

# “One for all or all for one?”

A normative study of the moral responsibility towards  
asylum seekers and refugees in the EU

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# Abstract

In this paper, the moral responsibility towards asylum seekers and refugees in the EU is highlighted, from the perspectives of Universalism and Communitarianism. Due to different levels of safety and conditions related to being granted asylum in EU member states, the attractiveness of these states for asylum seekers and refugees to seek protection differ substantially. The implementation of the Dublin II Convention in 1990, stating that asylum seekers should be the concern of the first country in which they arrive in the EU, has narrowed the choices for refugees and asylum seekers to obtain asylum in EU member states.

The purpose of this paper is to discuss the moral responsibility towards asylum seekers and refugees based on Universalism, as well as to reveal the normative problematic arising, when contrasting these universal values towards those of Communitarianism and the state as a community. I argue that there is a responsibility to grant protection based on universal moral principles that each individual should be treated equally.

*Key words:* Dublin II Convention, Geneva Convention, Universalism, Communitarianism, responsibility

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# 1 Introduction

In September 2009, the refugee camp known as ‘The Jungle’ in Calais in northern France was closed by French authorities. The Jungle was largely occupied by Afghan, Iraqi and Eritrean refugees and asylum seekers, entering Europe mainly by illegal ways. Many of these people first arrived in Greece and Italy, as these are coastal countries. A majority had paid a large amount of money to people smugglers promising to bring them to the UK.

To avoid protection seekers applying for asylum in multiple countries the Dublin II Convention was implemented, according to which, asylum should be asked in the first country of arrival. The restriction can be seen as positive in the sense that people smuggling can be diminished. But still, consequently, asylum seekers and refugees in need of protection are being affected by this restriction, and many are now facing the threat of being deported to Greece or Italy, where chances of getting asylum are very small.

Political ethics related to asylum seekers and refugees has become a highly charged political issue across developing countries and raises questions of what responsibilities the countries have towards refugees who arrive at their borders (Gibney, 2004).

The 1951 Geneva Convention Relating to the Status of Refugees has been agreed upon by member states of the European Union. Still, refugees and asylum seekers suffer from a lacking regulatory framework for how their cases should be handled once within European borders. There is in many cases reluctance by EU member states to handle the burden of groups of people, many of whom have fled difficult conditions, arriving in Europe.

This is a normative study examining how the restrictions adopted under the Dublin II system towards refugees and asylum seekers can be morally justified using universal values with a consideration of the EU member state and its communitarian values.

## 1.1 Statement of Purpose

What caught my interest for addressing this specific issue, was a series of articles concerning illegal immigrants residing in camps along the coast bordering France and Britain, particularly ‘The Jungle’ in Calais, France. When reading these articles, I became interested in exploring why this type of situation occurs in the EU, and more specifically, how the occurrence of situations like these can be explained and morally justified from a normative perspective. I understood that there is at the moment a lack of capacity, or maybe even will, for burden-sharing between states in the EU to provide protection to refugees and asylum seekers. Who is responsible for protecting these people and how should it be justified that refugees and asylum-seekers are being sent back and forth between countries without being taken care of?

When carrying out a normative study, it is important to define the meaning of and relationship between values (Badersten, 43:2006). The underlying value in this paper is that there should be a universal duty towards asylum seekers and refugees to grant them protection. I try to explain why, from a universalist perspective, as much as I try to uncover the normative problematic found when also applying a communitarian normative perspective to the question.

The purpose of this paper is thus to answer the question: *Is it morally right to impose restrictions upon refugees and asylum seekers such as the Dublin II Convention in the EU? - A normative study from a universalist and communitarian perspective.*

The reason why I have chosen to use the Dublin II Convention and Regulation as a basis is because the current situation in Europe can, to a large extent, be explained by countries decision to act under these. These actions step away from important initial agreements signed by member states in the 1951 Geneva Convention Relating to the Status of Refugees. It is important to note that the Dublin Convention was a feature of European Union law, and not a duty arising from international law (Irish Refugee Council, 04-04-2002).

## 1.2 Method

I have in this study used both a classic normative analysis and the ‘given-that’ analysis to answer my question. Normative statements are explained as statements which include the term ‘*should*’, to which different *values* are prescribed (Goldmann et al, 182:1997). A value is a generalized, abstract idea of a way of living or acting or a specific state of being, as individually or socially desirable (Goldmann et al, 292:1997). In normative analysis, it is important to be specific

about which values are the ones constituting the basis for the study, through looking at the arguments for why something should be a certain way (Badersten, 32:2006). To answer my question, I have tried to identify the consequences of imposing restrictions such as the Dublin II system has brought, and used these to study from the universalist and communitarian perspective the moral right to impose such restrictions. I have also presented arguments for *possible* underlying reasons for why this type of restriction has been implemented in the EU, to get an alternative understanding of why states in many cases are not willing to grant asylum. Based on an *alternative* view of how asylum seekers and refugees are viewed, I have further tried to gain this understanding.

Badersten explains that normative questions are aiming to answer how something *should* be and how this can be *justified* (Badersten, 7:2006). The goal of a normative study is to reach sustainable principles for human behavior through creating a basis for an adopted position to the problem examined (Esaiasson et al, 42:2003). By studying different concepts, the analyst tries to explain the meaning of and relation between different normative values (Badersten, 43:2006). In this study, the value in focus is the importance of moral right. What then is morally right? The explanation found in the universalist theory, is that states should collectively guarantee protection and that every human has rights on the basis of being human.

In normative theory, there is a distinction made between deontological ethics and theological ethics. My study will be of the theological type, which focuses on how the consequences of an action can be justified based on the moral content of the action, as I try to understand how it can be morally justified for the EU to act under the regulations of the Dublin II convention.

### 1.2.1 ‘Given-that’ - Analysis

The ‘given that’-analysis problematizes and compares different normative positions, explaining how ‘*should*’- questions are answered in different ways. As I argue from a universalist view, the universal ethics are being advocated for, at the same time as contrasted towards the normative values of Communitarianism. Using the ‘given-that’ analytical method, the analyst assumes different normative premises and asks what the normative conclusion will be ‘given that’ these normative premises exist (Badersten, 44:2006). The aim is to *investigate*, from a normative perspective, an act or a specific state of being, given certain values or principles (Badersten, 46:2006).

In the analysis carried out in this paper, the *act* or *state of being* will be the expulsion of or negligence shown towards asylum seekers and refugees in the EU. The normative perspectives will be the universalist and the communitarian. The underlying values or principles, is that under the Geneva Convention, refugees should not be sent back to the country from which they are fleeing if there is a risk of persecution. Also – found in the main argument of the implementation of the

Dublin convention – asylum-shopping is something negative because it is difficult to determine who is a ‘genuine’ protection seeker.

The aim of carrying out normative ‘given that’ – analysis is to show that different normative values or premises tested on the same issue, can lead to different normative conclusions (Badersten, 44:2006). I find the ‘given that’-analysis especially relevant as a method for my study, as Badersten explains that *‘a common example of a normative ‘given that’-analysis, is the study of different kinds of ethical decisions, where the analyst asks if a specific decision or a specific way of acting can be justified vis-à-vis different moral principles’*(Badersten, 45:2006). I find this method applicable on my problem as I try to understand if the EU’s acting under the Dublin II Convention is morally right seen from a universalist vis-à-vis a communitarian perspective.

### 1.2.2 Taking Position, Inter-subjectivity and Level of Neutrality

For an argumentation to be strong the analyst, as a principle in normative analysis, has to define the values which are being argued for. Why am I then, one could ask, giving the opponent the opportunity to criticize the universalist perspective applied through putting forward the communitarian one? When arguing that universal ethics should rule, one should in my opinion also consider if this is practically possible - when claiming that universal ethics should rule, the state is still that is the one asked to take responsibility, which imposes a responsibility on the state.

Through bringing forward the communitarian perspective, I, as an analyst, acknowledge that there is a conflict between universal and communitarian responsibility towards asylum seekers and refugees. In this context the EU member state, also, has a certain right to protect itself.

The ‘given-that’ analysis is an alternative method to the classic normative analysis method. In the first, the aim is to reveal that what is morally right can differ depending on which position is taken. In the second, the analyst takes a clear position. I am not taking a neutral position as an analyst, as the analyst usually does in the ‘given-that’ analysis, since I adhere more strongly to the universalist thought. This, based on the belief that universal moral values should be followed. Adopting this position, means that I am bringing out a normative theory in the classical sense where the analyst takes a certain position, at the same time as I apply a ‘given –that’ analysis.

One could ask what the point then is to make a ‘given-that’ analysis where an issue is being problematized rather than solved. In my opinion, in the issue addressed, there is no one-handed solution. Consideration has to be taken both to what is universally morally right, as well as considering the community as the ones implementing this right. What I try to show in some way is that it is easy to claim a value, but it can be difficult to live up to this value when taking into consideration how it is to be realized. This is an issue which I find important to raise.

## 1.3 Material

As a primary material basis, I have chosen to concentrate on the two core arguments from the Dublin II Convention and Regulation and from the article 33 of the 1951 Geneva Convention relating to the Status of Refugees respectively. These are that asylum shopping should be avoided and that refugees should not be sent back if there is a risk of persecution.

To bring out the analysis, I have applied secondary material on these main arguments, mainly articles but also books. These describe the situation in Calais as well as the UNHCR's work in trying to develop a better protection system in the EU. The material provides empirical facts concerning the consequences of implementing the Dublin II Convention and the 1951 Geneva Convention in the EU. It mainly includes documentation from the UNHCR, as well as articles by scholars in Refugee studies and law, such as Helen O'Nions, Gregor Noll and Matthew Gibney. To a large extent, the material selected present arguments relating to the outcome of the implementation of the conventions discussed.

Esaiasson et al explain the importance of the source not being tendentious, presenting reality in a way that is beneficial for the own interests (Esaiasson, 309:2003). To defend the reliability of my material, I have chosen sources which, according to me, can be seen as of high credibility. For example, statements made by Spindler, UNHCR, are a primary source as he has himself been working in Calais during the closure of 'The Jungle'. When choosing my material, I have tried to be as objective as possible, relying on official sources providing material written by UN agencies or scholars specifically dealing with refugee studies.

The material for my theoretical framework is mainly based on research brought out by Christina Boswell, presented in her book '*The ethics of refugee policy*'. Boswell has done deep research on the subject of community and universal responsibilities towards refugees. Pécoud and Guchteneire's 'Migration without borders' as well as normative statements concerning asylum seekers and refugees, made by the UNHCR have also been used for the discussion of universal values. Bjorn Baderstens' book 'Normative method' was of importance for the methodological part of the study, as it is one of the few books that I could find which specifically addresses normative method.

## 1.4 Definitions and Limitations

A first important definition to make is that of an asylum seeker and a refugee. When fleeing people seek safety in another country than their own, it is often mandatory for them to officially apply for asylum (UNHCR Public Information, 25:2008). An asylum seeker is by definition someone who:

*'Has left their country of origin, has applied for recognition as a refugee in another country, and is awaiting a decision on their application'* (UNHCR Definitions and Obligations, 2009).

A refugee, however, is defined by the UNHCR, referring to Article 33 of the Geneva Convention relating to the status of refugees, as someone who:

*"owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of protection of that country; or who, not having a nationality or being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"* (Geneva Convention Article 33:1951).

In this paper I have studied both groups, although, without making a distinction between the definitions. In the context of the analysis, the aim is to study the responsibility towards these people, who under the Dublin II Regulation, experience the same problematic. Both groups seek protection, and even though a refugee should under the Geneva Convention not be sent back to a country where there is a risk of persecution, this person still experiences the same problem as the asylum-seeker in terms of being rejected by the state, a case which can be seen in for example 'The Jungle'. While the asylum seeker faces a risk of being sent back without obtaining refugee status, a refugee faces problems of not being granted asylum, meaning that he or she, too, faces the problem of being rejected by the state. One could ask why I have not chosen migrants as such as a group. The reason for this is that migrants involve asylum seekers, refugees, illegal immigrants and 'regular' migrants. As different laws apply to all these groups, there is a need for limitation. The other reason is that the group I particularly want to examine is these which fall under the conventions applied. One could argue that migrants also apply for asylum, however, these people do not necessarily have to be people who are vulnerable in the same way as asylum seekers or refugees who either have obtained refugee status because they have been recognized as refugees, or who have applied for this status due to fear of persecution.

When asking the question *why*, it is also important to ask *why not*. I am asking if it is morally right from my two chosen perspectives to act under the Dublin II system. To ask why this would not be morally right, one has to define the reasons for this 'not'. A definition then important to make is that of the risk involved of acting under the Dublin II system. For example, the UNHCR talks about asylum seekers and refugees living in fear, living in bad conditions in camps, and being in dangerous risk of exploitation (Spindler, 25-11-2009). What is also considered as a risk is the fact that under the Dublin II Convention, people should be sent to the first country of arrival to seek asylum. The risk connected with this is obviously that there is no possibility to choose destination, even though this choice might be of legitimate reason such as family connection, social reasons or simply better living conditions. There is also a risk involved in where the person is sent, as many countries, for example Greece, known for declining asylum in many cases, might send these people back to their country of origin or not give them the rightful opportunity to apply for asylum (UNHCR, 2:2008). A risk can also be

seen in the physical and mental pressure to which these people are exposed when living in fear of the future.

Another term important to define is *moral right*. The definition of morality stems from the Latin *mores*, meaning habit or way of life and the term describes what is right, good or proper (Amstutz, 2:1999). Moral right in this sense is defined in the two normative theories applied, where universalists adhere to moral values, ethics, as universal rights creating a responsibility (Goldmann et al, 246:1997), and communitarians to the community's right to integrity and responsibility only for the members of the own community (Gibney, 25:2004).

A last point important to bring out; the community is in this paper studied in the meaning of the state as a community. The EU as a whole could also be studied as a community, but this would take the focus to another level than the one studied. As each state itself is responsible for asylum applications, and there is no common institution in the EU for this matter, the state as a community is more relevant to study for the set out purpose.

## 1.5 Disposition

To provide the reader with an understandable structure which is a crucial part of the text (Uddman, Gustavsson 10:2007), I have tried to set up a steady background framework as an initial part of my study.

In the first part of the study I have explained the purpose of the study as well as presented the research problem including the method used to carry out the study. In the theory part, which I have chosen to make into a separate chapter, my two theories are presented.

To explain the Dublin II Convention, I have started by giving a background of Asylum Policy development in the EU, as the Dublin II is a milestone in this still ongoing development. The Dublin II Regulation has three under-chapters, in which problems arising from the implementation of this system are explained.

As part of the background I have also presented 'The Jungle' as an illustrative case of the problematic analyzed. When the framework has been set, the analysis starts off, where I apply my theories onto the Dublin II and Geneva Conventions' consequences for protection seekers in the EU.

My analysis finishes off with a presentation of the results, followed by a concluding summary.

## 2 Theoretical Approach

Normative research on migration, asylum and refugee issues has been carried out by several scholars. Refugee issues are subject to a wide range of analysis; still, the work on the ethical implications applied to refugee policies is very limited (Boswell, 394:2005).

I have chosen to approach my thesis problematic from a universalist as well as from a communitarian perspective to find an understanding of the ethical aspects connected with states acting towards asylum seekers and refugees in Europe. These two perspectives are contradicting; as the first one puts the universal ethical aspects of protecting non-nationals in focus, the second one puts in focus the importance of the community as crucial, without an obligation towards outsiders of that community. Using these two perspectives, I am trying to reveal an understanding of why situations, such as the one in Calais, can arise in Europe today.

Theories supporting refugee studies are often based on democracy, citizenship and legal perspectives. My aim is to get an ethically based understanding of how situations as the one in Calais can arise in the EU of today. I try to study this from a moral, human to human view and a view explaining the ethical foundation of duties of the EU towards refugees. In this sense, what will be examined is how it can be morally explained that the existing legislation does not provide sufficient protection for refugees and asylum seekers in the EU.

Christina Boswell who is a former researcher on migration and refugee issues, has focused on ‘what duties liberal democracies and their citizens owe to refugees who seek protection on their territory’ (Boswell, 2:2005). To explain why states are reluctant towards taking in refugees and asylum seekers, Boswell explains that commentators often describe it as having to do with economic reasons among others, saying that ‘...*there is a conflict between refugee rights and national interests... Assisting large numbers of refugees and asylum-seekers is considered to impose a financial, social and political burden on receiving states, running directly counter their national interests*’ (Boswell, 3:2005). Boswell however also explains that “*it is misleading to conceive of a national interest that is independent of broader ethical considerations*” (Boswell, 8:2005). It is important to acknowledge that many asylum seekers and refugees have been and are given protection in the EU (UNHCR, 2008). The underlying normative problematic in this study is that decisions about how to handle asylum seekers and refugees in the EU often involve universal ethics conflicting with national interest.

## 2.1 Universalism

In the universalist perspective, according to Talcott Parsons, universal societies are societies where everybody is a legitimate participant and where everyone has the right to for example vote, unlike particular societies, divided into groups based on class or religion (Goldmann et al, 277:1997). Universalists consider human rights universal rights based purely on a human basis, meaning that they are prescribed to the humans on the basis of being humans. Hence, they do not understand human rights as something which is prescribed to a certain group of people or to a certain nationality. The definition of refugee was clearly based on a universalist theory of human rights (Boswell, 27:2005).

Universalists see states as collective guarantors of the implementation of protection, as it is written in human rights, meaning that protection obligations are picked up by another state when one state fails (Noll, 74:2000).

When talking about human rights, Universalism as a perspective could be seen as part of the natural law approach in which a framework of laws, based on what is by nature set as ethical, and has validity everywhere. Natural rights are moral rights, and these rights derive from our basic moral values, such as freedom, autonomy or equality (Goldmann, 246:1997). The reasoning behind universal rights is that *rights create duties* – rights occur because some interests are of such a great importance, that people have a *duty*, a responsibility, to commit to and encourage them. This duty is according to Universal rights justified on this basis of an ‘obvious’ existing natural law of what is morally right (ibid). When in this paper discussing moral responsibility, it is this relative duty which is in focus.

Pécoud and Guchteneire explain, that a person’s rights arise from his or her rights of being human, and ‘*any legal or political arrangement in which citizens have rights which aliens do not have is unjust*’ (Pécoud, Guchteneire, 71:2007). From a universalist perspective, seeking asylum could be seen as a universal right, based on the assumption that a state has a moral duty towards the protection-seeker. All member states have signed the 1951 Geneva Convention, which falls under legal rights obligations, but could also be considered a universal right as it from a universalist perspective should fall under the natural law not to send someone to a country where there is a risk of persecution as well as restraining a person’s freedom of and right to live in a certain country.

Universalists further argue that where universal rights are considered fundamental to well-being, each individual should have an equal right to live in a state where these rights can be enjoyed (Boswell, 49:2005). Universal theories give equal moral weight to the welfare of *all* individuals. It is a perspective often invoked by those defending refugee and asylum seekers rights against restriction policies, such as for example the Dublin II Regulation and other policies which work as measures to prevent or deter potential asylum seekers from travelling to European countries (Boswell, 4:2005). As universalists argue that only attributes which are common to all human beings are morally relevant, an individuals’ nationality is not something which affects the weight accorded to her moral claims (Boswell, 49:2005). From this perspective, universal rights are considered as basic

for an individual's well-being, so each individual should have an equal right to live in a state where these rights can be enjoyed – this enjoyment of universal rights including a universal right to move (Boswell, 49:2005).

## 2.2 Communitarianism

As Noll explains, while the universalist endorses '*all for one*' along the concept of equality, the communitarian endorses '*one for all*', insisting on freedom – a freedom from responsibility and obligation towards individuals not part of the community (Noll, 80:2000).

Communitarianism was primarily born as a critical response to John Rawls universal justice described in his book 'A Theory of Justice', opposing the idea of justice and of ethics and values as global; the standards of justice are instead found in how life and traditions are shaped in particular communities, and these standards look different depending on society (Bell, 2009). What is of relevance in this perspective is how community shapes individuals identity and conception of the good (Boswell, 125:2005). Communitarians argue that freedom is the basis of the right world concept, including freedom from responsibility and obligation towards individuals who are not part of the community (Noll, 80:2000). Agreeing on claims to inclusion for individuals seeking protection could be seen as a something which would be at odds with communities – nation states (Noll, 80:2000).

The basic idea of communitarianism is that there is a natural proximity and affinity between individuals with a common set of values in communities (Goldmann et al, 128:1997). I have chosen to adapt this perspective as contrary explanatory tool to universalism, as it is a perspective which concentrates, as the name indicates, on the common good of the community, in contrast to that of the individual, endorsed by Universalism.

Michael Walzer, a social scientist adhering to communitarianism explains that "*it is only as members somewhere that men and women can hope to share in the other social goods – security, wealth, honor, office and power – that communal life makes possible*"(Noll, 80:2000).

Communitarianism strongly emphasizes the importance of the well-being of communities and the goal is to promote shared values constructed on a moral base which derives from the community and reflects its member's basic needs (Mortensen, 190:2003). The perspective indicates that states, as representatives of communities of citizens, can morally justify setting up entrance policies to their territory that privilege the interests of their members (Gibney, 23:2004). Gibney explains, that writers of the communitarian strand mostly have ignored the issue of states' responsibilities to refugees and have concentrated their attention primarily on the reciprocal duties of citizens – those already sharing a state, which has shown that they assume the question of *who is* and *who should be* a member of the political community is unproblematic (Gibney, 24:2004).

Known communitarian writers such as Michael Walzer or Charles Taylor have emphasized that personal identities are constituted by membership in national and cultural communities, and argue that cultural circumstances play an important role in making individuals moral agents (Gibney, 25:2004). Further, national communities have a moral right to protect their integrity and have the right to reproduce their culture free from interference of outsiders – a right that stems from being member of a community (Gibney, 25:2004).

## 3 Background

### 3.1 Asylum Policy in the EU – Towards a Common European Asylum System

Migration, International cooperation on border management, counter terrorism, crime-fighting and other issues related to international security is under the working of EU Policy-making on Justice and Home Affairs (JHA). The establishment of the JHA was agreed on as a result of problems of arising from the Schengen Agreement in 1985 by France, Germany and the Benelux countries, making it possible for people - including illegal immigrants, terrorists and organized crime groups to move freely over borders. The Schengen Agreement meant no systematic border controls within the Schengen area, but strengthened external borders vis-à-vis non-Schengen countries (Occhipinti in Bomberg, Peterson, Stubb, 141:2008).

By the implementation of the Maastricht Treaty in 1993, the JHA became a formal policy area of the EU with greater possibility of moving towards the goal of the “four freedoms” of the EU in the field of international security, namely free movement of people, goods, services and capital (Occhipinti in Bomberg, Peterson, Stubb, 139:2008).

When the Amsterdam treaty was adopted in 1999, new concepts regarding justice, security, freedom and asylum policy arose in Europe. The treaty resulted in internal border abolishment and external border reinforcement (Occhipinti in Bomberg, Peterson, Stubb, 139f:2008). This was the beginning of the first phase of the Common European Asylum System, CEAS, and the question of a common asylum policy on European level started being discussed (Sotelo, 5-11-2009).

In October 1999, new milestones were set for the JHA’s EU agenda in Tampere, Finland, where EU countries committed themselves to ‘*the absolute respect for the right to seek asylum and the full and inclusive application of the 1951 Geneva Convention*’ (UNHCR, 02-12-2005). Following Tampere, the Hague programme, which is today still active, was presented during the Dutch presidency in 2004, with the key priority to create a common asylum area in Europe (Occhipinti in Bomberg, Peterson, Stubb, 145:2008). The Hague Program was adopted to guide the EU on JHA until 2010 (ibid).

The goal of a common asylum policy in the EU is primarily to provide a guarantee of protection for asylum seekers and refugees as well as to ensure that taking care of these people – often referred to as ‘handling the burden’ – is shared equally between EU member states (Occhipinti in Bomberg, Peterson, Stubb, 155:2008).

In the implementation of a CEAS, the EU has a long way to go as it has to ensure that the 1951 Geneva Convention on the Status of Refugees is the foundation of the EU refugee policy, which until now, has not been the case as asylum seekers and refugees have met severe restrictions upon their right to seek asylum and to be protected from being sent back. As a result, the rule of law in the EU has been questioned (ibid).

When discussing why such a system should be implemented, it is important to take into consideration the perception of asylum-seekers and refugees in the EU. An alternative point of view, is given by Pécoud and Guchteneire, who claim that the attitudes towards migrants are geo-politically biased as migration from developing countries from the East and the South is especially perceived as a threat (Pécoud, Guchteneire, 147:2007). “*Immigrants from developing countries are often associated with smuggling, illicit work, drugs, social problems, organized crime, fundamentalism and terrorism*” (Pécoud, Guchteneire, 147:2007). They further explain, that in this context, the citizens of rich European welfare states show worries about their future social rights and benefits and perceive multiculturalism born through migration as a symbol for violation of the traditional state borders (Pécoud, Guchteneire, 147:2007). When talking about immigration as a security issue, the immigrant becomes a criminalized person and thus perceived by the public as a threat – Western democracies usually justify their exclusionary politics and border control on these premises – thoughts which are at odds with universal ideas of equality (Pécoud, Guchteneire, 147:2007). After September 11th, there has been an increasing reluctance towards refugees in Europe (Boswell, 3:2005). One could speculate here whether the political climate of the 20th century, including the war on terror, has changed the attitude towards asylum seekers and refugees in Europe.

## 3.2 Dublin II Convention

In 1990 the Dublin II Convention, was implemented in the EU, determining that the applications of asylum seekers and refugees are to be processed and agreed on in the first European state of the applicant’s arrival (O’Nions, 2006).

The primary aim of implementing the convention was set out to be a harmonization of asylum policies in the EU. It was seen as a way to remove the alleged risk of “asylum shopping” in a number of EU states and an insurance that there is no potential for “asylum seeker in orbit” situations, whereby an asylum seeker or refugee is transferred between states without having their claim examined (Irish Refugee Council, 2002).

Since the beginning of the 1980s, there has been a great increase in asylum seekers which has eroded the distinction between economic migrant and political refugee (Spohn, O’Neill, 1998). Today, economic migrants are thought to widely apply for asylum in the EU, making it difficult to differentiate economic migrants

from ‘genuine’ refugees seeking protection from persecution. There is an underlying presumption that applicants who do not claim asylum in the first country of entry in the EU are made on a false basis, as these people might apply for asylum only for economic reasons. This attitude reveals a lack of consideration for family ties or language, which might be the real reasons for which asylum-seekers and refugees choose a particular destination to apply for asylum (O’Nions, 2006).

The Dublin convention has been criticized from a humanitarian perspective, as the granting of asylum or other protection to asylum seekers and refugees is not made on an equal basis in the EU, making these people being stuck between complicated regulations, meanwhile settled in temporary transits such as camps (O’Nions, 2006). The UNHCR has reported that these camps often provide difficult living conditions (Spindler, UNHCR 2009).

As the Treaty of Amsterdam came into work in 1999, the legal basis and procedure for asylum policy was changed, and a new community legal instrument therefore became necessary; the result was the Dublin II Regulation ([www.europa.eu](http://www.europa.eu), 04-2006). The regulation, which is still in function, made changes to the Convention; however, many of the above mentioned problems persist.

### 3.3 Dublin II Regulation

In 2003, the Dublin Convention from 1990 was replaced by the Dublin II regulation, which determines more clearly which state should be responsible for deciding on an asylum application lodged in an EU member-state by a third-country national (UNHCR, 34f:2006). The changes brought on by the 2003 Regulation were improvements in form of a speeding up of the procedural time of applications, not to leave applicants in a ‘state of uncertainty’ for too long as well as new provisions offering greater protection for the unity of family groups ([www.europa.eu](http://www.europa.eu), 18-12-2002). However, the purpose of the Regulation remains the same as that of the Convention – to avoid situations of ‘refugees in orbit’, by allocating responsibility to a Member State for handling the asylum application, as well as the aim to avoid asylum shopping ([www.europa.eu](http://www.europa.eu), 04-2006). The regulation thus also states that only one country should be responsible for the asylum procedure of each applicant. This means that if one state has started an application process, after which it is known that the asylum seeker is under the responsibility of another state, the applicant should be sent to that state ([www.europa.eu](http://www.europa.eu), 06-12-2009).

In the Dublin II Regulation it is clearly stated that the Member States respecting the criteria laid down in the 1951 Geneva Convention, respecting the principle of non-refoulement, are considered as safe countries for third-country nationals (EC No 343/2003 para.2). It should here be noted that not all countries follow these regulations and all member states do not provide the same level of

‘safety’ (O’Nions, 2006). The Regulation also sets out that each Member State has the right, pursuant to its national laws, to send back an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention ([www.europa.eu](http://www.europa.eu), 04-2006). The regulation has been accused to cause problems, resulting in the violation of asylum seekers’ human rights and in the abuse of the Geneva Convention (Sotelo, 5-11-2009). In this paper I refer to the Convention, as the issue discussed is primarily resulting from this.

### 3.3.1 “Asylum Shopping”

At present, it is easier, and as a result “more attractive” to receive asylum in some European countries than in others, which has led the emergence of the term ‘asylum-shopping’, where asylum-seekers apply for asylum in more than one country (Irish Refugee Council, 2002).

Some mean, that even though the Geneva Convention does not state that refugees should have the possibility of choosing their country of residence, it is still a violation of their rights to not let them live in a country of their preference, as this preference is often based on family connection grounds. This is by some seen as a pure ‘punishment’ and asylum-seekers are considered endangered by being sent back to the first country of arrival, as many countries in Europe provide very different opportunities to integrate (Sotelo, 5-11-2009). This has been a large problem especially in Greece, Italy and Spain – countries prone to receiving asylum-claims because of their geographical coastal placement. In Greece, even when Saddam Hussein was still in power, less than 1 percent of Iraqi applicants were given refugee status in the country (Lubbers, 5-11-2004).

Under the Geneva Convention, states should not send back people to their national country if there is a ‘well founded fear of persecution’ – the principle of non-refoulement. However, within the EU, states define which fear is ‘well founded’ very differently. This makes asylum shopping more common, as obtaining asylum is more difficult in some countries than in others. This situation has as consequence that asylum seekers often state that their reason of application for asylum is fear of persecution to this way obtain refugee status. However, it is common that many member states within the EU do not believe that this is the reason for asylum-applications, hence making it more ‘legitimate’ to return asylum seekers (O’Nions, 2006).

To prevent asylum-seekers to apply for asylum in several countries, a centralized system for collecting biometric data, called Eurodac, was implemented in 2003 as a part of the Dublin II System. The Eurodac enables authorities and border management officials to take fingerprints of asylum-seekers, making it legally possible to reject applications cases that have already been made in another country, and returning applicants to their original country of application (Occhipinti in Bomberg, Peterson, Stubb, 155:2008). As a result, asylum seekers and refugees have taken drastic measures. In the case of ‘The Jungle’, William

Spindler, spokesperson for the UNHCR in Paris, explains that *“To avoid being sent back to Greece or elsewhere, some have gone to the extreme of burning their fingertips with red-hot nails or sulphuric acid so that they cannot be identified”* (Spindler, 17-07-2009).

### 3.3.2 Responsibility towards Asylum Seekers and Refugees – Handling the Burden

The lack of a concrete European Asylum Policy in the EU has been on the agenda of discussion for a long time, but still no single institution handling this matter has been implemented – according to the UNHCR the reason is a lack of political will to establish such an institution (Lahteenmaki, 18-11-2004).

In 2004, Ruud Lubbers, former High Commissioner for Refugees, stressed the need of an increased efficiency of asylum procedures and the importance of not undermining Europe’s commitment to Human Rights and refugee protection (Lubbers, 5-11-2004). Lubbers clearly stated the need for member states to *not only put their short-term domestic political interests first*, but to also seek for the long-term *‘common good’* (ibid). An important issue, which is still, today almost six years later, on the agenda, is how to bring the member states closer together and to find a common system for burden-sharing (ibid). Lubber stated the lack of such a system, saying that instead there is a tendency to *‘shift the burden to other EU states or even to countries outside the EU that are ill-equipped to handle asylum claims’* (ibid). The issue has not yet been solved, as the goal of establishing a common system for all member states within the EU has not yet been met.

The fact that genuine refugees, meaning those who according to the Geneva Convention are recognized as refugees, need and deserve protection is the international asylum system’s *‘raison d’être’*. However, the protection needed is not always provided under Europe’s asylum systems and many asylum seekers do not even get a chance to state their claim (ibid). Lubbers on behalf of the UNHCR said that *‘a reliable system that identifies and then protects refugees is what Europeans want and refugees deserve* (Lubbers, 5-11-2004)’. This was in 2004. Today, there is still no system implemented which provides this protection in the EU.

### 3.3.3 The 1951 Geneva Convention Relating to the Status of Refugees

The 1951 United Nations Geneva Convention relating to the Status of Refugees was adopted in December 1951 after a UN general Assembly in 1950, and entered into work in 1954. It was written and brought out to constitute a framework for how receiving countries should treat refugees (Millbank, 05-09-2000). Two core

principles of the convention are the principle of *non-refoulement*, meaning that states should not send someone back to a country where there is a fear of persecution, and secondly, the principle of not *penalizing* asylum-seekers for illegally entering a country (ibid). The UNHCR was established as an implementing actor for protection of refugees adhering to the Geneva Convention. The mandate of the UNHCR is to provide international protection, trying to ‘*ensure that no refugee is returned involuntarily to a country where he or she has reason to fear persecution*’ (ibid).

After the Second World War, refugees were seeking protection, which gave rise to the protocol covering rights for refugees throughout the world. EU member states have signed and agreed to the convention and the obligations under it come into effect *when an asylum-seeker has entered a states territory and applied for refugee status*. This is important as the same rules do not apply for asylum-seekers as for refugees under the convention, a highly problematic issue, resulting in asylum seekers often entering a country with or without legal documentation claiming that they have a ‘well founded fear of persecution’ in order to obtain the same rights as refugees (Spohn, O’Neill, 86:1998). The UNHCR has a mandate to provide protection to those in need, however, the decision of granting asylum remains the choice of the individual state (Spohn, O’Neill, 86:1998).

The 1951 Geneva Convention acknowledges that refugees have “*the right to seek and to enjoy asylum*”, but imposes no correlative obligation upon states to *grant* the asylum (Spohn, O’Neill, 86:1998). What can be seen is that asylum seekers become the target of a quota system which gives asylum-seekers the right to enter a country, but the states have no correlative duty to accept them (O’Nions, 2006).

### 3.4 “The Jungle” – One of Many Cases

On Tuesday, the 22 of September 2009, French riot police with bulldozers entered a refugee camp known as ‘The Jungle’ in the town of Calais in Northern France. Makeshift tents that had been put up, providing shelter for almost 300 refugees mainly from Afghanistan, Iraq and Libya, were cleared with the ground and a total of 287 people, of which almost half were minors, were detained (Chrisafis, Siddique, 22-09-2009). Many of the residents had come to Europe with people smugglers, often paying large sums of money to cross several countries before reaching France (ibid). Calais, with its proximity to the final aim destination, Britain, connected by trucks, cars, ferries to cross the border, remains a magnet for refugees and asylum seekers as well as human traffickers exploiting their desire to reach the U.K., where many have family connections and where obtaining refugee status is easier and brings more in aid payments (Crumley, 15-12-2009). The aimed destination that was not reached. As Britain has ruled out taking in migrants due to as home secretary Alan Johnson stated ‘*measures that have been put in place to prevent illegal immigration and stop people-*

*trafficking...*' (ibid) instead these people got tangled up in the European asylum bureaucracy, imposing yet restraining rights for refugees. Johnson further explained that the closure of the camp was a measure taken by the British and the French together to '*...strengthen our shared border and that of Europe as a whole*' (ibid).

The Jungle is only one of several camps in Europe, where asylum seekers and refugees have settled. Along the Nord-pas-de-Calais coast in France, migrants mainly from Afghanistan, Iraq, Somalia and Eritrea have been settled in camps, waiting for possibilities to reach Britain. France is unlikely to return the residents of 'The Jungle' to Afghanistan because of the situations being insecure and this would stride against the rules stated in the Geneva Convention which France has agreed to as a member of the EU. However, it remains uncertain what will happen with these people. French immigration minister Eric Besson strongly criticized the handling of the camp closure and the treatment of its residents. Some had lived in the camp for more than 8 months and, at its peak, 'The Jungle' was home to almost 800 migrants (ibid).

Another camp, or detention centre, set up by the Red Cross in Sangatte, France, was closed in 2002. Sangatte and The Jungle have become symbols of the failure of British and French authorities to deal with protection seekers desperate to reach Britain, but stopped by British authorities and ending up on the border, stuck in a no man's land (Chrisafis, Siddique, 22-09-2009).

People that are unable to return to their country of origin for serious reasons, yet reasons which do not fall under the Geneva Convention, are regarded not to be refugees and are completely dependent on governments to grant them protection (Millbank, 05-09-2000). The problem faced at this stage is the difference in acceptance of refugees and asylum seekers depending on country of application. It is important to note that the 1951 Geneva Convention was not designed as a burden-sharing mechanism between states (Millbank, 05-09-2000).

Young Afghan and Iraqi men, settled in the camp since several months, have explained to UNHCR staff their concern of being sent back to Greece, where, reportedly, there have been several cases of violent treatment of asylum seekers. In Greece, the recognition rate of asylum requests from Iraqi immigrants stands around 0%, compared to 76% in Sweden (Blanc, 02-06-2009).

The fate of the former residents of 'The Jungle' is unknown, but as French Immigration Minister Eric Besson stated, many will simply be deported, but no one will be sent if the conditions are not safe (Kirby, 19-09-2009). The question then is what is considered as safe, and who should provide protection for these people.

## 4 Analysis – The EU Member State and its Universal Responsibilities towards Refugees

### 4.1 “One for All or All for One”?

In this part of the study, I will apply the main arguments from Universalism and Communitarianism onto the problematic evolving in the EU around the Dublin II Regulation and explain how this problematic can be normatively approached through two different value premises. The fate of asylum seekers and refugees is examined in order to explain the moral rights to act under the Dublin II regulation, given the importance of universal ethics on the one hand, and the importance of the European member state as a community on the other.

As Gregor Noll points out, asylum issues are situated in the ‘conflict zone’ between two foundational standards: either striving for the global realization of human rights or letting preference be given to the interest of a population of a certain state (Noll, 74:2000). While Universalism brings forward universal values, Communitarianism based on nation interest, stems to the thought that ‘*each group has a right to promote its own interests and especially independence without regard to the interests of larger groups*’ (Merriam-Webster, 10-12-2009).

#### 4.1.1 Universal Ethics and Refugee Protection in the EU under Dublin II

The perspective of universalism looks at ethical values as global, where each individual is seen as part of a global entity which has to ensure a level of protection which cannot be provided by a community in form of the state (Noll, 75:2000). In this view, the interest of the individual is prior to that of the community, and the universalist perception of global ethics towards refugees hence is understood in terms of ‘all for one’, meaning equality for each individual (Noll, 80:2000).

The Dublin II Regulation says that asylum applications should be lodged in the first country of arrival of the protection seeker. The aim of this is to prevent

situations of refugees in orbit, and at the same time, the system is designed to prevent ‘asylum shopping’ (www.europa.eu, Dublin II Regulation 2003, 06-12-2009). Thus, the underlying assumed value is that asylum shopping is something bad or unwanted. One should then ask *who* is it bad for? Universalists put the individual as part of a global community. Given that asylum shopping is indeed ‘bad’, partly because asylum seekers who are not in need of protection also get through the system; from a universalist perspective, where ‘all for one’ is the head principle, being able to choose the place of residence should be viewed as a common right. As it is difficult to determine who is a ‘genuine’ protection seeker, it should from this perspective be wrong to not provide protection to all. This right should, from a universalist perspective, not be based on if the protection seeker has a genuine reason for seeking protection or not. As it is at the moment not possible to determine who is a genuine protection seeker and who is not, sending a person back if there is a potential risk of persecution could have serious consequences.

Under the 1951 Geneva Convention, member states have agreed to protect refugees from being sent back. Currently, not all countries follow these regulations, even though the convention has been agreed upon. Knowing this, sending asylum seekers and refugees to for example Greece, where it is proven that the protection is insufficient and where there is a risk of refoulement, from a universalist perspective, this could be seen as striving against universal values where natural law sets out the rules for moral behavior.

Universalists adhere to Human Rights on the basis of the value attributed to being human. From this perspective, each individual, including asylum seekers and refugees, should be able to obtain protection as a human right. As Noll explains, states are by universalists seen as collective guarantors of the implementation of protection, and protection obligations are picked up by one state when another one fails. The Dublin system has created a situation where this protection by the state is not guaranteed and protection seekers are sent between states or stuck in temporary settlements such as ‘The Jungle’.

The inhuman conditions –as described by the UNHCR – in which the former residents of ‘The Jungle’ lived can, from a universalist perspective, be seen as wrong. From a universal ethical point of view, as explained, “*universal rights are considered fundamental to well-being and each individual should have an equal right to live in a state where these rights can be enjoyed*” (Boswell, 49:2005). Further, from this perspective, people should deserve to be granted protection in the state where they feel these rights can be enjoyed. The question of asylum-shopping as something negative could be questioned, as family connections and good living conditions are often a cause of choice of application destination. Universalism and universal ethics are often used to explain what global moral responsibilities should exist towards protection seekers. On the basis of being human – people, including protection seekers, should deserve to be treated equally.

In the example of ‘The Jungle’, given to illustrate the problematic of the current European asylum system, from a universalist perspective, not giving the

affected permission to reside in the UK is against the human rights of these people as it could affect their individual well-being.

#### 4.1.2 Community Values versus Universal Ethics in the EU?

From a communitarian perspective, based on the underlying assumption, or given that, asylum seekers and refugees in Europe are ‘unwanted’, it could be understood that these people are not part of the *community*, in this context, *the state*. The reluctance towards granting asylum for protection seekers could here be understood in terms of a threat to the community.

As communitarians argue that freedom is the basis of the right world concept, including *freedom from responsibility and obligation towards individuals who are not part of the community* (Noll, 80:2000), the unwillingness to provide protection for asylum-seekers could be understood as the states’ or *right to ‘freedom from responsibility’*, as the protection seekers is ‘not part of the community’. The community thus has no obligation to provide this protection.

The question is also to what extent the state wants to grant protection, based on how the asylum seeker and refugee could be perceived by the state; *if* – as described by Pécoud, Guchteneire and Boswell – viewed as a risk associated with of crime, social problems and terrorism and seen as a financial burden.

The Dublin II convention, followed by the Regulation and by Eurodac, also part of the Dublin II system, were an initiative going against the member states agreements under the 1951 Geneva Convention. Initially, these were implemented to avoid asylum shopping in the EU. One could, from a communitarian view, argue that the state does not have a responsibility towards people residing illegally on a states’ territory. Clearly, asylum shopping is something viewed negatively from a nation perspective, as it is the member state that has to ‘handle the burden’ of arriving protection seekers.

As communitarians argue that national communities have a moral right to protect their integrity and have the right to reproduce their culture free from interference of outsiders (Gibney, 25:2004), one could understand the EU member state as reluctant towards taking in asylum seekers and refugees as a way to protect not only their integrity but also their culture. Can one ask from the community to give up its interests to put first the interests of refugees and asylum seekers? Communitarians, again, argue that freedom is the basis of the right world concept, including freedom from responsibility and obligation towards individuals who are not part of the community (Noll, 80:2000). This freedom from responsibility is understood as a way of preserving the community and as putting the priorities of the communities own members first. In this context, acting under the Dublin II system could be justified.

## 5 Result

Given that Universalism and universal rights are in the centre of judgment, not giving the rightful protection to asylum seekers and refugees in the EU is not morally right as this is seen as a responsibility towards the individual on the basis of being human. However, what is morally right according to communitarians is that the community has the freedom to choose and has the right to protect itself. From this later perspective, the states acting under the Dublin II system can be understood as morally right. It has been argued that the Dublin II system violates the rights of asylum seekers and refugees, as it in the worst cases leads to refoulement. This because of the problem in determining if a person is a ‘genuine’ protection seeker or not.

Even though I more strongly argue for the universalist perspective, the problematic of coinciding normative values is nonetheless important. When arguing for what is morally right, one also has to consider what is practically possible in a specific context and to consider how to deal with the outcome of applying different perspectives to a problematic. There is a normative problematic arising in the fact that the one who is expected to grant protection to the asylum seekers and refugees is the state. This coincides with the communitarian perspective of the community’s obligations towards non-nationals.

From a communitarian perspective, the interest of the community should be protected, and there is no moral duty to the outsiders of this community. This could, from a universalist view be seen as strongly dismissive of ethical responsibility under the natural law.

When arguing for a normative position it is important to state why this position should be argued for. To do this, one should in this context ask what the costs will be for the affected parts – asylum seekers and refugees - given each perspective. While the universalist perspective is profiled towards the responsibility for the affected, the communitarian perspective could be viewed as more focused on the costs for the community. The costs for the state, such as financial expenses and possible negative effects such as fear of criminality as well as fear of losing state integrity if ‘asylum shopping’ and granting protection for asylum seekers and refugees continues, should be put against the consequences for refugees and asylum seekers if protection is not granted and if ‘asylum shopping’ is restricted.

The arguments for adopting a universalist view towards this issue, in my opinion, stand stronger than adopting a communitarian perspective. The costs for asylum seekers and refugees can be poor protection and an ignorance of their rights, as there is a risk of being sent back to a country which provides poor protection, as well as a risk of being displaced from family members. The risk also involves rough living conditions and the risk of being stuck in ‘no man’s

land' without possibilities to live a normal life – a universal right which each individual should have on the basis of being human. The Dublin II Convention has imposed problems striving against this right, and the protection seekers are the one being affected without, in some cases, even being able to claim protection. The problem that remains could be seen as universal responsibility conflicting with community interest.

## 5.1 Summarizing Conclusion

In the 'given-that' analytical method the aim is to problematize and compare different normative positions. I have in this study done this using a universalist and a communitarian perspective to explain the moral right of EU member states to act under the Dublin II Convention. I have done so taking into account different points, such as the 1951 Geneva Convention, the occurrence of asylum shopping, as well as the need of taking responsibility towards asylum seekers and refugees in the EU.

To answer the question of the moral right to impose restrictions upon protection seekers in the EU, I argue that there is a moral responsibility towards granting protection on a humanitarian basis seen from the universalist perspective as each individual should have the right to protection. Still, given that the community is the one expected to take responsibility, it is important keep in mind how the realization of such values should happen. As there is, as mentioned no existing implemented institution for this matter, the state is the one who stands responsible.

It has been my aim to understand the moral right of setting up restrictions which affect asylum seekers and refugees negatively – an issue which I think has to be recognized as important in the EU. When adopting the classic normative analysis the analyst takes a position for a specific value. Weighing universal and communitarian values towards each other, I find that there should, or even has to be, a universal approach to the question addressed. From a purely moral view, given the negative consequences for protection seekers, which in my opinion, stand higher than the preservation of integrity of the community, the protection of asylum seekers and refugees should not be neglected.

If more space was given, it could be interesting to study the meaning of state identity as an underlying factor for not granting asylum. Also, the EU could be studied as a community, where focus could be shifted to European versus Universal values. This however, would raise the question of the existence of European values and a European identity, and is a problem which deserves to be explored at a later stage.

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