

# ‘Fortress Europe’: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms

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## Keywords

Dublin II Regulation, ECHR, Asylum, Refugee, Asylum Seekers, 1951 Convention Relating to the Status of Refugees, Migration Law, Area of Freedom, Security and Justice, Inhuman or Degrading Treatment

## Abstract

Recently, the Dublin II Regulation, a cornerstone of the emerging Common European Asylum System, has been gravely criticised, especially in context of the living conditions and general situation of asylum seekers in Greece. The main concerns regard the potential noncompliance of the Dublin II Regulation with the European Convention on Human Rights (‘ECHR’), particularly with Article 3 - the prohibition of torture or inhuman or degrading treatment. This article examines the competing views in this respect. It analyses the relationship between EU law and the ECHR, protection of rights of refugees under the 1951 Convention relating to the Status of Refugees and main deficiencies of the Dublin II Regulation. The analysis starts with the non-equivalent protection of asylum seekers throughout the EU and finishes with the very limited definition of a family member and case law relevant to the principle of *non-refoulement*. This article concludes that the Dublin II Regulation *per se* cannot be deemed noncompliant with the ECHR. However, it emphasises the urgent need to change relevant legal provisions, or at least enforcement, and proposes possible solutions therein.

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## I. Introduction

The adoption, on 18 February 2003 of the Council Regulation 343/2003 which replaced the Dublin Convention,<sup>1</sup> established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin II Regulation')<sup>2</sup>. This was a significant step towards the creation of the Common European Asylum System ('CEAS').

The establishment and improvement of the criteria used to determine the Member State responsible for the asylum application was one of the first stages in creating a one-stop-shop procedure and a single uniform status valid throughout the European Union ('EU'). The Dublin II Regulation was designed to remove deficiencies of the Dublin Convention, including slow operation of the system,<sup>3</sup> uncertainty for applicants and Member States,<sup>4</sup> insufficient remedies for the 'refugees in orbit' phenomenon,<sup>5</sup> risk of 'chain refoulement',<sup>6</sup> lack of proper readmission rules and supervision<sup>7</sup> and disproportionate burden imposed on Member States with external borders.<sup>8</sup> Although the Dublin II Regulation introduced some changes and increased efficiency of the system, it has done so, to a large extent, at the expense of asylum applicants, and at the risk of violating their human rights.

The emergence and communitarisation of the European Asylum Policy have been the consequences of the abolishment of internal borders.<sup>9</sup> Free circulation of goods and free movement of persons within the common market generated the need for enhanced and strengthened control of external borders and stricter policies regarding third country nationals. This rationale, in itself, focusing on the protection of economic interests of the EU rather than on improving refugee protection, has already raised criticism at the very outset of the European asylum policy.<sup>10</sup> Viewed from the perspective of human rights law and the obligations those laws impose, if all EU legal instruments in this field were genuinely designed only to create a 'fortress Europe' and to prevent or inhibit flows of refugees and immigrants suffering persecution or hardship who fall within the scope of international protection, the whole European system would indeed deserve condemnation. The concepts demonstrating such policy, such as 'safe third country', 'safe country of origin' or the 'only Member State responsible' will not be thoroughly discussed here, except for the last one, since they have already been a subject of extensive research<sup>11</sup> and are not the main focus of the Dublin II Regulation itself.<sup>12</sup>

The Dublin II Regulation was designed to prevent two of the most undesirable phenomena in the area of refugee law - 'refugees in orbit' (refugees circulating between Member States or within one Member State neither being allowed to stay within its territory, nor being able to leave it) and 'asylum shopping' (lodging applications in several Member States or choosing the one having the most lenient policy or practice in this respect) - and to bring order to the process of examining asylum applications in the EU.

The criteria for determining the Member State responsible for examining asylum applications was meant to express the principle of solidarity<sup>13</sup> but, in fact, resulted in burden shifting – to the southern or eastern Member States located at the borders of the Union's territory. Politicisation in this area of law was also noticeable during accession negotiations of the States who joined the EU in 2004 and 2007. The same holds true for the recent accession negotiations with Croatia. To a large

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- 1 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities [1997] OJ C 254/1.
  - 2 Council Regulation (EC) 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2003] OJ L 50/1.
  - 3 Commission of the European Communities (Commission), 'Revisiting the Dublin Convention: Developing Community Legislation for Determining which Member State is Responsible for Considering an Application for Asylum Submitted in One of the Member States' (Staff Working Paper) SEC (2000) 522 final, point 9.
  - 4 *ibid* point 11.
  - 5 *ibid* point 13.
  - 6 *ibid* point 14.
  - 7 *ibid* point 15.
  - 8 *ibid* point 28.
  - 9 H Battjes, 'A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin II Regulation' (2002) 4 *European Journal of Migration and Law* 159.
  - 10 M T Gil-Bazo, 'The Protection of Refugees under the Common European Asylum System. The Establishment of a European Jurisdiction for Asylum Purposes and Compliance with International Refugee and Human Rights Law' (2007) 36 *Cuadernos Europeos de Deusto* 153, 156-157.
  - 11 N El-Enany, 'The Safe Country Concept in European Union Asylum Law: in Safe Hands?' (2006) 2 *Cambridge Student Law Review* 1, 1-9.
  - 12 Council Directive (EC) 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13.
  - 13 Dublin II Regulation, recital 8.

extent, there is an underlying fear of remaining a border guard of the Union and of the inconveniences linked thereto (for instance, German support of the Polish accession application).

Matters concerning asylum were of crucial importance during the recent negotiations with Croatia. Statistics show that EU Member States, despite their strict policies with regard to illegal migration, remain very attractive for asylum seekers and also economic migrants. In 2011, the number of asylum applications lodged in Croatia increased significantly compared to the previous year. At the same time, the recognition of these applications decreased by 3 percent.<sup>14</sup> During the negotiation procedure it was pointed out that Croatia needed to substantially amend parts of its legislation in this field in order to 'achieve full compliance with EU requirements'. Foremost was the need to improve reception conditions of asylum seekers and to ensure genuine access to asylum procedures.<sup>15</sup> Significant changes were introduced in 2010 which was confirmed by the head of the UNHCR mission in Croatia who approved them stating that the Croatian legislation has been brought into line with 'relevant UN and EU standards and presents an important contribution to the protection of persons fleeing violence and human rights violations worldwide.'<sup>16</sup> Although the Commission Report from the same year showed that the Croatian legislation has undergone positive changes, it indicated that particular attention should be still paid to the integration of persons who have been granted protection.<sup>17</sup> The most recent Commission report takes note of the steady progress in the implementation of the asylum acquis and approves of the new second instance courts established, mainly in order to enhance the administrative capacity to deal with the increasing number of asylum application.<sup>18</sup>

According to the Tampere conclusions, adopted rules should, in the long term, 'lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.<sup>19</sup> The introduction of uniform procedural rules and status, compliant with international minimum standards on refugee protection set up by the 1951 Convention relating to the Status of Refugees ('Refugee Convention')<sup>20</sup> would be beneficial, not only for asylum seekers, but also for Member States. Such a step would probably facilitate and accelerate the whole asylum-application process.

However honourable and praiseworthy this goal is, it suffices to say that at this point the reality of asylum seekers in Europe drifts far away from this idyllic vision. First of all, even if the procedural rules have already been approximated to a large extent, there is still an enormous difference in the practice of Member States. For instance, in 2007 recognition of Iraqi asylum seekers as refugees varied in Member States between 0% (Greece, Slovenia) and nearly 90% (Cyprus - 87,5%, Germany - 85%, Sweden - 85%).<sup>21</sup> Moreover, Sweden, which in 2006 was the main receiving country with regard to Iraqi asylum seekers, had to introduce a more stringent policy which naturally resulted in a drop in the recognition rate due to the lack of response to a call for solidarity addressed to the other Member States.<sup>22</sup> This trend, instead of reversing, is strengthening,<sup>23</sup> which was reflected by the many forced returns of Iraqi asylum seekers in 2010 and 2011.<sup>24</sup>

Such a situation seems to be much more like an asylum lottery than a common system of uniform rules. These effects are intensified by the fact that states having external borders of the Union are usually less inclined to apply more liberal asylum policies, since it is them who are most often deemed to be the ones responsible for examination of asylum applications under the Dublin II Regulation.

14 Human Rights Watch, 'World Report 2012: Croatia' (January 2012) <<http://www.hrw.org/world-report-2012/world-report-2012-croatia>> accessed 16 May 2012.

15 Commission, 'Screening Report: Croatia. Chapter 24 - Justice, Freedom and Security' 15 <[http://ec.europa.eu/enlargement/pdf/croatia/screening\\_reports/screening\\_report\\_24\\_hr\\_internet\\_en.pdf](http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_24_hr_internet_en.pdf)> accessed 16 May 2012.

16 'Croatia Brings Asylum Law in Line with EU Standards' (3 July 2012) <<http://www.eubusiness.com/news-eu/croatia-politics,5fb/>> accessed 16 May 2012.

17 Commission, 'Enlargement Strategy and Main Challenges 2010-2011' (Communication) COM (2010) 660 final, 34. See 'Asylum seekers in Croatia Often End Up Isolated (14 November 2011)' <[http://www.croatiantimes.com/news/General\\_News/2011-11-14/23188/Asylum\\_seekers\\_in\\_Croatia\\_often\\_end\\_up\\_isolated](http://www.croatiantimes.com/news/General_News/2011-11-14/23188/Asylum_seekers_in_Croatia_often_end_up_isolated)> accessed 16 May 2012.

18 Commission, 'Monitoring Report on Croatia's Accession Preparations' (Communication) 24 April 2012, 8 <[http://ec.europa.eu/commission\\_2010-2014/file/docs/news/20120424\\_report\\_final.pdf](http://ec.europa.eu/commission_2010-2014/file/docs/news/20120424_report_final.pdf)> accessed 16 May 2012.

19 Tampere European Council, 'Presidency Conclusions' (15-16 October 1999) point 15 <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)> accessed 20 March 2012.

20 See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugee Convention).

21 European Council on Refugees and Exiles, 'Five years on Europe is Still Ignoring Its Responsibilities Towards Iraqi Refugees' (March 2008) AD1/03/2008/ext/ADC p. 2, <<http://www.unhcr.org/refworld/pdfid/47e1315c2.pdf>> accessed 12 March 2012.

22 *ibid.*

23 In 2009 the recognition rate of Iraqi asylum seekers in Germany lowered (77%) while in Greece it remained at the same level. Greek Council for Refugees, 'Stop Sending Asylum Seekers to Greece' (29 October 2010) <<http://www.gcr.gr/en/node/504>> accessed 16 May 2012.

24 Amnesty International, 'European States Must Drop Forced Returns to Iraq' (10 November 2010) <<http://www.amnesty.org/en/library/asset/EUR01/028/2010/en/6044e775-b35e-4572-adfc-7a1835fbac4/eur010282010en.pdf>> accessed 16 May 2012.

As observed, this is less of a legal issue than a political one with a financial dimension. Still under construction, the Common European Asylum System is burdened by these issues, particularly those with a financial dimension, creating illusions regarding solidarity and burden sharing ideals. It is important to note that, although the EU as an international organisation sets its rules in the field of asylum and refuge, its Member States still remain accountable under international human rights treaties and conventions to which they are State Parties. One of the most significant instruments in this respect and in this region of the world is the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR' or 'European Convention on Human Rights').

The aim of this paper is to analyse the compliance of the Dublin II Regulation with the European Convention on Human Rights, which recently has been put in doubt. Application of its provisions in certain situations may amount to serious violations of human rights, even those which are absolute. Such cases and provisions will be thus identified and discussed here.

Problems related to the establishment of the Common European Asylum System are not a new phenomenon and have arisen only recently due to some unforeseen occurrences. They have been identified before, in fact not long after the adoption of the legal instruments within the CEAS: in 2008 the Commission proposed a recast of the Dublin II Regulation<sup>25</sup> and EURODAC Regulation<sup>26</sup>, followed by similar proposals regarding Reception Conditions Directive<sup>27</sup> and Asylum Procedures Directive<sup>28</sup>, and the adoption of the recast of the Qualification Directive<sup>29</sup>.

This shows the comprehensiveness of the recast process and also illustrates the deficiencies of the whole system, not only of a single legal instrument. In general, this partial reform of the CEAS was welcomed and positively assessed by NGOs and other organisations, although they proposed further recommendations in order to improve the position of asylum seekers and increase their chances of being granted protection.<sup>30</sup>

This issue has recently been a 'hot potato' in the EU, particularly in light of the Arab Spring. Furthermore, taking into account the fact that all Member States are Contracting Parties to the Convention, the forthcoming accession of the EU to the ECHR, and a steadily growing pile of case law in this respect at the Court of Justice of European Union (hereafter CJEU) and the European Court of Human Rights ('ECtHR'), it is of crucial importance.

Section 2 analyses the protection of refugees under the Refugee Convention and the ECHR, which is significant since all cases pertain to the right to asylum, an issue not included in the latter. Section 3 briefly outlines the relationship between the EU and the ECHR. Section 4 provides for an extensive discussion on the Dublin II Regulation itself and potential, as well as real, problems arising with regard to human rights obligations. It also devotes some attention to the recast of the Dublin II Regulation proposed by the Commission in December 2008. Section 5 provides for a conclusion, proposes alternatives to the existing system and raises some questions for further research and observation.

## II. Rights of refugees under ECHR. Relationship between the Refugee Convention 1951 and the ECHR

The primary legal source of refugee rights is the Geneva Convention adopted in 1951 together with its Protocol from 1967, which for the first time laid down a single definition of a 'refugee', independent of origin or any particular category of persons. According to Article 1, read in conjunction with the Protocol, a 'refugee' is a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result

25 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing criteria for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person' COM(2008) 820 final.

26 *ibid.*

27 Commission, 'Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers' COM(2011) 320 final.

28 Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status' COM(2011) 319 final.

29 Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

30 European Council on Refugees and Exiles, 'Comments from European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive' (March 2010) <<http://www.ecre.org/topics/areas-of-work/protection-in-europe/148.html>> accessed 15 May 2012.

of such events, is unable or, owing to such fear, is unwilling to return to it.’ This definition also serves as a basis for the legal instruments of the EU in the field of asylum,<sup>31</sup> although it has been narrowed by excluding EU citizens from the scope of the protection offered by these legal instruments. It is worth noting that a refugee status is of a declaratory nature which means that everyone who fulfils the conditions set out in the abovementioned provision is entitled to recognition of his rights as a refugee.<sup>32</sup>

The primary aim of the Refugee Convention was to provide a legal status for those persons who found themselves outside their country of nationality or habitual residence for fear of persecution as a consequence of ‘events occurring in Europe before 1 January 1951’, and it should be read in the context of the bipolar reality of the world at the time it was adopted and opened for signature, particularly in the light of forced displacement of people during and after the war.<sup>33</sup> The temporal and geographical limitations to the Convention were removed with the entry into force of the Protocol to the Convention adopted in 1967.

It is often emphasised that there exist at least four overlapping regimes in the field of international protection of asylum seekers and refugees in Europe: the Refugee Convention 1951, EU law, the United Nations Convention against Torture and the European Convention on Human Rights.<sup>34</sup> All Member States of the EU are Contracting Parties to these legal instruments. Before discussing the European Asylum System and its contribution to or impact on the protection of asylum seekers and refugees, it is necessary to draw the relationship between the basic document in this area of law, namely the Refugee Convention, and the ECHR.

First of all, there is no explicit reference to the right to asylum in the European Convention on Human Rights and very few other legal instruments mention it.<sup>35</sup> Nonetheless, refugee rights do find protection, indirectly in the ECHR. Some authors even argue that the refugee status comprises a bundle of rights and is defined by a set of different legal orders and instruments interacting with each other.<sup>36</sup>

In any case, it would certainly be difficult to argue that refugee rights are not a part of a broader category of human rights. Having that in mind, it will be possible to analyse compliance of the Dublin II Regulation pertaining to asylum procedures with the European Convention on Human Rights.

On the one hand, ECHR is a legal instrument encompassing many situations that fall outside the scope of other instruments intended to ensure international protection of asylum seekers, for example a case of a person not qualifying as a refugee who would definitely fall outside the ambit of the Refugee Convention. Rights of such a person would nevertheless still be protected by the ECHR which would, in fact, be tantamount to a form of subsidiary protection.

On the other hand, some doubts could be raised in respect of the applicability of the ECHR, since the Refugee Convention as well as the United Nations Convention against Torture are perceived to be a sort of *lex specialis* thereto. However, these doubts were dispelled by the European Court of Human Rights in *Cruz Varas*<sup>37</sup> case in which it extended the application of the criteria set out in *Soering*<sup>38</sup> to cases involving refused asylum seekers.

In the case *Soering v the United Kingdom*, which concerned extradition, the ECtHR reiterated the absolute character of the prohibition enclosed in Article 3 of the ECHR and ruled that ‘it would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed’<sup>39</sup>.

31 Dublin II Regulation, art 2(g): ‘refugee’ means a third-country national qualifying for the status defined by the Geneva Convention and authorised to reside as such on the territory of a Member State.’

32 Gil-Bazo (n 10).

33 N Mole, ‘Asylum and the European Convention on Human Rights’ (2007) 9 Human Rights Files 12 <<http://www.unhcr.org/refworld/pdfid/4ee9b0972.pdf>> accessed 16 March 2012.

34 *ibid* 9.

35 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 14.

36 Gil-Bazo (n 10) 177.

37 *Cruz Varas and Others v Sweden* App No 15576/89 (ECHR, 20 March 1991) paras 69-70.

38 *Soering v the United Kingdom* App No 14038/88 (ECHR, 7 July 1989).

39 *ibid* para 88.

*Soering* was reaffirmed in *Vilvarajah*<sup>40</sup> and *Salah Sheek*.<sup>41</sup> In these cases, the Court asserted that, despite the existence of other instruments of international law specifically addressing the issues at hand, the application of the ECHR was not excluded. It merely interpreted the Convention ‘in the light of its special character as a treaty for the protection of individual human beings’ in a manner making the safeguards provided therein practical and effective.<sup>42</sup>

Moreover, Article 60 of the ECHR states that nothing in the Convention ‘shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.’ This provision could be interpreted as a reinforcing power of the Convention and supporting human rights enshrined in other international legal instruments.

The ECtHR holds a very firm standpoint that Article 3 of the ECHR ‘against ill-treatment is equally absolute in expulsion cases’ and in such a situation, ‘the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration’<sup>43</sup>.

It is worth noting that Article 3 of the ECHR, albeit most acknowledged and important with regard to the issue at hand at the moment, due to the increasing number of cases thereon, is not the only provision which could potentially be invoked in cases of refusal of asylum or transfer of the asylum seeker to another State. Other rights, relevant in respect of asylum, however more difficult to rely on, could be derived from Article 2 (right to life), Article 5 (right to liberty and security of the person), Article 6 (right to a fair trial), Article 7 (prohibition on retroactive criminal punishment), Article 8 (right to respect for family and private life), Article 14 (prohibition of discrimination in the enjoyment of Convention rights), Article 16 (restrictions on political activity of aliens), Article 4 of Protocol No. 4 (collective expulsion of aliens), Article 1 of Protocol No. 7 (procedural safeguards relating to expulsion of aliens), Article 3 of Protocol No. 7 (exclusion of own nationals), Article 4 of Protocol No. 7 (prohibition on double jeopardy) and Protocol No. 12 (general prohibition on discrimination).<sup>44</sup> There has been no case law on the violation of these provisions with regard to asylum thus far (except of issues raised under Article 2) and developments in these areas are yet to be seen. However, as these provisions require a high standard of proof, it seems much less feasible and less likely that they would be successfully invoked as compared to Article 3.<sup>45</sup> Article 3 (the prohibition of torture or inhuman or degrading treatment), however, has one apparent advantage. Its scope covers situations where there is a risk of other rights enshrined in the Convention being violated even without sufficient evidence to prove it. Article 3 is covered in situations such as these by Article 15 paragraph 2, where it states that no derogation may be made from Article 3.

Moreover, the ECHR has one fundamental advantage over the Refugee Convention, namely a right of individual petition to a judicial body granted by Article 34, which is not provided at all by the latter.

To summarise, although the ECHR seems to be less specific and rather of a general character, the safeguards provided therein seem to be paradoxically stronger, comprising a broader range of situations and entailing easier procedures to benefit from them. Therefore, even if protection granted by other international legal instruments fails for whatever reason, asylum seekers in Europe may rely on the shield of the ECHR, which, despite lengthy procedures and a number of conditions to be fulfilled,<sup>46</sup> in the end proves to be effective. The relationship between the Refugee Convention and the ECHR also shows evidently the significance of the application of the ECHR to the cases of expulsions, return and transfer proceedings carried out under the Dublin II Regulation.

### III. Relationship between the EU and the ECHR

The relationship between the EU and the ECHR has been the subject of many publications.<sup>47</sup> The aim of this paper is not to discuss it extensively, but rather to outline recent developments and to present possible future issues relevant in cases concerning the rights of asylum seekers.

40 *Vilvarajah and Others v the United Kingdom* App No 13163/87, 13164/87 and 13165/87 (ECHR, 30 October 1991) paras 102-103.

41 *Salah Sheek v the Netherlands* App No 1948/04 (ECHR, 13 January 2007).

42 *Cruz Varas and Others v Sweden* App No 15576/89 (ECHR, 20 March 1991) para 94.

43 *Chahal v The United Kingdom* App No 22414/93 (ECHR, 15 November 1996) para 80.

44 *N Mole* (n 33) 21.

45 *Saadi v the United Kingdom* App No 13229/03 (ECHR, 29 January 2008) (with regard to Article 5 para 1 ECHR); *FH v Sweden* App No 32621/06 (ECHR, 20 July 2010) (with regard to Article 2 ECHR); *Chahal v The United Kingdom* App No 22414/93 (ECHR, 15 November 1996) (with regard to Article 8 ECHR).

46 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

47 T Lock, ‘EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg’ (2010) 35(6) *European Law Review* 777, 777-798.

All Member States of the EU are Contracting Parties to the ECHR. The Convention is nevertheless not binding upon the EU as such, since the Union has not yet acceded thereto. However, there exist some factors indicating that the Convention is taken into account while adopting, assessing and analysing law at the Union level.

Firstly, one of the sources of the EU law is known under the label of ‘General Principles of EU law’. According to Article 6 para. 3 of the Treaty on European Union (hereafter TEU), ‘fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union law.’ ECHR was thereby inserted in the EU law through the backdoor in the Treaty of Maastricht. Although Article 6 of the TEU<sup>48</sup> officially codified fundamental rights as general principles and thereby followed the previous case law of the European Court of Justice, it could not result in the inclusion of all implications that usually ensue from the accession to the ECHR, namely the jurisdiction of the ECtHR and the supervision of the Council of Europe. This way, CJEU may apply the standards set by the Convention in cases pending before it. The CJEU, in fact, very often refers to the rights enshrined in the ECHR, recognises them and takes into account the case law of the ECtHR. For this purpose it uses the formula stating that ‘the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect’.<sup>49</sup> It means that the CJEU respects the rules and rights contained therein, but nevertheless retains control over the way and the extent in which it implements them.

Secondly, on 1 December 2009, together with the Treaty of Lisbon, the Charter of Fundamental Rights (‘Charter’), initially adopted in 2000 and since then having unclear legal status,<sup>50</sup> entered into force. It does not replace the general principles but has a certain added value. Article 53 of the Charter states that it shall not ‘be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms [...]’. Moreover, Article 52 paragraph 3 obliges institutions to accord the same meaning and scope to the rights contained in the Charter which correspond with the rights guaranteed by the Convention. It also emphasises that they should be perceived as minimum standards, allowing the Union to provide for more extensive protection. The list of the corresponding rights has been included in the Explanations to the Charter.<sup>51</sup> Many of them are relevant for the protection of asylum seekers, that is: the right to life (Article 2 of the Charter, Article 2 of the ECHR), prohibition of torture or other inhuman or degrading treatment (Article 4 and 19 paragraph 2 of the Charter including its interpretation by the ECtHR, Article 3 of the ECHR), prohibition of slavery and forced labour (Article 5 paragraph 1 and 2 of the Charter, Article 4 of the ECHR), right to liberty and security (Article 6 of the Charter, Article 5 of the ECHR), and right to respect for private and family life (Article 7 of the Charter, Article 8 of the ECHR), prohibition of collective expulsion of aliens (Article 48 of the Charter, Article 6 paragraph 2 and 3 of the ECHR), right to fair trial in criminal matters (Article 48 of the Charter, Article 6 paragraph 2 and 3 of the ECHR), prohibition of punishment without law (Article 49 paragraph 1 (with the exception of the last sentence) and paragraph 2 of the Charter, Article 7 of the ECHR).

Apart from these provisions, some of the articles in the Charter have the same meaning but wider scope - two among them possibly relevant for asylum seekers: right to a fair trial within the meaning of Article 6 paragraph 1 ECHR (Article 47 paragraph 2 and 3 of the Charter) and the prohibition of double jeopardy set out in Article 4 of Protocol No. 7 (Article 50 of the Charter).<sup>52</sup> Moreover, the Charter also codified the right to asylum in Article 18 where it states that it shall be ‘guaranteed with due respect for the rules of the Geneva Convention’. The right to asylum is contained in very few international legal instruments, mainly in those with a specific refugee-focused character, and as such Article 18 is significant.

However, it is deplorable that the abovementioned provisions are addressed, according to Article 51 para. 1, only ‘to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. Therefore, the asylum seeker whose human rights were violated, for instance, by the order of transfer to another Member State or to another country under the Dublin II Regulation, may not rely on the provisions of the Charter, since the Dublin II Regulation is directly applicable, without any need or possibility

48 Treaty on European Union (Maastricht Treaty) [1992] OJ C 191, art F.

49 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659 para 71.

50 Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

51 European Parliament, Council and Commission, ‘Explanations Relating to the Charter of Fundamental Rights’ [2007] OJ C 303/33.

52 *ibid.*

to be implemented in the legal orders of the Member States.<sup>53</sup> This restriction significantly limits the positive impact of the inclusion of the rights corresponding to the ECHR in the Charter and the possibility to invoke them before judicial authorities. There still exist, however, general principles applicable to the Member States and the EU alone, but the right to asylum has not been recognised as one of them so far.

Thirdly and finally, Article 6 para. 2 TEU imposes the obligation on the EU to accede to the ECHR. On 1 June 2010 Protocol No. 14 to the ECHR entered into force, thereby opening up the perspective for the EU to become a Contracting Party to the Convention.<sup>54</sup> Future accession raises a lot of questions as to the roles and division of tasks between both courts - CJEU and ECtHR, the hierarchy between them, the potential evolution of the CJEU into a human rights court, the standard of protection of human rights, the autonomy of the legal order of the EU and exhaustion of legal remedies at the Union level. Although draft legal instruments on the accession of the EU to the European Convention on Human Rights were adopted in June 2011 and revised in October 2011, some problems that could not be solved between the Steering Committee for Human Rights and the EU remained.<sup>55</sup> Therefore the answers to these questions are yet to be seen. Adopted documents in their current shape envisage a so-called co-respondent mechanism, allowing either the EU to join the proceedings with regard to the alleged violation of a Convention right by one or more Member States or a Member State to join where the application is lodged against the EU.<sup>56</sup> This system, however, shall not be activated automatically in order to prevent intervention of the ECtHR with respect to the balance of powers and the division of competences between Member States and the EU.

The accession of the EU to the ECHR in the future will entail many advantages with regard to the protection of the rights of asylum seekers; it will foster EU's credibility in issues concerning human rights and its legal acts, including the Dublin II Regulation and will be subjected to the external control of the ECtHR.<sup>57</sup> However, the accession of the EU (previously known as the European Community) to the ECHR has been discussed for over thirty years now and the progress in this respect is still troublesome. Even after the adoption of proper legal bases, it remains to be an issue of very high political sensitiveness.

#### IV. Dublin II Regulation and Protection of Human Rights under ECHR and Refugee Convention

The main aim of the so-called 'Dublin System' and the Dublin II Regulation as its cornerstone was to prevent multiple asylum applications and to ensure a one-stop-shop asylum procedure through the creation of a rapid, 'clear and workable method for determining the Member State responsible for the examination of an asylum application'<sup>58</sup>. It has been widely criticised from the moment of its adoption and even during the drafting process. This criticism has grown stronger in the last few years, mainly as a result of the reception conditions and general situation of asylum seekers in Greece.

The aim of this section is to examine provisions of the Dublin II Regulation and to assess the conformity of their application in practice and their compatibility with the obligations of the Member States under the European Convention on Human Rights.

##### A. *The Process of Adopting the Dublin II Regulation: Alarming Assumptions*

The lawfulness of the genuine goals of the Dublin II Regulation and their conformity with the human rights obligations of Member States could have been put into doubt at the beginning of its formation. The Commission's Communication from 2000, which led to its adoption uses somewhat ambiguous phrases and sets out principles questionable in terms of obligations to protect asylum seekers and refugees. Although many challenges, potential drawbacks and problems were recognised therein, it contains some objectives which are rather alarming and worrying when viewed from the lens of human rights protection.

It lays down effective removal as a fundamental principle absolutely necessary for credibility of the whole asylum system. As much as it is understandable in terms of workability and effectiveness of the policy, its wording seems to indicate effective,

53 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/01, art 288: '[...] A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

54 ECHR, Protocol No. 14, art 17(2).

55 Steering Committee for Human Rights, 'Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights (14 October 2011) CDDH(2011)009, point 14.

56 *ibid* art 3.

57 Lock (n 47) 777.

58 Dublin II Regulation, recital 3.



rapid removal and combat against illegal immigration as principal goals of legal instruments in this field.<sup>59</sup> The declared aim of the asylum measures was the reduction of secondary movements. Enhanced genuine protection of individuals facing a risk of persecution seems to be simply forgotten here.<sup>60</sup>

### B. *Dublin II Regulation: Theory and Application*

The Dublin II Regulation improved the mechanisms provided for in the Dublin Convention with respect to effectiveness and speed. However, one may ask whether it simultaneously downgraded the thoroughness, appropriateness and due diligence to deal with asylum applications submitted in accordance with its rules. This subsection will attempt to answer this question by analysis of provisions which raised criticism.

The whole 'Dublin System' has been severely criticised by non-governmental organisations dealing with human rights protection, namely the European Council on Refugees and Exiles ('ECRE') and United Nations agencies, particularly the United Nations High Commissioner for Refugees ('UNHCR'). It is possible to set out at least ten points in this respect, concerning not only the procedure, but also substantive definitions contained in the Regulation:

1. No equivalence of protection throughout the Union leading to the 'asylum lottery' phenomenon;
2. No possibility to choose the country of asylum;
3. Dublin II Regulation as a responsibility-shifting instrument;
4. Responsibility for asylum application as a penalty for allowing third country nationals to enter the territory of the 'Fortress Europe';
5. Length and costs of procedure and transfers;
6. No suspensive effect of appeal or judicial review against the decisions to take charge or take back;
7. Possibility of detention;
8. Very limited notion of a 'family member';
9. Discretion of Member States with regard to application of sovereignty and humanitarian clauses;
10. Risk of violation of non-refoulement principle in case of automatic reliance on the provisions of the Regulation.

### C. *Asylum Lottery: No Choice for Asylum Seeker*

The phenomenon of 'asylum lottery', mentioned above, will be expanded upon here. In the Commission's Communication from 2000, there was an emphasis on the need for the implementation of equivalent asylum policies and procedures across all Member States 'in order to avoid negative effects for the Member States' interests'. Examination of submitted requests shall take place under the same conditions in every Member State.<sup>61</sup> The reality, however, is far away from this ultimate goal. As a consequence, asylum seekers are deprived, although not completely, of a choice they had had before the steps to create a European asylum system were taken. They may try to apply for asylum in a Member State other than the one of first entry and hope that the chosen country will apply on its own motion either sovereignty or humanitarian clause. Taking into account that these provisions are used relatively little in general, such efforts may appear to be futile at the end. However, the chance of a Member State assuming its own responsibility in a case where Greece is the country who should take back or take charge of the asylum seeker has recently increased,<sup>62</sup> especially after the judgments of the ECtHR<sup>63</sup> and the CJEU.<sup>64</sup>

Some authors argue that the Refugee Convention grants a right to seek recognition of refugee status in any state being a Contracting Party to this instrument and thereby render the rules and criteria determining the one and only Member State responsible to examine asylum application incompatible with international law.<sup>65</sup> However, it does not set any limitation with regard to the country where an asylum seeker may submit his refugee application and since it is perceived as a minimum

59 Commission, 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum' (Communication COM(2000) 755 final, 10.

60 *ibid.*

61 *ibid.* 7.

62 UNHCR, 'Updated UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece' (31 January 2011) <[http://www.ecoi.net/file\\_upload/1226\\_1299672198\\_4d7610d92.pdf](http://www.ecoi.net/file_upload/1226_1299672198_4d7610d92.pdf)> accessed 20 March 2012.

63 *MSS v Belgium and Greece* App No 30696/09 (ECHR, 21 January 2011).

64 C-411/10 *NS v Secretary of State for the Home Department*; C-493/10 *ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, nyp.

65 Gil-Bazo (n 10) 178.

standard, any rules imposing stricter conditions to obtain a refugee status shall be deemed inconsistent with it. Likewise, labelling all State Parties to the Refugee Convention under the concept of a 'safe third country' (except for the EU Member States which are not third countries) may run contrary to the purpose of the Convention, since the fact of being bound by international obligations does not necessarily entail full observance thereof.

Furthermore, the absence of a harmonised EU jurisdiction over asylum cases may lead to infringements of Member States' obligations in respect of human rights law. According to recital 2 of the Dublin II Regulation, Member States are considered as safe countries for third country nationals, but if, due to any occurrence, a Member State would no longer fulfil the conditions to be presumed as safe, the automatic transfer of an asylum seeker to that country would, as a matter of fact, amount to the violation of human rights. Moreover, since the instrument in question limits the scope of the definition of a 'refugee' and therefore applies to third country nationals only, the Union citizens, even hypothetically, may not seek protection under its provisions.

#### D. *Burden and Responsibility-shifting*

Although the preamble to the Dublin II Regulation mentions necessity to strike 'a balance between responsibility criteria in a spirit of solidarity',<sup>66</sup> it was absolutely not designed, same as its predecessor, to be a burden-sharing instrument with quotas to distribute asylum applicants among Member States.<sup>67</sup> Rather, it aimed to reduce secondary movements, a consequence of the abolishment of internal border controls,<sup>68</sup> and to legalise the sole process of allocating responsibility for asylum claims in the EU.<sup>69</sup> Therefore it has been widely criticised, also by the EU institutions themselves, as having failed to serve as a burden-sharing mechanism.<sup>70</sup> The system for determining responsibility of a particular Member State was supposed to be based on an 'objective, fair criteria both for the Member States and for the persons concerned'<sup>71</sup>. Despite the fact that the criteria set out in Chapter III of the Regulation – such as possession of a visa or residence permit, having family members in a Member State or previous asylum application somewhere else – are definitely objective, it is difficult to defend their fairness. Is it fair to put most of the responsibility on the eastern and southern Member States which are the ones most easily accessible by land and sea? Is it justified and fair to determine their responsibility and order transfers of applicants without having assessed their economic and financial situation as well as their capabilities in terms of reception of asylum seekers? Is it fair to deprive an asylum seeker of a right to choose where to lodge the application when the practice, procedure and recognition rates are so diverse among Member States?

These and many other questions may raise doubts solely under EU law and especially under its general principles, for instance, the principle of sincere cooperation,<sup>72</sup> and not to mention the infringements of the ECHR or the Refugee Convention. In fact, the system of transfers under the Dublin II Regulation and seeking 'protection' for asylum seekers elsewhere does not in any case qualify as an act of solidarity or responsibility sharing.

#### E. *Poor Border Control = Responsibility*

The Dublin System has created a direct link between the allocation of responsibility to examine an asylum application and the first entry of a third country national into the territory of the Union or, in the words of the Commission, the failure to discharge a Member State's 'responsibilities [...] to carry out effective pre-entry and entry [border] controls'.<sup>73</sup> The criteria set out in Chapter III of the Dublin II Regulation designed to determine the Member State responsible, clearly show this link. For instance, Article 18 puts responsibility on a Member State who let the applicant on the territory of the Union, based on submitted proof and circumstantial evidence (in fact: irregular entry in the era of EURODAC), whereas Article 9 puts responsibility on a Member State who granted a visa or a residence document.

66 Dublin II Regulation, recital 8.

67 Commission (n 3) point 29.

68 *ibid* point 19.

69 C Filzwieser, 'The Dublin II Regulation vs the European Convention of Human Rights - A Non-Issue or a Precarious Legal Balancing Act? section C. The current dilemma of the "Dublin System" ' 5 <[http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:5364](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5364)> accessed 21 March 2012.

70 European Parliament, 'Resolution of 2 September 2008 on the evaluation of the Dublin system' (Resolution) (2007/2262(INI)) point M.

71 Dublin II Regulation, recital 4.

72 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 4(3).

73 Commission (n 3) point 18.

The EURODAC Regulation<sup>74</sup> provides for tools facilitating identification of asylum seekers who enter the territory of the EU. On the basis of data collected by the system established, it is possible to determine the Member State responsible for the asylum application, especially in situations where applicants do not possess any identity documents and fingerprints are the only verifiable and reliable data. It has, however, been criticised for many reasons, not only relating to data protection concerns,<sup>75</sup> but also to its practical impact on asylum seekers, who, fearing rejection of asylum application may resort to drastic acts of mutilation of their own fingertips.<sup>76</sup>

It is not difficult to predict the practical effect of such rules on the protection of asylum seekers and refugees. Member States and their authorities, as well as FRONTEX,<sup>77</sup> tend not to grant third country nationals access to the territory of the Union without carrying out proper examination of their claims or requests.

It is a system based on sanctions for those states which allow irregular immigrants on the Union's territory and therefore must bear responsibility for their sole presence. On the one hand, such rules may prevent refugees from seeking protection in the EU at all. On the other hand, such a policy *per se* is manifestly noncompliant with the European Convention on Human Rights and the Geneva Convention, which obliges Contracting Parties to grant protection to all those who need it according to the criteria set out in Article 1 of the Refugee Convention and who apply for it at the border or on the territory of a particular state, since it *de facto* prevents access to protection.

Having such rules, can the EU call itself an organisation based on the rule of law and respecting human rights?<sup>78</sup> Dublin II Regulation provides for many incentives encouraging Member States to adopt rules which are often dubious when it comes to their compliance with refugee law or the international protection of human rights, such as, restricting access to the territory of Member States as much as possible.

#### F Procedural Issues: Length, Costs, No Suspensive Effect of Appeal, Detention

One of the main concerns which directed the Union (back then the Community) to adopt the Dublin II Regulation was the urge to eliminate the 'refugees in orbit' phenomenon through *inter alia* acceleration of procedure. The Dublin II Regulation has been successful in this respect, but only to a certain extent. It indeed shortened the prescribed periods to deal with asylum applications. However, the undesirable phenomenon still persists, which will be presented on the basis of a few examples. For instance, according to Article 16 paragraph 3, if a third country national leaves the territory of the Union for a period of at least three months, the responsibility of a Member State, whose territory he left, ceases. Such a situation amounts to nothing else than a 'refugee in orbit'. The length of the procedure also plays a vital role in this respect. Determination of the Member State responsible may take up to three months from the date of an application for asylum being lodged (Article 17 paragraph 1). Next, the Member State, to whom the request to take charge is directed, has two months to give a decision (Article 18 paragraph 1). The transfer shall take place within six months from the date of acceptance of the request to take charge (Article 19 paragraph 3). However, if it is not carried out within the prescribed time limit, it may be extended up to a maximum of eighteen months (Article 19 paragraph 4).

It is clearly visible from this brief and illustrative example that the Dublin II Regulation does not eliminate the phenomenon of 'refugees in orbit' and even functions in a way that is detrimental to the asylum seeker, placing him in limbo, often in detention or other facilities serving similar functions (preventing absconding), in contravention of one of the general

74 Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

75 Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' COM(2007) 299 final, 10.

76 Harriet Grant and John Domokos, 'Dublin regulation leaves asylum seekers with their fingers burnt' (*The Guardian*, 7 October 2011) <<http://www.guardian.co.uk/world/2011/oct/07/dublin-regulation-european-asylum-seekers>> accessed 16 May 2012.

77 European Council on Refugees and Exiles, 'Submission from the European Council on Refugees and Exiles in Response to the Commission's Green Paper on the Future Common European Asylum System (COM(2007) 301)' AD5/9/2007/Ext/RW, 2; European Free Alliance (The Greens), 'FRONTEX/EU Border Control: Half-hearted Improvements on Human Rights Protection Fall Short' (September 2011) <<http://www.statewatch.org/news/2011/sep/ep-greens-frontexeu-border-control-prel.pdf>> accessed 16 May 2012; New Frontex Mandate 'A Wolf in Sheep's Clothing' (September 2011) <<http://www.statewatch.org/news/2011/sep/ep-gue-frontex-prel.pdf>> accessed 16 May 2012; S Léonard, 'FRONTEX and the Securitization of Migrants through Practices' (September 2011) 2, 18-19 <<http://www.eui.eu/Documents/RSCAS/Research/MWG/201011/SLeonardpaper.pdf>> accessed 16 May 2012; Frontex, 'Annual Risk Analysis 2012' Table: Reasons for Refusal of Entry, 53 <[http://migrantsatsea.files.wordpress.com/2012/05/frontex\\_annual\\_risk\\_analysis\\_2012.pdf](http://migrantsatsea.files.wordpress.com/2012/05/frontex_annual_risk_analysis_2012.pdf)> accessed 16 May 2012.

78 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 2: 'The Union is founded on the values of [...] the rule of law and respect of human rights [...]'; Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23: 'It must first be emphasized in this regard that the European Economic Community is a community based on the rule of law'; Commission, 'European Governance. A White Paper' COM(2001) 428 final, 25.

principles of the EU law - the principle of legal certainty.

The asylum applicant must be informed of a decision to take charge and transfer him, which may be subject to an appeal or a review.<sup>79</sup> Nonetheless, such an appeal does not have a suspensive effect, unless it is otherwise provided for in the national legislation and decided by the courts on a case-by-case basis. No obligation to suspend the transfer procedure may amount to a violation of Article 13 as well as Article 3 of the ECHR. It is doubtful whether a remedy provided by the provisions of the Dublin II Regulation is genuinely effective, since in the meantime the applicant may be sent to another country without knowing the outcome of the proceedings. Even if his appeal was successful, the potentially severe damage would have already occurred.

### G. *Notion of a 'Family Member'*

Article 2(i) limits the definition of a 'family member' to a spouse or unmarried partner in a stable relationship (provided that national legislation treats unmarried couples in a comparable way) and minor children. It is much narrower than the scope of this term used with regard to Union citizens.<sup>80</sup> Therefore, it is controversial, especially when it comes to the protection of unaccompanied minors, whose application would not, in principle, be examined by a Member State where his other relatives (siblings, grandparents, etc) are present, and as a consequence would be detrimental to them. Such rules do not take into account the best interest of the children and a lengthy transfer procedure may result in their disappearance or in separation from the rest of the family and subsequently cause additional harm and hardship to them. Thus, does this concept respect the family life as enshrined in Article 8 of the ECHR?

It is noteworthy that the proposal for a recast of the Dublin II Regulation<sup>81</sup> extends the scope of the notion of a 'family member' to married minor children when it is in their best interest (Article 2(i)(iii)) and to minor unmarried siblings of the applicant when he/she is also an unmarried minor or even if he/she is married, and it would be in their best interest to reside together (Article 2(i)(v)). Strong emphasis on the best interest of minors is clearly visible (eg Recital 13, Article 8(3)).<sup>82</sup> The proposal also extends the right to family reunification to family members who were granted international protection other than refugee status (Recital 12, Article 6(4), Article 9). Moreover, other relatives also seem to be taken into account while considering the Member States responsible for the examination of the application (eg Article 8(4)).

### H. *Discretionary Clauses: Article 3 paragraph 2 and 15 of the Dublin II Regulation; Non-refoulement Principle*

The so-called 'sovereignty clause' enclosed in Article 3 paragraph 2 of the Dublin II Regulation gives leeway to a Member State which is not responsible, according to the criteria set out in Chapter III, to examine an application for asylum lodged with it. At first sight, it seems that Member States enjoy full discretion as to the examination of an application. That was probably also the view of the drafters of this provision. However, due to the recent occurrences in Greece with regard to the situation of asylum seekers often referred to as 'a humanitarian crisis',<sup>83</sup> this provision seems to be gaining different – narrower – scope and meaning.

On 21 January 2011, the ECtHR ruled on the case of *MSS v Belgium and Greece*. It is a ground-breaking judgment for many reasons. First and foremost, it is the first successful and admissible case regarding the Dublin system. Secondly, the Court asserted the responsibility of both states, including the one whose territory the applicant had already left. Thirdly, it raised much concern in relation to the EU as an actor observing human rights and Dublin II Regulation's compliance with the

79 Dublin II Regulation, art 19(2).

80 Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77, art 2(2).

81 Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing criteria for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person' COM(2008) 820 final, 2008/0243 (COD).

82 Dublin II Regulation, art 8(3): 'Where members of the applicant's family or his/her other relatives are legally present in more than one Member State, the Member State responsible for examining the application shall be decided on the basis of what is in the best interests of the minor.'

83 UN Refugee Agency, 'UNHCR Says Asylum Situation in Greece is "a Humanitarian Crisis" (21 September 2010) <<http://www.unhcr.org/4c98a0ac9.html>> accessed 16 May 2012. See also P McDonough, E Tsourdi 'Putting Solidarity to the Test: Assessing Europe's Response to the Asylum Crisis in Greece' UNHCR Research Paper No. 231 (January 2011) Human Rights Watch 'Updated Submission to the United Nations Committee Against Torture on Greece' (25 April 2012) <<http://www.hrw.org/news/2012/04/25/updated-human-rights-watch-submission-united-nations-committee-against-torture-greece>> accessed 16 May 2012; 'Greece Plans Sweep of Migrants and Asylum Seekers' (2 April 2012) <<http://www.amnesty.org/en/news/greece-plans-sweep-migrants-and-asylum-seekers-2012-04-02>> accessed 16 May 2012.

The case concerns an Afghan national who entered the EU in 2008 through Greece. A year later he lodged his asylum application in Belgium. Since under the Dublin II Regulation Belgium was not a state responsible for its examination, the authorities ordered his transfer to Greece. Immediately upon arrival to Athens, he was detained in appalling conditions and after issuance of his asylum seeker's card, he lived in the street with no resources.<sup>84</sup>

The ECtHR ruled that there were several violations of human rights, based on Article 3 (prohibition of inhuman or degrading treatment or punishment) and Article 13 of the ECHR (right of an effective remedy) in conjunction with Article 3. It found that the living conditions and detention that the applicant was subjected to amounted to degrading treatment<sup>85</sup> and the urgent procedure for applying for a stay of execution does not meet the requirements of Article 13 of the Convention, since it did not thoroughly examine the substance of the complaint.

It is ground-breaking because the Court relied on the rebuttable presumption that ECHR standards of human rights protection are equivalent to human rights protection standards within the EU, applied the lower standard of review with regard to the EU and was reluctant to admit the manifest deficiency of protection<sup>86</sup>, even in cases where the UNHCR complained and reported the treatment of asylum seekers being in breach of conventional rights.<sup>87</sup> According to the ECtHR, Belgian authorities in the *MSS* case should have activated the sovereignty clause in order to prevent a violation of Article 3 of the ECHR. Thus, this judgment sets the balance between the general criteria determining the Member State responsible for the asylum application and its exception in a different way than used to be attached to it hitherto.<sup>88</sup> In fact, it abolished the principle of automatic mutual trust.

Moreover, the EU Member States can no longer be perceived as safe before it is established that there is no direct risk of refoulement, that the applicant will not be detained for the sole reason of being an asylum-seeker and that reception conditions are satisfactory. This case also calls for a revision of the Dublin II Regulation, including a clear indication of when and how to apply the sovereignty clause which has been applied for 'different reasons, ranging from humanitarian to purely practical' and which will probably change previous practice.<sup>89</sup>

The CJEU followed the outcome and reasoning of the *MSS* judgment in the *NS* case<sup>90</sup> in which it decided that an asylum seeker may not be transferred to a Member State (Greece) where he risks being subjected to inhuman or degrading treatment. References for preliminary rulings in the joined cases *NS* and *ME and Others* concerned asylum proceedings, in the United Kingdom and Ireland respectively, of applicants who were supposed to be transferred back to Greece, since, according to the Dublin II Regulation it was determined to be the Member State responsible for the examination of asylum application.

The Court ruled that the discretionary powers of the Member States laid down in Article 3(2) of the Dublin II Regulation must be exercised in accordance with Union law, especially in accordance with other provisions of this Regulation.<sup>91</sup> In general, the judgment confirmed the existence of the presumption that asylum seekers in all Member States are treated in compliance with the requirements set by the Refugee Convention, ECHR and the Charter. A different approach would deprive the Common European Asylum System (and as a consequence, the Area of Freedom, Security and Justice), based on mutual trust and confidence, of its effectiveness and functionality.<sup>92</sup> However, in case there was 'a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers' in the Member State responsible for the examination of asylum application, transfer of an asylum seeker to such a state would amount to a violation of fundamental rights. Numerous reports by the UNHCR and non-governmental organisations confirmed the existence of grave deficiencies in Greece.<sup>93</sup> Therefore, the Member State where the asylum application is lodged cannot rely in such circumstances on its unawareness or lack of instruments to assess compliance with fundamental rights of the Member State responsible.<sup>94</sup> In such

84 *MSS v Belgium and Greece* App No 30696/09 (ECHR 21 January 2011) para 263.

85 *ibid* para 367.

86 *Bosphorus Hava Yollari Turzimi ve Ticaret Anonim Şirketi v Ireland* App No 45036/98 (ECHR 30 June 2005) paras 156-157.

87 *KRS v the United Kingdom* App No 32733/08 (ECHR 2 December 2008).

88 V Moreno-Lax, 'Dismantling the Dublin System: *MSS v Belgium and Greece*' (2012) 14 European Journal of Migration Law 1, 20.

89 Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' COM(2007) 299 final, 6-7.

90 *NS v Secretary of State for the Home Department; ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (n 64).

91 *ibid* paras 65-66.

92 *ibid* paras 80-83.

93 *ibid* para 90.

94 *ibid* paras 91, 94.

circumstances, there is a ‘conclusive presumption that the asylum seeker’s fundamental rights will be observed in the Member State primarily responsible for his application which is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.’<sup>95</sup>

The *NS* judgment is ground-breaking for many reasons. First of all, the CJEU consistently followed the case law of the ECtHR. Secondly, it confirmed the rebuttable character of the presumption of observance of fundamental rights among the EU Member States. Thirdly, it obliges Member States to examine the situation of asylum seekers in the Member State responsible in accordance with the Dublin II Regulation before requesting them to take charge of the applicant. Fourthly, and most importantly, it imposes the obligation upon Member States to apply Article 3(2) of the Dublin II Regulation in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers, rendering it in certain circumstances no longer a ‘sovereignty clause’ but, in fact, a duty.

Currently there are approximately 960 cases concerning the Dublin system pending before the ECtHR. The scale of this phenomenon shows the importance and seriousness of the issue.<sup>96</sup>

The ‘Humanitarian clause’ from Article 15, in turn, allows Member States to bring together family members even if they are not responsible to do so.

Both articles entail a certain, although gradually narrower, degree of discretion and both are exceptions to the principle of mutual trust, on which harmonisation processes are usually based. Some authors argue that the choice of a Member State may turn into an obligation in the case where human rights start to play a role.<sup>97</sup> The discretion is thus limited by the ECHR and its interpretation by the ECtHR.<sup>98</sup> However, since human rights are general principles of the EU, one may argue that there exists an obligation under the Union law to avoid breaches of human rights under the Dublin II Regulation. This can also be said for Article 3 paragraph 2 which leads to the violation of Article 3 ECHR as under Article 15 which also leads to a violation of Article 8 ECHR.<sup>99</sup>

The catalogue of deficiencies of the Dublin II Regulation discussed above is not exhaustive, although it contains most of the serious criticisms. It must be kept in mind that there are also other practices or provisions which may be contrary to the obligations of Member States in the area of human rights law, for instance a possibility to transfer an asylum seeker to third country under Article 3 paragraph 3.

In 2008 the Commission proposed a recast of the Regulation, in which it eliminated or reduced many of the abovementioned deficiencies: it reduced procedural deadlines, strengthened the right to appeal and the right of the applicant to remain in the territory of a state while the procedure is pending, extended definition of family members beyond the concept of a nuclear family, slightly revised the scope of discretionary clauses and put them under the same heading and included stateless persons within its scope.<sup>100</sup> However, what is most striking is that no explicit regulation or even indication when and how to rebut the presumption of equivalent protection under Articles 3 paragraph 2 and 15 of the Regulation was set therein. Most probably, after the judgments of 2011, the recast shall be reconsidered and provide for a clear criteria in this respect.

Some short-term amendments could be based on the recommendations of ECRE, for instance suspension or abolishment of irregular entry as one of the criteria leading to determination of a Member State responsible.<sup>101</sup>

95 *ibid* para 99.

96 ECHR, ‘Dublin Cases’ (Factsheet) <[http://www.echr.coe.int/NR/rdonlyres/26C5B519-9186-47C1-AB9B-F16299924AE4/0/FICHES\\_Affaires\\_Dublin\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/26C5B519-9186-47C1-AB9B-F16299924AE4/0/FICHES_Affaires_Dublin_EN.pdf)> accessed 21 March 2012.

97 Filzwieser (n 69) 2.

98 *ibid* 8.

99 *ibid* 11.

100 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing criteria for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person’ COM(2008) 820 final.

101 Commission, ‘Submission from the European Council on Refugees and Exiles in response to the Commission’s Green Paper on the Future Common European Asylum System’ (COM(2007) 301) 36.

## V. Conclusion

The initial idea and ultimate goal of the EU rules in the field of asylum, underlying the ‘Dublin system’, was good – the establishment of a ‘common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union’<sup>102</sup>. However, it is not the state of affairs at the moment, nor does it seem likely to be realised in the near future. This is the central problem of the Dublin System; it has been based on the presumption of ‘a level of harmonisation that simply does not exist’.<sup>103</sup>

Furthermore, even if procedural rules and standards were same, it would, in this author’s opinion, not guarantee a truly uniform treatment of all applicants. It is not purely a matter of interpretation of the EU law, but also and probably foremost a matter of finance, traditions, culture, mentality, administrative practice, understanding of a particular problem and also, unfortunately, it depends on the individual national officials examining asylum cases. In many cases these differences may be impossible to overcome.

The introduction of the Dublin system and mechanisms to determine a Member State responsible for the examination of asylum application was designed as a remedy for the phenomenon of ‘asylum shopping’, but in fact proved to be a tool for fighting its consequences and symptoms, instead of its causes. Therefore, from the very moment of its creation, it seemed unfeasible to be successfully implemented in practice, especially knowing that the standards and assessment criteria in each and every Member State diverge to a large degree. As a consequence, even such a system with strictly established criteria could not prevent asylum seekers from trying to reach a country with more liberal asylum procedure or with better living standards.

The Common European Asylum System was intended (at least in theory) to extend the scope of the protection provided for by the Refugee Convention through the creation of a complementary form of protection next to refugee status. It was perceived as a ‘great contribution to the common procedure’.<sup>104</sup> Although from a theoretical point of view it was a step forward, the practical application of the EU rules by Member States, conversely, lowered the minimum standards offered by the Refugee Convention and also as a result of it, Member States were granting subsidiary protection more often than refugee status. The possibility of such a risk was nevertheless envisaged in the Commission Communication from 2000.<sup>105</sup> It does not, however, cause the Dublin II Regulation per se to be incompatible with the European Convention on Human Rights or the Geneva Convention on the Protection of Refugees. Its provisions are reconcilable with international obligations under human rights treaties if applied in a proper, non-automatic way. It does not, however, mean that they are an example of the ‘better legislation’ programme fostered by the Union, at least since the adoption of the White Paper on European Governance.<sup>106</sup>

The Dublin II Regulation does not make a distinction between persons in genuine need of international protection (in this case: refugees) and other irregular migrants, travelling to Europe, for instance, due to economic reasons. It resembles the approach, from the very beginning of European integration, where all the undertaken initiatives were focused only on the economics and establishment of a common market while human rights concerns were completely irrelevant, unrelated to the common market project.<sup>107</sup>

Unclear and inconsistent provisions of the Dublin II Regulation led to the confusion of Member States, being stuck between their international and EU obligations and looking for a proper balance.<sup>108</sup> These provisions prove that the Dublin System must be revised as soon as possible, and until then, at least the practice of its application should change. The criteria set by the Regulation provide for neither a fair burden-sharing mechanism between Member States nor a sufficient protection of asylum seekers. What are then the alternatives? In this author’s opinion, there are two systems which could be more effective and compliant with the ECHR, that is: a previously functioning free choice system or a system of collective responsibility of

102 Presidency Conclusions Tampere European (n 19) point 15.

103 Commission, ‘Submission from the European Council on Refugees and Exiles in Response to the Commission’s Green Paper on the Future Common European Asylum System’ (COM(2007) 301, 35.

104 Commission, ‘Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum’ (Communication) COM(2000) 755 final, 8.

105 *ibid.*

106 Commission, ‘European Governance’ (White Paper) COM(2001) 428 final.

107 G de Búrca, ‘The Road Not Taken: The EU as a Global Human Rights Actor’ (2011) 105 *American Journal of International Law* 6, 49 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1705690](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705690)> accessed 22 March 2012.

108 *NS v Secretary of State for the Home Department; ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (n 64).

the EU. Return to the former is not truly feasible. Switching to the latter at the moment would be too costly, but it would enhance the chance of reaching the goal of uniform status and procedures throughout the EU. However, it would not be likely to fulfil the conditions laid down by the principles of subsidiarity and proportionality.

Moreover, it is worth noting that refusal to admit or exclude aliens from the territory of a Member State is an attribute of national sovereignty. It could be argued that the EU, by creating 'Fortress Europe', tried to bend it to its own will and dispose of it to a certain extent, without having the competence to do so. ■