AMNESTY INTERNATIONAL

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Position Paper

THE PROPOSED DUBLIN REFORM

SUMMARY

On 4 May 2016, the European Commission presented a proposal for a revision of the Dublin Regulation (so-called Dublin-IV), which aims to determine the member state responsible for processing an asylum application lodged within the European Union (EU).[1] This proposal is part of a package of proposals reviewing the Common European Asylum System.

Amnesty International is deeply concerned about the Dublin IV draft. The proposed changes aim to codify the practice of the EU-Turkey deal as member states would first and foremost be required to examine, in so-called admissibility procedures, whether the asylum seeker can be returned to a "safe third country" or "first country of asylum". These concepts involve the risk that the asylum and human rights situation in the relevant third country will not be sufficiently taken into account in the procedure and that the persons concerned are returned to a third country which does not provide them with adequate protection. Amnesty International has already documented that Turkey is not a "safe third country" for refugees and asylum seekers in respect of admissibility procedures carried out by the Greek authorities as part of the EU-Turkey deal.[2]

In addition to this highly problematic externalisation of refugee protection, the proposed Dublin-IV Regulation does not solve the problem of the unequal distribution of responsibility for refugee reception and status determination. Although the draft itself acknowledges that the current Dublin system was not designed to ensure a "sustainable sharing of responsibility" for asylum seekers across the EU, the system is not substantially changed by this proposal: obligations to ensure fair and effective processing of asylum applications rest principally with the countries at the EU's external borders. Due to the elimination of deadlines there will no longer be a defined time-limit after which responsibility would be shifted. This, and the restriction of the discretionary power of states to take responsibility in exception to the criteria, entrenches the responsibility of EU countries at the external borders even further. As already shown in practice, the overburdening of countries can lead to human rights violations of asylum seekers, as they will not be able to access fair asylum procedures and/or decent conditions of reception.[3]

Amnesty International welcomes certain aspects of the Dublin IV proposal, in particular the extended family definition which can bring together family members already in the EU. However, this and other improvements will be of modest consequence if, on account of prior admissibility checks, the vast majority of people will be denied access to asylum in the EU.

Amnesty International calls on EU member states to ensure that the right to seek and enjoy asylum is guaranteed to individuals within their territory or under their jurisdiction, including at their borders and irrespective of how those individuals have entered the territory.

Below Amnesty International's views on salient aspects of the proposal.

INADMISSIBILITY OR ACCELERATED PROCEDURES (ART. 3(3)-(5))

The Commission proposal requires member states to assess whether the application is admissible before competence of an EU member state to examine the application can be determined. If the asylum seeker comes from a "first country of asylum" or "safe

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[1] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing 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 (recast), COM(2016) 270, 4 May 2016.

[2] Amnesty International, *No Safe Refuge: Asylum-seekers and Refugees denied effective protection in Turkey,* 3 June 2016, Index number: EUR 44/3825/2016.

[3] See the impact of the overburdening of Greece on the human rights of refugees: Amnesty International, *Greece: Trapped in Greece: an avoidable refugee crisis*, 18 April 2016, Index number: EUR 25/3778/2016.

third country", the application for asylum is inadmissible. Applications of asylum seekers who come from a "safe country of origin" or present a security risk must be examined in an accelerated procedure.[4]

These procedures are the responsibility of the member states of application, but they will de facto mostly be carried out by member states of first entry, such as Italy and Greece. The parallels to the EU-Turkey deal are obvious: as a consequence of the deal, Greece is already examining whether Turkey is a "safe third country" or "first country of asylum" for the applicant. While creating additional onerous layers of procedure for the Greek asylum system, the impact of the deal has been to leave a large group of refugees stranded in Greece in appalling conditions, and with little prospect of accessing international protection as resources have been diverted away from processing asylum claims by those falling outside the terms of the deal.

FIRST COUNTRY OF ASYLUM

The "first country of asylum" concept refers to cases where a person has already, in a previous state, found international protection, that is once again accessible and effective for the individual concerned. This concept is regulated by Article 35 of the current Asylum Procedures Directive and Article 44 of the proposed Asylum Procedures Regulation. Application of the concept requires an individual assessment of whether the refugee will be readmitted to that country and granted a right of legal stay and be accorded standards of treatment commensurate with the Refugee Convention and international human rights standards, including protection from non-*refoulement*. The individual must have an opportunity within the procedure to be heard, and to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment based on his or her circumstances.

SAFE THIRD COUNTRY

The "safe third country" concept refers to cases where a person could, in a previous state, have applied for international protection or where protection was sought but status was not determined. This concept is regulated by Article 38 of the existing Asylum Procedures Directive and Article 45 of the proposed Asylum Procedures Regulation. Application of the concept requires an individual assessment of whether the previous state will readmit the person, grant the person access to a fair and efficient procedure, and accord the person standards of treatment commensurate with the Refugee Convention and international human rights standards, including protection from non-*refoulement*. The individual must have an opportunity within the procedure to be heard, and to rebut the presumption that she or he will be protected and afforded the relevant standards of treatment based on his or her circumstances.

The Asylum Procedure Regulation (Article 46) proposes for the first time that "safe third countries" should be designated at Union level (thus providing for a common list of “safe third countries”).

SAFE COUNTRY OF ORIGIN

The "safe country of origin" concept refers to the absence of any well-founded fear for persecution or real risk of being subjected to serious harm for the individual applicant in his or her country of origin or habitual residence. This concept is regulated by Article 36 of the Asylum Procedures Directive and Article 47 of the proposed Asylum Procedures Regulation. The applicant must have the opportunity to rebut this presumption based on his or her personal circumstances.

The Regulation establishing an EU common list of "safe countries of origin", currently under negotiation, would become an integral part of the proposed Asylum Procedures Regulation, which also foresees Union level designation of “safe countries of origin” (Article 48).

Amnesty International has concerns over the use of "safe third countries", "first countries of asylum" and "safe countries of origin" concepts, as they risk fundamentally undermining access to a fair and efficient individualised asylum procedure. Asylum seekers may be forced to overcome an unreasonable presumption against the validity of their claim. Such presumptions put them at risk of direct or indirect *refoulement* (deportation to a country of origin where they risk persecution or other serious human rights violations, or deportation to a third country which returns them to the country of origin where they face such a risk). Amnesty International therefore opposes the use of the concepts of "safe third countries" and "first country of asylum".

As a matter of principle, Amnesty International also opposes the concept of "safe countries of origin" because it is not consistent with the right to a fair and individual asylum procedure. It also leads to discrimination against asylum seekers on the basis of

[4] Proposed Regulation, Art.3(3).

their nationality. For the same reasons, Amnesty International opposes the EU list of "safe countries of origin" which is currently being negotiated and to be subsumed by the newly proposed Asylum Procedures Regulation.

Besides strong reservations on the use of such concepts in asylum procedures, their use in practice risks barring access to asylum to a significant number of refugees arriving to the EU and placing an unfair administrative burden on EU countries of first arrival. Countries taking inadmissibility decisions or applying accelerated procedures become responsible for the relevant asylum claims, including any subsequent application made by the asylum seekers, with a high risk of clogging up the countries asylum system.[5] Moreover, the obligation to assess the possible inadmissibility of an application on "safe third country" or "first country of asylum "grounds takes precedence over the application of any rules on responsibility for asylum claims. Thus, it would take precedence also over the obligation to bring family members together.

Amnesty International welcomes the fact that the proposal extends the definition of the term "family members" beyond the nuclear family to siblings and family relations formed after leaving the country of origin but before arriving in the territory of the Member state (for example in refugee camps).[6] This would be an important step in meeting the needs of refugees. However, the prior mandatory requirement to undertake admissibility checks undercuts the proposed broadening of the family definition and violates the right to family life, as defined in Article 7 of the EU Charter of Fundamental Rights and Article 8 (1) of the European Convention on Human Rights (ECHR). The right to family unity must be safeguarded and cannot be trumped by inadmissibility or accelerated procedures.

Amnesty International recommends deleting Article 3(3)-(5) which poses an obligation on member states of first entry to assess admissibility criteria and apply accelerated procedures prior to conducting a Dublin procedure.

Amnesty International also recommends the safeguarding in all procedures of the right to family life.

DISCRETIORNARY CLAUSE AND CESSATION OF RESPONSIBILITY (ARTS. 15, 19, 26 AND 30)

The negative impact of the first entry criterion, which the Commission proposal retains, is amplified by deletion of the clause envisaging cessation of responsibility after 12 months from irregular entry.[7] Similarly, the Commission proposes that expiry of deadlines for submitting take back requests or effecting transfer, as well as leaving the territory of the EU for more than 3 months, will no longer result in a shift of responsibility to the member state where the asylum seeker is present.[8] In the same vein, the discretionary clause under Article 17(1) of the Dublin Regulation will be amended to severely limit the circumstances in which a member state can examine an application that is not its responsibility. Currently, responsibility under this clause can be shifted on “humanitarian grounds based in particular on family or cultural considerations”. According to the proposal, the discretionary clause can only be used on “humanitarian grounds in relation to wider family” and only as long as no member state has been determined as responsible.[9] As a consequence, member states will have no more discretion to accept responsibility, implicitly, by suspending Dublin procedures as a matter of policy, or after responsibility determination to cancel transfer of an asylum applicant (for instance for health reasons and lack of available treatment in the member state responsible). The combined effect of these rules is to establish the principle of permanent responsibility upon EU countries of first entry.

For many asylum seekers removing any possibility to have their claims examined by another member state than the one that is initially responsible could lead to intolerable situations: even if their transfer is not possible for reasons such as systematic deficiencies in the member state actually responsible, the responsibility does not go to the member state of their current stay. In this way, the persons concerned would live in constant uncertainty and without a completed asylum procedure – thus being “in orbit”. In addition, they will also see their material benefits reduced (see below sanctioning of secondary movements).

Binding deadlines and discretionary rules have been instrumental in avoiding “in orbit” situations and giving access to protection in special circumstances or in the event of administrative inaction. They have helped to prevent human rights violations resulting

[5] Proposed Regulation, Art.3(4) and (5).

[6] Proposed Regulation, Art.2(g).

[7] Proposed Regulation, Art.15.

[8] Proposed Regulation, Art.26 and Art.30. Currently, if an asylum seekers has moved irregularly from member state A of first entry to member state B, member state B becomes responsible by default if it does not submit within a specific timeframe a request to take back the person concerned to member state A, or if the transfer of the asylum seekers from member state B to member state A is not effected within a set timeframe.

[9] Proposed Regulation, recital 21; Art. 19.

from inadequate accommodation and support, particularly when the asylum and reception systems in countries of first entry are overburdened by high number of arrivals of asylum seekers.

Amnesty International recommends to reinstate the rules on cessation of responsibility in Articles 15, 26 and 30, and revert to the original discretionary clause in Article 19 in order to avoid asylum seekers being left "in orbit" and at risk of human rights violations, and unfair responsibility being placed on the first country of entry. As is currently the case, the exercise discretion should be allowed also after a member state has been declared as responsible for the asylum claim.

On the positive side, shorter time-limits are proposed for the different phases of the Dublin procedure. This includes a reduction in the maximum length of time an asylum seeker can be detained under the Regulation while he or she is in the Dublin procedure.

PUNITIVE MEASURES FOR ASYLUM SEEKERS WHO MOVE TO ANOTHER EU COUNTRY (ART. 5)

To "discourage abuses" and "prevent secondary movements" of asylum seekers within the EU, the proposal introduces new obligations on the asylum seeker: (a) to apply for asylum in the member state of first irregular entry (or in the member state of regular stay); (b) to stay in the responsible member state.[10]

The punishment for asylum seeker who do not apply for asylum in the member state of first entry is the examination of their asylum application in an accelerated procedure.[11] The punishment for an asylum seeker who does not stay in the responsible member state is the loss of all "material reception rights" except "emergency healthcare"/"immediate material needs".[12] This would apply regardless of systematic flaws in the asylum procedure or reception conditions in the member state where the asylum seeker is supposed to apply for asylum and reside.

Procedural rights are human rights and their restriction cannot be used as sanctions as there are no links between a secondary movement and the substance of a claim. Moving irregularly to another member states does not make an asylum claim a manifestly unfounded or abusive claim, which may be dealt with in accelerated procedures.[13] Nor can reception conditions automatically been withdrawn as a sanction for secondary movements, as this would be incompatible with the EU Charter of Fundamental Rights and relevant jurisprudence.[14] Asylum seekers and refugees move onwards within the EU for various reasons. This can be due to the qualitative differences in national asylum systems and reception conditions, labour market opportunities and the presence of family, friends and networks in a different member state.

Rather than entrenching immobility through deterrence and sanctions, those granted protection should be offered the prospect of free mobility within the EU on the same conditions as EU citizens, as this would act as a major incentive for complying with Dublin rules. It is unfortunate that the Commission instead proposes to jeopardise accruement of free mobility rights as yet another deterrent against secondary movement. In fact, according to Article 44 of the proposed Qualification Regulation, the 5-year period of legal residence necessary for recognised refugees to become eligible for long-term residence status and enjoy freedom of movement is to start again each time the person has unlawfully moved to another EU member state.

Amnesty International recommends to delete Article 5 introducing sanctions for secondary movements, both as concerns their impact on the asylum procedure and on material benefits.

Amnesty International also recommends an amendment of the Long-term Residence Directive in order to shorten the period of legal residence required to access free movement rights for individuals granted a protection status.

RIGHT TO EFFECTIVE REMEDY AND APPEALS (ART. 28(4) AND (5))

The proposal limits the scope of the right to effective remedy to an assessment of whether the asylum seeker's rights to respect of family life, rights of the child, or the prohibition of inhuman and degrading treatment risk have been violated.[15] Amnesty International is concerned about this reduction in scope and notes that it circumvents a recent ruling by the Court of Justice of the

[10] Proposed Regulation, Art.4.

[11] Proposed Regulation, recital 22; Art.5.1 and Art.20.3.

[12] Note the inconsistency in the text between recital 22 ("immediate material needs") and Art. 5.3 ("emergency health care").

[13] See EXCOM Conclusion No.30 on the problem of manifestly unfounded or abusive applications for refugee status or asylum.

[14] See for instance the ruling in the case brought by Cimade and Gisti (C-179/11), para.56: the loss of "material reception rights" would violate the EU Charter of Fundamental Rights.

[15] Proposed Regulation, recital 24; Art. 28.4.

European Union (CJEU) that the right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights also includes the correct application of the criteria allocating responsibility under the Dublin III Regulation.[16]

Asylum seekers will also only have 7 days to appeal instead of the current "reasonable period".[17] The right to an effective remedy is a key principle of EU and international human rights law[18] and requires reasonable time limits for its exercise. A 7-day time limit to appeal risks not to be reasonable and in breach of the EU Charter of Fundament Rights.[19] The period prescribed must always be sufficient in practical terms to enable the applicant to prepare and bring an effective action. While current practice varies significantly across member states, many countries provide much longer deadlines, including 30 days in Belgium, Latvia and Finland and 60 days in Italy and Spain.[20] Unlike a fixed time limit, stating a "reasonable period" allows national judges to be competent to determine whether, in an individual situation, the time limit is sufficient in view of the specific circumstances.

On the other hand, Amnesty International welcomes that the proposal makes the suspensive effect of appeals mandatory, whereas currently member states have discretion to have a system where suspensive effect must be requested.[21] Also to be welcomed is the new remedy, in the form of an appeal or a review, in fact and in law, before a court or tribunal, introduced in case no transfer decision is taken and the applicant claims that a family member is legally present in another member state.[22] Whilst, enforceability of this right needs to be clarified, this provision closes an important gap. Under the current rules, remedies are envisaged only to challenge a decision to transfer back, not to oblige member states to take charge of an asylum claim if under the rules they would be responsible. The new remedy would allow for instance asylum seekers in Calais or Idomeni to challenge France and Greece in order to be reunited with family members legally present in another Member state.

Amnesty International recommends to delete the proposed restriction of the scope of appeals against transfer decisions in Article 28.4 and that a "reasonable period" for appeals be reinstated in Article 28.2 rather than the 7-day time limit.

UNACCOMPANIED MINORS (ARTS.8(2) and 10(5))

The proposal includes an obligation to assess the child's best interests by appropriately qualified staff in all circumstances implying the transfer of an unaccompanied minor. However, according to the proposal, the appointment of a guardian must be made only in the state responsible for the minor's asylum claim.[23] Moreover, in the interest of discouraging secondary movements of unaccompanied minors, the proposals also assigns responsibility to the first member state where the unaccompanied minor applied for asylum, unless it is shown that this would not be in the child best interests.[24]

This reverses a ruling by the CJEU, which based on Article 24 of the EU Charter of Fundamental Rights, has established that it is in the interest of unaccompanied minors "not to prolong unnecessarily the procedure for determining the member state responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status". Therefore, according to the Court, unaccompanied minors should basically have access to the asylum procedure in the member state in which they are present, unless the child best interests requires a transfer to another member state (for instance because of family relations).[25]

Amnesty International recommends to reinstate in Article 8.2 an obligation to appoint a representative for the child which is not limited to the state where an unaccompanied minor is obliged to be present. Moreover, in accordance with the CJEU ruling, Article 10.5 should provide that unaccompanied minors be allowed to apply for international protection in the member state in which they are present, unless their best interests dictate otherwise.

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[16] C-63/15 *Ghezelbash*, judgment of 7 June 2016.

[17] Proposed Regulation, Art.28.2.

[18] Art. 2(3) International Covenant on Civil and Political Rights

[19] In the *Diouf* case, the CJEU found that a 15-day time limit to appeal was acceptable, para. 67.

[20] See AIDA country reports.

[21] Proposed Regulation, Art.28.3.

[22] Proposed Regulation, Art.28.5.

[23] Proposed Regulation, Art.8.2.

[24] Proposed Regulation recital 20, Art.10.5.

[25] C-648/11 *MA and Others*. The Commission had proposed an amendment to the Dublin III Regulation to reflect the ruling but the proposal, still under negotiation, is to be withdrawn (see COM(2014) 382 final).

THE "CORRECTIVE ALLOCATION MECHANISM" (ARTS.34-43)

Rather than seeking to reform the Dublin system in a way which can ensure a fairer distribution of asylum seekers from the outset, the Dublin IV proposals remains intrinsically flawed in that it "retains the link between responsibility in the field of asylum and the respect by member states of their obligations in terms of protection of the external border…"[26]. In other words, states, such as Greece and Italy, that because of their geographical position receive larger numbers of asylum seekers, are considered not to have sufficiently protected the EU external border and are "punished" with a relatively larger responsibility in the field of asylum. This inherent imbalance is then supposed to be "corrected" by a blind allocation mechanism, which only kicks in when the countries of first entry face situations of a disproportionate number of asylum applications.

For the purpose of applying the corrective mechanism, the Commission proposal foresees that a reference key will allocate to each member state their respective "share" of asylum seekers. This is based on the number of asylum applications for which it is responsible and the number of refugees it effectively resettled. The reference key is made up of two rather crude criteria: the size of the population (50%) and the total GDP (50%).[27] Where the number of applications for international protection for which a member state is responsible plus the number of refugees it resettled exceeds 150% of the figure identified in the reference key, the "corrective allocation mechanism" is activated automatically.[28] As a consequence, all new applications lodged in the member state experiencing the disproportionate pressure are allocated to those member states with a number of applications below the number identified in the reference key. This allocation is done without taking into account the individual circumstances of the asylum seekers concerned, their specific links with a particular member state, their vulnerabilities or special needs and the capacity of the member state of allocation to address and meet those needs.

Moreover, the member state of first entry experiencing the "disproportionate pressure" is still responsible for the admissibility check.[29] The corrective allocation mechanism does not include applications declared inadmissible or examined in accelerated procedure.[30] This is likely to exclude a considerable number of asylum seekers from being re-allocated, which will therefore only bring limited relief this member state. The system is also designed to separate allocation decisions from Dublin decisions, which will be made in the state of allocation. This will involve an additional bureaucratic layer and multiple transfers of the asylum seeker, first to the state of allocation, then to the state responsible for his application under the Dublin rules. For asylum seekers it will imply delays in accessing the asylum determination procedure.

As seen above, the Commission proposes to limit significantly member states' discretion to take responsibility for asylum claims. In stark contrast with that, when it comes to applying the solidarity principle, it gives them discretion to buy themselves out of the corrective mechanism and not take any responsibility for asylum claims. A member state may decide to temporarily not take part in the "corrective mechanism" for a period of 12 months. The asylum seekers that would have been allocated to that member state are allocated to another member state instead. The member state which temporarily opts out must make a "solidarity contribution" of EUR 250,000 per applicant to the member states where the applicant is sent.[31] Member states opting for financial compensation simply have to notify their choice, without giving reasons.[32]

The lack of a mandatory participation in the corrective allocation mechanism weakens it to the point of irrelevance, as an opt out by states unwilling to participate in the system does not have to rest on objective and justifiable reasons and triggers a financial solidarity mechanism that is difficult to enforce effectively and will not lead to increased financial contributions to EU states of first entry. The option for states to trade money in exchange for their share in the responsibility to deal with an increased number of asylum applications defies the purpose of the "collective allocation mechanism": to ensure fair sharing of responsibility between member states.

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[26] Explanatory memorandum, p.14, 5th para.

[27] Proposed Regulation, Art.35.

[28] Proposed Regulation, Art.34.2.

[29] Proposed Regulation, recitals 32-33.

[30] Proposed Regulation, Art.36.3.

[31] Proposed Regulation, recital 35, Art. 37(3).

[32] In the 9 September proposed decision for emergency relocation from Italy, Greece and Hungary, the proposal was to make a financial contribution to the EU budget equal to 0,002% of GDP in lieu of relocation. But that option was foreseen in exceptional circumstances and required duly justified reasons compatible with the fundamental values enshrined in Article 2 TEU (see COM(2015)451 final). In any case, it was rejected by member states. The same financial solidarity mechanism was included in the permanent crisis relocation proposal, which is now to be withdrawn (COM(2015)450 final).

Amnesty International recommends the redesign of a mandatory distribution system which takes into account the following: legitimate interests of asylum seekers to the extent possible; triggering of the mechanism below 100% of a member state allocation capacity; application of the mechanism to all asylum claims lodged in the country (thus deleting Article 36.3); avoidance of multiple transfers.

CONCLUSIONS

The European Commission's proposed revision of the Dublin system will cement and even exacerbate the existing problems of Dublin III: the responsibility for processing asylum applications as well as the reception of refugees will continue to be placed disproportionately upon a few states. The remaining EU member states will not have to assume responsibility in most cases, even if they wanted to do so, with the notable exception of family cases. The envisaged corrective mechanism is much too narrow in scope and triggered far too late to correct the even heavier responsibility placed on a few states by the Dublin IV proposal, due to the fact that responsibility can no longer shift.

Amnesty International's views are particularly critical towards the European Commission's attempt, through this proposal, to extend EU-wide the admissibility procedures made mandatory in Greece under the EU-Turkey deal. This is based on the idea that spontaneous arrivals of refugees to the EU should be stopped and they should be and remain the responsibility of the EU's neighboring states. This is very serious for several reasons. First, many neighboring countries of Europe do not meet the standards required to be considered as "safe third countries". This has already been documented by Amnesty International for Turkey.[33] In other major transit countries, such as Libya, refugees are even subjected to arbitrary detention, ill-treatment and torture.[34] Secondly, such a policy contravenes the principle of responsibility sharing, as laid down in the preamble to the Geneva Convention on Refugees. Already 86% of the world's refugees are hosted by low- and middle-income countries.[35] Europe has therefore still some way to go to meet its fair share as the wealthiest political block and should not outsource this responsibility.

The review of the Common European Asylum System should be used to ensure that the reception of refugees is based on the principle of solidarity and is compatible with human rights. It is necessary for all EU member states to participate in this task and not only to push this onto a few states. The granting of freedom of movement soon after a protection status has been obtained should be an integral part of this review, which would meet the needs of those concerned while taking much of the pressure away from a system designed to allocate responsibility for asylum claims, not long-term stay of refugees. Finally, a core element of a European asylum policy rests also on developing safe and legal access routes, which would allow better to organize the reception of refugees from the beginning and to reduce unnecessary suffering along the road to protection.

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[33] See above.

[34] Amnesty International, *Refugees and migrants fleeing sexual violence, abuse and exploitation in Libya*, 1 July 2016.

[35] UNHCR, Global Trends, Forced Displacement in 2015, p.2.