



Faculty of Law  
Ghent University

Academic year 2014-2015

# **THE DUBLIN REGULATION: PAST, PRESENT, FUTURE**

Master thesis in partial fulfilment of the requirements  
for the degree  
'Master in Law'

Submitted by

***Katrien Desimpelaere***

00605548

Promotor: Prof. Dr. Yves Haeck  
Commissioner: Dr. Salvatore Nicolosi

## FOREWORD

This thesis is written as completion to the master Law at the Ghent University. In my master program I mainly chose a combination of International Public Law, Human Rights Law and Refugee Law courses. The subject of this thesis, the Dublin Regulation, combines these fields in a most interesting way. However, the choice of my subject was not only a consequence of the topics which raised my interest during my Law studies, but also of some related experiences I had the past years, which I would like to briefly mention here.

In the summer of 2011, just before I started studying Law, me and a friend, both freshly graduated in moral sciences, went to the Italian island Lampedusa. Just like many other people we arrived on the island on a sunny day. However, unlike many of these people, we did not arrive in a rickety boat and were not there in search for a better future in Europe. It was the first time I was confronted with the struggle of many people at the borders of ‘Fortress Europe’. Two years later I went with Amnesty International volunteers from all over Europe to the Greek island Lesbos, another ‘gate’ to Europe. There I heard for the first time about the – then newly modified – Dublin Regulation. Among all the information we got, this contested Regulation attracted my attention and I wanted to know more about it. It was thus a logical choice to suggest to write my master thesis about the Dublin Regulation.

In this foreword I would like to express my sincerest gratitude towards all the people who supported me while writing this master thesis.

First of all I want to thank my supervisor Professor Dr. Yves Haeck who accepted this topic and gave me interesting ideas and advice on how to approach this complex matter. I also want to thank him and Dr. Salvatore Nicolosi for the valuable feedback they gave me throughout my writing process.

My friends, for their support and especially my friend Luca with who I went to Lampedusa, which was essential for raising my awareness about this matter.

Last but not least I want to thank my family for their invaluable support, while writing this thesis, but also throughout all of my studies. Thank you!

*Katrien Desimpelaere*

*16 August 2015*

## TABLE OF CONTENTS

Foreword .....	1
Abbreviations .....	4
Introduction .....	5
1. The international refugee protection regime .....	6
2. First attempts of European cooperation in the field of asylum: Schengen and Dublin I .....	9
2.1. Differing national asylum regimes and related problems .....	10
2.2. Evolution towards a European internal market .....	11
2.3. The Schengen Convention .....	12
2.4. The Dublin Convention (Dublin I) .....	14
2.4.1. Provisions on responsibility .....	15
2.4.2. Procedure .....	16
2.4.3. Evaluation .....	17
3. The Europeanisation of asylum policy and its cornerstone: Dublin II .....	24
3.1. The first stage of the CEAS: From cooperation towards harmonisation .....	24
3.2. The legal framework of the CEAS .....	26
3.3. The Dublin II Regulation .....	29
3.3.1. Provisions on responsibility .....	31
3.3.2. Procedure .....	32
3.3.3. Evaluation .....	34
3.4. The Recast Dublin Regulation Proposal .....	40
3.5. The end of blind mutual trust: ECtHR and CJEU jurisprudence on Dublin II .....	41
3.5.1. The ECtHR and CJEU as ‘regional refugee law courts’ .....	43
3.5.2. The recognition of refutability: <i>T.I. v the UK</i> and <i>K.R.S. v the UK</i> .....	45
3.5.3. The ECtHR to the rescue: <i>M.S.S. v Belgium and Greece</i> .....	51
3.5.4. The CJEU’s cautious confirmation: <i>N.S./M.E.</i> .....	57
3.5.5. Developments in the wake of <i>M.S.S.</i> and <i>N.S./M.E.</i> .....	63
4. The last reform and future perspectives: Dublin III .....	69
4.1. The second stage of the CEAS: Minimum standards become standards .....	69
4.2. The reformed legal framework of the CEAS .....	70
4.3. The Dublin III Regulation .....	72
4.3.1. Provisions on Responsibility .....	74
4.3.2. Additional Safeguards .....	78
4.3.3. Procedure .....	79
4.3.4. Evaluation .....	80

4.4. Proposals for reform .....	88
4.4.1.Addressing the problems associated with the Dublin system .....	88
4.4.2.Alternatives for the Dublin system .....	92
4.5. Recommendations for the future .....	99
Conclusion .....	103
 Annex I: overview of responsibility criteria .....	 105
Annex II: overview of procedural time limits .....	106
Annex III: ICMPD comparison table of different distribution models .....	107
Summary in Dutch (Nederlandstalige samenvatting) .....	108
Bibliography .....	111

## ABBREVIATIONS

AG	Advocate General (at the Court of Justice of the European Union)
Benelux	Belgium, the Netherlands and Luxembourg
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	Committee for the Prevention of Torture
DC	Dublin Convention 1990
EASO	European Asylum Support Office
EC	European Communities
ECHR	The European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUREMA	Pilot Project for intra-EU Relocation from Malta
Eurodac	European Automated Fingerprint Recognition System
ICMPD	International Centre for Migration Policy Development
IOM	International Organisation for Migration
IRO	International Refugee Organisation
NGO	Non-Governmental Organisation
SC	Schengen Convention 1990
SWP	Stiftung Wissenschaft un Politik (German Institute for International and Security Affairs)
TEC	Treaty establishing the European Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights 1948
UNHCR	United Nations High Commissioner for Refugees

## INTRODUCTION

Allocation of responsibility for examining asylum applications, among different States was one of the first examples of intergovernmental cooperation in the field of asylum. Not surprisingly this happened in an era and a place where the creation of borderless areas became real. The present responsibility allocating rules in the Dublin III Regulation are still largely based on the general principles set out in the Schengen Agreement of 1985 and the Dublin Convention of 1997. However, these principles have not been undebated in the past eighteen years. Several stakeholders have repeatedly argued for the overhaul of the Dublin system which is criticised for being unfair to both asylum seekers and Member States. This thesis shall give a comprehensive overview of the developments the Dublin system went through, against the background of the ‘europeanisation’ of asylum policy.

In the first Chapter a brief overview shall be given of the international refugee protection regime. This background shall focus on the concept of asylum and the main principles of international refugee law, which provide for the general framework for every asylum policy, be it national or European.

The second Chapter will zoom in on the European situation in the eighties and nineties, where the creation of a borderless area created the need to cooperate in the field of asylum. The first responsibility allocating mechanisms, respectively in the Schengen Agreement of 1985 and the Dublin Convention of 1997 shall be discussed against this background.

The third Chapter shall focus on the Dublin II Regulation, the so-called cornerstone of the Common European Asylum System. In evaluating the Dublin II Regulation and its underlying principle of mutual trust, particular attention will be paid to the judgements of the European Court of Human Rights and the Court of Justice of the European Union.

Finally, the fourth and last Chapter shall focus on the present Dublin III Regulation and give an overview of possible alternatives to it. It shall conclude with recommendations for the future, considering the present challenges.

## 1. THE INTERNATIONAL REFUGEE PROTECTION REGIME

The international refugee protection regime established by the United Nations is fairly new compared to the concept of asylum which is deeply rooted in the history of human society. The word “asylum” derives from the Greek *asylia* or “inviolability”,<sup>1</sup> literally it means ‘something not subject to seizure’.<sup>2</sup> Traditionally asylum was related to a place or territory where one cannot be seized by his or her pursuers. Nowadays it relates to the broader concept of protection or freedom from such seizure. However, such protection or freedom is intrinsically linked to a geographical location, where it can be found and enjoyed.<sup>3</sup> The scope of that protection and those who could benefit from it changed throughout the centuries. In ancient Greece a specific procedure called *hikateia* enabled people fleeing from persecution in their own state to claim asylum in another state. A successful claim would grant the claimant immunity from the authority of those who pursued him. During the early Middle Ages, “sanctuary” or asylum granted by the Church rather served as a vehicle for mercy for both innocents and criminals. From the 15<sup>th</sup> century onwards asylum regained its criminal justice character by defending innocent people against extradition to the state which would inflict unjust punishment. After the French Revolution in 1789 this also included the protection of those who were persecuted abroad for political offenses. Asylum’s historical function was thus to immunise fugitives from extradition in order to protect them against the perceived unjust punishment in another state.<sup>4</sup>

In the twentieth century, the awareness arose of the responsibility of the international community to provide protection and find legal solutions in the field of asylum, given the intrinsic border-transcending character of asylum. First attempts to create an international refugee protection regime were undertaken by the League of Nations after the First World War. In 1921 Dr. Fridtjof Nansen was appointed as High Commissioner for Refugees in response to the Russian emigrant crisis after the Russian Revolution in 1917. The office of the High Commissioner dealt with questions of legal status, repatriation and coordination of relief operations.<sup>5</sup> During the following years, their mandate was extended to protect Armenian,

---

<sup>1</sup> Matthew E. Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009), 26

<sup>2</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law. Vol II Asylum, Entry and Sojourn* (AW Sijthoff 1972), 3

<sup>3</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law. Vol II Asylum, Entry and Sojourn* (AW Sijthoff 1972), 3

<sup>4</sup> Price (n 1) 24-58; Grahl-Madsen (n 3), 8-9

<sup>5</sup> James C. Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’ (1984) 33 Int’l & Comp LQ, 350-351; Louise W. Holborn, ‘The Legal Status of Political Refugees, 1920-1938’ (Oct 1938) 32(4) AJIL, 683

Assyrian and Turkish refugees.<sup>6</sup> In 1946 the International Refugee Organisation (IRO) was created to help refugees in Europe in the aftermath of the Second World War and two years later this was replaced by the United Nations High Commissioner for Refugees (UNHCR).<sup>7</sup> The UNHCR was initially established with a three-year mandate and the idea to disband thereafter.<sup>8</sup> However, up to the present day it is the leading international organisation dealing with the protection of refugees and stateless people.

The ‘right to asylum’ can be understood in different ways, dependent on the subject. Traditionally it was considered as the right of a State *to grant* asylum. More popular nowadays is the right of the individual *to seek* and/or *to be granted* asylum.<sup>9</sup> The Universal Declaration of Human Rights (UDHR) of 1948 was the first international legal instrument to mention the right to asylum. In line with its historical function, Article 14 UDHR stated that “everyone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>10</sup> The proposal to include the more important right *to be granted* asylum was rejected, constraining it to the right *to seek and enjoy* asylum.<sup>11</sup> Without being legally binding, the UDHR is regarded as “an authoritative expression of the customary international law of today in regard to human rights”.<sup>12</sup> Most rights are reaffirmed in subsequent regional human rights instruments, as was the case with the right to asylum which is included in the American Convention on Human Rights, the African Charter on Human and Peoples’ Rights and the Charter of Fundamental Rights of the European Union.<sup>13</sup>

The *Geneva Convention Relating to the Status of Refugees* (Geneva Convention), adopted by the United Nations in 1951, is grounded on the right to seek asylum laid down in the UDHR.<sup>14</sup> Created in the aftermath of the Second World War, the 1951 Convention originally limited its scope to persons fleeing the events in Europe before 1951. The Protocol which was added in 1967 removed these geographical and temporal limitations and thus gave

---

<sup>6</sup> This gradual expansion of their mandate, depending on migratory crises demonstrates the group or category approach adopted by the League of Nations, in contrast with the general approach under the Geneva Convention after the 1967 Protocol entered into force (*infra*), see: S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Third Edition, Oxford University Press 2007), 16, 36

<sup>7</sup> Erika Feller, ‘Evolution of the International Refugee Protection Regime’ (2001) 5 Wash.U.J.L. & Pol’y, 130

<sup>8</sup> – ‘History of UNHCR’ UNHCR <<http://www.unhcr.org/pages/49c3646cbc.html>> (accessed 28 July 2015)

<sup>9</sup> Grahl-Madsen (n 3), 6

<sup>10</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) art 14

<sup>11</sup> Grahl-Madsen (n 3), 11

<sup>12</sup> Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5(1) Duke J. Comp. & Int’l L., 6

<sup>13</sup> Organization of American States, American Convention on Human Rights [1969] (Pact of San Jose), article 22(7); Organization of African Unity, African Charter on Human and Peoples’ Rights [1982] CAB/LEG/67/3 rev 5, 21 ILM 58 (Banjul Charter), article 12(3); European Union, Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (The Charter / CFREU), article 18

<sup>14</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Geneva Convention), introductory note

the Convention universal coverage.<sup>15</sup> The Geneva Convention and its Protocol do not include a right to seek or be granted asylum, but provide the key principles for the international protection of refugees. A ‘refugee’ is defined as a person who owing to 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 the protection of that country.<sup>16</sup> The refugee status is of a declaratory nature which implies that everyone who meets the criteria of the definition is a refugee, regardless of the official recognition thereof.<sup>17</sup> The Convention does not place States under the legal obligation to grant asylum to persecuted people, but it does impose a more narrow *non-refoulement* duty.<sup>18</sup> This prohibits States to expel or return a refugee to territories where he or she will face persecution or the threat of persecution.<sup>19</sup> In a world with closed borders, asylum thus “transformed from an element of international criminal law (a defence to extradition) to a subset of immigration policy (a defence to deportation)”.<sup>20</sup>

Up to the present day, the 1951 Convention is the only binding refugee protection instrument with a universal character and is therefore considered as the cornerstone of international refugee law. How its principles are implemented traditionally falls under State sovereignty. However, in the last decennia some attempts have been undertaken in Europe to coordinate and even harmonise national asylum policies. A first attempt was undertaken with the establishment of a responsibility allocating mechanism for asylum claims, in the Schengen Convention and the Dublin Convention. These first cooperation initiatives in Europe will be outlined in the next chapter.

---

<sup>15</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (The 1967 Protocol);

Four countries retained the former geographical limitation to European refugees: Congo, Madagascar, Monaco and Turkey (see: UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (HCR/1P/4/ENG/REV3 December 2011), 69)

<sup>16</sup> Refugee Convention, 1.A

<sup>17</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (HCR/1P/4/ENG/REV3 December 2011), H:28; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Second Edition, Cambridge University Press 2014), 1

<sup>18</sup> Price (n 1) 17

<sup>19</sup> Refugee Convention, article 33; The same prohibition is adopted in Article 19 CFREU

<sup>20</sup> Price (n 1) 25

## **2. FIRST ATTEMPTS OF EUROPEAN COOPERATION IN THE FIELD OF ASYLUM: SCHENGEN AND DUBLIN I**

The evolution of the refugee protection regime within the European Community cannot be considered separately from the early developments in the cooperation between the European States. In the aftermath of the Second World War the newly established UNHCR was confronted with approximately one million refugees in Europe.<sup>21</sup> In the same period six European countries, Belgium, France, Germany, Italy, Luxemburg and the Netherlands started cooperating in heavy industry sectors in order to prevent new conflicts. The cooperation expanded to other sectors and more countries joined in the following decades, resulting in the creation of the European Communities (EC) which later became the European Union (EU).<sup>22</sup> They succeeded in intensifying their cooperation and preventing new conflicts between the Member States, resulting in a relatively safe area.

Whereas the period after the Second World War was mainly characterised by intra-community migratory flows, the safe environment in the West-European countries attracted more and more individuals fleeing from political crises and conflicts in other areas of the world. In the 1980s the European Member States were confronted with a substantial increase of asylum applications from people mainly originating from Eastern European countries, Turkey, Iran and Sri Lanka.<sup>23</sup> The disintegration of the Soviet Union and the conflicts following the breakup of the former Yugoslavia resulted in a peak of asylum seekers fleeing to the European Union in the early 1990s.<sup>24</sup> In the same decennium an increase of asylum seekers coming from Turkey, Iraq, Afghanistan and African countries such as the Democratic Republic of Congo and Somalia was recorded.<sup>25</sup>

---

<sup>21</sup> Feller, 'Evolution of the International Refugee Protection Regime', 131

<sup>22</sup> The three founding treaties are: Treaty Establishing the European Coal and Steel Community [1951] 261 UNTS. 140; Treaty Establishing the European Economic Community [1957] 298 UNTS 140 (EEC Treaty); Treaty Establishing the European Atomic Energy Community [1957] 298 UNTS 167

<sup>23</sup> UNHCR, 'Asylum Applications in Industrialized Countries: 1980-1999' (Geneva November 2001), viii; Marlou Schrover, 'History of International Migration' <<http://www.let.leidenuniv.nl/history/migration/index.html>> (accessed 12 November 2014)

<sup>24</sup> Timothy J. Hatton and Jeffrey G. Williamson 'Refugees, Asylum Seekers and Policy in Europe' (IZA Discussion Paper No 1230, Bonn July 2004), 3

<sup>25</sup> UNHCR, 'Asylum Applications in Industrialized Countries', ix, 82, 137

## 2. 1. DIFFERING NATIONAL ASYLUM REGIMES AND RELATED PROBLEMS

The substantial increase of asylum seekers coming to the European Union from third countries created new challenges for the European Member States. The 1951 Convention was ratified by all of them, hence accepting the universal ‘refugee’ definition and the principles laid down in the Convention. Nonetheless, the way they applied these principles varied strongly from one Member State to another. This illustrates the paradox which is generally characteristic of asylum: “it transcends national boundaries but it can only be set in motion within national boundaries”<sup>26</sup>; bringing *international* protection into operation presupposes *national* legislation which is politically based on the doctrine of national sovereignty.<sup>27</sup>

In order to deal with the growing inflow of asylum seekers the Member States individually started to adopt various restrictive measures,<sup>28</sup> such as non-arrival policies which aim at blocking access to their territory, non-admission policies which shift the responsibility for protection to other countries, reforms to the procedures to examine asylum applications and changes in the treatment of asylum seekers during the processing of their claim.<sup>29</sup> These measures affected neighbouring countries, which in turn experienced an increase in the number of asylum applications resulting in “a race for the most restrictive policies with serious results for the right of asylum”.<sup>30</sup>

International refugee law never provided an answer to the question which State should be responsible for offering international protection to a refugee.<sup>31</sup> The lack of a responsibility-allocating mechanism together with the differing asylum regime led to secondary migratory movements within Europe, since many asylum seekers who entered a European Member State travelled on to another Member State where their application for asylum was more likely to be successful.<sup>32</sup> This gave rise to two problematic phenomena: asylum shopping and refugees in orbit. *Asylum shopping* or *multiple applications* refers to the phenomenon where “third-country nationals apply for international protection in more than one Member State with or without

---

<sup>26</sup> Reinhard Marx ‘Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications’ (2001) 3 EJML, 7

<sup>27</sup> Ibid

<sup>28</sup> Clotilde Marinho and Matti Heinonen, ‘Dublin after Schengen: Allocating Responsibility for Examining Asylum Applications in Practice’ (1998) 3 EIPASCOPE, 1

<sup>29</sup> ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006), 6; Hatton and Williamson, 15-16

<sup>30</sup> Marinho and Heinonen (n 28), 1

<sup>31</sup> Marx (n 26), 8.

<sup>32</sup> Karsten Kloth, ‘The Dublin Convention on Asylum: A General Presentation’ in Claudia Faria (ed) *The Dublin Convention on Asylum: Between Reality and Aspirations* (European Institute of Public Administration 2001), 8.

having already received protection in one of those Member States”.<sup>33</sup> This can result in a chain of several asylum applications in different Member States lodged by the same person.<sup>34</sup> *Refugees in orbit* are “refugees who, although not returned directly to a country where they may be persecuted, are denied asylum or unable to find a State willing to examine their request, and are shuttled from one country to another in a constant search for asylum”.<sup>35</sup>

## 2. 2. EVOLUTION TOWARDS A EUROPEAN INTERNAL MARKET

During the 1980s negotiations were held at the European level to establish a European internal market.<sup>36</sup> In 1986 the then twelve Member States of the EC signed the *Single European Act* which aimed at completing the internal market, defined as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”, before 1993.<sup>37</sup> The free movement of persons implied the abolishment of checks and controls at the internal borders for both EC nationals and nationals from third countries. Initially not all Member States seemed willing to lift those controls for third country nationals, but rather wished to retain their sovereignty in controlling immigration into their territories.<sup>38</sup> Nonetheless, despite the fact that no consensus was reached on this point at this stage, the foundations for a borderless internal market were laid.

The abolishment of the internal borders would logically facilitate secondary migratory movements within Europe, which in its turn would increase multiple applications and refugees in orbit. The question of how to abolish internal border checks whilst monitoring and controlling the movement of the increasing amount of asylum seekers within that area, called for a coordinated response.<sup>39</sup> It is therefore not surprising that the first intergovernmental cooperative initiatives in the field of asylum came along with the establishment of borderless

---

<sup>33</sup> ‘EMN Glossary & Thesaurus’ European Commission - Migration and Home Affairs  
<[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary/index\\_a\\_en.htm#asylumshopping](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/glossary/index_a_en.htm#asylumshopping)> (accessed 10 May 2015)

<sup>34</sup> Kloth (n 32), 8

<sup>35</sup> ‘UNHCR International Thesaurus of Refugee Terminology’ UNHCR  
<[http://www.refugeethesaurus.org/hms/refugee\\_obj.php?type=terms&id=40#a40](http://www.refugeethesaurus.org/hms/refugee_obj.php?type=terms&id=40#a40)> (accessed 10 May 2015).

<sup>36</sup> The foundations therefor were laid down in the White Paper on the Internal Market: Commission of the European Communities ‘White Paper on Completing the Internal Market’ [1985] COM(85) 310.

<sup>37</sup> ‘Single European Act’ [1987] OJ L 196/1, art 13 and declaration on art 8a of the EEC Treaty

<sup>38</sup> As expressed in an annex to the Single European Act stating that “*nothing in these provisions shall affect the right of the Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries*” (See: ‘Single European Act’, art 13 and General Declaration on Articles 13 to 19 of the Single European Act)

<sup>39</sup> ECRE, ‘Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention’ (1997), §3

areas, first within the Schengen framework and shortly after between the EC Member States. In line with the UNHCR recommendations, a solution was found in the establishment of a responsibility-allocating mechanism for asylum claims, by adopting common criteria.<sup>40</sup> A first attempt hereto was made in the Schengen Agreement of 1985 and very similar but more detailed provisions were presented in the Dublin Convention of 1990. Both intergovernmental instruments focused on the coordination of different national policies rather than harmonising those policies, as will be demonstrated in this chapter. In a second phase, from the mid-1990s onwards, the focus shifted towards harmonisation, with the development of a Common European Asylum System. These developments will be discussed in the next chapter.

## 2. 3. THE SCHENGEN CONVENTION

Given the initial reluctance of some Member States to abolish the internal border controls, five EC Member States initiated the creation of their own borderless area, separately from the developments on the EC level. In 1985 the Benelux States, France and Germany signed the Schengen Agreement which was aimed at the gradual abolishment of checks at their common borders in the so called Schengen Area. The Schengen Convention (SC) implementing the agreement was signed in 1990 and came into force in 1995.<sup>41</sup> The Convention was only applicable in the contracting States, but in 1999 it was incorporated in the EU acquis when the Treaty of Amsterdam was signed.<sup>42</sup> Until then Schengen was considered as a ‘testing ground’ for the internal market aspirations of the EC.<sup>43</sup>

The main aim of the Schengen Agreement was the abolishment of internal borders and the creation of a common external border.<sup>44</sup> The Schengen countries agreed that the freedom of movement needed ‘compensatory measures’ such as the strengthening of external border

---

<sup>40</sup> UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without and Asylum Country’ (1979), (h)

<sup>41</sup> ‘Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders’ [1990] OJ L 239/19 (Schengen Convention)

<sup>42</sup> ‘The History of Ceas. From Schengen to Stockholm, a History of the Ceas’ ECRE  
<<http://www.ecre.org/topics/areas-of-work/introduction/194.html>> (accessed 12 February 2015)

<sup>43</sup> See the Statement by the Commission in Agence Europe, 30 November 1989, no. 5142 (n.s.) in: Thomas Hoogenboom ‘Symposium: The Status of Non-Community Nationals in Community Law (1992), 3 EJIL, 51; Georgia Papagianni, *Institutional and Policy Dynamics of Eu Migration Law* (Martinus Nijhoff Publishers 2006), 111-112.

<sup>44</sup> Schengen Convention, Chapter 1 & 2; ‘The Schengen Area and Cooperation’ Eur-Lex  
<[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_migration/l33020\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_migration/l33020_en.htm)> (accessed 14 April 2015)

controls and cooperation in the field of asylum and immigration.<sup>45</sup> Determining one single State as responsible for examining an asylum claim made within the Schengen Area was introduced as a solution to address the anticipated increase in asylum shopping and refugee in orbit situations. Therefore, the parties, while drafting the Schengen Agreement, negotiated about objective criteria to determine the responsible State, rather than harmonising substantive or procedural rules of asylum.<sup>46</sup>

The provisions on asylum were laid down in Chapter VII of the Schengen Convention. The main principle is that only one State shall be responsible for processing the asylum application of an alien.<sup>47</sup> That State is obliged to examine the asylum application.<sup>48</sup> The responsible State was not the one chosen by the asylum seeker, but designated by the objective criteria set out in the Convention.<sup>49</sup>

Responsibility is respectively allocated to: a) the State where a member of the alien's family<sup>50</sup> was already granted asylum; b) the State which issued a visa or residence permit to the asylum seeker; c) the State which was entered legally without visa requirement; d) the State across whose external borders the asylum seeker illegally entered the Schengen Area; e) the first State where an application was lodged and being processed; d) the State with which the application was lodged if none of the foregoing criteria was applicable.<sup>51</sup>

The Convention included two possibilities to deviate from the foregoing criteria. The first and general possibility is the *sovereignty clause* or *opt-out clause*, which entails that a State retains the right to process an application for asylum even if another Schengen State would be responsible according to the SC. In that case the latter State shall be relieved of its obligations.<sup>52</sup> The second and more specific possibility is the *humanitarian clause* which enables the responsible State to ask, for humanitarian reasons based in particular on family or cultural grounds, another Schengen State to examine the asylum application.<sup>53</sup>

---

<sup>45</sup> ECRE, 'The History of Ceas. From Schengen to Stockholm, a History of the Ceas'

<sup>46</sup> Marinho and Heinonen (n 28), 2

<sup>47</sup> Schengen Convention, art 29(3)

<sup>48</sup> Kloth (n 32), 9.

<sup>49</sup> ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention' (1997), §2

<sup>50</sup> 'family member' in this context is the refugee's spouse or unmarried child who is less than 18 years old or, if the refugee is an unmarried child who is less than 18 years old, the refugee's father or mother. (Schengen Convention, art 35(2))

<sup>51</sup> Schengen Convention, art 30 & 35

<sup>52</sup> Schengen Convention, art 29.4 & 30.2

<sup>53</sup> Schengen Convention, art 36

## 2. 4. THE DUBLIN CONVENTION (DUBLIN I)

The Schengen project could be considered as “a few states moving ahead faster than the community as a whole”.<sup>54</sup> Confronted with the same challenges and sharing the ambition of establishing a borderless internal market, the EC reached similar conclusions on how to control movement of third country nationals and asylum seekers within a borderless area. Since asylum policy did not fall within the EC competences, the twelve EC Member States conducted intergovernmental negotiations.<sup>55</sup> On 15 June 1990 this resulted in the adoption of the *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities*, briefly referred to as the Dublin Convention (DC) or Dublin I.<sup>56</sup> Unlike the Schengen Convention which aimed at the establishment of a borderless area, the Dublin Convention only deals with a specific element of asylum policy.<sup>57</sup> It provides for a responsibility allocating mechanism for asylum applications, similar to the Schengen asylum provisions, without touching upon the substantive issues for granting asylum, which traditionally fall under State sovereignty. The Dublin Convention was an important step forward to cooperate in the field of asylum, by providing one of the first attempts in international law to solve the controversial question of state responsibility by elaborating *a cooperative system of interstate action*.<sup>58</sup>

Drafted with the same goals, the Dublin provisions are very similar to the asylum-related provisions laid down in Chapter VII SC. For that reason the Schengen States (the five original members plus Portugal and Spain) agreed in the Bonn Protocol of 26 April 1994 that the provisions of Section II, Chapter VII of the Schengen Convention would no longer be applied from the moment the Dublin Convention entered into force.<sup>59</sup> Since the Dublin Convention is a treaty under international law and not a Community law instrument, ratification by all signatory States was required to enter into force. This was concluded seven years later and the Convention entered into force on 1 September 1997. More countries joined in the following

---

<sup>54</sup> ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006), 8

<sup>55</sup> Ibid

<sup>56</sup> Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities [1990] OJ C 254/01 (1997) (Dublin Convention)

<sup>57</sup> Johannes van der Klaauw ‘The Dublin Convention: A Difficult Start’ in Monica den Boer (ed) *Schengen's Final Days?* (EIPA 1998), 77

<sup>58</sup> Marx (n 26), 9.

<sup>59</sup> Kloth (n 32), 10; ‘Protocol on the Consequences of the Dublin Agreement Coming into Effect for Some Regulations of the Schengen Supplementary Agreement’ [1994] (Bonn Protocol), art 1

years, making it applicable for all Member States of the European Union at that time, plus Norway and Iceland, based on a parallel agreement.<sup>60</sup>

#### **2. 4. 1. Provisions on responsibility**

The main principle of the Dublin Convention is that only one Member State is responsible for examining an asylum application lodged within the European Community, also known as the *authorisation principle*.<sup>61</sup> This principle in combination with the obligation for the responsible Member State to examine the asylum application, in accordance with its national laws and international obligations,<sup>62</sup> aims at avoiding multiple applications and refugees in orbit situations.

The Dublin Convention contains a hierarchy of criteria in Articles 4 to 8<sup>63</sup>, determining the responsible State. This is an improvement on the Schengen rules where a hierarchical order was lacking. The principle underlying the criteria is that, in an area where the free movement of persons is guaranteed, Member States are answerable to each other for the entry or residence of third country nationals.<sup>64</sup> Thus the entry and residence conditions of an asylum seeker play the most important role to allocate responsibility to Member States, with an exception for family reunion.<sup>65</sup> The choice of the applicant, similar to the Schengen rules, is only considered last resort.

The first criterion refers to the Member State in which the applicant has a family member<sup>66</sup> who is already recognised as a refugee (Article 4). Placing the family criteria first in line meets the UNHCR recommendation that States, in the interest of family reunification, should facilitate the admission to their territory of family members<sup>67</sup> of those persons who were already granted asylum.<sup>68</sup> Secondly, the Member State who issued a valid residence permit or visa is responsible (Article 5). The Dublin Convention assigns more weight to a residence permit which is ranked higher in priority than a visa, whereas both were of equal value in the Schengen rules. Third, in case of illegal entry, the Member State whose external borders the

---

<sup>60</sup> Kloth (n 32), 10

<sup>61</sup> Dublin Convention, art. 3.2

<sup>62</sup> Dublin Convention, art. 3.3

<sup>63</sup> Dublin Convention, art 3.2

<sup>64</sup> European Commission Staff Working Paper: Evaluation of the Dublin Convention SEC(2001) 756, 1

<sup>65</sup> Ibid

<sup>66</sup> 'Family member' is defined as the spouse of the asylum applicant or his or her unmarried child who is a minor of under eighteen years, or his or her father or mother where the applicant himself or herself is an unmarried child who is a minor of under eighteen years (Dublin Convention, art 4 §2)

<sup>67</sup> 'family member' is described as "at least the spouse and minor or dependent children"

<sup>68</sup> UNHCR EXCOM Conclusion No 15 (XXX) 'Refugees Without and Asylum Country' (1979)

asylum applicant illegally crossed will be responsible (Article 6). Contrary to the Schengen Convention this responsibility shall cease to exist when the applicant has been living for at least six months in another Member State where he or she lodged the application.<sup>69</sup> Fourthly, the Member State where the asylum seeker entered legally and where the need for a visa is waived, shall be responsible (Article 7). Compared to the Schengen Convention, the third and fourth criteria are presented in reverse order, considering illegal entry prior to the legal entry. Finally, the first Member State where the asylum applicant lodged for asylum shall be responsible if none of the foregoing criteria is applicable (Article 8).

Again, two discretionary provisions enable Member States to derogate from the foregoing principles. Each Member State has the option to examine an application lodged within its territory, even if it is not responsible under the Dublin criteria (sovereignty clause).<sup>70</sup> In addition, the responsible Member State can request another Member State to examine an asylum application for humanitarian reasons, such as family or cultural grounds (humanitarian clause).<sup>71</sup> Both clauses require the consent of the applicant. This is an important improvement from a refugee protection perspective, since the Schengen Convention only required consent when applying the humanitarian clause.<sup>72</sup> However, both provisions do not establish an individual right for the asylum applicant, but they allow Member States to approach the responsibility for an individual asylum case with more flexibility.

#### **2. 4. 2. Procedure**

If a Member State where an asylum application was lodged, considers that another Member State is responsible for examining the application, it should send a request to the other Member State *to take charge* of the applicant. The request should be made as soon as possible and in any case within six months after the application, otherwise the responsibility shall rest with the State in which the application was lodged. The requested Member State has to provide an answer within one month<sup>73</sup>, and in no case later than three months after receiving the request.<sup>74</sup>

---

<sup>69</sup> Dublin Convention, art 6.2

<sup>70</sup> Dublin Convention, art 3.4.

<sup>71</sup> Dublin Convention, art 9.

<sup>72</sup> Marinho and Heinonen (n 28), 4.

<sup>73</sup> Decision No 1/97 of 9 September 1997 of the Committee Set up by Article 18 of the Dublin Convention of 15 June 1990, Concerning Provisions for the Implementation of the Convention [1997] OJ L 281/01 (Decision No 1/97), art 4.1

<sup>74</sup> Dublin Convention, art 11.1 & 11.4

Once the request is accepted the transfer of the asylum applicant to the responsible Member State should be organised within one month.<sup>75</sup> The asylum applicant has to be informed about the request, the outcome thereof and the planned transfer to another Member State.<sup>76</sup> In case the asylum applicant previously lodged an application for asylum in another Member State, the Member State on whose territory the applicant is present, shall send a request *to take back* the applicant. When the responsible Member State agrees, it shall take back the applicant as quickly as possible and at the latest one month after it agreed to do so.<sup>77</sup> The clear formulation of time limits is an important improvement on the Schengen Convention which only mentioned a six month period for making the request, but did not provide time limits for the answer and the transfer.

The Member States should exchange information about national legislative or regulatory measures or practices in the field of asylum and statistical data on monthly arrivals of asylum applicants and their nationalities, besides the fact that they can exchange general information on new trends in asylum applications and on the situation in the countries of origin or provenance of the asylum applicants.<sup>78</sup>

The essential issue of how and which evidence is used to determine the responsible State is not addressed in the Dublin Convention. The lack of clear rules concerning evidence allowed Member States to use very different standards of proof. The Committee set up by Article 18 of the Dublin Convention in order to examine questions concerning interpretation and application of the Convention,<sup>79</sup> addressed this lacuna partly in their Decision No. 1/97. Therein the Article 18 Committee insisted on “genuine cooperation” between the Member States while considering all evidence available to them. A distinction was made between formal proof which can only be refuted by contrary evidence and circumstantial evidence which is merely indicative.<sup>80</sup>

### **2. 4. 3. Evaluation**

The same year the Dublin Convention entered into force (1997), the Treaty of Amsterdam provided to replace the Convention by a Community instrument, within the next five years

---

<sup>75</sup> Dublin Convention, art 11.5

<sup>76</sup> Decision No 1/97, art 19

<sup>77</sup> Dublin Convention, art 12 & 13

<sup>78</sup> Dublin Convention, art 14

<sup>79</sup> Dublin Convention, art 18

<sup>80</sup> Decision No 1/97, art 23

(*infra*).<sup>81</sup> Although the Convention provided for some important improvements on the Schengen asylum rules by elaborating the provisions on both criteria and procedures, the revision was welcomed as an important chance to address the deficiencies of the Dublin system which were revealed soon after it entered into force. The European Commission stated that there was “widespread agreement that it [was] not functioning as well as had been hoped”,<sup>82</sup> and therefore “the Convention’s role as a measure that complements freedom of movement is limited”.<sup>83</sup> The impact of the Convention remained rather limited due to different elements which hampered the efficiency of the system. During 1998 and 1999 slightly less than 30% of all the requests to take charge or take back resulted in an actual transfer. Compared to the total amount of asylum applications lodged in the 15 Member States in that period this was only 1.7%.<sup>84</sup>

Shortcomings in efficiency were due to differing national practices in applying and interpreting the Dublin provisions,<sup>85</sup> and inadequate communication between the Member State which slows down the procedure and difficulties with effectively implementing the transfers.<sup>86</sup> The main problem however was the difficulty to assemble the evidence used to determine the responsible State and, if evidence was available, the disagreements about how to apply it.<sup>87</sup> The system relied heavily on the travel and identity documents of asylum applicants to reconstruct their immigration history in order to determine the responsible State. Yet, many of the applicants arrived without papers, and for those who did there was the incentive to destroy them.<sup>88</sup> Without a supranational central database containing personal information of asylum applicants, Member States with more extensive national registers tend to be ‘penalised’ because their responsibility could be proved more easily.<sup>89</sup> In 2000 the Council of the EU adopted the Eurodac Regulation, establishing the European Automated Fingerprint Recognition System (Eurodac) in order to address the information and evidence related problems. With the help of this database it would be easier in the future to prove whether an applicant for asylum already

---

<sup>81</sup> Consolidated Version of the Treaty Establishing the European Community [1997] OJ C 340/173 (Treaty of Amsterdam), art 63(1)(a)

<sup>82</sup> Commission of the European Communities, ‘Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States’ (2000) Commission Staff Working Paper SEC(2000) 522 (hereinafter: Commission Staff Working Paper SEC(2000) 522), 1

<sup>83</sup> European Commission Staff Working Paper: Evaluation of the Dublin Convention SEC(2001) 756, 3

<sup>84</sup> *Ibid*, 2-3

<sup>85</sup> Commission Staff Working Paper SEC(2000) 522, chapter III

<sup>86</sup> European Commission Staff Working Paper: Evaluation of the Dublin Convention SEC(2001) 756, 16-17

<sup>87</sup> Commission Staff Working Paper SEC(2000) 522, §47

<sup>88</sup> Gloria Bodelón Alonso ‘Problèmes Liés à la Mise en Oeuvre de la Convention de Dublin’ in Cláudia Faria (ed) *The Dublin Convention on Asylum. Between Reality and Aspirations* (European Institute of Public Administration 2001), 39; Commission Staff Working Paper SEC(2000) 522, §38

<sup>89</sup> Decision No 1/97, art 23.4.

lodged an application in another Member State or had crossed a certain external border.<sup>90</sup> The Regulation would enter into force once all Member States made the necessary technical arrangements to put the system into operation.<sup>91</sup> This was finalised in 2003, the same year the Dublin Convention was replaced by the Dublin II Regulation (*infra*).

From the Member States' perspective the Dublin rules were likely to create an unbalanced burden on the Member States located at the external borders of the EU, since the geographical location of States in relation to asylum seekers' travel routes was significant.<sup>92</sup> This imbalance was expected to increase in the future, when the Eurodac system would be launched and the illegal crossing of individuals would be proven more easily. The entry criteria (both legal and illegal) imply that responsibility for an asylum claim is treated as the 'punishment' for Member States which allowed an individual to arrive in the EU.<sup>93</sup>

The Dublin Convention seemed most problematic from the asylum seekers' point of view. Although it was welcomed as an improvement on the Schengen asylum rules in this respect, concerns were uttered that the Dublin rules restricted asylum seekers' freedoms without enhancing their protection.<sup>94</sup> Elements contributing to this were mainly the safe third country principle, the provision on family unification, the lack of socio-economic safeguards and the weak judicial position of asylum seekers under the Dublin procedure.

One of the most contested provisions of the Dublin Convention was Article 3(5) which stipulated that any Member State has the right to send an applicant for asylum to a 'safe third country'.<sup>95</sup> This example of non-admission policy is based on the idea that asylum applicants who left a country (different of the country of origin) that can be considered as safe, can be sent back to that country, as long as the *non-refoulement* principle is respected.<sup>96</sup> In essence, this is

---

<sup>90</sup> Friedrich Löper 'The Dublin Convention Provisions on Time Limits and the Exchange of Information: Which Are the Provisions and What Are the Problems?', 33

<sup>91</sup> Council Regulation (EC) 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2000] OJ L 316/01 (Eurodac Regulation), art 27

<sup>92</sup> ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention' (1997), §15; ECRE, 'Guarding the Standards – Shaping the Agenda. Analysis of the Treaty of Amsterdam and Present EU Policy on Migration, Asylum and Anti-Discrimination' (1999) (hereinafter: 'Guarding the Standards – Shaping the Agenda'), 9

<sup>93</sup> Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18(3-4) IJRL, 637

<sup>94</sup> ECRE, 'Guarding the Standards – Shaping the Agenda', 9

<sup>95</sup> The examination whether or not an applicant can be sent back to a safe third country will precede the determination of a responsible Member State under the Dublin Convention (Council Resolution of 30 November 1992 on a Harmonised Approach to Questions Concerning Host Third Countries [1992] WG I 1283, art 3)

<sup>96</sup> UNHCR, 'Implementation of the Dublin Convention: Some UNHCR Observations' (1998), 2; 'Safe third country' is defined by the UNHCR as: "a country in which an asylum-seeker could have had access to an effective asylum regime, and in which he/she has been physically present prior to arriving in the country in which she/he is applying for asylum" (UNHCR, *Master Glossary of Terms* (Rev. 1 June 2006), 19

the basic idea behind the Dublin system in which Member States mutually recognise each other as safe third countries.<sup>97</sup> However Article 3(5) refers to *third* countries which are not party to the Convention. By requiring accordance with international commitments, the Schengen Convention provided for more safeguards than the Dublin Convention which only requires compliance with the Geneva Convention.<sup>98</sup> There is no guarantee for the asylum seeker that his application will be examined in the third country. Hence, while avoiding ‘orbit’ situations within the EU, the Convention seems to contribute to this phenomenon in the rest of the world.<sup>99</sup> Moreover, the application of the safe third country notion raises serious concerns about indirect or chain *refoulement*.<sup>100</sup> Therefore, without sufficient safeguards, this example of non-admission policy poses a serious risk “the institution of asylum and to the fundamental principle of *non-refoulement*”.<sup>101</sup>

Not only external transfers to safe third countries, raised concerns. Also internal transfers to another Member State under the Dublin system could be problematic, given the diverging State legislations and practices in the field of asylum. A blind trust in the safety of other Member States’ practices seemed therefore not in its place.<sup>102</sup> This conclusion could be drawn from the 2000 *T.I. v UK* decision of the European Court of Human Rights (ECtHR). The ECtHR noted that the effectiveness of the Dublin Convention may be undermined in practice by differing approaches adopted by Contracting States to the scope of the protection offered, and that being party to an international organisation or agreement (in this case the Dublin Convention), did not absolve Contracting States from their responsibility under the The European Convention on Human Rights (ECHR).<sup>103</sup> It was the first time the ECtHR stipulated that the presumption of safety underlying the Dublin system could not be considered absolute.<sup>104</sup>

The Dublin Convention met the UNHCR recommendations to promote family reunification, by listing it first.<sup>105</sup> However, this criterion was so narrowly confined that its value could be questioned. Only the spouse, unmarried minor children or parents of the asylum

---

<sup>97</sup> Hurwitz ‘The 1990 Dublin Convention: A Comprehensive Assessment’, 647

<sup>98</sup> Schengen Convention, art 29.2 & Dublin Convention, art 3(5)

<sup>99</sup> Hurwitz ‘The 1990 Dublin Convention: A Comprehensive Assessment’, 650.

<sup>100</sup> Commission Staff Working Paper SEC(2000) 522, §14

<sup>101</sup> ECRE, ‘Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention’, §9

<sup>102</sup> See: Gregor Noll ‘Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law’ (2001) 70 Nordic J. Int’l L., 161-182

<sup>103</sup> *T.I. v UK* [2000] ECtHR (Dec.) 43844/98, 15

<sup>104</sup> Chapter 3.5 will further elaborates on this issue, taking the *T.I.* decision and following ECtHR and CJEU jurisprudence into account

<sup>105</sup> UNHCR EXCOM Conclusion No 9 (XXVIII) ‘Family Reunion’ (1977) and UNHCR EXCOM Conclusion No 24 (XXXII) ‘Family Reunification’ (1981)

applicant were considered as ‘family member’ and their presence was only relevant if that person is recognised as a refugee.<sup>106</sup> Thus, family members who legally reside in the EC on another ground, such as people with a (temporarily) residence permit, those who sought for asylum but are still waiting for the decision or even citizens of a Member State, were not included.<sup>107</sup> The UNHCR and the European Council on Refugees and Exiles (ECRE) recommended the Council to adopt a broader definition of ‘family’ in the future and the Member States to apply the sovereignty and humanitarian clauses in cases where the strict applications of the Dublin criteria would lead to the separation of family members.<sup>108</sup>

At least this first criterion and the next (possession of a residence permit or visa) presumed a clear connection or link between the asylum applicant and the responsible Member State.<sup>109</sup> This was not the case for the entry criteria (Article 6 and 7) which were solely based on the contested ‘first country of asylum principle’, which states that an asylum seeker should request asylum in the first country where he or she is not at risk.<sup>110</sup> No other connection between the asylum seeker and the country entered was required to establish responsibility. The country of choice was only considered last and other relevant links between the asylum seeker and a possible country of asylum were not taken into account in the Dublin Convention, such as the presence of friends or supportive communities, linguistic or historical connections between the country of origin and the country of asylum or the sympathy in that country for the kind of problem faced by the asylum seeker.<sup>111</sup> Hence, very little attention was paid to the asylum seekers’ interest in or connection with a certain Member State. This approach was expected to have repercussions on the applicants’ integration process, since proper integration is “unlikely to be achieved in countries arbitrarily selected by the Dublin Convention criteria with no appropriate links for the claimant”.<sup>112</sup>

---

<sup>106</sup> Thus, spouses, children or parents which are not recognised as a refugee but legally reside in a European Member State, nor unmarried partners, adult children, siblings, aunts and uncles or other extended family units are taken into account for family reunification. (Nicholas Blake ‘The Dublin Convention and Rights of Asylum Seekers in the European Union’ in Elspeth Guild and Carol Harlow (eds) *Implementing Amsterdam. Immigration and Asylum Rights in Ec Law* (Hart Publishing 2001), 107)

<sup>107</sup> Blake (n 106), 107

<sup>108</sup> UNHCR, ‘Implementation of the Dublin Convention: Some UNHCR Observations’, 2; ECRE, ‘Guarding the Standards – Shaping the Agenda’, 9; ECRE, ‘Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention’, §17; Guidelines on how to apply the discretionary clauses with regard to family members are set out in Decision No 1/2000 of 31 October 2000 of the Committee Set up by Article 18 of the Dublin Convention Concerning the Transfer of Responsibility for Family Members in Accordance with Article 3(4) and Article 9 of that Convention [2000] OJ L 281/1 (Decision No 1/2000)

<sup>109</sup> Again meeting a recommendation made in: UNHCR, UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979)

<sup>110</sup> IOM, *Glossary on Migration* (IOM 2004), 24

<sup>111</sup> Blake (n 106), 99

<sup>112</sup> *Ibid*, 107-108.

The clear procedural time limits set out in the Dublin Convention were welcomed as an improvement on the Schengen rules. However, by applying them fully, the procedure to determine the responsible State alone could take over nine months. This lengthy procedure, which might take longer than the actual examining of the asylum application, was not in the interest of the asylum seeker and contrasted with the aim expressed in the preamble to avoid lengthy procedures during which the applicants are left in doubt.<sup>113</sup> Moreover, concerns were expressed about the lack of provisions on social and economic rights of asylum seekers during the Dublin procedure. The denial of socio-economic rights could constitute inhuman or degrading treatment under Article 3 of the ECHR.<sup>114</sup> Therefore, both the UNHCR and ECRE urged for the adoption of rules ensuring asylum-seekers adequate reception conditions and assistance during the Dublin procedure.<sup>115</sup>

Other concerns from the refugee protection perspective were mainly linked to the weak judicial position of the asylum seeker during and after the Dublin procedure. The Dublin Convention as a convention under international law had no direct effect and consequently merely established rights and obligations for Member States, not for individual asylum applicants.<sup>116</sup> The rules did not confer on the asylum applicant an individual right to a material examination of his or her application.<sup>117</sup> Nor could the applicant derive any rights from the sovereignty and humanitarian clause, although his or her consent was required in this context. Furthermore, the Convention excluded the jurisdiction of the Court of Justice of the European Union (CJEU). Only the Article 18 Committee had the authority to examine questions concerning the application or interpretation of the Convention.<sup>118</sup> Since the Convention had no direct effect, excluded the jurisdiction of CJEU and did not provide for a general right to appeal, the appeal possibilities for the asylum applicants were limited.<sup>119</sup> A transfer decision could only be challenged at the national court of a Member State *if* an appeal possibility was granted by the national law *and* these proceedings were suspensory,<sup>120</sup> but not all Member States provided for such a possibility in their national legislation.<sup>121</sup> As mentioned before, not only the appeal

---

<sup>113</sup> Löper (n 90), 29 & 32.; and Dublin Convention, Preamble

<sup>114</sup> ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention', §36

<sup>115</sup> UNHCR, 'Implementation of the Dublin Convention: Some UNHCR Observations', 3; ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention', §35-36.

<sup>116</sup> Löper (n 90), 29

<sup>117</sup> Marinho and Heinonen (n 28), 3.

<sup>118</sup> Dublin Convention, art 18(2)

<sup>119</sup> Marinho and Heinonen (n 28), 8-9

<sup>120</sup> Dublin Convention, art 11(5)

<sup>121</sup> Marinho and Heinonen (n 28), 9

possibilities, but also the asylum procedures of the Member States were very divergent. Hence the probability of a successful claim varied from Member State to Member State.<sup>122</sup> Realising this, the EU acknowledged shortly after the Dublin Convention came into force that for the Convention to be effective, “a high level of harmonisation of the asylum procedures within the EU [was] necessary”.<sup>123</sup>

---

<sup>122</sup> Ibid, 8

<sup>123</sup> European Parliament ‘Working Paper: Asylum in the Eu Member States’ (January 2000), 27

### **3. THE EUROPEANISATION OF ASYLUM POLICY AND ITS CORNERSTONE: DUBLIN II**

#### **3.1. THE FIRST STAGE OF THE CEAS: FROM COOPERATION TOWARDS HARMONISATION**

By establishing a responsibility-allocating mechanism, the Schengen and Dublin Conventions were one of the first attempts of interstate cooperation in the field of asylum. Both intergovernmental Conventions were concluded outside the EU legal framework and solely addressed the State responsibility, without touching upon substantive asylum issues. As mentioned before, it quickly became obvious that for the Dublin system to work effectively, harmonisation of national asylum policies was required. Together with the gradual creation of a European internal market which implied free movement of persons, asylum policy gradually became an EU competence from the early 1990s onwards.

Asylum was first introduced into the EU framework by the Treaty of Maastricht of 1992.<sup>124</sup> The Treaty created the European Union (EU) consisting of three pillars: the European Community; common foreign and security policy; and cooperation in the fields of justice and home affairs. The third pillar comprised cooperation in areas of common interest such as asylum policy, rules governing the crossing of the Union's external borders, immigration policy and policy regarding third-country nationals.<sup>125</sup> Since it concerned highly delicate matters the intergovernmental method is used which implies that the Commission's right of initiative is shared with the Member States and the Council decides unanimously.<sup>126</sup>

With the signing of the Treaty of Amsterdam in 1997 the Schengen acquis was integrated into the framework of the European Union.<sup>127</sup> Policies related to the free movement of persons, such as asylum and visa, were transferred from the third to the first pillar and thus became a Community competence.<sup>128</sup> Hence decisions are no longer made in an intergovernmental, but in a supranational way by applying the Community method, which implies a monopoly for the Commission on the right of initiative and the widespread use of qualified majority voting in the Council.

Article 63 of the Amsterdam Treaty set out the asylum policy objectives for the next five years: replacing the Dublin Convention by a Community instrument determining the

---

<sup>124</sup> Consolidated Version of the Treaty on European Union [1992] OJ C 191/01 (Treaty of Maastricht)

<sup>125</sup> Treaty of Maastricht, art K.1

<sup>126</sup> Treaty of Maastricht, art K.3 and K.4

<sup>127</sup> Protocol integrating the Schengen acquis into the framework of the European Union [1997] OJ C 340/96

<sup>128</sup> Consolidated Version of the Treaty Establishing the European Community [1997] OJ C 340/173 (Treaty of Amsterdam), title IV

responsible Member State for an asylum application; adopting minimum standards on the reception of asylum seekers, the qualification of third country nationals as refugees, the procedures for granting or withdrawing refugee status and the temporary protection; and promoting a balance of effort between Member States in the consequences of receiving refugees.<sup>129</sup> Thus, the Treaty of Amsterdam, which incorporated both the Dublin and Schengen acquis into the EU framework, went a step further by not only aiming to establish standards to determine the responsible Member State, but by also obliging the Council to take measures related to more substantive issues. This holistic approach was a first step to harmonise the asylum legislations of the Member States. Yet, at this stage “the main thrust of the measures to be taken concerned the establishment of minimum standards, rather than common rules”.<sup>130</sup>

The political frame for this programme was provided by the Tampere European Council of 15 and 16 October 1999. Building further on the provisions of the Treaty of Amsterdam and the achievements made within the Schengen and Dublin framework, the Tampere Conclusions set out a roadmap to establish a common asylum and migration policy.<sup>131</sup> One of the aims was to set up a Common European Asylum System (CEAS) within “an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity”.<sup>132</sup> The objectives set out in Article 63 of the Amsterdam Treaty marked the first stage of the CEAS.<sup>133</sup> The Hague Programme of 2004 set out the aims for the second stage, being the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection.<sup>134</sup>

The Europeanisation of the asylum policy also implied the gradual expansion of the CJEU’s jurisdiction in this field. Article 68 of the Treaty of Amsterdam introduced the possibility for the CJEU to interpret asylum related EU acts. However, dissimilar to other areas, the CJEU’s jurisprudence in the field of asylum was restricted to questions referred by *higher*

---

<sup>129</sup> Treaty of Amsterdam, art 63

<sup>130</sup> Arne Niemann ‘The Dynamics of Eu Migration Policy: From Maastricht to Lisbon’ in Jeremy Richardson (ed) *Constructing a Policy-Making State? Policy Dynamics in the European Union* (Oxford University Press 2012), 215-216

<sup>131</sup> Thierry Balzacq and Sergio Carrera, *Migration, Borders and Asylum. Trends and Vulnerabilities in EU Policy* (Centre for European Policy Studies 2005), 5

<sup>132</sup> Council of the European Union, ‘Tampere European Council 15 and 16 October 1999 – Presidency Conclusions’ [1999] (Tampere Conclusions), §4

<sup>133</sup> Tampere Conclusions, §14

<sup>134</sup> Council of the European Union ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’ (2004) OJ C 53/1 (The Hague Programme)

courts.<sup>135</sup> This restriction was abolished when the Treaty of Lisbon entered into force in 2009.<sup>136</sup> Since then the CJEU has general jurisdiction in the field of asylum, which entails that any national court or tribunal can refer a question to the CJEU concerning the interpretation of a EU instrument on asylum.<sup>137</sup>

### 3.2. THE LEGAL FRAMEWORK OF THE CEAS

From 2000 onwards the Council of the European Union adopted new EU rules in order to create the Common European Asylum System. The System included in its first stage four Directives and two Regulations. All of them were based on the full and inclusive application of the Geneva Convention and with respect for the fundamental rights recognised in particular in the Charter for Fundamental Rights of the European Union.<sup>138</sup> In the light of this paper, the main interest goes out to the Dublin II Regulation which determines State responsibility, but in order to provide a general picture and since they are all interconnected, the core principles of the other legal instruments which have been adopted in the framework of the CEAS are set out below.

#### *The Eurodac Regulation of 2001*

The Eurodac Regulation was the first CEAS instrument adopted by the Council, in December 2000. This Regulation establishes the European Automated Fingerprint Recognition System (Eurodac) which started operating in 2003. The system consists of an EU asylum fingerprint database with the objective to facilitate the determination of the responsible Member State according to the Dublin System.<sup>139</sup> Member States can consult the fingerprint database to help identify asylum applicants and persons who would irregularly have crossed the external border of the EU. By comparing fingerprints, they can determine if the person already lodged an asylum application in another Member State or whether the person entered the EU territory

---

<sup>135</sup> Treaty of Amsterdam, art 68; Steve Peers, Elspeth Guild, Diego Acosta Arcarazo, Kees Groenendijk and Violeta Moreno-Lax (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Vol 2 EU Migration Law* (Martinus Nijhoff Publishers 2012), 24; Andrew Nicol 'From Dublin Convention to Dublin Regulation: A Progressive Move?' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law Policy* (Hart Publishing 2007), 271

<sup>136</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (TFEU)

<sup>137</sup> Court of Justice of the European Communities, 'Press Release No 104/09' (30 November 2009), 2

<sup>138</sup> In contrast to the Geneva Convention, not every person can be considered as an asylum seeker or refugee under the CEAS instruments. Only *third country nationals* or *stateless persons*, but not European Union citizens, are included in the definition of 'asylum seeker' or 'refugee'. For instance see: Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States [2003] OJ L 31/18, art 2(c). This is in line with the Protocol on Asylum for Nationals of Member States of the European Union as Annexed to the Treaty Establishing the European Community [2004] OJ C 310/362, which limits the options for a national of a Member State to seek for asylum in another Member State

<sup>139</sup> Eurodac Regulation, art 1

unlawfully.<sup>140</sup> Since the irregular crossing of a Member States' external border can lead to the responsibility of that Member State according to the Dublin rules, Eurodac is particularly relevant for the Dublin System.

### ***The Temporary Protection Directive of 2001***<sup>141</sup>

In 2001 the EU Council adopted the Temporary Protection Directive as a response to the mass influx of people coming from former Yugoslavia and other conflict areas during the 1990s.<sup>142</sup> The Directive aims to harmonise this protection mechanism, which exists separately from the refugee protection regime based on the Geneva Convention. It sets out minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries, in particular if it is likely that the asylum system will be unable to process this influx.<sup>143</sup> The provisions of the Temporary Directive have not been implemented up to this date.<sup>144</sup>

### ***The Reception Conditions Directive of 2003***<sup>145</sup>

The Reception Conditions Directive, adopted in 2003, sets out the minimum standards for reception conditions of asylum seekers.<sup>146</sup> It deals in particular with the access to reception conditions for asylum seekers while they wait for the examination of their claim. Examples of such conditions are access to employment, housing, food, healthcare, as well as medical and psychological care. Also, rules concerning detention of asylum seekers, a very sensitive issue from a human rights perspective, are laid down in the Directive.<sup>147</sup>

---

<sup>140</sup> 'Eurodac System' Eur-Lex

<[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_migration/l33081\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_migration/l33081_en.htm)> (accessed 16 April 2015)

<sup>141</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L 212/12 (7 August 2001) (Temporary Protection Directive 2001)

<sup>142</sup> 'Temporary Protection' European Commission - Migration and Home Affairs

<[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm)> (accessed 05 April 2015)

<sup>143</sup> Temporary Protection Directive 2001, art 1

<sup>144</sup> 'Temporary Protection' European Commission - Migration and Home Affairs

<[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm)> (accessed 28 July 2015)

<sup>145</sup> Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States [2003] OJ L 31/18 (Reception Conditions Directive 2003)

<sup>146</sup> Reception Conditions Directive 2003, art 1

<sup>147</sup> European Commission 'Factsheet: A Common European Asylum System' (2014), 5

### ***The Qualification Directive of 2004***<sup>148</sup>

The Qualification Directive was adopted in 2004. It lays down the minimum standards for the qualification of third country nationals or stateless people as refugees or beneficiaries of subsidiary protection,<sup>149</sup> and the content of the protection granted.<sup>150</sup> The Directive is based on the provisions and obligations laid down in the Geneva Convention, but excludes nationals of EU Member States from the definition of a refugee.<sup>151</sup> The minimum standards for qualification have to address the diverging national interpretations of the Geneva Convention. The Qualification Directive also foresees a series of rights on protection such as *refoulement*, access to employment, social welfare and specific provisions for children and vulnerable persons.<sup>152</sup>

### ***The Asylum Procedures Directive of 2005***<sup>153</sup>

The Asylum Procedures Directive was adopted by the Council in 2005. The main aim of the Directive is to introduce a minimum framework on Community level on procedures for granting or withdrawing refugee status.<sup>154</sup> It contains rules on the whole process of claiming asylum: how to apply, how the application will be examined, what help the asylum seeker will be given, how to appeal and whether the appeal will allow the person to stay on the territory, what can be done if the applicant absconds or how to deal with repeated applications.<sup>155</sup> Coordinating these rules should lead to faster and more efficient procedures.

---

<sup>148</sup> Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12 (Qualification Directive 2004)

<sup>149</sup> 'Person eligible for subsidiary protection' means a third a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. See: Qualification Directive 2004, art 2(e)

<sup>150</sup> Qualification Directive 2004, art 1

<sup>151</sup> See: 'Protocol on Asylum for Nationals of Member States of the European Union as Annexed to the Treaty Establishing the European Community' [2004] OJ C 310/362, which limits the right of a Member State citizen to seek for asylum in another Member State

<sup>152</sup> European Commission 'Factsheet: A Common European Asylum System' (2014), 6.

<sup>153</sup> Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 (Asylum Procedure Directive 2004)

<sup>154</sup> Asylum Procedure Directive 2004, art 1

<sup>155</sup> European Commission 'Factsheet: A Common European Asylum System' (2014), 4.

### 3.3. THE DUBLIN II REGULATION

In 2003 the Council adopted the *Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, or Dublin II Regulation, which superseded the Dublin Convention. The Regulation applied to asylum applications and take charge or take back requests made from 1 September 2003 within the EU Member States.<sup>156</sup> The territorial scope later extended to Iceland, Norway, Liechtenstein and Switzerland.<sup>157</sup> The Dublin II Regulation, together with the Eurodac Regulation and their Implementing Regulations<sup>158</sup> constitute the Dublin system.

The replacement of the Dublin Convention by a Community instrument, one of the objectives of the Treaty of Amsterdam, was welcomed by the Commission, UNHCR and NGO's as a possibility to address the deficiencies of the Convention.<sup>159</sup> In the preceding years the Commission wondered if it would be sufficient to simply address certain weaknesses identified in the Dublin system, or whether a fundamentally different approach was required.<sup>160</sup> Possible alternatives were explored by the Commission while taking new developments into

---

<sup>156</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003], OJ L 50/1 (Dublin II Regulation), art 29

<sup>157</sup> Denmark was initially not bound by the Regulation (see recital 18 of the Dublin II Regulation), but joined in 2006: Agreement between the European Community and the Kingdom of Denmark on the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in Denmark or Any Other Member State of the European Union and 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2006] OJ L 66/38. Norway and Iceland joined in 2006: Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Iceland or Norway [2006] OJ L 57/16. Switzerland and Liechtenstein joined in 2008: Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland [2008] OJ L 161/8

<sup>158</sup> Commission Regulation (EC) No 1560/2003 of 2 September 2003 Laying Down Detailed Rules for the Application of Council Regulation (EC) No 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2003] OJ L 222/03; and Council Regulation (EC) No 407/2002 of 28 February 2002 Laying Down Certain Rules to Implement Regulation (EC) No 2725/2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2002] OJ L 62/01

<sup>159</sup> See: Commission Staff Working Paper SEC(2000) 522; UNHCR, 'UNHCR's Observations on the European Commission's Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2002); and ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention'

<sup>160</sup> Commission of the European Communities, 'Towards common standards on asylum procedures' (1999) Commission Working Document SEC(1999) 271 final, §5(1)

account, such as the introduction of Eurodac, the communitarisation of asylum policy and the creation of the CEAS.<sup>161</sup> The proposal to create a system based on allocation of responsibility according to where the asylum application is lodged (choice of the asylum seeker), was considered the most credible alternative according to the Commission, UNHCR and NGO's.<sup>162</sup> However, the Commission observed that such a system requires a certain degree of harmonisation in other asylum related matters, which simply did not exist yet with the CEAS in its infancy.<sup>163</sup> Thus, whereas the discrepancy in asylum policies was considered an obstacle for a system based on choice, it was not conceived as a hindrance for the Dublin system.

Consequently, the new Regulation followed the same principles underlying the Dublin Convention. The general principle that responsibility will be allocated to the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, with an exception to protect family unity, remained the same. Accordingly the provisions of the Dublin II Regulation are very similar to those of its predecessor, including a number of modifications and innovations in order to take the lessons of the past on board.<sup>164</sup> The main difference with the Dublin Convention is the legal status of the Dublin II Regulation. As EC Regulation it has direct effect and is binding on all Member States.<sup>165</sup> The central importance hereof lies in the fact that the Regulation does not only engender obligations for the Member States, but also rights for individuals. Consequently, individuals can directly invoke the provisions of the Regulation before national and European courts.<sup>166</sup>

---

<sup>161</sup> Commission Staff Working Paper SEC(2000) 522, §48-56

<sup>162</sup> See: Commission Staff Working Paper SEC(2000) 522, §56; European Commission 'Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2001) 447 final, OJ C 304 E/192, explanatory memorandum §2.2; UNHCR, 'UNHCR's Observations on the European Commission's Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2002), §4

<sup>163</sup> Commission Staff Working Paper SEC(2000) 522, §59; Commission of the European Communities, 'Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum' (2000) Communication from the Commission to the Council and the European Parliament COM(2000) 755 final, 10; European Commission 'Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2001) 447 final, OJ C 304 E/192, explanatory memorandum §2.2

<sup>164</sup> European Commission 'Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2001) 447 final, OJ C 304 E/192, explanatory memorandum §2.2

<sup>165</sup> Dublin II Regulation, epilogue and art 288 TFEU (ex art 249 Treaty of Amsterdam)

<sup>166</sup> See Case C-26/62 *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I; – 'The Direct Effect of European Law' Eur-Lex < <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l14547> > (accessed 28 July 2015)

### 3. 3. 1. Provisions on responsibility

The Dublin II provisions on responsibility are very similar to those in the Dublin Convention, based on the main principle that only one Member State shall be responsible to examine an asylum application and that this Member State is obliged to do so.<sup>167</sup> Although no longer mentioned, the examination shall be completed in accordance with the national laws of the responsible Member State. Yet, the ongoing process of harmonisation of the asylum legislation on the EU level intends to equalise the chances for asylum seekers to receive protection in the EU Member States. This should in its turn strengthen the mutual trust between Member States which underlies the Dublin system.<sup>168</sup>

In order of priority responsibility is attributed to the Member States as follows: the Member State in which the applicant has a family member whose application for asylum is being examined or who is recognised as a refugee (Article 7 and 8); the Member State which has provided the applicant with a residence document or a visa (Article 9); the Member State whose border has been crossed illegally by the asylum applicant (Article 10); the Member State where a third-country national entered legally and where the need for a visa is waived (Article 11); if none of these criteria is applicable, the first Member State where the asylum application was lodged (Article 13); and finally the Member State which is responsible for the largest number of asylum-seeking family members or for the application of the oldest of them, if applying the other criteria would result in the family being separated (Article 14).

Again, the responsibility lies with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, with some exceptions to protect family unity.<sup>169</sup> It is based on the same idea that in a borderless area, each Member State is answerable to the others for "the entry and residence of third-country nationals and must bear the consequences thereof in a spirit of solidarity and fair cooperation".<sup>170</sup> Nonetheless, modifications were made to address some inadequacies in the Dublin Convention. In the first place, more attention is paid to the protection of unaccompanied minors in the Dublin II Regulation. Coming first in line, it is stated that the Member State where a member of his or her family is *legally present* shall be responsible for the application of the minor. In the absence of a family member, the Member State where the minor has lodged his application is

---

<sup>167</sup> Dublin II Regulation, art 3.1 & 16.1(b)

<sup>168</sup> See: Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9(1) Utrecht Law Review

<sup>169</sup> Peter van Krieken, *The Consolidated Asylum and Migration Acquis - the Eu Directives in an Expanded Europe* (Asser Press 2004), 58

<sup>170</sup> *Ibid*, 59.

responsible.<sup>171</sup> Thus, in contrast with the other asylum applicants, priority is given to the country of choice when it concerns unaccompanied minors. Second, the family member criterion changed slightly under the Dublin II Regulation. Whereas responsibility was previously only allocated to the Member State where the asylum seeker has a family member which is recognised as a refugee, responsibility can now also be allocated to Member States where the asylum application of a family member is under examination. Moreover, the definition of ‘family member’ got both expanded and constrained: besides the spouse of the asylum seeker, also his or her unmarried partner in a stable relationship is included into the definition, provided that unmarried couples are treated in a comparable way to married couples according to the legislation or practice of the Member State. Minor children on the other hand should not only be unmarried but also *dependent* in order to fall under the new definition of ‘family member’.<sup>172</sup>

The Dublin II Regulation also contains the sovereignty and humanitarian clauses, which allow Member States to deviate from the responsibility criteria for political, humanitarian or practical considerations.<sup>173</sup> Under the Dublin Convention both clauses required the asylum applicant’s consent, which was generally considered as an improvement on the Schengen rules which only required consent when applying the sovereignty clause (*supra*). The Dublin Regulation on the other hand only requires consent when applying the humanitarian clause, and no longer when applying the sovereignty clause, since consent could be inferred from the fact that the asylum applicant lodged an application in the Member State concerned.<sup>174</sup>

### 3. 3. 2. Procedure

As soon as an asylum application is lodged in a Member State, that State starts the process to determine the responsibility for the application according to the Dublin provisions.<sup>175</sup> Similar to its predecessor, the Regulation distinguishes two scenarios. If the Member State where an asylum seeker lodged its application considers that another Member State is responsible according to the criteria, then it requests the responsible Member State *take charge* of the

---

<sup>171</sup> Dublin II Regulation, art 6

<sup>172</sup> Dublin II Regulation, art 2(i)

<sup>173</sup> Dublin II Regulation, art 3.2 & 15

<sup>174</sup> European Commission ‘Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National’ (2001) 447 final, OJ C 304 E/192, explanatory memorandum, 10

<sup>175</sup> Dublin II Regulation, art 4.1

applicant. In case the asylum seeker previously lodged an application which is still pending in the responsible Member State, a request to *take back* shall be made.

Similar to the Dublin Convention, no time limit is provided for sending a *take back* request, but only the one month time limit to answer such a request is mentioned (Article 20). When it concerns a request to *take charge*, some important amendments are made under the Dublin II Regulation. It should be sent within three months of the date the asylum application was lodged, instead of six months under the Convention (Article 17). An answer by the requested State shall be provided within two months after receiving the request (Article 18). Although the Convention provided for three months in this case, the Regulation time limit is actually longer than the amended one month period presented in Decision no. 1/97 of the Committee set up by Article 18, right after the Convention entered into force.<sup>176</sup> The timeframe for the actual transfer expanded from one month under the Convention to six months under the Regulation (Article 19).<sup>177</sup> Shortening the formal procedure (in total maximum five months instead of seven months) and expanding the transfer time limit meets the recommendations to speed up the procedure while taking into account that in reality the transfer could not be organised within one month in many cases.<sup>178</sup> However, the extension of the transfer period seems somehow exaggerated, especially considering that it can rise up to eighteen months in some circumstances. However, unlike the Convention, which did not provide for any consequences if the time limit was exceeded, the Regulation states that in that case the responsibility shall lie with the Member State in which the application was lodged (Article 19.4).<sup>179</sup>

An important improvement is the launching of the Eurodac system which should facilitate the implementation of the Dublin II Regulation.<sup>180</sup> The Eurodac Regulation obliges each Member State to take the fingerprints of every person who lodges an asylum application and every alien who is apprehended while irregularly crossing the external borders of the EU, from the age of 14.<sup>181</sup> The fingerprints and additional personal data of that person shall be recorded in a central database.<sup>182</sup> This enables the Member States to compare the fingerprint data and check whether an alien who lodged an asylum application or who is illegally present

---

<sup>176</sup> Decision No 1/97, art 4.1

<sup>177</sup> This time limit can be extended up to one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to eighteen months if the asylum seeker absconds (Dublin II Regulation, art 19.4)

<sup>178</sup> Marinho and Heinonen (n 28), 6; European Commission Staff Working Paper: Evaluation of the Dublin Convention SEC(2001) 756, 9-11.

<sup>179</sup> Nicol (n 135), 273

<sup>180</sup> Dublin II Regulation, recital 11

<sup>181</sup> Eurodac Regulation, art 4 & 8

<sup>182</sup> Eurodac Regulation art 4, 5 & 8

in their territory has previously lodged an application for asylum.<sup>183</sup> Consequently, multiple applications in the EU and the illegal crossing of the external borders can more easily be detected and proven. Other elements of proof used for determining the responsible Member State are again divided into two categories: formal proof which can only be refuted by contrary evidence and circumstantial evidence which is merely indicative.<sup>184</sup> Contrary to the Convention, the rules on proof and evidence are now included into the Regulation.

The mutual and general information exchange provisions on the other hand have been omitted in the Regulation.<sup>185</sup> This may be regretted since it concerned different data than those stored in the Eurodac database. It could be argued that there was less need for exchange of information about national legislative or regulatory measures or practices in the field of asylum given the European harmonisation in that field, but this would ignore the reality that European asylum policies were still very divergent and only *minimum standards* were established on the European level at that stage.

### 3. 3. 3. Evaluation

Overall, the philosophy of the Dublin System remained the same, in the sense that the asylum applicant should not have the choice as to which Member State shall be responsible for his or her asylum application.<sup>186</sup> Retaining the general principle that the responsibility for examining an asylum application lies with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, with some exceptions to protect family unity,<sup>187</sup> the Dublin II Regulation showed a very similar pattern as its predecessor: a small number of transfers and a disproportionate burden on countries on the eastern and southern borders of the EU.<sup>188</sup> As such it remained unfair to both asylum seekers and certain Member States.<sup>189</sup> The central importance of the Regulation lies in the fact that the

---

<sup>183</sup> Eurodac Regulation, art 11

<sup>184</sup> Dublin II Regulation, art 18

<sup>185</sup> See Dublin Convention, art 14

<sup>186</sup> Nicol (n 135), 266

<sup>187</sup> Commission of the European Communities, 'Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System' (SEC(2007)742), 9

<sup>188</sup> Nicol (n 135), 267

<sup>189</sup> – 'Right of Asylum in Europe: the "Dublin Regulation" – an Unfair System Both for Asylum Seekers and for States' Parliamentary Assembly of the Council of Europe (8 December 2010) <<http://assembly.coe.int/nw/xml/News/FeaturesManager-View-EN.asp?ID=962>> (accessed 30 July 2015); Juha Raitio, 'A Few Remarks to Evaluate the Dublin System and the Asylum Acquis' in Flora Goudappel and Helena Raulus (eds) *"The Future of Asylum in the European Union": Problems, Proposals and Human Rights* (TMC Asser Press 2011), 112

Dublin rules had taken the form of a Regulation which has direct effect upon the Member States.<sup>190</sup> Consequently, the Dublin II Regulation does not only engender obligations for Member States, but also rights for individuals.

In accordance with Article 28 of the Dublin II Regulation, the European Commission made an evaluation of the Dublin system three years after the Regulation entered into force. The Commission recommended some minor adjustments, but concluded that, overall, the objectives of the Dublin system to establish a clear and workable mechanism for determining responsibility for asylum applicants, had to a large extent been achieved.<sup>191</sup> The generally optimistic evaluation by the Commission did not comply with the evaluations made by the European Parliament, the UNHCR and NGO's, which suggested serious flaws within the Dublin system, adversely affecting both asylum seekers and Member States.<sup>192</sup> According to the Commission, the low transfer rates were "one of the main problems for the efficient application of the Dublin system".<sup>193</sup> Compared to the Dublin Convention era, the actual transfers compared to the number of requests (from 28% to 30%) and to the total number of asylum applications (from 1.7% to 2.8%) hardly increased during the first two years after the Regulation entered into force.<sup>194</sup> For the period 2008 to 2012 a small increase in the number of transfers compared to the total number of asylum applications was observed (4,5%), while the actual transfers compared to the number of requests (30%) remained the same.<sup>195</sup> Apparently, the establishment of Eurodac did not change the situation considerably.<sup>196</sup> The low transfer rates and the increasing number of multiple applications during the first years,<sup>197</sup> reflected the

---

<sup>190</sup> ECRE, 'Report on the Application of the Dublin II Regulation in Europe' (ECRE & ELENA 2006), 10

<sup>191</sup> Commission of the European Communities, 'Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System' (COM(2007) 299 final) (hereinafter: Commission Report (COM(2007) 299 final)), 13

<sup>192</sup> For instance see the Statement of the European Parliament on the Commission's evaluation: "it would appear that the optimistic conclusion drawn by the Commission from its evaluation [...] is based more on a favourable bias towards the system (which one may or may not share) than on a rigorous analysis" in: European Parliament, 'Report on the evaluation of the Dublin System' (*Committee on Civil Liberties, Justice and Home Affairs* A6-0287/2008), 12

<sup>193</sup> Commission Report (COM(2007) 299 final), 4

<sup>194</sup> See the data in: European Commission Staff Working Paper: Evaluation of the Dublin Convention SEC(2001) 756, 2; and Commission Report (COM(2007) 299 final), 4

<sup>195</sup> In the period 2008-2012, 62.053 Dublin transfers were carried out, which is 4.5% on the total of 1.392.400 asylum applications which were registered in the same period. (Own assessment of data in 'Dublin Statistics 2008-2012: tables and figures' available at: Eurostat 'Dublin statistics on countries responsible for asylum application' Updated 16 June 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin\\_statistics\\_on\\_countries\\_responsible\\_for\\_asylum\\_application](http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application)> (accessed 6 August 2015) and data in 'Asylum Statistics 2004-2014: tables and figures' available at: Eurostat 'Asylum Statistics' Updated 21 May 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> (accessed 6 August 2015))

<sup>196</sup> Raitio (n 189), 115

<sup>197</sup> See Commission Report (COM(2007) 299 final), 4; and ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' (March 2008), 11

ongoing inefficiency of the Dublin System.<sup>198</sup> This raised questions about the costs of the system, which had not been assessed by the Commission due to a lack of precise data, but they reassured that “Member States consider the fulfilling of the political objectives of the system as very important, regardless of its financial costs”.<sup>199</sup> According to ECRE on the other hand, the available data reflected the possibility that the Dublin system imposed a significant financial burden on Member States.<sup>200</sup> Moreover, Member States situated at the southern and eastern borders of the EU experienced an ongoing disproportionate allocation of responsibility under the Dublin system. In its Green Paper on Asylum of 2007, the Commission acknowledged that “the Dublin system may *de facto* result in additional burdens on the Member States that have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location”.<sup>201</sup> But in its evaluation of the same year it denied that this actually the case, ‘contrary to the widely shared supposition’.<sup>202</sup> This claim was based on incoming transfers only, while the net assessment (incoming minus outgoing transfers) clearly revealed a disproportionate burden on the border Member States.<sup>203</sup> For the period 2008-2012 the vast majority of incoming requests were related to entry reasons (93%).<sup>204</sup> This continuing trend became more alarming when the awareness arose that those regions have the least developed asylum systems and often fewer financial resources, as will be discussed in the next chapter.<sup>205</sup> Moreover, when people are recognised as a refugee, they are not free to move immediately to another Member States. Only after five years they are granted the ‘long-term resident status’ which enables them under certain conditions to move to another Member

---

<sup>198</sup> European Parliament, ‘Report on the evaluation of the Dublin System’ (*Committee on Civil Liberties, Justice and Home Affairs* A6-0287/2008), 4

<sup>199</sup> Commission Report (COM(2007) 299 final), 13

<sup>200</sup> ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 12

<sup>201</sup> Commission of the European Communities, ‘Green Paper on the Future Common European Asylum System’ (COM(2007) 301 final), 10

<sup>202</sup> Commission Report (COM(2007) 299 final), 12

<sup>203</sup> See the data in: ‘Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System’ (SEC(2007)742), 52; and the analysis of this data in: ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 13

<sup>204</sup> Eurostat ‘Dublin statistics on countries responsible for asylum application’ Updated 16 June 2015  
<[http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin\\_statistics\\_on\\_countries\\_responsible\\_for\\_asylum\\_application](http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application)> (accessed 6 August 2015)

<sup>205</sup> ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 14; In that regard the European Parliament asked the Commission to make proposals for burden-sharing mechanisms in order to help alleviate the disproportionate load which could fall on border Member States, and until this is achieved, to provide for mechanisms to correct the adverse effects on the Member States at the external borders: European Parliament, ‘Report on the evaluation of the Dublin System’ (*Committee on Civil Liberties, Justice and Home Affairs* A6-0287/2008), 6

State.<sup>206</sup> Hence, refugees are ‘stuck’ in the country which was responsible for their asylum application, for at least five years.

The Dublin II Regulation had its harshest effects on asylum seekers, since it “failed to resolve the ‘refugees in orbit’ phenomenon, while by disregarding the different levels of treatment afforded asylum seekers by different Member States, it has perpetuated a dangerous ‘asylum lottery’ in Europe”.<sup>207</sup> Through the years, alarming national policies and practices were identified, with regard to the reception conditions and asylum procedures. In some Member States the asylum seekers subject to the Dublin procedure received a different treatment than those people who are not (anymore) subject to it. This resulted often in less protection for the ‘Dublin’ asylum seekers, both in terms of reception conditions and access to the asylum procedure.<sup>208</sup> There was also an increasing trend to detain asylum seekers to avoid possible absconding.<sup>209</sup> Another concern raised was the *de facto* denial of access to asylum procedures in some Member States and the great divergence in recognition rates, which were extremely low in some Member States.<sup>210</sup> In 2009 for instance, the recognition rate in Finland was 77.8%, around 40% in Denmark, Germany, Italy, Latvia and Poland, and by far the lowest rate was 2.2% in Greece.<sup>211</sup> In view of these observations, the Dublin system had created an ‘asylum lottery’, where the outcome of the application depended primarily on the travel route people had taken.<sup>212</sup> These findings made the mutual trust underlying the system hardly defensible, as will be discussed in the next chapter.

The Dublin II Regulation also retained the possibility for Member States to send applicants to ‘safe third countries’ (external transfers).<sup>213</sup> The Asylum Procedures Directive of 2005 provided for the adoption by the Council of a minimum common list of safe third countries and set out minimum standards which Member States should take into account when designating additional third countries as safe in their national legislation.<sup>214</sup> ECRE reiterated its concerns regarding these provisions, pointing out the inadequate safeguards to comply with

---

<sup>206</sup> Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents [2003] OJ L 16/44, art 1; Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1

<sup>207</sup> ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 14

<sup>208</sup> UNHCR, ‘The Dublin II Regulation. A UNHCR Discussion Paper’ (2006), 51-52

<sup>209</sup> UNHCR, ‘The Dublin II Regulation. A UNHCR Discussion Paper’ (2006), 52-53

<sup>210</sup> The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (*European Comparative Report* 2013), 15

<sup>211</sup> See data in: UNHCR, ‘UNHCR Statistical Yearbook 2009’ (2010)

<sup>212</sup> The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (*European Comparative Report* 2013), 15; ECRE, ‘Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation’ (April 2009), 3

<sup>213</sup> Dublin II Regulation, art 3(3)

<sup>214</sup> Asylum Procedures Directive 2005, art 27, 29, 30 and Annex II

international standards, such as the prohibition of *refoulement*, and the potential to undermine asylum in the EU.<sup>215</sup> The practice of sending asylum seekers back got further underpinned by the possibility for Member States, and since the Treaty of Amsterdam also for the EU, to sign readmission agreements with third countries.<sup>216</sup> Readmission agreements contain reciprocal obligations and procedures to facilitate the return of persons (own nationals of the readmitting State, third-country nationals or stateless persons) who are illegally residing in the requesting State.<sup>217</sup> Designed for “fighting illegal immigration”,<sup>218</sup> they generally do not include separate provisions on refugees. This creates a real risk that asylum seekers are transferred as ‘irregular migrants’, which might possibly lead to *refoulement* by way of chain deportation.<sup>219</sup>

While the ‘safe third country’ notion was copied into the Dublin II Regulation without additional safeguards, other provisions got modified in order to address inadequacies of its predecessor. As mentioned before, the ‘family member’ notion got expanded by including not only family members recognised as refugees, but also those whose asylum application is under examination. Although this was an improvement on the previous Dublin rules, the UNHCR regretted it did not go as far as including family members who are *legally residing* in a Member State.<sup>220</sup> The European Parliament and ECRE recommended the further extension of the ‘family member’ definition in accordance with the Family Reunification Directive of 2003, including all close relatives (such as siblings) and long-term partners, especially those who have no other family support.<sup>221</sup> The new provisions on unaccompanied minors and the Commission’s emphasis on the need to clarify these, while taking the best interest of the child into account,

---

<sup>215</sup> The concept is particularly concerning with regard to “States on the periphery of the Union, which lack efficient asylum systems and where serious human rights violations persist”, since article 36 of the 2005 Asylum Procedures Directives allows Member States to deny access to an asylum procedure to applicants who illegally arrive from those countries, if considered safe. See: ECRE, ‘Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status’ (2006) IN1/10/2006/EXT/JJ, 23, 31-32

<sup>216</sup> Peers et. al., *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Vol 2 EU Migration Law* (Martinus Nijhoff Publishers 2012), 553

<sup>217</sup> Commission of the European Communities, ‘Communication From the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents’ COM(2002) 564 final, 26

<sup>218</sup> *Ibid*, 4

<sup>219</sup> On the difficult balance between readmission agreements and human rights / refugee rights, see: Council of Europe, ‘Readmission Agreements: A Mechanism for Returning Irregular Migrants’ (*Doc 12168, Committee on Migration, Refugees and Population* 2010); UNHCR, ‘Global Consultations on International Protection. Regional Meeting Budapest 6-7 June 2001’ (2001) EC/GC/01/14; Mariagiulia Giuffré, ‘Readmission Agreements and Refugee Rights: From a Critique to a Proposal’ (2013) 32(3) *Refugee Survey Quarterly*, 79-111

<sup>220</sup> UNHCR, ‘UNHCR’s Observations on the European Commission’s Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National’ (2002), 3-4

<sup>221</sup> See: European Parliament, ‘Report on the evaluation of the Dublin System’ (*Committee on Civil Liberties, Justice and Home Affairs* A6-0287/2008), 7; ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 20; and Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L 251/12 (Family Reunification Directive), art 4

were generally welcomed.<sup>222</sup> It was recommended to give similar consideration to other vulnerable groups, such as people who got traumatised or have serious health problems.<sup>223</sup>

According to the Dublin II Regulation, a transfer decision *may* be subject to appeal, however this appeal “shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this”.<sup>224</sup> Hence, despite previous recommendations of the UNHCR and NGO’s the Regulation does not explicitly guarantee a suspensive right to appeal, which might leave individuals at risk of chain *refoulement*.<sup>225</sup> As reported in 2006, all Member States offered an appeal or review possibility of the transfer decision, yet, Portugal was the only Member State which automatically provided for a *suspensive* right of appeal in those cases.<sup>226</sup> The right to appeal was further limited through Member States’ actions, such as informing the asylum applicant of the transfer decision shortly or immediately prior to the actual transfer and curtailing the opportunity to access free legal assistance.<sup>227</sup> The insufficient legal safeguards not only curtailed their appeal possibilities, but also their access to the asylum procedure. While the Dublin II Regulation explicitly aimed to ensure that every asylum seeker’s claim will be examined by one Member State,<sup>228</sup> this seemed far from reality. Several Member States restricted or even denied access to a procedure to individuals returning under the Dublin II Regulation, especially to those who were ‘taken back’.<sup>229</sup> The situation was particularly concerning in Greece, where the government ‘interrupted’ and closed asylum cases if the asylum seeker left the place of residence, which is inevitably the case for returned Dublin applicants.<sup>230</sup> In 2011 the situation in Greece would become subject to two landmark cases on the Dublin II Regulation, of respectively the ECtHR and the CJEU, as discussed later.

---

<sup>222</sup> See: Commission Report (COM(2007) 299 final), 7; ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 20

<sup>223</sup> ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 20

<sup>224</sup> Dublin II Regulation, art 19(2) for transfer decisions after a request to take charge and art 20(1)(e) for transfer decisions after a request to take back

<sup>225</sup> ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 17

<sup>226</sup> ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006), 166

<sup>227</sup> ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006), 167

<sup>228</sup> Dublin II Regulation, recital 4, art 3(1)

<sup>229</sup> ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006), 150-151

<sup>230</sup> ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008), 15; Also see: ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006), 150-151; UNHCR, ‘The Dublin II Regulation. A UNHCR Discussion Paper’ (2006), 46-47; Amnesty International, ‘Public Statement: Greece: No Place for an Asylum-Seeker’ (27 February 2008) AI Index: EUR 25/002/2008; UNHCR, ‘Position on the Return of Asylum-Seekers to Greece under the “Dublin Regulation”’ (15 April 2008)

### 3. 4. THE RECAST PROPOSAL OF 2008

In 2008 the Commission released a proposal to recast the Dublin II Regulation, in order to enhance the system's efficiency while ensuring higher standards of protection for the applicants and addressing situations of particular pressure on Member States' reception facilities and asylum systems.<sup>231</sup> While the proposal retained the same general principles,<sup>232</sup> it also introduced some significant humanitarian reforms such as the introduction of a right to information, a personal interview and additional guarantees for minors and vulnerable asylum seekers.<sup>233</sup> A new provision on detention aimed at limiting this practice by setting clear rules on the grounds for detention, the duration, periodical reviews and competent authorities.<sup>234</sup> A general "right to an effective judicial remedy" of the transfer decision was introduced, no longer leaving it to the Member States to decide if a transfer decision could be reviewed.<sup>235</sup> However, also the recast did not provide for an *automatic suspensive* appeal. Consequently, this provision was unlikely to create a significant difference, since all Member States provided for an appeal or review opportunity, yet often without suspensive effect. The biggest breakthrough proposed by the Commission was the introduction of a suspension mechanism. This should enable Member States to temporarily suspend transfers to a Member State faced with a particularly urgent situation which places an exceptionally heavy burden on its reception conditions and asylum system.<sup>236</sup> The proposed mechanism aimed at avoiding that Member States in such conditions experience even more pressure by additional transfers and that asylum seekers are transferred to Member States which cannot offer them a sufficient level of protection. Without offering a durable solution, this remedial mechanism should reduce the consequences of the Dublin system in view of the considerable disparities in protection standards.<sup>237</sup> This measure would be in accordance with Article 80 TFEU which requires the asylum policy to be governed by the

---

<sup>231</sup> Commission of the European Communities, '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' (COM(2008) 820 final) (hereinafter: European Commission Proposal to recast the Dublin Regulation (2008)), 3

<sup>232</sup> Again the general principle is to allocate responsibility to the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, with exceptions to protect family unity, see: European Commission Proposal to recast the Dublin Regulation (2008), 3-4

<sup>233</sup> European Commission Proposal to recast the Dublin Regulation (2008), art 4-6, 30(1); also see: Laurence De Bauche, *Vulnerability in European Law on Asylum: A Conceptualization Under Construction. Study on Reception Conditions for Asylum Seekers* (Bruylant 2012), 101

<sup>234</sup> European Commission Proposal to recast the Dublin Regulation (2008), art 27

<sup>235</sup> European Commission Proposal to recast the Dublin Regulation (2008), art 26

<sup>236</sup> European Commission Proposal to recast the Dublin Regulation (2008), art 33

<sup>237</sup> ECRE, 'Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation' (April 2009)

principle of solidarity and fair sharing responsibility. It was also the acknowledgement on the side of the Commission, that the presumption of safety underlying the Dublin system is not always tenable.

The proposed recast by the Commission was welcomed by ECRE and the European Parliament as a recognition that the Dublin system should be improved,<sup>238</sup> but they regretted that the Commission did not substantially change the flawed Dublin system. As the European Parliament noted: “Whatever the political obstacles to change, such a single-minded preference for the *status quo* could only be defensible on the premise that the Dublin system worked by and large satisfactorily”.<sup>239</sup> In reality however, the political obstacles seemed to prevail. Despite the increasing evidence of its flawed nature and the concomitant detrimental effects for certain Member States and asylum seekers, the majority of Member State were unwilling to make fundamental changes to the system. The idea to introduce a suspension mechanism was neither supported by the majority of the Member States,<sup>240</sup> nor by the Council,<sup>241</sup> who underlined in the Stockholm Programme of 2009 that “the Dublin system remains a cornerstone in building the CEAS”.<sup>242</sup> Solidarity did not seem to reign in the field of asylum, contrary to the obligations under Article 80 TFEU. The proposed recast was shelved again and it would take five more years, till 2013, until the Dublin II Regulation got reformed.

### **3. 5. THE END OF BLIND MUTUAL TRUST: ECtHR AND CJEU JURISPRUDENCE ON DUBLIN II**

The inefficient Dublin system in combination with insufficient legal safeguards and alarming Member State practices raised great concern from a refugee protection perspective. In this light, the mutual trust underlying the Dublin system, which implies that all Member States consider

---

<sup>238</sup> See: ECRE, ‘Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation’ (April 2009); European Parliament, ‘Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal’ (2009) Civil Liberties, Justice and Home Affairs PE 410.690

<sup>239</sup> European Parliament, ‘Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal’ (2009) Civil Liberties, Justice and Home Affairs PE 410.690, 1; This view was supported by ECRE, see: ECRE, ‘Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation’ (April 2009), 13

<sup>240</sup> Dirk Vanheule, Jianne van Swelm and Christina Boswell, ‘The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration’ (*European Parliament Study, Directorate General for Internal Policies* PE 453.167 / 2011), 75

<sup>241</sup> Council of the European Union, ‘Draft Statement of the Council’s Reasons’ (2008/0234(COD)), 5

<sup>242</sup> The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (*European Comparative Report* 2013), 15-16; European Commission Proposal to recast the Dublin Regulation (2008), 5; European Council, ‘The Stockholm Programme (2009) – An Open and Secure Europe Serving and Protecting Citizens’ (2010) OJ C 115/01 (hereinafter: The Stockholm Programme (2009)), 32

each other as safe countries, became hardly defensible.<sup>243</sup> This was already suggested in the ECtHR *T.I. v UK* decision of 2000 with regard to the Dublin Convention. However the mutual trust got a supposedly stronger basis with the establishment of the CEAS which respects the provisions of the Geneva Convention, besides the fact that all Member States are party to the ECHR.<sup>244</sup> It presupposes a certain level of harmonised protection standards within the European Union. In practice however, despite the developments in the framework of the CEAS, there were – and still are – significant differences in national asylum systems and reception conditions.<sup>245</sup> The Commission acknowledged this ‘critical flaw’ in the CEAS, pointing at the differences in recognition rates among Member States, in the Asylum Policy Plan of 2008.<sup>246</sup> Paradoxically, the Dublin system contributed to the protection-gap between Member States, by *shifting* instead of *sharing* responsibility, putting some Member States which already have limited reception and absorption conditions under additional strain. However, as mentioned, the temporarily suspension mechanism which should address this issue, was unacceptable for the majority of Member States and the Council.<sup>247</sup> In the meantime it was suggested to use the leeway provided by Article 3(2) on a case-by-case basis, when a transfer would be incompatible with a Member State’s obligations under international law.<sup>248</sup> Yet, given its discretionary nature, the interpretation and application of the sovereignty clause varied widely among Member States. While some applied it in case a transfer to another Member State would result in inhuman or degrading treatment, others applied it very restrictively or not at all.<sup>249</sup> The question arose whether recourse to the sovereignty clause should be compulsory in cases a

---

<sup>243</sup> Evelien Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’ (2013) 9(1) Utrecht Law Review, 138

<sup>244</sup> Dublin II Regulation, recital 2; Evelien Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’ (2013) 9(1) Utrecht Law Review, 138; See also the explicit recognition of Member States as safe countries of origin in: Protocol on Asylum for Nationals of Member States of the European Union as Annexed to the Treaty Establishing the European Community [2004] OJ C 310/362 / Protocol (No.24) on Asylum For Nationals of Member States of the European Union as Annexed to the TEU [2010] OJ C 83/305

<sup>245</sup> These diverging asylum practices in Member States are described in several comparative studies on the application of the Dublin II Regulation: UNHCR, ‘The Dublin II Regulation. A UNHCR Discussion Paper’ (2006); ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006); The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (European Comparative Report 2013)

<sup>246</sup> Commission of the European Communities, ‘Policy Plan on Asylum. An Integrated Approach to Protection Across the EU’ (COM(2008) 360 final), 3

<sup>247</sup> See: Vanheule et. al., ‘The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration’ (European Parliament Study, Directorate General for Internal Policies PE 453.167 / 2011), 75; Council of the European Union, ‘Draft Statement of the Council’s Reasons’ (2008/0234(COD)), 5

<sup>248</sup> UNHCR, ‘The Dublin II Regulation. A UNHCR Discussion Paper’ (2006), 35; The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (European Comparative Report 2013), 53

<sup>249</sup> Ibid, 45

transfer to another Member State would result in inhuman or degrading treatment, or lead to chain *refoulement*.<sup>250</sup> In the following years these issues were considered by the ECtHR and the CJEU in a series of judgements, which will be discussed after a short presentation of the two European Courts.

The situation definitely revealed the paradox at the heart of the Dublin system: its objective is to avoid secondary migratory flows, which are for a large part triggered by the differences in national asylum systems, but these differences invalidate its core assumption: that all Member States offer at least a minimum of equal access to the asylum procedure and subsequent protection. Or, the other way round: the differences which undermine the mutual trust underlying the Dublin system, encourage migratory flows, which in their turn strengthen ‘the need’ for the Dublin system to operate.

### **3. 5 1. The ECtHR and CJEU as “regional refugee law courts”**

Europe’s two supranational courts, the European Court of Human Rights (ECtHR / Strasbourg Court) and the Court of Justice of the European Union (CJEU / Luxembourg Court) have both been confronted with an increasing number of cases on asylum. By expanding and mutually reinforcing their role in securing access to asylum and the protection of asylum seekers, they gradually established themselves as the two key “regional refugee law courts”.<sup>251</sup>

The ECtHR has jurisdiction over the 47 Member States of the Council of Europe (CoE), including all 28 EU countries, with regard to alleged violations of the fundamental rights set out in the ECHR.<sup>252</sup> Although the ECHR does not contain express provisions relating to asylum, the Convention proved to be of great relevance for protecting asylum seekers’ rights.<sup>253</sup> Most asylum jurisprudence of the Strasbourg Court is based on Article 3 ECHR which contains the absolute prohibition of torture and inhuman or degrading treatment or punishment.<sup>254</sup> In the

---

<sup>250</sup> Violeta Moreno-Lax, ‘Dismantling the Dublin System: M.S.S. v. Belgium and Greece’ (2012) 14 EJML, 5-6

<sup>251</sup> Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012), 12(2) H.R.L.Rev., 288; Samantha Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer 2014), 77

<sup>252</sup> European Convention on Human Rights as Amended by Protocols Nos. 11 and 14 [opened for signature 4 November 1950, entered into force 3 September 1953] (hereinafter: ECHR), art 19

<sup>253</sup> Nuale Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010), 19

<sup>254</sup> Other Convention rights invoked in asylum cases are: Article 2 ECHR (right to life), Article 4 ECHR (prohibition of slavery and forced labour), Article 5 ECHR (right to liberty and security), Article 6 ECHR (right to a fair trial), Article 7 ECHR (prohibition of punishment without law), Article 8 ECHR (right to respect for private

1989 *Soering* case, the ECtHR stated for the first time that Article 3 prohibits the extradition of a person to a country where he or she would face a real risk of being subjected to ill-treatment.<sup>255</sup> From 1991 onwards, the ECtHR applied the same principle to the expulsion of asylum seekers, which implied that Article 3 ECHR provides for protection against both direct and indirect *refoulement*.<sup>256</sup> This paved the way for increasing jurisprudence on asylum.

The CJEU is the judicial institution which ensures that EU law is interpreted and applied the same in all 28 EU Member States.<sup>257</sup> The role of the Luxembourg Court in asylum cases expanded significantly after the Treaty of Lisbon entered into force in 2009. The Treaty abolished the restrictions on the CJEU's competence in this field, giving the Court general jurisprudence over the interpretation of EU asylum legislation. Through the preliminary ruling procedure, which enables national courts to refer questions to the CJEU on the interpretation of EU law,<sup>258</sup> the CJEU has played a crucial role in shaping the CEAS.<sup>259</sup> Moreover, the Treaty of Lisbon made the Charter of Fundamental Rights of the EU (the Charter / CFREU) legally binding,<sup>260</sup> allowing the CJEU to develop itself as a 'human rights court', and more specific a 'refugee rights court'.<sup>261</sup> Unlike the ECHR, the Charter explicitly contains the right to asylum (Article 18 CFREU) and the prohibition of *refoulement* (Article 19 CFREU).<sup>262</sup> However, generally there is great overlap between the rights guaranteed by the Charter and the ECHR. Therefore Article 52(3) of the Charter stipulates that the scope and meaning of the corresponding rights shall minimum be the same as provided by the ECHR, without excluding

---

and family life), Article 9 ECHR (right to freedom of thought, conscience and religion), Article 10 ECHR (right to freedom of expression), Article 11 ECHR (right to freedom of assembly and association), Article 13 ECHR (right to an effective remedy), Article 14 ECHR (prohibition of discrimination in the enjoyment of Convention rights), Article 4 of Protocol No. 4 (collective expulsion of aliens), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), Article 3 of Protocol No. 7 (exclusion of own nationals), Article 4 of Protocol No. 7 (prohibition on double jeopardy), Article 1 of Protocol No. 12 (general prohibition of discrimination). See: Velluti (n 251), 79 note 12; and Council of Europe and European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Asylum, Borders and Immigration* (Publications Office of the European Union 2013)

<sup>255</sup> *Soering v UK* [1989] ECtHR 14038/88, §91

<sup>256</sup> Direct *refoulement*, see e.g.: *Cruz Varas and others v Sweden* [1991] ECtHR 15576/89, §69; and *Vilvarajah and others v UK* [1991] ECtHR 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, §102-103; *Salah Sheekh v The Netherlands* [2007] ECtHR 1948/04, §135; *Saadi v Italy* [2008] ECtHR (Grand Chamber) 37201/06, §125; Indirect *refoulement*, see e.g.: *T.I. v UK* [2000] ECtHR (Dec.) 43844/98, 14-15

<sup>257</sup> TFEU, art 251-281

<sup>258</sup> TFEU, art 267

<sup>259</sup> Geert De Baere, 'The Court of Justice of the EU as a European and International Asylum Court' (2013) Working Paper No. 118 EU and Global Governance – Leuven Centre for Global Governance Studies, 13

<sup>260</sup> Consolidated Version of the Treaty on European Union [2008] OJ C 115/13 (TEU), art 6(1)

<sup>261</sup> See e.g.: ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to Asylum Law* (ECRE Booklet 2014)

<sup>262</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 (The Charter), art 18 and 19; However, the prohibition of *refoulement* is implicitly covered by Article 3 ECHR (*supra*)

a more extensive protection.<sup>263</sup> Despite this provision, the relation between the ECtHR and the CJEU in the field of fundamental rights review remains a complex one. The Lisbon Treaty also provided for the accession of the EU to the ECHR, but up to date this has not been realised.<sup>264</sup>

### **3. 5. 2. The recognition of refutability: *T.I. v UK and K.R.S. v UK***

Given the unwillingness to revise the Dublin II Regulation, in spite of the growing evidence of its deficiencies, the two European Courts have increasingly been required to intervene to protect the fundamental rights of asylum seekers.<sup>265</sup> As mentioned before the question arose whether the presumption of safety could be considered rebuttable and whether recourse to the sovereignty clause should be compulsory in case a transfer would violate an asylum seeker's fundamental rights.

#### ***T.I. v UK: the principle of refutability formulated***

The refutability of the Dublin system was for the first time implied by the ECtHR in the before mentioned *T.I. v UK* decision of 2000, with regard to the Dublin Convention.<sup>266</sup> The case concerned a Sri Lankan national who fled his country after being tortured by a Tamil terrorist organisation and applied for asylum in Germany. After his application was rejected in first instance and in appeal,<sup>267</sup> he went to the UK where he lodged an new asylum application. The UK did not examine the merits of his claim, but sent a request to Germany to take back the applicant pursuant to the Dublin Convention. The applicant challenged the transfer decision, claiming that the transfer to Germany would violate his rights under Articles 2, 3, 8 and 13 ECHR, since they would most likely deport him to Sri Lanka. In response, the UK argued that it “would be wrong” to assess whether another Contracting State such as Germany was complying with the ECHR, and that this would moreover “undermine the effective working of the Dublin Convention”.<sup>268</sup>

While assessing if the UK could be held responsible under the ECHR for transferring the applicant to Germany with the risk that he would be deported to Sri Lanka, the Strasbourg Court established that both direct and indirect *refoulement* are covered by Article 3 ECHR.<sup>269</sup>

---

<sup>263</sup> Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 (The Charter), art 52(3)

<sup>264</sup> TEU, art 6(2)

<sup>265</sup> The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (*European Comparative Report* 2013), 16

<sup>266</sup> Moreno-Lax (n 250), 6

<sup>267</sup> *T.I. v UK* [2000] ECtHR (Dec.) 43844/98, 3

<sup>268</sup> *Ibid*, 12

<sup>269</sup> *Ibid*, 14-15

Subsequently, it was stated that the UK could not automatically rely on the arrangements made in the Dublin Convention, underlining that being party to an international organisation or agreement does not absolve States from their responsibility under the ECHR.<sup>270</sup> This principle seemed *a fortiori* applicable in the present context, as the Court noted, in line with the UNHCR, that the effectiveness of the Dublin Convention “may be undermined in practice by the differing approaches adopted by the Contracting States to the scope of protection offered”.<sup>271</sup> However, in its further analysis, the Court found not enough evidence that there was a real risk that Germany would expel the applicant to Sri Lanka, in breach of Article 3 ECHR and the application was declared admissible.<sup>272</sup>

Without applying it on the present case, the ECtHR established two important principles. First, Member States are not only responsible for protecting asylum seekers against direct *refoulement*, but also against indirect *refoulement*, and second, the presumption of safety underlying the Dublin system is refutable.<sup>273</sup> It can be considered that the second principle followed from the first one, since transfer to another Member State was – at least at this stage – not generally regarded as a possible risk of ‘direct’ *refoulement*. Noll for instance, in the wake of this case, suggested Member States to make an additional assessment of the risk of ‘indirect’ *refoulement* when applying the Dublin regulation, but was silent on ‘direct’ *refoulement*.<sup>274</sup>

### ***K.R.S. v UK: a step back?***

In the *K.R.S. v UK* decision of 2008, the ECtHR reaffirmed the refutability of the presumption of safety in the context of the Dublin II Regulation, but took a step back by giving arguments in favour of the reliance on this presumption, despite mounting evidence to the contrary. The case concerned an Iranian national who claimed for asylum in the UK, but they send a request to take charge to Greece, where he had entered the EU. Fearing that his asylum application would not be examined by the Greek authorities and he would be deported to Iran, the applicant applied for judicial review. After this was refused by the High Court, he seized the ECtHR,

---

<sup>270</sup> Ibid, 15

<sup>271</sup> Ibid, 15

<sup>272</sup> Ibid, 18

<sup>273</sup> See also: Nuale Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010), 27; Evelien Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’ (2013) 9(1) *Utrecht Law Review*, 139; Moreno-Lax (n 250), 8; Hemme Battjes, ‘A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation’ (2002) 4 *EJML*, 160

<sup>274</sup> Gregor Noll, ‘Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law’ (2001) 70 *Nordic J. Int’l L.*, 181-182; See also: Hemme Battjes, ‘A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation’ (2002) 4 *EJML*, 192

which indicated a Rule 39 interim measure to suspend the transfer to Greece, while considering the case.<sup>275</sup>

The Strasbourg Court observed the particularly critical situation for asylum seekers in Greece, relying on reports of the European Committee for the Prevention of Torture (CPT), the UNHCR, Amnesty International, the Norwegian Organisation for Asylum Seekers and other NGO's. All of these reported on the poor reception, living and detention conditions for asylum seekers in Greece.<sup>276</sup> After the CJEU found in 2007 that Greece had failed to implement the Reception Conditions Directive of 2003, Greece introduced new legislation to comply with its duty under EU law. However, the UNHCR Position Paper noted that "the implementation continued to present serious flaws".<sup>277</sup> The reports further mentioned the alarming ongoing practice of "interrupted claims" which denied Dublin returnees access to the asylum procedures if they left Greece without informing the authorities before their claims had been decided.<sup>278</sup> As a consequence of their findings, the UNHCR and Amnesty International recommended Member States to suspend transfers to Greece by making use of the sovereignty clause in Article 3(2) of the Dublin II Regulation.<sup>279</sup> The UK Government, on the other hand, took recourse to a letter from the Greek Dublin Unit, in support of the presumption of safety it wished to rely on.

---

<sup>275</sup> By virtue of Rule 39 the ECtHR may issue interim measures which are binding on the concerning State, see: Rules of Court [1 June 2015] European Court of Human Rights / Registry of the Court, Rule 39

<sup>276</sup> See: CPT, 'Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007' (CPT/Inf (2008) 3); UNHCR, 'Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"' (15 April 2008); Amnesty International, 'Public Statement: Greece: No Place for an Asylum-Seeker' (27 February 2008) AI Index: EUR 25/002/2008; Norwegian Organisation for Asylum Seekers, Norwegian Helsinki Committee and Greek Helsinki Monitor, 'A Gamble with the Right to Asylum in Europe. Greek Asylum Policy and the Dublin II Regulation' (2008)

<sup>277</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 12; See: *C-72/06 Commission v Greece* [2007] ECR I/57; More specifically the UNHCR observed that "[w]hile the [new legislation] provides in law for higher standards of reception than those previously available to asylum-seekers, its implementation continues to present serious flaws" and that "[a]ccommodation for asylum-seekers remains a major source of concern in Greece, including those who are returned under the Dublin Regulation", see: UNHCR, 'Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"' (15 April 2008), 6-7

<sup>278</sup> See: UNHCR, 'Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"' (15 April 2008), §9; Amnesty International, 'Public Statement: Greece: No Place for an Asylum-Seeker' (27 February 2008) AI Index: EUR 25/002/2008; Norwegian Organisation for Asylum Seekers, Norwegian Helsinki Committee and Greek Helsinki Monitor, 'A Gamble with the Right to Asylum in Europe. Greek Asylum Policy and the Dublin II Regulation' (2008), 49-51; In the view of the "interrupted claim" practices, the Commission had launched a procedure against Greece at the CJEU for infringing the Dublin II Regulation. This was mentioned in the *K.R.S.* decision without any further considerations as the case was pending at that time. In 2009 the case was withdrawn. See: *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 12, 14; 'Action brought on 31 March 2008 – Commission of the European Communities v Hellenic Republic (Case C-130/08)' (2008) OJ C 128/25; 'Order of the President of the Court of 24 April 2009 – Commission of the European Communities v Hellenic Republic' (2009) OJ C 180/36

<sup>279</sup> UNHCR, 'Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"' (15 April 2008), §26; Amnesty International, 'Public Statement: Greece: No Place for an Asylum-Seeker' (27 February 2008) AI Index: EUR 25/002/2008

The letter referred to the recent legislative changes in Greece and claimed that it is the aim of the Greek state to ensure the unhindered access to the asylum procedure for all asylum seekers, also those send back under the Dublin II Regulation.<sup>280</sup> Another letter mentioned that no asylum applicants were at that time returned to Iran (or Afghanistan, Iraq, Somalia, Sudan or Eritrea) by the Greek Authorities, even if their asylum application was rejected.<sup>281</sup>

In its assessment whether there would be a breach of Article 3 ECHR if K.R.S. would be removed to Greece, the ECtHR took a rather ambiguous position. Unlike the *T.I.* ruling, the Court first elaborated on the fact that Article 3 ECHR comprises the prohibition of direct *refoulement*: deportation is prohibited, where substantial grounds have been shown that it would lead to *refoulement*.<sup>282</sup> As a consequence, Article 3 ECHR entails the obligation for Contracting States to make a rigorous assessment of the asylum applicant's claim, without automatically or mechanically applying procedural requirements, since this would contrast with "the fundamental value embodied in Article 3". Subsequently, the ECtHR recalled the *T.I.* principles that Article 3 ECHR also comprises the prohibition of indirect *refoulement* and that being party to an international agreement does not absolve Contracting States from their responsibilities under the ECHR.<sup>283</sup> It was underlined that this applies with equal force to the Dublin II Regulation – in theory affirming the refutability of the presumption of safety underlying the Dublin system.<sup>284</sup> However, in its further assessment of the case the Court seemingly ignored their relevance and only stated arguments which reinforced the presumption of trust. First the Court observed that returning an asylum seeker to another Member State on the basis of the Dublin II Regulation "is the implementation of a legal obligation on the State in question which flows from its participation in the asylum regime created by that Regulation".<sup>285</sup> This simply overlooks the fact that the Dublin II Regulation does not 'oblige' participating States, given the existence of the sovereignty clause.<sup>286</sup> The Court went on, stating that "the asylum regime so created protects fundamental rights, as regards both the substantive guarantees offered and mechanisms controlling their observance".<sup>287</sup> With respect to Greece it was mentioned that the "presumption must be that Greece will abide by its obligations under [the Asylum Procedures Directive and the Reception Directive]".<sup>288</sup> The concerns of the UNHCR, Amnesty

---

<sup>280</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 5

<sup>281</sup> *Ibid*, 4

<sup>282</sup> *Ibid*, 15; See: *Saadi v Italy* [2008] ECtHR (Grand Chamber) 37201/06, §125

<sup>283</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 16

<sup>284</sup> *Ibid*

<sup>285</sup> *Ibid*

<sup>286</sup> Moreno-Lax (n 250), 14

<sup>287</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 16

<sup>288</sup> *Ibid*, 17

International, and the Norwegian Organisation for Asylum Seekers and other NGO's simply could not outweigh the presumption of safety the UK wished to rely upon to transfer K.R.S. to Greece.<sup>289</sup> The Court concluded that the UK would not breach Article 3 ECHR by removing the applicant to Greece and declared the application inadmissible.<sup>290</sup> This was based on the facts that, first, Greece did not seem to remove people to Iran, and second, *if* they would decide to do so, returnees under the Dublin II Regulation could lodge an application with the ECtHR for a Rule 39 measure to prevent this.<sup>291</sup>

The latter argument is at least surprising and hard to accept, for the following reasons. It was noted that the UNHCR doubted if an effective remedy as foreseen by Article 13 ECHR was accessible for 'Dublin returnees'. The Court therefore elaborated on States' obligation under Article 13 ECHR.<sup>292</sup> It was recalled that in conjunction with Article 3 ECHR and particularly in asylum matters, a remedy with automatic suspensive effect is required to prevent *refoulement* pending the case.<sup>293</sup> However, having said so, no further attention was paid to it. The Court did not examine whether remedies in Greece were suspensive, let alone effective, but was simply satisfied with the fact that those who fear deportation by Greece in violation of Article 3 ECHR can apply to the ECtHR for a Rule 39 to prevent this.<sup>294</sup> Whereas in *T.I.* the Court had ignored the UK's argument that it was sufficient that the applicant could apply for a Rule 39 measure in Germany, but instead emphasised the importance of a *domestic* remedy in the German system, it reasoned exactly the other way round now.<sup>295</sup> Nonetheless, the *T.I.* interpretation of Article 13 ECHR seems to be the only acceptable one. In *K.R.S.* the Court overlooked that recourse to Rule 39 should be the exception, not the rule.<sup>296</sup> The possibility to apply to the ECtHR for such interim measures in a certain Member State cannot be considered sufficient to comply with the requirements under Article 13 ECHR.

As Moreno-Lax observed, the triumph of formal arguments over practical evidence was striking in the *K.R.S.* case.<sup>297</sup> The ECtHR's assessment paid very little attention to the reports

---

<sup>289</sup> Ibid; Moreno-Lax (n 250), 15

<sup>290</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 18

<sup>291</sup> Ibid, 17-18

<sup>292</sup> Article 13 ECHR: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"

<sup>293</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 15; See: *Čonka v Belgium* [2002] ECtHR 51564/99, §§81-83; and *Gebremedhin v France* [2007] ECtHR 25389/05, §53

<sup>294</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 17

<sup>295</sup> See: *T.I. v UK* [2000] ECtHR (Dec.) 43844/98, 19; Costello (n 251) 320

<sup>296</sup> In *Mamatkulov and Askarov v Turkey* the ECtHR stated that "the Court applies Rule 39 only in restricted circumstances" and "[a]lthough it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage", see: *Mamatkulov and Askarov v Turkey* [2005] ECtHR (Grand Chamber) 46827/99; 46951/99, §§103-104

<sup>297</sup> Moreno-Lax (n 250), 16

of the UNHCR, Amnesty International and other NGO's, but focused instead on the arguments which "presumed" compliance of Greece with its obligations under EU asylum law and the ECHR. The decision could therefore be criticised for encouraging Member States to apply the Dublin II Regulation without taking practical deficiencies in the CEAS and specific Member States into account.<sup>298</sup>

Moreover, in *K.R.S.* the ECtHR only assessed whether the UK's transfer to Greece would violate Article 3 ECHR as a result of *indirect refoulement*, namely if there was a risk that the Greek Authorities would deport the applicant to Iran. The transfer to Greece was not considered as a possible risk of *direct refoulement*. Although, unlike *T.I.* which concerned a transfer to Germany, there was mounting evidence that transfer to Greece could in itself be an act of *refoulement*. The ECtHR acknowledged this possibility in its final remark, observing that the detention conditions for asylum seekers in Greece is 'of some concern' in the light of their obligations under the Reception Directive and Article 3 ECHR.<sup>299</sup> However, the Court held that claims arising from these conditions should first be subject of a case with the Greek courts and could then be submitted to the ECtHR.<sup>300</sup> Six months later, in a case on this issue, the ECtHR found that the detention conditions for asylum seekers in Greece amount to degrading treatment within the meaning of Article 3 ECHR.<sup>301</sup>

### ***Member States' interpretations post K.R.S.***

Exactly one day after the *K.R.S.* decision, the Commission published its proposal to recast the Dublin II Regulation, with the inclusion of a suspension mechanism. Whereas the Commission, by doing so, gave a signal for change, the ECtHR had refrained to do so in *K.R.S.*. In the wake of this case, the Member States took very divergent views of their EU and ECHR obligations in the context of the Dublin system.<sup>302</sup> Some Member States seemed to practically deny the possible refutability. The Dutch government, for instance, stated about facts occurring in 2009 that "in keeping with the Court's decision in *K.R.S.*" it should be assumed "that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the [ECtHR]. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was

---

<sup>298</sup> Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9(1) Utrecht Law Review, 140

<sup>299</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 18

<sup>300</sup> *Ibid*

<sup>301</sup> *S.D. v Greece* [2009] ECtHR 53541/07, §§49-54; See also: *Tabesh v Greece* [2009] ECtHR 8256/07, §§38-44; *A.A. v Greece* [2010] ECtHR 12186/08, §§57-65

<sup>302</sup> Costello (n 251), 320

based”.<sup>303</sup> Other national authorities acknowledged the possibility to rebut the presumption of safety, but underlined that this could only be done in “wholly exceptional cases”.<sup>304</sup> Hence, while the ECtHR recognised the refutability of the presumption of safety *in theory* in both *T.I.* and *K.R.S.*, it allowed Member States to mechanically rely on this presumption *in practice*.

### 3. 5. 3. The ECtHR to the rescue: *M.S.S. v Belgium and Greece*

The Member States’ restrictive interpretation of their responsibilities under the ECHR, in the aftermath of the *T.I.* and *K.R.S.* cases, was hardly tenable in the light of mounting evidence that Dublin transfers to certain Member States (and especially Greece) might lead to a violation of the fundamental rights of asylum seekers. On 21 January 2011, the ECtHR took the needed opportunity to revise its previous *K.R.S.* decision, in the landmark ruling *M.S.S. v Belgium and Greece*. Eleven years after the possibility to rebut the presumption of safety underpinning the Dublin system was first recognised, the ECtHR actually did so.

#### ***Facts***

The case concerned an Afghan national, Mr. M.S.S., who entered the EU through Greece and travelled on to Belgium where he lodged for asylum in February 2009. The Belgian authorities sent a Dublin request to take charge of him to Greece after a Eurodac hit revealed that he had previously been registered there. The Greek authorities first ignored the request but later confirmed their responsibility by means of a standard document. In the meantime Belgium had received a letter from the UNCHR which recommended Belgium to suspend transfers to Greece in the light of the deteriorating situation there. Despite this letter, the Belgian authorities decided to transfer M.S.S. to Greece, arguing that Greece was responsible under the Dublin II Regulation, that there was no reason to suspect that the Greek authorities would fail to honour their obligations under EU asylum law and the Geneva Convention and that Belgium was under no obligation to apply the sovereignty clause.<sup>305</sup> The appeal against this decision was rejected because his counsel did not attend the hearing which was scheduled one hour after it was lodged.<sup>306</sup> Thereafter he applied to the ECtHR for a Rule 39 measure to stop the transfer, but this was also rejected, as the Court was as confident as Belgium that Greece would abide with

---

<sup>303</sup> As cited in *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §330

<sup>304</sup> See the statements of the Belgian Aliens Appeals Board and the Government of the UK: *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§150-151, §331

<sup>305</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §17

<sup>306</sup> *Ibid*, §§21-22

its obligations under the ECHR.<sup>307</sup> On 15 June 2009 the applicant was transferred to Greece, where he was immediately placed in detention in a building next to the airport, locked up in a small place with 20 other detainees, with no access to open air, very little to eat and extremely poor hygiene conditions.<sup>308</sup> After three days he was released and, having no means of subsistence, he went to live in a park in central Athens in a state of complete destitution.<sup>309</sup> Being informed of the situation and in the light of the growing insecurity in Afghanistan and the plausibility of the applicant's story concerning the risk he faced if he would be sent back, the ECtHR applied Rule 39 to prevent deportation.<sup>310</sup> After the applicant attempted to leave Greece with false papers, he was detained again, for seven days, and allegedly beaten by the police officers in charge. He said he wanted to get out of Greece at any cost so as not to have to live in such difficult conditions.<sup>311</sup> Six months after his arrival in Greece, the Ministry of Health and Social Solidarity had found accommodation for the applicant, but in the absence of an address where he could be contacted, they had not been able to inform him thereof.<sup>312</sup> Again six months later, in June 2010, he went to the central police station to renew his 'pink card',<sup>313</sup> where he received a notice in Greek inviting him to an interview, which he did not attend. He attempted to leave Greece a second time, but was stopped by the police who allegedly tried to illegally expulse him to Turkey.<sup>314</sup>

### ***Judgement***

M.S.S. filed a complaint with the ECtHR against Belgium and Greece and on 21 January 2011 the Grand Chamber judged in favour of the applicant, condemning both States for breaching their obligations under Articles 3 and 13 ECHR.<sup>315</sup> In reaching this conclusion, considerable weight was given to a list of reports by the CPT, UNHCR, Amnesty International, ECRE, Human Rights Watch and a number of other organisations, on the deteriorating situation for asylum seekers in Greece.<sup>316</sup> Contrary to *K.R.S.*, the Court attached great value to these

---

<sup>307</sup> Ibid, §§31-32

<sup>308</sup> Ibid, §§33-34

<sup>309</sup> Ibid, §§35,37,170

<sup>310</sup> Ibid, §§38-40

<sup>311</sup> Ibid, §§43-44

<sup>312</sup> Ibid, §49

<sup>313</sup> A 'pink card' is the temporarily residence permit asylum seekers receive in Greece

<sup>314</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§50-53

<sup>315</sup> Article 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"; Article 13 ECHR: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"

<sup>316</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§159-160

‘findings on the ground’, which enabled them to – finally – rebut the presumption of safety underlying the Dublin regime *in concreto*.

The reports attested to a systematic practice of detaining asylum seekers in deplorable conditions, including overcrowding, appalling sanitary and hygiene conditions, lack of ventilation and verbal and physical mistreatment by staff.<sup>317</sup> Based on these findings and in line with three former judgments,<sup>318</sup> the ECtHR found that the Greek detention conditions of asylum seekers amounted to degrading treatment in the meaning of Article 3 ECHR.<sup>319</sup> Underlining the absolute character of Article 3, the Court did not accept Greece’s counterargument to take their difficult circumstances into account, being the overburdening of their asylum system as an external border State and the economic crisis.<sup>320</sup> Also the living conditions of the applicant in Greece, were found to breach Article 3 ECHR, since they could be attributed to the Greek State. Again the ECtHR relied on the disturbing findings in the reports and noted the country’s obligations under the Reception Directive. Moreover, considerable importance was attached to the fact that the applicant, as an asylum seeker, belonged to a “particularly underprivileged and vulnerable population group in need of special protection”.<sup>321</sup> Finally, Greece was found to have violated Article 13 in conjunction with Article 3 ECHR because of the deficiencies in the asylum procedure which exposed him to the risk of *refoulement*.<sup>322</sup> The Court reached this conclusion by observing the practical obstacles to access the procedure, the long duration thereof, the lack of information and the disturbingly low success rates.<sup>323</sup> Unlike *K.R.S.*, but similar to *T.I.*, the Court re-emphasised the importance of a *domestic* effective remedy, without referring to the possibility to request the ECtHR for a Rule 39 measure: “Article 13 [ECHR] guarantees the availability *at national level* of a remedy to enforce the substance of the [ECHR] rights and freedoms”, which is required to have automatic suspensive effect.<sup>324</sup> Thus, the Court came back on its previous view, which was difficult to accept. The Court further observed that, whereas appeals against a decision rejecting an asylum application had no automatic suspensive

---

<sup>317</sup> Ibid, §§161-166

<sup>318</sup> See: *S.D. v Greece* [2009] ECtHR 53541/07, §§49-54; *Tabesh v Greece* [2009] ECtHR 8256/07, §§38-44; *A.A. v Greece* [2010] ECtHR 12186/08, §§57-65

<sup>319</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§205-234

<sup>320</sup> Ibid, §223

<sup>321</sup> Ibid, §§235-264

<sup>322</sup> Ibid, §§265-321

<sup>323</sup> Only 0.06% of the cases (or eleven people) decided at first instance were afforded protection. This is in stark contrast with the average of 32.6% in the five countries (France, the UK, Italy, Sweden and Germany) which, along with Greece, received the largest number of applicants in Europe in 2008, see: *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §126; and UNHCR, ‘Observations on Greece as a Country of Asylum’ (2009), 17-18

<sup>324</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§286-293, *emphasis added*

effect, appeals against expulsion orders following the rejection did, however the inaccessibility of that procedure in practice made them *de facto* ineffective.<sup>325</sup>

While the Court did not examine the risk of *refoulement* under Article 3 ECHR separately from Article 13 ECHR in respect in Greece, it did so in relation to Belgium.<sup>326</sup> When assessing Belgium's obligation to prevent the risk of indirect *refoulement*, the Court first clarified that the *Bosphorus* doctrine cannot be applied in this case. In *Bosphorus Hava Yolları Turizm v Ticaret Anonim Şirketi v Ireland* (2005), the ECtHR had elaborated on the delineation of competences in human rights review between the ECtHR and the CJEU. The ECtHR presumed that EU Member States would not depart from their obligations under the ECHR when fulfilling their obligations under EU law, given its trust in the EU – and especially the CJEU – to provide for a protection of fundamental rights 'equivalent' to the protection offered by the ECtHR.<sup>327</sup> Within the EU framework, this 'presumption of equivalent protection' only applies to State's actions which strictly fall under EU law obligations. According to the Court, this was not the case in *M.S.S.*, since Belgium had the discretionary power to refrain from transferring the applicant to Greece, under the sovereignty clause in article 3(2) of the Dublin II Regulation.<sup>328</sup> This elaboration was of particular interest since the Court had presented the Dublin system in *K.R.S.* as a system generating the *obligation* for Member States to transfer, thereby ignoring the real possibility for Member States to refrain from transferring by applying the sovereignty clause.<sup>329</sup>

In its next step the Court recalled the principle, developed in *T.I.* and reaffirmed in *K.R.S.*, that States should verify whether the responsible Member State guarantees sufficient guarantees against *refoulement*, in order to prevent chain *refoulement*.<sup>330</sup> Contrary to both former cases, the Court *de facto* applied the principle to the present case and found Belgium guilty for violating Article 3 ECHR by blindly relying on the presumption of safety, thereby exposing the applicant to a risk of indirect *refoulement*. In reaching this conclusion, opposite to the one in *K.R.S.*, the Court emphasised that many of the reports on Greece and the Commission's proposal to reform the Dublin system had been published *after K.R.S.* but *before* the transfer order was issued by Belgium. The Court also attached 'critical importance' to the UNHCR letter sent to the Belgian authorities in April 2009 which requested the suspension of

---

<sup>325</sup> Ibid, §§317-321

<sup>326</sup> Moreno-Lax (n 250), 25

<sup>327</sup> The *Bosphorus* doctrine is not restricted to the EU, but was formulated in general terms with regard to international organisations, see: *Bosphorus Hava Yolları Turizm v Ticaret Anonim Şirketi v Ireland* [2005] ECtHR (Grand Chamber) 45036/98, §§151-158

<sup>328</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§339-340

<sup>329</sup> *K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08, 16

<sup>330</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§341-343

transfers to Greece.<sup>331</sup> The ECtHR found that the Belgian authorities “knew or ought to have known that [the applicant] had no guarantee that his asylum application would be seriously examined by the Greek authorities”.<sup>332</sup> In the light of the general knowledge of the situation for asylum seekers in Greece, the Court moreover considered that the applicant should not be expected to bear the entire burden of proof in this context.<sup>333</sup> On the contrary, it was up to the Belgian authorities to take up a more active role by not merely assuming that the applicant would be treated in conformity with the ECHR, but by verifying how the Greek authorities applied their legislation in practice, or briefly: Belgium should not have blindly relied on the presumption of safety.<sup>334</sup>

Belgium was not only condemned for a violation of Article 3 ECHR on account of the indirect *refoulement* through Greece, but also on the basis of the risk of direct *refoulement* to Greece. It was in the meantime well-established case-law that expulsion of an asylum seeker to a country where he could face inhuman or degrading treatment is prohibited under Article 3 ECHR.<sup>335</sup> Having found the applicant’s detention and living conditions in Greece degrading in the meaning of Article 3 ECHR, and taking into consideration that Belgium applied the Dublin II Regulation systematically while they were or should have been aware of these practices, the Court condemned Belgium for violating Article 3 ECHR for exposing the applicant to the risk of direct *refoulement*.<sup>336</sup> Finally, Belgium was also condemned for violating Article 13 ECHR in conjunction with Article 3 ECHR, for not providing an effective domestic remedy against the expulsion order. The Belgian law provided for a regular appeal without automatic suspensive effect and an ‘extremely urgent procedure’ with automatic suspensive effect. However, this last procedure was found to reduce the rights of the defence and the examination of the case to a minimum. Therefore it did not comply with the requirements under Article 13 ECHR.<sup>337</sup>

---

<sup>331</sup> Ibid, §§348-349, 77

<sup>332</sup> Ibid, §358

<sup>333</sup> Ibid, §§346, 352

<sup>334</sup> Ibid, §359

<sup>335</sup> See e.g.: *Cruz Varas and others v Sweden* [1991] ECtHR 15576/89, §69; and *Vilvarajah and others v UK* [1991] ECtHR 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, §102-103; *Salah Sheekh v The Netherlands* [2007] ECtHR 1948/04, §135; *Saadi v Italy* [2008] ECtHR (Grand Chamber) 37201/06, §125

<sup>336</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§366-368

<sup>337</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§385-397; In a judgement of 2014 the ECtHR established that the Belgian appeal system as a whole was too complex to provide asylum seekers an effective remedy in the meaning of Article 13 ECHR. Belgium was condemned for violating Article 13 in conjunction with Article 3 ECHR and subsequently requested by the ECtHR to reform its national legislation in order to meet its obligations under Article 13 ECHR, see: *Affaire S.J. c Belgique* [2014] ECtHR 70055/10, §§106-108, 152-153

## *Importance*

The importance of the *M.S.S.* judgement cannot be underestimated. The case revealed that the foundation of the Dublin system, that all Member States are safe countries for third-country nationals, is false:<sup>338</sup> the presumption of safety was rebutted *in concreto*. This reinforced the valuable principle of refutability developed in *T.I.* which was weakened by the belief that the creation of the CEAS provided for a stronger basis of mutual trust and the *de facto* confirmation of this belief in *K.R.S.*. In the present case, reliance on that principle was found to expose *M.S.S.* to a real risk under Article 3 ECHR. Moreover, whereas the ECtHR had refrained from examining the risk of direct *refoulement* to Greece in *K.R.S.*, the risk of both indirect and direct *refoulement* was found to be real in this case. This was a complete confirmation that blind mutual trust in each other's compliance with fundamental rights is actually incompatible with fundamental rights. *M.S.S.* clearly established that in the context of a Common European Asylum System, Member States should be engaged in each other's asylum systems,<sup>339</sup> since this imposed a duty on the Member States to verify the safety of other Member States before transferring applicants under the Dublin II Regulation.<sup>340</sup> Concerns for human rights should come prior to blind reliance on the presumption of safety and self-interest.

The Court could reach its conclusions by leaving its formal approach in *K.R.S.* and by instead allocating considerable weight to the observations 'on the ground' made by international and national organisations. Also the particular position of *M.S.S.* who, as an asylum seeker, belonged to a vulnerable group and was in need of 'special protection', played an important role for the Court. It was the first time the ECtHR underlined the vulnerability of asylum seekers, distinguishing them from other aliens or third-country nationals. This element should be taken into consideration when assessing the risks for asylum seekers under Article 3 ECHR in a particular situation, as the ECtHR did in *M.S.S.*<sup>341</sup> Other ECtHR jurisprudence on expulsions (however not with regard to the Dublin II Regulation) considered other ECHR rights as well. Before *M.S.S.*, the Court had examined *non-refoulement* in relation to, for example, the right to family (Article 8 ECHR)<sup>342</sup> and the right to liberty and security (Article 5 ECHR).<sup>343</sup> This implies that the *M.S.S.* reasoning, which dealt with Article 3 and 13 ECHR, could be

---

<sup>338</sup> Maarten den Heijer, 'Life after *M.S.S.*: Unfinished Business' (2013) 31(3) Netherlands Quarterly of Human Rights, 238

<sup>339</sup> *Ibid*, 240

<sup>340</sup> Hélène Lambert, 'Safe third country' in the European Union: An Evolving Concept in International Law and Implications for the UK' (2012) 26(4) J.I.A.N.L., 332-333

<sup>341</sup> *Ibid*, 327, 332

<sup>342</sup> See e.g.: *Boultif v Switzerland* [2001] ECtHR 54273/00 and *Maslov v Austria* [2008] ECtHR (Grand Chamber) 1638/03

<sup>343</sup> *Adamov v Switzerland* [2011] ECtHR 3052/06

expanded to cases where other fundamental rights are at stake. Taking this into consideration, a general test which provides for high fundamental rights protection can be read in *M.S.S.*: a Member State is prohibited to transfer an asylum seeker under the Dublin system when that Member State knows or ought to have known that there is a real risk that his or her fundamental rights will be violated when transferred. The judgement implied that in that case the Member State has to take recourse to Article 3(2) of the Dublin II Regulation and examine the asylum application itself. However, the ECtHR did not elaborate on this procedural issue, since the interpretation of EU law is not within their competence.

### **3. 5. 4. CJEU's cautious confirmation: *N.S./M.E***

The *M.S.S.* ruling of the ECtHR has elucidated the duties of Member States under the ECHR when applying the Dublin II Regulation. However, questions remained in the aftermath of the judgement, particularly with respect to the interpretation of the sovereignty clause in Article 3(2) of the Dublin II Regulation, in view of the ECtHR's findings. Exactly on this point, among other procedural issues, an answer was formulated by the CJEU in the joined cases of *N.S.* and *M.E.* of 21 December 2011.

#### ***Facts***

The first case, *N.S. v Secretary of State Home Department* concerned an Afghan national who challenged his transfer from the UK to Greece under the Dublin rules. He claimed that transfer to Greece would violate his rights under Article 3 ECHR. This was found manifestly unfounded, since Greece was on a 'list of safe countries' of the UK, which entailed a conclusive presumption of safety. Therefore his appeal to the High Court was rejected. He was however enabled to appeal to the Court of Appeal, which referred seven questions to the CJEU.<sup>344</sup> The second case, *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, concerned five asylum seekers from Afghanistan, Iran and Algeria who challenged their transfer from Ireland to Greece. The Irish High Court referred two questions to the CJEU. Given the correspondence of the legal issues at stake, both cases were joined. The questions concerned the legal status of the sovereignty clause under EU law, the refutability of the presumption of safety underlying the Dublin system and, if found refutable, the

---

<sup>344</sup> Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, §§34-50

consequences thereof. The references to the CJEU preceded the *M.S.S.* judgement and reflected the contradictory interpretations after the *K.R.S.* ruling. However, when considering *N.S./M.E.*, the CJEU relied on the Strasbourg ruling in *M.S.S.*, eleven months earlier.

### ***Judgement***

In first instance the Luxembourg Court examined whether a decision adopted by a Member State on the basis of the sovereignty clause (Article 3(2) of the Dublin II Regulation) falls within the scope of EU law. This was particularly relevant in relation to the Charter, since Article 51(1) CFREU states that its provisions are addressed to Member States only when they are implementing EU law. The discretionary powers of a Member State under Article 3(2) were considered to be part of the Dublin mechanism which is ‘merely an element of the CEAS’, and were therefore considered EU law, within the meaning of Article 51(1) CFREU.<sup>345</sup>

Subsequently the CJEU assessed whether the presumption of safety underlying the Dublin system is a conclusive or refutable one. The Court started with emphasising the central importance of mutual confidence for the CEAS and more specifically the Dublin system. It reiterated that “it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR”.<sup>346</sup> However, immediately afterwards the CJEU made a reality check and observed that it is not inconceivable that the asylum system in a given Member State experiences “major operational problems which causes a substantial risk for asylum seekers fundamental rights”, when transferred there.<sup>347</sup> The Court thus followed Advocate General (AG) Trstenjak’s Opinion that a conclusive presumption of compliance with fundamental rights would in itself be incompatible with Member States’ duty to interpret the Dublin Regulation in a manner consistent with fundamental rights.<sup>348</sup>

Having confirmed the refutability, the Court elaborated on the circumstances in which the Member States can consider the presumption of safety rebutted and are consequently obliged not to transfer. Pointing at the similarities between the present case and *M.S.S.* (both concern Dublin transfers to Greece), the Court concluded that the Member States “may not transfer an asylum seeker to the ‘Member State responsible’ [...] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker

---

<sup>345</sup> Ibid, §§64-69

<sup>346</sup> Ibid, §§75-80

<sup>347</sup> Ibid, §81

<sup>348</sup> Case C-411/10 *N.S. v Secretary of State for the Home Department* [2011], Opinion of AG Trstenjak, §131

would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter”.<sup>349</sup>

It has been noted that, whereas the CJEU referred extensively to the *M.S.S.* judgement, it reached a conclusion which is not in full conformity with that judgement.<sup>350</sup> The ‘test’ put forward by the CJEU to decide if transfer under the Dublin rules should be precluded, is indeed more difficult to meet than the one developed in *M.S.S.*. The Court noted that mere infringement of provisions in the EU asylum law can in itself not be sufficient to prevent transfer. On the contrary, there should be ‘systemic deficiencies’ in the asylum procedure or reception conditions, as was proved to be the case in Greece in *M.S.S.*.<sup>351</sup> It appears that the CJEU introduced an additional condition, in the sense that only the risks resulting from ‘systemic deficiencies’ will prohibit transfers under the Dublin II Regulation. This seems however incompatible with the well-established case law of the ECtHR that a real risk for degrading or inhuman treatment in the sense of Article 3 ECHR prohibits States to expulse (*supra*). As Cathryn Costello puts it: “[t]he Article 3 ECHR [or Article 4 CFREU] risk is no greater or lesser for emerging from systemic or non-systemic factors”.<sup>352</sup> Therefore, and in the light of article 52(3) CFREU, which guarantees that protection under the Charter shall minimum be equal to the protection offered under the ECHR, it has been argued that ‘systemic deficiencies’ should not be read as an additional condition.<sup>353</sup> However, in the *Abdullahi* case of 2013 the CJEU re-emphasised that the existence of ‘systemic deficiencies’ is a necessary condition in order to successfully challenge a transfer decision.<sup>354</sup>

Probably the weakest part in the test developed in *N.S./M.E.* is that only Article 4 CFREU risks are taken into account to prohibit transfers, unlike the ECtHR which has examined *non-refoulement* claims in relation to other ECHR rights than Article 3 ECHR.<sup>355</sup> AG Trstenjak

---

<sup>349</sup> Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, §94; Article 4 CFREU is the equivalent of Article 3 ECHR

<sup>350</sup> See: Costello Cathryn, ‘Dublin-case NS/ME: Finally, an end to blind trust across the EU?’ (2012) 2 A&MR, 89-91; Maarten den Heijer 'Joined Cases C-411 & 493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011' (2012) 49(5) C.M.L. Rev., 1747

<sup>351</sup> Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, §§84-85

<sup>352</sup> Costello Cathryn, ‘Dublin-case NS/ME: Finally, an end to blind trust across the EU?’ (2012) 2 A&MR, 89

<sup>353</sup> See also Costello on this point: Costello Cathryn, ‘Dublin-case NS/ME: Finally, an end to blind trust across the EU?’ (2012) 2 A&MR, 89

<sup>354</sup> Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, conclusion *in fine*

<sup>355</sup> See: Costello Cathryn, ‘Dublin-case NS/ME: Finally, an end to blind trust across the EU?’ (2012) 2 A&MR, 91; Other rights the ECtHR took into consideration not to expulse are a.o. Article 4, 5, 6 and 8 ECHR. See e.g.: *Boultif v Switzerland* [2001] ECtHR 54273/00; *Maslov v Austria* [2008] ECtHR (Grand Chamber) 1638/03; *Adamov v Switzerland* [2011] ECtHR 3052/06; and more in: European Court of Human Rights, ‘Factsheet: Expulsions and extraditions’ (July 2013)

went a step further by suggesting in her Opinions to envisage the violation of any fundamental right enshrined in the Charter, when assessing whether transfer should be precluded.<sup>356</sup> The CJEU had the chance to follow this reasoning and develop a test protecting all fundamental rights laid down in the Charter. Nevertheless the Court chose to solely focus on ‘the orthodox obligations of *non-refoulement*’, as it only mentioned Article 4 CFREU.<sup>357</sup> Thus, whereas the Court reaffirmed the refutability of the presumption of safety, it appears to have only done so with regard to Article 4 CFREU. This leads to a conclusion which is hard to accept: the presumption remains conclusive when it concerns the compliance with other fundamental rights.

Having settled in which circumstances transfers under the Dublin II Regulation should be precluded, the Luxembourg Court formulated an answer to the question whether the prohibition to transfer entails the obligation to make use of Article 3(2) of the Dublin II Regulation for a Member State. Post *M.S.S.*, exactly this procedural issue remained the topic of confusion and discussion. Although the ECtHR judgement seemed to imply such a duty, it was not within their competence to give a conclusive answer to this question, since the interpretation of EU law is an exclusive power of the CJEU. The *N.S./M.E.* judgement came right on time. Unlike the Opinions of AG Trstenjak, which proposed a confirmative answer to the question,<sup>358</sup> the Court held that the prohibition to transfer does not create an automatic obligation to examine the asylum application. Instead, the Member State should continue to examine whether one of the following Dublin criteria identifies another Member State as responsible.<sup>359</sup> Only when no other responsible Member State can be designated on the basis of the Dublin criteria or if the determination thereof would take an ‘unreasonable length of time’, the Member State is under

---

<sup>356</sup> Case C-411/10 *N.S. v Secretary of State for the Home Department* [2011], Opinion of AG Trstenjak, §178; Case C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011], Opinion of AG Trstenjak, §79(1)

<sup>357</sup> Costello (n 251), 308; The CJEU maintained this restrictive interpretation of fundamental rights which might constitute a prohibition to expulse in two later cases with regard to the European Arrest Warrant. In the *Radu* case of 2013 the Opinion of AG Sharpston referred to *N.S./M.E.* in order to establish that fundamental rights violations should constitute grounds for non-expulsion. *In casu* Article 47 and 48 CFREU (equivalent to Article 6 ECHR) were at stake. The CJEU did not follow this reasoning in its judgement, focusing on mutual trust instead. This was repeated in the *Melloni* case, later that year. See: Case C-369/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu* [2013], Opinion of AG Sharpston, §§76-77; Case C-369/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:636; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107

<sup>358</sup> Case C-411/10 *N.S. v Secretary of State for the Home Department* [2011], Opinion of AG Trstenjak, §178(2); Case C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011], Opinion of AG Trstenjak, §79(1)

<sup>359</sup> Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, §96

the obligation to take recourse to Article 3(2) of the Dublin II Regulation and examine the asylum application itself.<sup>360</sup>

### *An attempt to converge the M.S.S. and N.S./M.S. tests*

The two judgements each developed their own test for Member States to decide whether a Dublin transfer should be precluded:

The *M.S.S.* test:<sup>361</sup> a Member State is prohibited to transfer an asylum seeker under the Dublin system when that Member State knows or ought to have known that there is a real risk that his or her fundamental rights will be violated when transferred.

The *N.S./M.E.* test: a Member State is prohibited to transfer an asylum seeker under the Dublin system when that Member State cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 CFREU.

In an attempt to coordinate both landmark rulings with each other, two paths can be followed. The first possibility, in the light of Article 52(3) CFREU, is to read the *N.S./M.E.* test in accordance with the *M.S.S.* test. As a consequence, within this approach there would be only one test: the *M.S.S.* test. When those conditions are met, transfer is prohibited. As follows from *N.S./M.E.* the Member State should in that case the determination to see whether another Member State can be found responsible. If not, or if this process would last too long, the Member State shall examine the application itself by using Article 3(2) of the Dublin II Regulation. Very simple at first view, this approach seems to be at variance with the CJEU's jurisprudence. It implies that 'systemic deficiencies' is not conceived as an additional condition, as Costello suggested. A real risk should be sufficient.<sup>362</sup> This however, runs counter to the CJEU's emphasis in a later case, as mentioned before, that the proof of 'systemic deficiencies' is a necessary condition to prohibit transfers.<sup>363</sup> Moreover, the second implication of this

---

<sup>360</sup> Ibid, §§97-98

<sup>361</sup> In the light of other ECtHR jurisprudence which examined *non-refoulement* in relation to ECHR articles. See e.g.: *Boultif v Switzerland* [2001] ECtHR 54273/00; *Maslov v Austria* [2008] ECtHR (Grand Chamber) 1638/03; *Adamov v Switzerland* [2011] ECtHR 3052/06

<sup>362</sup> Costello Cathryn, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' (2012) 2 A&MR, 89

<sup>363</sup> Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, §62;

Also the opposite position has been argued, namely to interpret the *M.S.S.* test as requiring 'systemic deficiencies', see: Hélène Lambert, 'Safe third country' in the European Union: An Evolving Concept in International Law and Implications for the UK' (2012) 26(4) J.I.A.N.L., 334; This restrictive interpretation can however not be supported in the light of the *M.S.S.* judgement, and *a fortiori* in view of the later *Tarakhel* judgement of the ECtHR (*infra*)

approach is equally unacceptable, namely, to interpret the reference to Article 4 CFREU as being not exhaustive. This simply seems to be untrue to the CJEU's intentions.

The second possibility involves a more strict reading of the *N.S./M.E.* case. This entails a test which is higher to meet than the one developed in *M.S.S.*, in the sense that there must be 'systemic deficiencies', and provides for less protection, since only Article 4 CFREU risks will be taken into account. With two different tests, this approach leads to a somehow remarkable result in practice. In cases where the *N.S./M.E.* test is met and thus transfer is prohibited, the Member State shall, in accordance with *N.S./M.E.* search another responsible Member State by applying the hierarchical Dublin criteria. If this does not lead to any result, or if the determination process would take too long, the Member State should apply Article 3(2). In other cases, it is conceivable that the *M.S.S.* test is met, but not the *N.S./M.E.* test, because there are no 'systemic deficiencies' or there are other fundamental rights than Article 4 CFREU at stake. Then the Member State shall be prohibited to transfer under the ECHR. However it is unclear if in that case the *N.S./M.E.* rule applies, which entails that the Member State should continue the examination, or on the other hand, they are entitled to make use of Article 3(2). It was hoped that the CJEU would give clarification on this point in the *Abdullahi* case of 2013.<sup>364</sup> However, the relevant question was not taken into consideration.<sup>365</sup> Although this second 'path' seems less practical with two tests and remaining questions, it is the only one which is compatible with the CJEU jurisprudence, while offering equal protection as provided under the ECHR.

### ***Evaluation***

When ruling on the *N.S./M.E.* case, the CJEU was clearly benefited by the recent *M.S.S.* case of the ECtHR, on which it relied to a great extent. However, as noticed, there are remarkable differences between the conclusions reached by both Courts. Where the CJEU had the chance to go a step further, and provide for broader fundamental rights protection when applying the Dublin II Regulation, it chose not to do so. As Costello puts it, "there are many legally innovative paths not taken".<sup>366</sup> This reflects the CJEU's position that, although it offers generally at least the same degree of protection as the ECtHR does, it finds that it is free to have its own divergent jurisprudence on EU law.<sup>367</sup> The ECtHR acknowledged this possibility in its *Bosphorus*

---

<sup>364</sup> The Dublin Transnational Project, 'Dublin II Regulation: Lives on Hold - European Comparative Report' (*European Comparative Report* 2013), 112

<sup>365</sup> Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, §63

<sup>366</sup> Costello Cathryn, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' (2012) 2 A&MR, 91

<sup>367</sup> See: Marcelle Renneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing 2014), 62; Velluti (n 251), 88

doctrine, which leaves the fundamental rights review of EU law in first instance to the CJEU, however, to the extent that the CJEU offers ‘equivalent protection’.<sup>368</sup> It is remarkable that the ECtHR explicitly stated in *M.S.S.* that Article 3(2) falls outside the scope of that doctrine, emphasising the *discretionary* nature of the article, while the CJEU, on the other hand, underlined that the decisions taken on the basis of Article 3(2) are implementing EU law, and thus fall within the scope of Article 51(1) CFREU. These different approaches are in itself not problematic from a human rights protection point of view, since they offer a maximum of protection with regard to the legal forum. However, the CJEU’s position on EU law, which enabled them to provide for a higher threshold (additional condition of ‘systemic deficiencies’) and lower protection (only Article 4 CFREU risks) in *N.S./M.E.*, is open to criticism from a human rights perspective. However, Member States have their obligations under both the CFREU and the ECHR and should therefore, as outlined before, take both ‘tests’ into consideration when assessing whether or not a Dublin transfer should be precluded. In this regard, both judgements are of major importance for clarifying the role of fundamental rights in the establishment of responsibility for asylum applications. On the day of the *N.S./M.E.* judgement, Cecilia Malmström, EU Commissioner for Home Affairs at the time, stated that the “the Dublin system needs to be complemented with provisions addressing root causes and crises and ensuring that deficiencies in one or other Member State do not affect the entire system or lead to human rights violations”.<sup>369</sup> Although there was no consensus on how ‘these provisions’ would look like, both judgements were the ultimate confirmation of the pressing need to change the Dublin system in order to prevent similar events in the future.

### 3. 5. 5. Developments in the wake of *M.S.S.* and *N.S./M.E.*

#### *ECtHR jurisprudence on other Member States*

Immediately after the *M.S.S.* judgement, the majority of Member States officially suspended transfers to Greece.<sup>370</sup> In *M.S.S.* the ECtHR had requested Greece, by applying Article 46

<sup>368</sup> *Bosphorus Hava Yolları Turizm v Ticaret Anonim Şirketi v Ireland* [2005] ECtHR (Grand Chamber) 45036/98, §§151-158

<sup>369</sup> ‘Statement by Cecilia Malmström, EU Commissioner for Home Affairs, following the preliminary ruling of the European Court of Justice on the transfer of asylum seekers under the EU Dublin Regulation’ (21 December 2011) MEMO/11/942

<sup>370</sup> See: UNHCR, ‘Updated Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in Particular in the Context of Intended Transfers to Greece’ (2011); Several Member States had already done so before *M.S.S.*: UNHCR, ‘Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in Particular in the Context of Intended Transfers to Greece’ (2010); However, ECRE reported in 2013 that a number of Member States had not issued a general policy prohibiting Dublin transfers to Greece. Some Member States continue to make an individual assessment of each case. However, in general

ECHR, to adopt general measures to prevent similar violations in the future.<sup>371</sup> The Greek government committed to do so by passing new legislation and setting up new services for asylum seekers.<sup>372</sup> To date however, the situation in Greece remains critical, with an ongoing lack of access to the asylum procedure, deficient reception and detention conditions and the risk for chain *refoulement*.<sup>373</sup> In January 2015 the UNHCR reiterated that EU countries should not transfer asylum seekers to Greece.<sup>374</sup> In two cases from 2013 and 2014, concerning a Dublin transfer to Greece, the ECtHR found no violation of Article 3 ECHR. The contested transfer decisions dated from 2008 and early 2009, respectively one year and a few months before the transfer decision which was challenged in *M.S.S.* The ECtHR concluded that at that time, authorities should have been aware of the deficiencies in the Greek asylum system and reception conditions, but not to the extent that they ought to have known that those deficiencies reached the Article 3 ECHR threshold, as was the case in *M.S.S.*<sup>375</sup> By doing so, the ECtHR reaffirmed its questionable *K.R.S.* ruling, five and again, six years later.

*M.S.S.* definitely opened up the debate on Dublin transfers to other Member States.<sup>376</sup> Alarming trends in the asylum procedures and reception conditions for asylum seekers, similar to those in Greece, have been observed in other EU countries, particularly those located at the southern and eastern borders.<sup>377</sup> Consequently, there has been a growing number of cases in

---

there have been relatively few transfers to Greece after *M.S.S.*, see: The Dublin Transnational Project, 'Dublin II Regulation: Lives on Hold - European Comparative Report' (*European Comparative Report* 2013), 110-111

<sup>371</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §400

<sup>372</sup> Mariana Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece' (2013) 4 Int.Am. & Eur.Hum.Rts.J., 102

<sup>373</sup> See e.g.: Mariana Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece' (2013) 4 Int.Am. & Eur.Hum.Rts.J., 103-112; UN General Assembly, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Mission to Greece' (*Human Rights Council A/HRC/23/46* 2013); UNHCR, 'Observations on the Current Situation of Asylum in Greece' (2015); Global Detention Project, 'The Detention of Asylum Seekers in the Mediterranean Region' (2015), 3-5; With regard to chain *refoulement*, the deportation of asylum seekers from Greece to Turkey raised particular concerns. This was either 'legally' done by making use of the readmission agreement between them, or, as reported by different NGO's, illegally at the land border with Turkey or by 'pushbacks' at sea. See e.g.: Mariana Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece' (2013) 4 Int.Am. & Eur.Hum.Rts.J., 107-108; Amnesty International, 'Greece: The End of the Road for Refugees, Asylum-Seekers and Migrants' (*AI Index: EUR 25/011/2012*), 4; Amnesty International, 'The Human Cost of Fortress Europe. Human Rights Violations Against Migrants and Refugees at Europe's Borders' (*AI Index: EUR 05/001/2014*); Amnesty International, 'Greece: Frontier of Hope and Fear. Migrants and Refugees Pushed Back at Europe's Borders' (*AI Index: EUR 25/004/2014*); Pro-Asyl 'Pushed Back. Systematic Human Rights Violations Against Refugees in the Aegean Sea and the Greek-Turkish Land Border' (2014);

<sup>374</sup> UNHCR, 'New UNHCR Report warns against returning asylum-seekers to Greece' (30 January 2015) Briefing Notes; UNHCR, 'Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece' (December 2014)

<sup>375</sup> *Sharifi v Austria* [2013] ECtHR 60104/08, §38; and *Safaii v Austria* [2014] ECtHR 44689/09, §50

<sup>376</sup> Maarten den Heijer, 'Life after *M.S.S.*: Unfinished Business' (2013) 31(3) Netherlands Quarterly of Human Rights, 237

<sup>377</sup> See: The Dublin Transnational Project, 'Dublin II Regulation: Lives on Hold - European Comparative Report' (*European Comparative Report* 2013), 113;

which national courts ordered suspension of Dublin transfers to border countries, including Bulgaria, Hungary, Malta, Poland, and Romania.<sup>378</sup> With regard to Bulgaria, the UNHCR and NGO's explicitly recommended to (temporarily) suspend Dublin transfers.<sup>379</sup> Not surprisingly, the ECtHR has increasingly been required to intervene in Dublin cases.

Since 2013 the ECtHR has decided on a number of cases with regard to Dublin transfers to Italy. Except for one case, no violation of Article 3 ECHR was found which could prohibit the transfer. In the first case *Mohammed Hussein v The Netherlands and Italy*, the ECtHR held that it was not proven that the applicant's "future prospects if returned to Italy [...] disclose a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3".<sup>380</sup> Hence, the *M.S.S.* test was not met and the application was declared inadmissible. Building further on this case, the ECtHR made a more general statement with regard to Italy in *Daybetgova and Magomedova v Austria*, namely that neither the access to asylum procedures, nor the living conditions for asylum seekers in Italy amounted "to such a systemic failure as was the case in *M.S.S. v Belgium and Greece*".<sup>381</sup> The same reasoning was followed in subsequent cases with regard to Italy.<sup>382</sup> In one case of 2014, *Tarakhel v Switzerland*, a violation of Article 3 ECHR was found if the applicants would be transferred to Italy. Interestingly, this was not due to the general situation in Italy (the same general view was maintained), but to the particular situation of the applicants: a family with six minor children. The ECtHR underlined the vulnerable position asylum seekers find themselves in, as stated in *M.S.S.*,<sup>383</sup> and found that this is *a fortiori* the case when the persons concerned are children.<sup>384</sup> Since the Swiss authorities had not obtained individual guarantees from the Italian authorities that the family would be kept

---

<sup>378</sup> The Dublin Transnational Project, 'Dublin II Regulation: Lives on Hold - European Comparative Report' (*European Comparative Report* 2013), 113-114; – 'ECRE joins UNHCR in a Call for the Suspension of Dublin Transfers to Bulgaria' ECRE (8 January 2014) <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/555-ecre-joins-unhcr-in-calling-on-eu-member-states-to-stop-sending-asylum-seekers-to-bulgaria-under-the-dublin-regulation.html>> (accessed 30 July 2015)

<sup>379</sup> – 'UNHCR calls for temporary halt to Dublin transfers of asylum-seekers to Bulgaria' UNHCR (3 January 2014) <<http://www.unhcr.org/52c691d59.html>> (accessed on 30 July 2015); – 'ECRE joins UNHCR in a Call for the Suspension of Dublin Transfers to Bulgaria' ECRE (8 January 2014) <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/555-ecre-joins-unhcr-in-calling-on-eu-member-states-to-stop-sending-asylum-seekers-to-bulgaria-under-the-dublin-regulation.html>> (accessed 30 July 2015); Amnesty International, 'Suspension of Returns of Asylum-Seekers to Bulgaria Must Continue' (*AI Index: EUR 15/002/2014*)

<sup>380</sup> *Mohammed Hussein a.o. v The Netherlands and Italy* [2013] ECtHR (Dec.) 27725/10, §78

<sup>381</sup> *Daybetgova and Magomedova v Austria* [2013] ECtHR (Dec.) 6198/12, §66

<sup>382</sup> See: *Halimi v Austria and Italy* [2013] ECtHR (Dec.) 53852/11, §68; *Abubeker v Austria and Italy* [2013] ECtHR (Dec.) 73874/11, §72

<sup>383</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §251

<sup>384</sup> *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §119; The contested transfer decision was based on the Dublin II Regulation, but the ECtHR also referred to the new Dublin III Regulation which provides for more safeguards with regard to unaccompanied minors (*in casu* the minors were accompanied) and other persons requiring special protection. See: *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §35

together and would be taken charge of in a manner ‘adapted to the age of the children’, the ECtHR found that a transfer would violate Article 3 ECHR.<sup>385</sup> A following case with regard to Italy, *A.M.E. v the Netherlands*, was again declared inadmissible, given the general situation for asylum seekers in Italy.<sup>386</sup> The ECtHR emphasised that in this case, unlike the applicants in the case of *Tarakhel*, the applicant is ‘a young man with no dependents’.<sup>387</sup> This demonstrates how the ECtHR takes the general as well as the individual circumstances into consideration when assessing the risks under Article 3 ECHR.<sup>388</sup> In that sense, the *Tarakhel* case is a good example of a situation where the *M.S.S.* test is met, but not the *N.S./M.E.* test, since there are no ‘systemic’ deficiencies in the Italian asylum procedure of reception condition. Moreover, the *Tarakhel* judgement implies that in some cases an individual guarantee that the applicant’s rights will be respected after transfer is required.<sup>389</sup> This further reduces the scope for Member States to apply the Dublin rules in an automatic way. The *Tarakhel* judgement is therefore of major importance from a human rights perspective.

The ECtHR also examined Article 3 ECHR in relation to Dublin transfers to Hungary. In the first case in 2013, *Mohammed v Austria*, the ECtHR found a violation of Article 13 in conjunction with Article 3 ECHR because he had been deprived of *de facto* protection against forced transfer to Hungary, when there was a real risk under Article 3 ECHR if he would have been transferred there.<sup>390</sup> However, since he was not yet deported and in the light of previous case-law,<sup>391</sup> the ECtHR made a new assessment of his risk under Article 3 ECHR, taking the situation in Hungary *at the time of the proceedings* into consideration.<sup>392</sup> Based on a UNHCR report on the improved situation in Hungary, the ECtHR concluded that there was *no longer* a real and individual risk under Article 3 ECHR if the applicant would be transferred to Hungary.<sup>393</sup> Likewise, in *Mohammadi v Austria* in 2014, no violation of Article 3 ECHR was found in case the applicant would be transferred to Hungary.<sup>394</sup>

---

<sup>385</sup> *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §122

<sup>386</sup> *A.M.E. v the Netherlands* [2015] ECtHR (Dec.) 51428/10, §35

<sup>387</sup> *Ibid*, §34

<sup>388</sup> This rebutted former interpretations of the *M.S.S.* judgement that the verification of safety prior to transfer does not necessarily entail an assessment of individual elements, but should consider the general situation in the Member State: see reference to Hemme Battjes, ‘The roles of the national judge, the ECJ and the ECtHR in asylum law’ (2011) in Hélène Lambert, ‘Safe third country’ in the European Union: An Evolving Concept in International Law and Implications for the UK’ (2012) 26(4) J.I.A.N.L., 336

<sup>389</sup> *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §§121-122

<sup>390</sup> *Mohammed v Austria* [2013] ECtHR 2283/12, §85

<sup>391</sup> *Saadi v Italy* [2008] ECtHR (Grand Chamber) 37201/06, §133

<sup>392</sup> *Mohammed v Austria* [2013] ECtHR 2283/12, §96

<sup>393</sup> *Ibid*, §§103, 111

<sup>394</sup> *Ibid*, §§74-75

### *CJEU jurisprudence on procedural aspects*

Although the landmark rulings of the ECtHR and the CJEU had clearly established the human rights obligations of the Member States when applying the Dublin II Regulation, there remained some confusion in practice. In the years after *N.S./M.E.*, several questions were referred to the CJEU with regard to the interpretation of the Dublin II Regulation. For instance, some Member States believed that in order to stop transfers to another Member States, they should first request the UNHCR to present its views.<sup>395</sup> The CJEU clarified in the *Halaf* ruling of 2013 that this is not the case. Although Member States are free to do so, no additional request to the UNHCR is necessary to stop the transfer, where it is apparent from other UNHCR documents that the responsible Member State is in breach of the EU asylum rules.<sup>396</sup> In *Abdullah* the CJEU underlined the need to prove ‘systemic deficiencies’ in the asylum procedure and reception conditions in a Member State, in order to preclude a transfer. More specifically it was stated that, once a Member State takes charge of an application, this decision can only be overturned by proving systemic deficiencies.<sup>397</sup> As such, the CJEU limited the possibilities of asylum seekers to challenge a transfer decision as provided for in Article 19(2) of the Dublin II Regulation. However, the effect of this judgement was rather limited, since the Dublin III Regulation, which introduced enhanced appeal possibilities, entered into force twenty-one days later. Also, the restrictive approach of the CJEU in *Abdullahi* can be considered overhauled by the *Tarakhel* case of the ECtHR. In *Puid* the CJEU re-established that the prohibition to transfer does not entail the obligation to make use of Article 3(2) of the Dublin II Regulation.<sup>398</sup> Instead, the Member State should continue the examination by applying the Dublin criteria, as established in *N.S./M.E.*<sup>399</sup> Consequently, the asylum seeker has no enforceable right to force a Member State to use Article 3(2) of the Dublin II Regulation.<sup>400</sup> However, there is nothing which stops Member States from applying Article 3(2) if they want to do so, as was clarified by the CJEU in *Halaf*. In this case the CJEU emphasised the discretionary power of Member States to make use of the sovereignty clause, which is not subject to any particular condition.<sup>401</sup>

---

<sup>395</sup> Costello Cathryn, ‘Dublin-case NS/ME: Finally, an end to blind trust across the EU?’ (2012) 2 A&MR, 89

<sup>396</sup> Case C-528/11 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2013] ECLI:EU:C:2013:342, §§43-48; The important role of UNHCR documents for the assessment of Member States’ duties under EU asylum law was also considered in e.g. Case C-364/11, *Abd El Kareem El Kott and Others* [2012] ECLI:EU:C:2012:826, §43

<sup>397</sup> Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, 62

<sup>398</sup> Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid* [2013] ECLI:EU:C:2013:740, §§25-26

<sup>399</sup> *Ibid*, §§32-35; As mentioned before, it was hoped that the CJEU would elaborate on this issue in the *Abdullahi* case of 2013. However, the Court did not give further clarification, see: Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, §63

<sup>400</sup> Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid* [2013] ECLI:EU:C:2013:740, §§23, 25-26

<sup>401</sup> Case C-528/11 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2013] ECLI:EU:C:2013:342, §§35-36, 39

The CJEU reached a different conclusion on the other – more specific – discretionary provision in the Dublin II Regulation, the humanitarian clause in Article 15 which allows Member States to bring together family members *as well as other dependent relatives*. The CJEU clarified that the category of people referred to in Article 15 is wider than the ‘family member’ definition in Article 2(i) of the Dublin II Regulation.<sup>402</sup> In that sense Article 15 provides for a wider protection of family reunion than Articles 6 to 8 of the Dublin II Regulation on that matter. *In casu* Austria ordered the transfer of the applicant, although her daughter-in-law who was dependent on her assistance resided in Austria. The CJEU held that Article 15 does not only aim ‘to bring’ together family members, as the wording suggests, but also ‘to keep’ together family members, if they are already present in the same Member State.<sup>403</sup> Thus, if family unity would not be preserved by applying the Dublin criteria, the use of Article 15 of the Dublin II Regulation is no longer discretionary, but mandatory.

In *M.A. and others v Secretary of State for the Home Department*, the CJEU established that the application of Article 6 of the Dublin II Regulation, on unaccompanied minors, should always have ‘the best interest of the child’ as a primary consideration. This applies equally to paragraph 1 which mentions this notion, as to paragraph 2 which makes no reference to it.<sup>404</sup>

---

<sup>402</sup> Case C-245/11 *K v Bundesaylamt* [2012] ECLI:EU:C:2012:685, §§38-40

<sup>403</sup> In that case, where the family members already reside in the same (not responsible Member State) no request is required from the responsible Member State to make use of the humanitarian clause, since that would run counter to the obligation to act speedily, see: Case C-245/11 *K v Bundesaylamt* [2012] ECLI:EU:C:2012:685, §§30, 52

<sup>404</sup> Case C-648/11 *M.A. and others v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:367, §59; Case C-648/11 *M.A. and others v Secretary of State for the Home Department* [2013] Opinion of AG Cruz Villalón, §64; Worth noting is the intervention of the AIRE Centre (Advice on Individual Rights in Europe) in this case. The Dublin III Regulation, which was adopted pending the case is currently under revision in order to comply with this CJEU judgement, as will be discussed in the next chapter.

## 4. THE LAST REFORM AND FUTURE PERSPECTIVES: DUBLIN III

### 4.1. THE SECOND STAGE OF THE CEAS

The second stage of the CEAS aimed at the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection, as set out in the Hague Programme of 2004.<sup>405</sup> In view of the evaluation of the first phase instruments, this got fine-tuned in the following years. The Asylum Policy Plan of 2007 pointed at the ‘critical flaw’ of the first phase: a lack of common practice among the EU Member States.<sup>406</sup> This was reaffirmed in the Stockholm Programme of 2009 which expressed the need to increase the mutual trust between Member States.<sup>407</sup> This required a higher degree of harmonisation in EU asylum law, accompanied by effective practical cooperation. In order to achieve this last measure, the European Asylum Support Office (EASO) was set up in 2010,<sup>408</sup> which was considered as an ‘important tool in the development and implementation of the CEAS’.<sup>409</sup> The EASO’s task is to facilitate, coordinate and strengthen practical cooperation among Member States ‘on the many aspects of asylum’.<sup>410</sup> In accordance with Article 80 TFEU, the Stockholm Programme also underlined the importance of sharing responsibilities and promoting solidarity, in particular with those Member States who face ‘particular pressures’.<sup>411</sup>

Article 78 TFEU lays down the measures which should be adopted to establish the second CEAS phase. The adoption of these legislative measures, which would replace the first phase instruments, was planned for 2010,<sup>412</sup> but later rescheduled to 2012.<sup>413</sup> However, by the end of this new deadline, the EU had only adopted one key measure: the second-phase Qualification Directive of 2011.<sup>414</sup> Finally it would take until mid-2013 to agree upon all the second phase legislative measures: the Reception Conditions Directive, the Asylum Procedures

---

<sup>405</sup> Council of the European Union ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’ (2004) OJ C 53/1 (The Hague Programme), 8

<sup>406</sup> Commission of the European Communities, ‘Policy Plan on Asylum. An Integrated Approach to Protection Across the EU’ (COM(2008) 360 final), 3

<sup>407</sup> The Stockholm Programme (2009), 32

<sup>408</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office [2010] OJ L 132/11 (EASO Regulation)

<sup>409</sup> The Stockholm Programme (2009), 32

<sup>410</sup> EASO Regulation, art 1

<sup>411</sup> The Stockholm Programme (2009), 32

<sup>412</sup> Council of the European Union ‘The Hague Programme: Strengthening Freedom, Security and Justice in the European Union’ (2004) OJ C 53/1 (The Hague Programme), 9

<sup>413</sup> Commission of the European Communities, ‘Policy Plan on Asylum. An Integrated Approach to Protection Across the EU’ (COM(2008) 360 final), 2; The Stockholm Programme (2009), 32

<sup>414</sup> Steve Peers, ‘The Common European Asylum System: State-of-play Update’ (2012) Statewatch Analysis, 1

Directive, the Eurodac Regulation, and the Dublin III Regulation. The Temporary Protection Directive of 2001 is retained unchanged.<sup>415</sup> The three Directives no longer provide for minimum standards, as their predecessors of the first CEAS stage did, but for uniform statutes and common procedures. Although they do not create a uniform system of protection, they are expected to increase the harmonisation of EU asylum law and practice within the EU.<sup>416</sup> The main amendments of each instrument will briefly be outlined below, with a comprehensive assessment of the Dublin III Regulation in the next subchapter.

## 4. 2. THE REFORMED LEGAL FRAMEWORK OF THE CEAS

### *The Qualifications Directive of 2011*<sup>417</sup>

The main objective of the recast Qualifications Directive is to introduce uniform rules on the recognition of ‘applicants for international protection’, which comprises both asylum applicants and persons eligible for subsidiary protection,<sup>418</sup> and the content of protection granted.<sup>419</sup> While these are no longer considered as mere minimum standards, as was the case in the former Qualifications Directive, Member States remain free to adopt more favourable standards in so far they are compatible with the Directive.<sup>420</sup> The Directive introduces some rules which make it easier to be recognised as a refugee,<sup>421</sup> and removes most of the previous provisions which

---

<sup>415</sup> As mentioned before, up to date no events have triggered the activation of this Directive, which provides for a framework of responses to the mass displacement of persons who are unable to return to their country of origin. However, recently it has been recommended as a response to the ongoing Syrian refugee crisis. See: Cynthia Orchard and Dawn Chatty, ‘High time for Europe to offer temporary protection to refugees from Syria?’ Open Democracy (2 October 2014) < <https://www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to> > (accessed 1 August 2015); Cynthia Orchard and Andrew Miller, ‘Protection in Europe for refugees from Syria’ (*Refugee Studies Centre – Forced Migration Policy Briefing 10*, 2014), 9, 29-31

<sup>416</sup> Pieter Boeles, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Second Edition, Intersentia 2014), 250

<sup>417</sup> Applicable from 21 December 2013, see: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L 337/9 (Qualification Directive 2011), art 40

<sup>418</sup> Qualifications Directive 2011, art 2(h); ‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. See: Qualifications Directive 2011, art 2(f)

<sup>419</sup> Qualifications Directive 2011, art 1

<sup>420</sup> Qualifications Directive 2011, art 3

<sup>421</sup> E.g.: Qualifications Directive 2011, art 7 and art 9(2)(f)

provided for lesser protection for persons with subsidiary protection as compared to refugees.<sup>422</sup> It also introduced a broader ‘family member’ definition,<sup>423</sup> which is mirrored in the other CEAS instruments.

### ***The Reception Conditions Directive of 2013***<sup>424</sup>

The recast Reception Conditions Directive sets out the standards of reception for applicants for international protection. Thus, it does not longer concern *minimum* standards and the scope is expanded to include not only applicants for the refugee status, but also those for subsidiary protection. It is also explicitly stated that the Directive applies “during all stages and types of procedures concerning applications for international protection”.<sup>425</sup> This should ensure that the provisions are also applied in detention centres and in relation to applicants subject to the Dublin procedures, as was previously not the case in some Member States.<sup>426</sup> Other important changes in the recast Directive include the detailed provisions on detention,<sup>427</sup> the extension of the non-exhaustive list of vulnerably persons and the obligation to assess whether applicants have special reception needs and support these people.<sup>428</sup>

### ***The Asylum Procedures Directive of 2013***<sup>429</sup>

The Asylum Procedures Directive provides for a uniform procedure for granting and withdrawing international protection. It thus requires Member States to apply a single procedure to examine both claims for asylum and for subsidiary protection.<sup>430</sup> The recast enhances the

---

<sup>422</sup> ECRE, ‘Information Note on Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) (2013), 12

<sup>423</sup> The requirement for children to be dependent is dropped and the parents of unmarried children is added: Qualifications Directive 2011, art 2(j)

<sup>424</sup> Applicable from 21 July 2015, see: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down Standards for the Reception of Applicants for International Protection (recast) [2013] OJ L 180/96 (Reception Conditions Directive 2013), art 32

<sup>425</sup> Reception Conditions Directive 2011, recital 8; This clarification is in line with CJEU jurisprudence which confirmed that the obligation to provide reception conditions under EU law applies to all applicants, including those who are subject to procedures under the Dublin Regulation. See: Case C-179/11 *Cimade and GISTI v Ministre de l’intérieur* [2012] ECLI:EU:C:2012:594, §48

<sup>426</sup> ECRE, ‘Information note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down Standards for the Reception of Applicants for International Protection (recast)’ (2015), 8

<sup>427</sup> Reception Conditions Directive 2013, art 11

<sup>428</sup> Reception Conditions Directive 2013, art 22

<sup>429</sup> Applicable from 21 July 2015, see: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L 180/60 (Asylum Procedures Directive 2013), art 53

<sup>430</sup> Asylum Procedures Directive 2011, art 3; See: ECRE, ‘Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)’ (2014), 6

safeguards which ensure asylum seekers' access to the asylum procedure and introduces specific time limits in this respect.<sup>431</sup> The right to an effective remedy now explicitly requires that the remedy shall be suspensive, allowing applicants to remain in the Member State pending the appeal.<sup>432</sup> The former provision on a minimum common list of safe third countries is omitted and the sources of information needed to assign a third country as safe is expanded with information from other Member States, EASO, UNHCR, the CoE, and other relevant international organisations.<sup>433</sup>

### ***The Eurodac Regulation of 2013***<sup>434</sup>

The provisions in the recast Eurodac Regulation remain mainly unchanged. Some minor amendments concern the new 72-hour deadline to send fingerprints to the Eurodac system,<sup>435</sup> and a new provision on additional information concerning asylum-seekers to make sure that the correct person is sent to another Member State after a fingerprint match.<sup>436</sup> The principal – and most controversial – change is the access of national law enforcement agencies and Europol to the Eurodac database.<sup>437</sup> This option is introduced despite the recommendations from UNHCR and the European Data Protection Supervisor not to do so, since this may lead to interference with the right to privacy and family life of asylum seekers and refugees and may also result in stigmatisation by associating them with criminal activity.<sup>438</sup>

## **4. 3. THE DUBLIN III REGULATION**

On 26 June 2013, the European Parliament and Council adopted the *Regulation (EU) No 604/2013 of the European Parliament and the Council Establishing the Criteria and*

---

<sup>431</sup> See: Asylum Procedures Directive 2013, art 6-8

<sup>432</sup> Asylum Procedures Directive 2013, art 46(5)

<sup>433</sup> Asylum Procedures Directive 2011, art 37

<sup>434</sup> Applicable from 20 July 2015, see: Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 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 and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 establishing a European Agency for the Operational Management of Large-scale IT Systems in the Area of Freedom, Security and Justice (recast) [2013] OJ L 180/1 (Eurodac Regulation 2013), art 45

<sup>435</sup> Eurodac Regulation 2013, art 7

<sup>436</sup> Eurodac Regulation 2013, art 10

<sup>437</sup> Eurodac Regulation 2013, art 1(2), 6, 7, 19-22, 33 and 36

<sup>438</sup> See: UNHCR, 'An Efficient and Protective Eurodac' (2012); European Data Protection Supervisor, 'Eurodac: Erosion of Fundamental Rights Creeps Along' (5 September 2012) Press Release EDPS/12/12

*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)*, or Dublin III Regulation. It is applicable on any request to take charge or take back applicants from 1 January 2014.<sup>439</sup> Up to date, this was the last reform of the Dublin system. The Dublin III Regulation is applicable in all 28 EU Member States plus Iceland, Norway, Liechtenstein and Switzerland. Together with its Implementing Regulation<sup>440</sup> and the Eurodac Regulation from 2013 it forms the Dublin system.

Proposed in 2008, planned for 2010, postponed to 2012, adopted in 2013 and applicable from 2014: the replacement of the Dublin II Regulation was the result of a long-term process and lengthy negotiations. Nevertheless, the Council and the European Parliament chose for a *status quo*, since they considered it appropriate ‘in the light of the results of the evaluations’, to confirm the principles underlying the Dublin II Regulation.<sup>441</sup> Hence, again, the general principle is retained that responsibility for asylum claims will be allocated to the Member State which played the greatest part in the applicant’s entry into or residence on the territories of the Member States, with an exception to protect family unity and unaccompanied children. Nonetheless, the Dublin III Regulation also introduces some substantive changes and new provisions, in order to enhance the efficiency of the functioning of the Dublin system as well as to ensure higher standards of protection for the applicants who fall under the Dublin procedure.<sup>442</sup> Thus, similar to the situation in 2003, the replacement in 2013 was welcomed as an opportunity to address some deficiencies of its predecessor, while it was regretted that the Dublin system was not fundamentally changed.<sup>443</sup>

---

<sup>439</sup> Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 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) [2013] OJ L 180/31 (Dublin III Regulation), art 49

<sup>440</sup> Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 Laying Down Detailed Rules for the Application of Council Regulation (EC) No 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2014] OJ L 39/1 (Commission Implementing Regulation 118/2014)

<sup>441</sup> Dublin III Regulation, recital 9

<sup>442</sup> Council of the European Union, ‘Recast of the Dublin Regulation: enhancing the efficiency of the functioning of the current system’ (7 June 2013), Press Release 10526/1/13 REV 1, 1

<sup>443</sup> See: ECRE, ‘Comments on Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 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)’ (March 2015), 3-4; Steve Peers, ‘The Revised ‘Dublin’ Rules on Responsibility for Asylum Seekers: The Council’s failure to Fix a Broken System’ (2012) Statewatch Analysis; Dublin Transnational Project, ‘Press Release: Little to Celebrate on Dublin’s 10<sup>th</sup> Anniversary – New Research Shows that the System Continues to Violate the Rights of Refugees (18 February 2013)

One of the core changes in the Dublin III Regulation is the extension of its scope to determine the responsible Member State for an application for *international protection*, lodged in one of the Member States by a third-country national *or a stateless person*. The explicit inclusion of stateless persons, next to third-country nationals, is supported by the UNHCR, since this removes the risk for disputes about the responsibility for claims made by stateless persons, while there is no legal reason to treat their applications for international protection different.<sup>444</sup> Moreover, the Regulation applies to all applications for ‘international protection’, which includes both applications to seek refugee status and subsidiary protection status.<sup>445</sup> This parallels the expansion made in the other second phase CEAS instruments. However, as noted by Boeles et. al., ‘asylum’ is the common word to denote all forms of protection of forced migrants, and can therefore be used interchangeably with ‘international protection’.<sup>446</sup> Therefore, when further reference is made to the concept ‘asylum application’ or ‘asylum applicant’, this shall include respectively applications and applicants for both refugee status and subsidiary protection status.

#### **4. 3. 1. Provisions on responsibility**

The main principle is retained that one single Member State shall be responsible for the examination of an application for international protection. Whereas the Dublin Convention and Dublin II Regulation already mentioned the duty for the responsible Member State to examine the application, this gets a stronger basis now in the new Article 18 of the Dublin III Regulation which clearly lays down the obligations for the responsible Member State. It clarifies that the responsible Member State shall examine or complete the examination of the application when it took charge or took back an applicant according to the Dublin rules.<sup>447</sup> Particular attention is paid with regard to applicants ‘taken back’ by the responsible Member State in which he or she had previously lodged and withdrawn an application, in order to ensure them effective access

---

<sup>444</sup> See: UNHCR, ‘Comments on the European Commission’s Proposal for a recast of the 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 (“Dublin II”) (COM(2008) 820, 3 December 2008) and the European Commission’s Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)’ (2009), 3; Worth noting is that European citizens are still excluded from the scope, since they cannot be considered as asylum applicants in other European Member States, in accordance with Protocol (No.24) on Asylum For Nationals of Member States of the European Union as Annexed to the TEU [2010] OJ C 83/305

<sup>445</sup> Dublin III Regulation, art 1, 2(b) and Qualifications Directive 2011, art 2(h)

<sup>446</sup> Boeles et. al., *European Migration Law* (Second Edition, Intersentia 2014), 250

<sup>447</sup> Dublin III Regulation, art 18

to the asylum procedure, by completing their application, or enabling to lodge a new one.<sup>448</sup> Another new provision clarifies that the obligations under Article 18 shall cease when the responsible Member State can prove that the applicant has left the EU territory for at least three months, unless that person has a valid residence document issued by the responsible Member State.<sup>449</sup>

Article 3(2) introduces, in line with the *N.S./M.E.* judgement of the CJEU, the prohibition to transfer to the responsible Member State when “there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception condition for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter” and clarifies that in that case the Member State shall continue to examine the criteria in order to establish whether another Member State can be designated as responsible.<sup>450</sup> Furthermore, a ‘mechanism for early warning, preparedness and crisis management’ is introduced in Article 33 of the Dublin III Regulation. It provides for the setting up of a ‘preventive action plan’ or a ‘crisis management action plan’, in case the application of the Regulation may be jeopardised due to a particular pressure on, or problems in the functioning of a Member State’s asylum system.<sup>451</sup> In that case the EASO shall play an important role in supporting the Member State in order to address the detected deficiencies in its asylum system. The mechanism aims at developing mutual trust and solidarity among Member States.<sup>452</sup>

The criteria to establish responsibility are hierarchically laid down in Chapter III of the Dublin III Regulation.<sup>453</sup> In order of priority responsibility shall be allocated as follows: the Member State in which the applicant has a family member who is a beneficiary for international protection or who is an applicant for international protection (Article 9 and 10); the Member State which is responsible for the largest number of asylum-seeking family members or for the application of the oldest of them, where several family members lodged an application in the same Member State and where the application of the other criteria would lead to their separation

---

<sup>448</sup> Dublin III Regulation, art 18(2)

<sup>449</sup> Dublin III Regulation, art 19; Moreover, the application of the Dublin Regulation shall cease when the applicant withdraws his application before the responsible Member State has agreed to take charge of the applicant. See: Case C-620/10 *Migrationsverket v N., V. and V. Kastrati* [2012] ECLI:EU:C:2012:265, §49

<sup>450</sup> Dublin III Regulation, art 3(2)

<sup>451</sup> Dublin III Regulation, art 33(1)-(3); The assessment of a Member State’s asylum system shall be based on the information gathered by EASO, who plays an important role throughout the entire process for early warning.

<sup>452</sup> Council of the European Union, ‘Recast of the Dublin Regulation: enhancing the efficiency of the functioning of the current system’ (7 June 2013), Press Release 10526/1/13 REV 1, 2

<sup>453</sup> Dublin III Regulation, art 7(1)

(Article 11); the Member State which provided the applicant with a residence document or visa (Article 12); the Member State whose border has been crossed illegally by the asylum applicant (Article 13); the Member State where a third-country national or a stateless person entered legally and where the need for a visa is waived (Article 14); and finally the Member State in which the application was lodged, if no other Member State can be designated on the basis of the criteria (Article 3(2)).

Overall, the order in which the criteria are presented remains the same: entry to and residence in a Member State are the rule, with an exception to protect family unity and the choice of the applicant shall only be considered last. Similar to the Dublin II Regulation, but with additional safeguards, primary attention is paid to the protection of unaccompanied minors. A first change is the expansion of the definition of unaccompanied minors by the omission of the criterion to be unmarried.<sup>454</sup> Article 8 of the Dublin III Regulation contains the rules to allocate responsibility for the application of unaccompanied minors, depending on whether or not the unaccompanied child has family members in other Member States. Article 8 explicitly recognises that the ‘best interest of the child’ should be the primary consideration.<sup>455</sup> The CJEU judgement in *M.A.*,<sup>456</sup> gave rise to further revision of Article 8(4) of the Dublin III Regulation which states that, in the absence of a family member, sibling or relative, the Member State in which the unaccompanied child has lodged asylum shall be responsible, provided it is in the best interest of the child.<sup>457</sup> The Commission proposed to replace Article 8(4) with four subparagraphs which envisage more scenarios and enhanced protection than currently covered by the text.<sup>458</sup> Despite the fact that the proposal got support from various

---

<sup>454</sup> Dublin III Regulation, art 2(j); It is worth noting that the definition of accompanied minors, which falls under the definition of ‘family members’ is more restrictive, since the criterion to be unmarried has not been omitted there. See: Dublin III Regulation, art 2(g)

<sup>455</sup> See also: Dublin III Regulation, art 6, on guarantees for minors

<sup>456</sup> See *supra*, Case C-648/11 *M.A. and others v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:367, §59

<sup>457</sup> Dublin III Regulation, *in fine*: Statement by the Council, the European Parliament and the Commission

<sup>458</sup> See: European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (COM(2014) 382 final)

stakeholders,<sup>459</sup> the Council suggested a more restrictive amendment.<sup>460</sup> Up to date, no consensus has been reached on the issue.<sup>461</sup>

In contrast to the provisions on unaccompanied children, neither the criteria to unite family members, nor the definition of ‘family members’ have been substantially changed. Also the criteria on entry to and residence in a Member State remained by and large the same. A compositional innovation is the combination of the two discretionary clauses – the sovereignty clause and the humanitarian clause – under Article 17 of the Dublin III Regulation. Their content has not been modified considerably, but the Member States should recall the jurisprudence of the CJEU in order to interpret them correctly. With regard to the sovereignty clause (now in Article 17(1)), the CJEU clarified that its use is not dependent on any condition.<sup>462</sup> The humanitarian clause (now in Article 17(2)), on the other hand, becomes obligatory according to the CJEU, when families would be separated by applying the Dublin criteria.<sup>463</sup> This does not only imply ‘bringing’ family relations together, as the wording still suggests, but also ‘keeping’ them together when they are present in the same Member State.<sup>464</sup> The notion ‘family members as well as other dependent relatives’ in the humanitarian clause of the Dublin II Regulation is replaced by ‘any family relations’, which is not defined in the Dublin III Regulation and should be given a wide interpretation in line with the CJEU jurisprudence.<sup>465</sup>

---

<sup>459</sup> See: LIBE Committee, ‘Report on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (18 May 2015) European Parliament 2014/0202(COD) / A8-0168/2015; UNHCR, ‘Protecting the Best Interest of the Child in Dublin Procedures. UNHCR’s Comments on the European Commission’s Proposal for a Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (February 2015); Meijers Committee, ‘Note on the Proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation)’ (2 December 2014) Note to the Members of the LIBE Committee

<sup>460</sup> Council of the European Union, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (20 November 2014) 2014/0202(COD) / 15567/14

<sup>461</sup> See: –‘2014/0202(COD)’ Parltrack <[<http://parltrack.euwiki.org/dossier/2014/0202\(COD\)>](http://parltrack.euwiki.org/dossier/2014/0202(COD))> (accessed 12 August 2015)

<sup>462</sup> Case C-528/11 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2013] ECLI:EU:C:2013:342, §§35-36, 39

<sup>463</sup> Case C-245/11 *K v Bundesaylamt* [2012] ECLI:EU:C:2012:685, §46; The CJEU further emphasised the importance to preserve ‘family unity’ in: Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri, Danijela Dordevic, Danjel Saciri, Sanela Saciri, Denis Saciri, OCMW van Diest* [2014] ECLI:EU:C:2014:103, §§41, 45-46

<sup>464</sup> In that case, where the family members already reside in the same (not responsible Member State) no request is required from the responsible Member State to make use of the humanitarian clause, since that would run counter to the obligation to act speedily, see: Case C-245/11 *K v Bundesaylamt* [2012] ECLI:EU:C:2012:685, §§30, 52; Remarkably, the obligation to ‘keep or bring’ together is explicitly stated in Article 16 of the Dublin III Regulation on dependent persons

<sup>465</sup> Case C-245/11 *K v Bundesaylamt* [2012] ECLI:EU:C:2012:685, §§38-46

### 4. 3. 2. Additional Safeguards

A major improvement in the Dublin III Regulation is the introduction of additional safeguards for asylum applicants who are subject to the Dublin procedure. Article 4 of the Dublin III Regulation on the right to information, requires the competent authorities of the Member States to inform the applicant about the Dublin procedure. Paragraph 1 of Article 4 contains a list of factors which should be communicated in writing, in a language the applicant understands, and where necessary also orally. This includes information about the objectives and consequences of the Dublin system, the right to challenge a transfer decision and the right of access to data relating to the applicant.<sup>466</sup> In accordance with Article 4(3) of the Dublin III Regulation, the Commission drew up standard common leaflets and an additional leaflet for unaccompanied children.<sup>467</sup> Article 5 of the Dublin III Regulation requires to hold a personal interview with the applicant, before any decision is taken to transfer the applicant.<sup>468</sup> The objective of the interview is to facilitate the determination of the responsible Member State and to help the applicant understand the information he or she received in accordance with Article 4.<sup>469</sup> It can however be omitted when the applicant absconded, or when he or she already provided the relevant information before, but the applicant should still have the opportunity to present further information, prior to the transfer decision.<sup>470</sup>

Furthermore, additional guarantees for minors and dependent persons who are subject to the Dublin procedure are introduced. According to Article 6 of the Dublin III Regulation, Member States are under the obligation to cooperate in assessing the best interest of the child, which should be a primary consideration throughout the entire Dublin procedure. For the unaccompanied minor, Article 6 requires that a representative with the requisite qualifications and expertise shall represent and assist him or her.<sup>471</sup> Article 16 of the Dublin III Regulation includes guarantees for vulnerable people who are dependent on others. Member States are instructed to ‘keep or bring together’ the applicant and his or her child, sibling or parent, where he or she is dependent on their assistance due to pregnancy, a new-born child, serious illness, severe disability or old age.<sup>472</sup>

---

<sup>466</sup> Dublin III Regulation, art 4(1)

<sup>467</sup> Commission Implementing Regulation 118/2014, Annex X, XI (for unaccompanied minors), XII, XIII

<sup>468</sup> Dublin III Regulation, art 5(1)&(3)

<sup>469</sup> Dublin III Regulation, art 5(1)

<sup>470</sup> Dublin III Regulation, art 5(2)

<sup>471</sup> Dublin III Regulation, art 6(2)

<sup>472</sup> Dublin III Regulation, art 16(1) and recital 16

### 4. 3. 3. Procedure

The process to determine the responsible Member State starts as soon as an application for international protection is lodged with a Member State.<sup>473</sup> In line with its predecessors the Dublin III Regulation distinguishes two scenarios: the procedures for *take charge* requests and the procedures for *take back* requests.

The procedural time limits remain by and large the same. Similar to the Dublin II Regulation, the total length of the procedure, from asylum application to transfer can take up to eleven months, and in exceptional cases up to two years and one month.<sup>474</sup> An important improvement is the introduction of time limits to send a *take back* request. In contrast to requests to *take charge*, this was not mentioned in the Dublin II Regulation. Now, both types of requests should be sent within three months after the application was lodged, or within two months if it is based on a Eurodac hit.<sup>475</sup> With regard to *take back* requests, a further distinction is introduced between take back requests ‘when a new application has been lodged in the requesting Member State’ (Article 23) and take back requests ‘when no new application has been lodged in the requesting Member State’ (Article 24). The latter case concerns persons who are illegally staying in the territory of the requesting Member State and can either be sent back, if it is considered that another Member State is responsible, or returned to a third country, if the application in the other Member State has been rejected by a final decision.<sup>476</sup> The time limit to carry out the transfer remains six months from the moment the take charge or take back request is accepted, with the option to extend it up to one year or eighteen months under certain conditions.<sup>477</sup> In case the time limits to request or to transfer are not respected, responsibility shall lie with the requesting Member State.<sup>478</sup> Failure to respect the time limit to answer shall be considered as a tacit acceptance from the requested Member State.<sup>479</sup>

The Dublin III Regulation also introduces some important procedural safeguards for the applicants who are subject to a transfer decision. Article 26 requires Member States to notify

---

<sup>473</sup> Dublin III Regulation, art 20(1)

<sup>474</sup> For an overview of the time limits, in comparison with the Dublin Convention and the Dublin II Regulation, see Annex II

<sup>475</sup> Dublin III Regulation, art 21(1), art 23(2), art 24(2)

<sup>476</sup> Dublin III Regulation, art 24(1)&(4); The return procedure shall be carried out in accordance with: Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98

<sup>477</sup> Dublin III Regulation, art 29(1)-(2)

<sup>478</sup> Dublin III Regulation, art 21(1) *in fine*, art 23(3), art 24(3), art 29(2)

<sup>479</sup> Dublin III Regulation, art 22(7), art 25(2)

the transfer decision and provide information on the legal remedies which are available to the applicant or his or her legal advisor. A separate provision on remedies is introduced in Article 27 of the Dublin III Regulation which ensures that the applicant shall have the right to an effective remedy against a transfer decision, before a court or tribunal. This right is further enhanced by requiring that the appeal shall have at least a minimum of suspensive effect and that the applicants have access to legal assistance, which shall on request be free of charge where the person cannot afford the costs.<sup>480</sup> The Dublin III Regulations also contains a new provision on detention, which assures that persons shall not be held in detention for the sole reason that they are subject to the Dublin procedure. Detention of applicants shall only be allowed where there is a ‘significant risk of absconding’,<sup>481</sup> with respect for the time limits and conditions set out in Article 28 of the Dublin III Regulation and Articles 9, 10 and 11 of the Reception Conditions Directive of 2013.<sup>482</sup> Furthermore it is emphasised that the transferring Member State shall meet the costs of the transfer, not the applicant.<sup>483</sup>

With regard to information sharing, the Dublin III Regulations contains some more elaborated provisions.<sup>484</sup> Besides all other relevant information,<sup>485</sup> Member States should exchange health data to ensure continuity of care, in particular when it concerns disabled people, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical or sexual violence.<sup>486</sup> Finally, Member States should inform the Commission of the specific authorities which are responsible for the Dublin procedure in their country. The entire list shall be published by the Commission and the authorities mentioned on that list are entitled to get training on the application of the Dublin III Regulation.<sup>487</sup>

#### **4. 3. 4. Evaluation**

In the second revision, sixteen years after the Dublin Convention entered into force, the general principles of the Dublin system have once more been maintained. The preamble of the Dublin

---

<sup>480</sup> Dublin III Regulation, art 27(3)-(6)

<sup>481</sup> Dublin III Regulation, art 28(1)-(2); ‘significant risk of absconding’ means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or third-country national or a stateless person who is subject to a transfer procedure may abscond (art 2 (n))

<sup>482</sup> Dublin III Regulation, art 28(3)-(4)

<sup>483</sup> Dublin III Regulation, art 30

<sup>484</sup> Dublin III Regulation, art 31-32, 34

<sup>485</sup> Dublin III Regulation, art 31

<sup>486</sup> Dublin III Regulation, art 32

<sup>487</sup> Dublin III Regulation, art 35

III Regulation states explicitly that this was considered appropriate ‘in the light of the results of the evaluations’, while making ‘the necessary improvements to the effectiveness of the system and the protection granted to applicants’.<sup>488</sup> As set out before, the Dublin system did indeed introduce some important additional safeguards for the applicants, throughout the entire Dublin process. However, it can be questioned if these ‘necessary improvements’ are sufficient, and if it is indeed ‘appropriate’ to build further on the unsteady foundations underlying the system. Relying on the generally optimistic evaluation of the Commission of 2007,<sup>489</sup> one could conclude that this is indeed the case, but this would ignore the many reports of UNHCR, ECRE and other stakeholders which revealed serious flaws in the Dublin system, throughout the years, and the ultimate confirmation thereof in the case-law of the ECtHR and the CJEU.<sup>490</sup> The reaction of the European Parliament on the recast proposal of the Commission (which planned to introduce some more far-reaching changes than presently laid down in the Dublin III Regulation) may be recalled in that light: “whatever the political obstacles to change, such a single-minded preference for the *status quo* could only be defensible on the premise that the Dublin system worked by and large satisfactorily”.<sup>491</sup> Let this exactly be what the Dublin system did not do. The lack of political will to change obviously prevailed. Even the suspension mechanism proposed in 2008 did not get the support of the Council and the majority of Member States, who chose for the less intrusive ‘early warning mechanism’, despite the ECtHR and CJEU case-law.<sup>492</sup>

Nevertheless, it is appropriate to assess the added value of the safeguards introduced in the Dublin III Regulation. First of all, the expanded scope, which is mirrored in all new CEAS instruments, to include both third-country nationals and stateless people who apply for the recognition of refugee status as well as subsidiary protection status, can be welcomed. An important improvement is the new Article 18 of the Dublin III Regulation, which elaborates on the obligations of responsible Member States, which complies with the aim to ensure effective access to the asylum procedure as part of the right to asylum in Article 18 CFREU.<sup>493</sup> The

---

<sup>488</sup> Dublin III Regulation, recital 9

<sup>489</sup> (*supra*) Commission of the European Communities, ‘Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System’ (SEC(2007)742)

<sup>490</sup> See e.g.: ECRE, ‘Report on the Application of the Dublin II Regulation in Europe’ (ECRE & ELENA 2006); UNHCR, ‘The Dublin II Regulation. A UNHCR Discussion Paper’ (2006); ECRE, ‘Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered’ (March 2008); The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (European Comparative Report 2013)

<sup>491</sup> European Parliament, ‘Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal’ (2009) Civil Liberties, Justice and Home Affairs PE 410.690, 1

<sup>492</sup> Council of the European Union, ‘Draft Statement of the Council’s Reasons’ (2008/0234(COD)), 5

<sup>493</sup> Dublin III Regulation, recital 5; and ECRE, ‘Comments on Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the

Article explicitly states that an applicant who is ‘taken back’ by the responsible Member State in which he or she had previously lodged and withdrawn an application, shall be entitled to request that the examination of his or her application is completed or to lodge a new application.<sup>494</sup> This should avoid practices such as the ‘interrupted claim’ practice observed in Greece.

With regard to the Member States’ duties to respect the fundamental rights of asylum seekers subject to the Dublin procedure, it can be regretted that the Dublin III Regulation only implements the CJEU case-law in Article 3(2), and not the ECtHR case-law, since it only mentions the ‘*N.S./M.S. test*’. In view thereof, it has to be recalled that Member States should at the same time comply with their obligations under the ECHR when applying the Dublin III Regulation. This entails that the potential violation of any relevant fundamental right, and not only of Article 4 CFREU / Article 3 ECHR has to be examined. Additionally, while doing so, ‘systemic deficiencies’ should not be considered as a *condition sine qua non*, as the *Abdullah* judgement of the CJEU suggested.<sup>495</sup> This runs counter to the need to take, next to the general situation, the individual circumstances into consideration, as clearly expressed by the ECtHR in *Tarakhel*.<sup>496</sup> Moreover the ECtHR clarified in *Tarakhel* that, when there is serious doubt about the compliance of the responsible Member State with its obligations under the ECHR, the determining Member State is required to obtain individual guarantees from the responsible Member State.<sup>497</sup> The restrictive interpretation of grounds which might prohibit transfers reflects the ongoing emphasis on mutual trust. The preamble slightly changed the presumption of safety, stating that “Member States, *all respecting the principle of non-refoulement*, are considered safe countries for third-country nationals”.<sup>498</sup> This is also echoed in the choice for the less intrusive ‘early warnings mechanism’ instead of the ‘temporary suspension mechanism’ proposed by the Commission in 2008.<sup>499</sup> The Dublin III Regulation thus does not fully address the issue of Member States which are too unsafe to receive Dublin transfers.<sup>500</sup>

The additional safeguards for applicants under the Dublin procedure, on the other hand, are a significant improvement. Prior to the transfer decision, especially the right to be informed, both in writing and orally when necessary, and the right to have a personal interview are

---

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)’ (March 2015), 23

<sup>494</sup> Dublin III Regulation, art 18(2)

<sup>495</sup> Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, §62

<sup>496</sup> *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §122

<sup>497</sup> *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §121-122

<sup>498</sup> Dublin III Regulation, recital 3 (emphasis added)

<sup>499</sup> Dublin III Regulation, art 33

<sup>500</sup> Boeles et. al., *European Migration Law* (Second Edition, Intersentia 2014), 266

important innovations. The information leaflets should help to avoid the insufficient informing practices observed in some Member States, which leave applicants subject to the Dublin rules with limited or inaccurate knowledge about the procedure and appeal possibilities.<sup>501</sup> The new provision on detention has been welcomed as a possibility to address the increasing practice observed in a number of Member States to detain applicants before the transfer. Detention is now only possible when there is ‘a significant risk of absconding’. However, this concept is vaguely defined in Article 2(n), leaving the door open for unnecessary use of detention. Moreover, Article 28 permits Member States under certain conditions to detain applicants up to three months before transferring them. While this is shorter than the previous practice in some Member States, it seems to fit uneasily with the obligation to detain applicants ‘for as short a period as possible’.<sup>502</sup>

The Dublin III Regulation also improved the position of the applicant after the transfer decision. It can be welcomed that there is now an explicit requirement to notify the applicant or his counsellor of the transfer decision,<sup>503</sup> but the most important aspect thereof, to do this in a timely manner, is not mentioned, unlike the recast proposal of 2008 which stated that the notification should take place within fifteen working days after the receipt of reply from the requested Member State.<sup>504</sup> The new provision on remedies in Article 27 no longer presents challenging a transfer decision as a possibility, as the Dublin II Regulation did, but as a right of the applicant.<sup>505</sup> In order to avoid *de facto* denial of an appeal possibility, access to (free) legal assistance is guaranteed, though *free* legal assistance can be refused where the appeal seems to have ‘no tangible prospect of success’.<sup>506</sup> Article 27(3) furthermore ensures that the transfer decisions shall have at least a minimum of suspensive effect. Member States are required to implement one of the three options in this respect, set out in Article 27(3). The first and most protective option provides for suspensive effect pending the outcome of the appeal. In the second possibility the suspensive effect exists for a reasonable period of time in which the court

---

<sup>501</sup> Philip Amaral, ‘Protection Interrupted. The Dublin Regulation’s Impact on Asylum Seekers’ Protection’ (*JRS Europe* June 2013), 28-36

<sup>502</sup> Dublin III Regulation, art 28(3); See: Asylum Information Database, ‘The Legality of Detention of Asylum Seekers under the Dublin III Regulation’ (June 2015) AIDA Legal Briefing No. 1

<sup>503</sup> Dublin III Regulation, art 26

<sup>504</sup> European Commission Proposal to recast the Dublin Regulation (2008), art 25(1)

<sup>505</sup> Dublin III Regulation, art 27 and recital 19; It is worth noting that in February 2015 the court of The Hague (The Netherlands) has referred preliminary questions to the CJEU on the extent of Article 27 in conjunction with recital 19 of the Dublin III regulation. The case has not yet been taken into consideration. See: *Case X en de Staatssecretaris van Veiligheid en Justitie* [2015] Rechtbank Den Haag AWB 14/12282, ECLI:NL:RBDHA:2015:1004, accessible at

<<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:1004>> (accessed 12 August 2015)

<sup>506</sup> If this decision is taken by an authority other than a court or tribunal, there must be a possibility to challenge this decision before a court or tribunal, see: Dublin III Regulation, art 27(6)

or tribunal should decide whether or not this should be retained. In the last option the applicant can request a court or tribunal to suspend the transfer decision, within a reasonable period of time. In that case the transfer shall at least be suspended until the court or tribunal has taken its decision on the suspensive effect.<sup>507</sup> Although it can be regretted that full suspensive effect is not automatically granted, it introduces a considerable improvement compared to the Dublin II Regulation and is furthermore in accordance with Article 13 ECHR and Article 47 CFREU on the right to an effective remedy, which require that either the appeal against the transfer *or* the request for interim protection shall have suspensive effect.<sup>508</sup> Here it should also be recalled that the examination of the merits of the appeal should not be interpreted restrictively, as the CJEU did in *Abdullahi*, where only ‘systemic deficiencies’ were found to provide a basis to overturn a transfer decision.<sup>509</sup> Also the individual circumstances should be assessed, in accordance with ECtHR’s *Tarakhel* judgement.<sup>510</sup> Overall, the new provision has generally been welcomed, though ECRE deplores the fact that appeal possibilities against decisions *not* to transfer are not mentioned.<sup>511</sup> Other improvements include the additional guarantees for children, either accompanied or not, and vulnerable people.<sup>512</sup>

Nevertheless, the situation is not entirely rosy. Some major critiques on the Dublin II Regulation have not been addressed. While adding new safeguards, the Dublin III Regulation left some problematic provisions unchanged. The ‘family member’ definition, for instance, remained by and large the same, despite the recommendations to expand it. In order for minor children to fall under the ‘family member’ definition, it is no longer required that they are dependent, but they should still be unmarried, in contrast with the definition of unaccompanied children where the condition to be unmarried has been omitted.<sup>513</sup> Also the requirement that the family ties already existed in the country of origin is maintained. This overlooks the reality that many applicants establish family ties outside their country of origin during their flight.<sup>514</sup>

---

<sup>507</sup> Dublin III Regulation, art 27(3)

<sup>508</sup> See: Marcelle Renneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing 2014), 142-145; ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to Asylum Law* (ECRE Booklet 2014), 56

<sup>509</sup> Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, §62

<sup>510</sup> *Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12, §122

<sup>511</sup> In particular in situations where the decision not to transfer would risk violating the applicant’s fundamental rights, such as the right to family life or the best interests of the child, this might be problematic. See: ECRE, ‘Comments on Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 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)’ (March 2015), 30

<sup>512</sup> Dublin III Regulation, art 6 and 8, recitals 13-16; art 16 and 32

<sup>513</sup> Dublin III Regulation, art 2 (g)(i)(j)

<sup>514</sup> ECRE, ‘Comments on Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining

Overall, the definition remains too restrictive to provide for proper protection as required under Article 8 ECHR and 7 CFREU on the right to family life. Member States should therefore make more use of the humanitarian clause in Article 17(2) of the Dublin III Regulation, which contains the undefined notion of ‘family relations’. With regard to the sovereignty clause and the humanitarian clause, it can be deplored that for neither of them the requirement of the applicant’s consent has been added. Member States retain the possibility to send an applicant to a ‘safe third country’, but reference is made to the recast Asylum Procedures Directive of 2013 which introduced some additional procedural requirements in order to assign a third country as ‘safe’ (*supra*).<sup>515</sup>

The impact of the Dublin III Regulation on the effectiveness of the Dublin system remains to a large extent to be seen. However, the available data for 2014 indicates a lower transfer rate than observed in the foregoing years. Only 13.340 transfers were carried out, which is 2.5% of the historically high number of 625.900 asylum applications registered in the EU that year.<sup>516</sup> The Parliamentary Assembly of the CoE expressed the need for a comprehensive review of the Dublin Regulation and its implementation.<sup>517</sup> A ‘fitness check’ of the Dublin system by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system, including its effects on fundamental rights, is foreseen in the preamble of the Dublin III Regulation and was planned by the Commission for 2014, but has not been carried out yet.<sup>518</sup> By 21 July 2016, the Commission is required to evaluate the Dublin III Regulation and propose necessary amendments.<sup>519</sup>

---

an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast)’ (March 2015), 10

<sup>515</sup> Dublin III Regulation, art 3(3); Asylum Procedures Directive 2011, art 37

<sup>516</sup> Due to the discrepancy in how Member States report outgoing and incoming transfers, the number is only based on outgoing transfers of which more were reported (13.340) than incoming transfers (8.215) in 2014. See data available at: Eurostat ‘Dublin statistics on countries responsible for asylum application’ Updated 16 June 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin\\_statistics\\_on\\_countries\\_responsible\\_for\\_asylum\\_application](http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application)> (accessed 6 August 2015); and Eurostat ‘Asylum Statistics’ Updated 21 May 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> (accessed 6 August 2015)

<sup>517</sup> Parliamentary Assembly of the Council of Europe, ‘Assessing the need for a comprehensive review of the Dublin Regulation and its implementation – Motion for a Resolution’ (11 September 2014) Doc. 13592

<sup>518</sup> Dublin III Regulation, recital 9; European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced intra-EU solidarity in the Field of Asylum. An Agenda for Better Responsibility-Sharing and More Mutual Trust’ (COM(2011) 835 final), 7; In 2015 the Commission reiterated its aim to conduct the ‘fitness check’, however only in footnote this time, see: European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration’ (COM(2015) 240 final), 14 fn 38

<sup>519</sup> Dublin III Regulation, art 46

In March 2015 the Commission already observed that the Dublin system is not working as it should, despite the entry into force of the Dublin III Regulation.<sup>520</sup> Those subject to a Dublin transfer still seem to be the ‘unlucky few’. However, with the growing number of asylum applicants arriving in the EU, the problems created by the system only got bigger dimensions. On the one hand, the system still has the potential to overburden Member States at Europe’s borders, since the entry to the EU territory still plays a central role in allocating responsibility. In the wake of the UNHCR recommendations,<sup>521</sup> less transfers have been reported to countries such as Greece and Bulgaria.<sup>522</sup> For other border countries, such as Italy, Poland and Hungary, who are already struggling with the rising number of arriving asylum seekers, the added burden of Dublin transfers remains a real problem.<sup>523</sup> On the other hand, eighteen years after it entered into force, the Dublin system still seems not to succeed in avoiding migratory secondary movements within the EU.<sup>524</sup> The ongoing discrepancies between the Member States in reception conditions and access to the asylum seekers are an important incentive for people arriving at Europe’s borders to continue their way towards other EU countries which provide for better protection. Aware of the consequences of the Dublin rules, people have tried to avoid being identified in the Eurodac system,<sup>525</sup> with even documented instances of individuals mutilating their fingers in order not to be fingerprinted.<sup>526</sup>

---

<sup>520</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration’ (COM(2015) 240 final), 13

<sup>521</sup> UNHCR, ‘New UNHCR Report warns against returning asylum-seekers to Greece’ (30 January 2015) Briefing Notes; UNHCR, ‘Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece’ (December 2014); – ‘UNHCR calls for temporary halt to Dublin transfers of asylum-seekers to Bulgaria’ UNHCR (3 January 2014) <<http://www.unhcr.org/52c691d59.html>> (accessed on 30 July 2015); – ‘ECRE joins UNHCR in a Call for the Suspension of Dublin Transfers to Bulgaria’ ECRE (8 January 2014)

<sup>522</sup> See data available at: Eurostat ‘Dublin statistics on countries responsible for asylum application’ Updated 16 June 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin\\_statistics\\_on\\_countries\\_responsible\\_for\\_asylum\\_application](http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application)> (accessed 6 August 2015)

<sup>523</sup> See e.g.: Susan Fratzke, ‘Not Adding Up: The Fading Promise of Europe’s Dublin System’ (*Migration Policy Institute Europe – EU Asylum: Towards 2020 Project*, March 2015), 10

<sup>524</sup> Susan Fratzke, ‘Not Adding Up: The Fading Promise of Europe’s Dublin System’ (*Migration Policy Institute Europe – EU Asylum: Towards 2020 Project*, March 2015), 13-15

<sup>525</sup> Susan Fratzke, ‘Not Adding Up: The Fading Promise of Europe’s Dublin System’ (*Migration Policy Institute Europe – EU Asylum: Towards 2020 Project*, March 2015), 15

<sup>526</sup> Chris Jones, ‘11 Years of Eurodac’ (January 2014) Statewatch Analysis, 5; Harriet Grant and John Domokos, ‘Dublin Regulation leaves asylum seekers with their fingers burnt’ *The Guardian* (7 October 2011) <<http://www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers>> (accessed 10 August); In this light, the information leaflet of the Commission on the Dublin III Regulation, which Member States have to give to applicants subject to the Dublin procedure, assures the applicants that “if you have deliberately damaged your fingers, the fingerprints will be taken again in the future”, see: Commission Implementing Regulation 118/2014, Annex X, XII and XIII; In May 2015 the Commission reiterated the importance of fingerprinting the people who arrive in Europe, see: European Commission, ‘Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the Obligation to take Fingerprints’ (SWD(2015) 150 final)

Whereas the ineffectiveness of the Dublin system may be welcomed by the ‘southern’ Member States who fear additional pressure on their – already overburdened – asylum systems, it raises serious concerns for ‘northern’ Member States who are confronted with an increasing number of asylum claims from people who made their way north.<sup>527</sup> Whether or not working effectively, the Dublin system seems in any case to be in stark contrast with the EU’s reiterated emphasis on solidarity and responsibility sharing in the field of asylum, in accordance with Article 80 TFEU.<sup>528</sup> It simply is not a ‘responsibility sharing’ mechanism, but a mere ‘responsibility assigning’ mechanism, or rather, an ineffective ‘responsibility assigning’ mechanism.<sup>529</sup> From the asylum seekers’ perspective, the judicial decisions of the ECtHR have highlighted that the Dublin system violates their fundamental rights, as set out in the previous chapter. Since the Dublin III Regulation failed to fully address this issue, it remains to be seen how the Member States will comply with their obligations under the ECHR when applying the Dublin rules, especially in the light of the *Tarakhel* case of 2014 which underlined the need to take individual circumstances into consideration.

Overall it is clear that the Dublin system does not effectively avoid migratory secondary movements and remains unfair for both asylum seekers and Member States. Moreover it only partially addresses the issue of Member States which are too unsafe to receive Dublin transfers. In the light of the foregoing, it seems at least inappropriate to call the Dublin system ‘the cornerstone of the CEAS’.<sup>530</sup> Therefore, the discussions on solidarity in asylum are now dominated by the question if the Dublin system requires some kind of compensatory ‘sharing’

---

<sup>527</sup> Guild Elspeth, Cathryn Costello, Madeline Garlick, Violeta Moreno-Lax, Minos Mouzourakis, ‘New Approaches, Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’ (*European Parliament, Study for the LIBE Committee PE509.989 / 2014*), 20

<sup>528</sup> In the Stockholm Programme of 2009 the Council called for “effective solidarity with the Member States facing particular pressures”, see: The Stockholm Programme (2009), 32; Dublin III Regulation, recital 7; Council of the European Union, ‘Council Conclusions on a Common Framework for Genuine and Practical Solidarity towards Member States Facing Particular Pressures on their Asylum Systems, including through Mixed Migration Flows’ (8 March 2012); European Council, ‘Conclusions of the European Council Meeting on 26 and 27 June 2014’ (EUCO 79/14, 27 June 2014), §7; European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration’ (COM(2015) 240 final), 2

<sup>529</sup> Vanheule et. al., ‘The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration’ (*European Parliament Study, Directorate General for Internal Policies PE 453.167 / 2011*), 19

<sup>530</sup> See also: Vanheule et. al., ‘The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration’ (*European Parliament Study, Directorate General for Internal Policies PE 453.167 / 2011*), 94; Guild Elspeth, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 8

mechanism, or should be totally overhauled, with an alternative system replacing it.<sup>531</sup> The next subchapter will give an overview of the suggestions made in this regard.

#### **4. 4. PROPOSALS FOR REFORM**

Recently a number of reports have been published, addressing the need to change the existing Dublin system. The proposals range from a series of additional measures to real alternatives based on very different principles. Here, three measures shall be outlined which might mitigate the detrimental effects of the Dublin system. Subsequently, two alternative approaches shall be considered.

##### **4. 4. 1. Addressing the problems associated with the Dublin system**

As long as the Dublin system is not fundamentally changed, Member States are recommended to make more use of the discretionary clauses to prevent the detrimental effects the Dublin III Regulation can have on asylum applicants. Member States should in particular make use of the sovereignty clause when a transfer might violate the fundamental rights of asylum seekers. The humanitarian clause on the other hand, should be interpreted in a broad way, enabling Member States to bring or keep together families. Besides a more flexible application of the Dublin III Regulation, additional measures have been proposed to address problems related to the Dublin system. The ongoing discrepancies between Member States' reception conditions and asylum systems remain reality, despite the efforts of the EU to increase harmonisation in the field of asylum. Therefore, the Dublin system has been compared with an 'asylum lottery', since the chances to be granted asylum vary from Member State to Member State. On the other hand, the system does not succeed in sharing responsibility among Member States in a fair way. Without changing the Dublin system, some measures might however reduce the detrimental effects of the system. In this regard three proposals which are currently discussed at the EU level shall be briefly outlined. Two of them, joint processing and free movement, focus on the effects for refugees, while the last one, financial support, focuses on the consequences for Member States.

---

<sup>531</sup> See e.g.: Dirk Vanheule et. al. 'The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration' (*European Parliament Study, Directorate General for Internal Policies* PE 453.167 / 2011), 94; Guild et. al., 'Enhancing the Common European Asylum System and Alternatives to Dublin' (*European Parliament, Study for the LIBE Committee* PE 519.234 / 2015); Minos Mouzourakis, "We Need to Talk about Dublin – Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union" (December 2014) Refugee Studies Centre Working Paper No. 105

## *Joint Processing*

One of the proposals to address the ongoing discrepancies in asylum procedures among the Member States is to pull the decisions on asylum claims to the EU level. This would imply that asylum claims are ‘jointly processed’ by an EU Agency, instead of separately by the competent authorities of the Member States. By ensuring a Europe-wide uniform asylum procedure, this could potentially leapfrog the slow process of harmonisation.<sup>532</sup> Moreover, it would support Member States which are unable to respond effectively to large numbers of applicants.<sup>533</sup> Different concrete proposals have been made in this direction.<sup>534</sup> Some of them suggest to give the Agency not only competence to process asylum applications, but also to determine responsibilities across the EU.<sup>535</sup> After carrying out a feasibility study on joint processing within the EU,<sup>536</sup> the Commission supported the idea as a possibility for the coming years to enhance solidarity in the field of asylum.<sup>537</sup> However, no concrete steps have been undertaken to set up such an Agency, or allocate these responsibilities to the EASO.<sup>538</sup> The loss of over 2.000 lives in the Mediterranean since the beginning of 2015,<sup>539</sup> has sparked new debates about the possibility of joint processing *outside* the EU.<sup>540</sup> The Commission planned another feasibility study to examine the possibility of external processing in order to reduce the number of people who make hazardous journeys in the hope of reaching Europe.<sup>541</sup>

---

<sup>532</sup> Richard Williams, ‘Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament’ (March 2015), 13

<sup>533</sup> Guild et. al., ‘New Approaches, Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’ (*European Parliament, Study for the LIBE Committee PE509.989 / 2014*), 107

<sup>534</sup> See: Four options are set out in: Helene Urth, Mathilde Heegaard Bausager, Hanna-Maija Kuhn, Joanne Van Selm, ‘Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for Joint Processing of Asylum Applications on the Territory of the EU’ (*Study for the European Commission, HOME/2011/ERFX/FW/04*, February 2013); Sergio Carrera, Daniel Gros and Elspeth Guild, ‘What Priorities for the New European Agenda on Migration?’ (April 2015) CEPS Commentary

<sup>535</sup> See: Carrera et. al., ‘What Priorities for the New European Agenda on Migration?’ (April 2015) CEPS Commentary, 3

<sup>536</sup> Urth et. al., ‘Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for Joint Processing of Asylum Applications on the Territory of the EU’ (*Study for the European Commission, HOME/2011/ERFX/FW/04*, February 2013)

<sup>537</sup> European Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an Open and Secure Europe: Making it Happen’ (SWD(2014) 154 final), 7-8

<sup>538</sup> Guild et. al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 59

<sup>539</sup> ‘Press Release: Deadly Milestone as Mediterranean Migrant Deaths Pass 2.000’ (IOM 4 August 2015) <<http://www.iom.int/news/deadly-milestone-mediterranean-migrant-deaths-pass-2000>> (accessed 12 August 2015)

<sup>540</sup> Jane McAdam, ‘Extraterritorial Processing in Europe – Is ‘Regional Protection’ the Answer, and if not, what is?’ (May 2015) Andrew & Renata Kaldor Centre for International Refugee Law, Policy Brief 1, 1

<sup>541</sup> European Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an Open and Secure Europe: Making it Happen’ (SWD(2014) 154 final), 8

### ***Freedom of movement for beneficiaries of international protection***

As mentioned before, people who are granted international protection do not immediately enjoy ‘freedom of movement’ within the EU. Only after five years they are granted the ‘long-term resident status’ which enables them under certain conditions to reside in other Member States.<sup>542</sup> Hence, they are ‘stuck’ in the country which was responsible for their claim for at least five years. In order to enable beneficiaries of international protection to move sooner after the positive outcome of their claim, there has been urged for mutual recognition of positive asylum decisions, since currently only negative decisions are mutually recognised.<sup>543</sup> This would be in line with Article 78(2)(a) TFEU which provides for a ‘uniform status valid throughout the Union’,<sup>544</sup> and might reduce the incentive for secondary migratory movements when asylum seekers first enter the EU.<sup>545</sup> This would moreover allow beneficiaries of international protection to reside in a country where they have extended family members, social networks and cultural or linguistic ties, which is advantageous for their integration.<sup>546</sup> This is especially relevant as long as the relocation mechanism in force, as the present Dublin system, does not take these factors into consideration. The EU Presidency trio Italy-Latvia-Luxembourg planned to make work of the mutual recognition of asylum decisions in their 2014-2015 programme.<sup>547</sup> However, no proposal has been made under the Italian and Latvian Presidency.<sup>548</sup> Neither is it mentioned in the current Luxembourg Programme, with the appropriate name ‘A Union for the Citizens’.<sup>549</sup>

---

<sup>542</sup> Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents [2003] OJ L 16/44, art 1; Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1

<sup>543</sup> On the basis of: Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98, recital 9

<sup>544</sup> TFEU, art 78(2)(a); ECRE, ‘Discussion Paper: Mutual Recognition of Positive Asylum Decisions and the Transfer of International Protection States within the EU’ (November 2014), 14

<sup>545</sup> Richard Williams, ‘Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament’ (March 2015), 15

<sup>546</sup> ECRE, ‘The Way Forward’ Europe’s role in the Global Refugee Protection System – Towards Fair and Efficient Asylum Systems in Europe’ (September 2005), 35

<sup>547</sup> Council of the European Union, ‘18 month programme of the Council (1 July 2014 – 31 December 2015)’ (11258/14 June 2014), 13

<sup>548</sup> Richard Williams, ‘Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament’ (March 2015), 14

<sup>549</sup> Presidency of the Council of the European Union, ‘A Union for the Citizens – Priorities of the Luxembourg Presidency 1 July – 31 December 2015’ (2015)

### *Financial support*

Another additional measure tries to address the unequal burden the Dublin system creates for Member States, by providing financial compensation to the countries who deal with most asylum claims. In 2000 the Council established the European Refugee Fund, which distributed resources among Member States depending on the number of persons being granted or applying for international protection.<sup>550</sup> It was criticised for not being truly solidary and redistributive, by not taking other factors into account.<sup>551</sup> Consequently, a number of proposals have been made based on different distribution keys, which allow to determine which Member States receive financial compensation as well as the amount of the compensation.<sup>552</sup> The German Stiftung Wissenschaft und Politik (SWP) created a model which allocates different weight to four different factors: Member States' share in the European GDP (40%), size of the population (40%), geographical area (10%) and unemployment rate (10%).<sup>553</sup> In 2014 the International Centre for Migration Policy Development (ICMPD) published an overview of models based on different distribution keys and the outcome of each model for the 28 EU Member States.<sup>554</sup> Without altering the Dublin system, financial support mechanisms allow to mitigate the unequal burdens experienced by Member States. A step in that direction is the EU Asylum, Migration and Integration Fund of 2014 which aims to support Member States in different asylum related matters including the enhancement of solidarity and responsibility-sharing between Member States.<sup>555</sup> While not specifically addressing the unequal burdens created by the Dublin system, it provides for 'emergency assistance' for Member States which experience 'heavy migratory pressure'.<sup>556</sup>

---

<sup>550</sup> Council Decision of 28 September 2000 Establishing a European Refugee Fund (2000/596/EC) [2000] OJ L 252/12, art 10(2); See Annex III, left column of the table

<sup>551</sup> Eiko Thielemann, 'Burden Sharing: The International Politics of Refugee Protection' (March 2006) The Center for Comparative Immigration Studies, University of California, Working Paper 134, 18-19

<sup>552</sup> Eiko Thielemann, Richard Williams, Christina Boswell, 'What System of Burden-Sharing Between Member States for the Reception of Asylum Seekers?' (*European Parliament, Study for the LIBE Committee PE 419.620 / 2010*), 119

<sup>553</sup> Steffen Agenendt, Marcus Engler and Jan Schneider, 'European Refugee Policy – Pathways for fairer Burden-Sharing' (November 2013) SWP Comments, 5

<sup>554</sup> Martin Wagner and Albert Kraler, 'An Effective Asylum Responsibility Sharing Mechanism' (October 2014) ICMPD Asylum Programme for Member States – Thematic Paper; See Annex III for an overview table

<sup>555</sup> Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 Establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, art 3, recital 36

<sup>556</sup> Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 Establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, art 2(k) and art 21

#### 4. 4. 2. Alternatives for the Dublin system

From the foregoing it is clear that the Dublin system raised serious concerns since its very existence, given that it fails to safeguard the fundamental rights of asylum seekers while being unable to provide for fair responsibility sharing among the Member States. Already in 2000 there has been urged for a fundamental overhaul of the system and also the Commission welcomed the reform of the Dublin Convention as a possibility to consider whether a fundamentally different approach would be required.<sup>557</sup> Nevertheless, the EU chose for a *status quo* in 2003 and again in 2013, with all the consequences this entails. In the meantime various stakeholders have suggested alternatives to the Dublin system. One of the models focuses on fairer burden-sharing among the Member States, while the other focuses on fairer outcomes for the asylum seekers.

##### *Relocation: towards a fair system for Member States*

One of the alternatives which has been suggested is the physical redistribution or relocation of asylum seekers. Similar to financial support, this model is based on a distribution key which allows to determine the quota for each Member State. Again, everything depends on the factors taken into account in this distribution key. For instance, SWP suggested that their model can either be applied for ‘sharing money’ in addition to the Dublin system, or ‘sharing people’ as an alternative to the system.<sup>558</sup> The ICMPD study of 2014 gives an overview of the different proposals for relocation models based on different distribution keys and examines the impact of five models on the EU with regard to responsibility for asylum applications. As such, the ICMPD overview (see in Annex III) is relevant to see how different models lead to different outcomes.<sup>559</sup> For example, 21% of the asylum applications in the EU during 2009-2013 were lodged in Germany. This is in line with the 20.5% Germany would be responsible for under a model solely based on the share in the European GDP, but is much more than the 15.8% they would be responsible for under the SWP model. Some Member States would be responsible for

---

<sup>557</sup> See: Commission Staff Working Paper SEC(2000) 522, §56; European Commission ‘Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National’ (2001) 447 final, OJ C 304 E/192, explanatory memorandum §2.2; UNHCR, ‘UNHCR’s Observations on the European Commission’s Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National’ (2002), §4

<sup>558</sup> Steffen Agenendt, Marcus Engler and Jan Schneider, ‘European Refugee Policy – Pathways for fairer Burden-Sharing’ (November 2013) SWP Comments, 6

<sup>559</sup> Martin Wagner and Albert Kraler, ‘An Effective Asylum Responsibility Sharing Mechanism’ (October 2014) ICMPD Asylum Programme for Member States – Thematic Paper, 28

a smaller proportion of applications under all five models presented by the ICMPD than they actually process (e.g. Austria, Belgium, France, Greece and Sweden), while this would be the other way round for others (e.g. Spain, the UK, Ireland, Italy and Portugal).<sup>560</sup> Hence, the distribution keys enable to bring transparency to individual Member States' responsibilities.<sup>561</sup>

In 2009 a Pilot Project for intra-EU Relocation from Malta (EUREMA) was launched in order to assist Malta in coping with the pressures of hosting a relatively large number of refugees.<sup>562</sup> The project focused on the relocation of *recognised* beneficiaries of international protection, instead of asylum seekers, which is more relevant in the light of the present discussion.

Very recently, the relocation of asylum seekers has become – at least partly – reality within the EU as an answer to the refugee crisis in the Mediterranean area. Since 2014, Italy and Greece are being confronted with an unprecedented inflow of migrants and asylum seekers. Only in the first half of 2015, more than 124.000 people have arrived in Greece by sea, which is a staggering 750% increase on the same period in 2014.<sup>563</sup> The UNHCR called the situation a 'humanitarian emergency' which requires a European response.<sup>564</sup> On 27 May 2015, the Commission proposed to relocate 24.000 and 16.000 asylum seekers from respectively Italy and Greece to the other Member States.<sup>565</sup> This measure is based on Article 78(3) TFEU which contains a specific legal basis to deal with emergency situations.<sup>566</sup> On the Council meeting of 25-26 June 2015 the Council agreed to relocate 40.000 people.<sup>567</sup>

The answer to the following questions is crucial to practically organise the relocation. First, how will it be decided *how many* people go to a certain Member State? Second, *who*, out of all the people arriving in Italy and Greece, shall be relocated? Third, how will be decided *who* goes to *which* Member State?

For the first question, how to decide Member States' respective quota, the Commission suggested to use a distribution key which is very similar to the SWP model: population size

---

<sup>560</sup> See Annex III for a complete overview

<sup>561</sup> Guild et. al., 'Enhancing the Common European Asylum System and Alternatives to Dublin' (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 61

<sup>562</sup> EASO, 'Fact Finding Report on Intra-EU Relocation Activities from Malta' (July 2012), 1

<sup>563</sup> This is the number of people reported by the UNHCR at the end of July 2015, see: UNHCR, 'Number of refugees and migrants arriving in Greece soars 750 per cent over 2014' (7 August 2015) <<http://www.unhcr.org/55c4d1fc2.html>> (accessed 14 August 2015)

<sup>564</sup>

<sup>565</sup> European Commission, 'Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (27 May 2015) (COM(2015) 286 final), 4-5

<sup>566</sup> European Commission, 'Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (27 May 2015) (COM(2015) 286 final), Annex I & II

<sup>567</sup> European Council, 'Outcome of the Council Meeting of 20 July 2015' (11097/15), 4; European Council, 'Conclusions of the European Council Meeting of 25 and 26 June 2015' (EUCO 22/15), §4

(40%), GDP (40%), unemployment rate (10%) and average number of asylum applications and resettled refugees in the last five years (10%).<sup>568</sup> The Council, however, chose not to adopt this distribution key, but worked with a voluntary scheme. The outcome of these voluntary pledges of the Member States created 32.256 places, 20% less than the initial goal.<sup>569</sup> Whereas some Member States created more places than they were entitled to do according to the distribution key, others created less or even none. The Council ensured that the remaining 7.744 people will be allocated by December 2015, but the EU Commissioner for Migration and Home Affairs Avramopoulos expressed his disappointment that this did not happen on the Council meeting of 20 July 2015.<sup>570</sup>

In order to answer the second question, *who* shall be relocated, the Commission looked which nationalities had an average EU recognition rate over 75% in 2014, implying that only Syrians and Eritreans shall be relocated.<sup>571</sup> The use of past recognition rates, with a high threshold, can be problematic since the situation in the country of origin may change quickly and by taking only nationalities into account it furthermore risks to overlook particular protection needs of specific groups.<sup>572</sup> The Council adopted the 75% threshold approach, but clarified that priority should be given to vulnerable applicants and that the best interest of the child should always prevail.<sup>573</sup>

When deciding *who* will go to *which* country, the third question, factors such as language skills, family, cultural and social ties which would facilitate integration will be taken into consideration.<sup>574</sup> Finally – when considering which asylum seekers should go to which Member State, truly relevant criteria from the applicant's perspective are taken into account.

However, relocation to a certain Member State does not necessarily imply that this Member State shall be responsible for the examination of the asylum application. The Council

---

<sup>568</sup> Under the SWP model the last factor is replaced by geographical area, see: European Commission, 'Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (27 May 2015) (COM(2015) 286 final), Annex I & II

<sup>569</sup> European Council, 'Outcome of the Council Meeting of 20 July 2015' (11097/15), 3; The Council also agreed to bring 22.504 displaced persons to Europe under the resettlement program, 10% more than they agreed on during the Council meeting of 25 and 26 June. 'Resettlement' is the transfer of refugees from the country in which they have sought refuge to another State that has agreed to admit them. (UNHCR, *Master Glossary of Terms* (Rev. 1 June 2006), 19)

<sup>570</sup> 'Remarks of Commissioner Avramopoulos after the Justice and Home Affairs Council on 20 July 2015' (20 July 2015) (SPEECH/15/5421) <[http://europa.eu/rapid/press-release\\_SPEECH-15-5421\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5421_en.htm)> (accessed 14 August 2015)

<sup>571</sup> European Commission, 'Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (27 May 2015) (COM(2015) 286 final), 10

<sup>572</sup> Guild et. al., 'Enhancing the Common European Asylum System and Alternatives to Dublin' (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 62-63

<sup>573</sup> European Council, 'Proposal for a Council Decision Establishing Provisional Measures in the area of International Protection for the Benefit of Italy and Greece' (24 July 2015) (1132/15), §24

<sup>574</sup> *Ibid*, §25

explicitly states that the relocation program is a ‘temporary derogation’ from the illegal entry criterion in the Dublin III Regulation, but does not dispense Member States from applying the other Dublin provisions.<sup>575</sup> Furthermore, the applicant’s consent shall not be required.<sup>576</sup> This is at least problematic in the view of EASO’s fact finding with regard to the EUROMA project that “relocation should always be a voluntary decision on both the side of the beneficiary and that of the receiving country”, given that the removal of the voluntary aspect might create integration difficulties, which in their turn could lead to secondary movements.<sup>577</sup> The Council further stipulates that “considering that an applicant does not have the right under EU law to choose the Member State responsible of his/her application, the applicant should have the right to an effective remedy against the relocation decision in line with [the Dublin III Regulation], *only in view of ensuring respect of his/her fundamental rights.*”<sup>578</sup> This restrictive interpretation of Article 27 of the Dublin III Regulation seems incorrect. The right to challenge a transfer decision is simply not subject to such a restriction. Moreover, the Council only points out the least protective option with regard to the suspensive effect, as if this would be the rule, thereby ignoring the other two options Member States have under Article 27(3).<sup>579</sup> Finally, whereas it is accepted that no Dublin transfers are carried out to Greece, it is underlined that Dublin transfers to Italy remain possible, for those who are not subject to the present relocation programme, since, unlike Greece, there are no systemic deficiencies in the Italian asylum procedure and reception conditions of asylum seekers<sup>580</sup> – a remarkable clarification which uneasily fits with the whole aim to address the emergency situation in Italy.

While it was hoped that the present relocation programme would be a first step away from the Dublin system, towards better allocation mechanisms,<sup>581</sup> it is obvious from the foregoing that it holds on to it in every possible way. Hence, attention for truly relevant links between an asylum seeker and a Member State, as mentioned by the Council for the first time, remains rather illusory as long as the Dublin rules prevail.

However, it should be recalled that the present relocation programme is limited in scope, both temporarily and territorially. Moreover, due to its voluntary nature it is dependent on

---

<sup>575</sup> Ibid, §§16-17

<sup>576</sup> Ibid, §16

<sup>577</sup> EASO, ‘Fact Finding Report on Intra-EU Relocation Activities from Malta’ (July 2012), 13

<sup>578</sup> European Council, ‘Proposal for a Council Decision Establishing Provisional Measures in the area of International Protection for the Benefit of Italy and Greece’ (24 July 2015) (1132/15), §§16&27 (emphasis added)

<sup>579</sup> See: p 83-84

<sup>580</sup> European Commission, ‘Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece’ (27 May 2015) (COM(2015) 286 final), 5

<sup>581</sup> Guild et. al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 61

Member States' good intentions without making use of an objective distribution key, despite the proposal of the Commission. It is imaginable that relocation programs with a more expanded scope, based on objective criteria to determine Member States' respective quota are capable to provide for fairer responsibility sharing. In this sense, a distribution key is useful to identify Member States' respective responsibilities. Yet, as can be observed in Annex III, every distribution key leads to a different outcome, turning the choice for the factors underlying the key into a sensitive political issue. Overall, relocation focuses on equal burden sharing among Member States, but for a responsibility allocation mechanism to be fair, not only for Member States, but also for asylum seekers, it should also answer the crucial question of how it will be decided which asylum seekers will go to which Member States.

### ***Free choice: towards a fair system for asylum seekers***

Under the Dublin system, the individual interests of asylum seekers are not taken into consideration, except with regard to close family ties. The evaluations of the Dublin II Regulation moreover indicated that Member States make little or no use of the sovereignty or the humanitarian clause, which might be applied in the advantage of the applicant. Since the establishment of the Dublin system in 1997, there has been repeatedly urged for other systems taking into account the applicant's free choice or more relevant connections between him or her and the responsible Member State, hence, systems based on a philosophy contrary to the one underlying the current Dublin system. This would be in line with the UNHCR Executive Committee's Conclusion No 15 which states that "the intentions of asylum seekers as regards the country in which he [or she] wishes to request asylum should *as far as possible* be taken into account".<sup>582</sup> In stark contrast with the Dublin system, which takes the wishes of the applicant *as little as possible* into account. Whereas many refugee and human rights stakeholders repeatedly expressed their support for responsibility allocating system based on the applicant's free choice, few have made concrete assessments of how this might be realised in practice.

An interesting model has been proposed in the Memorandum '*Allocation of refugees in the European Union: For an equitable, solidarity-based system of sharing responsibility*', published in March 2013 by a group of NGO's. They suggested to implement a system where the country of choice plays a greater role, by rescinding the criterion of irregular border crossing

---

<sup>582</sup> UNHCR EXCOM Conclusion No 15 (XXX) 'Refugees Without and Asylum Country' (1979), (h)(iii) (emphasis added)

in Article 13 of the Dublin III Regulation.<sup>583</sup> This would be a small operation with a huge impact, since it is by far the most frequently used criterion. For the period 2008-2012 for instance, 93% of the take charge request were based on entry reasons.<sup>584</sup> Consequently, unless other relevant criteria to define responsibility such as family relations, protection of unaccompanied minors or residence papers would apply, the first country in which the asylum application was lodged would be the responsible one in accordance with Article 3 of the Dublin III Regulation. In addition to this, it should be guaranteed that the application is lodged in the Member State where the asylum seeker voluntarily wishes to apply for asylum.<sup>585</sup> Thus, asylum seekers arriving irregularly in the EU, should be allowed to continue their journey under an orderly procedure, so that they can lodge the application in the Member State of choice.<sup>586</sup> While being more fair for asylum seekers, this model is likely to create unevenly distributed burdens among Member States. Therefore the Memorandum suggests that it is linked to a financial compensation fund, possibly the new Asylum, Migration and Integration Fund.<sup>587</sup>

It may be obvious that this model is most advantageous from a refugee protection perspective. To put it bluntly – in contrast with the Dublin system or systems based on quota, it does not treat asylum seekers as a ‘burden to be off-loaded’, but as humans who need protection, giving them a voice in where they will end up.<sup>588</sup> In the light of the existing limited freedom of movement for asylum seekers and refugees under EU law, such a model can only be encouraged. The responsible country is not merely a transit camp, but a permanent home.<sup>589</sup> In taking, next to family ties, also the presence of cultural and social networks and language skills into account, it is expected that the integration process of asylum seekers and refugees in their desired Member State shall run more smoothly.<sup>590</sup> The model would moreover provide for a more ‘human’ alternative, in omitting the need for coercive measures, as is now the case under

---

<sup>583</sup> German Bar Association, AWO Workers’ Welfare Association, Diakonia Germany, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS, ‘Memorandum: Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility’ (March 2013), 5

<sup>584</sup> Eurostat ‘Dublin statistics on countries responsible for asylum application’ Updated 16 June 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin\\_statistics\\_on\\_countries\\_responsible\\_for\\_asylum\\_application](http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application)> (accessed 6 August 2015)

<sup>585</sup> German Bar Association, AWO Workers’ Welfare Association, Diakonia Germany, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS, ‘Memorandum: Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility’ (March 2013), 5

<sup>586</sup> Ibid

<sup>587</sup> Ibid, 6

<sup>588</sup> See: Guild et. al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 60-61

<sup>589</sup> Blake (n 106), 107

<sup>590</sup> German Bar Association, AWO Workers’ Welfare Association, Diakonia Germany, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS, ‘Memorandum: Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility’ (March 2013), 25

the Dublin system.<sup>591</sup> Coercive measures would only be needed when asylum seekers whose application was rejected make a repeat application in another Member State.<sup>592</sup>

However, a system based on free choice has its repercussions on the Member States. As already mentioned, it is very likely that some Member States shall receive much more asylum seekers than others. Individuals will probably join family and friends and communities within Member States will grow, creating a snowball-effect.<sup>593</sup> This does not only create unequal burdens, but also the risk for a race to the bottom in reception conditions and procedural standards, in order to deter asylum seekers.<sup>594</sup> To address these issues, the financial compensation mechanism, suggested in the Memorandum, should on the one hand support Member States who experience disproportional high numbers of asylum seekers, while on the other hand avoid a race to reduce procedural and protection standards.<sup>595</sup>

An alternative based on free choice has been suggested as early as 2000. In the run up to the reform of the Dublin Convention, the Commission considered this a viable alternative which would “certainly provide the basis for a clear and workable system in relation to the objectives of speed and certainty, avoiding refugees in orbit, tackling multiple asylum applications and ensuring family unity”.<sup>596</sup> However, it was considered that more harmonisation was required in other asylum matters for such a system to work. At that time the CEAS was still in its infancy. Now, fifteen years later, the second phase of the CEAS is implemented, striving towards uniform standards and procedures. It may be obvious from the foregoing that this is far from achieved in practice. But it may above all be obvious that the Dublin system based on arbitrary, instead of relevant, connections between the individual and the Member State, while at the same time being blind for the different protection standards in Member States, might be more problematic in this light.

Recently, a number of publications expressed the need to fundamentally change the Dublin system.<sup>597</sup> Whereas there is no general consensus on how the alternative should look

---

<sup>591</sup> See: Guild et. al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 64-65

<sup>592</sup> Richard Williams, ‘Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament’ (March 2015), 21

<sup>593</sup> Richard Williams, ‘Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament’ (March 2015), 22

<sup>594</sup> Ibid

<sup>595</sup> German Bar Association, AWO Workers’ Welfare Association, Diakonia Germany, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS, ‘Memorandum: Allocation of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility’ (March 2013), 22

<sup>596</sup> Commission Staff Working Paper SEC(2000) 522, §59

<sup>597</sup> See e.g.: Guild et. al., ‘New Approaches, Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’ (*European Parliament, Study for the LIBE Committee PE509.989 / 2014*); ECRE, ‘Comments on Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an

like, the free choice model has increasingly been suggested as a viable alternative. In May 2015 the UN Special Rapporteur on the human rights of migrants François Crépeau stated that: “Reversing the present logic, asylum seekers should be able to register their asylum claim in the country of their choice and the European Union should build upon current initiatives and support the countries receiving asylum claims with proportionate and adequate financial and technical support”.<sup>598</sup>

#### 4.5. RECOMMENDATIONS FOR THE FUTURE

Almost celebrating its twentieth birthday, the Dublin system is still not ‘adding up’.<sup>599</sup> The small impact it has on secondary movements, due to its ongoing inefficiency, is in stark contrast with the huge impact it potentially has for certain Member States and the ‘unlucky few’ who are subjected to a transfer. It may be true that the Dublin III Regulation, unlike its predecessors, is not totally blind for the differences in protection standards among Member States, but neither did it see the light. The system remains unfair for both asylum seekers and certain Member States. Especially considering the vast increase of people arriving at Europe’s shores, the problems created by this ‘first entry’ system are expected to grow to larger dimensions. Additional measures such as the present relocation programme might bring temporary relief, but will not lead to genuine change as long as they cling to the present Dublin system. Neither can it be expected that another reform of the Regulation with additional patchwork shall truly address the problems associated with the Dublin system. Admittedly, pointing out the flaws of the current system is not the challenge, but finding a viable alternative is. Ideally, the Dublin system should be replaced by a responsibility allocating mechanism based on a philosophy

---

Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast)’ (March 2015); Minos Mouzourakis, “We Need to Talk about Dublin’ – Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union’ (December 2014) Refugee Studies Centre Working Paper No. 105; Susan Fratzke, ‘Not Adding Up: The Fading Promise of Europe’s Dublin System’ (*Migration Policy Institute Europe – EU Asylum: Towards 2020 Project*, March 2015); Richard Williams, ‘Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament’ (March 2015); Guild et. al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*)

<sup>598</sup> UN General Assembly, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’ (*Human Rights Council A/HRC/29/36* May 2015), §66

<sup>599</sup> With the words of Susan Fratzke: Susan Fratzke, ‘Not Adding Up: The Fading Promise of Europe’s Dublin System’ (*Migration Policy Institute Europe – EU Asylum: Towards 2020 Project*, March 2015)

which is fair towards both asylum seekers and Member States. However, exactly this is the challenge: to find an alternative which strikes a compromise between the interests at stake.

On the one hand there is the Member States' interest perspective and on the other hand there is the refugee protection perspective. Both lead to somehow contradictory approaches: whereas the relocation system, based on a distribution key, is the most fair system from a Member State perspective, the free choice model is preferable from a refugee protection perspective. Ideally, both could be combined, given that the number of asylum seekers who choose for a Member State corresponds with that Member States' quota. In that case each Member State would meet its commitments, while asylum seekers can lodge their application in the country they want. However, such a match is simply utopian. Therefore, choices need to be made. Yet, the situation is neither black or white, so there should be strived for a compromise at the same time.

Given the interests at stake, it should be considered that the protection of asylum seekers should be a primary consideration, which comes before the equal distribution of responsibilities among Member States. With the words of the ECtHR: "asylum seekers belong to a particularly underprivileged and vulnerable population group in need of special protection".<sup>600</sup> Every discussion concerning responsibility for asylum applications should take this as a starting point. In this view, it is recommended to replace the Dublin system with a system which takes into account the free choice of the asylum seeker. Actually, as the model outlined before suggested, this should not necessarily result in a total overhaul of the Dublin system, since it would be sufficient to omit the irregular entry criterion in Article 13 of the Dublin III Regulation. Automatically, the first country where the asylum application was lodged, which is now considered last, shall in that case rank higher, after family reunification, the best interest of the unaccompanied minor or the legal residence in or entry to the EU territory are considered. But, provided that there are sufficient guarantees for people to continue their journey to the country of choice, the need for a responsibility allocating mechanism would eventually vanish.

However, as pointed out before, the free choice model is not a logic choice from the Member States' perspective. There is after all a strong case to be made for distributing responsibility equally among them. Therefore, it should not be implemented without taking the financial compensation mechanism on board. It is essential for the system to work, that Member States who receive a high number of asylum seekers shall get financial support. Here, the distribution keys play an important role in measuring Member States' respective quota. These numbers should be used to assess how much more or less than expected a Member State is

---

<sup>600</sup> *M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09, §§235-264

doing, which in its turn will provide the basis to calculate how much financial support the Member State should get from or give to a fund.

Even accompanied by a financial support mechanism, the choice model can be considered hard to accept from some Member States' perspective. It might be already obvious which Member States will receive more asylum seekers than others. But, we should learn lessons from the past. It is simply not acceptable in some cases to send people seeking for international protection to certain Member States. There are differences, and we should not be blind for them. Neither should we see them as an excuse not to implement a choice system, as the Commission did in 2000, but rather as a reason to overhaul the Dublin system.

Moreover, as long as positive decisions of asylum applications are not mutually recognised among the Member States, and the freedom of movement of recognised refugees within the EU is limited for at least five years, every responsibility allocating system has a huge implication: it decides where a person who is granted protection will build up a new life. Despite this fact, the Dublin system has never considered the integration chances of a person in a certain Member State as a priority. Although, higher integration chances, due to the existence of relevant links between the asylum seeker and the host country, could be more advantageous for both parties. It is unacceptable that the 'penalisation' of Member States who allow aliens onto their territory – or rather, who do not succeed in keeping the gates of Fortress Europe closed – is given higher priority than the integration chances of the individuals concerned. Under the choice system the roles would be turned around: Member States taking up their responsibility for asylum seekers shall be rewarded and supported, while others should contribute to achieve this.

It may be clear that it concerns a politically sensitive issue, which cannot be achieved overnight. By the end of July 2016 the Commission has to report on the application of the Dublin III Regulation and propose the necessary amendments. This review offers the chance of a turning point, a chance that must be seized. Moreover, the challenges the European Union is confronted with nowadays, invigorate the call for change. On 14 August 2015 the EU Commissioner for Migration and Home Affairs Avramopoulos made another plea for enhancing solidarity and responsibility sharing within Europe, which finds itself struggling to deal with the high influxes of people seeking refuge, as the world is facing the worst refugee crisis since World War II.<sup>601</sup> But, while the present events underline the need for change, they definitely reveal how grim the public opinion is in the field of asylum, as the debates are often

---

<sup>601</sup> 'Speech of EU Commissioner Avramopoulos: "A European Response to Migration: Showing Solidarity and Sharing Responsibility"' (14 August 2015) (SPEECH/15/5498) <[http://europa.eu/rapid/press-release\\_SPEECH-15-5498\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5498_en.htm)> (accessed 16 August 2015)

dominated by arguments of self-interest. However, as mentioned before, the interest of people in need of international protection should be the primary consideration. It can therefore not be accepted that the European Union and its Member States turn their back on asylum seekers. This requires a comprehensive approach where both the European Union and the Member States take up their responsibility while enhancing protection standards and access to asylum procedures.

As long as the Dublin system remains in place, it is recommended that Member States apply it in a flexible way, by making more use of the sovereignty and humanitarian clause and giving the best interest of the child primary consideration. Member States should especially ensure that they respect their obligations under the ECHR and the Charter by not transferring applicants to a Member State where they could be exposed to fundamental rights violations. This requires an assessment of the general situation in the Member State with regard to reception conditions and access to the asylum procedure, while at the same time taking the individual circumstances of the applicant concerned into consideration.

Besides a more ‘humane’ application of the Dublin III Regulation, additional measures should be implemented to mitigate the detrimental effects it causes. Most important in this respect is to introduce the mutual recognition of positive asylum decisions, which would open up free movement rights, allowing beneficiaries of international protection to join family and friends or accept job offers that maximise opportunities for integration.<sup>602</sup> This would however not alleviate the ‘asylum lottery’ effect the Dublin system has, as it would not change the situation up to the point where the asylum seeker is granted protection. Therefore the implementation of the CEAS should remain priority, to ensure that Member States provide for reception conditions which guarantee a dignified standard of living for asylum seekers and for *de facto* access to a fair and efficient asylum procedure. Financial compensation measures should support Member States who are responsible for a disproportional number of asylum applications. In pressing emergency situations, as is now the case in Greece and Italy, it should be ensured that Dublin transfers are temporarily suspended (this is already the case for Greece, but not for Italy). Moreover, the EU should raise the number and categories of people who can be relocated to other Member States. In order for relocation programs to take a step away from Dublin, the consent of the asylum seeker should be required and more attention should be paid to relevant links between him or her and the host country, enhancing the chances of integration.

---

<sup>602</sup> Guild et. al., ‘Enhancing the Common European Asylum System and Alternatives to Dublin’ (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*), 11

## CONCLUSION

As early as 2000 it has been recommended to replace the Dublin Convention with a system based on the choice of the asylum applicant. The Commission took this proposal into consideration, while drafting the Dublin II Regulation, but decided to maintain the same general principles. The argument was that a system based on the choice of the applicant requires harmonisation in asylum procedures, which was not yet achieved. But does a system primarily based on choice require a higher level of harmonisation than a system primarily based on entry and residence? The Commission did not provide any arguments to support this claim, and neither do there seem to be any. It simply ignored that the Dublin system was based on a presumption of safety, which requires a certain degree of harmonisation. Not surprisingly, at that time, where the primary consideration was to avoid secondary migratory flows, *caused by* the differences in the Member States' asylum systems. This reveals the paradox at the heart of the Dublin system: created to reduce the effects of divergent levels of protection in the Member States, while presuming a certain level of protection in all Member States. Ironically, in the following years, when mutual trust got a supposedly stronger basis with the establishment of the CEAS, the awareness raised that that trust is based on a flawed presumption. The alarming situation for asylum seekers in Greece led to the complete recognition thereof in 2011 by both the ECtHR and the CJEU. The so-called cornerstone of the CEAS seemed to have lost its own cornerstone. More cases followed with regard to other countries, when it became obvious that Greece was not the only bad pupil in the Dublin class. This example of judicial activism, where the ECtHR took the lead in every aspect, was the ultimate confirmation of the need to fundamentally change the Dublin system. However, even the suspension mechanism proposed by the Commission in 2008 seemed too much of a change for the Council.

Thus, in 2013, sixteen years after the Dublin system started operating, the same core principles were once again reaffirmed in the new Dublin III Regulation. A compromise was found in retaining the general principles while introducing a number of additional safeguards and a reference to the most restrictive interpretation of the Member States' obligations to respect fundamental rights: the one of the CJEU in *N.S./M.E.*. The EU proved itself to be a master in patchwork.

The call for fundamental change has been a long, but unanswered one. In the light of the present refugee crisis and the challenges this creates for the European Union, the problems associated with the Dublin system will probably take larger dimensions. Continuing with a system which allocates responsibility to Member States as a penalty for not keeping Europe's

gates closed is simply unacceptable, neither are the consequences this has for asylum seekers. In order to stop the present asylum lottery with real risks for asylum seekers fundamental rights, the Dublin systems should ideally be replaced with a system which takes into account the intentions and preferences of the individuals it is all about, while ensuring that Member States who provide them protection, are supported. In such a system, not the Member States who let people in to the EU should be penalised, but those who do not provide for a protective environment for asylum seekers, contrary to their duties under the CEAS. Not by making them responsible for additional asylum applications, but by letting them pay to the fund which supports Member States in taking up their duties. The debate should not be dominated by the self-interest European Union and its Member States, but by how we can achieve in protecting the asylum seekers arriving in Europe. It may be hoped that the Commission seizes the chance for change, when it presents its evaluation and proposals in July 2016.

## ANNEX I: OVERVIEW OF RESPONSIBILITY CRITERIA

		<b>Dublin Convention (1997)</b>	<b>Dublin II Regulation (2003)</b>	<b>Dublin III Regulation (2013)</b>
Unaccompanied minors		–	Art 6	Art 8
Family Members		Art 4	Art 7, 8, 14	Art 9, 10, 11
Residence	Residence Permit	Art 5(1)	Art 9(1)	Art 12(1)
	Visa	Art 5(2)	Art 9(2)	Art 12(2)
Entry	Illegal	Art 6	Art 10	Art 13
	Legal	Art 7	Art 11	Art 14
First Member State where application lodged		Art 8	Art 13	Art 3(2)

## ANNEX II: OVERVIEW OF PROCEDURAL TIME LIMITS

		<b>Dublin Convention (1997)</b>	<b>Dublin II Regulation (2003)</b>	<b>Dublin III Regulation (2013)</b>
Request	Take charge	6 m  (Art 11(1))	3 m  (Art 17(1))	3 m  or 2 m (Eurodac-hit)  (Art 21(1))
	Take back	–	–	3 m  or 2 m (Eurodac-hit)  (Art 23(2) and 24(2))
Answer	Take charge	1 m  or 3 m  (Art 4 Dec1/97)	2 m  (Art 18(1))	2 m  (Art 22(1))
	Take back	8 d  or 1 m  (Art 13(1)(b)) (Art 5 Dec1/97)	1 m  (Art 20(1)(b))	1 m  or 2 w (Eurodac-hit)  (Art 25(1)-(2))
Transfer		1 m  (Art 11(5) & Art 13(1)(b))	6 m  or 1 y or 18 m  (Art 19(3)-(4) & Art 20(1)-(2))	6 m  or 1 y or 18 m  (Art 29(1)-(2))

y: year  
m: month  
d: day

Dec 1/97 : Decision No 1/97 of 9 September 1997 of the Committee Set up by Article 18 of the Dublin Convention of 15 June 1990, Concerning Provisions for the Implementation of the Convention [1997] OJ L 281/01

### ANNEX III: ICMPD COMPARISON TABLE OF DIFFERENT DISTRIBUTION MODELS

	SWP model	German Proposal 1994	German model	Austrian model	% of EU GDP	Asylum applications in % (2009-2013)	ERF quota
Austria	2,45%	1,96%	2,10%	1,66%	2,35%	4,74%	5,65%
Belgium	2,46%	1,92%	2,70%	2,17%	2,90%	8,15%	4,39%
Bulgaria	1,27%	1,41%	0,70%	1,46%	0,30%	0,70%	0,82%
Croatia	0,94%	0,82%	0,50%	0,85%	0,35%	0,22%	-
Cyprus	0,55%	0,17%	0,10%	0,17%	0,14%	0,67%	2,01%
Czech R.	1,94%	1,68%	1,50%	2,08%	1,19%	0,26%	1,24%
Denmark	1,74%	1,32%	1,60%	1,10%	1,90%	1,62%	-
Estonia	0,50%	0,47%	0,20%	0,26%	0,13%	0,02%	0,59%
Finland	2,14%	3,37%	1,30%	1,07%	1,47%	1,16%	2,59%
France	13,11%	13,66%	14,70%	12,87%	15,77%	17,72%	11,73%
Germany	15,80%	14,89%	19,10%	16,22%	20,47%	21,08%	11,61%
Greece	2,09%	2,27%	1,70%	2,21%	1,66%	3,31%	4,33%
Hungary	1,60%	1,61%	1,20%	1,98%	0,77%	1,83%	1,22%
Ireland	1,28%	1,25%	1,10%	0,90%	1,29%	0,48%	2,04%
Italy	10,78%	10,29%	12,00%	11,75%	12,38%	6,96%	6,52%
Latvia	0,57%	0,67%	0,20%	0,41%	0,16%	0,05%	0,60%
Lithuania	0,72%	0,77%	0,40%	0,61%	0,24%	0,16%	0,67%
Luxemb.	0,76%	0,16%	0,30%	0,10%	0,33%	0,41%	0,60%
Malta	0,50%	0,05%	0,10%	0,08%	0,05%	0,54%	1,23%
Netherl.	3,98%	2,95%	4,20%	3,30%	4,71%	4,72%	4,57%
Poland	5,19%	5,81%	4,50%	7,60%	2,87%	3,11%	2,82%
Portugal	1,83%	1,83%	1,50%	2,09%	1,34%	0,09%	0,54%
Romania	3,06%	3,45%	2,10%	4,00%	1,03%	0,47%	0,80%
Slovakia	0,98%	0,90%	0,70%	1,07%	0,54%	0,19%	1,25%
Slovenia	0,74%	0,38%	0,30%	0,41%	0,28%	0,09%	0,72%
Spain	8,30%	9,60%	8,30%	9,23%	8,27%	1,01%	1,85%
Sweden	3,22%	4,96%	2,70%	1,86%	2,94%	11,44%	17,64%
UK	11,54%	10,69%	14,10%	12,48%	14,16%	8,82%	11,96%

<b>SWP model:</b> share in the EU's GDP (40%), population size (40%), geographical area (10%), unemployment rate (10%)
<b>German proposal 1994:</b> population size as a proportion of the EU (1/3), territory size as a proportion of the EU (1/3), GDP as a proportion of the EU (1/3)
<b>German model:</b> population size (1/3), tax revenue (2/3)
<b>Austrian model:</b> population size (100%)
<b>% of EU's GDP:</b> share in EU's GDP (100%)
<b>ERF</b> (European Refugee Fund): relative share in number of beneficiaries of international protection admitted in the past three years (30%), relative share in number of applicants for international protection in the past three years (70%)

**SOURCE:** Martin Wagner and Albert Kraler, 'An Effective Asylum Responsibility Sharing Mechanism' (October 2014) ICMPD Asylum Programme for Member States – Thematic Paper, 21-28

## NEDERLANDSTALIGE SAMENVATTING

In de jaren tachtig werden er plannen gemaakt om een Europese interne markt te creëren. Door het openen van de interne grenzen zou echter niet alleen de mobiliteit van Europese burgers toenemen, maar ook van asielzoekers en migranten. Men vreesde dat dit zou leiden tot ‘asielshoppen’, namelijk dat asielzoekers na een negatieve beslissing zouden verder reizen naar een ander land om daar opnieuw asiel aan te vragen. Anderzijds was het denkbaar dat asielzoekers ‘in orbit’ zouden blijven, zonder gehoor of bescherming te krijgen, doordat geen enkel land de verantwoordelijkheid opneemt om zijn of haar asielaanvraag te onderzoeken. Om aan deze problemen tegemoet te komen werden er regels vastgesteld om de verantwoordelijkheid tussen de lidstaten onderling te verdelen. Dit gebeurde voor het eerst in het Schengen Akkoord van 1985 dat het vrij verkeer van personen realiseerde in de Schengenzone. In 1990 werd tussen de toenmalige twaalf lidstaten van de Europese Gemeenschap de Dublin Conventie ondertekend, die in 1997 in werking trad. Verder bouwend op de regels vastgelegd in Schengen, bevatte de Conventie een lijst criteria aan de hand waarvan bepaald kon worden welke Europese lidstaat verantwoordelijk is voor het behandelen van een bepaalde asielaanvraag. In de eerste plaats wordt naar de aanwezigheid van familieleden in de Unie gekeken, daarna naar de lidstaat waarvan de persoon een verblijfsvergunning of visum heeft, vervolgens de lidstaat waar de persoon het Europese grondgebied illegaal of legaal binnengekomen is en tenslotte, als geen enkel criterium toepasselijk is, de lidstaat waar de persoon asiel heeft aangevraagd. Er zijn twee mogelijkheden voor de lidstaten om van voornoemde criteria af te wijken. Ten eerste kunnen ze om gelijk welke reden beslissen om zelf het asielverzoek te behandelen, op basis van de soevereiniteitsclausule. Ten tweede is er de humanitaire clausule die lidstaten toelaat om omwille van humanitaire redenen een asielverzoek te behandelen waarvoor ze niet verantwoordelijk zijn. Eens de verantwoordelijke lidstaat vastgesteld is zal een overname- of terugnameverzoek verstuurd worden, afhankelijk van het feit of de asielzoeker er eerder al asiel aanvroeg. Na aanvaarding van het verzoek wordt de asielzoeker aan de verantwoordelijke lidstaat overgedragen, alwaar zijn asielverzoek verder ten gronde zal onderzocht worden. Al snel nadat de Dublin Conventie in werking trad, bleek dat zijn impact slechts gering was door de inefficiëntie van het systeem.

In 2003 werd de Conventie vervangen door de Dublin II Verordening. Samen met één andere Verordening en vier Richtlijnen kaderde dit in de creatie van een Gemeenschappelijk Europees Asielbeleid. De Europese Unie had in de jaren daarvoor immers bevoegdheden verworven over asiel aangelegenheden. De Dublin II Regulatie was gebaseerd op dezelfde

filosofie als zijn voorganger: de lidstaat die de grootste rol speelde in het verblijf op of de toegang tot het Europese grondgebied van de asielzoeker, zal zijn verantwoordelijkheid moeten opnemen, met de uitzondering om familieleden te herenigen. De keuze van de asielzoeker werd slechts in laatste instantie in acht genomen. Het systeem steunde op wederzijds vertrouwen tussen de lidstaten, aangezien zij allen als ‘veilige landen’ kunnen beschouwd worden voor asielzoekers. Echter, in de praktijk waren er opvallende verschillen in opvangvoorzieningen voor asielzoekers, alsook in toegang tot en kwaliteit van de asielprocedure, tussen de lidstaten onderling. Het Dublin systeem werd daardoor vergeleken met een ‘loterij’, waar de kansen van asielzoekers om asiel te krijgen grotendeels afhankelijk waren van de reisroute die ze genomen hadden. Anderzijds creëerde het een extra druk op de asielsystemen van de lidstaten aan de buitengrenzen van de Europese Unie.

De kritiek op de Dublin II Verordening nam toe toen duidelijk werd dat de overdracht van asielzoekers in bepaalde gevallen tot onverantwoorde situaties leidde. Dit werd bevestigd door het Europees Hof voor de Rechten van de Mens (EHRM) in 2011. In de zaak *M.S.S.* veroordeelde het EHRM zowel Griekenland – voor de mensenonterende situatie waarin de asielzoeker er leefde – als België – doordat zij de asielzoeker naar Griekenland hadden gestuurd terwijl ze *wisten of hadden moeten weten* dat dit de fundamentele rechten van de asielzoeker zou kunnen schenden. Deze zaak bracht het hele Dublin systeem aan het wankelen, aangezien het één van de basisprincipes onderuithaalde: niet alle lidstaten kunnen zonder meer als veilig beschouwd worden. Enkele maanden later volgde een gelijkaardige uitspraak van het Hof van Justitie van de Europese Unie (HvJEU) in de zaak *N.S./M.E.*. Het betrof eveneens een Dublin-overdracht naar Griekenland. Het HvJEU volgde de uitspraak van het EHRM in *M.S.S.* grotendeels, maar paste een ietwat strenger criterium toe. Het Hof stelde dat overdracht onder de Dublin-regels verboden is wanneer er *fundamentele tekortkomingen* zijn in de asielprocedure en de opvangvoorzieningen in de verantwoordelijke lidstaat, die een reëel risico creëren dat de fundamentele rechten van de asielzoeker geschonden zouden worden na overdracht. Dit lijkt erop te wijzen dat de fundamentele tekortkomingen een *conditio sine qua non* zijn voor het HvJEU om een Dublin-overdracht te verbieden. Het EHRM, daarentegen, benadrukte in de zaak *Tarakhel* van 2014 de nood om niet enkel de algemene situatie in de verantwoordelijke lidstaat in acht te nemen, maar tevens de individuele omstandigheden van de asielzoeker die zou overgedragen worden.

In 2013 werd de Dublin II Verordening vervangen door de Dublin III Verordening die in werking trad op 1 januari 2014. Opnieuw is het algemene principe behouden dat het land dat de grootste rol speelde in het verblijf op of toegang tot de Unie van de asielzoeker,

verantwoordelijk zal zijn voor het behandelen van zijn of haar aanvraag, met de uitzondering om familieleden te herenigen. De Dublin III Verordening voert echter enkele belangrijke innovaties in voor asielzoekers onderhevig aan de Dublin regels. Zo zijn er een aantal nieuwe procedurele waarborgen voor asielzoekers, zoals een persoonlijk interview, het recht om beroep aan te tekenen met een minimum schorsende werking tegen een overdracht-beslissing, het recht op juridische bijstand en striktere regels omtrent het gebruik van detentiemaatregelen. De nieuwe Verordening bevat verder ook extra waarborgen voor (al dan niet begeleide) minderjarigen en kwetsbare personen. Het voorstel van de Europese Commissie om een mechanisme in te voeren dat overdrachten tijdelijk opschort naar bepaalde lidstaten werd echter niet overgenomen. Over heel de lijn genomen blijft het wederzijdse vertrouwen blijkbaar groot.

Hoewel de extra waarborgen zeker aangemoedigd kunnen worden, valt het te betwijfelen of deze voldoende zijn om het systeem ‘humaan’ te maken. Het is nog wachten op het rapport van de Commissie waarin de Dublin III Verordening zal geëvalueerd worden, vooropgesteld voor juli 2016. Het is echter nu al duidelijk dat het Dublin systeem nog steeds kampt met inefficiëntie waardoor de impact gering is vergeleken met het totaal aantal asielaanvragen op jaarbasis. Niettemin, de impact die het heeft op de personen die wel overgedragen worden naar een andere lidstaat is enorm. Ten eerste zijn er nog steeds aanzienlijke verschillen tussen de asielprocedures in lidstaten, waardoor het ‘loterij’ effect stand houdt. Bovendien hebben erkende vluchtelingen slechts beperkte mogelijkheden om te verblijven in andere lidstaten dan de lidstaat waar ze asiel kregen. Het Dublin systeem houdt geen rekening met relevante linken tussen de asielzoeker in kwestie en de verantwoordelijke lidstaat, zoals de aanwezigheid van verdere familieleden en sociale en culturele netwerken, kennis van de taal of job mogelijkheden. Juist deze factoren zijn relevant om de goede integratie te garanderen, wat in het voordeel is van zowel de asielzoeker als de verantwoordelijke lidstaat.

Verschillende belangengroepen hebben meermaals gepleit om het Dublin systeem te veranderen. In zijn huidige vorm is het oneerlijk voor zowel asielzoekers als bepaalde lidstaten. Een valabel alternatief zou een systeem kunnen zijn waarbij werkelijk rekening wordt gehouden met de keuze van de asielzoeker, zodat het land waarin asiel aangevraagd wordt, dit ook zal behandelen. Aangezien dit een ongelijke verdeling zou teweegbrengen tussen de lidstaten, moet dit systeem noodzakelijkerwijs gepaard gaan met een financieel compensatiefonds dat toelaat om lidstaten die proportioneel gezien meer asielverzoeken behandelen, financieel te steunen. Anderzijds kan dit fonds gespijsd worden door de bijdragen van lidstaten die proportioneel gezien minder doen dan redelijkerwijs van hen verwacht kan worden. Dit kan bepaald worden aan de hand van verdeelsleutels, zoals uiteengezet in Annex III.

## BIBLIOGRAPHY

### CASES

#### ECtHR

*A.A. v Greece* [2010] ECtHR 12186/08

*A.M.E. v the Netherlands* [2015] ECtHR (Dec.) 51428/10

*Abubeker v Austria and Italy* [2013] ECtHR (Dec.) 73874/11

*Adamov v Switzerland* [2011] ECtHR 3052/06

*Affaire S.J. c Belgique* [2014] ECtHR 70055/10

*Bosphorus Hava Yolları Turizm v Ticaret Anonim Şirketi v Ireland* [2005] ECtHR (Grand Chamber) 45036/98

*Boultif v Switzerland* [2001] ECtHR 54273/00

*Čonka v Belgium* [2002] ECtHR 51564/99

*Cruz Varas and others v Sweden* [1991] ECtHR 15576/89

*Daybetgova and Magomedova v Austria* [2013] ECtHR (Dec.) 6198/12

*Gebremedhin v France* [2007] ECtHR 25389/05

*Halimi v Austria and Italy* [2013] ECtHR (Dec.) 53852/11

*K.R.S. v UK* [2008] ECtHR (Dec.) 32733/08

*M.S.S. v Belgium and Greece* [2011] ECtHR (Grand Chamber) 30696/09

*Mamatkulov and Askarov v Turkey* [2005] ECtHR (Grand Chamber) 46827/99; 46951/99

*Maslov v Austria* [2008] ECtHR (Grand Chamber) 1638/03

*Mohammadi v Austria* [2014] ECtHR 71932/12

*Mohammed Hussein a.o. v The Netherlands and Italy* [2013] ECtHR (Dec.) 27725/10

*S.D. v Greece* [2009] ECtHR 53541/07

*Saadi v Italy* [2008] ECtHR (Grand Chamber) 37201/06

*Safaii v Austria* [2014] ECtHR 44689/09

*Salah Sheekh v The Netherlands* [2007] ECtHR 1948/04

*Sharifi v Austria* [2013] ECtHR 60104/08

*Soering v UK* [1998] ECHR 14038/88

*T.I. v UK* [2000] ECtHR (Dec.) 43844/98

*Tabesh v Greece* [2009] ECtHR 8256/07

*Tarakhel v Switzerland* [2014] ECtHR (Grand Chamber) 29217/12

*Vilvarajah and others v UK* [1991] ECtHR 13163/87; 13164/87; 13165/87; 13447/87; 13448/87

## **CJEU**

Case C-179/11 *Cimade and GISTI v Ministre de l'intérieur* [2012] ECLI:EU:C:2012:594

Case C-245/11 *K v Bundesasylamt* [2012] ECLI:EU:C:2012:685

Case C-26/62 *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963]

Case C-364/11, *Abed El Kareem El Kott and Others* [2012] ECLI:EU:C:2012:826

Case C-369/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:636

Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813

Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813

Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107

Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid* [2013] ECLI:EU:C:2013:740

Case C-528/11 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2013] ECLI:EU:C:2013:342

Case C-620/10 *Migrationsverket v N., V. and V. Kastrati* [2012] ECLI:EU:C:2012:265

Case C-648/11 *M.A. and others v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:367

Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri, Danijela Dordevic, Danjel Saciri, Sanela Saciri, Denis Saciri, OCMW van Diest* [2014] ECLI:EU:C:2014:103

Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011] ECR I-13905 / ECLI:EU:C:2011:865

## **CJEU Case Opinions**

C-493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2011], Opinion of AG Trstenjak

Case C-369/11 *Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v Ciprian Vasile Radu* [2013], Opinion of AG Sharpston

Case C-648/11 *M.A. and others v Secretary of State for the Home Department* [2013] Opinion of AG Cruz Villalón

Cases C-411/10 *N.S. v Secretary of State for the Home Department* [2011], Opinion of AG Trstenjak

## **National Case**

Case *X en de Staatssecretaris van Veiligheid en Justitie* [2015] Rechtbank Den Haag AWB 14/12282, ECLI:NL:RBDHA:2015:1004, accessible at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:1004> (accessed 12 August 2015)

## **LEGISLATION**

Agreement between the European Community and the Kingdom of Denmark on the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in Denmark or Any Other Member State of the European Union and ‘Eurodac’ for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2006] OJ L 66/38

Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 (The Charter / CFREU)

Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 Laying Down Detailed Rules for the Application of Council Regulation (EC) No 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2014] OJ L 39/1

Commission Regulation (EC) No 1560/2003 of 2 September 2003 Laying Down Detailed Rules for the Application of Council Regulation (EC) No 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2003] OJ L 222/03

Consolidated Version of the Treaty Establishing the European Community [1997] OJ C 340/173 (Treaty of Amsterdam)

Consolidated Version of the Treaty on European Union [1992] OJ C 191/01 (Treaty of Maastricht)

Consolidated Version of the Treaty on European Union [2008] OJ C 115/13 (TEU)

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 (TFEU)

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities [1990] OJ C 254/01 (1997) (Dublin Convention)

Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders [1990] OJ L 239/19 (Schengen Convention)

Convention Relating to the Status of Refugees [adopted 28 July 1951, entered into force 22 April 1954] 189 UNTS 137 (Geneva Convention)

Council Decision of 28 September 2000 Establishing a European Refugee Fund (2000/596/EC) [2000] OJ L 252/12

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L 212/12 (Temporary Protection Directive 2001)

Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents [2003] OJ L 16/44 as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1

Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L 251/12 (Family Reunification Directive)

Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States [2003] OJ L 31/18 (Reception Directive 2003)

Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals of Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12 (Qualification Directive 2004)

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 (Asylum Procedures Directive 2005)

Council Regulation (EC) 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2000] OJ L 316/01 (Eurodac Regulation 2000)

Council Regulation (EC) No 407/2002 of 28 February 2002 Laying Down Certain Rules to Implement Regulation (EC) No 2725/2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2002] OJ L 62/01

Council Resolution of 30 November 1992 on a Harmonised Approach to Questions Concerning Host Third Countries [1992] WG I 1283

Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum [1992] WG I 1282 REV 1

Decision No 1/2000 of 31 October 2000 of the Committee Set up by Article 18 of the Dublin Convention Concerning the Transfer of Responsibility for Family Members in Accordance with Article 3(4) and Article 9 of that Convention [2000] OJ L 281/1 (Decision No 1/2000)

Decision No 1/97 of 9 September 1997 of the Committee Set up by Article 18 of the Dublin Convention of 15 June 1990, Concerning Provisions for the Implementation of the Convention [1997] OJ L 281/01 (Decision No 1/97)

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L 337/9 (Qualification Directive 2011)

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L 180/60 (Asylum Procedures Directive 2013)

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down Standards for the Reception of Applicants for International Protection (recast) [2013] OJ L 180/96 (Reception Conditions Directive 2013)

European Convention on Human Rights as Amended by Protocols Nos. 11 and 14 [opened for signature 4 November 1950, entered into force 3 September 1953] (ECHR)

European Union, 'Charter of Fundamental Rights of the European Union' [2012] OJ C 326/391

Organisation of African Unity, 'African Charter on Human and Peoples' Rights' [1982] CAB/LEG/67/3 rev 5, 21 ILM 58 (Banjul Charter)

Organisation of American States, 'American Convention on Human Rights' [1969] (Pact of San Jose)

Protocol (No.24) on Asylum For Nationals of Member States of the European Union as Annexed to the TEU [2010] OJ C 83/305

Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland [2008] OJ L 161/8

Protocol integrating the Schengen acquis into the framework of the European Union [1997] OJ C 340/96

Protocol on the Consequences of the Dublin Agreement Coming into Effect for Some Regulations of the Schengen Supplementary Agreement [1994] (Bonn Protocol)

Protocol Relating to the Status of Refugees [adopted 31 January 1967, entered into force 4 October 1967] 606 UNTS 267

Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Iceland or Norway [2006] OJ L 57/16

Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 Establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 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 and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 establishing a European Agency for the Operational Management of Large-scale IT Systems in the Area of Freedom, Security and Justice (recast) [2013] OJ L 180/1 (Eurodac Regulation 2013)

Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 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) [2013] OJ L 180/31 (Dublin III Regulation)

Rules of Court [1 June 2015] European Court of Human Rights / Registry of the Court

Single European Act [1987] OJ L 196/1

Treaty Establishing the European Atomic Energy Community [1957] 298 UNTS 167.

Treaty Establishing the European Coal and Steel Community [1951] 261 UNTS. 140

Treaty Establishing the European Economic Community [1957] 298 UNTS 140 (EEC Treaty)

Universal Declaration of Human Rights [adopted 10 December 1948] UNGA Res 217 A(III) (UDHR)

### **UNHCR EXCOM CONCLUSIONS**

UNHCR EXCOM Conclusion No 58 (XL) ‘Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989).

UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979)

UNHCR EXCOM Conclusion No 9 (XXVIII) ‘Family Reunion’ (1977)

UNHCR EXCOM Conclusion No 24 (XXXII) ‘Family Reunification’ (1981)

### **EU DOCUMENTS**

Commission of the European Communities, ‘Commission Staff Working Document Accompanying the Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System’ (SEC(2007)742)

Commission of the European Communities, ‘Communication From the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents’ COM(2002) 564 final

Commission of the European Communities, ‘Green Paper on the Future Common European Asylum System’ (COM(2007) 301 final)

Commission of the European Communities, ‘Policy Plan on Asylum. An Integrated Approach to Protection Across the EU’ (COM(2008) 360 final)

Commission of the European Communities, ‘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’ (COM(2008) 820 final)

Commission of the European Communities, ‘Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System’ (COM(2007) 299 final)

Commission of the European Communities, ‘Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States’ (2000) Commission Staff Working Paper (SEC(2000) 522)

Commission of the European Communities, 'Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum' (COM(2000) 755 final)

Commission of the European Communities, 'Towards common standards on asylum procedures' (1999) Commission Working Document SEC(1999) 271 final

Commission of the European Communities, 'White Paper on Completing the Internal Market' (1985) COM(85) 310

Council of the European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (2004) OJ C 53/1 (The Hague Programme)

Council of the European Union, 'Council Conclusions on a Common Framework for Genuine and Practical Solidarity towards Member States Facing Particular Pressures on their Asylum Systems, including through Mixed Migration Flows' (8 March 2012)

Council of the European Union, 'Draft Statement of the Council's Reasons' (2008/0234(COD))

Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State' (20 November 2014) 2014/0202(COD) / 15567/14

Council of the European Union, 'Tampere European Council 15 and 16 October 1999 – Presidency Conclusions' (1999) (Tampere Conclusions)

Council of the European Union, '18 month programme of the Council (1 July 2014 – 31 December 2015)' (11258/14 June 2014)

European Commission 'Factsheet: A Common European Asylum System' (2014)

European Commission 'Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2001) 447 final, OJ C 304 E/192

European Commission Staff Working Paper: Evaluation of the Dublin Convention SEC(2001) 756

European Commission, 'Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the Obligation to take Fingerprints' (SWD(2015) 150 final)

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration' (COM(2015) 240 final)

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Enhanced intra-EU solidarity in the Field of Asylum. An Agenda for Better Responsibility-Sharing and More Mutual Trust' (COM(2011) 835 final)

European Commission, ‘Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an Open and Secure Europe: Making it Happen’ (SWD(2014) 154 final)

European Commission, ‘Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece’ (27 May 2015) (COM(2015) 286 final)

European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (COM(2014) 382 final)

European Council, ‘Conclusions of the European Council Meeting of 25 and 26 June 2015’ (EUCO 22/15)

European Council, ‘Conclusions of the European Council Meeting on 26 and 27 June 2014’

European Council, ‘Outcome of the Council Meeting of 20 July 2015’ (11097/15) (EUCO 79/14, 27 June 2014)

European Council, ‘Proposal for a Council Decision Establishing Provisional Measures in the area of International Protection for the Benefit of Italy and Greece’ (24 July 2015) (1132/15)

European Council, ‘The Stockholm Programme (2009) – An Open and Secure Europe Serving and Protecting Citizens’ (2010) OJ C 115/01

European Parliament, ‘Library Briefing: Transfer of Asylum-Seekers and Fundamental Rights’ (30/11/2012)

European Parliament, ‘Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal’ (2009) Civil Liberties, Justice and Home Affairs PE 410.690

European Parliament, ‘Report on the evaluation of the Dublin System’ (*Committee on Civil Liberties, Justice and Home Affairs* A6-0287/2008)

European Parliament, ‘Working Paper: Asylum in the Eu Member States’ (January 2000)

Presidency of the Council of the European Union, ‘A Union for the Citizens – Priorities of the Luxembourg Presidency 1 July – 31 December 2015’ (2015)

## **BOOKS AND ARTICLES**

### **Books**

Balzacq Thierry and Sergio Carrera *Migration, Borders and Asylum. Trends and Vulnerabilities in EU Policy* (Centre for European Policy Studies 2005)

Boeles Pieter, Maarten den Heijer, Gerrie Lodder and Kees Wouters, *European Migration Law* (Second Edition, Intersentia 2014)

Council of Europe and European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Asylum, Borders and Immigration* (Publications Office of the European Union 2013)

De Bauche Laurence, *Vulnerability in European Law on Asylum: A Conceptualization Under Construction. Study on Reception Conditions for Asylum Seekers* (Bruylant 2012)

ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to Asylum Law* (ECRE Booklet 2014)

European Union Agency for Fundamental Rights, Council of Europe, *Handbook on European Law, relating to Asylum, Borders and Immigration* (Publications Office of the European Union 2013)

Goodwin-Gill S. and Jane McAdam, *The Refugee in International Law* (Third Edition, Oxford University Press 2007)

Grahl-Madsen Atle, *The Status of Refugees in International Law. Vol II Asylum, Entry and Sojourn* (AW Sijthoff 1972)

Hathaway James C and Michelle Foster, *The Law of Refugee Status* (Second Edition, Cambridge University Press 2014)

IOM, *Glossary on Migration* (IOM 2004)

Mole Nuala and Catherine Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe 2010)

Papagianni Georgia, *Institutional and Policy Dynamics of Eu Migration Law* (Martinus Nijhoff Publishers 2006)

Peers Steve, Elspeth Guild, Diego Acosta Arcarazo, Kees Groenendijk and Violeta Moreno-Lax (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition. Vol 2 EU Migration Law* (Martinus Nijhoff Publishers 2012)

Price Matthew E, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press 2009)

Renneman Marcelle, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing 2014)

UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (HCR/1P/4/ENG/REV3 December 2011)

UNHCR, *Master Glossary of Terms* (Rev. 1 June 2006)

Van Krieken Peter, *The Consolidated Asylum and Migration Acquis - the Eu Directives in an Expanded Europe* (Asser Press 2004)

Velluti Samantha, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer 2014)

## Chapter in edited book

Blake Nicholas, 'The Dublin Convention and Rights of Asylum Seekers in the European Union' in Elspeth Guild and Carol Harlow (eds) *Implementing Amsterdam. Immigration and Asylum Rights in Ec Law* (Hart Publishing 2001)

Bodelón Alonso Gloria, 'Problèmes Liés à la Mise en Oeuvre de la Convention de Dublin' in Cláudia Faria (ed) *The Dublin Convention on Asylum. Between Reality and Aspirations* (European Institute of Public Administration 2001)

Kloth Karsten, 'The Dublin Convention on Asylum: A General Presentation' in Claudia Faria (ed) *The Dublin Convention on Asylum: Between Reality and Aspirations* (European Institute of Public Administration 2001), 7-26.

Löper Friedrich, 'The Dublin Convention Provisions on Time Limits and the Exchange of Information: Which Are the Provisions and What Are the Problems?' in Cláudia Faria (ed) *The Dublin Convention on Asylum. Between Reality and Aspirations* (European Institute of Public Administration 2001)

Nicol Andrew, 'From Dublin Convention to Dublin Regulation: A Progressive Move?' in Anneliese Baldaccini, Elspeth Guild and Helen Toner (eds) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law Policy* (Hart Publishing 2007)

Niemann Arne, 'The Dynamics of Eu Migration Policy: From Maastricht to Lisbon' in Jeremy Richardson (ed) *Constructing a Policy-Making State? Policy Dynamics in the European Union* (Oxford University Press 2012)

Raitio Juha, 'A Few Remarks to Evaluate the Dublin System and the Asylum Acquis' in Flora Goudappel and Helena Raulus (eds) *"The Future of Asylum in the European Union": Problems, Proposals and Human Rights* (TMC Asser Press 2011)

Van der Klaauw, Johannes 'The Dublin Convention: A Difficult Start' in Monica den Boer (ed) *Schengen's Final Days?* (EIPA 1998)

## Journal article

Battjes Hemme, 'A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation' (2002) 4 EJML, 159-192

Boed Roman, 'The State of the Right of Asylum in International Law' (1994) 5(1) Duke J. Comp. & Int'l L., 1-33

Brouwer Evelien, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9(1) Utrecht Law Review, 135-147

Costello Cathryn, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) H.R.L. Rev., 287-339

Costello Cathryn, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' (2012) 2 A&MR, 83-92

Den Heijer Maarten, 'Life after *M.S.S.*: Unfinished Business' (2013) 31(3) Netherlands Quarterly of Human Rights, 236-240

Den Heijer Maarten, 'Joined Cases C-411 & 493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011' (2012) 49(5) C.M.L. Rev., 1735-1753

Feller Erika, 'Evolution of the International Refugee Protection Regime' (2001) 5 Wash.U.J.L.& Pol'y, 129-139

Giuffré Mariagiulia, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal' (2013) 32(3) Refugee Survey Quarterly, 79-111

Guild Elspeth, 'The Europeanisation of Europe's Asylum Policy' (2006) 18(3-4) IJRL, 630-651

Hathaway James C., 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33 Int'l & Comp LQ, 348-380

Holborn Louise W., 'The Legal Status of Political Refugees, 1920-1938' (Oct 1938) 32(4) AJIL, 680-703

Hoogenboom Thomas, 'Symposium: The Status of Non-Community Nationals in Community Law (1992), 3 EJIL, 36-52

Hurwitz Agnès, 'The 1990 Dublin Convention: A Comprehensive Assessment' (1999) 11 IJRL, 646-677

Lambert Hélène, 'Safe third country' in the European Union: An Evolving Concept in International Law and Implications for the UK' (2012) 26(4) J.I.A.N.L., 318-336

Mariana Gkliati, 'Blocking Asylum: The Status of Access to International Protection in Greece' (2013) 4 Int.Am. & Eur.Hum.Rts.J., 85-117

Marinho Clotilde and Matti Heinonen, 'Dublin after Schengen: Allocating Responsibility for Examining Asylum Applications in Practice' (1998) 3 EIPASCOPE, 1-12

Marx Reinhard, 'Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications' (2001) 3 EJML, 7-22

Moreno-Lax Violeta, 'Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*' (2012) 14 EJML, 1-31

Noll Gregor, 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70 Nordic J. Int'l L., 161-182

## **OTHER SOURCES**

### **Reports**

Amaral Philip, 'Protection Interrupted. The Dublin Regulation's Impact on Asylum Seekers' Protection' (*JRS Europe* June 2013)

Amnesty International, 'Greece: Frontier of Hope and Fear. Migrants and Refugees Pushed Back at Europe's Borders' (*AI Index: EUR 25/004/2014*),

Amnesty International, 'Greece: The End of the Road for Refugees, Asylum-Seekers and Migrants' (*AI Index: EUR 25/011/2012*)

Amnesty International, 'Suspension of Returns of Asylum-Seekers to Bulgaria Must Continue' (*AI Index: EUR 15/002/2014*)

Amnesty International, 'The Dublin II Trap. Transfers of Asylum-Seekers to Greece' (*AI Index: EUR 25/001/2010*)

Amnesty International, 'The Human Cost of Fortress Europe. Human Rights Violations Against Migrants and Refugees at Europe's Borders' (*AI Index: EUR 05/001/2014*)

Council of Europe, 'Readmission Agreements: A Mechanism for Returning Irregular Migrants' (*Doc 12168, Committee on Migration, Refugees and Population* 2010)

CPT, 'Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007' (*CPT/Inf (2008) 3*)

EASO, 'Fact Finding Report on Intra-EU Relocation Activities from Malta' (July 2012)

ECRE, 'The Way Forward' Europe's role in the Global Refugee Protection System – Towards Fair and Efficient Asylum Systems in Europe' (September 2005)

ECRE, 'Comments on Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 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)' (March 2015)

ECRE, 'Report on the Application of the Dublin II Regulation in Europe' (*ECRE & ELENA* 2006)

ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' (March 2008)

Fratzke Susan, 'Not Adding Up: The Fading Promise of Europe's Dublin System' (*Migration Policy Institute Europe – EU Asylum: Towards 2020 Project*, March 2015)

Global Detention Project, 'The Detention of Asylum Seekers in the Mediterranean Region' (2015)

Guild Elspeth, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin' (*European Parliament, Study for the LIBE Committee PE 519.234 / 2015*)

Guild Elspeth, Cathryn Costello, Madeline Garlick, Violeta Moreno-Lax, Minos Mouzourakis, 'New Approaches, Avenues and Means of Access to Asylum Procedures for

Persons Seeking International Protection’ (*European Parliament, Study for the LIBE Committee PE509.989 / 2014*)

LIBE Committee, ‘Report on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as Regards Determining the Member State Responsible for Examining the Application for International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (*European Parliament A8-0168/2015 / PE544.47v03-00 / 2015*)

Norwegian Organisation for Asylum Seekers, Norwegian Helsinki Committee and Greek Helsinki Monitor, ‘A Gamble with the Right to Asylum in Europe. Greek Asylum Policy and the Dublin II Regulation’ (2008)

Orchard Cynthia and Andrew Miller, ‘Protection in Europe for refugees from Syria’ (*Refugee Studies Centre – Forced Migration Policy Briefing 10, 2014*)

Pro-Asyl, ‘Pushed Back. Systematic Human Rights Violations Against Refugees in the Aegean Sea and the Greek-Turkish Land Border’ (2014)

The Dublin Transnational Project, ‘Dublin II Regulation: Lives on Hold - European Comparative Report’ (*European Comparative Report 2013*)

Thielemann Eiko, Richard Williams, Christina Boswell, ‘What System of Burden-Sharing Between Member States for the Reception of Asylum Seekers?’ (*European Parliament, Study for the LIBE Committee PE 419.620 / 2010*)

UN General Assembly, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’ (*Human Rights Council A/HRC/29/36 May 2015*)

UN General Assembly, ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Mission to Greece’ (*Human Rights Council A/HRC/23/46 2013*)

UNHCR, ‘Asylum Applications in Industrialized Countries: 1980-1999’ (*UNHCR 2001*)

UNHCR, ‘Greece as a Country of Asylum: UNHCR Observations on the Current Situation of Asylum in Greece’ (2014)

UNHCR, ‘Observations on Greece as a Country of Asylum’ (2009)

UNHCR, ‘Observations on the Current Situation of Asylum in Bulgaria’ (2014)

UNHCR, ‘Observations on the Current Situation of Asylum in Greece’ (2015)

UNHCR, ‘UNHCR Statistical Yearbook 2009’ (2010)

Urth Helene, Mathilde Heegaard Bausager, Hanna-Maija Kuhn, Joanne Van Selm, ‘Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for Joint Processing of Asylum Applications on the Territory of the EU’ (*Study for the European Commission, HOME/2011/ERFX/FW/04, February 2013*)

Vanheule Dirk, Jianne van Swelm and Christina Boswell, 'The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration' (*European Parliament, Study for the LIBE Committee* PE 453.167 / 2011)

### **Working Papers and other Papers**

Agenendt Steffen, Marcus Engler and Jan Schneider, 'European Refugee Policy – Pathways for fairer Burden-Sharing' (November 2013) SWP Comments

Asylum Information Database, 'The Legality of Detention of Asylum Seekers under the Dublin III Regulation' (June 2015) AIDA Legal Briefing No. 1

Carrera Sergio, Daniel Gros and Elspeth Guild, 'What Priorities for the New European Agenda on Migration?' (April 2015) CEPS Commentary

De Baere Geert, 'The Court of Justice of the EU as a European and International Asylum Court' (2013) Working Paper No. 118 EU and Global Governance – Leuven Centre for Global Governance Studies

ECRE, 'Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation' (April 2009)

ECRE, 'Discussion Paper: Mutual Recognition of Positive Asylum Decisions and the Transfer of International Protection States within the EU' (November 2014)

ECRE, 'Information Note on Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) (2013)

ECRE, 'Information note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down Standards for the Reception of Applicants for International Protection (recast)' (2015)

ECRE, 'Information note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down Standards for the Reception of Applicants for International Protection (recast)' (2015)

ECRE, 'Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status' (2006) IN1/10/2006/EXT/JJ, 23

ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention' (1997)

ECRE, 'Guarding the Standards – Shaping the Agenda. Analysis of the Treaty of Amsterdam and Present EU Policy on Migration, Asylum and Anti-Discrimination' (1999)

German Bar Association, AWO Workers' Welfare Association, Diakonia Germany, Pro Asyl, Paritätische Welfare Association, Neue Richtervereinigung, JRS, 'Memorandum: Allocation

of refugees in the EU: for an equitable, solidarity-based system of sharing responsibility' (March 2013)

Hatton Timothy J. and Jeffrey G. Williamson, 'Refugees, Asylum Seekers and Policy in Europe' (IZA Discussion Paper No 1230, Bonn July 2004)

Jones Chris, '11 Years of Eurodac' (January 2014) Statewatch Analysis

McAdam Jane, 'Extraterritorial Processing in Europe – Is 'Regional Protection' the Answer, and if not, what is?' (May 2015) Andrew & Renata Kaldor Centre for International Refugee Law, Policy Brief 1

Meijers Committee, 'Note on the Proposal of the European Commission of 26 June 2014 to amend Regulation (EU) 604/2013 (the Dublin III Regulation' (2 December 2014) Note to the Members of the LIBE Committee

Mouzourakis Minos, 'We Need to Talk about Dublin' – Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union' (December 2014) Refugee Studies Centre Working Paper No. 105

Parliamentary Assembly of the Council of Europe, 'Assessing the need for a comprehensive review of the Dublin Regulation and its implementation – Motion for a Resolution' (11 September 2014) Doc. 13592

Peers Steve, 'The Common European Asylum System: State-of-play Update' (2012) Statewatch Analysis

Peers Steve, 'The Revised 'Dublin' Rules on Responsibility for Asylum Seekers: The Council's failure to Fix a Broken System' (2012) Statewatch Analysis

Peers Steve, 'The Second Phase of the Common European Asylum System: A Brave New World – Or Lipstick on a Pig?' (2013) Statewatch Analysis

Thielemann Eiko, 'Burden Sharing: The International Politics of Refugee Protection' (March 2006) The Center for Comparative Immigration Studies, University of California, Working Paper 134

UNHCR 'The Dublin II Regulation. A UNHCR Discussion Paper' (2006)

UNHCR, 'An Efficient and Protective Eurodac' (2012)

UNHCR, 'Global Consultations on International Protection. Regional Meeting Budapest 6-7 June 2001' (2001) EC/GC/01/14

UNHCR, 'Implementation of the Dublin Convention: Some UNHCR Observations' (1998)

UNHCR, 'Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in Particular in the Context of Intended Transfers to Greece' (2010)

UNHCR, 'Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"' (15 April 2008)

UNHCR, 'Protecting the Best Interest of the Child in Dublin Procedures. UNHCR's Comments on the European Commission's Proposal for a Regulation (EU) No 604/201 as Regards Determining the Member State Responsible for Examining the Application for

International Protection of Unaccompanied minors with no family member, sibling or relative legally present in a Member State' (February 2015)

UNHCR, 'UNHCR's Observations on the European Commission's Proposal for a Council Regulation Establishing the Criteria for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National' (2002)

UNHCR, 'Updated Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in Particular in the Context of Intended Transfers to Greece' (2011)

Wagner Martin and Albert Kraler, 'An Effective Asylum Responsibility Sharing Mechanism' (October 2014) ICMPD Asylum Programme for Member States – Thematic Paper

Williams Richard, 'Beyond Dublin: A Discussion Paper for the Greens/EFA in the European Parliament' (March 2015), 13

### **Web pages**

– 'ECRE joins UNHCR in a Call for the Suspension of Dublin Transfers to Bulgaria' ECRE (8 January 2014) <<http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/555-ecre-joins-unhcr-in-calling-on-eu-member-states-to-stop-sending-asylum-seekers-to-bulgaria-under-the-dublin-regulation.html>> (accessed 30 July 2015)

– 'EMN Glossary & Thesaurus' European Commission - Migration and Home Affairs <[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary/index\\_a\\_en.htm#asylumshopping](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/glossary/index_a_en.htm#asylumshopping)> (accessed 10 May 2015)

– 'Eurodac System' Eur-Lex <[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33081\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33081_en.htm)> (accessed 16 April 2015)

– 'History of UNHCR' UNHCR <<http://www.unhcr.org/pages/49c3646cbc.html>> (accessed 28 July 2015)

– 'Right of Asylum in Europe: the "Dublin Regulation" – an Unfair System Both for Asylum Seekers and for States' Parliamentary Assembly of the Council of Europe (8 December 2010) <<http://assembly.coe.int/nw/xml/News/FeaturesManager-View-EN.asp?ID=962>> (accessed 30 July 2015)

– 'Temporary Protection' European Commission - Migration and Home Affairs <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/temporary-protection/index_en.htm)> (accessed 28 July 2015)

– 'The Direct Effect of European Law' Eur-Lex <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l14547>> (accessed 28 July 2015)

– 'The History of Ceas. From Schengen to Stockholm, a History of the Ceas' ECRE <<http://www.ecre.org/topics/areas-of-work/introduction/194.html>> (accessed 12 February 2015)

- ‘The Schengen Area and Cooperation’ Eur-Lex  
<[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133020\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm)> (accessed 14 April 2015)
- ‘UNHCR calls for temporary halt to Dublin transfers of asylum-seekers to Bulgaria’ UNHCR (3 January 2014) <<http://www.unhcr.org/52c691d59.html>> (accessed 30 July 2015)
- ‘UNHCR International Thesaurus of Refugee Terminology’ UNHCR  
<[http://www.refugeethesaurus.org/hms/refugee\\_obj.php?type=terms&id=40#a40](http://www.refugeethesaurus.org/hms/refugee_obj.php?type=terms&id=40#a40)> (accessed 10 May 2015)
- ‘2014/0202(COD)’ Parltrack <[http://parltrack.euwiki.org/dossier/2014/0202\(COD\)](http://parltrack.euwiki.org/dossier/2014/0202(COD))> (accessed 12 August 2015)

Eurostat, ‘Asylum Statistics’ Updated 21 May 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> (accessed 6 August 2015)

Eurostat, ‘Dublin statistics on countries responsible for asylum application’ Updated 16 June 2015 <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin\\_statistics\\_on\\_countries\\_responsible\\_for\\_asylum\\_application](http://ec.europa.eu/eurostat/statistics-explained/index.php/Dublin_statistics_on_countries_responsible_for_asylum_application)> (accessed 6 August 2015)

Eurostat, ‘Resettled persons’ Updated 2 March 2015  
<<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00195&plugin=1>> (accessed 13 August 2015)

Orchard Cynthia and Dawn Chatty, ‘High time for Europe to offer temporary protection to refugees from Syria?’ Open Democracy (2 October 2014)  
<<https://www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to>> (accessed 1 August 2015)

Schrover Marlou ‘History of International Migration’  
<<http://www.let.leidenuniv.nl/history/migration/index.html>> (accessed 12 November 2014)

## **Press Releases and Others**

- ‘Bulgaria to Complete Fence at Border with Turkey by End of Year’ *Sofia News Agency* (3 July 2015)  
<<http://www.novinite.com/articles/169640/Bulgaria+to+Complete+Fence+at+Border+with+Turkey+by+End+of+Year>> (accessed 12 August 2015)
- ‘Hungary Expects to Complete Serbia Border Fence by November: Lawmaker’ *Reuters* (24 July 2015) <<http://www.reuters.com/article/2015/07/24/us-europe-migrants-hungary-fence-idUSKCN0PY0VX20150724>> (accessed 12 August 2015)
- ‘Action brought on 31 March 2008 – Commission of the European Communities v Hellenic Republic (Case C-130/08)’ (2008) OJ C 128/25
- ‘Order of the President of the Court of 24 April 2009 – Commission of the European Communities v Hellenic Republic’ (2009) OJ C 180/36

‘Press Release: Deadly Milestone as Mediterranean Migrant Deaths Pass 2.000’ (IOM 4 August 2015) <<http://www.iom.int/news/deadly-milestone-mediterranean-migrant-deaths-pass-2000>> (accessed 12 August 2015)

‘Remarks of Commissioner Avramopoulos after the Justice and Home Affairs Council on 20 July 2015’ (20 July 2015) (SPEECH/15/5421) <[http://europa.eu/rapid/press-release\\_SPEECH-15-5421\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5421_en.htm)> (accessed 14 August 2015)

‘Speech of EU Commissioner Avramopoulos: “A European Response to Migration: Showing Solidarity and Sharing Responsibility”’ (14 August 2015) (SPEECH/15/5498) <[http://europa.eu/rapid/press-release\\_SPEECH-15-5498\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5498_en.htm)> (accessed 16 August 2015)

‘Statement by Cecilia Malmström, EU Commissioner for Home Affairs, following the preliminary ruling of the European Court of Justice on the transfer of asylum seekers under the EU Dublin Regulation’ (21 December 2011) MEMO/11/942

Amnesty International, ‘Public Statement: Greece: No Place for an Asylum-Seeker’ (27 February 2008) AI Index: EUR 25/002/2008

Council of the European Union, ‘Recast of the Dublin Regulation: enhancing the efficiency of the functioning of the current system’ (7 June 2013), Press Release 10526/1/13 REV 1

Court of Justice of the European Communities, ‘Press Release No 104/09’ (30 November 2009)

Dublin Transnational Project, ‘Press Release: Little to Celebrate on Dublin’s 10<sup>th</sup> Anniversary – New Research Shows that the System Continues to Violate the Rights of Refugees (18 February 2013)

European Court of Human Rights, ‘Factsheet: Expulsions and extraditions’ (July 2013)

European Data Protection Supervisor, ‘Eurodac: Erosion of Fundamental Rights Creeps Along’ (5 September 2012) Press Release EDPS/12/12

Grant Harriet and John Domokos, ‘Dublin Regulation leaves asylum seekers with their fingers burnt’ *The Guardian* (7 October 2011) <<http://www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers>> (accessed 10 August)

UNHCR, ‘New UNHCR Report warns against returning asylum-seekers to Greece’ (30 January 2015) Briefing Notes

UNHCR, ‘Note on Dublin Transfers to Hungary of People who have Transited Through Serbia’ (October 2012)

UNHCR, ‘Note on Dublin Transfers to Hungary of People who have Transited Through Serbia – Update’ (December 2012)

UNHCR, ‘Number of refugees and migrants arriving in Greece soars 750 per cent over 2014’ (7 August 2015) <<http://www.unhcr.org/55c4d1fc2.html>> (accessed 14 August 2015)