposed a second type of solution: involving countries considered as “safe third-party countries” in managing the flow of migrants and asylum seekers. The European Commission has proposed a new regulation that would require Member States to proceed with a preliminary assessment of admissibility of asylum applications before beginning the investigation process. After this quick assessment, applications from persons who are said to have stayed in a safe third-party country, i.e. a country where in theory the applicants are not subject to the fears stipulated by the Geneva Convention, would be considered inadmissible. These applications would thus have to be rejected before even being investigated and the applicants would be sent back to the countries in question, as long as the latter appear on the common European list

of “safe third-party countries” and as long as readmission agreements have been passed with these countries.

Although it has found favor with some, this mechanism would lead in reality to outsourcing the management of receiving migrants to a strip of buffer countries located between the countries of origin and the EU, especially on the southern shore of the Mediterranean, or to Turkey. While this proposal seems to have been dismissed for reasons to which we will return later, the idea of “safe third-party countries” has not completely disappeared from discussions in Brussels and could soon reappear.

2.1.2. The limits of these proposals

Focused on the Mediterranean problem, these measures for reducing the flow of migrants all have serious flaws or even major risks.

First of all, this type of solution poses a philosophical and ethical question: can we ask countries that are much poorer than ours — and whose respect for fundamental human rights is often far from evident — to “warehouse” on their territory migrants we do not want, and to do this in varying and even deplorable conditions, even when some of them would certainly be eligible for international protection in our democracies? We cannot be the Europe of Human Rights, perceived and envied as such, and conclude that the arrival of refugees whose numbers are moderate, all things considered, in relation to the general population of the Union, would put our comfort in such danger that we are reduced to purchasing our peace of mind at the expense of the human beings in question by means of a quid pro quo that is mainly monetary. The effectiveness of the bilateral agreements (which has been demonstrated, for now) seeking to

contain the flow of migrants already requires heavy compensation that we cannot turn away from. The case of Libya, where 800,000 to one million migrants are currently said to be waiting around in deplorable conditions, is from this viewpoint tragically symbolic: there are abundant reports of summary executions, torture, slavery, rape, and predatory behavior of all kinds.¹⁵

2.1.3. Temporary management versus lasting management of the flow of migrants

Moreover, while solutions of this type (bilateral agreements) allow for *de facto* temporary management of the flow of migrants, they certainly do not constitute a long-term answer. Indeed, even assuming that the third-party countries who would accept to contain asylum seekers manage to fulfill their role, their containment abilities would eventually reach their limits. Then the flow of migrants would start again. Moreover, the political sustainability of these agreements is far from certain, for the compensation demands on the part of third-party countries could regularly increase.

Additionally, it seems that this type of agreement could lead to a domino effect of closures. For instance, the reasons that led Turkey to close its border with Syria in 2015 are multiple and complex; it is reasonable to think, however, that the agreement with the EU and the requirement for the country to host a population of

¹⁵ Jean-Claude Cousseran, Jean Faber, Alice Guel, Thierry Pech, Jean-François Rial, Jean-Paul Tran Thiet, and Leïla Vignal, "Droit d'Asile: Retrouver une Solidarité" ("The Right to Asylum: Finding Solidarity") Terra Nova and Institut Montaigne, June 15, 2018; column in Le Monde https://abonnes.lemonde.fr/idees/article/2018/07/05/politique-europeenne-du-droit-d-asile-au-defaut-de-solidarite-s-ajoute-un-defaut-d-efficacite_5326464_3232.html

over three million people in need of protection have something to do with it: Turkey henceforth refuses to receive Syrians seeking refuge.

Finally, in practice, the effectiveness of a mechanism of the “safe third-party country” type would depend closely on that of the police of the State in question; not all third-party countries, even if they are described as safe regarding the right to asylum, are as organized and equipped as Turkey for monitoring their borders. If the third-party country presumed to be safe is not able to control its borders, it will soon become useless to return anyone to its soil. The solution of “safe third-party countries” will thus very soon reach the limits of its supposed effectiveness.

2.1.4. A break with constitutional law and treaty law

Like the mechanism of “safe third-party countries,” bilateral agreements allow the EU Member States to “externalize” the right to asylum and its implementation to third-party countries, some of which are not parties to the Geneva Convention (Libya) or have only partially adopted it (for example, Turkey).¹⁶

This Convention prohibits signatory States from discriminating between asylum seekers, especially regarding their country of origin, and from restricting the right to asylum when its conditions have been met. More generally, such an approach fails to recognize the eminently individual nature of any asylum application in accordance with the Geneva Convention, whose goal is to protect someone who has personal fears of persecution. Finally, as recalled by UNHCR,

¹⁶ Turkey recognizes refugee status only for European nationals.

which has the responsibility of monitoring the enforcement of the Convention by virtue of article 35, *“asylum cannot be refused solely for the reason that it could have been requested of another State.”*

Moreover, the European Commission's proposal would directly contradict the constitutional laws of countries like France who have made asylum a fundamental right. In a decision of August 13, 1993, the Constitutional Council recalled that the right to asylum includes the right to have the asylum application examined. A corollary of this is the right to remain on the territory until a decision has been made on the asylum application, in order to allow the applicant to effectively exert the defense rights. In this same decision, the Constitutional Council ruled that it was a violation of the constitution to ban an asylum seeker from bringing a case to OFPRA on the grounds that the examination of this application would fall *“under the jurisdiction of another State according to the provisions of the Dublin Convention of June 15, 1990.”* This decision led the government to revise the constitution by introducing article 53-1 through the constitutional law of November 25, 1993: *“The French Republic can make agreements with European States that are bound by commitments that are identical to France's in terms of asylum, Human Rights protection and fundamental freedoms, to establish their respective jurisdictions for examining asylum applications that are presented to them.”* But this article does not concern safe third-party countries, which are by definition outside the EU. Therefore, as clearly specified by the opinion of the State Council that was passed in a general meeting on May 16 of this year, given that asylum is one of our fundamental values, as established by the fourth paragraph of the preamble of 1946, the Commission's proposal would be incompatible with the constitutional identity of the French Republic. Adopting such a regulation would require France to disregard EU demands (unless

the constitution were to be revised), which would cause a major crisis.

2.1.5. Outsourcing, dependence and extortion

Moreover, if it is to be operative, this type of externalization involves reaching agreements with the third-party countries in question, whether they are readmission agreements as part of the mechanism of “safe third-party countries” — in order to be able to send back applicants whose applications are deemed inadmissible — or in the context of bilateral agreements along the model of those between the EU and Turkey or Italy and Libya. Yet such agreements are not easy to obtain and, when they can be reached, they inevitably give rise to expensive bargaining.

Bilateral agreements and outsourcing to third-party countries would place us in a dependent relationship by granting significant authority to countries whose compliance with the Geneva Convention and real motivations can be questioned. The compensations are often substantial, and increase over time: they initially have been financial (Turkey has already received three billion euros, will receive three more, and will present us with the bill again, at regular intervals), but could gradually become diplomatic and political. In the Turkish case, the visa issue, in particular, is on the table. And Turkey has not stopped bringing up other subjects: negotiations for joining the EU, the issue of Cyprus, etc. Multiplying this type of agreement would significantly increase the risks of Europe being the victim of blackmail, or, in the case of strictly bilateral agreements between a Member State and a third-party country, of the Member State being blackmailed.

In short, the path of bilateral agreements and safe third-party countries risks leading Europeans into dangerous territory and putting them into the hands of governments who are prepared to leverage the migratory issue to obtain various types of compensation. We should already ask ourselves if the relative silence we have shown regarding continuing authoritarian political practices in Turkey may be due to our fear of seeing Turkey criticize its agreement with the EU and threaten to “open the flood gates.”

2.1.6. The “disembarkation platforms” proposed by Austria

In May 2018, just before holding the presidency of the European Council (starting in July 2018, for six months), the Austrian government, dominated by a coalition of parties from the right and far right, informally circulated to other Member States a document concerning asylum management based on the concept of strengthening Europe's borders. Additionally, Austria proposes establishing “disembarkation platforms” in third-party countries, especially south of the Mediterranean, but also, if necessary, in the Balkans.

The objective of these platforms is twofold : on the one hand, to create a sorting process between asylum seekers and other migrants, and, on the other, to handle asylum applications on site so that eventually no more applications would be directly filed on European soil. However, the Austrian proposal also aims to distinguish, in these centers, between the asylum seekers who “*respect the EU values and its fundamental rights and freedoms*” and the others.

These platforms are thus fundamentally different from the “hotspots” established by the EU on its territory as of 2016, which are assembly centers that were set up in *ad hoc* fashion in Italy and Greece in

order to support these countries in managing asylum applications. In contrast, the Austrian proposal for disembarkation platforms in third-party countries reflects the desire, shared by a certain number of current EU administrations, to “contain the flow” into the EU and to make sure that migrants can no longer directly file an asylum application in EU territory. Such a proposal for complete externalization is incompatible with the responsibilities of signatory States of the Geneva Convention.

The Austrian proposal still needs to be fleshed out. However, it is certain that this proposal has received a frosty reception from the countries who would be likely to receive such structures on a voluntary basis. None of the third-party countries under consideration have volunteered to participate. This hesitation also applies to other projects for controlled centers that receive and examine applications outside the EU: in North Africa, Egypt, Tunisia, and Morocco were approached but declined the offers that were made to them. Their hesitation can be explained by the fact that, for one thing, they do not want to establish or attract migrant populations onto their territory who may not leave again for a long time. In addition, they have the feeling (surely a legitimate one) that the Europeans are trying to outsource a task to them that they themselves do not want to handle. The Europeans are not looking to share the task, but simply trying to get rid of it.

From the EU point of view, such platforms would be subject to the same risks and limits as the other solutions for externalizing asylum management that have already been analyzed. Moreover, the conditions that would be imposed on them for access to asylum (respecting the values of the EU and its fundamental rights and freedoms) would lead to an unacceptable deviation from the conventional right to

asylum, of which the Europeans are a part. This distinction, whose criteria are extremely vague and questionable, both from the legal and political point of view, consists in fact in establishing a condition for access to asylum that is absolutely foreign to the conventional right to asylum and to its enforcement in the EU — without even mentioning the fact that it is hard to see what criteria could be objectively established between “good” and “bad” asylum seekers without opening the door to all kinds of discrimination.

2.2. The attempts for an equitable burden sharing among European States have failed

2.2.1. The European resettlement mechanism: a mitigated outcome

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During negotiations of the Dublin III Regulation, the EU decided in 2009 to establish an early warning mechanism for managing a crisis in case of a large number of applications in one of its Member States. However, in 2015, it was not activated. Faced with a massive increase in arrivals and asylum applications in certain States, the European Commission decided to circumvent the Dublin requirement regarding the country of initial entry. It implemented a temporary relocation mechanism that is both automatic and required, aiming to distribute to other Member States within twenty-four months 160,000 people “who clearly need international protection” and who are present in Italy, Greece, and Hungary, three countries on the front line of the flow of migrants. The number of asylum seekers that each Member State was supposed to receive by means of this mechanism was calculated according to a distribution key combining

the size of the population (40%), the GDP (40%), the average number of refugees resettled and spontaneous asylum applications per one million inhabitants for the 2010-2014 period (10%), and the unemployment rate (10%). In fact, the Commission proposed that this temporary mechanism, designed to last for two years, be made permanent. As the EU then had over 508 million inhabitants, this represented an overall effort to absorb less than 0.04% of its population.¹⁷ However, the version that was finally approved by the European Council mentioned only 120,000 people present in Italy and Greece (or 0.02% of the European population). Most significantly, the distribution of asylum seekers among the Member States (and other voluntary States), while remaining obligatory, was now performed on the basis of quantified commitments approved by the Council and no longer through an automatic distribution key.

Almost three years later, in May 2018, the European Commission indicated that, out of 98,255 asylum seekers in question (34,953 for Italy and 63,302 for Greece), only 34,689 people had been “resettled” (table 2), or 35% of the total. This is a small number compared to the defined objectives. Indeed, many States have still only partially met their quota of resettled asylum seekers in 2018, as shown in table 2. However, while the reasons for these mixed results are numerous and varied, the direct opposition of certain Member States certainly has something to do with it. In particular, the countries known as the Visegrád group refuse to do their share: in 2018, the Czech Republic resettled only 12 asylum seekers instead of 2,691; Slovakia, 16 people instead of 902; and Hungary and Poland, zero instead of 1,294 and 7,082 people respectively. They

¹⁷ See the policy paper by Terra Nova, Joana Pétin, *Crise migratoire en Méditerranée. Le droit européen de l'asile et la solidarité remis en question* (“The migrant crisis in the Mediterranean. Challenges to the European right to asylum and solidarity”).

justify this position by their vision of what EU priorities should be, with the strengthening of external borders ranking very high. By doing this, these countries — which are now joined by Austria — have not only slowed down the resettlement process but also harmed European solidarity, a founding principle of the EU, which expressly appears in article 67 of the Treaty on the Functioning of the EU in terms of the right to asylum. Moreover, Slovakia and Hungary filed an appeal with the Court of Justice of the EU to criticize this mechanism and the plan for European “quotas.” In September 2017, however, the Court rejected this appeal on the basis of the principle of European solidarity in receiving asylum seekers. In 2017, infringement proceedings were launched by the Commission against the Visegrád group countries: their refusal to accept their share of the resettlement effort could eventually lead to financial penalties.

Table 3: Rate of resettlement of asylum seekers present in Italy and Greece (European Council decision, September 2015) in EU Member States and other voluntary States, in May 2018

Destination	Resettlements from			Commitment	
	Italia	Greece	Total	Number	%
Germany	5434	5391	10825	27536	39,3
France	635	4394	5029	19714	25,5
Sweden	1392	1656	3048	3766	80,9
Netherlands	1020	1755	2775	5947	46,7
Finland	778	1202	1980	2078	95,3
Portugal	356	1192	1548	2951	52,5
Norway	816	693	1509		
Switzerland	920	580	1500		
Spain	235	1124	1359	9323	14,6
Belgium	471	700	1171	3812	30,7
Republic of Ireland	0	1022	1022	600	170,3

II. THE PROPOSED SOLUTIONS ARE INEFFECTIVE
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Destination	Resettlements from			Commitment	
	Italia	Greece	Total	Number	%
Romania	45	683	728	4180	17,4
Luxembourg	249	300	549	557	98,6
Lithuania	29	355	384	671	57,2
Latvia	34	294	328	481	68,2
Slovenia	81	172	253	567	44,6
Malta	67	101	168	131	128,2
Estonia	6	141	147	329	44,7
Cyprus	47	96	143	320	44,7
Croatia	22	60	82	968	8,5
Bulgaria	10	50	60	1302	4,6
Austria	43	0	43	1953	2,2
Slovakia	0	16	16	902	1,8
Czech Republic	0	12	12	2691	0,4
Liechtenstein	0	10	10		
Denmark	0	0	0		
Hungary	0	0	0	1294	0
Poland	0	0	0	6182	0
United-Kingdom	0	0	0		
Iceland	0	0	0		

Source: <http://www.europeanmigrationlaw.eu/fr/articles/donnees/relocalisation-des-demandeurs-dasile-depuis-la-grece-et-litalie.html>

It is essential to support the European countries on the external borders of the EU, who are the most affected by the increase in the number of asylum seekers. No EU Member State can unilaterally decide to avoid shared obligations. However, it is clear that the issue of asylum is harming solidarity, which is the cornerstone of European unity. In 2015, the original proposal for temporary resettlement mechanisms made by the European Commission was worthy of praise, especially faced with the faint-heartedness of EU members. The heated debates in the Council over this proposal and the Visegrád

group's refusal to implement what had been approved by the European Council have therefore led to disappointing results: the system established in fall 2015 has not resolved the short-term crisis in Italy and Greece, nor has it established a sustainable system for crisis management.

2.2.2. Controlled centers still in development

After the European Council meeting in June 2018, the Commission is now developing the concept of “controlled centers” and working on developing short-term measures that could improve the processing of migrants arriving in the EU. The proposal is still in the very early stages, and for now no consensus seems to have emerged. The latest proposals consider situating centers in European countries on the Mediterranean shore. They would resemble “waiting areas” where a first “sorting” of asylum seekers could be performed. Asylum applicants with a chance to see their request granted would be divided among the European countries according to a distribution key that would in particular take into account GDP and population (on the model of what was established in 2015). According to this approach, the handling of asylum applications would take place on European soil.

This proposal contains a first draft of the path that could be followed to establish regional processing systems with third-party countries, i.e. which would combine establishing centers in safe third-party countries with controlled centers on EU territory. It is certain that reception and orientation centers in the countries that migrants pass through, especially on the southern shores of the Mediterranean, would prevent hundreds of migrants from risking their lives crossing the Mediterranean, and in this regard they offer real potential.

Additionally, combining these two approaches could contribute to real responsibility-sharing at the regional level, in order to respond to the challenges of migration in all their complexity.

Above all, this plan, which is still being developed by the Commission, offers a serious advantage that should not be overlooked. It consists in recognizing in practice a European responsibility-sharing authority. This is exactly the issue that the quota mechanism for managing the 2015 crisis came up against. We believe that in order to re-establish solidarity among Member States, nothing can be done without such an authority in place.

RESHAPING THE EUROPEAN POLICY ON THE RIGHT TO ASYLUM TO RESTORE ITS MEANING AND EFFECTIVENESS

When his gardener told him that it takes one hundred years
to grow a Cedar of Lebanon, Marshall Lyautey replied:
“Well, plant it this afternoon then!”

Considering the slow speed at which the EU makes decisions, we would like first to describe the general objectives to be attained. The issue is defining what a humane, effective, and united EU asylum policy should look like, based on independent national authorities in collaboration with a European Office endowed with real powers. This policy would abandon the rule of the country of initial entry on EU territory and strengthen solidarity among Member States. This will happen through a truly united effort by the EU and its Member States while taking into account their respective jurisdictions and relationships with the countries of origin and the countries of transit. Gradually, this joint management will need to give way to a true “migration diplomacy” that should be incorporated at the European level.

By defining in general terms what this European system of asylum laws should look like, we are merely strictly applying the provisions of the Treaty of Lisbon, which stipulates in article 67 that “[the Union] develops a shared policy on asylum, immigration, and external border control that is based on the solidarity of Member States” and specifies in article 78, paragraph 1, that “the Union develops a shared policy on asylum, subsidiary protection, and temporary

protection, in order to offer an appropriate status to any national of a third-party country who needs international protection and to ensure observation of the principle of non-refoulement [not turning away asylum seekers]. This policy must be consistent with the Geneva Convention of July 28, 1951 and the Protocol of January 31, 1967 relating to the status of refugees, as well as with the other relevant treaties.”

3.1. A European policy on the right to asylum that combines humanism, effectiveness and solidarity

The objective to be attained is part of article 78 of the Treaty on the Functioning of the European Union. Paragraph 2 anticipates the passing of ambitious laws intended — among other things — to establish a uniform status for refugees; to create common procedures for granting and withdrawing this status and standards concerning the conditions for receiving asylum seekers; as well as cooperation with third-party countries to manage the flow of people seeking asylum or subsidiary or temporary protection. These laws must be adopted by a qualified majority, which should allow them to be imposed, if necessary, on a potential minority of Member States.

Proposal 1

In each Member State, transform the national authority in charge of asylum applications into an independent agency (such as OFPRA in France) in order to prevent any political interference.

Proposal 2

Eliminate from the Dublin Regulation the clause of the country of first entry and allow each asylum seeker to request the protection of the Member State of their choice, while prohibiting multiple applications.

Proposal 3

Create an Office for the Right to Asylum in Europe (ORAE) tasked with coordinating the independent national agencies and gradually harmonizing their decision-making criteria.

3.1.1. The role of the national authorities

There are several reasons to maintain the national asylum agencies:

- They have existed for a long time and have recognized skills;
- They will be more capable than the European Office of making informed decisions on individual cases, based on a concrete examination of personal situations;
- They will be able to deal with numerous local projects related to registering asylum seekers (for example, OFPRA acts as a “town hall” for refugees, especially regarding personal records) and, above all, will be able to monitor the integration of those who receive international protection.

It is important to remove authorities responsible for examining asylum applications from short-term political influences. This is an essential condition for guaranteeing the right to protection that stems from the traditions and values of our countries (and is sometimes enshrined in their constitution) in addition to being based on the treaties they have signed and the commitments they agreed to in the context of the EU. Moreover, the independence of the national authorities is essential for ending the “asylum lottery” (see above, 1.2.): according to the asylum seeker’s country of origin and the country in which the application is filed, the same application having very different chances of being accepted, which is unacceptable. For example, the gates of Germany were wide open to Afghan asylum seekers in 2015 and have to a great extent been closed since then. Such abrupt changes are the result of political choices and not of the application of the rule of laws. In the system that we propose, the independent status granted to national authorities will thus ensure them real freedom of decision with regard to national politicians and will constitute an essential first step towards harmonized management of the right to asylum at the EU level.

The nomination process for their directors will need to safeguard their freedom of decision. In particular, the directors and members of the potential collective body will have to be named for a term of fixed length that is non-renewable, during which they cannot be removed. These independent authorities will be solely tasked with enforcing the provisions of the Geneva Convention and the regulations decreed at the European level, in particular articles 67 and 78 of the Treaty on the Functioning of the EU, their provisions, and finally the general guidelines issued by the ORAE. They will accomplish this task under the sole supervision of national judges, who will be called upon to rule on the merits of potential appeals of their deci-

sions. Appeals of the decisions of these independent authorities will fall within the competence of the national courts (in France, the CNDA or National Court of Right to Asylum). An appeal of the latter's judgements, which will only be heard on issues of law, will be handled by a specialized chamber of the General Court of the European Union.

The national authorities will need to have adequate administrative services to collect applications for protection from the outset and process them rapidly. The actions of these administrative services will have to answer only to the instructions of the independent authorities. They will not be subjected to the hierarchical authority of governments or to that of other national administrations. They will incorporate the administrative offices which, in some countries such as France, currently handle initial contact with asylum seekers, in conditions that are often dubious. In this way, OFPRA and its European counterparts, without replacing the police forces or customs agents positioned at the borders, will have to incorporate administrative services (from the prefectures, in France) for the task of receiving asylum seekers, from first contact through the entire administrative follow-up process. In several countries, including France, this will require a reassignment of human resources, similar to what we experienced several times in the history of the French government (for example, the 2008 transfer of personnel in charge of antitrust investigations to a newly-established independent authority). The goal is to eliminate from the traditional administrative authorities – and also from the inland police forces – the temptation to drag one's feet (or even to violate asylum seekers' rights, as was found to have happened several times in certain prefectures in France) in order to dissuade applicants for protection from exercising their rights. Such actions are unworthy of our democracies and must be stopped.

Eliminating the rule of the country of first entry into European territory

The system that makes the country of first entry into the EU bear the responsibility for handling asylum applications has revealed its limits and is no longer viable. It is not in keeping with the spirit of the Geneva Convention, in that it does not offer the refugee a choice of host country and makes their integration into society more difficult, given that they are in a country that, from the viewpoint of many asylum seekers, has little to offer except its position on the access route to the EU. Moreover, this system has also shown its ineffectiveness: not only are the readmission applications that Member States send to each other in keeping with the Dublin Regulation often ineffectual, but these mechanisms have not halted secondary movements and cause asylum seekers to lose a great deal of precious time. (see above 1.4).[MG1]

We suggest that it be eliminated.

Eliminating this clause from the Dublin Regulation should signal the end of an era when the Member States located on the EU external borders were solely responsible for their protection. Some people may fear that this elimination partially removes responsibility from the countries located on the external borders of the EU (Spain, France, Greece, Italy, etc.), which could consequently reduce the border control efforts that fall to them. However, it is not justified to make the protection of the shared external borders of the EU depend on these countries alone, and Frontex should also be brought in to help with this protection. Ultimately, any laxity on the part of a country could come back to it in a boomerang effect in the form of a greater flow of asylum seekers and an increase in European expenses that the country will also have to bear.

Henceforth, no matter which Member State they used to enter EU territory, the asylum seeker will choose the country in which he requests asylum. However, he will be held to the choice he expresses and will not be able to request asylum from another national authority.

In the case of a security threat (especially terrorism), the authority of the country where protection is requested will reject the application, under control of the appropriate national jurisdiction, and will inform the European authority, as well as the appropriate authorities in other Member States of this refusal and the reasons it is based on.

In order to concretely embody the principle of solidarity in asylum and immigration matters, which is expressly indicated in article 67, paragraph 2 of the Treaty on the Functioning of the European Union (the EU “*develops a common policy on asylum, immigration, and external border control that is based on solidarity between Member States*”), two equalization mechanisms will be established.

Proposal 4

Allow ORAE, assisted by a committee of representatives from the independent national authorities, to redistribute pending cases in case of an evident overload in one Member State.

A mechanism for solidarity in the number of applications to process

Exceptionally, in case of an overload in one country, it will be up to the independent national authority to inform ORAE, based on the number of applications that it is facing and what it knows its processing capabilities to be (material and human resources), as well as the capabilities for receiving and integrating immigrants in the country. In order to divide the burden as equitably as possible, the ORAE will be able to proceed, on the basis of the demonstrated reasons and after analyzing their merits, with redirecting certain asylum seekers to another national authority, taking into consideration objective criteria linked to the population, unemployment rate, and GDP per capita of the various EU countries. A committee composed of representatives of the national authorities will assist the ORAE in this task, with the ability to oppose its proposals, if a qualified majority believes them to be inappropriate. The Member States will be required to comply with the ORAE's decision, which must be justified.

Proposal 5

When the number of refugees received by a country significantly exceeds the share of effort expected of it, give ORAE, upon the request of the national authority, the task of dividing the load among the other Member States, based on criteria related to their population, GDP per capita, and unemployment rate.

A mechanism for solidarity in the number of refugees received

Similarly, if a Member State is facing too high a number of refugees in relation to its capabilities, based on the criteria mentioned above (population, unemployment rate, GDP per capita), it will be able to request from the ORAE that asylum recipients who have been established for less than a year be relocated to other Member States. The ORAE will decide under the same conditions as for the reassignment of asylum seeker cases, assisted by the same committee representing the independent national authorities.

An EU-wide recognized status for refugees

Negative decisions by a national authority (after being confirmed on appeal, if necessary) will immediately be recognized as such by all the other national authorities (no double or triple examination is possible, in keeping with the theory of the Dublin Regulation), and incorporated into a file made available to other Member States, in order to avoid “asylum shopping”.

Of course, this will not exclude the possibility, in case of a change in the circumstances on which the first decision was based, of requesting that it be reexamined at a later stage. But such an application will have to be filed with the authority that made the initial decision and it will rule, under the supervision of its national judge.

Pursuant to article 78, paragraph 2, of the Treaty on the Functioning of the EU, European institutions must define a uniform status of asylum and subsidiary protection. In the ten years since the Treaty of Lisbon was signed, nothing of the sort has been done. Such

inaction is especially incomprehensible since such a uniform status, while it must be based on “*standards concerning the conditions of receiving those who request asylum or subsidiary protection*,” does not necessarily impose a standardization of all the accompanying measures. Establishing a “base” of essential rights, as we propose below (3.1.5), would already constitute definite progress.

While awaiting this uniform status, mutual recognition, as regards the right of residence and establishment, of the national decisions granting asylum or subsidiary protection must be granted to their recipients, in order to preserve the useful effect of one of the fundamental freedoms instituted by the Treaty - the free circulation of people - which includes the right to settle and stay in the Member State of one's choice. If necessary, the issue should be referred to the Court of Justice to ask it to enforce the principle of mutual recognition regarding the right of residence and establishment.

In this context, a protection order from a national authority will lead to the granting of a residence permit valid in all Member States, along with a right to access the job market. However, the benefits of support mechanisms and social rights particularly linked to the granting of this protection by a specific country (housing, national aid for social integration, etc.) will not be exportable to another Member State. Refugees can settle in the country of their choice, but they cannot demand the portability of specific aid to which they would have been entitled in the country that granted protection, nor can they request equivalent rights in the new Member State where they settle. A similar system exists in Germany where refugees are received under condition of residency in a specific Land (state), but can settle in another Land, as long as they give up the specific aid that was granted by the initial Land on the condition of residency.

3.1.2. The functions of the Office for the Right to Asylum in Europe (ORAE)

To ensure proper coordination of this network of national authorities, the European regulator will be granted true authority for harmonization and monitoring. Of course, national authorities will determine their individual decisions, considering the concrete situations, without direct interference from either their government or ORAE.

But the European regulator will issue guidelines on which the national authorities will be required to base their actions. These guidelines will be defined in cooperation with these authorities and will specify the criteria to apply for handling cases. For example, on the basis of information provided by UNHCR and diplomatic posts, they will indicate new areas of evident insecurity or those where intense humanitarian crises are being alleviated. However, the ORAE will have no jurisdiction to handle individual cases.

As indicated above, ORAE will be able to intervene at the request of a national authority and proceed to reassign asylum application cases or relocate refugees to another Member State if their numbers are clearly excessive in one country, in relation to its population, unemployment rate, and GDP per capita. The ORAE will be assisted in this task by a committee comprised of representatives of the national authorities.

ORAE will also be in charge of monitoring compliance with the principles established in the Geneva Convention and incorporated in EU law (articles 67 and 78 of the Treaty on the Functioning of the EU).

In case of malfunctioning of a national authority (for example, in case of significant statistical discrepancies in the number of favorable or unfavorable decisions according to time period or country of origin of applicants), ORAE will make appropriate recommendations, even, if necessary, issuing a ruling to enforce the criteria that have been defined at the European level. In case of non-compliance with these criteria and decisions, the Commission will launch proceedings for breach of law against the Member State in question.

In addition, it is necessary, if we want to maintain the proper functioning of the mechanisms for the right to asylum, to end the gaps in European legislation that allow any migrant who has succeeded in remaining under the radar of all authorities and controls for over eighteen months, to regain the ability to request asylum in the country of their choice, or even to restart a procedure after having been rejected due to the disappearance of their personal information from the files. These provisions encourage secondary movements, “asylum shopping”, and continued illegal residence. Once a person enters or remains without a residence permit on the territory of an EU Member State, their information should be collected and kept for ten years, whether or not they have requested asylum and whether or not refugee status has been granted to them.

3.1.3. Europeanization of the procedures for removal and their enforcement

Proposal 6

Europeanize the procedures for the removal of rejected applicants by using the resources of Frontex and give the EU the task of negotiating, along with Member States, readmission agreements with the countries of origin.

The integrity and sustainability of the procedures for granting the right to asylum in Europe will only be guaranteed if an effective distinction is made between the fate of its beneficiaries and that of rejected applicants.

This supposes that the persons to whom international protection has been refused (if necessary, after having exhausted the possibilities of appeal) and who are not eligible for another legal immigration route are sent back to their country of origin. Before activating the procedures for sending someone back, however, care should be taken to see whether the person in question is not admissible through some other legal immigration procedure. But this will not be a new procedure entitling the applicant to delays or postponed implementation.

In this context, the role of the EU in removal procedures will be strengthened through use of European funds and the resources of Frontex. Making these removal decisions dependent on the funds and resources of the EU will share the burden of handling rejected applications and persons who are not eligible for the right to asylum or for another legal form of immigration. Moreover, this will significantly

improve the position of Member States who, for various reasons (memories of colonial history, special political or trade relationships, etc.) cannot adopt too firm positions in relation to certain countries.

3.1.4. An increased role for the EU in international relations connected to immigration and procedures for granting or refusing the right to asylum

Considering the interconnectedness between managing the flow of migrants and the policy of granting the right to asylum (see above, parts 1 and 22), there must be improved coordination of the international actions of Member States and the EU, concerning both those requesting international protection and people considered as “economic” migrants. It is clear that in general the policy on migrants has a retroactive effect on the asylum situation. If we want to relieve the asylum path of the additional burden that it bears today due to the reduction of other legal means of immigration, and thus guarantee the normal functioning of the procedures for granting the right to asylum, it will be necessary to make a somewhat wider path for economic immigration, as well as for that of educational migration (especially student migration).

This better-integrated European policy will have to include essential structuring with coordinated migration policies for people who are not entitled to international protection, either because they have not applied for asylum or because they have applied and been rejected by a national authority.

Such an integrated policy is expressly provided for in articles 78 and 79 of the Treaty on the Functioning of the EU, with article 78 stipulating that the EU will have to adopt measures including

“partnership and cooperation with third-party countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection” (article 78, 1, g), and article 79 stipulating that *“the Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States”* (article 79, 3). In coordination with Member States, European institutions must be granted the necessary resources and authority to manage and enforce this migration diplomacy.

The Commission will be tasked with negotiating agreements with the principal third-party countries involved, on the basis of mandates granted by the Council. The EU will not act alone, but will become, in the defined context of foreign policy and by relying as much as necessary on decisions of a qualified majority:

- First of all, the site of exchanging ideas and defining the medium-term objectives of migration policy;
- Next, the site of implementing mixed jurisdictions, some related to the Member States (the visa regime, permission to reside, etc.), and others to the EU (trade policy), others being already mixed (development aid);
- Finally, the site of verifying the effectiveness of the measures decided upon in common by the EU and its Member States.

These negotiations will be primarily concerned with readmission agreements with the countries of origin, involving various tools, for example:

- Strengthening of development aid in its various components (education/training, investment, preferential trading agreements, etc.), part of which could be made conditional on compliance with these agreements;
- Concluding or extending preferential trading agreements (with the implicit threat of suspending or reducing, in case of non-cooperation, existing agreements that may involve resource flows that are completely essential to the economies of the countries under consideration),
- Technical assistance in establishing an efficient civil registration system: the readmission policy may take place, in certain cases, through massive assistance to make the administrative systems of the countries of origin reliable, in order to facilitate migrants' return, as long as the States in question are recognized to be safe;
- Technical cooperation for improved control of the external borders of the countries of emigration.

In return, cooperative countries of origin could benefit from a smoother visa policy, including tourist visas. Member States will be more trusting if they have reasons to believe that the country of origin will not turn a deaf ear to their requests when migrants are sent back.

Proposal 7

Concerning countries of transit, conclude partnership agreements to ensure that they receive migrants in a way that is respectful of human dignity, to establish training and orientation programs, and to make asylum seekers' path to Europe safer (resettlement procedure with UNHCR).

Similarly, there could be better security along the migration routes for asylum seekers, especially with neighboring states of countries that are “issuers” of refugees (establishing access channels in our embassies and consulates where this appears feasible). In this context, it will be appropriate to increase programs known as “resettlement”, which applicants for asylum could benefit from. These programs anticipate the transfer, upon the proposal of the UNHCR and with the agreement of the destination country, of persons who clearly need international protection, from a third country to a Member State where they will be admitted and granted a residence permit and all other rights comparable to those granted to other beneficiaries of international protection. The national authorities of EU countries could, on the basis of bilateral agreements, initiate the processing procedure for asylum seekers' cases in these countries. In order to avoid raising sovereignty issues or complicating the review of the legality of the decisions of these European national authorities' representatives, it would be appropriate, as is currently the case with OFPRA that they proceed only with “pre-decisions,” which will

have to be approved in keeping with the territorial law of the EU Member State in question.

This policy will also lead to individual agreements with interested countries of transit, granting them assistance for receiving migrants in conditions that respect human dignity, and for establishing a training and orientation policy to benefit them, or even possibly providing aid for their return.

These agreements will have to ensure that the representatives of the national authorities of EU countries will have free access to the places where people are staying, both to make the asylum seekers' path safe and to verify the conditions in which all migrants are received and treated. Under no circumstances will these countries of transit be tasked with handling asylum applications in the name of and on behalf of EU Member States. As indicated above (part 2), such an "externalization" of the obligations of international protections would be unconstitutional in many countries and, in any case, incompatible with the Geneva Convention.

3.1.5. Minimum harmonization of the conditions in which beneficiaries of international protection are received

Proposal 8

Allow the asylum applicant to have access to employment three months at the latest after filing the application.

Proposal 9

Facilitate the integration of refugees by more efficiently coordinating the activities of social workers, volunteers, and government offices (housing, language classes, technical and legal advice, etc.).

Proposal 10

Grant refugees the right of residence and settlement in any Member State, without transferring the benefits of the specific social systems applicable in the territory that granted protection.

The EU will establish, pursuant to article 78, paragraph 2 of the Treaty on the Functioning of the EU, minimum common rules concerning:

- Reducing time periods for processing applications, with a tacit agreement clause: each national authority will have to rule on a case within three months of the filing of the application. If no administrative decision is made after six months, a one-year residence permit, with possibility of renewal, will have to be granted to the applicant, to allow them to reside and work legally until a decision is made regarding their application. Postponements of decisions will be possible on an exceptional basis and can only be based on the personal behavior of the applicant (refusal to appear for a summons, for example).
- Access to national social benefits as soon as the application is filed, in terms of medical coverage and emergency assistance, and then with non-discriminatory access, after the granting of international protection.

- A special effort for linguistic training in the (or one of the) official language(s) of the host country.
- Access to employment, guaranteed at the latest three months after filing the application, including during the possible appeal process of a negative decision, in order to avoid an increase in illegal work which, in certain farming regions or certain economic sectors (catering, construction, transports and logistics) tends to turn into a form of modern slavery.

The way in which asylum seekers are received and the future of those who obtain international protection cannot be limited to an administrative procedure. The role of society is essential to the success of the asylum path.

In all our societies, a special effort must be made, both in terms of communication and of the action of social workers, to allay the fears of a portion of the population regarding cultural differences and to explain how to deal with them. To save the right to asylum, we must also encourage its acceptance by our fellow citizens, which supposes an effort on the part of the host populations and also a new direction for public integration and housing policies. In order to facilitate the integration of refugees, provision should be made for creating conditions that do not group them together in areas of isolation and inferiority.

This necessary bridge between social work and administrative tasks is lacking in many European countries, especially in France. Without trying to determine how right or wrong either side is, we can observe that humanitarian organizations are suspicious of the government authorities, or may even be hostile to them, while government

agencies and law enforcement officials treat them with disdain or even contempt, sometimes even accusing them of encouraging illegal immigration.

A true reform of the right to asylum in Europe will mean ending the hostile confrontation between humanitarian organizations and government authorities. Having centers with multiple areas of expertise, that rely on effective providers for access to employment and social integration, would mean significant progress. In this context, attitudes must evolve, especially in France: government authorities and humanitarian associations must learn to cooperate with more trust. The associations can do this by demonstrating their skills and effectiveness in assisting refugees (including legal assistance for establishing cases and preparing possible appeals, which some of them already do very well). The government authorities must recognize this work and break with a culture that is too often purely repressive.

From this point of view, the German example should inspire all Member States: in Germany, the processing centers bring together social workers, law enforcement and government authorities, various associations, public service and employment officials, etc. Therefore, their efforts are more coordinated and integration is faster and more effective.

Another change must also occur regarding the approach to asylum seekers or refugees. They are too often assumed to be people living in social exclusion. Without prejudice to the needs they may have in terms of housing or food, there is no reason not to pay equal attention to their degrees, qualifications, experiences, or aspirations — all elements that can accelerate their integration and improve their counseling.

3.2. Possible responses to a deadlock in European negotiations: the issue of differentiated enforcement

Proposal 11

Have the European budget bear the essential part of the costs of asylum policy in Europe, especially for establishing processing and urgent treatment centers for people rescued at sea (see below, proposal 14 and following proposals), as well as for returning rejected applicants to their country of origin.

Proposal 12

Impose financial penalties on Member States that refuse to participate in the mechanisms for reallocating cases to be examined or for distributing refugees.

Proposal 13

If necessary, act through strengthened cooperation or ad hoc agreements between the most willing Member States.

The above-mentioned measures should be adopted and implemented by all twenty-seven EU Member States, even if this means relying on passing by a qualified majority to remove any remaining objections. However, there is no reason not to provide for differentiated enforcement of certain obligations for some Member States. EU law provides numerous examples of such special dispensations,

either temporarily or for an undefined period, as long as they are proportional and rely on objective criteria.

For example, provisions could be made so that Member States with very little experience with the right to asylum and with limited capabilities for hosting refugees could see their obligations reduced in terms of participating in the effort to reallocate cases or relocate refugees. However, in order to preserve a minimum of solidarity, which is the driving force behind the building of the EU, such dispensations would depend on two conditions:

- They must agree to host a minimum number of refugees, according to their national regulations and procedures;
- They must in return take on financial obligations beyond their basic contribution to the European budget.

Under these conditions, no Member State could totally avoid the requirement for European solidarity, which expressly appears in article 67 of the Treaty of Lisbon discussing the principles of the policy on asylum and migrations.

If no majority can be obtained within the 27 Member States, it may then be necessary to rely on a mechanism of “strengthened cooperation,” as expressed in article 20 of the Treaty on the EU, between Member States that are inclined to act together, or even, if the very strict legal conditions imposed by the Treaty on the EU and the Treaty on the Functioning of the EU cannot be met, for the countries in question to sign a specific treaty, as was the case originally with the Schengen Agreement.

In the context of the latter solution, which would necessarily be by default, the concrete consequences of such an action by only a few countries should be examined, while considering their major impact on the cohesion of the Union.

- The first consequence affects the free circulation of people, especially within the Schengen area. If all the States that are currently part of the Schengen Agreement do not join the “acting minority,” then Schengen will most likely need to distinguish a “Schengen Plus,” allowing for real elimination of physical controls at the borders between Member States that are part of the “hard core” of the European policy for the right to asylum, and a “Lesser Schengen” for those who reject this and to whom would be applied a situation of “permanent exception” to the benefit of the elimination of border controls. As for those who are currently located outside Schengen, they can only hope to enter it by joining the countries that have agreed to establish common policies for the right to asylum and on the condition, of course, of fulfilling the other conditions that have been established for joining Schengen.
- The second consequence concerns the necessary solidarity that must exist in the EU. The question of the solidarity principle and conditionality will have to be asked in this context: must we maintain the benefit of massive budgetary transfers to States that would not agree to comply with the stipulations of the Geneva Convention that have been incorporated into the European framework?

Each EU country must scrupulously observe the rules decreed in particular by article 78 of the Treaty on the Functioning of the EU. This full compliance clearly constitutes an essential component of the rule of law that must apply to all Member States. Those who refuse

everything must clearly be told that solidarity is not a variable obligation and that any breach will lead to some kind of conditionality of European funds (far beyond the already-existing mechanism that imposes a fine on a State that refuses to enforce a decision of the European Court of Justice). It is important to bring this issue into the political discussion, including integrating it into the definition of overall budgetary guidelines, in which the European Parliament plays a significant role. From the outset, the complete budgeting of the expenses for creating an integrated European asylum policy will involve the recalcitrant States bearing a significant portion of the costs in any case. But we must not hesitate to make a more general threat, explaining that with continued constraints on the European budget, the trade-offs between these types of expenses, considered to be EU priorities, and those of structural funds, will necessarily lead to reducing the latter. Over recent decades, the history of the EU has shown the permanence of such mechanisms of “bargaining,” if not outright extortion. The countries that are the most uncooperative regarding European integration should not have a de facto monopoly on this blocking capacity.

3.2.1. Emergency Measures

*“Our sea who art not in heaven,
at dawn You are the color of wheat
at twilight, of grapes at the harvest
we have sowed You with the drowned more than
in any era of storms.”*

Secular prayer. Poem recited by Erri de Luca on Italian television on April 19, 2015.¹⁸

¹⁸ *Mare nostro che non sei nei cieli all'alba sei colore del frumento al tramonto dell'uva di vendemmia, Ti abbiamo seminato di annegati più di qualunque età delle tempeste.*

Developing a truly European system of asylum management will not be easy nor quick. But in order to do this, the two priority measures are: establishing the ORAE, tasked with coordinating national authorities and gradually harmonizing their asylum practices - thus with the authority to decide and real power to penalize -, and creating a network of national authorities that will be truly independent and not subject to political pressure.

Moreover, launching a true “EU migration diplomacy” should be one of the urgent decisions of the Union and its Member States.

Above all, right now, while waiting for all the measures listed above to be established (3.1), a solution must be provided to the crisis that we have been experiencing in the Mediterranean for several years now.

Proposal 14

Establish European Receiving and Processing Centers (ERPCs) in EU Mediterranean countries where asylum applications from those rescued at sea will be processed in less than one month.

The main tragedy of migration to Europe has had a particular geography for several years: the Mediterranean. This tragedy is primarily a human one, since, as everyone knows, several thousands of people have perished since 2010 off the coasts of Lesbos, Malta or Lampedusa. But this tragedy has gradually become political as well, since European countries continue to fight tooth and nail over the issue: the distressing saga of the Aquarius, from spring to fall 2018, illustrated the ability of European States to become divided on the

issue and even, for some of them, to betray their humanitarian duties, to take innocent people hostage in diplomatic extortion, and to use these situations to stimulate an anti-European populism that does not bode well for the future. The most urgent humanitarian and political issue is thus in the Mediterranean. This is why we believe it necessary to formulate a proposal in this report that coheres with this particular situation.

In order to find a solution to these difficulties that is both honorable and effective, we propose to bring into play a dual solidarity: solidarity among the European Mediterranean countries on the one hand, and solidarity between these countries and the other EU Member States on the other. This should all take place with the material, logistical, and financial support of the EU. The general idea is simple: the European countries on the Mediterranean would share the burden of receiving asylum seekers rescued at sea under the control of the ORAE handling the equitable distribution of refugees among Member States. The Mediterranean countries of the EU would not, however, be left alone to face the consequences of this task, for examining the asylum applications as well as receiving those who would ultimately be granted international protection would be shared with all the other EU members. The European “division of labor” organized by this new system of solidarity would only apply, throughout the humanitarian crisis that we are familiar with, to migrants rescued in the Mediterranean and could be tested out on a sub-regional scale along one of the three large maritime routes in this area.

In order to make this idea a reality, we propose that ERPCs, for handling asylum applications, be installed on the coasts of EU

countries on the Mediterranean Sea in the most general sense, i.e. including the Aegean Sea and the Black Sea (Spain, France, Italy, Greece, Malta, Cyprus, Bulgaria). Financed by the EU, these centers will specifically be devoted to receiving asylum applicants who cross the borders by sea and are rescued in the territorial waters of Member States or in neighboring international waters. They will be granted the status of “safe spaces” and, in keeping with maritime law, coast guards, Frontex agents, NGO ships, and private boats will be invited to direct rescued individuals who wish to apply for EU asylum to these centers. People who are rescued at sea but disembark at another port will also be transferred there with their consent, upon the proposal of the appropriate national authorities.

In case of evident overload in one of these centers, ORAE will be able to decide to place asylum seekers in one ERPC instead of another, in order to divide this burden as equitably as possible. If necessary, this redirection may take place after boats reach the closest safe port or while the boat is still at sea with the agreement of its captain.

Proposal 15

While waiting for the “country of first entry” clause to be definitively revoked, allow people received in ERPCs to request asylum in the Member State of their choice, subject to possible equalizations (see above, proposals 4 and 5).

The main emergency system dedicated to rescued at sea of the ERPCs will be to receive people rescued at sea¹⁹ in humane conditions and to handle and process applications for international protection, with all efforts being made to reduce the time period for this to a maximum of 30 days, not including possible appeals. Handling the application and the final decision will be the task of the national authorities of the Member States (including that of the host country of the ERPC), which will open offices within the centers and send agents there who will be tasked with processing applications, assisting with integration as well as facilitating access to employment for those who receive refugee status. The national authorities will also send interpreters to the centers. Thus, the system will involve no loss of sovereignty on the part of Member States. However, it will be important, as stated previously, for these national authorities to be independent (see above 3.1.5) in order to ensure that they will not be under the influence of decisions of a political nature while fulfilling their mission.

The distribution of asylum seekers among the various offices of the national authorities established or represented within a single ERPC will primarily take place on the basis of the asylum seekers' preference. But it can be corrected by ORAE in case one or several offices are overburdened. Overall, the European regulator will have the ability to "dispatch" the arrivals among various ERPCs and then, within each ERPC, to divide up the applicants among the national authorities, in case of obvious imbalance, whether this is upon request by the countries hosting the ERPCs or the offices of the national authorities themselves.

¹⁹ The ERPCs will manage only the flow of entering migrants and not those already on EU territory.

Proposal 16

In each ERPC, open offices of the various national authorities so that asylum applications of people present can be handled and so that those who receive protection can be transferred to the Member State that has granted it.

In order to simplify the system, several organizational elements will be set up:

- a) Some national authorities will be able to delegate their representation in ERPCs to others through bilateral agreements of mutual assistance and cooperation. The delegate authorities will then act in the name of and on behalf of the delegating authorities. Such agreements, based on mutual trust and made possible by the expression of European guidelines on the criteria to be applied, should be encouraged, in order to limit the number of authorities present (and thus of offices established) within a single ERPC.
- b) The national authorities that choose not to send any of their agents, even though they were invited to do so, will be considered as having accepted that the proceedings be handled in their name and on their behalf by the national authority on whose territory the ERPC is established. They will accept the resulting assignments of refugees, after possible equalization.
- c) Electronic systems will be developed. In France, OFPRA already holds interviews via video-conferencing, and the French National Court of Asylum has video hearings.
- d) The work of authorized NGOs will be facilitated. In particular, these organizations will be able to act within the ERPCs to provide

information to asylum seekers, to help with writing “life stories,” or even to prepare appeals of negative decisions (which already happens in other countries, particularly in Germany). Unlike those who are suspicious of the non-profit world in these matters, fearing an increase of expenses and procedures, we believe that organizations selected for their legal or technical skills (like the NGO La Cimade in France) could on the contrary improve the overall efficiency of the system.

These centers will not be “closed,” and in this regard they will not be containment centers and certainly not internment centers. But asylum seekers will be able to benefit from both tight procedure deadlines and these hosting conditions only if they commit to residing there continuously until the end of the administrative proceedings. Asylum seekers will stay there until the examination of their case is complete and will be prohibited from filing another application with another authority in the EU. One can thus hope to “settle” these populations while their cases are examined and decided upon and to facilitate the monitoring of the individuals in question through the registration measures implemented in this framework.

Alternate option:

Another option could have been envisioned: that of closed centers with the ability to retain asylum applicants for a period of 30 to 40 days. This option would avoid the “evaporation” of a portion of the population in question and contain uncontrollable secondary movements. Moreover, it could meet with the approval of public opinion among those who seek tighter controls. But it raises at least two major difficulties. First of all, confining for such a long time persons who have committed no crime and who are not subject to any removal

order from the territory, even authorized by an order or a European regulation, would risk being rejected by the European Court of Human Rights. Besides, a confinement period of 30 to 40 days is both very long in terms of public freedoms, and certainly too short to cover possible appeal proceedings following a negative decision. This period could thus cover only the initial application procedure. As it cannot be acceptable to deprive people of their right of appeal, they may, after 30 to 40 days, remain on the territory, with freedom of movement, while their appeal is being examined. This situation is particularly applicable to countries such as France, where the appeal process has a suspensive effect. The risk of applicants scattering, which we were seeking to prevent, would only be postponed. That is why we are favoring a method based more on encouragement.

This emergency system dedicated to rescued at sea could be rapidly implemented without requiring an amendment to the Dublin Regulation, since its article 17 already provides for the possibility of an exemption.²⁰ It would be sufficient to establish that this exemption is applicable to persons who file their asylum applications in an ERPC. Those who would leave the ERPC while their cases are being processed, thus breaking their commitment, would no longer benefit from the advantages of the reception and accelerated procedures offered by these centers. However, they would not be excluded from the ability to file an asylum application through ordinary channels, but such a request would fall under the national authority

²⁰ "By way of derogation from article 3, paragraph 1, each Member State may decide to examine an application for international protection lodged with it by a national from a third-party country or a stateless person, even if such examination is not its responsibility under the criteria laid down in this regulation." / "The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility."

where the ERPC is set up, which would then be considered the “country of initial entry.” The number of people concerned, i.e. those who would flee the ERPC in order to file an application according to the normal procedure, should not be very high. In fact, those who would leave would in all probability be those who have little faith in their chances of obtaining international protection and who are unlikely to file their “new” application with the local authority managing the ERPC. Ultimately, it should produce only a small number of “Dublinized” arrivals.²¹ However, informing the police authorities of their departure will allow for implementing possible measures for removal.

When the asylum application has been examined, the applicant can appeal an unfavorable decision that may be issued or file a residence application on a different basis (in the latter case, fulfilling the obligation to leave the territory that may have been communicated to them can be postponed, but only on the initiative of the appropriate administration). The appropriate judges in case of appeal of decisions issued by the national offices will be those of the authority that rejected the asylum application and not those of the country where the ERPC is located. An asylum applicant who appeals will agree once more to remain continuously within the center if they wish to see their appeal processed within a time period that authorities will strive to limit to a maximum of 6 additional weeks.

²¹ The “Dublinized” arrivals are the asylum applicants in an EU Member State who, after entering the EU through another country, are sent back there. This removal would become unnecessary in the cases of asylum applicants at ERPCs.

Negative decisions by a national authority (after being confirmed on appeal, if necessary) will immediately be recognized as such by all other national authorities (no double or triple examination is possible, in keeping with the Dublin Regulation), and incorporated into a European file made available to other Member States, in order to avoid “asylum shopping”. The principle controlling relations between Member States concerning asylum decisions will thus remain asymmetrical: “Everyone says yes for himself, but not for everyone else” (modulo the States’ discretionary clause). However, we could, in what we hope will be the near future, combine granting protection to refugees with the right to move, stay, and settle in the entire EU, but disconnected from the specific social entitlements offered to recipients of asylum in the country that granted asylum (see 3.1.7).

At the same time, these centers will also fulfill other functions. The idea is to make them multi-purpose organizations, intended to facilitate the integration of refugees:

- a) Those arriving at the centers will first go through a security check (terrorism, trafficking, etc.) performed by specialized agents (in theory, agents of the Member State where the ERPC is located, possibly in the presence of a Frontex agent, with an obligation to share the collected information) before any other procedure. They can also be interviewed regarding their means of travel (so that information can be collected on smuggling networks).
- b) A medical check-up will be performed and treatment will be provided, first of all in the interest of the migrants, whose health situation is sometimes disastrous after a trying journey, but also in the interest of the host communities (preventative medicine, vaccinations, etc.).

- c) The people who are received, even before the outcome of the procedure is known, can inform authorized social workers or the appropriate government agents of their professional experience and qualifications, in order to prepare their future integration process as soon as they are allowed to access employment.

For all these reasons, the ERPCs will have to be able to house and coordinate a wide variety of participants, as is observed in the German welcome centers.

Non-Mediterranean Member States who refuse to participate in the activity of the ERPCs will not necessarily be required to do so, but will be obliged to:

- a) agree to welcome, up to a limit of 20% of the portion that should have been theirs according to the general distribution key,²² all the refugees who will be admitted by the appropriate national authority or “relocated” by the European regulator, and who have in addition expressed the desire to settle in that country;
- b) assume significant material and financial compensation, in keeping with the principle of “differentiated shared responsibility,” so that no Member State can totally avoid the required solidarity that is an inherent part of the European project. This material and financial compensation should be of equal value to the average costs of receiving the refugees that the country in question will not receive, increased by a factor of 2 as a penalty and additional contribution to the proper functioning of European solidarity.

²² Distribution key whose components will be population, GDP per capita, and unemployment rate (for example, 45% / 45% / 15%).

The establishment of ERPCs will also allow for shared management of the situation of rejected applicants. Rejected applicants who have not chosen to appeal or who have exhausted the legal means of entering European territory will have to be sent back to their country of origin. It will then be necessary to request their readmission. For everyone whose application is rejected in an ERPC, the EU will contact the countries of origin to request and plan their readmission, in keeping with the arrangements described above (3.1.3 and 3.1.4).

Some rejected applicants who are not readmitted to their country of origin will remain on EU territory, as is already the case today.²³ It cannot be possible to contain them in “internment camps” on EU soil, as this would be a breach of the legislation of several Member States. There will thus still be a risk, for the States housing ERPCs, of having rejected asylum applicants moving about on their territory, a large part of whom will end up being foreigners residing there illegally.

But this risk will certainly be much lower than in the current situation, for several reasons:

- a) Initially dividing the applicants according to a principle of quantitative fairness among Mediterranean States will dilute this risk among several destinations through Euro-Mediterranean solidarity;

²³ Each Member State will preserve the possibility of granting asylum to some of them in a discretionary manner, on the basis of the country's internal regulations, for example the “constitutional right to asylum” in France (see decision n°93-325 of the Constitutional Council of August 13, 1993, concerning the “Pasqua” law and the Council of State opinion n°394206 of February 15, 2018, concerning the “Collomb” law).

- b) Establishing upstream measures (see 3.1.6) will reduce the incoming flow of migrants without relying on the type of “warehousing agreements” that we have criticized (see above part 2) ;
- c) The ERPCs will have a limited number of spaces so that every Mediterranean Member State will be able to evaluate the nature of this “risk” in advance. Additionally, we should recall that, due to secondary movements across the EU, this risk already exists (France does not receive any direct flow of migrants rescued at sea but has experienced the phenomenon of “secondary movements,” especially from Italy or Germany).

We are aware that setting up this system on a large scale in a short period of time would raise significant material, practical, and logistical difficulties. This is why we suggest testing it out in a more localized fashion, either by opening some ERPCs along each of the three large Mediterranean maritime routes and by limiting the total capacity of the system to 20,000 applicants per year, or by setting it up on a sub-regional scale along the “central Mediterranean” route (mainly around Malta and Italy).

In the latter case, Spain, France, Italy, and Malta would be asked to host on their soil a minimum of one ERPC each, financed by the EU. This Euro-Mediterranean solidarity in hosting asylum seekers would be accompanied, as previously stated, by solidarity with other Member States in examining applicants and redistributing the accepted refugees, with each ERPC hosting a minimum of ten national offices (or multinational offices in case of agreements between Member States).

Assuming that each ERPC has 300 places (or a little more than 100,000 overnight stays per year) and that the length of the average stay is 25 days for the processing of each application and 42 additional days (six weeks) for those who appeal (assuming an initial acceptance rate of 35% and an appeal rate of 50%), each ERPC would be able to receive and process almost 2,700 cases per year. With a minimum of 4 ERPCs set up in the 4 countries under consideration, we could process a flow of approximately 11,000 asylum seekers. If this system turns out to be convincing, it could soon increase its load. Each of these variables can of course be adjusted in one direction or the other: the flow of arrivals (number of consenting people), length of stay (number of people leaving before the end of a procedure, efficiency of processing, etc.), capacities of each center, admission rate, etc. But, overall, a regional experiment with a quota of 10,000 asylum applicants appears completely feasible in a short time period.

At this stage, the details of the arrangement are less important than simply establishing a new system of European solidarity. A system that does not overwhelm the “front-line” countries with all the burden, but does not remove their responsibility either. A system that calls on the active participation of the countries behind the “front lines”, but allows them to receive only those recognized as refugees. A system that puts a stop to the aberrations of the Dublin system without requiring a new regulation in the short term. Finally, a system that gives uncooperative countries the possibility of pulling back, but at the cost of a minimum level of participation and ensuing financial contributions.

APPENDICES

APPENDIX 1: Glossary

Asylum

Asylum is legal protection granted by a host State to a person who seeks protection due to fears of being persecuted or exposed to a threat in their country. The person who benefits from the right to asylum then obtains the refugee status.

Refugee

According to the Geneva Convention of July 28, 1951 (Article 1A2), a refugee is a person who is located outside the country of their nationality or where they have their habitual residence; who has founded fear of being persecuted due to the community they belong to, their religion, their nationality, membership in a certain social group, or political opinions, and is unwilling to avail themselves of the protection of that country or return there due to the aforementioned fear.

According to the terms of the Constitution's preamble, the status of refugee is attributed *"to any person persecuted due to their actions in support of freedom."*

Finally, any person on whom the UNHCR exercises its mandate is considered a refugee.

In France, refugee status is granted by OFPRA on the basis of one of these definitions.

Persons recognized as refugees are placed under the legal and administrative protection of OFPRA and receive a residence permit that is valid for ten years.

Asylum Applicants

Persons attempting to obtain refugee status.

International Protection

International protection is protection granted by a State to an asylum seeker due to the granting of international refugee status or subsidiary protection.

Subsidiary Protection

Subsidiary protection can be granted to any person who does not meet the conditions for receiving refugee status but who establishes that they are exposed:

- To the death penalty or execution,
- To torture or inhumane or degrading treatment,
- To a serious individual threat against their life or person due to violence resulting from an internal or international armed conflict, which can extend to people without consideration of their personal situation.

The term “subsidiary” means that the asylum application is first examined in light of the admission criteria for refugee status.

A temporary residence permit for one year that is renewable is issued to the foreigner who has obtained subsidiary protection.

Resettlement

Refugees are identified by UNHCR as needing resettlement when they are subjected to a risk in their country of refuge, have special needs, or are vulnerable. Resettlement thus consists in transfer to another country of refuge.

Relocation

Relocation is the transfer of persons having applied for, or already having received, international protection from an EU Member State to another Member State that will grant them similar protection.

APPENDIX 2: estimation of the cost of the proposals set out in this report

Proposed measures	Measures with a cost for Member States	Measures with a cost for the EU budget
Transforming European asylum agencies into independent authorities	X	
Establishing the Office for the Right to Asylum in Europe (ORAE)		X
Establishing an additional chamber in the General Court of the EU		X
Strengthening the services of consulates and embassies in countries of transit to begin processing asylum applications	X	
Reducing time periods for processing asylum applications	X	
Access to national social benefits as soon as the application is being processed	XX	
Increasing language instruction	XX	
Establishing European Receiving and Processing Centers (ERPCs)	X	XX
Strengthening the efficiency of the removal of rejected asylum seekers		XX
Transferring the asylum seekers to the authorities of the Member State to which they applied		XX

1. Transforming European asylum agencies into independent authorities

The independent administrative authorities are involved in a wide variety of areas, with the main goals of preserving certain freedoms and regulating economic sectors. In addition to budgetary resources of varying scope, these authorities have fairly extensive managerial autonomy. Salaries and the type of hiring (civil servants with appropriate employment status or contractors) are not fixed.

In 2017, according to the Court of Auditors, the 26 independent administrative authorities that exist in France had a budget of €230.17 million, for an average cost of €8.8 million. The job ceiling was 3,267 full-time equivalents working for these institutions.

OFPPA is currently a public administrative institution over which the Ministry of the Interior exercises administrative and financial supervision, also known as an “operator.” Its budget was €287.5 million in 2017, with a significant increase in 2018 to €392.2 million. Over three quarters of this amount corresponds to transfer expenses paid to the French Office for Immigration and Integration to cover the costs of managing the allocation of asylum seekers. Funding for public service costs, which correspond to the institution’s budget in the strict sense, is €69.9 million pour 2018. 690 agents work for OFPPA.

➔ In theory, the transformation into an independent administrative authority should not produce any additional cost for OFPPA, whose resources are already independent to a large extent.

- However, it is possible that it would lead to significant additional costs for member states in which asylum applications are handled by ministerial departments. To a large extent, this will depend on the status of the civil servants in the State in question (ability to relocate agents effectively despite their status or not).
- Additionally, we observe that the status of independent administrative authorities can produce additional costs due to the reduction in resources offered to the managers of the program in terms of fungibility and the greater freedom of action offered to these leaders, particularly in terms of salary. However, it can be contained if appropriate measures are implemented.
- We did not calculate the costs of the asylum seekers' transfer, from the country of first entry into EU territory to the Member State to which they want to apply, as we lacked the data regarding the number of people involved. The costs should be covered by the EU.

2. Establishing the ORAE

ORAE will have to include a minimum of a hundred agents (in the short term) to accomplish the tasks that are entrusted to it. With an annual cost estimated at €52K per agent, the establishment of the agency should cost at least €5.2 million.

The cost of establishing ORAE can also be estimated based on the cost of establishing similar agencies. For example, Europol, which was established in the early 1990s, had a budget of 360 million francs in the early 2000s, or around €60 million.

It is likely that, including expenses of IT management, operating

costs, the possible establishment of liaison officers, and foreign assignment costs, ORAE's budget will be between €20 and 40 million per year (which would still be lower than the budget of the national authorities of a Member State such as France).

3. Establishing an additional chamber in the General Court of the European Union

We propose establishing an additional chamber in the General Court of the EU that would be in charge of examining appeals of decisions on asylum applications.

Approximately 1.8% of the decisions of the National Court for the Right to Asylum are appealed before the Council of State, which examines approximately 800 cases per year. By multiplying this figure by 8, we can estimate the number of cases that will be examined by this specialized chamber at 6,400 for the entire EU.

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By way of comparison, the EU Civil Service Tribunal handled 150 cases per year and was made up of 7 judges. We can consider that appeals of decisions by the national authorities in charge of examining asylum applications will be more similar to those of general lawsuits, and that the European judges in charge of handling them may see three times more.

It will thus be necessary to hire a hundred judges and twenty support staff to ensure a follow-up of these cases. Estimating the salary of judges in this new specialized chamber at €80K, we therefore estimate the annual cost of the chamber at €1.2 million annually (€800K in judges' salaries and €400K in operating costs and support staff salaries).

4. Strengthening the services of consulates and embassies in countries of transit

A consular services agent handles on average 2,000 to 10,000 visa applications per year. An agent of OFPRA handles on average 166 asylum applications per year.

Excepting the 2015 crisis period, there are approximately 150,000 illegal crossings of the European border. Approximately 30% of them could probably be avoided by handling asylum applications in the embassies or consulates of Member States. The objective would thus be to process 45,000 applications in European embassies, particularly those located in Tunisia, Algeria, Morocco, Egypt, Jordan, Lebanon, Turkey, and possibly the Balkans.

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If the twenty-seven countries of the EU participated in this policy, each diplomatic and consular network would be able to handle 1,666 applications per year, which corresponds to the hiring of 10 “asylum attachés” per Member State.

In terms of the French system, the cost of a full-time equivalent in the A or A+ category in the embassies in the Mediterranean region is approximately €90K per year, with significant variations according to the salary scales applied by the Ministry of Foreign Affairs and the family situation of the agents.

This measure would cost around €1 million per Member State if applications were divided in perfectly equitable fashion. As this is unrealistic, we can use an approximate figure of €27 million for the whole EU, with the methods of financing this additional cost to be discussed.

5. Reducing time periods for processing asylum applications

In 2017, the time frame for processing applications was significantly higher than the target: 449 days in normal proceedings (or 209 days more than the target) and 228 days in accelerated proceedings.

In 2018, OFPRA received 15 full-time equivalents and a budget increase of 6.8% – or an additional €4.26 million – to reduce its number of cases with a backlog of over two months to zero (or 240 days of processing in all in certain cases, with appeal to the National Court for the Right to Asylum).

While these additional resources were not adequate for reducing the time periods considering the ongoing large number of applications, we should plan for a new increase in OFPRA's budget in the coming years of the same size recorded in 2018 (approximately €4 million).

6. Creating a minimum set of rights for refugees

Improving access to language instruction

The contract of integration into the French Republic currently includes three different tracks of 50, 100, or 200 hours of instruction offered for free to foreigners who do not speak French when they arrive on national territory. The cost of one hour of instruction is estimated at €15.²⁴

²⁴ Report n°660 by Mr. Roger Karoutchi, "Migrants : les échecs de l'apprentissage du français et des valeurs civiques", produced on behalf of the finance commission of the Senate and filed on July 19, 2017. The cost of language instruction for those who sign the contract of integration into the French Republic ranges between €500 and 3,000. The sum of €3,000 corresponds to the cost of instruction proposed in French Guiana.

Considering that there were approximately 100,000 asylum applicants in France in 2017, and that we can expect, applying the percentages observed for those who sign contracts of integration into the French Republic, that approximately 56% of them are not proficient in French upon arriving on the territory, the target population represents around 56,000 individuals in 2017. Considering that French classes are currently offered to refugees only once their application is accepted, it would be necessary to create entirely new offerings.

A package of fifty hours of instruction, with personalized follow-up and materials, would cost approximately €750 per applicant. The cost of this instruction for all applicants would be approximately €42 million.

Access to health care as soon as the application is being processed

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A health check-up, with an average cost of €40, is already provided by the French Office for Immigration and Integration to all foreigners arriving on French territory. It is also envisaged that all asylum applicants have access to universal health coverage including coverage for low-income individuals as soon as the application is filed upon presentation of their notification. In practice, asylum applicants who have not been granted residence (those in Dublin proceedings before their transfer, for example) cannot access coverage for low-income individuals.

We propose expanding the benefit of health coverage for low-income individuals to Dublinized asylum applicants.

In 2017, 41,500 asylum applicants were placed in Dublin proceedings, including 5,500 minors (who already receive full health

coverage). The target population thus represents approximately 40,000 people per year, for a length of at least 6 months (time for transfer to the responsible country and examination of the application).

In 2015, the budget of the low-income health fund was €2.46 billion for 5.5 million beneficiaries. The average cost is thus €447 per beneficiary for an entire year, or €223.50 for 6 months.

The opening of the low-income health fund to asylum applicants in Dublin proceedings would cost approximately €8.94 million.

We could also plan on creating a “health care package” with a value of €100 for asylum applicants who have just filed their application and who have difficulties actually obtaining the medical care benefit to which they are entitled. This package would allow, for example, to finance assistance in taking the appropriate steps and possibly interpretation costs.

The cost of this measure would be €10 million.

7. ERPCs

Reminder:

We are planning to set up 4 ERPCs with capacity of 300 in 4 EU countries. The ERPCs staff must in particular include agents in charge of security (possibly Frontex agents), social workers, doctors, an adequate number of interpreters, and protection officers from each of the EU countries, grouped in national offices.

In order to guarantee optimal conditions, the cost of one night in an ERPC must be appreciably higher than that of one night in a welcome center for asylum seekers. The latter cost being €18.9 (in France), we can envision an additional cost of 30%, which would bring the cost of one night to approximately €25 per applicant (including lodging, maintenance, food, clothing, etc.). Considering that 100,000 nightly stays per ERPC are anticipated, the operating costs would be €2.5 million euros annually per ERPC.

The costs of interpretation and health care can be estimated based on the costs observed in the immigrant detention centers (which will have to be doubled, as their capacity is limited to 140).

- For an immigrant detention center, interpretation expenses are €95,384 annually. For an ERPC, they should therefore be approximately €200,000 annually.
- For an immigrant detention center, social support and health care expenses are €311,539. For an ERPC, they should therefore be approximately €600,000 annually.

Finally, each ERPC will have 2,700 asylum applications to handle per year. Considering that a protection officer handles an average of 166 per year, we will need at least 16 agents from the national authorities to be assigned to each ERPC. As it would be preferable for each Member State to be represented, we can consider that this figure represents a “full-time equivalent employee” and not the number of officers actually working in the ERPCs. If we estimate each salary at €20K annually, with an increase to €30K annually due to geographical distance, there is an additional cost of €320,000 per ERPC.

Specific protection and security costs must be anticipated, and could result in additional expenses of €100,000.

The cost of building an emergency housing center is approximately €2 million for 30 people (the Alba center in Corsica is an example). The construction of an ERPC for 300 refugees should thus be close to €20 million. Of course, existing buildings could be used, but it is very likely that this would do quite little to reduce the costs, as the needs of the ERPCs are very specific.

Project management assistance will be needed in order to define as soon as possible the specifications of the ERPCs, to be approved by the European Commission and communicated to Member States.

In all, building the ERPCs will cost approximately €80 million. The annual operating costs of these centers will be close to €4 million.

8. Reinforcing the efficiency of the removal of rejected asylum seekers

We propose to ensure that the rejected asylum seekers are removed from EU territory by charging to the EU budget expenditure arising from the costs of a more efficient policy.

Currently in France, around 20% of irregular migrants (among whom are rejected asylum seekers) are in fact subject to a removal order (among which 5% of assisted returns). This ratio could be considered to be equivalent to that of rejected asylum seekers, as well as similar to that in the other Member States. Therefore, it should be envisaged to charge to the EU budget expenditure arising from the costs of the

removal of 80% of rejected asylum seekers. Considering that the number of asylum applications have been decreasing since 2016, we could imagine that 400,000 asylum requests will be annually filed in the EU between 2018 and 2022. By considering that around 50% asylum requests are rejected, but that around 10% of the rejected asylum seekers may be granted another residence permit, the target population is evaluated at 180,000 people. As an estimated 20% of people are already taken care of by the Member States, the EU would have to ensure that 144,000 people are sent back to their country annually.

Forcibly returning rejected asylum seekers costs around €2,500.²⁵ As the cost of a voluntary assisted return is lower, we could estimate the high range of that measure by keeping this number.

For the EU budget, the cost of a perfectly efficient policy of return of rejected asylum seekers is thus estimated at €360 million.

²⁵ Estimate based on the figures in the annual performance report of the “immigration and asylum” program 303.

Estimation of the cost of the measures proposed in the report (annual cost in millions of euros)

Please note: The French population represents 12% of the European population. The cost of a measure for all Member States is thus estimated by multiplying the estimated cost for France by 8 (except for the cost of strengthening the services of consulates and embassies, which is calculated considering that the measure is financed equally by all Member States).

Proposed measures	Estimate of cost for France	Estimate of cost for all Member States	Estimate of cost for EU budget
Transforming European asylum agencies into independent authorities	€0 million	€0 million	€0 million
Establishing the Office for the Right to Asylum in Europe (ORAE)	-	-	€30 million
Establishing an additional chamber in the Court of the EU	-	-	€1.2 million
Strengthening the services of consulates and embassies in countries of transit to begin processing asylum applications	€1 million	€27 million	-
Reducing time periods for processing asylum applications	€4 million	€32 million	-

Proposed measures	Estimate of cost for France	Estimate of cost for all Member States	Estimate of cost for EU budget
Access to national social benefits as soon as the application is being processed	€10 million	€80 million	-
Increasing language instruction	€42 million	€336 million	-
Establishing European Receiving and Processing Centers (ERPCs)	-	-	€4 million/year (+ €80 million of initial investment in total)
Taking care of the removal of rejected asylum seekers	-	-	€360 million
Total	€57 million	€475 million	€475,2 million

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Saving the Right to Asylum

The right to asylum in the European Union is in danger. The number of asylum requests in Europe – 4 million between 2013 and 2017 – has declined but political tensions between Member States are growing. The joint report by the Institut Montaigne and Terra Nova calls for overhauling the European asylum policy and for a rapid, unified response to the humanitarian emergency in the Mediterranean.

The solutions that have been proposed so far to resolve the difficulties linked to the Dublin Regulation are inadequate, and some of them are simply unacceptable. The current situation clearly plays into the hands of some governments and political parties which, instead of seeking new solutions, are banking on the crisis becoming worse and are ready to sacrifice European unity in the interest of elections. In order to emerge from this deadlock and to save the right to asylum in Europe, this report puts forth 16 concrete and well thought out proposals.

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