

Patchy law and return practices in Europe: On vulnerable persons' human rights in the context of the present and future Dublin Regulation



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List of Abbreviations

APD	Asylum Procedures Directive
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	UN Committee on the Elimination of Discrimination Against Women
CESCR	UN Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Commission	European Commission
COO	Country of origin
Council	Council of the European Union
CRC	Convention on the Rights of the Child
CRC Committee	UN Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DPr	Commission proposal for a recast Dublin Regulation
DR or Dublin II	Dublin Regulation
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	The European Court of Human Rights
EP	European Parliament
GC	Convention Relating to the Status of Refugees
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MS	Member State
MSs	Member States
NOAS	Norwegian Organization for Asylum Seekers

NOU	Official Norwegian Report
OHCHR	Office of the United Nation High Commissioner for Human Rights
QD	Qualification Directive
RCD	Reception Conditions Directive
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UDI	Norwegian Directorate of Immigration
UNE	Immigration Appeals Board
UNHCR	The UN High Commissioner for Human Rights
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

Nearly 280 000 individuals arrived in the EU in pursuit of a safe haven in 2011, in terms of registered pleas for international protection.¹ A legal framework governing the treatment of such persons and their claims for asylum has been established at EU level. This includes the Dublin Regulation (DR or Dublin II), an instrument with the purpose of defining what State is responsible for an asylum application, and thereby ensuring applicants access to asylum procedures, however only in one State. For what concerns efficiency, European States have a legitimate interest in preventing subsequent applications in multiple Member States (MSs)² from the same person. Concurrently, a Regulation with this objective must protect the dignity of the persons concerned, as codified in human rights law.

This study investigates what international and regional human rights stipulations are particularly relevant to Dublin procedures and vulnerable applicants. As will be elaborated below, among the Regulation's provisions, the discretionary Articles are the most applicable in relation to vulnerability. The research question is therefore specified as follows:

What human rights standards bear on the Dublin Regulation's discretionary clauses' applicability to vulnerable persons?

The reason for selecting this issue is above all that protection of applicants' rights has been a recurrent concern in relation to Dublin procedures. So also in proposals for a revised DR, whose ongoing negotiations are to be finalised by the end of 2012, meaning that the thematic is highly topical. While extant studies of the DR commonly address human rights perspectives, the present study assumes an exclusive human rights approach, with the aim of presenting a comprehensive review of relevant human rights law, from both international and regional sources. The research question is subject to

1 UNHCR (2012a) p. 20

2 "Member State(s)" in this text refers to the 27 EU members plus four States associated with the Dublin Regulation; Switzerland, Iceland, Liechtenstein and Norway.

the limitation of focusing on persons perceived to be particularly vulnerable, an approach emphasised by the European Commission (Commission) as central in the recast process of asylum instruments within the EU. The same can be said about human rights law, which installs particular safeguards for such groups. This will be seen in the analysis, which includes a discussion of the concept of vulnerability.

The study employs legal method to establish the relevant legal standards (*de lege lata*). The most applicable legal sources are esteemed to be human rights treaties on the global and regional levels which have been ratified by all EU States, and jurisprudence from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

Following the present introduction, the opening chapter discusses in what circumstances the Dublin system was created, and locates the Regulation in the context of related EU legislation. Next follows perspectives on why the research question has been framed to focus on vulnerable persons, and how this term can be conceptualised. Chapter 4 reviews what human rights standards are relevant to Dublin procedures and to three highlighted vulnerable groups: torture victims, pregnant women and unaccompanied minors. Subsequently follows a presentation of the main rules and exceptions to these in the DR. The extant provisions are examined in light of suggested changes in recasts proposed by the Commission and the Presidency of the Council of the European Union. Chapter 6 examines how the DR discretionary clauses are implemented in practice, including an overall review on practice across the MSs and an in depth study of Norway, as a case in point. The chapter to follow considers this practice on the background of jurisprudence from the two European Courts.

Concluding reflections on the research question include firstly, that several human rights norms arguably apply to decisions made pursuant to the DR concerning vulnerable asylum seekers. Yet, these obligations are to a limited extent reproduced in the text of the Regulation, and State practice towards vulnerable persons is inconsistent. While both case law from the ECtHR and suggested revisions of the DR designate a

heightened concern for vulnerable groups, it is to be expected that the Council of the European Union (Council) will adopt a more restrictive position in the recast negotiations. Should the EU adopt a new legal text with a lacking human rights profile, MSs still have the position and obligation to act in compliance with their human rights commitments. Notably, Dublin procedures can be abstained from pursuant to the sovereignty clause, if this is necessary on account of the circumstances obtaining in an individual case.

2 A significant facet of European asylum cooperation: Provenance of the Dublin system

2.1 Control measures to realise the four freedoms

The initial cooperation within the framework of what is today the EU³ in the area of asylum was partly a result of the wish to have free circulation of persons as one of the four freedoms.⁴ With the Single European Act of 1986, EU States agreed to work towards establishment of the internal market, allowing for free movement of goods, services, capital and persons among them. However, a removal of internal border controls was controversial among some, and in any event perceived to necessitate compensatory initiatives, for example, common rules on what third country nationals would be given access to the shared territory.⁵ Another reason States saw the need to collaborate on asylum matters was the significant increase in the number of applicants in the 1980s.⁶

Provisions regarding responsibility allocation of asylum applications initiated within the framework of the Schengen cooperation, but was from 1997 on governed by the Dublin Convention.⁷ These first agreements on the area of immigration and asylum in the EU

3 In the text at hand, due to simplicity, the term “EU” is employed to denote both the EU at present, and relevant antecedents before the Amsterdam Treaty entered into force on 1 May 1999.

4 Battjes (2006) p. 26

5 Battjes (2006) p. 26

6 Vevstad (2006) p. 60

7 Vevstad (2006) p. 161

were concluded at an intergovernmental level. As already indicated, there were two main reasons why the States saw a need for shared rules on responsibility for asylum seekers: Firstly, with open borders it was expected that asylum seekers would increasingly try their case more than once. States had an incentive to make this impossible, as it would be costly to process the same application in one State after another.⁸ Secondly, the agreement aimed at protecting applicants' rights by preventing a situation where applicants were excluded from the asylum institute because no State assumed responsibility for their case.⁹

2.2 A supranational and changing asylum system

One reason applicants resort to forum shopping is obviously different protection and welfare standards across Europe. This was recognized in the Treaty of Amsterdam which called for radically increased cooperation on the area of asylum. The treaty, in force from May 1999, also situated the power to make decisions on immigration and asylum within EU's supranational competence.¹⁰ Art. 63 of the Treaty Establishing the European Community (TEC) as consolidated by the Amsterdam Treaty, specified that legislation on the area of asylum was to be adopted within five years. The harmonisation provided for was comprehensive and stipulated common EU rules on new subject matters, such as the interpretation of the refugee definition and standards on procedures and reception conditions.

The European Council established that the many instruments to be adopted under Art. 63 were to be understood as a unity within the concept of a Common European Asylum System (CEAS).¹¹ From 2003 to 2005 the following main components of CEAS were adopted by the Council: the DR, the Reception Conditions Directive (RCD), the Qualification Directive (QD) and the Asylum Procedures Directive (APD). Today, the treaty basis for the CEAS instruments is Art. 78 of the Treaty on the Functioning of the

8 Ibid.

9 Dublin Convention (1990) Recital 4

10 Battjes (2006) p. 29

11 Battjes (2006) p. 30

European Union (TFEU). This change resulted from the entering into force of the Lisbon Treaty in December 2009, which amended the two EU treaties, and renamed TEC to TFEU.¹² TFEU also installs a new and central principle in Art. 80 which states EU policies on asylum “shall be governed by the principle of solidarity and fair sharing of responsibility”. From 2010 to 2014, EU's priorities on the area of justice and home affairs are governed by the Stockholm programme.¹³ Among other objectives, it is here highlighted by the European Council that a second generation of CEAS instruments should be adopted by the end of 2012.¹⁴

The Commission has proposed recasts of all CEAS measures listed above, which are expected to be adopted by the end of 2012. Pursuant to TFEU Art. 78(2), the instruments are subject to the ordinary legislative procedure. State of play as concerns the DR is that the European Parliament (EP) has adopted its position on first reading.¹⁵ Meanwhile, negotiations in the Council have proved lengthy. The latest proposal from the Presidency for a Council position was issued on 16 March 2012.¹⁶ While the EP position on a recast mainly supports the Commission's original proposal (DPr),¹⁷ for what regards the provisions highlighted in the present study, the Presidency text does not to the same extent. Therefore, when sections below produce reflections on divergences between the DR and the prospected recast, it is principally referred to the DPr, and the recent Presidency proposal, and not to the EP position.

Against this backdrop, next chapter introduces ways of interpreting vulnerability as a concept, and why this is central in Dublin procedures.

12 Treaty of Lisbon (2007) Art. 2(1)

13 European Council (2009)

14 Ibid. para 6

15 EP (2009)

16 Council (2012a)

17 Commission (2008a)

3 Vulnerable asylum-seekers: Concept and legal standard

Vulnerability has been a topical approach in the current process towards a second generation of asylum instruments in the EU, and framed by the Commission as a concern with holistic relevance across the CEAS.¹⁸ This section aims at identifying how vulnerability can be conceptualized in the context of European asylum legislation, a discussion introduced by perspectives on the links between vulnerability and human rights. Arguments are also presented on why treatment of vulnerable asylum seekers under the DR requires consideration.

3.1 Human rights protection for the undefined vulnerable

Without addressing here the persistent topic within human rights discourse on whether or not human rights are best conceptualized as universal values, a starting point for situating vulnerability within a human rights framework is the Universal Declaration of Human Rights (UDHR), where the idea of universal human rights was grounded in the inherent dignity shared by all human beings. In the alternative, others have taken the approach to say that what all humans have in common is vulnerability, the ability to feel pain and humiliation, and that this makes it possible and necessary to formulate universal rights aiming at protection against common threats.¹⁹

It is, moreover, possible to identify in international society a recognition that in particular certain groups are potentially vulnerable, for example by looking at the subject matter of the nine core international human rights treaties. While the International Bill of Human Rights²⁰ focus is on safeguarding human rights for all persons, later treaties concern what are perceived to be potentially vulnerable groups, such as women, children and disabled persons.²¹

18 Commission (2007a) p. 7

19 Turner (2006) p. 9

20 This term comprises the UDHR, ICESCR and ICCPR with protocols, see OHCHR (2007a)

21 Rumsey and Weissbrodt (2011) p. xi

The newest of the indicated treaties – the Convention on the Rights of Persons with Disabilities (CRPD) – has not been ratified by 10 MSs, and not been signed by Switzerland and Liechtenstein. For this reason, combined with the limited space available, CRPD is not made part of the analysis below.

However, it can be argued that although human rights law is fundamentally concerned with protecting the rights of the most vulnerable of individuals, the human rights paradigm contains no explicit definition or list of who are included in this concept.²² As an illustration, one study of the work of the Committee on Economic, Social and Cultural Rights (CESCR), found that although a recurrent approach for the Committee was that of requiring States to be particularly aware of their obligations towards vulnerable groups, it lacked a consistent and clear definition of this term.²³ Despite the lack of a definition of vulnerability within human rights law, what can presumably be agreed on, is the possibility that one person belongs to various vulnerable groups. This helps clarify why the focus here is on vulnerable asylum seekers. Often, asylum seekers in general will be referred to as a vulnerable group of any society, and for good reasons. However, most will still agree that within a diverse group such as the category of asylum seekers, certain persons can be more vulnerable and require special follow up from the moment they submit an asylum claim.

3.2 Special needs within the CEAS paradigm

In an EU context, it can be highlighted that the Charter of Fundamental Rights of the European Union (CFREU) recognises that some persons are potentially more vulnerable than other. This transpires from its chapter on equality which effectively stipulates that special protection is necessary for certain groups, namely, children (Art. 24), the elderly (Art. 25) and persons with disabilities (Art. 26). Moreover, a distinctive legal basis on treatment of vulnerable asylum seekers within the EU framework is established in the RCD. This is the only among the first generation instruments of the CEAS which has an explicit definition of vulnerable persons.²⁴

The RCD stipulates minimum standards on asylum seekers' rights in the period they are awaiting a final decision on their application. Although States follow different practices

²² Carbonetti and Chapman (2011) p. 683

²³ Carbonetti and Chapman (2011) p. 691, see also p. 682

²⁴ Brekke, Sveaass and Vevstad (2010) p. 24

when it comes to applying the RCD to Dublin procedures,²⁵ it will here be argued that the Directive's listing of potentially vulnerable groups is a good reference for an analysis of State practice towards such persons under the DR. Given that the CEAS is meant to form a holistic system, it must be both plausible and suitable to employ a fundamental concept such as vulnerability, found in one of the instruments, when analysing an other instrument. It has, furthermore, been professed by the Commission that the RCD applies to persons subjected to Dublin procedures.²⁶ This position has been incorporated in the DPr, in Recital 9. However, the suggestion is removed in the Presidency proposal.²⁷

RCD Art. 17(1) has a list on who are perceived potentially to be vulnerable persons, specified as “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”. Two comments can be made on this catalog. Firstly, it is introduced by the wording “such as”, which indicates that what is presented is not an exhaustive list. Secondly, Art. 17 (2) states that it shall be determined on an individual basis whether a particular person is subject to paragraph 1. These aspects both point to the necessity of considering vulnerability individually – in the case of each applicant. That is, applicants covered by the list may turn out *not* to have special needs and applicants not included in the list may *have* such needs.

While all groups in Art. 17(1), and additional ones, indeed merit an equal level of concern, main focus in the present study is on three of the groups: Unaccompanied minors, pregnant women and persons who have been subjected to torture. The reason for this limitation is that the said groups are particularly distinguishable in extant human rights treaties all MSs have ratified. It should also be mentioned that the most recent Council proposal for a recast of the RCD includes the following additional categories of potentially vulnerable persons: victims of trafficking, persons with serious illnesses and

25 Maiani and Vevstad (2010) p. 146

26 Commission (2007b) p. 13

27 Council (2012a)

persons with mental disorders.²⁸

3.3 The Dublin system and vulnerability

Focus now turns to why this study argues it is valuable to employ a vulnerability approach in the context of the DR. Several reasons can be given why the perspective of vulnerability is significant in *any* asylum procedure, including Dublin cases: Firstly, the information can be crucial for the outcome of the asylum application itself, for the access to rehabilitation and to prevent self harm or societal risk.²⁹ Next, identification of vulnerable asylum seekers is relevant in a human rights context. Belonging to a category of vulnerable persons may imply entitlement to particular rights, which cannot be invoked without a prior identification of vulnerability.

In relation to the Dublin system, several distinctive concerns can be supplemented. Prominently, if someone is to be transferred to another MS, the person must be medically fit to travel and necessary services must be available in the receiving State.³⁰ Further, the best interests of the child must guide the choice of whether a minor applicant shall be sent to another State or not.³¹ In the next chapter, these and additional concerns are analysed in light of human rights standards. Another critical matter from a human rights perspective is the extensive use of detention in Dublin procedures, which becomes particularly questionable if an applicant is vulnerable.³² The specific item of detention practices is, however, not as such a part of the study at hand.

As provided by TFEU Art. 78(1), and politically confirmed in the Stockholm programme,³³ EU legislation on asylum and protection must be compatible with relevant international law. The next chapter explores human rights law considered specially relevant to Dublin procedures and the three vulnerable groups in focus.

28 Council (2012b) Art. 20

29 Brekke, Sveaass and Vevstad (2010) p. 10

30 Maiani and Vevstad (2010) p. 147-154

31 Ibid.

32 UNHCR (2006) p. 55. See also *Muskhadzhiyeva and others v. Belgium* (2010)

33 European Council (2009) Para. 6.2.1

Regional case law will also be more extensively analysed in chapter 7. What follows first are some general comments on the international legal system and the place of human rights law in it.

4 Human rights law applicable to vulnerable persons

4.1 Sources of international law

At present, the most commonly recognized pointer to the sources of international law is Art. 38(1) of the Statute of the International Court of Justice (ICJ), which indicates the legal sources the Court must apply.³⁴ The following are the primary legal sources acknowledged in this provision: Treaties, customary international law and general principles of law. In addition, judgements and academic writings are described as subsidiary judicial sources. In essence, Art. 38(1) installs a classical positivist approach to international law, with a clear definition of relevant legal sources and without including concepts such as moral and politics.³⁵ The study at hand is principally guided by the sources recognised in Art. 38(1), as these constitute the most widely endorsed representations of binding international law.

In particular treaty law has been described as the “most effective” and “primary expression” of international law.³⁶ A treaty is a written legal agreement concluded between two or more States.³⁷ Central rules on principles relevant to such agreements are codified in the Vienna Convention on the Law of Treaties (VCLT). The Convention has only 111 State Parties, excluding such countries as France and the United States.³⁸ Still, most of its Articles are recognized as customary international law by the ICJ.³⁹ Important principles in VCLT are the requirement that treaties must be implemented in “good faith” (Art. 26), that States cannot “invoke the provisions of its internal law as

34 Aust (2010) p. 5, Alston, Goodman and Steiner (2007) p. 60

35 Alston, Goodman and Steiner (2007) p. 60

36 Ibid. p. 107

37 VCLT Art. 2(1) a

38 UN (2012)

39 Aust (2012) p. 50

justification for its failure to perform a treaty” (Art. 27), and the rules on interpretation provided in its Section 3. Inter alia, Art. 31(1) establishes that a treaty must be interpreted in line with the “ordinary meaning” of the text, and on the background of its purpose.

The second source of international law according to the ICJ Statute is customary law. International customary law is said to be the most ancient source of international law.⁴⁰ Such custom can be created if a specific practice is followed by a certain number of States over time, and the States acted as they did from a sense of legal obligation (*opinio juris*).⁴¹

Soft law instruments are international guidelines and recommendations, without the status of binding law.⁴² Such sources can, however, be steps towards establishment of new treaties or be relevant to interpretations of the content of international customary law.⁴³ A distinct class of soft law documents are General Comments issued by the Committees established under each human rights treaty. These expert bodies' mandates are to monitor States' implementation of the treaties, inter alia by publishing General Comments, in which the Committees indicate how treaty provisions should be interpreted.⁴⁴ Such Comments are not legally binding upon the State Parties,⁴⁵ but it can reasonably be held that they are relevant legal sources, inasmuch as States have bestowed the said expert and monitoring function upon the Committees.

Another employed legal source in the study at hand are judgements issued by the ECtHR and the CJEU, which have the competence to adjudicate on the basis of the respective human rights treaties under their jurisdiction.

40 Alston, Goodman, Steiner (2007) p. 71-72

41 Ibid. p. 72

42 Aust (2010) p. 11

43 Aust (2010) p. 6, 11

44 OHCHR (2007b)

45 Dybvik Øyen and Vevstad (2010) p. 48

4.2 Human rights law and refugees

Although many States have bills of rights as part of their national constitutions, international human rights instruments install a different kind of protection for individuals, for several reasons. For example, many would say human rights obligations must be observed by States also extraterritorially, when a situation is under the State's effective control.⁴⁶ This was most recently confirmed by the ECtHR in *Hirsi*.⁴⁷ Further, human rights apply to all persons under a State's jurisdiction, including non-citizens.⁴⁸

Refugee- and human rights law can be conceptualized as two specialized regimes of international law. Concurrently, they are indeed blended together in many respects, and three aspects can be highlighted to illustrate this interrelatedness. Firstly, the right to seek and enjoy asylum from persecution is guaranteed in UDHR Art. 14(1), but not in any of the nine global human rights treaties. While in principle, declarations do not constitute hard law, many would say UDHR or parts of it has become international customary law.⁴⁹ The right to seek asylum is one of the UDHR principles which has arguably developed to attain this status.⁵⁰

Secondly, the most significant treaties on refugee protection are the Convention Relating to the Status of Refugees (GC) and the Protocol Relating to the Status of Refugees, with respectively 145 and 146 State Parties.⁵¹ This legal framework developed at first independently of the human rights regime, but a human rights vocabulary is now essential within refugee law, since serious human rights violations has become one way of defining persecution, and hence central to the refugee definition.⁵² Lastly, the principle of non-refoulement, which is fundamental to the protection installed by the GC,⁵³ is concurrently safeguarded in several human rights

46 Gardbaum (2009) p. 252-253

47 *Hirsi Jamaa and others v. Italy* (2012) para. 70-82

48 *Ibid.* p. 253.

ICESCR however, makes a partly exception to this principle for developing countries, cf. Art. 2(3).

49 Alston, Goodman, Steiner (2007) p. 152

50 Vevstad (2006) p. 206, Einarsen (2000) p. 111

51 UN (2012)

52 UNHCR (2011a) para 17

53 Dybvik Øyen and Vevstad (2010) p. 44

treaties. As non-refoulement is a basic concern in any transfer under the DR, the following section considers how this principle is covered in international law. All MSs have ratified the GC and the human rights treaties applied in the study at hand.⁵⁴

4.2.1 Non-refoulement

Non-refoulement can be described as the prohibition on sending someone to a place where he or she will be exposed to torture or other ill-treatment. In light of the principle's wide endorsement in State practice and *opinio juris*, it must be held that non-refoulement today constitutes international customary law.⁵⁵ Within treaty law, the principle was first acknowledged in GC Art. 33(1) which requires that States must not return refugees to a place where their "life or freedom would be threatened" on account of the reasons mentioned in Art. 1 A(2), i.e. the definition of a refugee.⁵⁶ A wider protection is warranted in global human rights treaties, which do not make the link to qualification for refugee status. Initially, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly prohibits refoulement in Art. 3(1), when "there are substantial ground for believing" someone will be subjected to torture. Moreover, the International Covenant on Civil and Political Rights (ICCPR) Art. 7 says "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and has been interpreted by the Human Rights Committee (HRC) to protect against both direct and indirect refoulement.⁵⁷ The threshold here on what amounts to refoulement is whether there are "substantial grounds for believing that there is a real risk" of the prohibited treatment.⁵⁸

Indirect or chain refoulement means sending someone to a place he or she risks onward removal in violation of the non-refoulement principle. When making decisions on Dublin transfers, MSs must consider both the issue of direct and indirect refoulement. It must be assessed whether the situation the applicant will face *in* the other Member State

⁵⁴ Except the CFREU which does not apply to the non-EU countries.

⁵⁵ Goodwin-Gill and McAdam (2007) p. 345-354

⁵⁶ However, Art. 33(2) allows for return of refugees who constitute a threat to the country of asylum.

⁵⁷ HRC (2004) para 12

⁵⁸ *Ibid.*

(MS) will be acceptable in light of the limits drawn up by the non-refoulement principle. Moreover, MSs must consider whether the applicant will risk indirect refoulement, *through* the other MSs. The main concern in this latter assessment is the quality of the asylum procedures in the other MSs, since the sending State has not examined the applicant's invoking of a need of international protection. ICCPR Art. 7 installs a wider protection against refoulement than CAT Art. 3(1), because it encompasses other ill-treatment in addition to torture, and since it is not restricted to acts performed by or with the acquiescence of public authorities.⁵⁹

The recognition of vulnerability in human rights instruments imply that States' assessments of whether a risk of refoulement exists, must be sensitive to the situations of vulnerable persons. This will be clarified in 4.4, where focus is on global human rights standards applicable to the three highlighted vulnerable groups. Before that follows a passage on the role of regional human rights law and its relevance in the study at hand.

4.3 European rights protection

Also the regional level recognizes specific human rights provisions relevant to the DR and vulnerability. Firstly, the system created under the European Convention on Human Rights (ECHR) has been said to constitute the most advanced international legal mechanism on human rights protection.⁶⁰ This description refers not least to the possibility of taking individual complaints to the ECtHR,⁶¹ whose judgements are binding on the concerned State Parties, pursuant to ECHR Art. 46(1). ECHR applies to 47 European States.⁶²

The general principles on international law and treaty interpretation, as commented on above, surely apply to intergovernmental cooperation at the regional level. Further, the

59 Goodwin-Gill and McAdam (2007) p. 306

60 Alston, Goodman and Steiner (2007) p. 933

61 Ibid. p. 964

62 Council of Europe (2012)

ECtHR has in its case law clarified how the Court perceives ECHR should be construed, for example is ECHR considered superior to the State Parties' alternative treaty obligations.⁶³ Another concept to be mentioned is the doctrine of “margin of appreciation”, which means States have some scope of discretion concerning how the Convention shall be implemented. This has been a consistent doctrine in the Court's case law, however, it does not apply to Art. 2 (right to life) and Art. 3 (prohibition of torture).⁶⁴

In the context of the EU, a series of human rights stipulations are provided by the basic Treaties, and bear on the enforcement of EU legislation. Especially since the Lisbon Treaty entered into force on 1 December 2009 have human rights been vested in positive treaty law. Crucially, the Treaty on European Union (TEU) Art. 6(1) now provides that the CFREU has the same legal value as TEU and TFEU. Hence, the Charter moved from being a non-binding instrument to gaining the status of EU primary law, and it has come to be central in the CJEU case law: after some 13 months in force it had been referred to in around 30 judgements.⁶⁵

The Charter applies to EU States and institutions only insofar as they implement EU law, according to its Art. 51(1). Other treaty stipulations on human rights include TEU Art. 2, which recognizes human rights as one of the Union's core values. Further, the legal basis for CEAS, TFEU Title 4, says that the common area of freedom, security and justice must “respect” fundamental rights.⁶⁶ This requirement is mirrored in DR Recital 12, which emphasize MSS' obligation to treat persons subjected to the Regulation in accordance with their commitments under international law.

The CFREU and the ECHR have numerous corresponding rights, frequently the wording is also equal, either for the whole or parts of an Article. In an attempt to ensure coherence in the European human rights standard, CFREU Art. 52(3) specifies that in cases such twin rights exist in the two instruments, the CFREU shall be interpreted in

63 Gardbaum (2009) p. 242

64 Alston, Goodman and Steiner (2007) p. 999

65 Costa and Skouris (2011)

66 TFEU Art. 67(1)

line with, or wider than, what is already established under the ECHR. The presidents of the CJEU and the ECtHR in 2011 jointly expressed the view that coherent interpretation of corresponding Articles of the two treaties is imperative in order to secure a coherent case law in Europe.⁶⁷ A pertinent example is ECHR Art. 3 and CFREU Art. 4. These Articles both have the wording “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. This implies CFREU Art. 4 must be interpreted to install, at least, the same level of protection as ECHR Art. 3, which is among the core rights of the ECHR to which no derogation is permitted, pursuant to Art. 15.

The reason these provisions are crucial in the present study is that unlike the CFREU, the ECHR does not explicitly comprise the right to asylum or the prohibition on refoulement. However, ECHR Art. 3 has been relied on in a number of applications from rejected asylum seekers to the ECtHR, and an elaborate jurisprudence has developed on the application of Art. 3 to these issues. The standards set in this case law are relevant to the interpretation of both ECHR Art. 3 and CFREU Art. 4, as explained above.

ECtHR landmark cases concerning the DR will be analysed in chapter 7, but some essential precedents concerning ECHR Art. 3 can be introduced here. Consistent with the HRC's interpretation of ICCPR Art. 7, the ECtHR has interpreted ECHR Art. 3 to imply extraterritorial obligations, i.e. prohibition on refoulement. This was first established in *Soering*, where the Court said Art. 3 would be violated if the were “substantial grounds” for believing that a person would face a “real risk” of being subjected to treatment contrary to Art. 3 if sent out of a State.⁶⁸ The ECtHR has also developed standards on what situations fall within the scope of “inhuman or degrading treatment”. In *Saadi* the Court said what amounts to ill-treatment must be interpreted in relation to the circumstances, but must reach “a minimal level of severity”.⁶⁹ For a treatment to be classified as torture it must be deliberately imposed upon an individual and cause “very serious and cruel suffering”.⁷⁰

67 Costa and Skouris (2011)

68 *Soering v. the United Kingdom* (1989) para. 91

69 *Saadi v. Italy* (2008) para. 134

70 *Ibid.* para. 136

As suggested, the CFREU recognises in addition the right to asylum expressly in Art. 18, and the prohibition on refoulement in Art. 19(2). In the CJEU case of most relevance to obligations under the DR, the CJEU pronounced that Art. 18 did not imply a different conclusion than what the Court had found in relation to Art. 4, cf. section 7.2 below.⁷¹

Guided by the general international and regional human rights context, as identified thus far in the present chapter, the next three sections consider specific provisions applicable to the highlighted vulnerable groups.

4.4 Legal standards and the three groups in focus

4.4.1 Torture victims

The prohibition on torture is declared in several human rights instruments, including UDHR Art. 5 and as seen above, ICCPR Art. 7. The latter is a non-derogable right under ICCPR,⁷² which means prohibition on torture is perceived to be among the most fundamental rights of the Convention. CAT is the most extensive binding human rights treaty on torture. Art. 1(1) has an elaborate definition of what acts constitute torture. The threshold is here connected to “severe pain or suffering, whether physical or mental [...] intentionally inflicted on a person”, which must be linked to the acts or acquiescence of public authorities. The standard established in ICCPR is interpreted to be wider, cf. section 4.2.1 above.

Victims of torture are among the persons listed as potentially vulnerable in RCD Art. 17(1). The same Directive contains a supplementary provision in Art. 20, obliging States to facilitate necessary medical treatment to torture victims and other victims of violence or rape. The fact that this has been highlighted in a separate Article bears witness of how crucial it is perceived to be that torture victims receive adequate follow

⁷¹ Joined cases C-411/10 and C-493/10 (2011) para. 114-115

⁷² ICCPR Art. 4(2)

up, since the same level of protection has, strictly speaking, already been installed in Art. 17(1). The reason torture victims are potentially vulnerable is evidently that persons can suffer from serious mental or physical damages as a result of ill-treatment. This is recognised in CAT Art. 14, which installs a guarantee for victims of torture, *inter alia* to “the means for as full rehabilitation as possible”. The same right to medical care is confirmed by the HRC in General Comment 20, stipulating that victims of torture must be ensured “such full rehabilitation as may be possible”.⁷³

In the context of implementing the DR, States must recognise this kind of special treatment for torture victims instructed by international law. Firstly, although highly relevant to all persons with special needs, for torture victims in particular is it critical that advanced identification procedures exist in the country of asylum.⁷⁴ This because the said group can often not be immediately recognised, unless the injuries are visible.⁷⁵ Secondly, it is decisive that identification of vulnerability takes place soon after the application for asylum has been submitted.⁷⁶ Or else, when persons are subjected to Dublin procedures, their special needs might not be detected in time for the information to be included in the assessment under the DR.⁷⁷ Thirdly, medical follow-up and rehabilitation must be provided, to the extent this is necessary in each individual situation, as required by CAT and ICCPR. The issue arising then, in relation to Dublin transfers, is whether interrupting the treatment is medically defensible. Relatedly, the person concerned must be in a condition which makes the travel itself feasible and safe.⁷⁸ Further, it must be argued that the sending State cannot conduct a transfer unless the receiving State has adequate facilities to resume the commenced therapy or other treatment.⁷⁹ As will be seen in section 5.3 below, in particular the latter two objectives are reflected in the DPr Art. 30, but only indirectly so in Dublin II, in its general reference to States' obligations to comply with international law.⁸⁰

73 HRC (1992) para. 15

74 Brekke, Sveaass and Vevstad (2010) p. 25

75 Ibid.

76 Ibid. p. 28

77 Ibid.

78 Ibid.

79 Ibid.

80 DR Recital 12

4.4.2 Pregnant women

As will be recalled, another potentially vulnerable group in RCD Art. 17(1) is pregnant women. Specific rules relating to pregnancy and childbirth are stipulated in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Art. 12(2) says women have the right to “appropriate services in connection with pregnancy, confinement and the post-natal period” and further to “adequate nutrition during pregnancy and lactation”. In essence, Art. 12(2) recognizes women's vulnerability in all stages relating to reproductive health, and the corresponding necessity of ensuring adequate services in these situations.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has required State Parties to give special attention to the health of vulnerable groups of women, including migrants and refugees.⁸¹ The Committee has further established that the obligation to implement the treaty is of an immediate nature, i.e. that there is no legitimate reason for a delay in its realisation.⁸²

Similar safeguards connected to pregnancy and child birth exist also in other human rights treaties. Firstly, it can be argued that the International Covenant on Economic, Social and Cultural Rights (ICESCR) integrates this principle in Art. 12 on everyone's right to the highest obtainable standard of health. In General Comment 14, the CESCR says ensuring “maternal (pre-natal as well as post-natal) and child health care” is of “comparable priority” to the non-derogable core obligations arising from Art. 12.⁸³ The same document asserts that if a State maintains Art. 12 can not be realized for reasons of lack of resources, the burden of proof is on the State to show that “every effort” has been made to fulfill the obligations.⁸⁴ Also Art. 24(2) d of the CRC says States must “ensure appropriate pre-natal and post-natal health care for mothers”.

Together, the protection installed by these three treaties is a cogent statement on States'

81 CEDAW Committee (1999) para. 6

82 CEDAW Committee (2010) para. 29

83 CESCR (2000) para. 44 (a), 47

84 Ibid. para. 47

obligations towards female asylum seekers finding themselves in the circumstances described. Based on individual assessments, the obligations should imply that Dublin transfers cannot be carried out in a reasonable pre- or post-natal period. Further, in particular if the mother is solitary, the sending State should determine in each case whether the reception conditions available to a woman with an infant in the other MS are adequate, before deciding whether a transfer can legitimately take place. This consideration must take into account any supportive network the applicant has invoked in one of the MSs, to the effect that women should be allowed access to asylum procedures in a State where any relatives providing necessary support in relation to her reproductive health, are present.

4.4.3 Unaccompanied minors

Unaccompanied minors are mentioned not only in RCD Art. 17(1), further safeguards are also stipulated in Art. 19, where required treatment for this group is specified. A recognition that children are particularly vulnerable and must be given special protection is reflected in several human rights treaties, for example the ICCPR Art. 24 and ICESCR Art. 10(3). Extensive *lex specialis* on children's rights is, however, above all governed by the CRC, which in Art. 1 defines children to be everyone under the age of 18 unless national legislation provides otherwise.

A fundamental rule in the CRC is Art. 3(1), which states the “best interests of the child shall be a primary consideration” whenever government behaviour has an impact on children. CRC further contains Articles with bearing on the specific situation of unaccompanied minors. Firstly, Art. 20(1) says children who are deprived of their “family environment” are particularly vulnerable and must be given “special protection”. Secondly, Art. 22(1) specifies that all asylum seeking children must be ensured the rights in the Convention, and Art. 22(2), that efforts must be employed to locate the parents or other family members of unaccompanied children with a view to reunification.

These and other Articles are elaborated by the Committee on the Rights of the Child (CRC Committee) in General Comment 6, which discusses the topic of unaccompanied and separated child migrants. “Unaccompanied children” is defined as children separated from all relatives, and “separated children” those separated from legal parents but taken care of by other relatives.⁸⁵ The General Comment is based on the CRC as a whole, and articulates the Committee's opinion on how the Convention should be enforced towards the said children, which are described as particularly vulnerable.⁸⁶ It says, firstly, that the obligations under the treaty are both positive and negative, implying that States must at times proactively ensure the rights are realised.⁸⁷ Among other things, this means they must install “measures to prevent separation” and “reunify separated and unaccompanied children with their families as soon as possible”.⁸⁸ The Committee further highlights that “changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child”, and that an unaccompanied child should get the opportunity to live with adult relatives who are already present in the country of asylum, if this is in his or her best interest.⁸⁹

Although not legally binding, these statements are clearly relevant to Dublin practice, in promoting that all relatives are important for the care situation of a child. The treaty text in itself, as referred above, is also clear on the vital importance of family, and must be interpreted to mean that unaccompanied minors should always be allowed to reside with any relative present in one of the MSs, if in his or her best interest. As will be seen in chapter 5, the present DR supports this standard only in the little used humanitarian clause, whereas reunification in the main rules is limited to a narrow definition of family members and on the condition that these have a legal stay in the EU. This is changed in the DPr, which inserts in the main criteria that an unaccompanied child shall be reunited also with relatives,⁹⁰ cf. section 5.3 below, an amendment which must be

85 CRC Committee (2005) para. 7, 8. The term “unaccompanied” in the present text refers to both situations.

86 Ibid. para. 1

87 Ibid. para. 13

88 Ibid. para. 13

89 Ibid. para. 40

90 Commission (2008a) Art. 8(2)

acclaimed from a human rights perspective.

Of particular relevance to the present study are also the General Comment's paragraphs on non-refoulement and return. It is highlighted by the Committee that considerations of refoulement must be gender- and age sensitive, for example that inadequate food or health services are particularly harmful to children.⁹¹ Further, it is framed that returns to a country of origin (COO) shall “in principle” only be implemented if this is in the child's best interest.⁹² It must be reasonable to interpret this tenet analogically, to the effect that the same applies to returns pursuant to the DR. Also these provisions must be held to be significant for States' obligations towards unaccompanied minors in a Dublin process. Notably, States must be cognizant about reception standards in other MSs. As was highlighted above in relation to victims of torture and women, every case must undergo an individual assessment of whether the anticipated situation in the other country will be in accordance with human rights obligations.

Together, these premises devised by human rights law bear on the applicability of the DR, of which legal provision are explored in the next chapter. The presentation includes a survey of developments observed in the recast process.

5 Legal rules on responsibility sharing

5.1 Main criteria

The main rules in Dublin II are introduced by Art. 3(1). This provision specifies that all applications for asylum submitted by a third-country national in the EU or at its border shall be examined, and by one country only. The paragraph then refers to Chapter III. Here, pursuant to Art. 5(1), the main rules for establishing what country is responsible are listed as criteria to be applied in their order of appearance. The first criteria is found in Art. 6, which provides for unaccompanied minors to be reunited with their family

⁹¹ CRC Committee (2005) para. 26-28

⁹² Ibid. para. 84

members⁹³ on the premise that these are legally present in another MS and that it is in the best interest of the minor. Otherwise, the State where the child lodged his or her application will be responsible. Art. 7 and 8 concern situations where one family member either has already been identified as a refugee in one MS or is waiting for a first instance decision, and provides for other family members to be united with him or her in such circumstances.

Arts. 9 to 12 stipulate criteria all bearing on what country is, one way or the other, linked to the arrival of the applicant on the shared territory. For example, Art. 10 confers responsibility on the State whose border an applicant has crossed irregularly. If none of the former criteria apply, Art. 13 determines that the MS where the application is lodged is responsible. Finally, Art. 14 has provisions pertaining to situations where multiple members of a family submit applications in the same State, together or all within a short period of time, and when employment of the prior criteria would entail a separation of the family.

It follows that, except for limited provisions on family unity, the leading principle of these criteria is that of giving responsibility to the State most extensively involved in admitting the asylum seeker to EU territory.

5.2 Exemptions

The Regulation has two Articles constituting derogations to the main rules, which can be applied at the discretion of MSs. Firstly, Art. 3(2), commonly referred to as the sovereignty clause, enables a State to take on responsibility for any application submitted on its territory without regard to the main rules. The second discretionary provision is Art. 15, named the humanitarian clause. Art. 15(1) allows MSs to acquire responsibility in order to bring together family members and dependent relatives for humanitarian reasons, on the condition that the persons in question give their consent.

⁹³ “Family members” is defined in Art. 2(i) and includes, on specified conditions, spouses, stable partners, minor children and parents or guardians.

Art. 15 (2) specifies that this *shall normally* be done, given that the family tie existed in the COO, when the need for assistance is caused by certain designated factors: “pregnancy or a new born child, serious illness, severe handicap or old age”. This is the closest the DR comes a listing of potentially vulnerable groups. Lastly, Art. 15 (3) enunciates that unaccompanied minors *shall if possible* be reunified with any relatives, when in the child's best interest.

Hence, the DR has provisions which can be used to alleviate unfortunate consequences of the main rules. Since the main rules do not take into account the situation of vulnerable applicants, except for the limited scheme on minor applicants, focus in this study is on the discretionary Articles. Below are presented some reflections regarding interpretations of Art. 3(2) and 15, followed by a section commenting on changes introduced in the recast process.

5.2.1 Interpretation

The Commission has encouraged use of the sovereignty clause for humanitarian reasons,⁹⁴ a recommendation made explicit in the DPr by means of an extension of the clause.⁹⁵ Another argument has been that, although the nature of Art. 15 is discretionary, if a State refuses a request based on Arts. 15 (2) or (3), such decisions must be justified.⁹⁶ This requirement on justification of refusals has also been taken in in the DPr.⁹⁷

Regarding the relationship between the two discretionary clauses, some have claimed that Art. 15 is relevant to bilateral operations only. For example, UNHCR has argued that if a State unilaterally takes on responsibility for an applicant, the correct warrant is Art. 3(2), even if the reason for the decision was a situation as described in Art. 15.⁹⁸ Indeed, the provisions of Art. 15 do use wording such as “bring together” and “at the

94 Commission (2007b) p. 21

95 Commission (2008a) Art. 17(1)

96 Commission (2007b) p. 22

97 Commission (2008a) Art. 17(2)

98 UNHCR (2006) p. 34

request of another Member State”, which indicate that the rules concern bilateral action. Yet, it must be held that Art. 15 (2) can *in addition* be interpreted to be applicable to situations where two or more persons are present in one country, since it is stated that MSs shall *keep* or bring together applicants.

However, if one is to assume the former and narrow conception, it must simultaneously be reasonable to hold that Art. 15 can be used as guidance for whether Art. 3(2) should be applied, i.e. that a State should consider avoiding transfers actively separating the persons described in Art. 15. Interestingly, amendments in the DPr would partly settle this issue. This follows mainly from suggested reformulations of parts of Art. 15, making it clear that States can apply the new provisions one-sidedly. Particularly relevant are DPr Art. 8(2), which says unaccompanied minors should be reunited with relatives, and Art. 11 on other dependent relatives. Both are in DPr allocated under the main criteria, and thereby made compulsory provisions. The Presidency proposal is more restrictive than the DPr here, as will become clear in the next section.

5.3 Vulnerability in the recast proposals

One reason why vulnerability is a topical way of approaching the DR is the heightened level of concern shown towards such persons in the recast process, which shows that Dublin II is perceived by the Commission to create insufficient safeguards for this category of applicants. The DPr reflects above all an intention to install a higher level of protection for unaccompanied, minor asylum seekers. This can be seen, firstly, in the list of definitions. For example, the definition of an unaccompanied minor is amended as to not exclude married minors from the category,⁹⁹ and minor siblings are taken in under the definition of family members.¹⁰⁰ Hence, suggested is an aspiration to ensure that focus is on the best interest of the child also when he or she is married, and a recognition that siblings is an important family relationship. However, in the Presidency proposal married minors are excluded from the definition of unaccompanied minors,¹⁰¹

99 Commission (2008a) Art. 2 h

100 Ibid. Art. 2 i(v)

101 Council (2012a) Art. 2 (i)

like in the present DR.

Further examples include DPr Art. 6, first paragraph, which says the best interest of the child must be a primary consideration for MSs when implementing the regulation. The Article also specifies what factors are relevant in such best interest determinations, such as family and “the minor's well-being and social development”.¹⁰² As these are very concrete regulations of MS behaviour, the suggestions would reduce the likeliness of diverging interpretations of the best interest concept. DPr Art. 6 is generally preserved in the Presidency proposal, but the scope of States' obligations has been moderated.¹⁰³

Critical is also DPr Art. 8 on unaccompanied minors. It establishes, *inter alia*, that not only the presence of family members but also of other relatives can be decisive for the determination of what State is responsible.¹⁰⁴ Also this stipulation is mainly retained in the Presidency proposal.¹⁰⁵ Given the narrow definition of family members in the current DR, this amendment is crucial for raising the level of unaccompanied minors' rights under Dublin procedures.

If none of the provisions on family unity are relevant, the DPr stipulates the responsible country for an unaccompanied minor shall be where the most recent application is submitted.¹⁰⁶ This would have been a further significant alteration of the premises for unaccompanied minor asylum seekers in Europe, as the DR in force allows States to return unaccompanied children to other MSs where they have already claimed asylum. However, both the EP position and the Presidency proposal discard this amendment.¹⁰⁷ Still, both texts preserve an addendum saying transfer to other MSs shall only be conducted if in the child's best interest,¹⁰⁸ which is conducive to a higher protection for this group than at present.

102 Commission (2008a) Art. 6(3) b

103 Council (2012a) Art. 6

104 Commission (2008a) Art. 8

105 Council (2012a) Art. 8(2)

106 Commission (2008a) Art. 8(4)

107 EP (2009) Art. 8(4), Council (2012a) Art. 8(4)

108 *Ibid.*

In concert with these changes on unaccompanied minors, other aspects of the recast process are essential for an analysis of the broader group of potentially vulnerable persons. DPr Art. 11 is of particular interest for the present study. It incorporates the substance of DR Art. 15(2), by providing for the keeping or bringing together of relatives in a situation where an applicant or his or her relative is dependent on the other, for reasons of “pregnancy or a new-born child, serious illness, severe handicap or old age”. What is new is, most importantly, that Art. 11 is taken in under the hierarchy of criteria and is no longer a discretionary clause. The new Article installs such guarantees as: “the best interests of the persons concerned shall be taken into account, such as the ability of the dependent person to travel”. Meanwhile, this level of protection is reduced in the Presidency proposal. For example, instead of referring to a relative, it is referred to the more narrow term “relation”, defined as parents, children or siblings.¹⁰⁹ Moreover, the proposal requires that the “relation” is on a legal stay in a MS, and if the asylum seeker is too sick to travel, MSs are not given an obligation to reunify him or her with the relation.¹¹⁰

A further pertinent amendment is DPr Chapter IV, where the extant sovereignty and humanitarian clauses are brought together and amended under new Art. 17. Art. 17(1) which on the whole corresponds to today's sovereignty clause, is expanded with the phrase “in particular for humanitarian and compassionate reasons”. This marks a shift from present Art. 3(2), which is a general sovereignty clause and has no particular instruction on how it should be used. DPr Art. 17(1) also stipulates that the person concerned must consent to decisions pursuant to it, which is not today the case, and therefore constitutes another improvement of applicants' rights. Also here, the suggestions in the Presidency proposal are restrictive versions of the DPr. Inter alia, the reference to “humanitarian and compassionate reasons” is deleted, so is the requirement that applicants must consent to use of the amended sovereignty clause.¹¹¹

Moreover, Art. 30 in the DPr could be critical for the situation of vulnerable persons.

109 Council (2012a) Art. 2 gb and 11

110 Council (2012a) Art. 11

111 Council (2012a) Art. 17

The Article is new in its entirety, and contains relatively detailed provisions on transfers of persons. Art. 30(1) says transfers can only be carried out if the person is in a condition that makes the transfer medically defensible.¹¹² Subsequent paragraph 2 describes obligations of MSs to share information on the applicant in order to secure further assistance, e.g. where the applicant needs medical care. Paragraph 3 underlines the objective of protecting “the rights and special needs of the applicant concerned”. Paragraph 4 prescribes that the responsible MS must provide necessary care, and instals an inventory of examples of groups requiring special attention as regards the need to transmit information on medical follow-up: “disabled persons, elderly people, pregnant women, minors and persons that have been subject to torture, rape or other serious forms of psychological, physical and sexual violence”.

The Presidency proposal appears to lower these standards in the DPr, to some extent. Firstly, it leaves out the requirement that persons can not be transferred is they are not fit for travel.¹¹³ Among several other changes are a replacement of the wording “provision of necessary medical care” in the DPr,¹¹⁴ with “provision of immediate health care required in order to protect the vital interest of the person”.¹¹⁵ Accordingly, the latter suggestion can be interpreted to refer to emergency relief, and not general, necessary medical care.

The main controversy causing the prolonged Council negotiations over a Dublin recast position, has concerned DPr Art. 31.¹¹⁶ It facilitates a possibility for the Commission to install temporary suspension of transfers to a MS facing an extraordinary “heavy burden on its reception capacities”. The suggestion would seem pragmatic in situations when all transfers to a State must be aborted, if human rights violations are to be avoided. General suspensions would be especially momentous for vulnerable persons, who are often the most affected by dysfunctional asylum systems. Meanwhile, the concept has been abandoned in the Council, where recent discussions have rather focused on

112 The provision is an echo of guideline 16(1) in a document on forced returns, issued by the Council of Europe in 2005. See Council of Europe (2005)

113 Council (2012a) Art. 30

114 Commission (2008a) Art. 30(2)

115 Council (2012a) Art. 30(1)

116 See Council (2011)

prevention, through a system for “early warning, preparedness and crisis management”.¹¹⁷ While a system aimed at preventing collapse must of course be warmly received, ideally it would replete the suspension mechanism instead of replacing it.

In sum, and coupled with the omission of a reference to the RCD in the Presidency proposal, cf. section 3.2 above, it transpires that the prospects for a higher protection for vulnerable persons is reduced in the Presidency proposal, compared to the DPr. However, it is clear that any of the two proposals would imply an improved situation in terms of human rights, than what is presently the case under the DR. It follows also that the final outcome of the legislative procedure, expected before the end of 2012, will be decisive for the level of legal protection in a recast Regulation. This since the EP position at first reading to a significantly higher degree than the most recent Presidency proposal, endorses the DPr with regard to the provisions highlighted, as also emphasised in section 2.2 above.

6 Vulnerable asylum seekers and discretionary clauses: Examples of practice

A broad evaluation process preceded the preparation of the DPr, and reports published in relation to this process are the most comprehensive studies available on experiences with States' implementation of the DR. This chapter discusses how the discretionary clauses have been applied, with a particular focus on vulnerable persons. Findings on the sovereignty clause and humanitarian clause are considered successively. In the first section, focus is on all MSs and the analysis is based on the said studies, published by EU institutions, researchers, UNHCR and NGOs. The second section is a more detailed study of practice in Norway.

¹¹⁷ Council (2012a) Art. 31

6.1 Exceptional appliance in Member States

The overall picture on the application of Art. 3(2) is that States rarely make use of this provision.¹¹⁸ By virtue of it being a derogation clause, large scale use would practicably be contrary to the intentions of the DR. States may also be reluctant to take on responsibility for applicants on account of insufficient safeguards in another MS, because of the tacit critique of that State such an action implies, which might be undesirable from a foreign policy point of view.¹¹⁹ Concurrently, there can be no doubt that States must make deliberate decisions on whether application of the sovereignty clause is required in each specific case. Yet, studies from 2006 showed that some MSs had *never* applied Art. 3(2), for instance Belgium, Cyprus, Greece, Lithuania, Poland, Portugal and Slovenia.¹²⁰

The Commission highlights diverging applications of Art. 3(2) as one considerable finding in its evaluation of the DR from 2007.¹²¹ It is produced that States use the sovereignty clause for a variety of purposes, ranging from humanitarian to more pragmatic ones.¹²² Pragmatic reasons for employing Art. 3(2) are typically situations where States find it more efficient to process an application than to launch a Dublin process, for example if an application is handled in a fast track procedure. This is identified by the European Council on Refugees and Exiles (ECRE) and UNHCR in German, Norwegian, Finnish and Austrian practice.¹²³

Vulnerability seems to impact on some countries' willingness to apply the rule. UNHCR has reported this tendency for example in Germany, Iceland, Spain, Switzerland, Belgium and Finland.¹²⁴ Austria had provisions in a *former* immigration law requiring use of Art. 3(2) to traumatized asylum-seekers. Finland and Ireland are found to apply Art. 3(2) to reunite family, to unaccompanied minors and in situations where it is

118 UNHCR (2010) p.1-2

119 Vevstad (2006) p. 184

120 UNHCR (2006) p. 30, ECRE (2006) p.11

121 Commission (2007c) p. 6

122 Ibid. p. 7

123 ECRE (2006) p. 10-11, UNHCR (2006) p. 31

124 UNHCR (2010) p. 1-2

deemed necessary because of illness.¹²⁵

With respect to the situation in Greece, where serious deficiencies in the asylum system have been reported over the last years, most MSs have stopped Dublin transfers of all asylum seekers there.¹²⁶ After the ECtHR 2011 judgement *M.S.S.*,¹²⁷ cf. section 7.1 below, several countries which had earlier suspended transfers to Greece pending this decision announced they would now acquire responsibility, i.e. apply Art. 3(2), for cases where the DR would otherwise have implied Greek responsibility.¹²⁸ The UK decided in September 2010 to assess on the merits all such cases. This was announced after the Court of Appeal of England and Wales had asked the Court of Justice of the European Union (CJEU) for a preliminary ruling on a set of issues relating to implementation of the DR.¹²⁹ The decision was delivered in December 2011, and established inter alia that transfers pursuant to the DR can be unlawful in the event that the receiving MS offers inadequate human rights protection, cf. section 7.2.

Also in the context of transfers to Greece, before the general suspensions were installed, some countries followed a practice of special concern for vulnerable groups. Denmark, Finland and Sweden exempted unaccompanied minors from transfers to Greece.¹³⁰ The same practice applied in Norway, as detailed in next section. Spain had taken on responsibility when vulnerable persons were involved in such cases since 2008.¹³¹ The same is true for Switzerland, which reported 400 such cases between December 2008 and the end of 2010.¹³² UNHCR refers to an example from Spain where a woman who had been severely ill-treated by her husband was not transferred.¹³³ In Austria, while no general suspension from transfers to Greece had been installed by January 2011, UNHCR observed an increase in the use of Art. 3(2) for vulnerable persons since

125 UNHCR (2006) p. 30

126 ECRE (2012) p. 2

127 *M.S.S. v. Belgium and Greece* (2011)

128 UNHCR (2011b) p. 7

129 *Ibid.* p. 5

130 UNHCR (2010) p. 3, 9, 11

131 UNHCR (2011b) p. 4

132 *Ibid.* p. 8

133 UNHCR (2010) p. 6-7

autumn 2010.¹³⁴

These findings suggest that there is a recognition in some MSs of a link between Art. 3(2) and vulnerability. By contrast, other examples show that there is no consistent practice of taking account of vulnerability in Dublin procedures across the MSs. In summer 2010, an applicant who claimed to be a minor and having been victim of rape at a reception centre in Sweden, committed suicide in Austrian detention, where he was held pending his transfer back to Sweden.¹³⁵ The applicant can arguably be placed in the category of vulnerable persons both on account of his age, because he had been subjected to sexual violence, and as his medical state was critical to the point that he committed suicide. In spite of this he was detained and he was not exempted from Dublin procedures.

As is the case with Art. 3(2), UNHCR finds that Art. 15 is in general not much in use, with Cyprus and Lithuania being examples of countries which have never used or received requests based on Art. 15.¹³⁶ The Article has rarely been used in Finland, Belgium, France, Germany, Ireland, Luxembourg, Norway and Sweden.¹³⁷ Oppositely, Poland is found to be an example of a country which frequently employs the humanitarian clause.¹³⁸ However, States' experiences are that request under Art. 15 are often rejected or not responded to by the requested State, as reported by Greece, Portugal and Poland.¹³⁹ Moreover, many require a high standard of proof to be met if the request is based on a family relationship.¹⁴⁰

These somewhat dated results can be complemented by 2010 numbers from Eurostat, attesting to the remarkably low usage of Art. 15. That year, 18 MSs never applied the humanitarian clause. 5 MSs sent between 1 and 10 requests pursuant to Art. 15, most were sent by Germany.¹⁴¹

134 UNHCR (2011b) p. 6-7

135 Amnesty (2011)

136 UNHCR (2006) p. 34, Commission (2007b) p. 22

137 UNHCR (2006) p. 34, ECRE (2006) p. 16

138 UNHCR (2006) p. 34-35, ECRE (2006) p. 15, Commission (2007b) p. 22

139 Ibid.

140 UNHCR (2006) p. 34-35

141 Eurostat (2012). For 8 MSs, data were not available.

The general picture drawn up by the Commission is that there is uncertainty among the MSs on practical aspects of submitting requests pursuant to Art. 15, for example on what time limits apply or on securing the consent of the persons involved, which unlike in Art. 3(2) is required under Art. 15.¹⁴² Further, while the conciliation mechanism provided for in the Dublin Implementing Regulation¹⁴³ could have been a tool for ensuring transfers pursuant to Art. 15 in cases where States are unable to agree, it has never been used.¹⁴⁴ Moreover, UNHCR contends State practice shows the difference between Arts. 3(2) and 15 is unclear the way discussed in section 5.2.1 above, i.e. unclarity on which Article should be invoked if States unilaterally take on responsibility. Ireland is used as an example, where Art. 15 was employed to take on responsibility for a diseased person.¹⁴⁵

However, in some cases Art. 15 has been used to reunify dependent relatives and when transfers have not been defensible because of an applicant's sickness or old age.¹⁴⁶ Further, Italy has applied the Article to pregnant women and those who have recently given birth.¹⁴⁷

In sum, it appears that MSs could more pro-actively consider the relevance of Art. 15 in each case and engage more in sending and answering to requests, with the aim of finding good solutions for dependent asylum seekers. As a last remark on general Dublin practice and vulnerability, it can be supplemented that ECRE has found a tendency for the ECtHR to order interim measures in Dublin cases referred to it, when these concern vulnerable asylum seekers.¹⁴⁸ Applicants' lines of argument were also consistently linked to applicants' vulnerability if the destination country was another country than Greece. ECRE further produces that in two cases where the Court ordered interim measures against intended transfers to Italy and Malta, the applicants were

142 Commission (2007b) p. 22

143 Dublin Implementing Regulation Art. 14

144 Commission (2008b) p. 13

145 UNHCR (2006) p. 34

146 ECRE (2006) p. 15

147 Ibid.

148 ECRE (2009) p. 1

clearly in situations of personal vulnerability.¹⁴⁹

6.2 Norwegian management of the discretionary clauses and vulnerable persons

6.2.1 Legal framework

Although not an EU member, Norway has participated in the Dublin system since 2003, through an association agreement concluded between the EU, Iceland and Norway.¹⁵⁰ The Norwegian Immigration Act and Immigration Regulations have been in force since 1 January 2010. Politically, it has been communicated that close cooperation with the EU is considered imperative for the Norwegian Government.¹⁵¹ The authors of the Act were also manifestly influenced by the QD and the DR when writing its Sections on protection, but markedly less so by the APD and the RCD.¹⁵² For example, the definition of a refugee, of persecution and the reasons thereof in Sections 28-30 of the Act, are almost a replica of those in the QD,¹⁵³ whereas the Act contains few provisions regulating reception standards.

A central legal basis in the Act is Section 3, which says the Act must be implemented in accordance with Norway's international commitments, when this benefits the individual. Section 3 implies that international legislation is directly applicable on the areas covered by the Act, which is notable in a country otherwise governed by a dualistic approach to international law.¹⁵⁴ The same principle derives from the Human Rights Act, which in Sections 2 and 3 classify certain human rights treaties as *lex superior* over other legislation. While this Act covers only five treaties, Section 3 of the Immigration Act refers to all international obligations, meaning that a wider catalog of such obligations have direct legal validity on the area of immigration.

149 Ibid. p. 2

150 Vevstad (2010) p. 268

151 Ministry of Justice and the Police (2010)

152 Brekke, Sveaass and Vevstad (2010) p. 15

153 See QD, in particular Arts. 2(c), 2(e), 7, 8, 9, 10 and 15.

154 Dybvik Øyen and Vevstad (2010) p. 41-42

The legal basis in the Act allowing for employment of the DR is Section 32, first paragraph, letter b. First paragraph specifies under what circumstances Norway may refuse to assess an application for asylum on the merits, and its letter b mandates transfer of responsibility for an applicant to States participating in the Dublin cooperation. Section 32, second and third paragraphs, provide exceptions to the main rules in paragraph one: If the applicant has affiliations to Norway making it more reasonable that Norway takes on responsibility, then this shall be done (second paragraph), and the same if a rejection to examine the case would imply a violation of Section 73 of the Act (third paragraph). Section 73 stipulates the absolute prohibition of refoulement.

These provisions of the Act are complimented by the Immigration Regulations Sections 7-3 and 7-4. While the former of these establishes how the Dublin cooperation shall be defined, the latter concerns what situations warrant an application of the Act Section 32, second paragraph. It is stipulated that if the relevant affiliation is presence of family in Norway, the definition of family members shall follow the definition in DR Art. 2(i), i.e. a more restrictive definition than the possibilities provided for in DR Art. 15. In other circumstances, responsibility shall only be assumed if “special grounds” are invoked, and medical issues will as a main rule not constitute a special ground.

Accordingly, Section 32, second paragraph of the Act, and Section 7-4 of the Regulations enable Norway to take on responsibility for a case instead of applying the DR main criteria. The said Sections are in the Circular on practice at first instance interpreted to regulate use of Art. 3(2), as will be seen below. For what concerns Art. 15, on the other hand, its provisions are undetectable in the wording of Norwegian legislation, c.f. also the restrictive definition of family members in the Regulations Section 7-4.

It follows that, while the DR as a whole is incorporated by the reference made to it in the Regulations Section 7-3, Art. 3(2) appears to be, in a certain sense, also transformed

into Norwegian law in the Act, Section 32, second paragraph, and the Regulations, Section 7-4. The humanitarian clause, however, is not transformed into the legal texts. This is reproduced in the Circular on practice at first instance, which gives little guidance on use of Art. 15, and in practice, which shows that it is rarely applied.

Illustrating that a more definite reference to DR Art. 15 might have been advantageous is the fact that UNE called for a precision on the relationship between the humanitarian clause and the content of the Act Section 32, second paragraph, in the hearings organised on the elaboration of a new Act.¹⁵⁵ Further, the expert committee report published in 2004 alongside the first legislative proposal for the Act, says the administration must take into account the humanitarian clause when considering whether responsibility for an application should be acquired by Norway.¹⁵⁶ This is opposite to what is provided in the Circular on DR implementation in Norway's first instance, where DR Art. 15 is described as a provision which mandates requests from one State to another, and not as related to one State's unilateral case processing.¹⁵⁷

Lastly, what can be observed in relation to Section 32 is that applicants who have already applied for asylum and obtained a permit in another MS must return to that country, but they are not subjected to the provisions in the DR. Their situation is instead governed by Section 32, first paragraph, letter a. The reason this point is addressed here is to show that Norwegian legislation gives weaker protection against transfers to applicants holding a permit in another MS, than to applicants subjected to the DR. This because the former will not be considered under the exception rules in the Act Section 32, second paragraph or the Regulations Section 7-4, as all of these are not connected to Section 32, first paragraph, letter a.

The non-refoulement obligation in Section 32, third paragraph *is* connected to Section 32, first paragraph, letter a, and therefore still applies to the group in question. However, Section 32, third paragraph is narrower than the residual exceptions applicable in

155 UNE (2005) p. 12
156 NOU (2004) p. 398
157 UDI (2010) para. 3.1.2

Dublin procedures. Further, the fact that no circular or other guidance exists on how Section 73 would be interpreted in the context of transfers on the European continent, means the probability low that anyone already granted protection in another MS will be subjected to the exemption in Section 32, third paragraph.

6.2.2 First instance practice

First instance asylum decisions in Norway are made by the Directorate of Immigration (UDI). A Circular with detailed guidelines on how UDI enforces the DR is the most specialised publicly available expression of Dublin practice at this level. For that reason, the following analysis of practice at first instance focuses on this Circular, on its relationship with the DR discretionary clauses and its provisions on vulnerable groups.

Unaccompanied minors is the only vulnerable group subject to extensive discussion in the Circular. It is produced that if DR Art. 6(1) does not apply, the main rule is that the responsible State is where an unaccompanied minor first applied for asylum.¹⁵⁸ In earlier practice, applications from unaccompanied minors were not subjected to the DR, which was commended by ECRE as an example of best practice in Europe.¹⁵⁹ However, in October 2008 UDI was instructed to change procedures and apply the DR also to this group.¹⁶⁰

The Circular discusses, further, the possibility of applying DR Art. 3(2) based on a child's connection to Norway. Generally, a principle is provided that each case must be assessed individually and holistically.¹⁶¹ The obligation to always take into consideration the best interest of the child is underlined, with reference to the direct applicability of the Convention on the Rights of the Child (CRC) in Norway.¹⁶² It is established that the best interest of the child shall be given considerable weigh, but must

¹⁵⁸ UDI (2010) para. 3.2

¹⁵⁹ ECRE (2006) p. 12

¹⁶⁰ Ministry of Work and Inclusion (2008a)

¹⁶¹ UDI (2010) para. 3.2

¹⁶² Ibid.

be weighed against other concerns.¹⁶³

These provisions on unaccompanied minors can be compared to the recommendations in General Comment 6 of the CRC Committee, cf. 4.4.3 above.¹⁶⁴ As seen, the Committee says the main rule must be that return to a child's COO can only be conducted if it is in the child's best interest.¹⁶⁵ Further, it is promoted that only right-based concerns can potentially override the best interest principle, for example if the child constitutes a menace to the country of asylum.¹⁶⁶ Moreover, immigration management will never, according to the Committee, weigh heavier than the best interest of the child.¹⁶⁷ Although these statements are made in relation to return to a child's COO, they must be held to be equally relevant to other return situations, such as transfers in the context of the DR. Norwegian practice cannot, then, be said to mirror these recommendations from the CRC Committee. This because, the best interest principle is in the Circular referred to in a general and principled manner, and with the explicit provisions that other concerns may weigh more. The latter point in particular must be said to be contrary to General Comment 6.

Although General Comments are not legally binding, such recommendations are arguably legitimate interpretations of human rights treaties, and when they are not followed this can be an indication of a State's failure to live up to its Convention obligations. Moreover, the Immigration Act distinctly provides in Section 3 that international obligations must not be violated. This is an argument for considering that immigration authorities must be particularly mindful towards international standards. On the other hand, the Norwegian Supreme Court in *Ashok*¹⁶⁸ established that General Comments from the CRC Committee are considered to be of less importance than those from the HRC, with the latter described as a significant source of law.¹⁶⁹ The reason given is that an individual complaints mechanism has not been established under the

163 UDI (2010) para. 3.2.1

164 CRC Committee (2005)

165 Ibid. para. 84-86

166 Ibid. para. 86

167 Ibid.

168 Puvaneswaran Jegatheeswaran v. Staten v/Utlendingsnemnda (2009)

169 Ibid. para 41

CRC.¹⁷⁰ It is, however, noticeable that the judgement subsequently provides a lengthy analysis of General Comment 6, indicating that the Court nevertheless sought to deliver a decision in compliance with the said Comment.

In relation to all applicants, the Circular pictures two principal situations in which Norway applies DR Art. 3(2). Firstly, in cases examined under accelerated procedures. Secondly, if the applicant is found to have special connections to Norway, pursuant to the Act, Section 32, second paragraph.¹⁷¹ Examples of what can amount to such connections include earlier residence in Norway or family relationships. When the police receives an application for asylum, the applicant must be asked questions on affiliation with Norway or other MSs, such as any presence of family members.¹⁷² This specification in the Circular promotes that such information can be detected and potentially be taken into consideration in the process, and must therefore be commended.

Further, the Circular governs the possibility that Norway may take on responsibility for humanitarian reasons. It is underlined that this will only happen in very special situations. The reasons must be compelling, and pursuant to the Regulations Section 7-4, second paragraph, medical reasons as a main rule do not imply an application of DR Art. 3(2). However, medical considerations can be a part of an overall assessment of affiliation on humanitarian grounds. The standard described in case of physical illness is that of acute, life threatening disease with a high risk connected to an interruption of medical treatment. On severe mental illness, the test is whether there is a need for acute treatment.¹⁷³

In sum, the openings for a use of Art. 3(2) are relatively narrow. Further, the directions do not discuss explicitly obligations towards the potentially vulnerable groups in the RCD, except for unaccompanied minors. It can be argued that extant human rights standards covering these groups signify that international commitments towards such

170 Ibid. para 42

171 UDI (2010) para. 3.3

172 Ibid. para. 2.1.1

173 UDI (2010) para. 3.3

persons should be highlighted in a Circular on first instance application of the DR. Notably, in addition to the CRC, other relevant treaties and stipulations as reviewed in chapter 4 above, should be referred to explicitly, in order to ensure vulnerable applicants are treated in accordance with rights conceded to them in international legislation.

Overall, the Circular has significantly less details on implementation of DR Art. 15 than on Art. 3(2). The groups listed in DR Art. 15(2) and (3) are cited, and it is affirmed that the humanitarian clause is used in order to unite such family members.¹⁷⁴ Inasmuch as Art. 15 can be applied at the discretion of MSs, further guidance would be appropriate, including details on when UDI shall approach another MS with the suggestion that two persons should be reunified. For example, it could be specified that this shall be done if the applicant is found to have special needs and a medical opinion recommends for him or her to be reunified with a relative. Earlier reports from ECRE have found that Norway is among the countries who rarely make use of Article 15,¹⁷⁵ and more developed instructions would presumably be conducive to it becoming more than a sleeping provision. This practice will to some extent have to be changed with a new Regulation, in accordance with any version of new Art. 11, cf. section 5.3 above.

Ultimately, a principle established in the Circular is that since MSs are bound by the RCD, submission in a case arguing against Dublin transfer on account of reception conditions will not be given weight.¹⁷⁶ The same reference to the RCD is made in a section on health conditions, where it is explicated that UDI assumes MSs have systems in place to offer necessary medical assistance to applicants.¹⁷⁷ Apart from the fact that all MSs are not bound by this Directive,¹⁷⁸ the presumption may appear plausible since the RCD requires adequate reception standards for applicants. However, it has become generally known over the last years that several States struggle to implement the

174 UDI (2010) para. 3.1.2

175 ECRE (2006) p. 16

176 UDI (2010) para. 1.2

177 UDI (2010) para. 3.3.2

178 Ireland and Denmark have opted out in accordance with the Protocols on their positions annexed to the EU treaties. The RCD also does not apply to Switzerland, Lichtenstein and Iceland.

standards of the RCD, most notably Greece, Italy, Malta and Hungary.¹⁷⁹

Further, as substantiated in chapter 7 below, the two European level courts have both confirmed that sending States cannot apply a conclusive presumption that conditions for asylum seekers in other MSs are in compliance with human rights. Therefore, it can not be justified that the Circular says reception conditions never will be a relevant issue in Dublin cases. To the contrary, Norway must be updated on the actual situation in other MSs, and such information must be a part of the assessments in individual decisions made pursuant to the DR.

6.2.3 Assessments at second instance

The Immigration Appeals Board (UNE) is appellate level for asylum cases in Norway. It is habitually referred to as a court-like body, but only a limited number of appeals are heard in a tribunal resembling environment, with the majority of cases being determined by a board chairman or the secretariat.¹⁸⁰ In certain circumstances, for example if clarification of practice is deemed necessary, a case can be heard and decided upon by a Grand Board.¹⁸¹ Such decisions set precedent both for UNE and UDI.¹⁸² The present discussion of UNE practice relies principally on such Grand Board decisions and on public information such as press releases.

In relation to the issue of children, studies have found that UNE's decisions bearing on this group are generally insufficiently individualised and lack adequate examination of the best interest of the child,¹⁸³ which is obviously problematic from a human rights perspective. Accessible Dublin case law nevertheless has examples that in particular unaccompanied children are at times excepted from the DR main rules, on account of their vulnerability. Notably, in October 2009 the Grand Board decided that a minor

179 See, respectively, *M.S.S. v. Belgium and Greece* (2011), *NOAS* (2011), *Amnesty* (2010), *UNHCR* (2012b)

180 UNE (2010a)

181 Immigration Regulations Section 16-4

182 UNE (2012)

183 Gording Stang (2011) p. 11

would be allowed to have his case tried in Norway instead of being brought back to Italy.¹⁸⁴ An issue discussed was especially the conception of the former Immigration Regulations Section 54b, which in substance equals the current Immigration Regulations Section 7-4, and the wording “special reasons”. The following is what the Grand Board established as precedent principles in its decision: Firstly, that being an unaccompanied minor is not in itself a “special reason”. Moreover, that the best interest of the child is a fundamental concern in the consideration of each application, and that several issues can be considered in order to determine best interest, including age, length of sojourn or affiliations with Norway or the first country on asylum, reception conditions in the first country of asylum and health. Ultimately, it is stated that concerns relating to immigration policy or other concerns may weigh heavier than the best interest of the child.

These principles indicate how UNE has interpreted the possibility of applying DR Art. 3(2) to children. The latter among the statements is arguably in conflict with the position of the CRC Committee in General Comment 6, as discussed in relation to first instance practice. It can further be noted that the decision refers to the CRC and the best interest principle, however, it is not found relevant to mention other obligations in that treaty, such as Art. 20(1) on children who are deprived of their “family environment” or Art. 22(2) saying that States must strive at locating family members of unaccompanied children.¹⁸⁵

What is further interesting with the said case is that the appeal was granted, on the grounds that the child had remote relatives in Norway and that it was deemed uncertain whether reception conditions in Italy were adequate. This stance differs from what is said in the UDI Circular discussed previously, which states reception conditions generally will not be a relevant issue in a case. Further, it shows that there are cases where the authorities conclude that the child's best interest imply that a Dublin transfer will not be conducted. However, the decision has not set precedent to the extent that

184 UNE (2009)

185 The present analysis is based on the summary of the decision made publicly available, and therefore subject to the disclaimer that residual parts of the decision do not mention the said CRC stipulations.

unaccompanied children are not being sent back to Italy, although the unease expressed in the judgement concerning reception conditions in Italy has been mirrored in NGO reports.¹⁸⁶ Several organisations specifically recommend that unaccompanied children should not be sent to Italy unless it is confirmed in each case that they will receive adequate follow-up.¹⁸⁷

The same reports discourage also transfers of single parents with children, and of persons suffering from mental illness, because it is considered uncertain whether Italy has the capacity to provide necessary services to these groups. A case from January 2011 illustrates that UNE practice towards such groups is restrictive: A mother and her two children were rejected and referred to asylum procedures in Italy, although they can arguable be said to have had special needs. The mother had formerly been involved in prostitution to survive in Italy, and said she had been forced to live together with a man against her will. She was also suffering from depression, but was not diagnosed with severe mental illness.¹⁸⁸ The decision explicitly provides that a transfer was not considered to be contrary to the ECHR. This contention is problematic in light of ECtHR judgement *M.S.S.*, delivered the same month. Inter alia, Belgium was here condemned for violation of Art. 3 for returning the applicant to appalling living conditions in Greece, cf. section 7.1. Lack of housing and the applicant's vulnerability as an asylum seeker were determinative factors leading to this conclusion. When the appellant in the Norwegian case claimed the family had not been offered housing in Italy and that she worked as a prostitute to ensure their subsistence, it must be held that returning her and the children to such living conditions equally constitute a violation of ECHR Art. 3.

Like in the other EU States, the most far-reaching application of the sovereignty clause in Norway is obviously in cases where the applicant would otherwise have been sent to Greece. No applicants have been sent from Norway to Greece since October 2010,¹⁸⁹ when the ECtHR requested Norway to install a moratorium on such transfers. The order

186 PROASYL (2011), NOAS (2011)

187 NOAS (2011) p. 37. See also Juss-Buss and Swiss Refugee Council (2011) p. 41

188 UNE (2011)

189 UNE (2010b)

was based on the Rules of the Court's well-known Rule 39, which allows the Court to instruct Parties on interim measures when there is a risk of irreparable harm. UNE had examined the issue of returns to Greece in Grand Board in February 2010, and found that such transfers were legitimate.¹⁹⁰

Meanwhile, for long had inadequate safeguards for asylum seekers in Greece been reported, and UNHCR had since April 2008 recommended suspension of transfers to Greece.¹⁹¹ The issue was therefore highly relevant in many cases before October 2010, and interestingly for the present study, applicants' vulnerability was often central to the conclusions, both in cases before UNE and in instructions from the Ministry level to UDI. For example, the sovereignty clause was applied towards unaccompanied minors in such cases, and for a period also for families with children.¹⁹² However, the general practice on what persons are included in the definition of vulnerability appears to be narrow. The case presented above on the family sent back to Italy shows that the threshold employed by UNE on what persons are included in the concept must be characterized as high. A restrictive practice is also what the Immigration Regulations requests, providing in Section 7-4 that health issues shall as the main rule not lead to a employment of DR Art. 3(2). Section 7-4 must here be held to be in direct conflict with human rights obligations, cf. chapter 4 above, since vulnerable person's special needs will most likely be interpreted as a health issue which shall not be reckoned with.

In sum, the clear instruction in Norwegian legislation and practice is that exceptions to Dublin transfers will rarely be necessary, based on the presumption that all MSs ensure applicants' human rights are protected. In the next chapter are introduced perspectives from regional human rights case-law, showing in particular that MSs must continuously assess to what extent transfers of asylum seekers between them are lawful.

190 UNE (2010c)

191 UNHCR (2008)

192 Ministry of Work and Inclusion (2008b)

7 European level jurisprudence on Dublin transfers

7.1 A dynamic ECtHR case law

The ECtHR has been approached on a number of occasions concerning the specific issue of States' application of the DR – in January 2011 the amount of such cases pending were approximately 960.¹⁹³ In particular three judgements are essential precedents clarifying States' Convention obligations when giving effect to the DR. Firstly, in the year 2000 case *T.I.*, the applicant had been refused asylum in Germany, but feared he would be subjected to torture if returned to his COO Sri Lanka.¹⁹⁴ He made a second claim for asylum in the UK, but the UK wanted to send him back to Germany under the Dublin rules. The application was deemed inadmissible because the Court found it had not been substantiated that Germany would necessarily force him to go back to the detriment of Art. 3.¹⁹⁵ However, the judgement established the principle that a sending State can not disclaim its obligations under the ECHR when carrying out a transfer to another MS, i.e. that Art. 3 encompasses the prohibition on indirect refoulement.¹⁹⁶

Secondly, also the case *K.R.S.* from 2008 was ruled inadmissible. It concerned return from the UK to Greece of an Iranian man. He claimed such transfer would be to the detriment of Art. 3 on account of the problematic situation for asylum seekers in Greece. The Court rejected the case on the grounds that, firstly, Greece did not accomplish returns to Iran, hence there was no risk of refoulement to the applicant's COO.¹⁹⁷ Secondly, in spite of reports on flaws in the Greek asylum system, the Court presumed that Greece would comply with the standards in the APD and RCD.¹⁹⁸ Lastly, the Court emphasised that if the applicant would later on fear being extradited from Greece in violation of Art. 3, he could submit an application to the Court under Rule 39,

193 ECtHR (2011)

194 *T.I. v. the United Kingdom* (2000)

195 *Ibid.* p. 18

196 *Ibid.* p. 15

197 *K.R.S. v. the United Kingdom* (2008), p. 17

198 *Ibid.*

and thereby have the expulsion postponed while the Court would consider his complaint.¹⁹⁹

Finally, the third landmark judgement concerning the issue of Dublin transfers and refoulement is *M.S.S.*, delivered in 2011.²⁰⁰ This decision was the first to establish that a Dublin transfer had been unlawful, and the Court thus reversed the precedents set in *T.I.* and *K.R.S.* The case concerned M.S.S., an Afghan citizen who claimed he had fled to Europe because he was targeted for murder by the Taliban, on account of his job as an interpreter for the international forces in Afghanistan. In brief, M.S.S. had been detained in Greece in a crowded space where he partly slept on the floor, could not access sanitary facilities without the guards' approval, and had been beaten by the police. He later lived on the streets, and when the authorities found him accommodation, he was not made aware of this as they did not have any contact details on him. M.S.S. also failed to meet for his asylum interview, and later explained that the translator who had read him the summons did not say anything about the interview. Belgium had sent him back to Greece under the DR in 2009.

M.S.S. relied on Arts. 2, 3 and 13 of the convention in his application to the Court. Art. 2 governs the right to life, and Art. 13 the right to an effective remedy.²⁰¹ The main issues before the Court can be summarised as follows: Firstly, were the detention conditions the applicant had been subjected to inhuman and degrading, amounting to a violation of Art. 3 by Greece? Secondly, did the living conditions of extreme poverty under which M.S.S. had subsisted in Greece imply a violation of Art. 3? Third, were asylum procedures in Greece insufficient to extent that Art. 13 had been dishonoured? Forth, had Belgium violated Art. 2 and 3 because M.S.S. was returned to Greece in spite of well known deficiencies in the country's asylum system, causing a risk of refoulement from Greece? Fifth, had Belgium violated Art. 3 because they returned him to the unacceptable detention and living conditions in Greece? Sixth and ultimately, had an effective remedy not been available to the applicant against the Belgian order on his

199 Ibid. p. 17-18

200 *M.S.S. v. Belgium and Greece* (2011)

201 Throughout the judgement, after analysing Art. 3 the Court consistently finds an examination of a possible violation of Art. 2 is unnecessary.

deportation to Greece, in violation of Art. 13? The short answer is that the Court ruled in favour of the complainant on all listed questions. Several passages in the judgement clarify States' obligations under Art. 3. The following are brief comments on particularly relevant discussions connected to the first and second questions.

Firstly, it is concluded that the treatment M.S.S. was subjected to in detention was degrading and compromising on his dignity to the extent that Art. 3 had been violated.²⁰² It is notable that the Court uses the vocabulary of vulnerability to reach its conclusion. It says the situation of the applicant must be interpreted in light of the vulnerability “inherent in his situation as an asylum seeker”.²⁰³ The judgement specifies also that his vulnerability is assumed on account of the “the traumatic experiences he was likely to have endured previously”.²⁰⁴ The same approach is applied in consideration of the second issue, where the Court finds Art. 3 has been violated by Greece, on account of the applicant's detrimental living conditions and the absence of any anticipation of a solution.²⁰⁵ It is again pointed to the applicant's “need of special protection”, and his vulnerability as an asylum seeker.²⁰⁶

What can also be noticed is the significance attached to the fact that Greece has transposed the RCD, and that authorities must “comply with their own legislation”.²⁰⁷ This can be compared to the findings in a resembling ruling from the CJEU discussed in next section. The CJEU underlines that minor failures to comply with CEAS directives in one State, *does not* oblige the other MSs to abstain from sending back applicants to that State.²⁰⁸ Hence, both Courts make reference to the degree of compliance with the RCD as a relevant factor when assessing a possible violation of, respectively, Articles 3 and 4 of the ECHR and CFREU. However, the CJEU also specifies a threshold in saying that the “slightest infringement” of a CEAS Directive will not amount to a violation of CFREU Art. 4.²⁰⁹ It is more unclear what threshold the ECtHR sets when it

202 M.S.S. v. Belgium and Greece (2011) para. 226-230, 233-234

203 Ibid. para. 233

204 Ibid. para. 232

205 Ibid. para. 263-4

206 Ibid. para. 251

207 Ibid. para. 250

208 Joined cases C-411/10 and C-493/10 (2011), para 84-86

209 Ibid. para 84

creates a link between States' failure to comply with an EU directive and violation of ECHR Art. 3.

The ECtHR's perspectives as highlighted above are clearly relevant to the research question in the present study. Above all, the judgement ruled that a Dublin transfer had been illegitimate, and that human rights obligations compelled Belgium to apply DR Art. 3(2). Next, the Court emphasised the applicant's vulnerability in its assessment of whether Art. 3 has been violated. The Court appears to link vulnerability to asylum seekers per se. However, it also alludes to “the traumatic experiences he was likely to have endured previously”,²¹⁰ a description which can be associated with one of the vulnerable groups in the RCD (“persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”). It is notable that the Court applies this approach, implying that vulnerability is of determinative relevance in an assessment of whether a Dublin transfer is in accordance with Art. 3.

7.2 CJEU case law corroborating ECtHR principles

As suggested above, in the case law of the CJEU, one ruling in particular concerns the DR, and has a subject matter similar to that before the ECtHR in *M.S.S.* It was delivered later in the same year, on the background that courts in the UK and in Ireland had asked the CJEU for a preliminary ruling on questions concerning the DR's relationship to the CFREU. The references for a preliminary ruling from the two countries were joined in one case.²¹¹ Both this case and *M.S.S.* were adjudicated by the Grand Chambers of the respective courts, which indicate that the questions at hand were considered exceptionally important.²¹²

The case from the UK involved an Afghan national, *N.S.*, whom the authorities had the intention of returning to Greece under the DR. The applicant had earlier been detained in Greece. He had been expelled to Turkey where he was detained for two months under

210 *M.S.S. v. Belgium and Greece* (2011), para. 232

211 Joined cases C-411/10 and C-493/10 (2011)

212 CJEU (2012), ECHR (2012)

what is describes as appalling conditions.²¹³ *N.S.* opposed being deported to Greece, and submitted this would be to the detriment of his human rights established in EU law, the Refugee Convention and the ECHR. The facts in the other case concerned five persons who had applied for asylum in Ireland. They had all earlier been in Greece, and therefore found to be under Greek responsibility pursuant to the DR. The appellants disapproved of a transfer, and argued Ireland was obliged to apply DR Art. 3(2) because of the unacceptable situation for asylum seekers in Greece.

The courts from the two countries asked the CJEU for a preliminary ruling on a catalog of questions, concerning in particular the scope of a sending State's obligation to assess the prospective situation of an asylum seeker in the other MS, when making the decision to transfer an applicant under the DR. The following are the conclusions delivered by the Court most relevant for the present study.

Firstly, that discretionary competence exercised under Art. 3 (2) constitutes enforcement of EU law in the meaning provided by TEU Art. 6 and CFREU Art. 51.²¹⁴ Secondly, that a MS cannot implement the DR relying on a conclusive presumption that the other MSs safeguard an applicants rights as codified in the CFREU. Moreover, an applicant cannot be sent to a MS where the procedures and reception facilities are systematically inadequate to the extent that there are “substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment”, as prohibited by Art. 4 of the CFREU.

Accordingly, the CJEU's ruling is in line with *M.S.S.* on the main finding that the sending State is obliged to evaluate the situation in the receiving State, and that Dublin transfers must potentially be aborted in order to avoid exposing asylum seekers to human rights infringements in another MS. The fact that both courts on the European level have established these principles constitute a weighty expression of MSs' human rights commitments and should impose authoritatively on the implementation of the

213 Joined cases C-411/10 and C-493/10, para 34-35

214 These legal bases establish that CFREU is binding insofar as the MSs implement EU law.

DR. This includes a requirement that it be individually assessed whether a transfer is legitimate. Essential facets of such evaluations must be the quality of the reception conditions and asylum procedures in the receiving State, together with any information on vulnerability and special needs of the applicant, in line with the particular protection given to vulnerable persons in human rights treaties.

8 Conclusions

The DR is constructed around the intention of ensuring all third-country nationals are able to exercise their right to apply for asylum if they present themselves on the territory of the MSs. While this is a commendable aspiration, the resulting rules on responsibility sharing must be said to insufficiently take into account human rights norms. Two factors have probably contributed to the modest recognition of human rights in context of the DR. Firstly, that the cooperation is built on the presumption that all MSs live up to basic human rights standards, including the principle of non-refoulement. With this bottom line established, MSs can readily employ the rhetoric that responsibility for an applicant's rights lie with another State. The fact that the UK asked the CJEU for its opinion on whether States must assess the conditions in other MSs before conducting transfers, shows to what point this has been taken for granted. Secondly, a core motivation behind the cooperation is to achieve an efficient system which prevents that administrative resources are spent on the same asylum dossier in more than one State. The less applicants' rights are made a part of the procedure, the more it becomes simple and efficient to carry out. This is illustrated by the experiences with the humanitarian clause, which is one of few stipulations with the purpose of facilitating a minimum of special treatment for vulnerable persons. It is easier for MSs not to set in motion its provisions, and practice shows that it is almost not in use.

Yet, MSs must lean an eye to human rights responsibilities when implementing the DR. It has become clear that, although the EU is in a broad process of harmonisation on the wider area of immigration, MSs employ diverging interpretations of common legislation and differ in their ability to realise its instructions. This was acknowledged

by the CJEU when it ruled that States must be considerate of the situation in other MSs when implementing the DR. Human rights compliance is particularly critical when the applicant can be defined as a vulnerable person with special needs. This study has identified specific stipulations in international law bearing on the situation of three groups of potentially vulnerable persons, including torture victims' right to rehabilitation, pregnant women's right to adequate treatment and unaccompanied minors' right to be treated in accordance with their best interest. These constitute precise obligations States have agreed to pursue, and must be actively assessed in cases under Dublin procedures.

Three aspects of such applicants' situation are particularly relevant. Firstly, any connection the person has to a particular MS, such as family, relatives or medical treatment. Secondly, the conditions waiting in the State found to be responsible, as regards both asylum procedures and living conditions. Thirdly, the person's ability to travel. On these three points, MSs must consciously make sure applicants are not subjected to ill-treatment. The standards established in human rights law for vulnerable persons indicate that considerations of ill-treatment must be sensitive to the special needs of such individuals. This approach is supported in the ECtHR's legal reasoning in *M.S.S.*, which showed that vulnerability is central to the interpretation of ECHR Art. 3.

Although practice shows vulnerability is to some extent taken into account in MSs' implementation of DR and Arts. 3(2) and 15, such individual's rights are not systematically protected by the DR or by practice. Further, a high threshold must be met before it is considered necessary to make exceptions from the main rules, as seen in examples from Norway. It can appear as if States feel more committed to fulfill human rights obligations the more explicit these are spelled out in *lex specialis* on a given area. It would therefore be recommendable that the DR would refer more explicit to specific established human rights safeguards for vulnerable persons, in line with international developments.

This approach is to some extent observable in the ongoing process for a new

Regulation, of which a visual result is that all proposed recasts are significantly longer texts than the DR. In particular the DPr and the Parliament's position are ambitious when it comes to introducing new Articles which can have the effect of improving human rights protection for vulnerable persons. Central elements of this development are: Explicit recognition that the RCD is valid in Dublin procedures, wider possibilities for reunification of dependent relatives, mandatory exchange of medical information and a requirement of fit for travel determinations. The latest suggestion from the sitting Danish Council Presidency maintains this approach to some degree, but reduces the level of protection installed in the other proposals. The Council is therefore likely to end up with a position deviating in part strongly from that of the Parliament, which again means the final outcome of negotiations between these two bodies will be crucial for everyone who will be subjected to Dublin procedures in years ahead.

From a human rights perspective, the recast process must be commended for overall placing a higher emphasis on vulnerable groups. Concurrently, many challenges will persist with any of the texts under negotiation. One issue is that the envisaged rules do not give instructions regarding States' obligation to assess whether the reception conditions in other MSs are adequate. The Commission proposed, and the Council discarded, a system for general suspension of transfers. However, what would be equally crucial for vulnerable persons, would be provisions on the case-by-case objective of ensuring that other MSs, which have been found to be responsible for an applicant with special needs, have the necessary reception facilities for the individual in question. This would be one way of inserting in the DR a clarification of MSs' arguable obligation to ensure the non-refoulement principle is respected also within Europe itself, in a manner taking account of some applicants heightened vulnerability.

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