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COMMENTARY

Rejections at the Border: A Derailed Debate with the Potential to Destroy the European Union[1]

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Abstract

The migration debate has become even more heated since the admission of refugees from Ukraine and the simultaneous general humanitarian and irregular migration pressure. It impacts national and European discourses as well as election results, government constellations and policies. In Germany, a dispute has arisen over the implementation of rejection of asylum seekers at internal borders. This has the potential to indirectly jeopardise the Common European Asylum System as well as the Schengen freedom of movement in Europe as a whole and eventually the European project itself. The following article aims to familiarise a European and international readership with the explosive force of this debate.

Key Words:

EU Law; Dublin III; national sovereignty; asylum seekers; rejection

1 Introduction

Since the mass influx of refugees in 2014-2016, migration and its management has been a core issue that has dominated elections and discourses in Europe. The flight of several million Ukrainians to the European receiving countries has updated and further intensified the debate. Right-wing parties have emerged or strengthened. The public debate has become polarised, brutalised and in some cases dehumanised. Institutions and people feel overwhelmed. The dysfunctional European asylum responsibility system Dublin III and its supremacy over national border regimes is no longer understood by the population. Member states are further undermining the system by ignoring and profiting from systemic deficiencies related to reception conditions and asylum procedures. In Germany, an asylum debate is intensifying that could have repercussions for the entire European Union (EU). Many are no longer struggling to find strategies that comply with European law, but are instead turning away from European rules or intentionally accepting their violation knowing that European control and sanction mechanisms are mostly slow and sometimes inefficient. The effects will be pan-European and threaten to shake the EU to its core - which is also the aim of its internal and external opponents.

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The intention of this article is therefore to Europeanise the German debate, because this corresponds to its actual dimension and solutions can only be found at a pan-European level. Firstly, the explosive force of the current discussion is outlined (2.), then an overview of the requirements and functioning of the European asylum responsibility system is given (3.), the legal arguments in favour of refoulement at borders are examined (4.) before alternatives are suggested (5.), and finally a summary with an outlook is given (6.). The discussion focusses on persons seeking international protection or German constitutional asylum at the border. Possibilities of refoulement under the Schengen Borders Code in relation to other migrants are therefore only recalled here but not further elaborated. The relevant Schengen Borders Code declares that the transfer procedure regulated therein does not apply to persons who have applied for international protection, see Art. 23a para. 1 subpara. 2 of Regulation (EU) 2024/1717.

2 Current German Debate and its Explosive Potentials for Europe

If Dublin III were to function according to the rules, this would lead to the final collapse of the asylum systems at the external borders in the south and east of the EU and, as a result, to further political radicalisation. This is because it almost purely relies on the responsibility of the border states for securing the common external borders and - on paper - relieves the burden on the often economically and financially stronger Member States of Central and Northern Europe. Nevertheless, the new EU migration pact of 2024 leaves the Dublin responsibility system untouched at its core. It relies on an even more extensive shift of responsibilities to the external borders and a complex compensatory solidarity mechanism; whether it will ever be effectively implemented remains to be seen but is already put in question by certain Member States (Roßkopf, 2024: 186-188). Hardly anyone in politics is likely to hope that this would lead to a fairer distribution, a functioning system and a pacification of public discourse.

The legal complexity of the multi-level system is incomprehensible to the population. However, the failure of the system is "felt" and discredits trust in established parties, institutions and the state. This makes the simplistic slogans of right-wing and left-wing parties all the more receptive. Their sometimes inhuman basic assumptions become are about to develop into mainstream. The elections of the last decade in the Member States are a clear evidence. At EU level, the 2024 European elections were the latest proof. In the Netherlands, the new right-wing government just announced its plan to declare an asylum crisis, tighten border controls, introduce the strictest asylum procedure ever and apply for an opt-out from the European asylum rules (Kazmierczak, 2024). In Germany, the Election for the European Parliament was followed by elections in federal States, from which the far-right Alternative for Germany (Alternative für Deutschland – AfD) party emerged as the strongest party in Thuringia and narrowly missed out on this goal in Saxony; forecasts see it coming first in the upcoming election in the State of Brandenburg.

Against this backdrop, the governing coalition in Germany (SPD, Greens, FDP) is backing the reintroduction of continuous border controls, extended detention and accelerated transfer procedures (Litschko, 2024) after a long period of resistance. The largest opposition group (CDU/CSU) additionally insists on the immediate rejection at German borders of people who have already been accepted in another EU Member State or the Schengen Area or who can also apply for asylum in a country from which they wish to enter (Deutscher Bundestag, 2024). Dogmatically, it does not argue outside of EU law, but rather within EU law by relying on Art. 72 of the Treaty on the Functioning of the EU (TFEU)

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(Thym, 2024). Those who see a basis for rejections in Art. 20 para. 4 Dublin III Regulation argue in a similar way, based on the primacy of European law. Others, on the other hand, see the systemic failure of European law as a justification for disregarding it and resorting to purely national border protection regulations (Fritzsch & Haefeli, 2024).

The German debate has European significance. Whatever the justification for the rejections at Germany's borders, considering the sheer absolute number of applicants destined to go to Germany, they are more than likely to trigger a domino effect on the other Member States – just as the introduction of the safe third country approach by Germany did in the 1990s. It is to be expected that Germany's neighbouring states would eventually resort to the same means. This would conceptually achieve the transfer of responsibilities to the external borders intended by the Dublin III Regulation - and at the same time in reality the complete collapse of the asylum system there, of humanitarian reception standards, of Member State solidarity and thus of a European asylum responsibility system.

In reality, however, this presupposes that the rejected persons are then treated by the respective neighbouring states in accordance with the applicable provisions of the Asylum Responsibility System. However, experience to date suggests that those applicants affected would continue to try to cross the green border into their destination country without being prevented from doing so by the neighbouring countries. The goal of easing the situation could therefore only be achieved by further expanding border controls, border facilities and border surveillance at Europe's internal borders. However, this would be the definitive end of a border control-free Schengen Area and thus the end of one of the main arguments in favour of a Europeanised asylum law as a whole (see also Rat für Migration, 2024).

The shocks that are to be expected from the collapse of these achievements of the European idea will hardly be limited to the migration context. They have the potential to throw the basic architecture of the EU back from a supranational community to an international organisation oriented towards the respective national self-interests. Frankly, this is the real goal of the various alliances of European right-wing parties and the hope of the economic, political and military opponents of the European Union globally. In the end, this desolidarisation would not stay limited to nationals of third countries. It is likely to eventually spread to nationals of other Member States, too. The often forgotten and at the same time so successful essence of the European Union, the establishment of a European peace order through supranational integration, would be jeopardised.

3 The Requirements of the European Asylum Responsibility System

The European asylum responsibility system is currently governed by the Dublin III Regulation (EU) No. 604/2013 of 26 June 2013 (Dublin III Regulation) and in future by the Management Regulation (EU) 2024/1351 of 14 May 2024 (Management Regulation). The latter leaves the core of the Dublin III Regulation fundamentally unaffected and, in its parts relevant here, will essentially only enter into force on 1 July 2026 (Art. 85 Management Regulation). The following explanations are therefore based on the Dublin III Regulation.

This

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> "lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person"

(Art. 1 Dublin III Regulation). In this respect, it promises that every application for international protection will be examined but only by a single Member State (Art. 3 para. 1 Dublin III Regulation). The criteria for determining the Member State responsible are set out in the order of priority (Art. 7 Dublin III Regulation) in Art. 8-15 Dublin III Regulation. Subject to the proviso that provisions on the protection of minors (Art. 8 Dublin III Regulation) or family protection (Art. 9-11 Dublin III Regulation) are not relevant and no Member State has already issued a residence permit or visa for the applicant, the Member State whose land, sea or air border an applicant from a third country has crossed illegally is generally declared responsible (Art. 13 para. 1 Dublin III Regulation). This gives rise to the main responsibility of the Member States with external borders and the large number of migration routes in the south and south-east of the EU for carrying out the procedure and securing these external borders.

In fact, however, reality shows that many protection seekers move on to other Member States unnoticed, unregistered or even after registering in one of these countries. Germany is the country most affected by this in absolute terms. In 2022, three quarters of the 217,774 first-time applicants in Germany had not yet been registered in any EU country, although almost all of them travelled via these countries (Reiche, 2024).

The Dublin III Regulation is not blind to this but establishes a formal admission and readmission procedure. However, this provides for relatively long deadlines of generally three months or, in the case of a Eurodac match, two months for the request to take charge (Art. 21 para. 1 Dublin III Regulation) or for the request to take back (Art. 23 Dublin III Regulation) regularly two months or, in urgent procedures, one month for the response to the request to take charge (Art. 22 para. 1 and 6 Dublin III Regulation) or one month or, in the case of a Eurodac match, two weeks for the response to the request to take back (Art. 25 Dublin III Regulation). There is a right of appeal against the transfer decision (Art. 27 Dublin III Regulation). The transfer itself should take place as soon as this is practically possible and at the latest within a period of six months after the acceptance of the application to take charge or take back, or a final decision on an appeal or a review, if these have suspensive effect (Art. 27 para. 3 Dublin III Regulation) (Art. 29 para. 1 Dublin III Regulation). If the aforementioned deadlines are not met, responsibility is transferred to the defaulting Member State. Additionally, the procedure is highly dependent on the cooperation and compliant registration by the Member States, which is often lacking in practice (see above) and therefore leads to the State of residence assuming responsibility once the deadline expires.

Furthermore, a transfer to the Member State actually responsible cannot take place if there are substantial grounds for believing that the asylum procedure and the reception conditions for applicants in this Member State have systemic weaknesses that entail a risk of inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights. In this case, the Member State examining responsibility continues the examination of the criteria set out in Chapter III in order to determine whether another Member State can be designated as responsible and, in case of doubt, becomes responsible itself (Art. 3 para. 2 subparas. 2 and 3 Dublin III Regulation). Conversely, if the violations of the law are not sanctioned immediately and consistently, this exception,

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which is required under human rights law, creates a false incentive for the Member State with a systemic problem (thereby violating its obligations under European law) not to remedy the irregularities in the first place. The fact that this is not happening to a sufficient extent in the case of Greece, even after a decade, can at best be explained but never be justified by referring to the financial and economic situation there, unless one wants to assume that the catastrophic humanitarian conditions at the external borders are intended to serve as a deterrent.

The asylum responsibility system, itself, provides for a separate mechanism for early warning, prevention and crisis management involving the European Commission and the European Union Agency for Asylum (Art. 33 Dublin III Regulation), which should provide a remedy. In addition, infringement proceedings could be initiated by both the European Commission (Art. 258 of the Treaty on the Functioning of the European Union - TFEU) and the other Member States (Art. 259 TFEU).

As part of EU law, the regulations of the European asylum responsibility system described above have priority of application compared to national laws. This is not only established case law of the European Court of Justice (see below) but also accepted by the Federal Constitutional Court (Federal Constitutional Court [Bundesverfassungsgericht – BverfG], Decision of 22 October 1986, 2 BvR 197/83); the exception made by the Court for the case of insufficient protection of fundamental rights at Union level is currently neither applicable nor conceivably relevant in the cases discussed here. The Basic Law itself gives priority not only indirectly to the obligation of the Federal Republic to participate in the development of a European Union, which is committed to democratic, constitutional, social and federal principles and to the principle of subsidiarity, in order to realise a united Europe, and which guarantees a protection of fundamental rights that is essentially comparable to this Basic Law (Art. 23 para. 1 Basic Law [Grundgesetz – GG]). Specifically in the area of the fundamental right to asylum, the primacy of relevant European law is expressly enshrined in Art. 16a para. 5 GG.

4 Rejections at the Border: Analysing the Legal Argumentation

There are essentially four lines of argumentation for the legal justification of intended refoulement at the borders with corresponding variations. These have already been analysed in detail by Markus Rau (2018) and can be followed up there in all their ramifications. Thus, when analysing the interpretative approaches below for their justifiability, the explanations will be limited to the main lines of thought, citing recent literature. Assuming for the sake of argument that these lines of argument were in fact convincing and rejections could be applied, the minimum human rights standards to be observed are outlined in conclusion. They could impair the efficiency and often intended deterrent effect of envisioned rejections.

4.1 Lines of Argument

4.1.1 Justified Recourse to National Regulations due to System Failure

Some argue that recourse to national regulations for the implementation of refoulement (in Germany: Section 18 (2) Asylum Procedure Act) is justified because the European asylum responsibility system has lost its priority of application due to its failure already referred to (most recently Fritzsch & Haefeli, 2024).

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However, such a reservation of sovereignty would not only be contourless and arbitrary. It would contradict the primacy of application of EU law, the Basic Law as well as the case law of the European Court of Justice and the Federal Constitutional Court (see 3. above). For example, the ECJ, Judgement of 26/7/2024, C-646/16, paras. 93-100, stated that the Dublin regulations would also have to be complied with in the event of a mass influx and an overburdening of the Member State responsible:

> "The fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the interpretation or application of Article 13(1) of the Dublin III Regulation.
>
> It should be noted, in the first place, that the EU legislature has taken account of the risk that such a situation may occur and therefore provided the Member States with means intended to be capable of responding to that situation appropriately, without, however, providing for the application, in that case, of a specific body of rules for determining the Member State responsible.
>
> Thus, Article 33 of the Dublin III Regulation establishes a mechanism for early warning, preparedness and crisis management designed to implement preventive action plans in order, inter alia, to prevent the application of that regulation being jeopardised due to a substantiated risk of particular pressure being placed on a Member State's asylum system.
>
> In parallel, Article 3(1) of the Dublin III Regulation provides for the application of the procedure established by that regulation to any application for international protection by a third-country national or a stateless person on the territory of any one of the Member States, without precluding applications which are lodged in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection.
>
> In the second place, that type of situation is specifically governed by Directive 2001/55, Article 18 of which states that, in the event of a mass influx of displaced persons, the criteria and mechanisms for deciding which Member State is responsible are to apply.
>
> In the third place, Article 78(3) TFEU empowers the Council of the European Union, on a proposal from the European Commission and after consulting the European Parliament, to adopt provisional measures for the benefit of one or more Member State confronted by an emergency situation characterised by a sudden inflow of third-country nationals.
>
> Accordingly, the Council has previously adopted, on the basis of Article 78(3) TFEU, Council Decisions (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ 2015 L 239, p. 146) and (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).
>
> In the fourth place, irrespective of whether such measures are adopted, the taking charge in a Member State of an unusually large number of third-country nationals seeking international protection may also be facilitated by the exercise by other Member States - unilaterally or bilaterally with the Member State concerned in a spirit of solidarity, which, in accordance with Article 80 TFEU, underlies the Dublin III Regulation - of the power provided for in Article 17(1) of that regulation, to decide to examine applications for international protection lodged with them, even if such examination is not their responsibility under the criteria laid down in that regulation."

Apart from its irrelevance, it would also not be justifiable, as European law provides Germany with sufficient options to counter perceived losses of sovereignty and control. This can be done on several levels: Contractually, by participating in the amendment of primary law; legislatively, by participating in the amendment of secondary law; judicially,

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by initiating infringement proceedings (such as those successfully conducted by the European Commission against Poland, Hungary and the Czech Republic for failing to cooperate in the resettlement of refugees, ECJ, Judgement of 2/4/2020, C-715/17, C-718/17, C-719/17); administratively by speeding up its own procedures or invoking the mechanism provided for early warning, prevention and crisis management, however inadequate they may be (see Wegge, 2024). However, the German government has only just confirmed the existing regulations by approving the migration pact. How could it possibly deviate from them immediately after. It is also not making use of the other existing mechanisms.

4.1.2 Bilateral Administrative Agreements

Some argued that bilateral administrative agreements with neighbouring countries could lead to accelerated procedures and transfers. Germany has indeed concluded some of these. However, these so-called "pre-Dublin procedures" are not covered by European law in accordance with Art. 36 para. 1 of the Dublin III Regulation as they do not merely regulate the practical modalities of implementing the Regulation. Rather, they contradict the Regulation and may therefore not be applied due to the primacy of European law (Wegge, 2024: 129-130; see also VG Munich, decision of 4/5/2021, M 22 E 21.30294, para. 88).

4.1.3 The Responsibility Rule of Art. 20 para. 4 Dublin III Regulation

In some cases, Art. 20 para. 4 Dublin III Regulation is seen as a suitable basis for the implementation of border refoulement. The provision reads:

> "Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged."

In some cases, the provision is only considered applicable to asylum applications in an embassy located in a Member State. Based on the wording and probably also the drafting history, applicability at internal borders cannot be ruled out. However, the scope of application is extremely limited, as it would only apply to cases in which the refusal took place, for example, in the context of joint advanced border controls on the territory of the neighbouring State or directly at the border, while the applicant is still on the territory of the neighbouring state. Only then would the meaning and purpose of the provision be fulfilled, namely to declare the Member State responsible that can exercise effective control over the person on the basis of territorial sovereignty, which would render any transfer procedure with all its formalities and the need for consensus between the Member States involved superfluous. This is also the aim of an EU Commission recommendation on alternatives for border controls (Reiche, 2024; see also on the current status European Commission, 2024).

For the same reason, attempts to reinterpret the "territory" defined under international law for the purposes of applying Article 20(4) of the Dublin III Regulation must be rejected in order to take account of the reality that border controls in the Schengen Area – insofar

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as they (may) still be carried out at all – regularly take place back from the border on national territory (Wegge, 2024).

4.1.4 The Responsibility Rule of Art. 72 TFEU

Art. 72 TFEU, which is subject to the general provisions of Title V of the TFEU, provides a legal basis for the implementation of refoulement that is conceivable in principle under European law, and thus concerns not only policies on border controls, asylum and immigration, but also the provisions on the area of freedom, security and justice in general. It states:

> "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

It would therefore be conceivable in principle to justify refoulement with the aim of maintaining public order and security (Fritzsch & Haefeli, 2024). However, it would have to be taken into account that the regulations of the European asylum responsibility system aim to achieve precisely this. It would therefore have to be an extraordinary crisis situation from the outset (cf. Thym, 2024). As explained above, they themselves and treaty law also provide options for action that can be used to address extraordinary stress and crisis situations or behaviour by other Member States that is in breach of the treaty (Thym, 2013). A justifiable situation therefore first requires that the legally available means are exhausted. Even then, burdens would generally have to be accepted as inherent in the regulations, unless they were so exceptional that the European legislator failed to recognise them in this dimension or apparently did not take them sufficiently into account and additionally are almost unbearable.

The ECJ, Judgement of 2/4/2020, C-715/17, C-718/17 and C-719/17, paras 144-147, explains in this respect:

> "In addition, the derogation provided for in Article 72 TFEU must, as is provided in settled case-law, inter alia in respect of the derogations provided for in Articles 346 and 347 TFEU, be interpreted strictly (see, to that effect, judgments of 15 December 2009, Commission v Denmark, C-461/05, EU:C:2009:783, paragraph 52, and of 4 March 2010, Commission v Portugal, C-38/06, EU:C:2010:108, paragraph 63).
>
> It follows that, although Article 72 TFEU provides that Title V of the Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, it cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities (see, by analogy, judgments of 15 December 2009, Commission v Denmark, C-461/05, EU:C:2009:783, paragraph 53, and of 4 March 2010, Commission v Portugal, C-38/06, EU:C:2010:108, paragraph 64).
>
> The scope of the requirements relating to the maintenance of law and order or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the European Union (see, to that effect, judgments of 11 June 2015, Zh. and O., C-554/13, EU:C:2015:377, paragraph 48, and of 2 May 2018, K. and H.F. (Right of residence and alleged war crimes), C-331/16 and C-366/16, EU:C:2018:296, paragraph 40 and the case-law cited).
>
> It is for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security (see, by analogy, judgments of 15 December 2009, Commission v Denmark, C-461/05, EU:C:2009:783,

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paragraph 55, and of 4 March 2010, Commission v Portugal, C-38/06, EU:C:2010:108, paragraph 66)."

However, the Federal Republic of Germany has not yet activated the other management mechanisms granted to it under European law. On the contrary, this year it has virtually agreed to the extension of the current asylum responsibility system in the form of the Management Regulation. In 2022 and extended since then, it has agreed to accept Ukrainian refugees after activating the special mechanism of the Temporary Protection Directive 2001/55/EC, taking in over a million of them and providing them with benefits that exceed the minimum required under EU law. The resulting burdens can hardly be cited to justify a deviation from European regulations on international protection. Moreover, European law would also leave room for manoeuvre, for example in lowering the national admission requirements to European minimum standards. Finally, the admission of a threat to security and order would also be an admission by the government that it loses control.

In any case, the justifying exceptionality would subsequently have to be demonstrated to the European Commission and the European Court of Justice. No Member State has yet succeeded in doing so by invoking Art. 72 TFEU. No better arguments for exceptional justification can be derived for Germany from the above. Nevertheless, to do so with a view to a judgement by the European Court of Justice at a much later date in the expectation that the deterrent effect could lead to a significant reduction in immigration figures by then (at least pointing to the possibility, Thym, 2024) would not only be based on no solid scientific assumption of the facts (Rat für Migration, 2024), but would also bear traits of an intentional breach of the law.

4.1.5 Interim Result

Refoulement at the German border cannot be justified dogmatically on the basis of system failure or bilateral administrative agreements and, with the exception of joint, border controls on the neighbouring countries side of the border, also not on the basis of Art. 20 para. 4 Dublin III Regulation. As for Art. 72 TFEU, its inherent requirements are not met.

4.2 Minimum Human Rights Standards in Rejection Cases

Even if it is assumed that there was sufficient justification for carrying out refoulements at the border, minimum human rights standards would have to be observed. In particular, the European Court of Human Rights (ECtHR) has derived corresponding requirements for refoulement at territorial borders from the European Convention on Human Rights (ECHR). Germany as a signatory state and the European Union on the basis of primary law (Art. 6 para. 3 of the Treaty on European Union - TEU) are obliged to comply with this Convention.

Actions by border officials or police officers at the land border fall within the scope of the European Convention on Human Rights (Art. 1 ECHR). This applies both to events at border fences erected by the contracting state on its territory (ECtHR, Judgement of 13/2/2020, N.D. and N.T. v. Spain, no. 8675/15 and 8697/15, para. 104-111), as well as to the refusal to accept asylum applications or to deny access at border control (ECtHR, Judgement of 11/12/2018, M.A. and Others v. Lithuania, no. 59793/17, para. 70; ECtHR, Judgement of 23/7/2020, M.K. and Others v. Poland, no. 40503/17, para. 129-132; ECtHR, Judgement of 8/7/2021, D.A. and Others v. Poland, no. 51246/17§§ 33-34).

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Therefore, there is an obligation on the returning state to assess the risk that the rejected asylum seeker (the application does not have to be explicit or formal, ECtHR, Judgement of 23/2/2012, Hirsi Jamaa and Others v. Italy, no. 27765/09, para. 123-136) is granted an adequate asylum procedure and protection from direct or indirect return to his or her country of origin in the neighbouring country without sufficient assessment of the risk of torture or inhuman or degrading treatment or punishment there (ECtHR, Judgement of 14/3/2017, Ilias and Ahmed v. Hungary, no. 47287/15, para. 130-138). To this end, the generally available information about the neighbouring state and its asylum system must be examined in an appropriate manner and on the asylum seeker's own initiative. In addition, the asylum seeker must be given the opportunity to demonstrate that the neighbouring state is not a safe third country in their particular case (ECtHR, Ilias and Ahmed v. Hungary, para. 139-141, 148, 152). This also applies to detention conditions and living conditions if this is precisely what constitutes a danger in the individual case (ECtHR, Ilias and Ahmed v. Hungary, para. 131).

Prohibitions on rejections must also be examined with regard to generally inadequate reception conditions (ECtHR, Judgement of 21/1/2011, M.S.S. v. Belgium and Greece, no. 30696/09, para. 362-368) or with regard to particular vulnerability (ECtHR, Judgement of 4/11/2014, Tarakhel v. Switzerland, no. 29217/12, para. 100-122). Insofar as asylum seekers clearly demonstrate the risk that their asylum application will not be treated seriously in the neighbouring country and that there is a risk of a violation of Art. 3 ECHR, the asylum seeker must be granted residence until the allegations can be properly verified (ECtHR, M.K. and Others v. Poland, para. 178-179). The mere reference to the responsibility of another member state for conducting the asylum procedure in accordance with the provisions of the Dublin III Regulation does not release the rejecting state from an individualised examination of potential violations of the ECHR (ECtHR, Judgement of 21/10/2014, Sharifi and Others v. Italy and Greece, no. 16643/09, para. 223).

Refoulement at the border therefore requires an administrative and documented verification procedure in individual cases. General exceptions for certain groups of particularly vulnerable persons are also conceivable. Germany would not be exempt from this obligation to check with neighbouring countries, even with regard to their status as EU Member States. However, the risk situation could be pre-checked in abstract terms and then concretised and updated on the basis of the individual claims of those seeking protection. As these are all states for which no systemic deficits have currently been identified, the review should be realisable in most cases with a reasonable amount of effort and in a way that will stand up in court.

5 Alternatives: European Solutions

Even if, from a human rights perspective, refoulement at the border appears conceivable and administratively manageable, this presupposes a legal justification for the refoulement in accordance with Art. 72 TFEU that is not yet apparent, as well as the actual acceptance of persons seeking protection by the neighbouring states. Their willingness to do so is likely to be low, at least in the event of uncoordinated measures. In any case, the Austrian Minister of the Interior Gerhard Karner has already positioned himself to this effect (Reiche, 2024).

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What remains beyond the possibilities of demonstrating an extraordinary threat to security and order are measures that – in line with the idea of the European Union – often require coordination and cooperation with the other Member States as well as third countries, some of which could also be implemented by the Federal Government alone. They can only be listed here in rudimentary form and in bullet points:

- Implementation of joint border controls in the territory of neighbouring states
- Initiating infringement proceedings against Member States that do not fulfil their legal obligations
- Changing the basic concept of the European asylum responsibility system towards a quota-based distribution of asylum seekers and further shortening of time limits in the transfer procedure
- Utilisation of the planned mechanism for early warning, preparedness and crisis management
- Expansion of European responsibilities for border security and asylum procedures
- Conclusion of further migration agreements with countries of origin and transit countries, granting legal access routes in exchange for the readmission of own nationals and third-country nationals who are obliged to leave the country
- Speeding up Dublin and asylum procedures by increasing the necessary human resources

In many cases, the key lies in the latter point of speeding up procedures – while at the same time safeguarding the interests of particularly vulnerable asylum seekers. Reception conditions that are conducive to further concentration of the procedure and at the same time counteract false incentives for economically motivated migration could be justified for rather short procedure periods of only a few days and weeks.

At the same time, it must be explained to the populations of the Member States that, in a globalised world from which they benefit in many ways, they are also negatively affected by realities in distant countries. This requires increased investment in international cooperation and development aid and the acceptance of migration as a reality. Migration must be shaped, but it cannot be barred out or completely stopped or controlled beyond one's own borders - except at the cost of losing one's own set of values, which isolationist agitators falsely try to make us pretend to be true out of carelessness or with the intention to deceive.

6 Conclusions and Outlook

The migration debate has become exacerbated, polarised and partially off the trail. It has the potential to destroy not only humanitarian migration law, but also the European Union as a supranational institution and peace order, as well as the constitution of its member states. After a decade of heated debates, growing disenchantment with politics and the delegitimisation of state institutions and their representatives, democratic, pro-European forces are called upon to finally find solutions that are both humanitarian and effective. Compromises from all sides are unavoidable. Too much is at stake. Unilateral state action, however, will not solve the problems but will only exacerbate them in the medium term.

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