

Compliance of the Dublin Regulation with the principle of non-refoulement

Does the Dublin Regulation of the European Union comply with the human rights guarantees provided by the principle of non-refoulement?

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1 Introduction

1.1 Purpose

Throughout history there have always been people who have had to leave their countries of origin because of war, generalized violence, persecution, or just in search of a better life for oneself and one's family. In recent years there has been a great influx of people trying to enter Europe both legally and irregularly, and migration and asylum policies have therefore become increasingly important to European governments.

The purpose of this thesis is to consider whether a specific part of European Union legislation, namely the Dublin II Regulation, is in full compliance with the principle of non-refoulement, which is seen as a cornerstone in international refugee law. The prohibition against refoulement provides refugees and asylum seekers with protection against being forcibly refouled or returned to a state where he or she might be subjected to persecution, torture or other ill-treatment. The Regulation will thus be considered in connection with fundamental human rights treaties to which the member states are parties, with a special emphasis on the European Convention of Human Rights¹ and its understanding of the principle after article 3 of the Convention, due to its significant impact on European Union (hereafter EU) law.

In the first part of this thesis the common European framework on asylum and the Dublin Regulation will be briefly presented, followed by a legal analysis of the principle of non-refoulement as it has been developed and thus its impact on the obligations of the contracting states. The Dublin Regulation is an essential part of the Common European Asylum System (CEAS), aiming at providing harmonized standards to ensure equal protection of refugees and asylum seekers throughout the Union. As the purpose of this

¹ Council of Europe: European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereafter ECHR)

thesis is to examine the compliance of the Dublin Regulation, the other legislative instruments of the CEAS and their possible deficiencies in relation to the principle of non-refoulement will not be considered.

The Dublin II Regulation is a mechanism that sets out the criteria for determining the member state responsible for examining an application for asylum submitted in one of the member states by a third-country national, aiming at ensuring that only one member state examine the individual's claim for asylum, and the system therefore facilitates transfers and returns of asylum seekers between the member states. The Regulation is based on the presumption that all member states live up to the standards of international human rights treaties and consequently can be considered as safe countries for third-country nationals, hence the transfer system as such will not be able to directly or indirectly violate the principle of non-refoulement. Since all of the member states of the European Union are parties to the 1951 Convention Relating to the Status of Refugees and the European Convention on Human Rights, thus obligated to preserve and respect the fundamental human rights provisions they contain, it might appear to be a valid presumption to automatically consider the EU member states as safe countries for asylum seekers.

However, ten years after it entered into force, the Regulation has been widely criticised and has displayed significant deficiencies regarding its unfortunate impact on those who are transferred in accordance with it. An examination of certain issues with the Regulation in connection to the possible violation on non-refoulement will thus be carried out, focusing primarily on the issues relating to mutual trust expressed by the safe country presumption, and the Regulation's failure to serve as a burden-sharing instrument as well as the lack of procedural safeguards for those who are transferred pursuant to the Regulation secondary. The main focus will be on the responsibilities of the sending state to avoid further arbitrary refoulement as a result of its decision to transfer an asylum seeker to another member state, and will consequently mainly concern the possible indirect violation of the prohibition of refoulement in accordance with how the principle is interpreted in the European Court of Human Rights' (ECtHR) case law. More specifically this pertains to a situation in which an asylum seeker fears that her return to another member state would put her at risk of being

further refouled to a territory in which she might be subjected to torture or other ill-treatment, without having the opportunity to have the merits of her claim for asylum properly considered by either the sending, nor the receiving member state. Furthermore, as the recent jurisprudence from the two European Courts has demonstrated, transfers pursuant to “Dublin” procedures to certain member states are also able to directly violate the principle of non-refoulement, and an analysis of the relevant case law of the ECtHR and the Court of Justice of the European Union (CJEU) will consequently be conducted in regard to both indirect and direct infringements of the prohibition against refoulement when this follows as a consequence of “Dublin” transfers in order to determine the member states responsibilities.

As the deficiencies of the system have also been acknowledged by the EU legislators, a recast of the Regulation is currently being discussed in the different institutions, and has so far been agreed upon politically.² Albeit the revised proposal appears to address many of the most pressing issues of the Regulation, by for instance introducing the right to a personal interview and access to effective appeal against a transfer-decision with the right to remain on the territory while the competent authorities decide whether or not its enforcement should be suspended, several others remain unresolved. This applies especially to the lack of a burden-sharing mechanism as well as the absence of legal requirements regarding temporary suspension of transfers in situations of non-compliance with the other CEAS instruments by certain member states, which were originally proposed by the Commission but has not been endorsed by the European Council.³

The proposed amendments will thus be examined in connection with the current provisions, and their ability to provide adequate protection against refoulement will be considered.

² Irish Presidency of the Council of the European Union, press release: Minister Shatter presents Presidency priorities in the JHA area to European Parliament, 22.01.2013

³ European Council, doc 7010/12, 2.3.2012

2 The legal background of the Dublin Regulation

2.1 Towards a Common European Asylum System

Before conducting a legal analysis of the Dublin II Regulation, the Regulation and its background and legal context will first be presented. The Dublin Regulation is part of the EU's common legal framework on asylum, which prior to the 1980's did not appear to be high on what was then the European Community's (EC) agenda. The signing of the Schengen agreement between Germany, France and the Benelux countries in 1985, which was originally an intergovernmental process outside the EC, nevertheless became the beginning of what was to become a common European approach to migration.⁴ In 1990 the first Dublin Convention⁵ was signed, and was like the Schengen agreement at the time based outside the Community aqis. Since the Schengen agreement removed internal border controls and the Single European Act⁶ provided the free movement of people, goods, services and capital, thus allowing persons to move relatively unrestricted between member states, the purpose of the Dublin Convention then was to decide how to determine which state party should be responsible for considering an asylum claim where the applicant had travelled through more than one state.

Asylum matters were first formally introduced to the EC institutional framework, which now had become the EU, with the Maastricht treaty⁷ where it was named one of nine "matters of common interest" in Justice and Home Affairs, and was supposed to ensure that developments on the area were be in compliance with the ECHR and the Geneva

⁴ Schengen Agreement, OJ L 239 , 22/09/2000 P. 0013 - 0018, 42000A0922(01)

⁵ Dublin Convention, 15.06.1990, Official Journal C 254, 19/08/1997 p. 0001 - 0012

⁶ European Community: Single European Act, OJ L 169, 29.06.1987

⁷ Treaty on European Union, OJ C 191, 29.7.1992

Convention.⁸ Compliance with international and regional human rights treaties on the area has thus been an important aim of the EU asylum system from the beginning.

In 1997 the treaty of Amsterdam,⁹ which amended the 1992 Maastricht Treaty, became an important step in the development of the Common European Asylum System (CEAS). The Treaty formally integrated the Schengen aquis in the EU and determined that the Union within a period of five years was to adopt measures and mechanisms on asylum policy, including common rules on determining the member state responsible for considering an application for asylum submitted by a national of a third-country in one of the member states,¹⁰ thus initiating the revision and adaption of the Dublin Convention in the EU framework. The Union also decided to adopt common minimum standards on reception conditions and procedures relating to asylum applications, as well as a common minimum standard on the determination of refugee status.¹¹ The purpose was to establish an area of “freedom, security and justice.”¹²

After several discussions within the EU, the four following legislative instruments were adopted mainly within the agreed timeframe, thus concluding the first phase of CEAS: The Reception Conditions directive,¹³ the Dublin Regulation,¹⁴ the Asylum Qualifications directive,¹⁵ and the Asylum Procedures directive.¹⁶

⁸ Christian Kaunert and Sarah Léonard: The European Union asylum policy after the treaty of Lisbon and the Stockholm programme: Towards supranational governance in a common area of protection? *Refugee Survey Quarterly*, Vol. 31, No. 4, pp. 1–20

⁹ European Union: The Treaty of Amsterdam, OJ C 340, 10.11.1997

¹⁰ *Ibid*, article 63(1)

¹¹ *Ibid*

¹² *Ibid* article 61(b-d)

¹³ Council Directive 2003/9/EC of 27 January, OJ L 31/18, 06.02.2003

¹⁴ Council Regulation (EC) No 343/2003/EC of 18 February 2003, OJ L 050 , 25.02.2003

¹⁵ Council Directive 2004/83/EC of 29 April 2004, OJ L 304/12, 30.09.2004

¹⁶ Council Directive 2005/85/EC of 1 December, OJ L 326/13, 13.12.2005

As the purpose of this thesis is to consider the compliance of the Dublin Regulation, the other three legal acts constituting the CEAS will not be assessed further, but might rather serve as a supplement to understanding the Dublin Regulation when necessary.

In the second phase the CEAS was, according to the Hague programme, supposed to move forward going beyond the minimum standards and establish a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection.¹⁷ The first phase measures were evaluated by 2007, which resulted in the Policy Plan on Asylum presented by the Commission,¹⁸ which pointed out three main strands of the CEAS; legislative harmonization, practical cooperation, and solidarity amongst Member States,¹⁹ and pushed the deadline for the implementation of the CEAS to be done by the end of 2012. The evaluation also showed that about 11.5 % of all asylum applications that were lodged in the “Dublin” area were subjected to transfer requests pursuant to the Regulation, which displays that the Regulation is not without impact on the situation for asylum seekers in the Union.²⁰

The Hague programme was then subsequently followed by the Stockholm programme, which contained the policy plan for the period of 2010-2014. The program reaffirms the Dublin system’s role as a cornerstone in building the CEAS, and maintains the commitment to create an area of equal protection and solidarity.²¹ The Programme also continues the approach of attempting to strike a balance between high level of protection for asylum seekers on one side, and to effectively prevent, combat and control illegal

¹⁷ European Council: The Hague Programme, OJ C 53/1, 03.03.2005, 1.3 paragraph 1

¹⁸ Commission of the European Communities: Policy Plan on Asylum – An Integrated Approach to Protection across the EU, COM(2008) 360, 17.06.2008

¹⁹ Kaunert, note 8, p. 14

²⁰ European Commission: Report on the evaluation of the Dublin system, COM(2007) 299 final, 6.6.2007

²¹ European Council: The Stockholm Programme, OJ C 115/1, 4.5.2010, p. 32

immigration as well as preventing abuse of the asylum system on the other.²² Albeit at least some of the EU institutions had to be aware of the deteriorating standards of the asylum systems of some of the member states at the time,²³ the principle of mutual trust remains the basis for cooperation in the area. Furthermore, the policy plan did not appear to challenge the Dublin Regulation's suitability to function as an instrument of a system which is supposed to promote burden-sharing and solidarity, despite the emergence of reports by international organisations and the evaluation of the European Parliament itself concluding otherwise.²⁴

With the entry into force of the Lisbon treaty, the relevant provisions in asylum matters in the main treaties are now article 78 TEU, which is the legal basis for the CEAS, stressing the importance of compliance with the Geneva Convention and the principle of non-refoulement, and article 80 TEU reiterating the principle of solidarity and fair sharing of responsibility among member states.²⁵

Finally, as a result of the evaluation and consultations, the four legislative instruments of the first phase have been revised, whereas in the time of writing, the recast of the Asylum Qualifications directive has been formally adopted,²⁶ the recasts of the Reception Conditions Directive and the Dublin Regulation have been agreed upon politically, and the negotiations of the Asylum Procedures Directive is yet to be finalized.²⁷ The revised proposal for the new Dublin III Regulation will thus be seen in connection with the current provisions when examined further in this thesis.

²² Ibid, p. 5

²³ See for instance Case C-72/06, *Commission v. Greece* (2007), ECR I- 00057.

²⁴ European Parliament: Resolution 2/9/2008 on the evaluation of the Dublin system, (2007/2262(INI)), point M.

²⁵ See European Union: Consolidated versions of Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and Charter of Fundamental Rights of the European Union (CFREU) (as amended by the Lisbon Treaty) OJ C 83/47, 30.3.2010

²⁶ Directive 2011/95/EU, OJ L 337/9, 20.12.2011

²⁷ See Irish Presidency, note 2

2.2 Purpose and criteria of the Dublin II Regulation

The purpose of the Regulations is to set out the criteria and mechanisms for determining the member state responsible for examining an application for asylum submitted in one of the member states by a third-country national.²⁸ All the current 27 member states of the EU are bound by the Regulation, as well as Norway, Switzerland, Liechtenstein and Iceland through special agreements. Therefore, when referring to the Dublin Regulation, Norway, Switzerland, Liechtenstein and Iceland are also included in the term “member states”, as they are parties to the Regulation, albeit without being members of the EU.

As with the Dublin Convention, the Regulation aims at prohibiting asylum seekers from lodging applications in several different member states hoping to be accepted somewhere, or so-called asylum shopping, and avoiding “refugees in orbit”, meaning asylum seekers who were sent from one state to another as no state appeared to be willing to consider their application.²⁹ Where one of the main issues with the 1990 Convention was to determine the identity of the refugee and his previous travel route, the Eurodac system of collection and comparison of fingerprints³⁰ was established to make the application of the Dublin system more effective.

The Dublin Regulation consists of two kinds of criteria, namely the ones that allocate responsibility for the examination of the asylum application, and those who decide transfer and reversal of asylum seekers.³¹

The first kinds of criteria after the Dublin Regulation is set out in Chapter III of the Regulation and are objective and hierarchal, where the basis of the examination of which member state is responsible for the asylum application is determined on the account of the situation obtaining when the asylum seeker first lodged his application with a member state. In many instances the asylum seeker has crossed the border irregularly or has arrived

²⁸ Dublin Regulation, note 14, article 1

²⁹ Kaunert, note 8, p. 17

³⁰ Council Regulation (EC) No 2725/2000, OJ L 316/1, 15.12.2000

³¹ Øyvind Dybvik Øyen (red): Lærebok i utlendingsrett, Universitetsforlaget (2013), p. 448

at the border without the necessary documents, in which case the first member state the asylum seeker enters is the one responsible for considering the application.³² This is often referred to as the “first country of asylum” principle, and applies usually in situations where there are no other factors to determine which country is best suited to handle the application.

In situations where there are such other factors in determining where the asylum application should be examined, these factors could be decisive for the applicant.

For instance, articles 6-8 concern situations where the applicant has family in a member state, and can all be seen as results of the respect of family unity, which is described as an important consideration in the Regulation’s preamble.³³ Furthermore article 9 decides that if an applicant has a valid residence permit, the member state who issued the document is responsible for the examination of the application. Due to the hierarchy of the rules set out in the Regulation itself,³⁴ the provisions in articles 6-9 are *lex superior* and therefore take precedence over the general “first country of asylum” principle in article 10. There are however two significant exceptions from these criteria, namely the discretionary clauses based on sovereignty in article 3(2) and humanitarian considerations in article 15.

³² Dublin Regulation, note 14, article 10 (1)

³³ Ibid, preamble (6)

³⁴ Ibid, article 5(1)

Since “Dublin II” is meant to make one and only one member state responsible for the individual asylum application, if an analysis of the criteria for responsibility described above displays that another member state than the state the asylum seeker is currently in is responsible for his claim, that state can then request that the responsible one to “take back” or “takes charge” of the applicant and thus the examination of his application.³⁵ The Regulation therefore contains a right for the sending state to transfer, but nevertheless not an obligation, as the sovereignty clause of article 3(2) of the Regulation allows the member states to consider an application albeit it does not have the responsibility to do so. On the other hand, the receiving state is obligated to accept the transfer if it indeed is responsible pursuant to the provisions of the Regulation.

³⁵ Ibid, article 16

3 The legal impact of other international treaties on European Union law

Several of the legal instruments which constitute the CEAS have mentioned the importance of full compliance with international human rights obligations, such as the ones from the Geneva Convention. However, the supremacy of what at the time was Community law over national law and obligations was established in the case of *Costa v. ENEL*,³⁶ and questions could therefore be asked regarding the formal impact of such human rights treaties on secondary legislation such as the Dublin Regulation. In the mentioned case, the European Court of Justice (ECJ) found that "the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights..."³⁷ Yet this does not apply to all international instruments, as the issue is moreover addressed in article 351 (1) (307 TEC) of the TFEU³⁸ which establishes that international obligations the member states adopted before 1958 will not be affected by the treaty. It has furthermore been established in case law that the application of Union law will not affect the member states obligations to respect the rights of a third-country under a previous agreement.³⁹ However, after article 351 (2), if the agreements are not compatible with the EU treaties, the member state(s) concerned have to take all appropriate steps to eliminate the incompatibilities. When interpreting the principle, the Court nevertheless found that the provisions that form the very foundations of the treaty, namely the protection of fundamental rights, cannot be challenged by 307 TEC.⁴⁰

³⁶ *Costa v. ENEL*, Case 6/64, ECR 585 (1964), see also *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, ECR 1 (1963)

³⁷ *Ibid*, p. 594

³⁸ See TFEU, note 25

³⁹ *Attorney General v. Burgoa*, C-812/79, (1980) E.C.R. 1-27-87

⁴⁰ *Kadi and Al Barakaat Int'l Foundation v. Council*, CA02, 415/05 P (2008) E.C.R. 1-6351

Regarding human rights treaties such as the Geneva Convention or the ECHR, the TFEU article 78, as mentioned, establishes that the common asylum policy should ensure compliance with the principle of non-refoulement and the Geneva Convention, as well as other relevant treaties. The ECHR would for instance appear to be such a relevant treaty in this respect. It could consequently be argued that article 78 is *lex specialis* in regard to article 351 considering the legal effect of international refugee and human rights treaties.⁴¹ Such international human rights treaties have been an important source of inspiration for the EU treaties themselves, as for instance in the case of the Charter of Fundamental Rights in the European Union.⁴²

The significance of the Geneva Convention is further emphasised through the EU's decision to accede to the treaty, on which a report by the Commission regarding its legal and practical impacts is due later this year.⁴³

As the Dublin system facilitates transfers of asylum seekers by determining the responsible member state, the system thus has to be considered against international human rights treaties containing provisions that also apply to transfers of asylum seekers. Therefore, in order to examine the Dublin Regulation and its compliance with the principle of non-refoulement, the next part of the thesis will reiterate the legal basis of the principle in order to determine the scope of protection that it requires.

⁴¹Maria-Teresa Gil-Bazo: Refugee Status: Subsidiary Protection, and the Right to be Granted Asylum Under EC Law, Research Paper No. 136, UNHCR, November 2006 (University of Oxford)

⁴² See below, chapter 4.3

⁴³ Commission: Action plan on the implementation of the Stockholm Programme, COM(2010) 171 final, 20.4.2010, p. 55

4 The impact of the prohibition of refoulement on the member states obligations

4.1 1951 Convention Relating to the Status of Refugees

The principle of non-refoulement is seen as a cornerstone in refugee protection, yet there is no overreaching principle in this regard, but rather a sum of state obligations under different international treaties, some of which will be presented in the continuation of this thesis. The 1951 Convention relating to the Status of Refugees (hereafter the Geneva Convention) was the first international treaty⁴⁴ to establish a single definition of the term refugee, to provide this group with fundamental rights, as well as establish state obligations in this regard, and is thus seen as the primary source of refugee law today.⁴⁵ The Geneva Convention provides protection from refoulement to persons who qualifies as refugees, which, according to the Convention, is someone who has a «...well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion...», who is outside the country of his nationality and is owing to that fear unable or unwilling to be under the protection of that State, and thus unable or unwilling to return to it.⁴⁶ The definition is based on the situation in Europe after the atrocities carried out during the Second World War, where there was a great urgency to manage the situation with millions of refugees throughout the continent, especially with political dissidents fleeing persecution in the communist states.⁴⁷ Since the refugee could no longer enjoy the protection from his or her country of origin, the thought seemed to be that the person should then be able to seek such protection elsewhere. It was only in 1967

⁴⁴ Although it was based on the 1933 Convention relating to the International Status of Refugees, see Guy S. Goodwin-Gill and J. McAdam: *The Refugee in International law*, 3 ed, Oxford University Press, 2007

⁴⁵ UNHCR: *Convention and Protocol Relating to the Status of Refugees with an Introductory Note by the Office of the United Nations High Commissioner for Refugees* (2010a)

⁴⁶ The 1951 Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, article 1 (A)(2)

⁴⁷ Catherine Phuong: *Internally Displaced Persons and Refugees: Conceptual Differences and Similarities*, 18 Neth. Q. Hum. Rts. 215 2000, part II A, p. 222

that the geographical and temporal reservations were lifted with an optional protocol,⁴⁸ but the provisions in the Convention remained unchanged and therefore the purpose was not just to protect people who have fled in fear of persecution in their home countries, but also to try to limit the scope of the definition in order to protect States from a possibly destabilizing mass influx of refugees seeking protection.⁴⁹

The Geneva Convention does not in itself include a right to asylum nor does it give any guidelines to the required procedures in the determination of refugee status, yet it could be argued that it is generally recognised that fair and efficient procedures are a necessary prerequisite to uphold the provisions of the Convention.⁵⁰

The Geneva Convention then provides the refugee with protection against being returned or expelled to the frontier of a territory where his or her life or freedom would be threatened on account of religion, race, nationality, membership of a particular social group, or political opinion.⁵¹ The only two exceptions from this principle of non-refoulement is for a person who otherwise qualifies after article 1(a) as a refugee, but for which there are reasonable grounds for regarding as a danger for the country of which he is currently a resident, or who has been finally convicted of a particularly serious crime and therefore constitutes a danger to the community of that country.⁵² Furthermore the refugee must not be excluded from refugee status after Article 1 (F)(b) of the Convention.

The principle does not only apply to persons who have formally been recognized as refugees, according to the Office of the United Nations High Commissioner for Refugees (UNHCR), whose task it is to oversee how the state parties apply the Geneva Convention, a

⁴⁸UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267

⁴⁹Toby D.J. Mendel: Problems with the International Definition of a Refugee and a Possible Solution, p. 5 1 Dalhousie J. Legal Stud. 7. 1992.

⁵⁰UNHCR: Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paragraphs. 4-5, (2001a)

⁵¹ Geneva Convention, note 46, article 33 (1)

⁵² Ibid, article 33(2)

person does not become a refugee because of recognition, but is recognized because he or she is a refugee.⁵³

The prohibition of refoulement is of the utmost importance as it guarantees that the rights of the Convention can be carried out effectively. Without the principle of non-refoulement it could be argued that the rights of the Geneva Convention would be illusory, since the host state could simply expel the refugee and thus in effect prohibit him from access to any other rights proscribed by the Convention. The fundamental character of this provision was also confirmed in the travaux préparatoires.⁵⁴ A migrant in search of protection from refoulement therefore has to demonstrate that his or her return would engage the responsibility of the sending state under international law.⁵⁵ According to the Draft Articles on State Responsibility, which is non-binding, but nevertheless a codification of relevant principles and have on several occasions been cited by the United Nations' International Court of Justice, in order to constitute such responsibility one must attribute a certain act or omission to a state and identify at least one international obligation that such conduct has breached.⁵⁶ The term international responsibility does not only apply in relation to another "injured" state, but also "...covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law..."⁵⁷

⁵³UNHCR: Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007)

⁵⁴Paul Weiss: The Refugee Convention 1951, the travaux préparatoires analyzed with commentary, (Cambridge, Cambridge University Press) 1995, p. 235

⁵⁵ Francesco Messineo: Non-refoulement Obligations in Public International Law: Towards a New Protection Status? Research Companion to Migration Theory and Policy, Satvinder Juss (ed), Ashgate, 2012, p. 4

⁵⁶ International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, article 2(a-b)

⁵⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, p. 33 (5)

After the Geneva Convention the principle of non-refoulement thus constitutes a direct responsibility for the sending state A to not transfer an asylum seeker to the receiving state B, if there is a real risk that the asylum seeker would face persecution in state B due to the five specific criteria listed above. In relation to the Dublin Regulation, which has clearly stated its aim of upholding this principle by ensuring that nobody is sent back to persecution,⁵⁸ this means in the strict sense that in order to comply with the Convention, a member state cannot transfer an asylum seeker to another member state if the individual concerned would face persecution there. According to the UNHCR this also includes rejection at the frontier, interception and indirect refoulement,⁵⁹ which will be examined further below.

In a European context it has been argued that refoulement is seen in particular as “... summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers...” and consequently has to be distinguished from expulsion or deportation.⁶⁰

Furthermore, the Geneva Convention and its prohibition of refoulement is not the only international treaty which proscribes obligations to the member states and, as will be argued, the EU institutions themselves. After the standards of the Geneva Convention, several other international and regional human rights treaties have expressed the principle of non-refoulement,⁶¹ yet the principle will only be assessed after the conventions which could be said to have direct impact or influence on the responsibilities of the member states

⁵⁸ Dublin Regulation, note 14, preamble (2)

⁵⁹ UNHCR: Note on international protection, 13.9.2001, A/AC.96/951, p.6, paragraph 16, (2001b)

⁶⁰ G. Goodwin-Gill, note 44, p. 201, see also Patricia Mallia: Notes and Comments – Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation, (2011) 30 Refugee Survey Quarterly, pp. 107–128, p. 110

⁶¹ Such as the 1967 UN General Assembly Declaration on Territorial Asylum, A/RES/2312(XXII) (1967), the 1969 American Convention on Human Rights (Pact of San José, Costa Rica), 1144 UNTS 143, the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 and the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, 22 November 1984

and the implementation of the Regulation. The development of direct and indirect refoulement after the ECHR and its consequences and impact on the Dublin Regulation, including an analysis of the relevant case law, will thus be carried out in order to examine the responsibilities of the member states when transferring asylum seekers pursuant to the Regulation.

4.2 The European Convention for the Protection of Human Rights and Fundamental Freedoms

In Europe, the ECHR has emerged as perhaps the most important regional treaty for the protection of human rights, and will therefore have special emphasis when considering legal acts of the European Union. Unlike the Geneva Convention, everyone can seek protection of their rights under the ECHR, given of course that the right in question is protected in the Convention, and as long as they are under the jurisdiction of a contracting party.⁶² The Convention does not explicitly contain any prohibition of refoulement nor does it guarantee the right to asylum in any of its articles. It could rather be argued that the principle is incorporated in the Convention through the case law of the ECtHR. Being the monitoring mechanism of the ECHR, the ECtHR affirmed already in 1978 in the case of *Tyrer v. United Kingdom*⁶³ that it intended to interpret the Convention evolutionary, as the Court stated that the ECHR was a “...living instrument...” which had to be interpreted in the light of “...present-day conditions”.⁶⁴

The Court has continued using this method of evolutionary or dynamic interpretation, and was thus able to establish the concept of an implied principle of non-refoulement under article 3 for the first time in the case of *Soering v. United Kingdom*.⁶⁵

⁶² Hélène Lambert: *The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities*, *Refugee Survey Quarterly*, Vol. 24, Issue 2, 2005, p. 39-55, p. 40

⁶³ *Tyrer v. The United Kingdom*, no. 5856/72 E.C.H.R.1978

⁶⁴ *Ibid*, paragraph 31

⁶⁵ *Soering v. United Kingdom* no. 14038/88 E.C.H.R. (Plenary) (1989)

4.2.1 Establishing the concept of implied non-refoulement

In the Soering case, a German national, Jens Soering, was imprisoned in the U.K. facing extradition to the U.S. where he would be trialled for murder where the maximum sentence was the death penalty. The applicant claimed that if he was sentenced to death, he would be exposed to the so-called “death row phenomenon” which allegedly amounted to breaching article 3, which provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁶⁶ The judgment did therefore not concern an asylum seeker, but nevertheless had, as will be argued, great impact on the rights of asylum seekers in Europe. The question the Court then had to consider in the Soering case was whether the extradition of the applicant to a state where he would be subjected or likely to be subjected to torture, inhumane treatment or degrading punishment would in itself engage the responsibility of a contracting state under article 3. The ECtHR expressed that the interpretation of the ECHR had to be conducted with regard to its special character as a treaty protecting human rights and fundamental freedoms, and given the absolute nature of article 3, the Court found that:

“Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 [...] would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.”⁶⁷

The Court consequently established a responsibility for the contracting states not only for actions on their own territory, but also for actions by the sending state which has the direct consequence of placing an individual at risk of treatment in violation of article 3 in another state,⁶⁸ a principle that appears to be in line with the prohibition of non-refoulement in the

⁶⁶ Ibid, paragraphs 80-81

⁶⁷ Ibid, paragraph 88

⁶⁸ Ibid, paragraph 91

International Convention against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT) article 3.⁶⁹ According to CAT, “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷⁰ In the assessment of whether such “substantial grounds” exists, the competent authorities must take into account all relevant considerations including if there is “a consistent pattern of gross, flagrant or mass violations of human rights”⁷¹ in the state concerned. This provision must be considered in the light of the purpose of the Convention, namely the prohibition of torture, which according to article 2 (2) is an absolute right from which there can be no derogation.

The legal basis for the assessment in CAT and the ECHR is therefore different from how the principle is materialized in the Geneva Convention. The principle in CAT and ECHR is based on protection from torture and other ill-treatment, while the principle in the Geneva Convention is protection from persecution and the threat against the refugee’s life or freedom based on her refugee status and the concerned individual’s belonging to a particular social group, her religion, political opinion, race or nationality. However, the prohibition of refolement after the ECHR is extended further than that of the CAT, as after the wording of CAT article 3, the provision appears to only include acts that amount to torture, not other cruel, inhuman or degrading treatment or punishment, while this is included in the protection provided by the ECHR.

⁶⁹ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85

⁷⁰Ibid, article 3 (1)

⁷¹Ibid, article 3 (2)

4.2.2 The scope of protection

A few years later, the ECtHR upheld the approach taken in the Soering judgment first in the case of Cruz Varas and others v. Sweden⁷² and then in the case of Vilvarajah and others v. United Kingdom.⁷³ In the latter, the Court expressed that albeit every state has the right to control the entry, residence and expulsion of aliens,⁷⁴ refoulement constituted a breach of article 3 if there was shown substantial grounds for believing that the applicant concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned. The Court also held that such a non-refoulement principle had an absolute character, hence “...the Court’s examination of the existence of a risk of ill-treatment in breach of Article 3 [...] at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.”⁷⁵

In the case of Chahal v. United Kingdom, the Court even stated that there were no provisions for exceptions or derogation from article 3 irrespective of the applicant’s conduct and that the protection afforded by the article is thus wider than that provided by articles 32 and 33 of the Geneva Convention.⁷⁶

Furthermore the threat of torture or ill-treatment does not have to originate from state officials in the receiving state; the Court has also confirmed that the threat can come from non-state agents, but with the added condition that the government then cannot obviate the risk by providing appropriate protection.⁷⁷

⁷² Cruz Varas and others v. Sweden, no. 15576/89, E.C.H.R. (Plenary) 1991

⁷³ Vilvarajah and others v. United Kingdom no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 E.C.H.R. (1991)

⁷⁴ Ibid, paragraph 102

⁷⁵ Ibid, paragraph 108

⁷⁶ Chahal v. United Kingdom, no. 22414/93 E.C.H.R. (Grand Chamber) (1996) paragraph 80

⁷⁷ Salah Sheekh v. The Netherlands, no. 1948/04 E.C.H.R. 2007, paragraph 137, see also H.L.R. v. France, no. 24573/94 E.C.H.R. 1997, paragraph 40

The applicant must however be able to establish that there are substantial grounds for believing there is a real risk of ill-treatment, which must moreover reach a minimum level of severity.

Furthermore, in the first case concerning the Dublin system, which will be analysed further in connection with the issues relating to mutual trust in chapter 5.1, the Court found that the indirect violation of the principle of non-refoulement, meaning the removal to an intermediary country where the applicant could risk further arbitrary refoulement would also be a violation of the sending state's obligations after the Convention.⁷⁸ This therefore corresponds with how the UNHCR interprets the principle as mentioned in chapter 4.1.

The Dublin Regulation does moreover rely on that there can be established some form of contact between the asylum seeker and the member state before the obligation to examine the application arises. The Regulation, as well as the ECHR and other international human rights treaties, depends on that the individual is within the state's jurisdiction. After the Dublin Regulation this means that the applicant has to reach the member state's border,⁷⁹ which appears to allow member states to evade their responsibilities if they can prevent asylum seekers from arriving at their borders in the first place. Several EU member states have therefore been criticised for carrying out border controls on the high seas and even in the territorial waters of third-countries, aiming at intercepting boats attempting to reach Europe and forcing them to return or diverting them back to North African states, as well as entering into bilateral agreements with such third-countries on migration control.⁸⁰

A recent case before the ECtHR, *Hirsi Jamaa and others v. Italy*,⁸¹ concerned Italy's interception of a migrant vessel outside Lampedusa and the subsequent direct return of the

⁷⁸ See *T.I. v United Kingdom*, no. 43844/98, E.C.H.R 2000, p. 15, paragraph 2 and chapter 5.1.1

⁷⁹ Dublin Regulation, note 14, article 3 (1)

⁸⁰ Amnesty International: "S.O.S Europe, Human Rights and Migration Control" (2012), page 10, paragraph 3

⁸¹ *Hirsi Jamaa and others v. Italy*, no. 27765/09, (Grand Chamber) E.C.H.R. (2012)

migrants to Libya, without providing information or examining whether the applicants onboard were in actual need of international protection. The Court ruled that albeit the applicants had not physically reached the Italian border, the Italian authorities had, through intercepting and transferring the applicants back to Libya, exercised exclusive *de facto* and *de jure* control over the applicants and consequently exercised jurisdiction in the meaning of the Convention.⁸² The Court, reiterating the absolute character of article 3, ruled that the Italian authorities had violated that article both because of the return to Libya itself exposed the applicants to the risk of degrading treatment contrary to article 3, and because of the risk of arbitrary further refoulement.⁸³

The prohibition of refoulement is therefore part of the protection from torture and other ill-treatment after article 3 of the ECHR, yet the question then remains if also other provisions of the Convention, such as for instance the right to freedom of expression, would engage the same responsibility? In the Geneva Convention the protection from refoulement is extended to the threat of “life and freedom”, whereas the ECtHR stated already in the Soering case that:

“Article 1 [...] cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.”⁸⁴

This was also shown in the case of J.E.D. v. United Kingdom, where the applicant claimed that his expulsion to the Ivory Coast would violate his right to freedom of expression after article 10, while the Court however held that deportation of an alien pursuant to immigration controls did not constitute an interference with the rights guaranteed under

⁸² Ibid, paragraphs 81-82

⁸³ Ibid, paragraphs 137 and 158

⁸⁴ Soering, note 65, paragraph 86

that article.⁸⁵ This difference might be explained by the fundamental character of the prohibition of torture under article 3, expressed for instance in article 15 of the Convention which determines that the rights of the Convention can temporarily be set aside in times of war or public emergency, yet there can under no circumstances be derogated from article 3. However, in the case of *D. United Kingdom*⁸⁶ the Court appears to have left the question open as to whether expulsion in some cases could constitute violation of articles 2 and 8 of the ECHR.⁸⁷ It later confirmed that refoulement could constitute breach of article 2,⁸⁸ as well as opened for the possibility that in exceptional cases it could be considered under article 6 regarding the risk of a “... flagrant denial of a fair trial.”⁸⁹

The ECtHR therefore appears to interpret the principle of non-refoulement primarily in connection with article 3, which the sending states pursuant to the Dublin Regulation thus have to act in accordance with, as the member states are also contracting parties of the ECHR. However, the Convention furthermore require the contracting parties to consider all circumstances in each particular case, where in exceptional situations expelling or returning a third-country national could lead to infringement of the individual’s fundamental rights pursuant to other provisions than article 3 as well.

⁸⁵ *J.E.D. v. United Kingdom*, no. 42225/98, E.C.H.R (1999) paragraph 5

⁸⁶ *D. v. United Kingdom*, no. 30240/96, E.C.H.R (1997)

⁸⁷ *Ibid*, paragraphs 59 and 64

⁸⁸ However in combination with article 3, see *Bader and Kanbor v. Sweden*, no. 13284/04 E.C.H.R. (2005) paragraph 48

⁸⁹ *Mamatkulov and Askarov v. Turkey* no. 46827/99 and 46951/99, E.C.H.R. (2005) paragraph 88

4.2.3 The impact of the European Convention of Human Rights on European Union law

Compliance with the ECHR is important for the member states when implementing EU law, as the Convention has not only been of great influence on Union legislation itself, but also became formally part of the general principles of EU law with the entry into force of the Maastricht treaty.⁹⁰ The special significance of the ECHR was then highlighted by the ECJ,⁹¹ and in an opinion in 1996 the ECJ even held that respect of human rights is a condition of the lawfulness of EU acts.⁹² Yet the same opinion declared that the EU lacked the competence to accede to the ECHR, given that this required an amendment to the treaties.

From the side of the ECHR, the ECtHR found some years later that the obligations arising from the Convention still applies to the contracting parties although they have transferred competences to international organisations such as the EU. In the case of *Matthews v. United Kingdom* the Court observed that such transfers of competence can only take place when the rights after the Convention continues to be secured, yet the acts of the EU itself could not be challenged as long as the EU is not a contracting party.⁹³ However, this will change due to the Lisbon treaty, which decided that the EU will also accede to the ECHR after all⁹⁴. As the 14th protocol amending the ECHR entered into force in June 2010, another legal barrier has been removed, and article 59 (2) of the ECHR now allows for the EU to accede the Convention, where it formerly was only open for states to become parties.⁹⁵

⁹⁰The Maastricht treaty, note 7, article F(2)

⁹¹ ECJ, Case C-260/89, *ERT* (1991) ECR I-2925, paragraph 41

⁹² ECJ, Opinion 2/94 (1996) ECR I-1759, paragraph 34

⁹³ *Matthews v. United Kingdom*, no. 24833/94, E.C.H.R. (1999), paragraph 32

⁹⁴ TEU, note 25, article 6(1) - (2)

⁹⁵ ECHR, as amended by protocol 14, article 59(2)

The great significance of the ECHR has furthermore been displayed several times in the different legislative acts of the EU, where compliance with the Convention was for instance an expressed aim of the different regulations and directives constituting the first phase of the CEAS. When transferring asylum seekers, the member states thus have to ensure that the transfer is in full compliance with its obligations after the ECHR.

4.3 The significance of the Charter of Fundamental Rights in the European Union

Since the Lisbon treaty gave the CFREU the same legal value as the “Treaties”,⁹⁶ the principles of the Charter are relevant to all institutions, agencies and offices of the EU, as well as all member states in their implementation of Union law.⁹⁷ However, in this lies also a limitation, which entails that a member state is only obligated to follow the provisions of the Charter when it could be said to exercise EU law, which distinguishes it from the ECHR where compliance is required in all actions or inactions that falls within the state’s jurisdiction.⁹⁸ In as much as transfers pursuant to the Dublin Regulation arguably are implementation and exercise of EU law, the member states are therefore also bound by the provisions of the Charter when applying the Regulation.

Originally, the treaties of the establishment and the functioning of the European Community did not contain any human rights provisions.⁹⁹ However, the ECJ¹⁰⁰ still considered fundamental rights as an integral part of the general principles of Community Law, which had to be ensured within the “framework of the structure and objectives of the

⁹⁶ Namely the TEU and the TFEU, note 25, TEU article 6(1)

⁹⁷ Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000, article 51(1)

⁹⁸ ECHR article 1

⁹⁹ Steve Peers: *Immigration, Asylum and the European Union Charter of Fundamental Rights*, *European Journal of Migration and Law* 3: 141–169, 2001, p. 141

¹⁰⁰ After the Lisbon treaty the name is now the Court of Justice of the European Union (CJEU)

Community.”¹⁰¹ Although the ECHR became formally a part of the general principles with the Maastricht treaty in 1992,¹⁰² instead of acceding to the ECHR, the EU instead started working on its own human rights provisions which lead to the political proclamation of the CFREU in 2000.¹⁰³ The Charter was the first single text to provide fundamental civil, political, economic and social rights of both EU citizens and residents within the EU framework, and became legally binding only with the entry into force of the Lisbon treaty in 2009.¹⁰⁴ The Charter is in many ways a codification of the kind of general principles that the ECJ already had interpreted to be a part of the Union’s legal framework, and resembles international human rights treaties such as the ECHR and the International Covenant on Civil and Political Rights.¹⁰⁵

The CFREU, unlike the ECHR, explicitly contains a right to asylum in accordance with the Geneva Convention.¹⁰⁶ Furthermore, the principle of non-refoulement is materialized in article 19, which proscribes that no one shall be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other ill-treatment. The principle therefore resembles that of the CAT and the ECHR, yet extends the principle to include protection from the death penalty, which is not as such prohibited after the two other mentioned conventions. In the commentaries to the Charter provided by the Bureau of the Convention, which has no legal value, but nevertheless contributes to the clarification of the provisions, the principle in article 19(2) is supposed to

¹⁰¹ *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* Case 11/70, ECR 1125 (1970), p.1134, no. 4

¹⁰² The Maastricht treaty, note 7, article F(2)

¹⁰³ Peers, note 99, p. 143

¹⁰⁴ TEU, note 25, article 6 (1)

¹⁰⁵ International Covenant on Civil and Political Rights, (1966), 999 U.N.T.S. 171

¹⁰⁶ CFREU, note 97, article 18

incorporate ECtHR case law, mentioning especially the *Soering* and the *Ahmed v. Austria* judgements.¹⁰⁷

The *Soering* case, which is presented above, prohibited extradition of a person where the applicant's risk of being exposed to the death-row phenomenon was found sufficient to establish breach of ECHR article 3.¹⁰⁸

In the case of *Ahmed v. Austria* the applicant claimed that his impending expulsion to Somalia would violate ECHR article 3 as he feared he would be subjected to torture there and that the Austrian authorities was aware of this risk, due to their previous recognition of his refugee status. The Austrian authorities did not deny the risk of him being exposed to treatment incompatible with article 3 if he returned to Somalia, but held that since the applicant had been convicted of a serious crime and his refugee status thus had been revoked, the authorities had complied with the requirements of that provision to the extent that Austrian legislation permitted. The Court found unanimously that the absolute character of article 3 was also valid in expulsion cases, and consequently the conduct of the applicant, however undesirable or dangerous, could not be the material consideration.¹⁰⁹ The judgment therefore further extends the scope of protection beyond that of the Geneva Convention, which allows for expulsion in such circumstances.

The link between the CFREU and the ECHR is further described in the Charter itself, where it confirms that where the rights of the Charter correspond with those of the ECHR, the meaning and the scope of those rights shall be the same.¹¹⁰ This is however meant as a minimum guarantee, since the provision explicitly proclaims that this does not prevent the rights of the Charter to be interpreted to provide more extensive protection. Moreover, it

¹⁰⁷ Explanations relating to the Charter of Fundamental Rights of the European Union, CHARTE 4473/00, 18.10.2000, p. 21

¹⁰⁸ See chapter 4.2.1

¹⁰⁹ *Ahmed v. Austria*, no. 25964/94 E.C.H.R. (1996) paragraph 41

¹¹⁰ CFREU, note 97, article 52(3)

has been claimed that this provision indicates that the CJEU cannot overrule the case-law of ECtHR.¹¹¹

In addition to extending the principle to include the death penalty, the Charter has moreover become an important source to understanding the general principles upon which the Union is built, which secondary legislation such as regulations and directives have to be interpreted in accordance with.

Finally, for the Dublin Regulation, the principle of non-refoulement after the international and regional human rights treaties to which the member states are legally bound therefore entails that the member states when conducting transfers have to ensure that there are not reasonable grounds for believing that the transferred asylum seeker would directly risk being persecuted, tortured or subjected to other ill-treatment, or face the death penalty in the receiving state. Moreover the sending state needs to ensure that the receiving state will not further transfer an applicant to a third-country where she might be exposed to such risks. The Regulation is constructed to comply fully with this understanding of the obligations after the principle of non-refoulement, however, the implementation of the system of “Dublin” transfers has nevertheless displayed significant deficiencies in this regard, which will be examined further in the next part of this thesis.

¹¹¹ Sophie Lieven: Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011, *European Journal of Migration and Law* 14 (2012) 223–238, p. 235

5 The presumption of safety and the principle of mutual trust

The entire Dublin system is based on the presumption that all member states due to their respect of the principle of non-refoulement are to be considered as safe countries of third-country nationals.¹¹² In practice, this appears to imply that a member state can transfer an asylum seeker back to the “first country of asylum” and take for granted that the receiving state will respect and uphold the human rights obligations of which they are both legally bound, without making further inquiries into the merits of this presumption. Such mutual trust is imperative for the system to be able to function efficiently and is in no way unique to the Dublin Regulation, but has rather been a cornerstone in the cooperation within the EU.¹¹³ However, due to the lack of full legal harmonization in the area, there are still divergent practices in the treatment of asylum seekers in the different member states. This in particular has been illustrated by the situation and reception conditions for asylum seekers in certain states such as Greece, which the UNHCR in 2010 described as a “humanitarian crisis”,¹¹⁴ which clearly does not live up to the standards required by both international human rights treaties as well as EU law itself. With such great differences between the asylum systems of the member states, a presumption of safety based on mutual trust does not appear to be completely warranted. The “Dublin” transfers to Greece has been considered recently in two landmark judgments by the ECtHR and the CJEU respectively, which have clearly decided that the member states cannot uncritically rely on the presumption of safety pursuant to the Regulation and simultaneously uphold their fundamental human rights obligations.

¹¹² Dublin Regulation, note 14, preamble, paragraph 2

¹¹³ Evelien Brouwer: Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof, 9 Utrecht L. Rev. 135 2013, p. 136

¹¹⁴ UNHCR: Submission by the UNHCR for the Office of the High Commissioner for Human Rights’ Compilation Report - Universal Periodic Review: Greece, November 2010, p. 8 (2010b)

5.1 Corroborating case law of the European Court of Human Rights

5.1.1 The T.I. and K.R.S. v. United Kingdom judgments

As presented above in chapter 4.2.3, the ECHR has a special impact on EU law and complaints regarding the Dublin Regulation have consequently been submitted to the ECtHR on several occasions. The first case before the Court concerning the Dublin system was the case of T.I v. the United Kingdom in 2000,¹¹⁵ and was hence considering the Dublin Convention, the predecessor of the Dublin Regulation. In the case, T.I., who was a Sri-Lankan national, had applied for asylum in the United Kingdom after his first application in Germany had been denied. The United Kingdom therefore wanted to transfer the applicant to Germany pursuant to the rules of the Dublin Convention. The applicant however feared that the transfer to Germany would lead to him being summarily removed to Sri Lanka in violation of several of the articles of the ECHR, including the absolute prohibition of torture and other ill-treatment in article 3, as he believed there was a real risk of him being subjected to torture if he was returned to Sri Lanka. The Court, by majority, rejected this claim and found it to be manifestly ill-founded and that his application was thus inadmissible.

The judgment was nevertheless significant, as the Court stated that the indirect removal to an intermediary country, although this would also be a contracting state, did not affect the responsibility of the UK to ensure that the applicant is not, as a result of the UK's decision to expel, exposed to treatment contrary to Article 3 of the Convention,¹¹⁶ thus establishing for the first time the principle of indirect non-refoulement.

Moreover, the Court held that the UK could not automatically rely on agreements such as the Dublin Convention, since it could still be held responsible for actions that resulted in violations of article 3. It thus highlighted that it would be incompatible with the object and purpose of the Convention if the state parties would be able to absolve themselves from their obligations after the ECHR by entering into international organisations or

¹¹⁵ T.I. v. United Kingdom, note 78

¹¹⁶ Ibid, p. 15, paragraph 2

international agreements that did not uphold fundamental rights. However in the present case, the Court was not persuaded that the transfer of the applicant to Germany would constitute a real risk of him being expelled to Sri Lanka in breach of article 3.

The first case considered by the ECtHR regarding the current Dublin II Regulation was in 2008 in *K.R.S. v. United Kingdom*.¹¹⁷ The applicant was an Iranian national who had applied for asylum in the UK after first entering the EU through Greece, and the UK therefore requested the Greek authorities to “take back” the applicant in compliance with the Dublin Regulation, a request the Greek authorities accepted. The applicant claimed that his transfer to Greece would put him at risk of being subjected to conditions violating article 3 in Greece, as well as possible chain-refoulement back to Iran. The ECtHR unanimously found the application to be inadmissible.

Although his claim was rejected, the ruling was important as the Court affirmed its position in the *T.I.* judgment regarding the contracting states’ continued responsibility not to put an individual at risk of being exposed to treatment contrary to ECHR article 3 as a result of the decision to transfer, albeit the receiving state was a party to the Convention as well. Furthermore, the Court also reiterated the *T.I.* ruling when it held that the contracting parties could not automatically rely on the rules of the Dublin Convention, and that this would apply with equal force to the Dublin II Regulation. This clearly challenges the Dublin system’s foundation of mutual trust and the presumption that all member states are safe countries for third-country nationals seeking asylum, and thus that a transfer between them cannot as such violate the principle of non-refoulement.¹¹⁸ In the case, the Court moreover argued, citing the case of *Jabari v. Turkey*,¹¹⁹ that albeit such mechanisms were acceptable, the “...automatic and mechanical application of such procedural requirements will be considered at variance with the protection of the fundamental value embodied in

¹¹⁷ *K.R.S. v. United Kingdom*, no. 32733/08, E.C.H.R. (2008)

¹¹⁸ Dublin Regulation, note 14, preamble (2)

¹¹⁹ *Jabari v. Turkey*, no. 40035/98, E.C.H.R. (2000)

Article 3 of the Convention”¹²⁰ and that a meaningful assessment of the applicant’s claim had to be ensured. The Court nevertheless, like in the T.I. judgment, failed to mention when it is justifiable in any particular case to rely on the presumption of safety as well as the level of scrutiny required by the sending state.¹²¹

When the Court in this case concluded that transferring the applicant from the UK to Greece in compliance with the Dublin Regulation did not violate article 3, it observed that the CEAS regime protected “...fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance”,¹²² and then consequently built on the same presumption as the Regulation that Greece did comply fully with these obligations, as it had not been presented sufficient evidence of the contrary. This was despite the fact that the European Commission had at the time filed infringement proceedings with the CJEU for Greece’s failure to fulfil its obligations concerning the reception conditions of refugees,¹²³ and that the UNCHR, whose “independence, reliability and objectivity” the Court remarked was beyond doubt, as well as several non-governmental organisations all recommended the parties to the Dublin Regulation to refrain from returning asylum seekers to Greece.¹²⁴

Furthermore, the Court emphasized that Greece did not at the time expel persons to Iran, hence there were no risk of further refoulement upon his arrival in Greece, and that even if Greece did recommence returns to Iran, the applicant would still be afforded a real opportunity of applying to the Court for a Rule 39 measure to prevent treatment violating article 3. The K.R.S. and T.I. decisions consequently established that the member states could follow the Regulation and still comply with the obligations after the ECHR, but that

¹²⁰ K.R.S, note 117, p. 15, paragraph 2

¹²¹ Violeta Moreno-Lax: Dismantling the Dublin System: M.S.S. v. Belgium and Greece, *European Journal of Migration and Law* 14 (2012) 1–31, p. 11

¹²² K.R.S., note 117, p. 16, paragraph 2

¹²³ CJEU, Case C-72/06, *Commission v. Greece* (2007), ECR I- 00057.

¹²⁴ KRS, note 117, p. 16, paragraph 3

it required them to not automatically implement transfers without ensuring that the applicant would not face ill-treatment in the receiving state or experience further refoulement without the possibility of having her claim properly considered.

5.1.2 M.S.S. v. Belgium and Greece

Despite of the result of the K.R.S. ruling, applications regarding the Dublin Regulation continued to arrive at the ECtHR, and in 2011 approximately 960 cases were pending before the Court.¹²⁵ The system of “Dublin” transfers was therefore considered again by the ECtHR in the landmark judgment of M.S.S. v. Belgium and Greece in 2011.¹²⁶ The case concerned an Afghan national, who like the applicant in K.R.S., had first entered the EU through Greece. Upon arrival in Greece the applicant had been registered and detained for a week before being released with an order to leave the country. The applicant then travelled to Belgium where he applied for asylum, which he had not done in Greece. Upon discovering that the applicant had first entered the EU through Greece, the Belgian authorities then requested Greece to take charge of the application based on the “first country of asylum” principle in article 10 of the Dublin Regulation. When the Greek authorities failed to reply within the two month deadline, the Belgian authorities considered this to be a tacit acceptance of the request pursuant to article 18 (7) of the Regulation and initially transferred the applicant back to Greece, after finally receiving confirmation from Greece of their acceptance of responsibility and assurance that the applicant could seek asylum there.¹²⁷ The applicant then filed complaints against both Belgium and Greece for allegedly violating ECHR article 3, due to his exposure to detention and his dire living conditions in Greece, as well as the deficiencies of the procedure in his case. The Grand

¹²⁵ Joanna Lenart: ‘Fortress Europe’: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Merkourios* 2012, Vol. 28/Issue 75, Article, pp. 04-19, p. 17, paragraph 3

¹²⁶ M.S.S. v. Belgium and Greece, no. 30696/09, E.C.H.R (2011)

¹²⁷ *Ibid*, paragraphs 14 and 24

Chamber of the Court concluded by clear majority, at some points even unanimously, that both countries had violated their obligations under article 3 and article 13.

The Court first examined the claim regarding his detention in Greece, where it held that albeit detention accompanied by appropriate safeguards was acceptable to prevent unlawful immigration, the conditions of the detention the applicant had experienced was unacceptable.¹²⁸ It also noted that this systematic placement of asylum seekers in detention centers in which the conditions amounted to degrading had been confirmed by numerous international organisations. The ECtHR has also in several previous cases ruled that Greece had subjected asylum seekers to degrading treatment in violation of article 3 due to the country's use of detention and appalling reception conditions.¹²⁹ Furthermore, the Court was not persuaded that the great pressure and disproportionate burden on the asylum systems of the EU states at the external borders due to increased influx of migrants and asylum seekers, which was even exacerbated by the "Dublin" transfers, could be taken into consideration when examining the applicant's complaint.¹³⁰ On the contrary, the Court held that owing to the absolute character of article 3, such circumstances did not absolve the contracting states of their responsibilities under that provision. This view has also been reaffirmed in a later case before the Court.¹³¹

As to the living conditions the applicant experienced in Greece, the Court found that the Greek authorities had through inaction exposed the applicant to degrading treatment because he had lived on the streets without any means to provide for his most essential needs, thus arousing in him "... feelings of fear, anguish or inferiority capable of inducing

¹²⁸ Ibid, paragraphs 216 and 233

¹²⁹ See *S.D. v. Greece*, no. 53541/07 E.C.H.R (2009), *Tabesh v. Greece*, no. 8256/07 E.C.H.R (2009) and *A.A. v. Greece*, no. 12186/08 E.C.H.R (2010)

¹³⁰ *M.S.S.*, note 126, paragraph 223

¹³¹ See *Hirsi Jamaa*, note 81, paragraph 122

desperation...” which attained the level of severity required after article 3.¹³² In this regard considerable importance had to be placed on the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable group in need of special protection.¹³³

Regarding the deficiencies of the applicant’s asylum procedure in Greece, the Court maintained that it does not examine the substance of the applicants’ asylum claims after the Geneva Convention or other relevant law, as the ECHR does not, as such, contain any right to asylum. The task of the Court is rather to consider whether effective guarantees exist to prohibit direct or indirect refoulement to a country where the applicant may risk being subjected to treatment contrary to article 3.¹³⁴ Relying on reports by UNHCR and several other international organisations, the ECtHR concluded that albeit the Greek asylum laws *de jure* complied with the standards required after the Convention, statistically the applicant had no chance of being offered any form of protection and that the merits of his claim *de facto* had not been seriously examined, thus establishing that Greece had also violated article 13 in conjunction with article 3.¹³⁵

After establishing violation of article 3 by the Greek authorities, the Court then had to examine the applicant’s complaints against the Belgian authorities for exposing him to the risks connected with the deficiencies of the Greek asylum system and the treatment he had experienced there. Building its argument on the Bosphorus judgment,¹³⁶ the Court reiterated that the ECHR did not prevent the contracting states from transferring sovereign powers to international organisations, as long as these organisations provided protection of fundamental rights equivalent to that of the Convention. Moreover, such transfers of

¹³² M.S.S., note 126, paragraph 263

¹³³ Ibid, paragraph 251

¹³⁴ Ibid, paragraph 268

¹³⁵ Ibid, paragraphs 320-321

¹³⁶ Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, no. 45036/98, E.C.H.R (2005)

powers did not affect the state parties obligations under the Convention, and a state would consequently be fully responsible for "... all acts falling outside its strict international legal obligations, notably where it exercised State discretion."¹³⁷ The ECtHR held that the sovereignty clause after article 3(2) of the Dublin Regulation provided the Belgian authorities with the opportunity to examine the applicant's claim if they considered that the receiving state did not comply with its obligations under the Convention. With such an option in place, the transfer of the applicant did not necessarily fall within Belgium's international legal obligations, thus the presumption of equivalent protection did not apply in the present case.¹³⁸

The question the Court therefore had to examine was whether the Belgian authorities not should have relied upon the presumption that the Greek authorities would uphold their international obligations regarding asylum matters, despite that this would have been in accordance with the ECtHR's previous K.R.S. decision. With the transfer of M.S.S. to Greece taking place less than six months after the ruling in K.R.S., Belgium however held that their actions had been pursuant to ECtHR case law and that the applicant had not been able to substantiate that he had personally been a victim of ill-treatment in Greece.¹³⁹ This, held together with the assurances of the Greek authorities given to the Court in the K.R.S. case regarding the asylum seekers possibilities to apply for asylum there, and that the ECtHR itself had not found it necessary to indicate an interim measure after rule 39 of the Rules of Court to the Belgian Government to suspend the applicant's transfer, the Belgian authorities concluded that there had been no reason to invoke the sovereignty clause in order to ensure the applicant sufficient protection under the Convention.

This view was supported by the partly dissenting judge Bratza, who concluded that the contracting parties were "...legitimately entitled..." to base their decisions on the K.R.S. judgment in the absence of clear evidence of a change in the situation for asylum seekers in

¹³⁷ Ibid, paragraphs 155-157

¹³⁸ M.S.S., note 126, paragraph 340

¹³⁹ Ibid, paragraph 327

Greece which had been considered by the ECtHR, or in the absence of “...special circumstances affecting the position of the particular applicant.”¹⁴⁰

When all the remaining judges of the Grand Chamber however found that Belgium had violated its obligations under article 3, it appears that they assigned crucial importance to three circumstances that distinguished M.S.S. from K.R.S, namely a letter from the UNHCR to the Belgian authorities calling for suspension of transfers of asylum seekers to Greece, the reports on the situation of asylum seekers in Greece had become more frequent, and finally the possible revision of the Dublin system to enhance protection proposed by the Commission.¹⁴¹ Although not expressly contradicting its previous case law, the Court also found that the interim measures after rule 39 and the possibility of appeal in Greece did not provide the applicant with sufficient protection,¹⁴² albeit this was exactly one of the reasons for ruling the case of K.R.S. to be inadmissible.

The Court concluded consequently that the Belgian authorities knew, or ought to have known, the risks connected with the applicant’s removal to Greece and that Belgium thus could not rely on the assumption of Greece being a safe country in accordance with the Dublin Regulation.¹⁴³ It also held that the transfer to Greece and the subsequent exposure of the applicant to the degrading detention and living conditions in itself was contrary to article 3, thus establishing both direct and indirect violation of the principle of non-refoulement.¹⁴⁴ Finally the Court, pertaining to Belgium’s unreasonably high standard of proof and apparent routinely use of “Dublin” transfers without due regard to the individual situation, found that Belgium had also violated article 13.¹⁴⁵

¹⁴⁰ Ibid, Partly dissenting opinion of judge Braza, paragraph 6

¹⁴¹ Ibid, paragraphs 347-350

¹⁴² Ibid, paragraph 357

¹⁴³ Ibid, paragraph 358

¹⁴⁴ Ibid, paragraph 367

¹⁴⁵ Ibid, paragraph 396

By establishing violations of the principle of non-refoulement pursuant to article 3 by both Greece and Belgium in the M.S.S. judgment, the Court provided a significant correction to the automatic safe country presumption of the Dublin Regulation. The Court thus clearly reinforced the primacy of the principle of non-refoulement over the effective application of the Dublin System.¹⁴⁶ According to Moreno-Lax the member states, in order to comply with the case law of the ECtHR and thus their human rights obligations after the ECHR, the contracting parties have to supplement the Regulation with a three-step analysis.¹⁴⁷ The first step consists of an extensive assessment of the merits regarding the risk of direct or indirect arbitrary refoulement to the country of origin, while the second step is to examine the compliance *de jure* and *de facto* of the receiving state with its obligations under the Convention. Finally, the third step requires the member states to withhold the transfer where it is ascertained that the asylum seeker would encounter a real risk of indirect refoulement or exposed to degrading treatment in the receiving state.¹⁴⁸

The case law of the ECtHR thus extends the obligations of the member states in connection to the reliance on mutual trust. Not only can the member states no longer automatically rely on each other when transferring applicants pursuant to the Regulation, the M.S.S. ruling furthermore requires the states to actively examine the receiving states compliance with its obligations under the ECHR and its practical implementation. Albeit, as in the judgments of T.I. and K.R.S. the Court did not specify the necessary level of scrutiny, it did however determine that diplomatic assurances of the receiving state were not sufficient.¹⁴⁹

Furthermore, in what is at the time of writing a completely new ruling of the ECtHR, the Court yet again unanimously found a case regarding the “Dublin” system to be inadmissible.¹⁵⁰ The case concerned a Somali national who alleged that her transfer to Italy from the Netherlands

¹⁴⁶ Moreno-Lax, note 121, p. 28

¹⁴⁷ Ibid

¹⁴⁸ Ibid, p. 29

¹⁴⁹ M.S.S., note 126, paragraph 354

¹⁵⁰ Mohammed Hussein v. the Netherlands and Italy, no. 27725/10 E.C.H.R. (2013), published 18.04.2013

pursuant to the Dublin Regulation would put her at risk of treatment in violation of article 3. The Court distinguished her case from that of M.S.S. by highlighting that the applicant had received access to reception facilities in Italy three days after her arrival, that her request for international protection had been granted which had provided her with many of the same rights as the general population of Italy, hence her treatment had not reached the minimum level of severity required by article 3.¹⁵¹ The Court therefore reiterated that unless there were “...exceptionally compelling humanitarian grounds against removal...”, a significant reduction of the applicant’s material and social living conditions after being transferred from the contracting state is not sufficient in itself to breach article 3.¹⁵²

Finally the Court held that albeit the situation for asylum seekers in Italy may have disclosed “...some shortcomings...” it had not however displayed systemic failure to provide support or facilities to particularly vulnerable groups such as asylum seekers.¹⁵³

It thus appears as the ECtHR requires the member states to withhold their transfers in order to comply with the principle of non-refoulement after article 3 if the receiving state is unable to provide for the applicants basic needs, if there is no access to proper procedure after arrival and that the reception system itself has systemic failures in providing adequate protection for asylum seekers transferred pursuant to the Regulation.

Still, approximately 90 cases are pending before the ECtHR regarding the application of the “Dublin” system to asylum seekers.¹⁵⁴

¹⁵¹ Ibid, paragraphs 74-75

¹⁵² Ibid, paragraph 71

¹⁵³ Ibid, paragraph 78

¹⁵⁴ ECHR: Press release, Factsheet: “Dublin Cases”, October 2012

5.2 The safeguards provided by the discretionary clauses

Although the Dublin Regulation itself evidently does not provide the necessary restrictions regarding the presumption of safety proscribed by the ECtHR case law, it does however contain exceptions from the right to transfer an applicant. Regardless of the criteria allocating responsibility, a member state can still decide to examine the asylum claim of an applicant, albeit another state is found responsible after the Regulation. This is provided through two discretionary clauses, based in the principle of sovereignty expressed in article 3(2), and in humanitarian considerations in article 15.

The humanitarian clause allows a member state to choose to unite families or other relatives depending on each other, based on respect of family unity or cultural grounds. If the applicant concerned is dependent on the other's assistance due to pregnancy or a newborn child, serious illness, severe handicap or old age, the member state would normally be obligated to unite the applicant with a family member present in the territory of another member state, provided that this family tie already existed in the state of origin.¹⁵⁵ In a recent case before the CJEU, the Court found that this also includes the obligation to keep family members together when they are already in the same state and one is facing a transfer, if there is a situation of dependence.¹⁵⁶ The case concerned an asylum seeker in Austria, who had previously applied for asylum in Poland, which after the Dublin Regulation made Poland responsible for the asylum claim. However, due to the fact that the applicant's daughter-in-law, who was already accepted as a refugee in Austria, was dependent on the claimant's care, the Court ruled that she should stay in Austria and have her claim considered there. The CJEU also concluded that derogation from the principle in article 15(2) can only take place when an exceptional situation has arisen, which was not present in the particular case.¹⁵⁷

¹⁵⁵ Dublin Regulation, note 14, article 15(2)

¹⁵⁶ CJEU, case C-245/11, K (2012), ECR I-0000

¹⁵⁷ *Ibid*, paragraph 46

The sovereignty clause provides the member states with the opportunity to examine an asylum claim although it is not their responsibility after the Regulation. This could for instance be in situations where returning an asylum seeker is not perceived safe and the return would therefore be in violation of the principle of non-refoulement. Originally, the intention of the sovereignty clause appears to be that using it is entirely voluntary for the member states, and that any justification can be made for applying it, such as considerations regarding cost or effectiveness of the transfer. However, the CJEU held in a recent ruling that the member states in certain circumstances are obligated to apply the sovereignty clause in order to prevent infringement of the asylum seeker's fundamental rights.

5.2.1 The case of N.S. and M.S. and others

With the increased focus on the Dublin Regulation and its deficiencies, the national courts of the member states also had to turn to the EU institutions to interpret their obligations.

The first case of real significance for the compliance with fundamental rights and the principle of non-refoulement was therefore deliberated some months after the ECtHR's ruling in the M.S.S. case in 2011, and concerned the interpretation of the sovereignty clause in the Regulation's article 3 (2).¹⁵⁸

Like in M.S.S., the joint cases of N.S. and M.E and others¹⁵⁹ concerned the transfer of asylum seekers to Greece from respectively the United Kingdom and Ireland, pursuant to the rules set out in the Dublin Regulation. The CJEU, like the ECtHR, decided to consider the case in Grand Chamber, clearly displaying the importance of the particular cases. The case of N.S. v. Secretary of State of the United Kingdom concerned an Afghan asylum seeker who had entered the EU through Greece, but after subsequently being expelled and removed to Turkey, travelled to the UK and sought asylum there. The applicant claimed that his pending transfer to Greece would violate his fundamental rights both after the ECHR and EU law.

¹⁵⁸The actual first case was Case C-19/08, ECR I-495 (2009)

¹⁵⁹ CJEU, Cases C-411/10 and C-493/10), ECR I-0000 (2011)

Albeit this case was being considered by the British Court of appeal before the result of the ECtHR case of M.S.S. was adjudicated and quite recently after the ruling in the case of K.R.S., the UK Court, given the many reports regarding the deficiencies of the asylum system and reception conditions in Greece, decided it needed clarifications on certain questions regarding the understanding of the Regulation before it could give judgment on the appeal.¹⁶⁰

The case of M.S. and others concerned five asylum seekers from Algeria, Iran and Afghanistan, who had also entered through Greece before applying for asylum in Ireland. Unlike N.S., the applicants had not claimed that their return to Greece would violate any of the provisions of the ECHR, nor the prohibition of refoulement. The applicants did however believe that due to the inadequate procedure and conditions for asylum seekers in Greece, Ireland was required to invoke its powers under the sovereignty clause.¹⁶¹

After first asserting that article 3(2) fell within the scope of EU law for the purposes of article 51(1) of the CFREU and concluding that actions pursuant to it therefore constituted as implementation of EU law,¹⁶² the CJEU examined in essence whether a member state could transfer an asylum seeker to another member state after the determination process of the Dublin Regulation even if this could lead to violation of the asylum seeker's fundamental rights.

The Court concluded in the negative. When reaching this result, the CJEU first reaffirmed that the CEAS was in full compliance with fundamental human rights standards, including those of the Geneva Convention and the ECHR, and the directives and regulations were thus created in a context that allowed the member states to have confidence in each other's respect of such rights.¹⁶³ Moreover, the Court appears to regard the reliance on the principle of mutual trust crucial to the Dublin Regulation's adoption in the first place, consequently finding that it would be contrary to the aims of the Regulation if the slightest infringement of the Reception and Qualifications directives could prohibit member states

¹⁶⁰ Ibid, paragraph 49

¹⁶¹ Ibid, paragraph 52

¹⁶² Ibid, paragraph 69

¹⁶³ Ibid, paragraph 78

from transferring asylum seekers pursuant to the Regulation.¹⁶⁴ Such an understanding of the provisions would deprive them of their substance and contradict the entire purpose of the Regulation, the Court noted.

Secondly, despite the basis in the mutual confidence between member states, the Court held that where there are substantial grounds for considering that a member state has “...systemic flaws...” in its asylum procedure and reception conditions which in turn could result in ill-treatment after article 4 of the CFREU and the sending member state cannot be unaware of the situation in the receiving state, the transfer would be incompatible with that provision.¹⁶⁵ Given the primacy of the Charter over secondary legislation, as noted above in chapter 4.3, a transfer under such circumstances would therefore be in violation of EU law.

Consequently, where the transfer cannot be executed due to possible infringement of article 4 of the CFREU, the sending state has to, without using an unreasonable length of time, continue analyzing the criteria to determine whether another member state is responsible, and if that is not the case, the member state in which the asylum seeker is present has to resume responsibility itself. This gives a different meaning to the sovereignty clause, as it now not only provides the member states with the option of considering a claim if they want to, but also includes a responsibility to do so under the right circumstances, thus becoming an obligation to which the member states never consented.¹⁶⁶ Consequently the Court concluded, like the ECtHR, that the member states could not automatically rely on the presumption that all the member states were safe countries for third-country nationals to seek asylum in, hence the presumption underlying the legislation “...must be regarded as rebuttable.”¹⁶⁷

¹⁶⁴ Ibid, paragraphs 79 and 84

¹⁶⁵ Ibid, paragraph 86 and 94

¹⁶⁶ Lieven, note 111, p. 234

¹⁶⁷ N.S., note 159, paragraph 104

As to the relationship between EU law and the ECHR, the Court apparently declined to answer whether the CFREU provided wider protection than that of the ECHR. With reference to the ECtHR's judgment in the M.S.S. case, the Court simply held that the articles 1, 18 and 47 of the Charter did not lead to a different answer regarding the rebuttal of the principle of mutual trust.¹⁶⁸

Albeit the decision provided an important correction to the understanding of the presumption of safety in the Dublin Regulation, as well as concurrence between the interpretations of the ECtHR and the CJEU regarding the member states responsibilities to respect fundamental rights, the N.S. judgment nevertheless leaves several questions unanswered. Like the ECtHR's M.S.S. decision, the CJEU fails to specify more precisely which circumstances would have to be established to require a member state to disregard the principle of mutual trust due to "systemic flaws" or when a state "cannot be unaware". The judgment did however determine that the member states cannot rely on an interpretation of an instrument of secondary legislation "... which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law."¹⁶⁹ Furthermore, the Court's rather evolutive interpretation of the sovereignty clause provides an important safeguard against both indirect and direct refoulement by establishing not only a right to disregard the result of the determination of responsibility after the Regulation, but also an obligation to do so under certain circumstances.

The revised version of the Regulation amends the procedure and the circumstances in which the sovereignty and humanitarian clauses should be used, as well as clarification on deadlines and rules regarding transfers. According to the Commission, the sovereignty clause is supposed to be used for "humanitarian and compassionate reasons", which perhaps makes it harder to distinguish between the uses of the two discretionary articles.

¹⁶⁸ Ibid, paragraph 114

¹⁶⁹ Ibid, paragraph 77

The humanitarian clause in the recast appears rather to be a safety buffer in cases where the application of the criteria gives an unreasonable result which separates family members or other relatives.¹⁷⁰ Furthermore, the new proposed article 17 requires the applicant's consent of the use of the discretionary clause, which, according to the UNHCR, will give the applicant an important guarantee that the member state cannot accept to the responsibility of examining his claim only due to cost or time-saving considerations, or to facilitate speedy rejection of claims.¹⁷¹ The recast does not however indicate that these clauses have a compulsory element in accordance with how the CJEU understood the obligation in the N.S./M.S. and others decision.

5.3 The safe third country concept

Although the purpose of the Dublin Regulation is to determine which member state is responsible for examining an asylum claim, the Regulation as such does not however give every asylum seeker entering their territories the right to have their applications considered in the Dublin-area.¹⁷² After article 3(3) of the Regulation, a member state can, pursuant to its national laws, transfer an applicant to a third country, provided that it is done in compliance with the Geneva Convention. There is nevertheless no common standard or criteria after the Regulation for determining when a return to a third country can be considered to be in compliance with the Geneva Convention, or in other words "safe". The practise of transfers to such "safe third countries" is thus a different aspect of the issue of mutual trust, as the Regulation permits member states to rely on non-EU countries as well, without specifying further the inquiries necessary to ensure that the third country is actually safe in terms of providing adequate protection for the asylum seekers.

¹⁷⁰ Commission: COM(2008) 820 final, 3/12/2008, p. 9

¹⁷¹ UNHCR: Comments on the Commission's recast of Dublin II, (2009a), p. 9

¹⁷² Vigdis Vevstad: Utvikling av et felles europeisk asylsystem. Jus og politikk. Universitetsforlaget (2006), p.

The Asylum Procedures Directive, which is also like the Dublin Regulation part of the CEAS, does however contain criteria for determining when to apply the concept. The Directive considers a third non-EU country to be safe if all of the following criteria is met; life or liberty of the asylum seeker is not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, the state in question complies with the prohibition of refoulement in accordance with the Geneva Convention and freedom from torture or other ill-treatment pursuant to other international law, and finally the existence of the possibility to seek refugee status and hence receive protection if the need for it can be established.¹⁷³ A safe third country in this regard is a country through which the applicant has travelled or has other connections as defined by national law, and where it is reasonable to expect that the applicant can seek protection.¹⁷⁴ The provisions of the Procedures Directive regarding the determination of a safe third country are not however applicable to transfers pursuant to the Dublin Regulation,¹⁷⁵ which leaves the determination to the member states' national laws. Allowing the member states such an extensive margin of appreciation increases the risk of subjecting asylum seekers to indirect or "chain" refoulement which is a violation of the individual's human rights. According to the UNHCR, a reliable assessment of the risk of such refoulement has to be carried out prior to the transfer in each individual case, to ensure that the asylum seeker will actually be admitted to the third country's territory and that the applicant concerned is treated in accordance with international human rights provisions once she has arrived there.¹⁷⁶

¹⁷³ Asylum Procedures directive, note 16, article 27 (1) (a-d)

¹⁷⁴ Ibid, preamble, paragraph 27

¹⁷⁵ Vevstad, note 172, p. 194

¹⁷⁶ UNCHR: Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No. 16643/09) (2009b)

6 Burden-sharing and procedural safeguards

In addition to the issues connected with the presumption of safety and mutual trust, the evaluation of the Regulation, although it concluded that the aims overall had been to a large extent achieved, did not only display that the intended efficiency of the system is lacking, but also that the system failed to provide the sufficient level of protection.¹⁷⁷ Several stakeholders, such as the European Council on Refugees and Exiles (ECRE) has remarked that the system is inefficient and expensive, as well as contributing to burden-shifting by placing an disproportionate amount of pressure on the member states on the EU's southern and eastern external borders.¹⁷⁸ Furthermore ECRE pointed out that the system, due to lack of full harmonization in the asylum legal framework, had extensive variations in terms of the quality of national asylum procedures, recognition rates and integration capacities, and that this consequently lead to a situation of "asylum lottery" for the asylum seekers.¹⁷⁹

The Regulation has finally been criticized for prohibiting the asylum seekers from choosing their country of asylum, that it has increased the probability of being subjected to detention and that there is no suspending effect of appeal or judicial review against the decisions to "take charge" or "take back".¹⁸⁰ Albeit all of these challenges can to different degrees contribute to the arbitrary refoulement of an asylum seeker, there are some aspects of the Regulation in particular that are able to challenge the perception of it being fully able to comply with the principle of non-refoulement in addition to the presumption of safety, namely the lack of burden-sharing and the procedural safeguards of the transferred.

¹⁷⁷ Commission: Report on the evaluation of the Dublin system, COM (2007) 299 final, SEC (2007)

¹⁷⁸ ECRE: Report on the application on the Dublin II Regulation in Europe, march 2006, p. 170

¹⁷⁹ Ibid, p. 5

¹⁸⁰ Lenart, note 125, p. 12.

6.1 The Regulation as a burden-sharing mechanism

Although burden-sharing has not been a directly expressed aim of the Dublin Regulation, it is nevertheless a matter of real significance for the cooperation among member states. The TEU moreover determines that the policies of the Union and their implementation will be governed by the principle of solidarity and fair sharing of responsibility, which applies to acts of secondary legislation such as the Dublin Regulation as well.¹⁸¹

Several international organisations have however claimed that the Regulation has not only been unable to achieve such an aim, but on the contrary contributed to burden-shifting from the some member states to the member states on the EU's southern and eastern external borders.¹⁸² This was also pointed out by the evaluation report of the European Parliament which proclaimed that the Regulation had failed to serve as a burden-sharing mechanism.¹⁸³

According to ECRE, the Dublin Regulation therefore contributes to a situation where an applicant's hope of having his request for protection granted would depend on the route of his escape rather than his actual need for international protection, due to the Regulation's reliance on the allocation of responsibility to the member state which played the most significant role in the applicant's entry into the "Dublin" area. This could clearly be displayed by the vastly diverging recognition rates of the different member states.¹⁸⁴

The Parliament appears to have arrived at a similar conclusion, where their evaluation held that the recognition rates of candidates for refugee status could vary for certain third-country nationals from approximately 0% to 90% within different member states.¹⁸⁵

This can for instance be illustrated by the case of Iraqi asylum seekers, which in 2007 had a 85 % chance of being granted refugee status in the first instance in Sweden and Germany, while a remarkable 0 % chance in Greece and Slovenia.¹⁸⁶

¹⁸¹ TEU, note 25, article 80, see also above part 4.3

¹⁸² See note 178

¹⁸³ Parliament Resolution 2007/2262(INI), note 24, point M.

¹⁸⁴ ECRE: Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, March 2008, p.5

¹⁸⁵ Parliament resolution 2007/2262(INI), note 24, point P

Furthermore, in 2011, almost 90 % of all irregular migrants entered the EU through only two member states, namely Italy and Greece.¹⁸⁷ After the Regulation, these two states would therefore become responsible for the claims of the vast majority of those who would apply for asylum amongst these migrants after the “first country of asylum” rule in article 10, thus creating an enormous amount of pressure on their asylum systems and displaying clearly the disparity the Dublin Regulation can contribute to.

The lack of burden-sharing is problematic for the Regulation’s compliance with the principle of non-refoulement because it facilitates the return of applicants to member states whose asylum systems already have insufficient capacities, without adequate regard for the consequences for the individual asylum seekers in question. The UNHCR has therefore called for a mechanism of temporary suspension of transfers in situations where certain member states are unable to provide for the fundamental rights of asylum seekers.¹⁸⁸ Moreover, The Aire Centre and Amnesty International has claimed that in its present form, without such a clause requiring suspension of transfers to countries unable to honour their international obligations in asylum matters, the Dublin Regulation exposes asylum seekers to a risk of refoulement in violation of both the ECHR and the Geneva Convention.¹⁸⁹

¹⁸⁶ ECRE: Five years on Europe is still ignoring its responsibilities towards Iraqi refugees, March 2008, AD1/03/2008/ext/ADC, p. 2

¹⁸⁷ Frontex: Annual risk analysis 2012, p. 46

¹⁸⁸ UNHCR: (2009a), note 171, p. 11

¹⁸⁹ See M.S.S., note 126, paragraph 333

Although some member states have already at times temporarily suspended transfers to certain member states, such as Greece,¹⁹⁰ by recommending national authorities to use the sovereignty clause in such situations, this has not been perceived as formally or legally required by the Regulation and thus enhancing the system's contribution to the inconsistent and arbitrary treatment of asylum seekers subjected to "Dublin" transfers. With the result of the N.S. case described above, the CJEU nevertheless appears to have established such an obligation, which hopefully will change the member states practice in this area.

Furthermore, the amended proposal of a new Dublin III Regulation accounts for the situation where a member state with limited reception capacities or deficient asylum procedure experience particular pressure, in which case transfers to that member state can be suspended.¹⁹¹ Albeit also the proposed Regulation does specify in which circumstances such suspensions is required, the provision nevertheless is part of an important revision of the presumption that all member states can be considered as safe countries, as well as a much needed mechanism of burden-sharing. This amendment has unfortunately not been endorsed by the member states represented in the Council, which in the time of writing has replaced the option of temporarily suspending "Dublin" transfers with a more political proposal for an "evaluation and early warning mechanism."¹⁹²

¹⁹⁰See for instance Norwegian Ministry of Justice and Public Security: UDI skal realitetsbehandle Dublinsaker fra Hellas, Press release no 113, 12.10.2010, and ECRE: Summary Report on the Application of the Dublin II Regulation in Europe, March 2006, AD2/3/2006/EXT/MH, p. 6 (2006b)

¹⁹¹ COM(2008) 820 final, note 170, article 31

¹⁹²Brouwer, note 113, p. 143, see also Øyen, note 31, p. 444

6.2 Procedural safeguards of the transferred asylum seekers

As outlined above, the purpose of the Dublin Regulation has been to rapidly determine which member state is responsible for the individual asylum application, and thus creating a more efficient system, avoiding repeated applicants in the different member states and ensuring that every application will be considered somewhere by guaranteeing access to asylum procedure. Connected to the issues of mutual trust and burden-sharing, the different approaches to access to procedures in the receiving states can also possibly put the asylum seeker at risk of further refoulement.

For instance, in its evaluation of the application of the Dublin Regulation in 2006, ECRE found indications that some member states denied so called “Dublin returnees” access to asylum procedure subsequent to their transfer, resulting in their asylum claims not being properly considered.¹⁹³ The report focused especially in this regard on the practice of “interrupted applications” by the Greek authorities, which allowed the responsible authority to disregard an asylum application from an individual that had illegally left Greece and travelled to another member state, which then had returned the applicant pursuant to the rules of the Dublin Regulation.¹⁹⁴ Under such a practice, the merits of the individual’s asylum application is not examined anywhere, neither in Greece nor in the sending member state, thus possibly violating the principle of non-refoulement, as well as the aim of the Regulation itself.

In other member states, the report described similar practices where the applicant found it difficult or nearly impossible to have her application re-opened upon her return, as several states considered the applicant’s absence as an implicit withdrawal or abandonment of the asylum claim.¹⁹⁵ The practice of “interrupted applications” has since been abolished by the Greek authorities after the Commission initiated infringement proceedings before the

¹⁹³ ECRE (2006), note 178, p.5

¹⁹⁴ Ibid

¹⁹⁵ Ibid, p. 6

CJEU,¹⁹⁶ yet the examination of claims are still being rejected due to a variety of technical or formal reasons following a Dublin transfer in some member states.

Furthermore, the current system does not provide the applicant with effective opportunity of judicial appeal against a transfer. The Regulation does open for the possibility for such appeal, yet the appeal will not have suspensive effect unless the competent authorities decide so pursuant to national law on the basis of the individual application,¹⁹⁷ thus limiting the possibility to a point where it almost becomes illusory. Given the almost automatic use of the “Dublin transfer” by some member states, the lack of a real possibility to challenge the transfer decision is unfortunate, since there can be compelling and legitimate reasons for why an asylum seeker should not be transferred, such as considerations regarding the applicant’s health, or the reception conditions and the lack of access to procedures in the receiving state as described above.

In the recast of the Dublin Regulation, the Commission has sought to address several of these issues. Firstly, the Commission’s clarification of the necessary procedure regarding “take charge” and “take backs” is an important adjustment in order to prevent indirect or “chain-refoulement”, as the proposed provision now clearly proclaims the receiving state’s responsibility to “examine or complete the examination of the application” after the applicant’s return to the receiving state.¹⁹⁸

¹⁹⁶ UNHCR (2009a), note 171 , p. 13,

¹⁹⁷ Dublin Regulation, note 14, article 19 (2)

¹⁹⁸ COM(2008) 820 final, note 170, article 18 (2)

Secondly, the recast provides the right to appeal against a transfer-decision by a member state and allows the applicant to remain on the territory while the competent authorities decide whether or not its enforcement should be suspended.¹⁹⁹ This gives the applicant valuable time and opportunity to present his case and could furthermore be used as an incentive to member states to consider whether the receiving state actually does comply with their obligations to uphold fundamental rights.

Moreover, the amended Regulation includes a new provision prohibiting the member states from detaining asylum seekers for the sole purpose that they are seeking international protection. The Commission emphasizes that this is done in order to ensure compliance with fundamental human rights provisions such as the CFREU, the ECHR and CAT in general, as well as specifically with article 33 of the Geneva Convention.²⁰⁰

Finally, the proposed “Dublin III” extends the scope of protection to also include those seeking subsidiary protection. In doing so, the amendment provides consistency with the Qualifications directive, which defines subsidiary protection as someone who does not qualify as a refugee pursuant to the definition of the Geneva Convention, but who nevertheless can display serious grounds for believing that the person concerned would be exposed to the risk of suffering “serious harm” if he is returned to his country of origin.²⁰¹

The recast version of the Dublin Regulation does therefore provide significant improvements to the procedural safeguards of those who are transferred, and the guarantee of continued or re-opening of the applicant’s claim after arrival in the receiving state appears to be a necessary prerequisite for the sending state to ensure that no one is subjected to indirect refoulement because of its decision to transfer.

¹⁹⁹ Ibid, p. 8

²⁰⁰ Ibid, p. 18 (18)

²⁰¹ Qualifications directive, note 15, article 2 (e)

7 Conclusions

As a cornerstone in the construction of the CEAS, the Dublin Regulation is an instrument that aspires to provide efficiency and rapid allocation of responsibility among the member states in asylum matters, while simultaneously upholding and respecting fundamental human rights provisions. While an admirable intention, this thesis has argued that the Regulation has certain systemic flaws which have resulted in the member states violation of their obligations proscribed by the principle of non-refoulement after fundamental human rights provisions. According to the human rights treaties supplementing secondary EU legislation such as the Regulation, the member states have a positive obligation to not transfer an applicant to another member state if the applicant could risk being subjected to torture, persecution or other ill-treatment after being transferred, either directly in the receiving state or indirectly due to further refoulement to a third state. Albeit the provisions of the Regulation satisfy the human rights standards provided by the ECHR and the Geneva Convention *de jure*, it has been argued that the Regulation regardless can have an unfortunate impact in practice. In particular, the compliance with the principle of non-refoulement has been challenged by the Regulation's underlying confidence in the principle of mutual trust, as well as lack of burden-sharing and absence of sufficient procedural safeguards protecting those who are transferred. Due to the almost automatic reliance on the member states ability to provide equal and adequate protection, it could be argued that the Regulation has been built on a presumption of a level of harmonization that simply does not exist.²⁰²

²⁰² Lenart, note 125, p. 18

The recent case law of both the CJEU and the ECtHR has clearly showed that not only does the Dublin system appear to fail to create a system of solidarity and fair sharing of responsibility, but even worse the routine use of transfers has contributed to the member states' violation of fundamental human rights.

In this regard, substantive corrections to the understanding of the Regulation and its implementation by the member states have been provided by the ECtHR and the CJEU, which has limited the possibility to rely on mutual trust and required the member states to actually examine whether the receiving state *de facto* complies with its obligations.

This applies perhaps especially to the CJEU's rather dynamic interpretation of the sovereignty clause, which provides an important safeguard against both indirect and direct refoulement where the EU legislators apparently have failed to do so, by establishing not only a right to disregard the result of the determination of responsibility after the Regulation, but also an obligation to do so under certain circumstances.

However, both Courts have failed to sufficiently clarify when it is justifiable in any particular case to rely on the presumption of safety, as well as the level of scrutiny required by the sending state, consequently leaving certain issues unresolved. The challenge of the reliance on mutual trust furthermore applies to the concept of the "safe third country", which allows member states to transfer applicants to non-EU countries as well, without specifying further the inquiries necessary to ensure that the third country is actually safe in terms of providing adequate protection and access to asylum procedures for the incoming asylum seekers.

Consequently, this thesis has argued that the current Dublin II Regulation apparently does not provide the necessary safeguards in order to comply fully the member states obligations after the principle of non-refoulement.

The recast proposal by the Commission has sought to address several of the main issues with the current Regulation, including the lack of burden-sharing as well as strengthening the procedural safeguards of those who are transferred.

Nevertheless, with the recast retaining the same underlying principles as the current Regulation, thus keeping the approach making the member state which played the greatest part in the asylum seeker's entry to the EU responsible for examining the individual's asylum application and building on the presumption of safety and similar treatment by the member states, the proposal does not challenge Regulation's character as a provision for providing efficiency in the determination of the member states responsibilities towards each other, rather than one concerned with providing adequate protection for asylum seekers. In this regard, the new Dublin III should ascertain that transfers can be temporarily suspended in situations where a member state certainly does not comply with the most important provisions of the other CEAS instruments, and provide clear instructions to the member states regarding the examination of whether the receiving state actually fulfils these obligations. Without such amendments, the revised Dublin III could unfortunately become a missed opportunity for the EU legislators to correct the deficiencies of a system currently unable to fully protect fundamental rights.

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