

**Reforming the Dublin system:
EU inter-state solidarity in the allocation of asylum seekers.**

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Abstract.

This thesis discusses how the principle of inter-state solidarity and the commitment to the protection of human rights could inform a reform of the Dublin system and the distribution of asylum seekers within the European Union. The first part studies the relationship between the different Member States within the EU by assessing the Dublin Regulation, the principle of solidarity and the idea of freedom of movement. The second part examines the relationship between asylum seekers and the EU and its Member States by looking at the normative concerns about human rights and at the minimal standards or principles with which every EU country should comply. The thesis then questions the precise implications of the recent rulings by the ECtHR and the ECJ on the rights of asylum seekers and their re-allocation. It will be argued that, despite the re-interpretation of the Dublin regulation in the case-law, and despite the EU's rhetoric of 'solidarity', the system still endangers basic fundamental rights of asylum seekers and does not prevent Member States acting in their own interest. Recent reports show the continuing malfunctioning of the Dublin system, and therefore this thesis will propose a normative rights-based approach to the reform of the Dublin system.

List of abbreviations.

AG: Advocate General.

CEAS: Common European Asylum System.

EASO: European Asylum Support Office.

ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms.

ECJ: European Court of Justice.

ECtHR: European Court of Human Rights.

EP: European Parliament.

EU: European Union.

JHA: Justice and Home Affairs.

MS: Member State(s).

NGO: Non-Governmental Organisation.

TEU: Treaty on European Union.

TFEU: Treaty on the Functioning of the European Union.

The UK: The United Kingdom.

UN: United Nations.

UNHCR: United Nations High Commissioner for Refugees.

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1. Introduction

“It must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR”¹.

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At the moment, the European Union (EU) is negotiating the Common European Asylum System (CEAS) in order to mainstream the EU Member States’ (MS) asylum policies. However, explicit disagreements exist between the EU institutions and clusters of EU Member States that overshadow the planned reforms. The Dublin Regulation (or Dublin System), the administrative component of the EU asylum policy that regulates the allocation of migrants within the territory of the EU, is heavily disputed, in particular in view of the increasing migratory pressures on the EU external borders, which produce a disproportionate level of responsibility for certain MS.

The EU has committed to establish the CEAS by 2012, which is unlikely to be met in the current political climate. The main question to be answered, which is also central to this thesis, asks how the Dublin system momentarily functions, whether it achieves its objectives and whether it should be reviewed to be in compliance with European and international human rights obligations. The present situation is particularly complicated due to migratory pressures in the Southern Member States, the gate-keepers of the external borders of the EU, while the financial difficulties in the Eurozone further complicate matters. Several MS are unable to cope with the migratory pressures and have requested the EU to support them. The mechanisms used for such support in asylum and migration policies are increasingly based on an ill-defined principle of solidarity.

The Dublin system, which was introduced in order to ensure that every asylum seekers’ application is examined by a state, puts a heavy burden on EU border states, which receive ninety percent of asylum seekers that enter the EU.² Many of these states, such as Greece and Malta, lack sufficient resources to comply with minimum

¹ *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v*
² These statistics were released by FRONTEX. Greek Ministry of Citizen Protection., 15.03.2011.

standards in the asylum procedures and reception conditions because the number of asylum seekers exceeds their capacity.³ The Dublin system rests on the assumption that the asylum systems are similar throughout the EU, while the asylum systems of the different MS heavily differ in quality, access and safeguards.⁴ In addition, EUROSTAT statistics show the uneven distribution of asylum seekers under this system, as some MS have transferred many more asylum seekers than they have received⁵. On the other hand, other MS received a disproportionate amount of asylum seekers in comparison to those being sent⁶, while they already have difficulties processing the asylum seekers that first enter their country. Furthermore, seventy-five percent of asylum seekers received protection in just six EU MS in 2011.⁷ In consequence of these asymmetrical pressures, the most fundamental rights of asylum seekers are at times threatened and discrimination, refoulement and inhuman or degrading treatment have become almost structurally and inherently linked to the Dublin system. The MS at the external borders of the Union have repeatedly pleaded for the need to strengthen ‘European solidarity’ in order to cope with the pressures. Nevertheless, the existing EU solidarity mechanisms appear to not sufficiently cope with such pressures, and national interest still thwart the more express institutionalisation of the idea of European solidarity through a reform of the Dublin system.⁸

At the same time, the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) play a crucial role in the functioning of the Dublin system. Both Courts have normatively reinterpreted the Dublin Regulation by establishing a clear link between the poor national asylum systems and reception conditions of some MS in violation of basic human rights. Recent rulings expose that the EU asylum system clearly lacks safeguards for asylum seekers and implicitly argues for amendments of the Dublin system such as increased judicial access, a suspension mechanism for transfers and stronger humanitarian clauses in the assessment of asylum claims in order to guarantee fundamental rights to asylum

³ Council of Europe, 22.09.2010, *The ‘Dublin Regulation’ undermines refugee rights*.

⁴ Idem.

⁵ Notably The Netherlands (-1.135), Switzerland (-1.709) and Germany (-1.674). In brackets the number of difference between incoming and outgoing transfers under the Dublin system. In: Forum Réfugiés, 2011, p.19.

⁶ Greece (+1.194), Italy (+1.759) and Poland (+950). Idem.

⁷ Eurostat, 19 June 2012.

⁸ Guild & Carrera, 2010, p.12.

seekers. However, various Member States appear reluctant and have vetoed earlier initiatives by the European Commission for the inclusion of such mechanisms by reasoning that it would practically reverse the Dublin system.

The Dublin system contains clear provisions in reference to the Charter of Fundamental Rights of the EU, the 1951 Refugee Convention⁹ and the Convention for the Protection of Human Rights and Fundamental Freedoms (from hereon referred to as The European Charter on Human Rights or ECHR). This implies that the system must, in practice, be guided by a clear definition and understanding on the legal obligations in relation to the rights of asylum seekers. In particular, the prohibition of discrimination, the principle of non-refoulement and a clear understanding of inhuman or degrading treatment in line with Article 3 of the ECHR¹⁰ should be safeguarded at all times in order to secure a functioning system in compliance with fundamental rights as it was once envisaged. However, the present problems and case-law indicates that the difficulty might not lie in the formal recognition of such principles, but in their implementation. It appears necessary to closely scrutinise such difference between the legal safeguards of the Dublin system and their actual implementation.

This thesis discusses how the principle of inter-state solidarity and the commitment to the protection of human rights could inform a reform of the Dublin system and the distribution of asylum seekers within the EU. It questions the precise implications of the recent rulings by the ECtHR and the ECJ on the rights of asylum seekers and their re-allocation¹¹. It will be argued that, despite the re-interpretation of the Dublin regulation in the case-law, and despite the EU's rhetoric of 'solidarity', the system still (structurally?) endangers basic fundamental rights of asylum seekers and does not prevent MS acting in their own interest.

In fact, could it be argued that the Dublin system itself indicates the limits of the principle of inter-state solidarity? In June 2012, for example, the Council agreed, without the co-decision of the European Parliament (EP), to change the legal status of

⁹ Officially: the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967.

¹⁰ Article 3 of the ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

¹¹ As recent case-law particularly focuses on the inhuman treatment of asylum seekers and the risk of refoulement in Greece, the unanswered question is what happens to the situation of asylum seekers which reside in states with similar conditions such as Portugal (See: Caritas Europe, 24.04.2012), Hungary (See: UN High Commissioner for Refugees, 24.04.2012), and Italy (See: Maccanico, n.d., Statewatch).

the Schengen agreement, upon which the freedom of movement, one of the cornerstones of the EU, is based. EU MS now have the possibility to close their borders, *inter alia* for migratory pressures, and several MS have already threatened to take such measures.¹² This is fundamentally a consequence of disagreements on the nature of the reforms of the EU asylum policies at various levels: between different Member States, between the Member States and the EU Institutions and between the EU institutions themselves. The assumption that underlie the Dublin system mirror these divisions, and preclude any reforms- let alone reforms aimed at more structurally incorporating the notion of solidarity.

It will be argued that the principle of solidarity in the EU asylum policy, which was recently explicitly introduced in the Treaty¹³, seems to suggest that the Dublin system should incorporate a duty on all MS to support Member States that receive an disproportionate amount of asylum seekers for which the minimum standards and rights to asylum seekers can no longer be guaranteed. The Dublin system must be amended in order to incorporate this principle of solidarity and in order to ensure a fair and efficient EU asylum policy.¹⁴ In this light, if a MS is unable to comply with the common standards, the EU must assist in support towards this compliance, if necessary. In this respect, the crux lies in the interpretation of the term ‘necessary’ in Article 80 TFEU, which lays down the obligation of solidarity between Member States in EU asylum policy. When does the EU, or its Member States, consider the ‘European solidarity’ necessary? As mentioned above, the asymmetry in asylum pressures, as well as the increased ability of MS to close off internal borders, already indicates a different view on how necessity is perceived by the different actors. At the same time, the normative re-interpretation of the Dublin system by the ECtHR and the ECJ suggests a wholly different approach to guarantee basic human rights standards to all asylum seekers that enter the EU. For example, the rulings essentially ceased the operation of the Dublin system in respect to Greece.¹⁵

In order to better understand how the principle of solidarity would restructure the distribution of asylums seekers within the Dublin system, this thesis presents two *axes*. The first axis, elaborated in chapter 2, studies the relationship between the

¹² France, Italy, Germany and Austria have threatened to do so. See: EurActiv, 09.03.2010. *Germany, Austria warn Greece to tighten border controls*.

¹³ Article 80 TFEU.

¹⁴ Council of Europe, 22.09.2010, *The ‘Dublin Regulation’ undermines refugee rights*.

¹⁵ McDonough & Tsoudri, 2012, p.1.

different MS within the EU by assessing the Dublin Regulation, the principle of solidarity and the idea of freedom of movement to which the system is inherently linked. It will be argued that the political problems and trade-offs in present debates on the establishment of the CEAS, of which the Dublin system forms part, usually highlight the diverse interests at play. Chapter 3 continues on this basis and presents the second *axis*: the relationship between asylum seekers and the EU and its Member States. More precisely, this chapter looks at the normative preoccupations about human rights and on the minimal standards or principles with which every EU country should comply. Therefore, it assesses the provisions of the ECHR, the 1951 Refugee Convention and relevant EU Law, which include the Charter of Fundamental Rights of the EU and secondary legislation: the Asylum Procedures Directive, the Qualifications Directive and the Receptions Conditions Directive. Chapter 4 thereafter assesses the two axes in light of the recent case-law, in which two cases will be centralised: *MSS v. Belgium and Greece* of the ECtHR and *NS, M.E. and Others* of the ECJ. Both cases have, in a similar reasoning, normatively re-interpreted and challenged the functioning of the Dublin system. Chapter 5 evaluates the Dublin system on the basis of these two axes and the case-law in order to expose its practical shortcomings. Chapter 6 will present the second phase of the CEAS, while Chapter 7 builds on the conclusions in the previous chapters and defends a rights-based approach¹⁶ in the reforms of the Dublin system. This approach, adopted by the UN as the way forward, implies that the rights holders, the asylum seekers, should be empowered by strengthening the capacity of the duty holders, the EU and its MS.

This thesis is limited on various grounds. First, it will not assess the overarching CEAS completely, but only those components that are relevant in light of the Dublin system and the principle of solidarity. Moreover, as the reforms are still ongoing, this thesis incorporates the developments, communications and case-law until June 2012. Finally, the main focus of this thesis is on the relationship between the Dublin system and the asylum seeker, who is defined as “a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken.”¹⁷ Although the term refugee¹⁸ is regularly used

¹⁶ Office of the United Nations High Commissioner for Human Rights, 2006.

¹⁷ Directive 2003/9/EC, Article 1 (c).

¹⁸ Under the EU Qualification Directive (2004/83), Article 2 (c), a Refugee: “means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of

throughout this paper, the main assessment will focus on asylum seekers in the context of the Dublin system.

nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it [...]”.

2. The EU and its Member States: The Dublin system and the principle of solidarity (the first axis).

2.1. Introducing the Common European Asylum System.

In order to assess the functioning of the Dublin system, this chapter presents the first *axis* of the problem in relation to EU asylum policies. It discusses the relationship between the MS and the EU, outlines the Dublin Regulation, the principle of solidarity and the freedom of movement to which the system is inherently linked. It also discusses the political problems and trade-offs that underlie the present debates on the establishment of the CEAS, which highlight the diverse interests at play.

First, a short side-step to the overarching CEAS is necessary to understand the complete context to which the Dublin system forms part. The first phase of the CEAS (1999-2004) saw the adoption of several legal instruments that set minimum common standards in the field of the reception of asylum seekers, the asylum procedures and the conditions to be met in order to be recognised as being in need of international protection. The following four key issues were thus agreed upon in this first stage: the definition (the ‘qualifications’) for refugee status, the asylum procedures, the reception conditions for asylum-seekers, and finally, the responsibility for asylum-seekers, i.e. the Dublin system.¹⁹

The second phase, originally planned for 2010 during the EU’s The Hague Programme, but extended to 2012, is momentarily in the crucial stage of negotiations. The latest developments of this second stage, in particular in light of the revisions of the Dublin system and the principle of solidarity, will be discussed in chapter six.

2.2. The functioning of the Dublin system.

The Dublin II Regulation 343/2003²⁰ allocates the responsibility of an asylum application to one single EU Member States²¹ and is considered to be the

¹⁹ Peers, 2012, p.1.

²⁰ Regulation 343/2003 establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one Member State by a third country national. In addition, Regulation 1560/2003 lays down the rules for application of the Dublin Regulation.

²¹ This system applies to all EU MS, plus Iceland, Norway and Switzerland and is based on the Council Regulation (EC) No 343/2003 which establishes the criteria and mechanisms for determining the MS

administrative component of the overarching CEAS.²² The system was established in 1997 by way of the Dublin Convention²³, as this agreement replaced the Convention applying the Schengen Agreement.²⁴ Within this new framework, the 1999 Tampere European Council Summit decided on the establishment of the CEAS. The Commission proposed to establish a EU instrument that would share the responsibility for the asylum applications within the territory of the Union. This commitment led to the adoption of the Dublin Regulation in 2003. The system, from hereon referred to as Dublin system, allocates responsibility to a single EU Member State in the processing of an asylum application.²⁵

Article 1 of the Regulation lays down the criteria and mechanisms for determining the MS responsible for the examination of an asylum application. Moreover, Article 3 (1) and (2)²⁶ of the Regulation lay down the responsible MS. In order to determine which MS is responsible under this Article, Chapter III of the Regulation sets the objective and hierarchical criteria on e.g. unaccompanied minors, family unity and others.²⁷ These are the main articles to ensure that, first, every asylum claim within the EU is examined by one of the states, and second, to prevent multiple asylum claims and the secondary movement of asylum seekers in the area. In the situation that no MS can be designated according to the hierarchy of criteria, the default rule is that the first MS in which the application is lodged will become responsible for examining the asylum application.²⁸ There is also a derogation rule

responsible for examining an asylum application lodged in one of the EU MS by the asylum seeker. This Regulation basically stands for the Dublin Regulation as we know it.

²² McDonough & Tsourdi. 2012, p.5.

²³ The Dublin Convention (Implementation) Order of 1997.

²⁴ Chapter VII of this Agreement, which is in accordance with the Protocol, was signed on 26 April 1994. 1990 Schengen Convention on the Application of the Schengen Agreement of June 14 1985.

²⁵ The preamble of the Convention states in Recital 4 and Articles 3.1 and 10.1 the reasoning behind the agreement.

²⁶ Article 3 (1) states: "Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible." Moreover, Article 3 (2) states: "By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant".

²⁷ The issue of a residence permit of visa, irregular entry into or residence in a MS and applications made in an international transit of an airport. Article 3 (2) Regulation. Moreover, the hierarchy of objective criteria are lined out in Articles 5 to 14 of the Regulation.

²⁸ Regulation 343/2003, Article 13.

included in the provisions, which is known as the *sovereignty* clause. Article 3 (2) enables MS to examine an asylum application, even if that MS is not directly responsible under the criteria of the Regulation. On the one hand, when a Member State in which an application has been lodged considers that another MS is responsible for the examination, it may request that MS to take charge of the asylum seekers' application.²⁹ The other MS must recognise this responsibility, after which the asylum seeker will be transferred to the responsible state.³⁰ In addition, when the MS in which the asylum seeker entered the EU has already started the examination of the application while the applicant has moved to a second MS without permission, the Member State of entry can also request to "take back" the asylum seeker to adequately complete the application.³¹ The Dublin system also includes a *humanitarian clause*, which implies that a MS has, even if it is not responsible under the binding criteria mentioned above, the possibility to accept and examine an asylum application in response to the request of another MS for humanitarian reasons based on e.g. family or cultural considerations.³² In that case, the person(s) concerned have to consent with the transfer. All these provisions are based on the assumption that asylum systems and their conditions are similar in all Member States, in line with the principles of mutual trust and mutual recognition. Finally, the Regulation fully applies, in an inclusive manner, the application of the Geneva Convention to ensure that the principle of non-refoulement³³ is central in this framework. The preamble of the Regulation also shows that it aims to seek the full observance of the right to asylum guaranteed by Article 18 of the Charter.³⁴

The EURODAC Regulation was adopted to complement the Dublin Regulation. The EURODAC Regulation is a tool to facilitate the application of the Dublin Regulation by registering and comparing asylum seekers' fingerprints.³⁵ As an effect, EURODAC serves as a centralised asylum seekers' database and is indispensable for the functioning of the Dublin regulation. Member States are obliged to take the fingerprints of each person above fourteen years of age who applies for

²⁹ Regulation 343/2003, Article 17.

³⁰ *Idem*, Article 19.

³¹ Commission of the European Communities, 2007, p.3.

³² Regulation 343/2003, Article 15 (1).

³³ This principle implies the assurance that no asylum seeker will be sent back to a place where they risk being persecuted and will be further elaborated upon in the following chapter.

³⁴ Recital 15 of the preamble.

³⁵ The Implementing Regulation and Council Regulation No 2725/2000 which establishes 'Eurodac' is known as the EURODAC Regulation.

asylum on their territory or who is apprehended when irregularly crossing their external border.³⁶ Moreover, fingerprints must be taken from people who illegally stay on their territory in order to check whether they have already applied for asylum in their territory or that of another MS, so that the Dublin system can function as intended.³⁷ In this light, all EU MS have to send fingerprints to the *EURODAC Central Unit*, managed by the Commission, which registers them in a central database and compare the data to stored statistics.³⁸ When these match, a ‘hit’ reveals if an asylum seeker already applied for asylum. The MS in which the asylum seekers reside will then act according to the provisions outlined in the Dublin Regulation.³⁹

EUROSTAT statistics show that 365.600 asylum applications were lodged in 2011, of which 84.100 asylum seekers were granted protection in line with Art 2 (g) of Directive 2004/83/EC.⁴⁰ More specifically, of all these recognitions, “42.700 persons were granted a refugee status, 29.400 subsidiary protection and 12.000 authorisation to stay for humanitarian reasons”⁴¹. This humanitarian status is granted on the basis of national legislation implementing international legal obligations, which explains the relatively low number. The MS most forthcoming in offering protection were the UK (14.400), Germany (13.000), France (11.700), Sweden (10.600), The Netherlands (8.400) and Italy (7.500).⁴² This means six Member States, out of the EU27, accounted for more than seventy-five percent of the grants, a trend that can also be discerned in the statistics for 2010.⁴³ The origin of the largest groups of people that were offered protection in 2011 were Afghans, Iraqis and Somalis. Strikingly, Southern European countries received an eighty-seven percent increase of asylum requests in 2011 in comparison to 2010.⁴⁴ In Italy, an increase of over hundred

³⁶ *Idem*, Article 4(1).

³⁷ *Idem*, Article 8(1).

³⁸ *Idem*, Article 4(2).

³⁹ Commission of the European Communities, 2007, p.4.

⁴⁰ Article 2 (g) of Council Directive 2004/83/EC states: “application for international protection» means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately”.

⁴¹ Eurostat, 19 June 2012.

⁴² *Idem*.

⁴³ Malmstrom, 19.01.2012.

⁴⁴ UNCHR, 2011, p.2.

percent in comparison to 2010 can be noted.⁴⁵ Finally, during the last three months of 2011, 30.000 irregular entries were recorded in Greece.⁴⁶

These statistics show an interesting paradox. While, on the one hand, seventy-five percent of the recognition of asylum seekers occurs in only six of the EU countries, the influx of migrants is mostly concentrated in other MS. This asymmetry shows that the Dublin system does (no longer) function as intended in light of the recognition criteria. The Commission first identified the shortcomings of the system. The two Regulations establishing the Dublin system and EURODAC had required the Commission to review both systems and to propose amendments to the Council and the EP. This has been completed in 2007 as one report.⁴⁷ The most interesting finding in these reports relate to the functioning of the Dublin system. While in 40.180 cases a second MS accepted to “take back” an applicant in relation of the criteria of the Dublin system, only 16.842 of these asylum seekers were actually transferred back to the responsible MS.⁴⁸ On this basis, the Commission’s proposal to recast the Dublin system was released in December 2008⁴⁹, which aimed to improve the systems’ efficiency and to extend its remit to cover persons seeking international protection. It aimed to ensure that asylum seekers cannot be transferred back to a MS which cannot provide sufficient protection by its asylum procedures and reception conditions.⁵⁰ This formal proposal was adopted by the EP in 2009 and further submitted to the Council and the Commission. However, the amendments were never adopted nor formalised, mainly due to divergent national interests. In consequence, the Dublin system continues to exist in the present form, despite the Commission’s observations on its shortcomings. Particularly the Northern MS benefit at the moment much from the status quo of the system and are unwilling to amend the Dublin Regulation⁵¹, even

⁴⁵ *Idem*, p.11.

⁴⁶ EUobserver, 16.05.2011. *Greece struggling to manage asylum seekers*.

⁴⁷ Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system. Commission of the European Communities, COM (2007) 299 final.

⁴⁸ *Idem*, p.4. It must be noted that this report, and thus the statistics, rely to the period from September 2003 until December 2005.

⁴⁹ Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person COM (2008) 820 final/2.

⁵⁰ *Idem*, Article 31.

⁵¹ HRW, 20.06.2011. *EU: Put rights at heart of Migration Policy*.

though it appears that the Commission's proposal would have established a fairer system with more efficient provisions.⁵²

In 2010, a number of reports⁵³ exposed the worsening situation of the asylum system and detention conditions in Greece, which had to cope with an increase of migrants who entered the EU through Turkey. The reports observed that "Greek prisons are overcrowded and law enforcement officials are overwhelmed"⁵⁴, in leading to conditions that violate the asylum seekers' fundamental rights of asylum seekers. In consequence, several Member States (e.g. Belgium, Sweden, The Netherlands and the UK) stopped sending asylum seekers back to Greece.⁵⁵ In effect, this implies a significant suspension of the Dublin system, given that ninety percent of all migrants enter the EU through Greece.⁵⁶ This, in turn, triggered the crisis of the Dublin system, leading to a re-assessment of its functioning, as well as the notions of solidarity implicit in it by the Union institutions, international courts and MS.

2.3. The principle of solidarity.

In December 2011, a Commission Communication on the '*enhanced intra-EU solidarity in the field of asylum: for an EU agenda for better responsibility-sharing and more mutual trust*'⁵⁷ was published, which sought to evaluate the EU asylum policies and the Dublin system. The communication explicitly refers to the principle of solidarity, which is:

"one of the fundamental values of the European Union and has been a guiding principles of the common European asylum policy since the start of its development in 1999. It is now enshrined in Article 80 of the Treaty on the Functioning of the European Union"⁵⁸.

The Commission expressed the urge to translate this idea of solidarity in more concrete measures, and highlights that all Member States' asylum systems are

⁵² Council of Europe, 22.09.2010. *The 'Dublin Regulation' undermines refugee rights.*

⁵³ This situation was first put under the attention by the Special Rapporteur on Torture, Manfred Nowak, in 2009. For detailed information see: UNHCR. *Report submitted by the Special Rapporteur on torture and other cruel, inhuman and other degrading treatment of punishment, Manfred Nowak.*

⁵⁴ UNHCR, 20.10.2009. *Greece: detention facilities in crisis, warns UN expert on torture.*

⁵⁵ BBC, 03.11.2010, *'Sweden stops returning migrants to Greece.*

⁵⁶ These statistics were released by FRONTEX. In: Greek Ministry of Citizen Protection., 15.03.2011.

⁵⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum. An EU agenda for better responsibility-sharing and more mutual trust. COM(2011) 835 final.

⁵⁸ *Idem*, p. 2.

interdependent, and that the malfunctioning of one system affects all others. The Commission stresses that this interdependence necessarily entails that the EU has the responsibility to assist struggling Member States in order to “uphold the Union’s common values and fundamental rights by ensuring adequate reception of asylum seekers and refugees and access to protection”⁵⁹. This recent communication centralises the principle of solidarity in relation to the future of the EU asylum policies. However, questions arise on the definition and interpretation of this principle of solidarity, and whether MS incur any legal obligations. Article 80 TFEU clearly connects the principle to Articles 77-79, which contain provisions on the regulation of border checks, asylum and immigration. Article 80 TFEU states:

“The policies of the Union set out in this Chapter and their implementation shall be governed by the *principle of solidarity and fair sharing of responsibility, including its financial implications*, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle” [emphasis added].”

Despite the inclusion in this Article, the principle of solidarity is a guiding principle, i.e. the reading of the principle is open for interpretation. Consequently, while the legal scope of this Article is still vague, the principle should be centralised in all EU actions in the field of asylum since the adoption of the Article by the Lisbon Treaty in 2009. In times of the establishment of the CEAS, it will be interesting to see how exactly the principle will be put in effect. Throughout the legal history of the EU’s asylum policy, ‘sincere cooperation’ was first centralised, which is now substituted by ‘solidarity’, which one could understand as something more advanced. Even though Article 80 TFEU does not indicate that the principle is an all-covering principle, a 2011 study for the EP on the “scope and implications” of Article 80 TFEU proposed that the principle obliges the “duty of cooperation through implementation, policing and penalization of infractions of EU Law”⁶⁰. The study also identified that the significance of Article 80 TFEU lies in both supporting the Member States’ systems for asylum, and in the duty for all MS to implement the agreed Directives and Regulations, which is ultimately for the benefit of the Union as a whole.⁶¹

The idea behind the principle of solidarity is also referred to in various other Articles. First, one could understand Article 4 (3) of the TEU as stating a similar idea,

⁵⁹ Idem, p.2.

⁶⁰ European Parliament DG for Internal Policies, 2011, p.6.

⁶¹ Idem, p.100.

as it mentions that MS have the duty to “the principle of sincere cooperation” and “assist each other in carrying out tasks which flow from the Treaties”. Second, Article 74 TFEU requires the Council to establish “measures to ensure administrative cooperation” in all areas covered by Title V TFEU. Within this Title V, Article 67 (2) envisages “solidarity between MS, which is fair towards third-country nationals” in relation to framing “a common policy on asylum, immigration and external border control”⁶².

According to the 2011 Commission’s communication mentioned above, the issue of solidarity is also linked to responsibility.⁶³ The Commission, first, highlights that MS asylum policies are to comply with the standards in EU and international law. Second, it articulates solidarity to reflect the requirement to keep one’s house in order, so as to avoid a negative impact on another MS’ house. In this light, the principle of mutual trust is highlighted, as “[the aspect of solidarity] also needs to be enhanced in order to create an environment of mutual trust, contributing to further development of mutual assistance”⁶⁴. As a consequence, solidarity and mutual trust are the two central concepts stressed upon, which should be increased and be truly committed to by the MS. The EU has started to develop a series of solidarity mechanisms to ensure a flexible toolbox able to react to the different needs of the MS. On the basis of the communication, the Commission proposed to reinforce the intra-EU solidarity around four axes: 1) through practical cooperation and technical assistance, 2) through financial solidarity, 3) through the allocation of responsibilities and, finally, 4) by improving tools for governance of the asylum system.⁶⁵ Furthermore, in light of the Dublin system, the Commission states that the EU has the responsibility to assist MS under pressure in order to ensure the adequate reception of asylum seekers, just as their access to protection⁶⁶ because the EU has not only a duty towards its MS, but also to asylum applicants.⁶⁷ However, in practice, this rhetoric seems just that-

⁶² McDonough & Tsourdi, 2012, p.9.

⁶³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum. An EU agenda for better responsibility-sharing and more mutual trust. COM(2011) 835 final, p.2.

⁶⁴ Idem.

⁶⁵ Idem.

⁶⁶ Idem, p.2

⁶⁷ Idem, p.10.

rhetorics- and the EU and its MS often proved unwilling to tackle human rights abuse in the common area.⁶⁸

Solidarity seems to mean something altogether different in practice, however. One practical example of solidarity has been the instalment of the Frontex Operation *RABIT*⁶⁹ in 2010, which was intended to increase the ‘solidarity and mutual assistance’ between Member States in the management of the EU external border.⁷⁰ During its instalment, the Justice and Home Affairs Commissioner Cecilia Malmström travelled to the Greek-Turkish border to meet RABITs and remarked that: “we have shown European solidarity”⁷¹. On the one hand, the Commissioner is right to consider this as EU solidarity because it indeed shows solidarity support to Greece, which has to deal with a disproportionate influx of migrants compared to other MS. On the other hand, this ‘EU solidarity’ is very limited in practice, which exposes the dual approach on the issue of solidarity. While Member States have committed to establish their policies around this principle, the ‘EU solidarity’ actions taken to counter the shortcomings on the application of the Dublin system are only limited. The following chapters will further elaborate on this issue.

2.4. The freedom of movement in the European Union.

“The right to free movement of persons is a cornerstone of the European Union and the Schengen area without border control is one of the most valued achievements of EU integration”⁷².

The Schengen area was agreed upon in 1985 between initially five EU countries⁷³, while it was at a later stage integrated in the EU framework by the Treaty of Amsterdam. Citizens of the States that form part of the Schengen area can travel passport-free throughout the area. The agreement is based on the assumption that border control is no longer necessary because each Member State fulfils the conditions set by the Schengen agreement. European institutions are responsible to

⁶⁸ HRW, 22.01.2012. *EU: Rights abuse at home ignored.*

⁶⁹ FRONTEX is the EU External Border Agency and RABIT stands for their Rapid Intervention Teams. See: Frontex and RABIT operation at the Greek-Turkish border.

⁷⁰ Recital 6 of the preamble of the Regulation no. 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams.

⁷¹ Guild & Carrera, 2010. In: *Papouts, Besson, Malmstrom and Laitinen visit RABIT operational area.* Frontex News Release, 5 November 2010.

⁷² Commission, biannual report on the functioning of the Schengen area, 1 Nov 2011 – 30 Apr 2012, p.2.

⁷³ Between Belgium, France, Germany, Luxembourg and the Netherlands.

oversee that the Member States indeed comply with these conditions, and respond adequately to the challenges the area faces.

Since 2011, the Commission therefore presents a bilateral report to the Parliament and the Council on the functioning of the Schengen area, which can be considered a useful mechanism to identify challenges in light of the present pressures. The report elaborates on the present situation by stating that illegal border crossings have augmented by 30.000 crossing between October and December 2011 in comparison to the year before, mostly as a result of the uprisings and civil unrest during the ‘Arab Spring’ of 2011.⁷⁴ These flows are relevant to the Schengen agreement because the freedom of movement is limited for asylum seekers who have applied in a MS and await their decision, which are not allowed to freely move to another MS. Nevertheless, many asylum seekers do not follow this obligation and illegally move to another MS. In 2011, according to the report, this amount constituted 350.944 people, which is still a 9.1 percent decrease in comparison to 2010.⁷⁵ At the moment, some Member States are threatening to close their borders to prevent illegal migration crossing.⁷⁶ These MS point to Article 23 of the Schengen Borders Code as a justification⁷⁷, which allows MS to exceptionally reintroduce border control in case of a serious threat to internal security or public policy. However, since the establishment of the Schengen area, the EU has only accepted exceptions in case of fight against organised crime or during big sporting events. So far, migratory pressures have never been accepted as justification. During the JHA Council meeting in June 2012, controversy arose when the EU MS indeed agreed to grant themselves more freedom to close their internal borders by changing the legal basis of the Schengen Evaluation Mechanism.⁷⁸ As a consequence of the change the legal basis from Article 77 (2) (e) to Article 70 TFEU, MS can now close their borders if there exists a serious threat to their internal security up to 10 days for urgent cases. Moreover, MS are able to close their internal borders for six months if there are persisting problems at their external borders.⁷⁹ Considering that some MS have

⁷⁴ Commission, biannual report on the functioning of the Schengen area, 1 Nov 2011 – 30 Apr 2012, p.3

⁷⁵ Idem, p.4.

⁷⁶ EUobserver, 27.04.2011. *France and Italy propose reform of EU border rules.*

⁷⁷ Regulation (EC) No 562/2006 of the EP and of the Council establishing a Community Code on the rules governing the movement of persons across borders.

⁷⁸ Fact Sheet on the Legal Basis of the Schengen Evaluation mechanism, 08.06.2012.

⁷⁹ EUobserver, 08.06.2012. *Hawkish step on EU borders outrage MEPs.*

showed intentions to close their borders in reaction to the migrants coming from in particular Greece⁸⁰, this new legal basis significantly restricts the MS' commitments to create an internal space of free movement. The agreement also created outrage from the EP⁸¹, because the Council completely excluded them from co-deciding, even though the EP was supposedly "closely involved" in the negotiations.⁸² The Commission, who plead for an active role in this decision-making⁸³, has also been put off-side. This is disputable because the freedom of movement is one of the cornerstones of the EU, but in particular France, Germany and The Netherlands voted against the EP's involvement in the final decision.⁸⁴

This development indicates the tensions within the framework of the EU asylum policies at various levels: between different Member States, between the Member States and the EU institutions and between the EU institutions themselves. In light of the Dublin system, the assumption by which this system was once created seems undermined by these divisions, as MS cannot agree to collectively tackle the problems. As one of the cornerstones of the EU already exposes such disparities, the future of the functioning of the Dublin system is questionable, which would have disastrous consequences for all those aliens that enter the EU. On the other hand, the issue described above exposes the tension between national sovereignty and the appeal of the Union to harmonise policies. In this light, it can be understood that some Member States want to re-introduce inner-border control if they receive many migrants for which they are not directly responsible. Re-introducing the border control could also be supported by stating that the principle of mutual trust is at this moment no longer applicable. On the other hand, and especially in light of solidarity, MS should understand the difficulties of an overburdened asylum system with which some Member States have to deal, especially because the number of arriving migrants is out of their direct control. In addition, all MS once committed to the freedom of movement and the applicability of solidarity in light of asylum policies, which implies that they should also bear the consequences in difficult times instead of turning their heads to the other states.

⁸⁰ EurActiv, 09.03.2010. *Germany, Austria warn Greece to tighten border controls.*

⁸¹ European Parliament, 08.06.2012. *EP hits out over tactic to exclude MEPS from Schengen decision.*

⁸² Fact Sheet on the Legal Basis of the Schengen Evaluation mechanism, 08.06.2012, fact 2.

⁸³ EUobserver, 06.09.2011. *EU Commission wants nations to give up border control decisions.*

⁸⁴ EUobserver, 08.06.2012. *Hawkish step on EU borders outrage MEPs.*

3. Asylum seekers and the EU Member States: normative preoccupations about human rights (the second axis).

3.1. The 1951 Refugee Convention and the principle of non-refoulement.

This chapter presents the second *axis* of the problem: the relationship between the asylum seekers and Member States of the EU. More precisely, this chapter inspects the normative preoccupations about human rights and the minimal standards or principles to which every EU system should comply. This chapter discusses the 1951 Refugee Convention, the ECHR and the provisions of relevant EU Law, i.e. the Charter of Fundamental Rights of the EU and secondary legislation in relation to the rights of asylum seekers under the Dublin system.

The 1951 Refugee Convention⁸⁵ makes the application of every asylum system restricted in scope in relation to the minimum standards it contains. The Convention has been crucial in the protection of asylum seekers at the global level, and many references are made to it in human rights law at the regional level, as can be seen in EU law and the ECHR. The Convention defines the relationship between a State and the granting of a refugee status and it contains the minimum rights and obligations for refugees. This Convention is by virtue of Article 18 of the Charter of Fundamental Rights of the EU⁸⁶, which will be discussed below and refers back to the Convention. Moreover, Articles 1A(2)⁸⁷, 1C(4)⁸⁸, 1C(5)⁸⁹ of the Refugee Convention confirm the right to asylum, which has been adopted by regional protection

⁸⁵ Formally the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967.

⁸⁶ Article 18 of the Charter of Fundamental Rights of the EU is the right to asylum.

⁸⁷ Article 1A(2) of the 1951 Refugee Convention states: “As a result of events occurring before 1 January 1951 and 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 of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national”.

⁸⁸ Article 1C(4) of the 1951 Refugee Convention states: “He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution”.

⁸⁹ Article 1C(5) of the 1951 Refugee Convention states: “He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality”.

mechanism, such as the Charter.⁹⁰ Equally, secondary Union legislation explicitly refers to the Refugee Convention. The Qualification Directive, for example, states that the common policy on asylum shall be:

“based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees [...] thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution”⁹¹.

The main innovation of the Convention has been the codification of the principle of non-refoulement at the global level and its introduction into international law. This principle prohibits the direct or indirect expulsion or return of a refugee to a persecuting state. The non-refoulement principle is laid down in Article 33 (1) of the Convention, which states that:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political organisation”.

This principle is crucial in light of the application of the Dublin system, and the recent case-law, because it obliges MS to carefully examine an application, so as to ensure that the asylum seeker will not be sent back to a country where he or she risks ill-treatment. Nevertheless, in practice this assessment is often problematic, as this thesis will show.

3.2 The ECHR in light of the Dublin system.

The European Convention on Human Rights (ECHR) was established in 1948 and binds the Member States of the Council of Europe, and therefore also all EU MS, to comply with the human rights and fundamental freedoms outlined in the Convention. As far as the obligations of contracting states vis-à-vis asylum seekers are concerned, the most important provision is laid down in Article 3, which prohibits torture and states that: “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Furthermore, the ECtHR established in its case-law that this prohibition also includes the issue of refoulement, as will be discussed below. Moreover, Article 13, the right to an effective remedy, is commonly linked to Article 3 ECHR in asylum seekers cases that challenge the Dublin system. Article 13 ECHR

⁹⁰ The right to asylum, Article 18 of the Charter of Fundamental Rights of the EU.

⁹¹ Council Directive 2004/83/EC, Recital 2.

envisages that everyone has the right to “effective remedy before a national authority” in the case that any of the Articles outlined in the Convention is violated. Mainly family reunification cases in light of the Dublin system have been initiated based on Article 8 ECHR, which gives everyone the right to “respect for his private of family life, his home or his correspondence”. Finally, Article 14 ECHR on the prohibition of discrimination can be considered in respect to the principle of non-refoulement, as it prohibits discrimination on any grounds in relation to the Convention.

The European Court of Human Rights (ECtHR) has jurisdiction to challenge possible violations on this Convention, and has mainly done so regarding Article 3 ECHR. This jurisdiction did not directly relate to the Dublin system itself, but at the consequences of its application, i.e. the risk of refoulement and ill treatment because of the malfunctioning of the asylum system of a specific state. Three cases are important to shortly consider. First, consequences on the application of the Dublin system in relation to the risk of ill treatment and refoulement were interpreted in *T.I. v. the UK*⁹² in 2000. The applicant, a Sri-Lankan national, was sent back from the UK to Germany in order to have his application examined, and the applicant feared he would ultimately be sent back to Sri Lanka, where he would risk ill-treatment. Nevertheless, the ECtHR found the application inadmissible because the risk that Germany would send the applicant back to Sri Lanka in violation of Article 3 could not be established.⁹³ Second, in 2008, *K.R.S. v. The United Kingdom*⁹⁴ concerned an Iranian national who had entered the EU through Greece after which he illegally travelled to the UK. In accordance with the Dublin criteria, the UK requested Greece to take care of the asylum seeker. The applicant, however, filed a complaint on the basis of the circumstances of asylum seekers in Greece was in violation with Article 3 ECHR. Again, the ECtHR found the case inadmissible, as they ruled that it must be presumed that Greece complies with its international obligations in respect of returnees without the absence of proof of the contrary.⁹⁵ The ECtHR stated that Greece, as a rule, did extradite any people to Iran, which suggested the absence of the risk of refoulement in violation of Article 3 ECHR. It appears that the high burden of proof demanded by the ECtHR did not allow for a substantive review of the conditions of asylum seekers in their state of entry. Third, it is interesting to consider the recent ruling in *Hirsi Jamaa*

⁹² *T.I. v. the United Kingdom*. Application no. 43844/98.

⁹³ ECtHR, factsheet – “Dublin cases”, p.1.

⁹⁴ *K.R.S. v. The United Kingdom*, Application no. 32733/08.

⁹⁵ ECtHR, factsheet – “Dublin cases”, p.2.

and Others v. Italy.⁹⁶ In this case the ECtHR condemned Italy in violation of Article 3 ECHR for the sending-back of asylum seekers at sea to Libya before they were able to lodge an application.⁹⁷ This ruling is important in relation to the principle of non-refoulement and “sending-back” practices of States, which deny asylum seekers to effectively lodge an application, as *Hirsi Jamaa and Others* proved.

A groundbreaking decision by the ECtHR did engage with the obligations on a state that wish to resend asylum seekers to the country of first entry. In 2011, in *M.S.S. v. Belgium and Greece*⁹⁸, the ECtHR ruled that both Belgium and Greece violated Articles 3 and 13 of the ECHR. This ruling, which will be analysed in Chapter 4, substantively reforms the Dublin system and is therefore crucial for the future functioning of the mechanism. In 2009-2010, alone, after all, the ECtHR received around 700 cases from asylum seekers seeking to challenge and to possibly suspend their transfer as envisaged by the Dublin system.⁹⁹ At the moment, around 960 ‘Dublin cases’ are pending before the ECtHR, mostly lodged in Finland, the Netherlands, France, Belgium and the UK.¹⁰⁰

3.3. The Charter of Fundamental Rights of the EU.

As mentioned above, principle of non-refoulement has been accepted in international human rights law and refugee law. Moreover, it has become customary international law.¹⁰¹ As for its application within EU law, Art 6 (1) of the TEU classifies the Charter of Fundamental Rights as EU primary law and refers to Title VII (Art 51-54) by stating that: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...]”. As a consequence, the Charter now has the same legal force as the Treaties, and so does the principle of non-refoulement.

The Charter of Fundamental Rights of the EU was proclaimed in 2000, but only obtained its full effect, thus with the same legal force as the EU Treaties, by the entry into force of the Lisbon Treaty in 2009. In the general context, Article 1 refers to human dignity, which must be respected and protected. Article 4 prohibits torture

⁹⁶ *Hirsi Jamaa and Others v. Italy*. Application no. 27765/09.

⁹⁷ European Voice. 23.02.2012. *Sending back migrants to Libya violated Convention on Human Rights, court rules*. For the full ruling, see: *Hirsi Jamaa and Others v. Italy*. Application no. 27765/09.

⁹⁸ *M.S.S. v. Belgium and Greece*, Application No. 30696.

⁹⁹ Council of Europe, 22.09.2010. *The ‘Dublin Regulation’ undermines refugee rights*.

¹⁰⁰ ECtHR, factsheet – “Dublin cases”, p.2.

¹⁰¹ UNHCR, November 1997, *UNHCR Note on the Principle of Non-Refoulement*.

and inhuman or degrading treatment or punishment, while Article 18 is more specific, guaranteeing the ‘right to asylum’, and ensuring with due respect for the rules of the 1951 Refugee Convention and the EU treaties. Finally, Article 19 (2) states that:

“No one may 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 inhuman or degrading treatment or punishment”.

This provision refers to the non-refoulement principle described above and also relates to the rights of adequate reception conditions, the rights to a fair procedure and a the granting of asylum when conditions are met. These four provisions are of importance to the Dublin system and the Charter can be employed as a benchmark to which MS’ actions in asylum policy are held. In the recent groundbreaking ruling *N.S.*, the Court applied the Charter as a source of individual rights in the same way as the ECtHR. Nevertheless, the rights mentioned in the Charter are not so absolute for asylum seekers in the sense that they are no EU citizens, leaving much of the scope of the provisions open for the interpretation of national Courts. It appears to be crucial to create some kind of overlapping framework that also guarantees all the rights envisaged by the 1951 Refugee Convention.

3.4. Secondary EU law: the ‘Dublin Directives’.

3.4.1. The common elements.

Several EU Directives are adopted in order to harmonise the EU asylum policies. Some of these Directives have already been revised in the first phase of the establishment of the CEAS, while others are being renegotiated with the aim to be amended during the second phase of the CEAS. In relation to the Dublin system, three Directives are crucial to consider as their provisions supplement the Dublin system: the Receptions Conditions Directive, the Asylum Procedures Directive and the Qualifications Directive. All of them clearly mention that they respect fundamental rights and the principles recognised by the Charter, and prescribe minimum standards for asylum determination procedures and the minimum criteria for the assessment of granting a refugee status in accordance with the 1951 Convention. This section assesses the relation between the asylum seekers and the MS, i.e. which provisions the Directives contain for the rights of asylum seekers. The Directives refer, in the respective second recital, to the conclusions of the Tampere European Council of October 1999. In this summit, as mentioned above, the EU committed to “the

establishment of a CEAS, based on the *full and inclusive application of the Geneva Convention*, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say, maintaining the principle of non-refoulement [emphasis added]”¹⁰². The Refugee Convention, and the principle of non-refoulement, are thus clearly stressed in the Dublin system legislation.

3.4.2. *The Reception Conditions Directive.*

The Council Directive 2003/9/EC of 27 January 2003 (from hereon referred to as the ‘Reception Conditions Directive’) lays down the minimum standards for the reception of asylum seekers.¹⁰³ The standards in this Directive concern in particular obligations to certain material reception conditions outlined in Chapter III of the Directive, such as the accommodation, food and clothing and sufficient allowance to protect asylum seekers from extreme need. Moreover, provisions on medical and physiological care and arrangements to protect the family unity are included.¹⁰⁴ The Directive contains provisions for the schooling and education of minors, employment for asylum seekers and their access to vocational training. Besides these obligations, the Directive also includes provisions that oblige MS to control the level of reception conditions¹⁰⁵ and the duty to provide the possibility to appeal¹⁰⁶ with regard to decisions covered by it. In addition, it contains rules on the training of authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.¹⁰⁷ Finally, the preamble of the Directive mentions that the Directive seeks, in particular, to ensure the full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter of Fundamental rights of the EU.¹⁰⁸ This Directive is a step forward in the protection of asylum seekers because it elevates the ad-hoc state practice on humanitarian protection to an international status by the inclusion of recital 15¹⁰⁹.

¹⁰² Recital (2) of Directive 2003/9/EC, Directive 2004/83/EC and Directive 2005/85.

¹⁰³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31.

¹⁰⁴ All these rights can be retrieved in Articles 5 to 15 of Chapter III on the General Provisions of Reception Conditions in the Council Directive 2003/9/EC.

¹⁰⁵ Council Directive 2003/9/EC, Article 23.

¹⁰⁶ *Idem*, Article 21.

¹⁰⁷ *Idem*, Article 24.

¹⁰⁸ Preamble of Council Directive 2003/9/EC, recital 5.

¹⁰⁹ Recital 15 of Council Directive 2003/9/EC states that: ”It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for

So far, the Commission and the Council could not yet agree on amendments in the reception conditions and asylum procedures, on which the Commission proposed their latest revisions in 2011. In fact, these proposals are considered to be rather a cosmetic change that “put lipstick on a pig”¹¹⁰. Shortcomings on detention conditions, time limits for detention, the access to benefits for asylum seekers without documentation, health care, legal aid and specific provisions for vulnerable asylum seekers are namely still not adequately addressed.¹¹¹ On the other hand, the revised Directive would introduce some important amendments in relation to the assessment on the necessity of detention, continuing judicial oversight and specific provisions for unaccompanied children.¹¹²

3.4.3. The Asylum Procedures Directive.

Council Directive 2005/85/EC of 1 December 2005 (from hereon referred to as the ‘Asylum Procedures Directive’) lays down the minimum standards on procedures in Member States for granting and withdrawing refugee status. This Directive contains asylum seekers rights governing the procedures for examining applications. These provisions for example provide that applications must be examined in an individual, impartial and objective manner¹¹³, while the application itself cannot be rejected solely on the ground that it has not been lodged as soon as possible.¹¹⁴ In addition, the asylum seeker must be given reasons for a decision and how to challenge, in writing, a possible negative outcome of this decision.¹¹⁵ Furthermore, the services of interpreters must be provided, and every asylum seeker must be given the opportunity to communicate with the UNHCR. Moreover, legal advisors must be accessible, especially in the case of a negative decision, when free legal assistance must be granted.¹¹⁶ Article 36 (1) of the Directive heads ‘The European safe third countries concept’ and states:

“MS may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II,

third-country nationals and stateless persons who ask for international protection from a Member State”.

¹¹⁰ Peers, February 2012, pp. 1-2. Moreover, see this analysis for the exact amendments proposed.

¹¹¹ *Idem*, p.7.

¹¹² UNCHR, January-June 2012, p.5.

¹¹³ Council Directive 2005/85/EC, Article 8 (2)(a).

¹¹⁴ *Idem*, Article 8 (1).

¹¹⁵ *Idem*, Article 9 (1).

¹¹⁶ *Idem*, Article 15 (2).

shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally its territory from a safe third country according to paragraph 2”.

The criteria for what is considered a ‘safe third country’ are laid down in Article 36 (2), which include 1) ratification of and compliance with the provisions of the Geneva Convention, 2) the existence of an asylum procedure prescribed by law; and 3) ratification of the Charter of Fundamental Rights of the EU, the ECHR, and compliance with its provisions, including the standards relating to effective remedies. On this basis, Article 39 of the Directive sets out effective remedies to pursue before the domestic courts of the MS.

The revised 2011 proposal¹¹⁷ shows a high number of revisions that would see the scope changing¹¹⁸, as it would be extended to asylum seekers with “subsidiary protection” status and not only to those with a refugee status. However, in its revisions on the proposal by the Council, the main entitlements to safeguards of asylum seekers which the Commission proposed were removed or clearly weakened by The Council:

“While the proposed Council draft would likely result in modest but tangible improvements in procedural rights for some asylum-seekers, Member States would still be able to accelerate the consideration of a significant number of applications. In these cases, Member States could have denied the applicant legal aid, access to the information used against him or her and a copy of the report of the interview during first-instance proceedings; and they could then prevent the applicant from staying on the territory during the appeal. The net result would be a grossly unfair procedure”¹¹⁹.

Council amendments are also made in standards that relate to the power to reintroduce a so-called ‘super-safe’ third country rule, which implies that an asylum application will not be considered if the applicant stems from a so-called ‘super-safe’ third

¹¹⁷ European Commission. Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast). COM(2011) 319 final 2009/0165 (COD).

¹¹⁸ Idem, 3.2 on the legal basis states: “The modified proposal amends Directive 2005/85/EC and uses Article 78(2)(d) of the Treaty on the Functioning of the European Union (TFEU) as a legal basis which foresees the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.” Moreover, for a detailed outline on the proposed revisions, see: Peers, May 2012, *The revised Asylum Procedures Directive: Keeping Standards Low*.

¹¹⁹ Peers, May 2012, pp.12-13.

country.¹²⁰ Such a rule is clearly in breach with the safeguards enshrined in the Geneva Convention and the Charter of Fundamental Rights of the EU, which guarantee a fair application to all. Moreover, there is no possibility for asylum seekers to challenge such decision. Although the Council's revision would still result in some improvements for asylum seekers in comparison to the present Directive, it is questionable whether the amendments are adequate in order to cope with the migratory pressures at the present day. Member States would still be able to neglect a high number of applications by denying the applicant access to legal aid or their information that can be used against them. The applicant could potentially be even ejected from the territory of the MS during the procedure.¹²¹ Finally, the proposed Article 31 (3) would enable a MS to postpone a decision, without any time limit, if the situation of the country of origin is uncertain or expected to be only temporary.¹²² This proposed provision is potentially very harmful, especially because there is no harmonisation on what the concept of a 'safe third country' exactly entails. Therefore, one could conclude that the revisions by the Council still leave many pitfalls that are potentially damaging the rights of asylum seekers residing in the EU.

3.4.4. The Qualifications Directive.

Council Directive 2004/83/EC of 29 April 2004 (from hereon referred to as the 'Qualifications Directive') sets out the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Chapter II hereof contains several provisions on how to assess the application, while Chapter III lays down the conditions that must be satisfied in order to qualify as a refugee. Chapter IV concerns the refugee status and Chapters V and VI lay down the conditions that must be satisfied in order to qualify for subsidiary protection and what this status implies. Chapter VII contains various rules that set out the content of international protection. According to Article 20 (1) of this Directive, the chapters must be read without prejudice to the rights laid down in the Geneva Convention. Finally, the preamble states that the Directive seeks, in particular, to ensure the full

¹²⁰ European Commission. Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), Article 30.

¹²¹ Peers, May 2012, pp. 13.

¹²² UNCHR, January-June 2012, p.4.

respect for human dignity and the right to asylum of applicants and their accompanying family members.¹²³ There are also weaknesses in this Directive related to the protection regimes of each MS, of which Article 15 (c) is indicative¹²⁴ because it leaves much open for interpretation of the national courts. Agreements on the revisions on the Qualification Directive has been made, but only based on modest improvements. The ‘2011 Qualification text’ would leave the troubling aspect of the gap between MS legislative obligations and the practice on the ground untouched.¹²⁵ It is also not surprising that an agreement has been found on revisions of only this Directive, as the standards were already set at a much higher level because the Directive respects the 1951 Convention that grants similar minimum standards.¹²⁶

In the end, revisions on the two most crucial Directives in light of the Dublin system are still being negotiated and it remains to be seen whether the EP can convince the Council to raise procedural standards in the second phase of the CEAS in order to ensure that those persons who are genuinely facing persecution or serious harm have a fair opportunity to prove it. Such raise of procedural standards is also crucial to successfully reform the Dublin system. In this light, all the regimes that protect asylum seekers under the Dublin system mentioned in this chapter also give problems of coherence, as different rules are applicable. The different interpretations of the rules have been emphasised by recent case-law.

¹²³ Council Directive 2004/38/EC, recital 10.

¹²⁴ Article 15(c) of Council Directive 2004/38/EC states that serious harm consists of: "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

¹²⁵ Peers, July 2011, p.7.

¹²⁶ *Idem*, p.6.

4. The ECtHR and the ECJ: protecting fundamental human rights for asylum seekers in light of the two axes.

4.1. ECtHR: MSS v. Belgium and Greece.

This chapter assesses the two axes in light of the recent case-law. Two recent rulings are central in this assessment: *MSS v. Belgium and Greece* of the ECtHR and *NS and Others vs. Secretary of State of the Home* of the ECJ. Both cases have normatively re-interpreted the Dublin system, even though the exact impact of the rulings is still unclear.

The *M.S.S.* ruling by the ECtHR was the first one to acknowledge the link between poor a national asylum system and reception conditions and the Dublin system. The Court did not acknowledge this link in previous cases of similar nature, such as *T.I.* and *K.R.S.* discussed above. However, it is likely that the accumulation of evidence before the Court from those earlier cases made the claim of MSS even stronger.¹²⁷ The applicant in this case, MSS, is an Afghan national who entered the EU through Greece in 2008. Thereafter, he travelled to Belgium where he applied for asylum in 2009. According to the Dublin criteria, the Belgian authorities sent a letter to request the Greek authorities to take charge of the asylum seeker. While this case was pending, the UNHCR sent a letter to the Belgian Minister of Migration and Asylum Policies to inform them on the deficiencies in the Greek reception conditions and asylum procedures. The letter recommended suspending the sending-backs to Greece.¹²⁸ Despite this recommendation, Belgium believed it had to respect its obligations under the Dublin system and found no reason to suspect that the Greek authorities would fail to honour their obligations. MSS was sent back to Greece. Thereupon, MSS lodged an appeal by arguing that he would run the risk of being accommodated in appalling conditions as there were clear deficiencies in the Greek asylum system. The applicant feared to be ultimately sent back to Afghanistan without a clear examination of the reason why he had initially fled the country, indeed, he claimed to be a target of the Taliban. After his transfer to Greece, MSS was immediately placed in detention where he was, according to a report, locked up in a

¹²⁷ Clayton, 2011, p. 762.

¹²⁸ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para. 194 and 195.

small area with twenty other detainees. Furthermore, the access to hygienic facilities was restricted, open air access was not allowed, food was scarce and the detainees had to sleep on dirty mattresses or on the ground.¹²⁹ When he received his asylum seeker's card, he started living on the streets without any means of subsistence. MSS tried to leave Greece with a false identity card, but he was arrested and again placed in the same detention facilities.¹³⁰

MSS filed a complaint claiming violations of various articles of the ECHR. First, he argued that the Greek detention and living conditions amounted to inhuman and degrading treatment in breach of Article 3 ECHR. He also argued that there was no effective remedy in Greek law in respect of his complaints under Articles 2 ECHR (the right to life) and Article 3 ECHR, in violation of Article 13 ECHR. Second, he complained that the Belgian state had exposed him to the poor living and detention conditions in Greece to which asylum seekers are subjected in violation of Article 3 ECHR. Similar to the complaint addressed to Greece, MSS argued that there was no effective remedy under Belgian law to challenge this situation, which implies a violation of Article 13 ECHR.¹³¹

In January 2011, the Grand Chamber of the ECtHR judged the case on the basis of these complaints. The Court ruled that Greece had indeed violated Article 3 ECHR, because of the detention conditions and living conditions in Greece.¹³² Greece also violated Article 13 ECHR in conjunction with Article 3 ECHR, because of deficiencies in the asylum procedure of the applicant's case.¹³³ The Court also found violations of Article 3 ECHR in relation to Belgium, on the basis of:

“having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and because of having exposed him to detention and living conditions in Greece, and a violation of Article 13 together with Article 3, for the lack of an effective remedy against the applicant's expulsion order”¹³⁴.

As regards Belgium, the Court found that since the general situation was known to the authorities, Belgium had not only the knowledge about the situation in Greece, but also the means (under the Dublin Regulation) to refuse a transfer to Greece. Because

¹²⁹ *Idem*, para. 206.

¹³⁰ EctHR, 21.01.2011, pp.1-2. Press release on the ruling.

¹³¹ *Idem*, p.2.

¹³² *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para. 234.

¹³³ *Idem*, para. 321.

¹³⁴ EctHR, 21.01.2011, p.1.

Belgium did not refuse the transfer, it violated the ECHR as the UNHCR letter on the risk of refoulement in Greece should have made the Belgian authorities aware of the risks. Therefore, the Court concluded that in every individual case where it can be shown that the return of a person to another Dublin state results in a breach of a right enshrined in the ECHR, that return must immediately be suspended.

There are several interesting aspects included in the ruling that should be highlighted. First, the notion of inhuman or degrading treatment of Article 3 ECHR has been innovatively extended by the Court to also include the living conditions of asylum seekers. The Court found a violation of Article 3 ECHR in three respects: the general living conditions, the conditions of MSS in detention and the inadequacy of the asylum examination system.¹³⁵ The Court reasoned in light of the Reception Conditions Directive by arguing that the “humiliating treatment [showed] a lack of respect for his dignity”¹³⁶. It is likely that the Court extended this scope because “all the Dublin system asylum seekers questioned by the UNHCR were homeless”¹³⁷. This was likely a factor in the ruling in respect to the ill treatment of asylum seekers, as they are left to survive by their own means in violation of the Receptions Conditions Directive. On the other hand, the Court also limited this extension in relation to Article 13 ECHR, because adequate living conditions do not per se mean financial assistance. Therefore, Greece did not violate Article 13 ECHR on this ground, as they are not obliged to financially support the asylum seeker. It remains uncertain what the implications of this renewed scope of Article 3 ECHR will have on e.g. the Reception Conditions Directive and consequently the Dublin system.

Second, whereas unaccompanied children were already indicated as being a vulnerable group¹³⁸, the Court specifically recognised asylum seekers for the first time as a “a particularly underprivileged and vulnerable population group in need of special protection”¹³⁹. This status implies that States have the positive obligation to protect asylum seekers in line with the ‘provisions for persons with special needs’ enshrined in the Receptions Conditions Directive. The Court was concerned “whether

¹³⁵ Clayton, 2011, p. 763.

¹³⁶ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para. 263.

¹³⁷ *Idem*, para. 258.

¹³⁸ See: *Rahimi v. Greece*. Application no. 8687/08.

¹³⁹ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para. 251.

effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect, to the country from which he or she has fled”¹⁴⁰.

Third, the Court turned out to assess the general country situation of Greece instead of the specific circumstances of the individuals’ case, in this case MSS as an Afghan national. In this respect, the decision was based on the question whether Belgium knew or was supposed to know the risk of ill treatment to which asylum seekers in Greece could be exposed.

Fourth, the Court gave much weight to reports on the treatment of asylum seekers in Greece and these became an important argument in the final ruling of the Court. These reports, ranging from reports of the UNHCR and the Commissioner for Human Rights to those by respected NGOs such as *Amnesty International*, *The European Council on Refugees and Exiles (ECRE)* and *Human Rights Watch*, were included in the ruling as evidence regarding the detention conditions and the risk of refoulement in Greece.¹⁴¹ Consequently, it will be interesting to see what will happen in similar circumstances when the UNCHR reports on a Member State that is potentially breaching fundamental rights according to Article 3 ECHR.

Finally, in light of the Dublin system, this ruling shows how the Dublin system can aggravate disparities between the EU MS, as it is still unclear which direct implications this case triggers in terms of international protection, reception conditions and expulsion measures. Since the ruling is based on the situation in Greece, the question is what happens with sending-backs to states in which there are equally bad conditions and where the risk of ill-treatment and possibly refoulement seems apparent? In other words, does the augmented standard of proof included in this case protect the breach of Article 3 ECHR only in relation to Greece?

4.2. ECJ: N.S., M.E. and Others.

The European Court of Justice, the supranational judicial body of the EU, has become an important actor to interpret EU asylum policies since 2009-2010, when it first ruled on various asylum cases in connection with the Charter of Fundamental Rights of the EU. Most of these first cases only had a limited impact on harmonisation of national asylum practices in the MS as they triggered little consequences on amendments in

¹⁴⁰ *Idem*, para. 286.

¹⁴¹ *Idem*, in para.160 the ruling lists the reports from 2006 until 2010 considered as evidence in the ruling.

national legislations.¹⁴² Some of these ruling became more influential, such as *Elgafaji*, which established more clearly which situations are entailed by Article 15 (c) of the Qualifications Directive.¹⁴³

The ECJ judged jointly on the cases C-411/10 (*N.S.*) and C-493/10 (*M.E. and others*), since the legal issues raised by those two cases were similar. *N.S.* concerned an Afghan national who was arrested in Greece in September 2008 and proved not to have applied for asylum in that country. Because of this non-compliance, NS was held in detention and eventually expelled to Turkey. NS escaped from the Turkish detention facilities and managed to travel to the UK. After arriving there in January 2009, NS lodged an application for asylum. In July 2009, NS was informed about the criteria under the Dublin system and transferred back to Greece. *M.E. and Others* concerned five asylum seekers from Iranian, Algerian and Afghan nationality. They jointly challenged the decision of Ireland who transferred them back to Greece in order to have their asylum application examined according to the Dublin criteria. Similar to NS, all claimants first travelled illegally through Greece after which they were arrested. Without applying for asylum, they left Greece for Ireland where they did apply for asylum. In *N.S.*, the Court of Appeal of the UK had referred to the ECJ¹⁴⁴ to the interpretation of EU law.¹⁴⁵ Similarly, in *M.E. and Others*, the High Court similarly asked questions for a preliminary ruling.¹⁴⁶

In September 2011, the Advocate General (AG) Trstenjak, in her Opinion in the joint cases, states the following:

“asylum seekers may not be transferred to other MS if they could there face a risk of serious breach of the fundamental rights which are guaranteed under the Charter of Fundamental Rights. In this context, the transferring MS may proceed on the assumption that those rights will be respected; if that assumption is shown to be

¹⁴² *Abdulla*, on cessation of the refugee status; *Bolbol*, on Art 1D of the Geneva Convention and the specific legal regime applicable to Palestinian refugees; and *B and D*, on the exclusion of a refugee status. An in-depth analysis of the impact of the cases on the domestic harmonization of EU asylum policies can be found in Gyulai, 2012. *The Luxemburg Court: Conductor for a Disharmonious Orchestra?*

¹⁴³ On the exact scope of Article 15 (c) of Council Directive 2004/83/EC, which states that serious harm consists of the “serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

¹⁴⁴ *N. S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, para. 49.

¹⁴⁵ *Idem*, para. 50.

¹⁴⁶ *Idem*, para. 52 and 53.

misplaced, however, that MS is under obligation to exercise its right to assume responsibility for examining the asylum application itself”¹⁴⁷.

AG Trstenjak first established that the transferring Member State must determine whether the asylum seeker in question will be exposed to any serious risks of violations of the rights guaranteed by the Charter. She established that the Greek asylum system is overburdened and can therefore no longer guarantee the requirements of EU law regarding the treatment of asylum seekers. Therefore, she concludes, when there exists a serious risk that the fundamental rights can not be upheld in the MS which has the primary responsibility under the Regulations, the other MS is in principle *obliged* to take the responsibility and therefore examine the application. According to the AG, this responsibility arises by interpreting the Dublin Regulation in accordance with the fundamental rights enshrined in the Charter. Member States may proceed from the assumption that all the fundamental rights will be respected in the responsible MS and are not obliged to actively establish whether the other MS complies with the obligations. Finally, AG Trstenjak argued in her Opinion that national law prohibiting the in-depth assessment of a complaint against a Dublin transfer violates Article 47 (1) of the Charter, which guarantees the right to an effective remedy before a court. On the other hand, she stated that clear breaches of secondary legislation would not necessarily preclude a transfer in the Dublin system.¹⁴⁸

The final ruling in December 2011 confirmed the AG’s opinion of September 2011. The Court stated that it can be assumed that the treatment of asylum seekers in all MS complies with the requirements of the Charter, the Geneva Convention and the ECHR.¹⁴⁹ The ECJ refers to the principle of mutual confidence within the Dublin framework¹⁵⁰, i.e. the assumption that every MS takes care of their asylum system and can trust that other MS similarly ensure that their system and proceedings comply with fundamental rights. In addition, the ruling states that “at issue here is the *raison d’être* of the European Union [...] based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular,

¹⁴⁷ Press release, opinions of AG in joined cases c-411/10 N.S. and c-493/10 M.E.

¹⁴⁸ Para 2-3 of the AGs conclusions.

¹⁴⁹ *N. S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, para. 80.

¹⁵⁰ *Idem*, para 79.

fundamental rights”¹⁵¹. The principle of solidarity enshrined in Article 80 TFEU is referred to¹⁵² and the Court assessed the relevant regulations and directives that also confirm that the Dublin system should comply with fundamental rights and principles recognised by the Charter.¹⁵³ Severe infringements of one of these Directives (2003/9, 2004/83, 2005/85) would be a reason to prevent the sending-back of an asylum seeker to the responsible Member State.¹⁵⁴ The Court also referred to Article 4 of the Charter that prohibits inhuman or degrading treatment. The Court ruled that a transfer to a MS, in which there are clear grounds to believe that there are systematic deficiencies in both the reception conditions and asylum procedures, would violate the rights of Article 4 of the Charter.¹⁵⁵ The Court hence agreed with the AG’s opinion and stated that a MS should not send an asylum seeker back if there are substantial grounds for assuming that the asylum seeker would risk violations of Article 4 of the Charter after being transferred back.¹⁵⁶

The Court also refers to the ruling in *M.S.S.* described above, as it compares the arguing to the violations of Articles 3 ECHR and 13 ECHR established for both Belgium and Greece.¹⁵⁷ In this light, the Court agrees on the reasoning and sources used by the ECtHR, as the ECJ later mentions that “information such as cited by the [ECtHR] enables the MS to assess the functioning of the asylum system in the MS responsible, making it possible to evaluate those risks”¹⁵⁸. When considering the conditions in Greece, the ruling refers to the ‘safe country concept’ of Article 36 of the Asylum Procedures Directive, in which paragraph 2 (a) and (c) provides that a third country can only be considered as a ‘safe third country’ when it has both ratified the Geneva Convention and the ECHR but also complies with the provisions thereof.¹⁵⁹ Finally, the Court ruled that:

“EU Law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union. Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the

¹⁵¹ *Idem*, para 83.

¹⁵² *Idem*, para 93.

¹⁵³ *Idem*, para 76.

¹⁵⁴ *Idem*, para 84.

¹⁵⁵ *Idem*, para 86.

¹⁵⁶ *Idem*, para 94.

¹⁵⁷ *Idem*, para 112.

¹⁵⁸ *Idem*, para. 91.

¹⁵⁹ *Idem*, para 102.

Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they *cannot be unaware* that systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State *amount to substantial grounds for believing* that the asylum seeker would face a *real risk* of being subjected to inhuman or degrading treatment within the meaning of that provision [emphasis added]”¹⁶⁰.

What does it exactly mean that a Member State cannot ‘be unaware’? And what exactly is a ‘substantial ground’ for believing that the fundamental rights of an asylum seeker will be infringed and when is there a ‘real risk’ of inhuman or degrading treatment? Of course, these questions can be answered by assessing compliance with international standards of the asylum conditions in a specific country. It still leaves a lot of discretion to the national courts to interpret such notions, which could potentially endanger the fundamental rights of asylum seekers or their right to non-refoulement.

In light of both rulings, it is also interesting to consider the recast proposal on revising the Dublin system proposed by the Commission. Will the introduction of a temporary suspension mechanism make the ECtHR return to its doctrine of ‘mutual inter-state confidence’? And can it be assured that the national law will provide asylum-seekers with some form of protection such as a period of suspension? If this answer is negative, an asylum seeker can be deprived of all of his or her rights until the transfer is annulled or a contrary decision is reached.

¹⁶⁰ *N. S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, final ruling.

5. The future of the Dublin system in light of the two axes: how should it work?

5.1. Reforming the Dublin system.

This chapter assesses the Dublin system on the basis of the two axes by taking the case-law presented in the previous chapter into consideration. Examples of the situation in several Member States will be used to illustrate the deficiencies and to underline the disputes on, and shortcomings of the (application of the) Dublin system. Chapter 2 already questioned the practical functioning of the Dublin system in light of current events, while Chapter 4 showed the rulings and their normative re-interpretation of the system. On the basis of this assessment, the weaknesses of the Dublin system have been revealed and a recast of the system is urgently needed. In 2008, the Commission issued a proposal to introduce a legislative amendment (*recast*) of the current legislation, as has been discussed above. The proposal included amendments to streamline transfer and responsibility procedures and to strengthen safeguards for asylum seekers. Four years later, none of these amendments have yet been agreed upon, let alone been put in effect. The Dublin system rests on the assumption that asylum systems are similar in every MS, which is a crucial understanding because it is the only way to ensure, theoretically, asylum seekers who are transferred back will be treated similarly as in the sending MS. On this basis, *M.S.S.* was a first case to successfully challenge and reject this assumption¹⁶¹, which is not defensible as the asylum procedures are in fact very different in their quality, conditions of access and safeguards.¹⁶²

The next subchapters further discuss the shortcomings in the application of the Dublin system, as exemplified by the lacking implementation of the provisions by the different Member States. This assessment will not be done from a purely legal approach, but rather by referring to recent reports and news articles to indicate the practical reality of the issues at stake. Moreover, these examples are used to support the argument for the introduction of a rights-based approach in the revision of the Dublin system, which will be presented in the final chapter.

¹⁶¹ International Commission of Jurists, 2011, pp 3-4.

¹⁶² Council of Europe, *The 'Dublin Regulation' undermines refugee rights*, 22.09.2010.

5.2. The need to secure the legal order.

The EU must secure that the national legal orders of all its MS fully comply with international and EU law. At the moment, a number of shortcomings are present in the implementation of the provisions, which proves its weakness.¹⁶³ This can be exemplified by the fact that each MS interprets the legal norm of a threat to ‘serious harm’ enshrined in the Qualifications Directive¹⁶⁴ in a different way. There are also flaws in what is considered a ‘safe third country’, which should ideally be determined at EU level, but the Asylum Procedures Directive does not provide for a clear definition. The problem herein is that the domestic Courts and their judges have a high degree of independence in the interpretation of important asylum and refugee law concepts, which heavily influence the outcomes. Consequently, obtaining protection in a MS is not a guarantee for asylum seekers, but a question of interpretation by domestic courts. While it is a normal and good thing for national Court to interpret concepts in light of national traditions and case-law, it should be avoided that national courts refer asylum seekers to other countries on adequate legal grounds. In light of the ‘safe third countries’ concept, German immigration officers have proven to sent back asylum seekers to a ‘safe third country’ outside the EU through which they travelled. In this regard, Germany considers fewer countries ‘safe third countries’ than e.g. the UK or France does.¹⁶⁵ Therefore, protection is absolutely no guarantee and the chance to obtain protection varies significantly throughout the EU, from eight to ninety-one percent.¹⁶⁶ This exemplifies why the Dublin system is sometimes called a *lottery* for asylum seekers, in particular whether a country is considered safe or not by a given Member State. In Greece, the number of first instance granted protection is less than one percent in asylum claims, in comparison to twenty-five to thirty-six percent in MS with a similar number of applications.¹⁶⁷ A more harmonised approach to these concepts is needed to established similar asylum procedures and circumstances for asylum seekers throughout the Union. In this light,

¹⁶³ UNHCR, 24.04.2012, observation 9.

¹⁶⁴ Directive 2004/83/EC refers to the conditions when international protection should be granted, mainly on grounds of “a well-founded fear of being persecuted or a real risk of suffering serious harm” in the country of origin.

¹⁶⁵ Deutsche Welle, 14.02.2012. *Taking refuge in Europe*.

¹⁶⁶ UNHCR, 26.01.2012, *Informal meeting of the JHA Council. Remark by Antonio Guterres*.

¹⁶⁷ Clayton, 2011, p. 760.

the risk of refoulement is never far off and a crucial concept such as safe third country needs to be clearly established by law and harmonised throughout the EU.

5.3. Limiting the risk of refoulement.

In *M.S.S.*, the ECtHR established that the chance of refoulement was present in Greece in violation of Article 3 ECHR. Various MS have, due to their border problems, increasingly sent back asylum seekers to countries they consider safe countries of asylum.¹⁶⁸ This creates a high risk of direct refoulement, especially because there is no common understanding within the Dublin framework on exactly which countries are unsafe. Therefore, effective operationalisation and monitoring on this process should be implemented in order to protect the expulsion of asylum seekers to unsafe countries. The issue of refoulement becomes particularly difficult when the sending back of an asylum seeker falls outside the direct scope of the EU law. Indirect refoulement through so-called ‘chain deportation’ is an even more difficult issue to tackle, because the EU and its MS might not be directly concerned. In the case of Hungary, for example, it occurred that asylum seekers were returned to Serbia, where the police immediately transported them to the Macedonian authorities without any formalities. Since Macedonia still considers Greece a safe country for asylum, asylum seekers might end up in Greece, where they are further exposed to removal without having their asylum claims considered on their merits. The rights of asylum seekers are further endangered because non-EU countries such as Serbia and Ukraine are not bound by legislative duties of a personal assessment.

The risk of refoulement is also high in bilateral ‘push-back’ agreements, which have been concluded between Member States and certain transit countries, of which those between Spain and Morocco, and Italy and Libya are the clearest examples. The latter two countries signed a ‘Friendship, Cooperation and Partnership’ agreement in 2008.¹⁶⁹ Although no sending-backs were observed in 2011¹⁷⁰, *Amnesty International* reported that Italy signed a new partnership agreement with Libya in June 2012¹⁷¹, while another ‘push-back’ bilateral agreement was signed between Italy and Tunisia.¹⁷² As has been discussed above, the ECtHR ruled in *Hirsi Jamaa and Others*

¹⁶⁸ For example in Hungary. See: UNHCR, 24.04.2012. observation 6.

¹⁶⁹ Nascimbene & Di Pascale, 2011, p.342.

¹⁷⁰ Human Rights Watch, 2012 *World Report 2012. European Union. Events of 2011*, p.9.

¹⁷¹ Amnesty International. 20.06.2012. *Italy must sink agreements with Libya on migration control*.

¹⁷² Human Rights Watch, 2012 *World Report 2012. European Union. Events of 2011*, p.8.

that Italy violated Article 3 ECHR by pushing-back asylum seekers under this agreement.¹⁷³ While these agreements are generally concluded in order to tackle illegal migration, there is a lack of monitoring on the exact scope of such ‘push-backs’ agreements, because they potentially violate the rights of asylum seekers under the 1951 Refugee Convention. Agreements of this nature could also be considered undemocratic and lacking transparency because they are generally not published. In 2009, Malta similarly operated one push-back in light of the Italy-Libya agreement, as the country is an important transit country for asylum seekers within the Schengen area.¹⁷⁴ These cases show how human rights and the protection needs of asylum-seekers have been accorded less priority than security and law enforcement objectives.

5.4. Securing adequate reception conditions.

The reception conditions for asylum seekers anno 2012 show deficiencies, as asylum seekers are often accommodated in penitentiaries that do not comply with basic standards. Member States do not seem capable or willing to ensure that their standards comply with the provisions in the Reception Conditions Directive. As mentioned, many of the states at the external EU border receive a disproportionate amount of asylum seekers. As a consequence, reception services often fall short of the international and EU standards. In various MS such as France, Spain and Poland, free movement is hindered in practice¹⁷⁵, which is clearly in breach of Article 7 of the Receptions Conditions Directive.¹⁷⁶ Asylum seekers cannot rely on judicial authorities in the detention facilities, have insufficient medical services, have no right to intimacy and are called by number instead of by name¹⁷⁷, which shows the degrading aspect of the facilities and further infringements of the Directive mentioned above. These observations show the lack of external oversight or a quality control mechanism in place to ensure the proper implementation of the Receptions Conditions Directive. An

¹⁷³ *Hirsi Jamaa and Others v. Italy*. Application no. 27765/09.

¹⁷⁴ International Commission of Jurists, 2011, pp. 5-6.

¹⁷⁵ Statewatch. 06.01.2012. *Spain and France: the ongoing disgrace of detention centers*. For Poland see: Migreurop, 2010, p.54.

¹⁷⁶ On residence and the freedom of movement. Exceptions can only be justified on the basis of public order, as envisaged by Article 7 (2) of Council Directive 2003/9/EC.

¹⁷⁷ *Idem*. More information on the reception conditions in France, and the infringements on the human rights standards, can be retrieved in: La Cimade, *Centres et locaux de Retention Administrative*. Rapport of 2010. Similarly, more information on the Spanish conditions and violations of international standards can be retrieved in Migreurop, 2010.

independent monitoring over the efficiency of the complaints procedure should be established, if such mechanism is even in place. In any case, it is crucial to urgently review the reception arrangements in all countries because the bad conditions do not seem determined by the needs, but rather by the available funding.¹⁷⁸

EU funds¹⁷⁹ are available to cover the basic costs of reception arrangement, but seem insufficient to support MS in a sustainable manner. The mechanisms that have been introduced with EU-support mainly aim at the interception of border crossing illegal migrants instead of structural mechanisms that offer support to the internal asylum conditions. In this respect, a fence along the Greek-Turkish border will now be installed to counter the influx of migrants.¹⁸⁰ Greece is still one of the worst cases and the inhumane conditions of detention have not improved over the last years.¹⁸¹ By the end of 2011, seventy-five percent of irregular migrants who entered the EU, still arrived through the Turkish-Greek border.¹⁸² Greece has fewer than 1.000 reception places available, while they have already received 10.000 new asylum applications in 2010.¹⁸³ At the moment, Greece is constructing “prison-style asylum centres”¹⁸⁴, which clearly violate the provisions in the Receptions Conditions Directive. Greek officials justify the construction by claiming that France and Spain accommodate asylum seekers in similar facilities.¹⁸⁵

5.5. Securing adequate asylum procedures.

In Hungary, asylum detention has become the rule instead of the exception since 2010, as amended laws make it possible to detain asylum seekers systematically to the maximum length of twelve months while their cases are being examined.¹⁸⁶ Poland has similarly extended the maximum length of detention up to a year¹⁸⁷, while in France laws were amended in 2011 to extend the detention period pending deportation

¹⁷⁸ UHCR, 24.04.2012., observation 42.

¹⁷⁹ Such as the European Refugee Fund.

¹⁸⁰ NY Times, 06.02.2012. *Greece to build fence on Turkish border to curb illegal migration.*

¹⁸¹ Human Rights Watch, *World Report 2012. European Union. Events of 2011*, p. 6.

¹⁸² European Commission. Communication from the Commission to the European Parliament and the Council. Biannual report on the functioning of the Schengen area 1 November 2011 – 30 April 2012. Brussels, 16.5.2012, COM (2012) 230 final, p.3.

¹⁸³ McDonough & Tsourdi, 2012, p.3.

¹⁸⁴ EurActiv, 29.03.2010. *Facing Schengen expulsion, Greece locks up immigrants.*

¹⁸⁵ Idem.

¹⁸⁶ Forum Réfugiés. 2011, p.13.

¹⁸⁷ Migreurop, 2010, p.57.

to forty-five days.¹⁸⁸ To prevent such practices and inconsistencies among MS, the Asylum Procedures Directive should provide for accelerated procedures, of which there is a clear lack in the present provisions. Such accelerated procedure would ensure that decisions are taken at first-instance in compliance with the provisions in the Directive. In Italy, the length and conditions of detention procedures and facilities infringe similar rights and asylum seekers often claim to be treated as “animals” in conditions that are “worse than a prison”¹⁸⁹. The behaviour of guards in the detentions facilities is sometimes noted to be problematic, as asylum seekers are at times treated as criminals. In light of such practices, it is interesting to consider the Court’s description of asylum seekers as a vulnerable group in *M.S.S.* In Malta, detention centres or closed centres where all arrivals are hosted are known for their bad conditions, as they are often overcrowded but still accommodate vulnerable groups such as asylum seekers and unaccompanied children.¹⁹⁰

The recognition of a refugee status is differently applied by the all MS’ asylum procedures. Statistics of EUROSTAT on the recognition of asylum seekers show intense variations, as has been indicated in Chapter 2. First, the seventy-five percent of protection recognition which happened in only six EU MS indicates a highly disproportionate number.¹⁹¹ Second, the statistics also expose that the rate of positive decisions in appeal vary significantly: while some countries, such as Belgium, Poland and Ireland stay under ten percent, other countries, such as Finland and Bulgaria, have a recognition rate above eighty percent.¹⁹² More particularly, for Afghan asylum seekers, the chance to become recognised as refugee varies between eight percent to ninety-one percent throughout the EU.¹⁹³ This underlines the already mentioned diverging interpretations by domestic courts on various provisions and the varying way the systems of appeal function.

In Hungary, one institution combines both the determination of the status of the refugee and the eligibility for subsidiary protection within one procedure.¹⁹⁴ The problem is that no second institution or mechanism exists to safeguard the quality of this system in compliance with the EU law. Although various initiatives have been

¹⁸⁸ Human Rights Watch, *World Report 2012. European Union. Events of 2011*. p. 5.

¹⁸⁹ Maccanico, n.d., p.2.

¹⁹⁰ Bordermonitoring, May 2012, pp. 9-10.

¹⁹¹ Eurostat, 19 June 2012.

¹⁹² Idem.

¹⁹³ UNHCR, 26.01.2012, *Informal meeting of the JHA Council. Remark by Antonio Guterres*.

¹⁹⁴ UNHCR, 24.04.2012., observation 23.

introduced to monitor such procedures at the EU level ¹⁹⁵, each MS should have their own monitoring system in place. The situation in Malta further underlines the necessity of a monitoring mechanism, because their reception system is specifically tailored to those arriving by sea. This implies that the asylum seekers who arrive through different channels have limited entitlements and are sometimes even excluded from any rights.¹⁹⁶ Greece has recently attempted to reform their asylum system, which can be considered positive even though the resources are limited. Structural problems remain by the absence of legal aid and an interpreter for asylum seekers, while they have to wait in long queues at police stations to submit an application. In order to lodge an application, a postal address is required, while there are insufficient accommodation facilities available.¹⁹⁷ To counter these problems, new legislation has been adopted in 2012, which re-establishes the second-instance administrative procedure for consideration of appeals against decisions on asylum applications¹⁹⁸ and enables the police to examine the first instance asylum applications. Moreover, staff, administrators and interpreters will become available in compliance with provisions in the Asylum Procedures Directive. Nevertheless, still no legal aid or legal service will be provided until the appeal stage.¹⁹⁹

5.6. Guaranteeing the access of justice.

Guaranteed access to justice is a crucial element to safeguard asylum seeker's rights and this access implies entitlements to judicial remedies, free legal assistance, a fair procedure and a system of appeal with suspensive effect in line with the provisions in Asylum Procedures Directive. Judicial access can potentially help asylum seekers to challenge decisions and avoid ill treatment and the risk of refoulement. Nevertheless, such access is not a guaranteed in all MS. The Netherlands is an example of a country that has narrowed down the right to a suspensive appeal internally.²⁰⁰ Access to justice and judicial remedies are at the moment weak in many of the MS because the provisions in the Directive do not oblige states to provide e.g. guaranteed free legal

¹⁹⁵ UNHCR-run Asylum Systems Quality Evaluation and Assurance Monitoring (ASQAEM) and the Further Developing Asylum Quality in the EU (FDQ) Projects. These last were carried out in the Central European region, funded by the ERF.

¹⁹⁶ International Commission of Jurists, 2011, pp. 5-6.

¹⁹⁷ *M.S.S. v. Belgium and Greece*, Application No. 30696/09, para. 179.

¹⁹⁸ Ministry of Citizen protection, 01.03.2012.

¹⁹⁹ International Commission of Jurists, 2011, p. 5.

²⁰⁰ Human Rights Watch, 2012 *World Report 2012. European Union. Events of 2011*, p.10.

assistance, which makes the burden to even have access to justice very high for an asylum seeker. The case of Romania also exemplifies that few interpreters are available in the detention centres to support asylum seekers in their applications and/or appeals.²⁰¹ As a consequence, a fair, impartial and individual procedure as envisaged in the Directive is far from evident.²⁰² In Hungary, this access has proven to be particularly difficult for the ‘sent-backs’ and those who enter via neighbouring countries such as Serbia, due to insufficient arrangements in the detention facilities for registering and forwarding applications to the competent authorities. The access to procedure is especially problematic for Dublin returnees, as these sent-backs are not automatically considered to be asylum seekers. They are forced to re-apply for asylum, irrespective of whether they have already done so in another Member State.²⁰³

Asylum seekers are generally not protected against expulsion to third countries and the merits of their asylum claims are sometimes completely neglected. For example, asylum seekers who return to Hungary based on the Dublin criteria might not even be granted a process at all²⁰⁴. This is especially worrying because the Dublin Regulation includes the clear legal obligation on the responsible State to examine the asylum application when it has to “take back” an applicant.²⁰⁵ In line with the Asylum Procedures Directive²⁰⁶, every asylum seeker should have the right to remain in the territory of the state until a decision over the claim is made. On the other hand, Belgium has shown a better way to cope with applications and appeals as there are two possibilities. First, the administrative Court suspends the decision if necessary, even though the threshold to be admitted is high. Second, asylum seekers in detention can appeal to the *Chambre du Conseil*. Since the ruling in *MSS*, transfers to countries such as Italy and Poland have also been limited due to the reception conditions in these countries. Because potential violations of Article 3 ECHR are considered very cautiously since *M.S.S.*, personal interviews have changed in context. While the focus of the interview was previously placed on the last country, the assessment is now

²⁰¹ Migreurop, 2010, p. 61.

²⁰² Article 8 (2) of Council Directive 2005/85/EC states that MS shall ensure that: “applications are examined and decisions are taken individually, objectively and impartially”.

²⁰³ UHCR, 24.04.2012, observation 20.

²⁰⁴ Human Rights Watch, *World Report 2012. European Union. Events of 2011*, p.8.

²⁰⁵ See: Dublin II regulation, Art.16(1)(a), (b), (c) and 20(1)(d) and the 2007 EC Evaluation Report on the Dublin System.

²⁰⁶ on the minimal standards on procedures in MS for granting and withdrawing refugee status.

extended to the situation of the country from where the person originates or through which he or she has passed.²⁰⁷ Such personalised interviews on case-to-case merit are crucial as they can avoid violations of Article 3 ECHR and exemplify how the Asylum Procedures Directive should be applied.

5.7. A suspension mechanism and a re-allocation clause?

Another necessity is the creation of a suspension mechanism to stop sending-backs if a Member State experiences an emergency situation in which it can no longer guarantee the compliance with the Dublin system. As discussed, the Commission repeatedly proposed such mechanism, but found little support by most of the MS for fear that such mechanism would eventually abolish the Dublin system. In fact, the rulings of both Courts have already practically excluded Greece from the Dublin system. The proposal to suspend transfers when the deficiencies of a MS amount to “strong and disproportionate pressure” for the asylum infrastructure was once again suggested during the Polish Presidency of the EU in the second part of 2011. The MS again rejected this idea, even if the mechanism would be accompanied by an asylum evaluation mechanism. Still, the many reports by the Commission and NGOs highlighted throughout this Chapter have confirmed the existence of weak asylum systems in the neighbouring states of the EU and add weight to the inclusion of the mechanism. Does the law and recent case-law not oblige all MS to agree on such mechanism, because it is the only way to prevent violations of the ECHR and the Charter in relation to sending-backs under the system? Because only a suspension and a monitoring mechanism on the asylum systems and accommodation conditions could truly guarantee a functioning Dublin system.

The Dublin system forces asylum seekers to submit their applications in the first MS of entry as envisaged by the Regulation, while these countries often have the poorest asylum procedures, as this thesis has repeatedly shown. In the case that the first country cannot handle the requests for a valid reason, the re-allocation of the asylum seeker is a logical solution to avoid infringements of the asylum seekers’ rights. A re-allocation mechanism would truly apply the principle of solidarity to the Dublin system, especially because this principle ideally also implies duties of MS in support of other MS. The Commission did not propose such mechanism in their recast

²⁰⁷ International Commission of Jurists, 2011, p. 4.

of the Dublin system. This is due to the tension between of creating asylum policies at the EU level, while keeping the national sovereignty of the MS in mind. In this light, it is understandable that MS do not wish to receive extra asylum seeking applicants only because other MS fail to comply with the *acquis*. Nevertheless, given the present situation, the introduction of a re-allocation mechanism would be the only way to keep the Dublin system functioning without overburdening certain Member States.

5.8. The necessity of a stronger humanitarian clause.

The existing humanitarian clause should be strengthened, as it is in practice not sufficiently considered.²⁰⁸ This implies the need for a specific case-to-case approach with emphasis on the protection that an asylum seeker requires by assessing each application on its merits. One of the components of the humanitarian clause is the consideration of family reunification. The Receptions Conditions Directive contains provisions on family reunification, but these are too strictly defined and leave much room for interpretation.²⁰⁹ Children, the most vulnerable group, should also be carefully treated, especially if unaccompanied because they are sometimes left unprotected by a MS and treated similarly to adult asylum seekers. The treatment of children in Malta has already been mentioned, while *the Refugee Council* exposed in May 2012 how children in the UK are often classified as adults and detained under similar conditions.²¹⁰ While this situation was already highlighted two years ago, no change in this situation has been observed. Similarly, in Hungary the detention of asylum-seeking families with children has been heavily criticised and the family ties are often not considered in the asylum application.²¹¹ The deportation of unaccompanied children has also been negatively highlighted in Germany²¹² and Italy.²¹³ As a consequence, various cases are pending in front of the ECtHR on this matter, which clearly exposes the weakness of the entitlements in the Receptions Conditions Directive.

²⁰⁸ Jesuit Refugee Service Europe, 2011, pp. 25-26.

²⁰⁹ Hurwitz, 1999, p. 646.

²¹⁰ Dennis, J. Refugee Council, May 2012. See also: Guardian, 20.05.2012. *Child asylum seekers 'still being imprisoned' by immigration service.*

²¹¹ UHCR, 24.04.2012, observation 45.

²¹² Human Rights Watch, *World Report 2012. European Union. Events of 2011*, p.6.

²¹³ *Idem*, p.8.

5.9. Final remarks.

The Dublin system is at times not functioning due to the secondary movement of asylum seekers in order to travel to a Member State that is not on the external Schengen border. In fact, the Dublin system indirectly triggers this kind of movement because an asylum seeker will seek to apply in a country where his or her application is more likely to be fairly examined. The Greek-Italian border along the Adriatic coast exemplifies this tendency, as many asylum seekers consider Italy as a transit country to move to another EU MS, mainly for family reunification motives.²¹⁴ These asylum seekers attempt to avoid the EURODAC fingerprinting and the risk to be sent back.²¹⁵ The EU and individual MS try to directly combat the secondary movement of asylum seekers, while they should consider the root causes and the many deficiencies in the system for this movement. This incentive to illegally travel to a second EU Member State can be partly eliminated by broadening the family members definition in the Receptions Conditions Directive discussed above.²¹⁶

Overall, the Dublin system often penalises asylum seekers because of the inefficiency of the asylum system in the first country of entry. The EU should ensure that the protection of asylum seekers stands above the political or logistical expediency of the system. This analysis shows that in order to re-establish a functioning system, several improvements are required, such as a suspension clause for the sending back of asylum seekers, an increased access to justice, stronger humanitarian clauses and the re-allocation of asylum seekers if a MS cannot adequately process asylum seekers. Solidarity seems largely absent within the framework of the Dublin system, in which there is a clear discrepancy between the need to reform the system and the insistence on national sovereignty, which denies true reforms which are urgently needed.

²¹⁴ See: La Repubblica. *Dossier: rifugiati, vergogna Italiana*.

²¹⁵ International Commission of Jurists, 2011, pp. 6.

²¹⁶ UNHCR, January-June 2012, p.4.

6. The finalisation of the CEAS

This chapter studies the establishment of the second stage of the CEAS in light of ‘EU solidarity’ measures and the Dublin system. At the time of completing this thesis, this second stage was not yet concluded and it is highly uncertain whether this will happen in 2012, as the Member States committed themselves to. The CEAS has already been called “extremely dysfunctional” by António Guterres, the UN High Commissioner for Refugees, who claimed that there seems to be no-one in charge and that the streamlining of common standards is very limited in practice.²¹⁷

The Council Conclusions on a *Common Framework for genuine and practical solidarity towards MS facing particular pressure on their asylum systems, including through mixed migration flows*²¹⁸ of June 2012 outline the most recent developments of the CEAS. A high number of solidarity measures have been achieved since March 2012, as mentioned by this Common Framework.²¹⁹ First, fifteen measures have been taken or await possible agreement: the development of a mechanism for early warning preparedness and crisis management within the Dublin system²²⁰; the EASO to develop tools for detecting situations likely to give rise to particular pressures²²¹; Member States to make the best use of EASO’s operational tools to strengthen capacity²²²; the EASO to evaluate the methodology of the Asylum Support Teams²²³; the Member States to contribute to an Asylum Intervention Pool in accordance with the EASO Regulation²²⁴; FRONTEX to conduct a risk analysis of emerging and present threats from illegal immigration and propose appropriate measures to tackle

²¹⁷ EurActiv, 21.03.2012. *UN official calls EU’s asylum system ‘extremely dysfunctional’.*

²¹⁸ Adopted by the Council on 8 March 2012.

²¹⁹ All the following measures have been retrieved from the annex of the Council Presidency to the Permanent Representatives Committee and Council on the ‘Implementation of the Common Framework for genuine and practical solidarity towards Member States facing particular pressures due to mixed migration flow – Political discussion with a particular focus on the support to Greece in areas of borders, asylum and migration management, 29.05.2012.

²²⁰ An agreement was reached by COREPER on the 4th of April on the basis of negotiations by the EP. The Dublin regulation will include provisions in Article 31 to introduce mechanisms for crisis management, preparedness and early warning within the Dublin system.

²²¹ A specific analytical capacity has been created within the EASO framework, which serves to detect trends that can potentially lead to pressures. This means that on a three-months basis, asylum data is analysed for every MS in order to trend forecast.

²²² This means twelve to fourteen train-to-trainer sessions in Malta and additional training in Greece and Luxembourg. There are also expert meetings organised in the EASO framework.

²²³ A first step in this evaluation process has been taken by the Asylum Intervention Contact Point meeting in May 2012.

²²⁴ This refers to the expert the Member States have made available to contribute to the Asylum Intervention Pool mentioned above.

identified threats²²⁵; strengthening of the cooperation between FRONTEX and EASO²²⁶; negotiations for a proposal for a European Border Surveillance System (EUROSUR)²²⁷; further discussions on the Asylum and Migration Funds and Internal Security Fund²²⁸; the evaluation of the Pilot Project for intra-EU Relocation for Malta (EUREMA)²²⁹; Member States to share best practices on return, including voluntary return and reintegration²³⁰; conclusions of readmission agreements with key countries of origin and transit²³¹; conclusion of the cooperation agreement between FRONTEX and Turkey²³²; the adoption of the amended Decision No 573/2007/EC establishing the European Refugee Fund for the period of 2008-2013²³³ and finally; strengthened cooperation with key countries of transit, origin and first countries to asylum in conformity with the Global Approach to Migration.²³⁴ Consequently, it is interesting to consider these ‘EU solidarity’ actions as almost all being of ad-hoc, reactive nature rather than structural measures in reaction to the present issues. The ‘solidarity measures’ are mainly put in place to counter illegal migration, rather than to support the capacity of the detention and accommodation system of Greece or Malta, where the migratory pressure is still overburdening the system. This can be exemplified by e.g. the deployment of the EASO, which conducted a first field operation to assist a MS ‘with a particular pressure’ in Greece.²³⁵ Similarly, Frontex has been mandated at the Greek border for a period of three years now.

Apart from these fifteen ‘solidarity measures’, one element of the CEAS framework that is already adopted is the revised Qualification Directive. Moreover, negotiations between the Council Presidency and the EP have been initiated to

²²⁵ This refers to various actions, such as the Annual Risk Analysis 2012.

²²⁶ In May 2012, meetings between the two mechanisms have been held on e.g. emergency and analysis. A sustainable cooperation and exchange of information is in process, especially for emergency support programmes in which both are involved. Links are also tightened on the analytical units of both regarding Preparedness System and Early Warning, plus their cooperation with civil society.

²²⁷ The Frontiers Working Party is momentarily in negotiations on this establishment of the EUROSUR.

²²⁸ The working group level in Brussels is momentarily in negotiations over these funds.

²²⁹ Member States have submitted their data in order to evaluate the project.

²³⁰ The Migration Working Group (Expulsion Party) is in discussion over these issues.

²³¹ The Draft Council Conclusions were presented to COREPER in May 2012, in particular in order to conclude on an EU-Turkey readmission agreement.

²³² This agreement has been signed by FRONTEX and Turkey on 28 May 2012.

²³³ This decision was adopted by the Council and the EP on 29 March 2012.

²³⁴ The General Affairs Council adopted the Council Conclusions on the Global Approach to Migration on the 29th of May 2012. Moreover, mobility partnerships negotiations with Morocco and Tunisia are ongoing. Finally, four pilot projects under the Prague Process are launched on illegal migration, legal migration, migration and development, and international protection and asylum.

²³⁵ McDonough & Tsoudri, 2012, pp.1-2.

approve the revised Receptions Conditions Directive and the Dublin Regulation, after the negotiations had been obtained by the COREPER. In addition, a political agreement is in progress for the creation of three mechanisms in the Dublin system, namely for preparedness, crisis management and early warning.²³⁶ Nevertheless, the present situation requires more profound reforms on a variety of issues to re-establish a functioning system. Finally, negotiations over the recast of the Asylum Procedures Directive have been initiated, with the aim to be finalised during the Cypriot Presidency in the second half of 2012.

In the end, only few of the shortcomings of the Dublin system have so far been tackled, let alone truly discussed. This thesis has clearly shown that the system and the related Directives lack provisions to provide all-encompassing safeguards to asylum seekers. The unwillingness to amend these shortcomings shows the mainly rhetorical nature of invocations of solidarity. This principle is mostly applied in view of some kind of ‘negative solidarity’, as one could name it, to stop migration or to cope with illegal crossing, as the establishment of Frontex or EASO indicate. In addition, while the EU seems to dedicate its resources to migration control measures²³⁷, the EU asylum policy lacks accountability as no-one seems to challenge human rights abuses within the Dublin system.²³⁸ None of the introduced mechanisms seem to challenge the “lack of adequate reception conditions for asylum seekers and refugees and the conduct of ‘border control practices’ whose compatibility with the principle of non-refoulement remain at stake”²³⁹. This can be further exemplified by the shared reaction of Belgium, France, Germany, the Netherlands, Austria, Sweden and the UK during the Danish Presidency.²⁴⁰ Although this common response reacts to the establishment of the CEAS, their common stance on the issue of solidarity and mutual trust herein shows their interests in this light. These countries are not at the external southern border of the EU and are accordingly not similarly exposed to the migratory influx. In light of the Dublin criteria, they are proportionally not processing as many asylum seekers. The main aim for their gathering was to “to agree on

²³⁶ Council Conclusions on a Common Framework for genuine and practical solidarity towards MS facing particular pressure on their asylum systems, including through mixed migration flows.

²³⁷ HRW, 22.01.2012. *EU: Rights abuse at home ignored*.

²³⁸ Pallister-Wilkens, 19.10.2011.

²³⁹ Guild & Carrera, 2010, p.2.

²⁴⁰ Council of the European Union, the Belgian, the French, the German, The Netherlands, the Austrian, the Swedish and the UK delegations. Common responses to current challenges by Member States most affected by secondary mixed migration flows. 7431/12.

measures regarding matters of mutual interest in the field of preventing illegal immigration with a special focus on secondary migration movements”²⁴¹. The MS in question are concerned with the lack of compliance with the existing *acquis*. They also stress that insufficient management of the external borders has become a serious threat to both the confidence of the EU citizens in management of migration at national and EU level and the Schengen system itself. Consequently, the “spirit of solidarity” is decentralised, which is understood in the sense that all MS should ensure that their external borders function appropriately in line with the Schengen *acquis*. In order to combat the secondary migration flows, all MS need a functioning national asylum system.²⁴² The shared reaction acknowledges that:

“some MS have to bear a greater burden than others, and that some MS’ asylum and migration system are significantly under-developed and unable to meet the pressures on them, the common goal of preventing and combating illegal immigration whilst protecting people in need of protection are difficult to achieve”²⁴³.

The countries propose that everyone should ‘keep one’s house in order’ as a precondition for the application of principles as solidarity and mutual trust. The principle of solidarity is thus explained as an *obligation* of a MS to another MS within the Union, rather than support by the Union to a MS, or support from one MS to the other. In light of this negative solidarity, the cluster of MS proposed some measures. First, “retaining the possibility for MS to reintroduce internal borders controls in line with the current system in the Schengen Borders Code”. Second, “ensuring the EU’s ability to return a person lacking a right to stay”. And finally, “concerted engagement beyond the external borders of the EU, including practical cooperation with countries of origin and transit”²⁴⁴. Still, it is questionable why the shared reaction does not propose or mention solidarity measures in support of those MS that have to deal with a disproportionate amount of applications and weak asylum systems. Consequently, there is a clear discrepancy between the need to reform the system and the MS’ interests in this respect.

In short, no agreement has been concluded on the ‘sensitive issues’ of the Dublin system, while the agreed amendments of the Directives are rather weak, as they do not extend the (judicial) safeguards to asylum seekers sufficiently. In the

²⁴¹ *Idem*, p.2.

²⁴² *Idem*, p.2.

²⁴³ *Idem*, p.3.

²⁴⁴ *Idem*, pp.4-5.

absence of an agreement over a revised Dublin Regulation, the CEAS will not be completed by 2012, as was promised. This implies that the lack of effective protection to asylum seekers remains and examinations continue to be extremely different in quality according to the MS in which an application is lodged.

7. Recommendations for a rights-based revision of the Dublin system.

This chapter concludes on the basis of the observations and analysis of the previous chapters. How should the Dublin system be reformed to be able to cope with deficiencies in the asylum systems of the EU MS to avoid refoulement and ill treatment? Do the system and the related Directives provide sufficient safeguards in this respect? This paper proposes a recast of the Dublin system based on a normative rights-based approach. This concept, developed by NGOs and adopted by the UN, implies that there are two stakeholder groups. First, the rights holders, the group that does not have full rights: the asylum seekers. Second, the duty bearers, the institutions, which ought to fulfil the rights of the rights holders: the EU and its MS. The rights-based approach aims to empower the rights holders by strengthening the capacities of the duty holders to comply with their obligations. Within this approach, all human rights are considered equally important and the main human rights obligations are threefold. First, to *respect* human rights, which means that no interference with the enjoyment of the rights should be permitted. Second, to *protect* human rights to ensure that a third party does not interfere with the human rights. Third, to *fulfil* human rights, which means to take progressive steps realise the rights.²⁴⁵ On the basis of this approach, this thesis proposes a rights-based approach to the Dublin system in order to secure the efficiency of the system and safeguard the rights of asylum seekers by harmonising the provisions. The Dublin system should be linked to other principles and concepts in line with the application of the principle of *solidarity*. These are the following: *lawfulness, fair and effective policies, harmonisation, fundamental human rights, the principle of non-refoulement, a stronger humanitarian clause, more knowledge and information, a re-allocation clause, judicial safeguards, the re-allocation of resources, humane conditions of detention and alternatives to detention*. These ideas must be emphasised in the rights-based revision of the Dublin system in order to re-establish a system that fully complies with international legal standards and truly applies the principle of solidarity to the functioning of the system.

²⁴⁵ More information on the rights-based approach, as developed by NGOs and adopted by the UN, can be retrieved in: UNHCHR, 2006, pp.1-2.

The obligation to protect fundamental rights is said to be common to the European Union and its Member States. However, in the political minds of many of the leaders of the EU MS, it is questionable whether the safeguarding of these rights really has a priority. As this thesis has shown, the problem does not lie in the formal recognition of the principles and rights, but in operationalising them. There is a clear absence of any serious financial, practical and technical assistance and cooperation in order to deal with the present problems of the Dublin system. As a consequence, the EU fails to guarantee many of its core fundamental rights to asylum seekers residing within its territory. First of all, solidarity should really be placed at the heart of the Dublin system and the legal nature of this principle should be stressed. In this light, the guarantees envisaged in international human rights law (i.e. the ECHR and 1951 Refugee Convention) and EU law (The Charter and secondary EU legislation) must be fully applied and extended in order to reform the Dublin system based on fair and effective policies. In particular the three ‘Dublin Directives’ leave too much room for interpretation to the Member State, which makes the application of important provisions vary significantly throughout the EU. This means that the Qualifications Directive, the Asylum Procedures Directive and the Receptions Conditions Directive must be profoundly revised in order to establish increasingly harmonised asylum systems throughout the EU that ensure consistency and a high level of protection. The relevant provisions on the prohibition of discrimination, on the principle of non-refoulement and on the protection against inhuman or degrading treatment must be more strongly emphasised in the legislation. In addition, notions such as a safe third country and safe country of asylum should be effectively harmonised. This also implies that the consequences for non-compliance must be clear to the MS and strictly supervised at the EU level. Only by starting from this understanding can it be ensured that access of an asylum seeker to the territory of a MS will happen in full respect of the principle of non-refoulement as established in international human rights law.

This is a first requirement to reconnect the Dublin system to its original objective in order to reduce the harm to asylum seekers and to avoid uncertainty among EU MS on the responsibility for addressing asylum applications. In this light, the Dublin system was designed to prevent “asylum shopping”²⁴⁶, but the system can

²⁴⁶ Regulation 343/2003 establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one Member State by a third country national.

nowadays rather be considered an inner-European trap²⁴⁷ because the conditions and asylum systems differ notably from one state to the other. At the moment, no strong applications for humanitarian assistance are included in the system and planned reforms show little improvement in this sense. The system should include a stronger humanitarian clause to identify the needs of every applicant and to specifically establish, case-by-case, which protection is required and proportional. This approach underlines the human element to provide a fair hearing to any asylum seeker, which should include the right of an asylum seeker to have the family situation considered. The family member definition in the Directive should be broadened in order to concretise such approach and to better protect unaccompanied children. A broader scope of this definition would also erase the incentive to illegally move to a second Member State for family reunification motives.

An increased case-to-case approach and the right to seek legal assistance should be required in every MS, in a harmonised manner. This requires the EU to standardise a clear and careful examination of all applications based on similar criteria in all Member States, preferably at an individual basis. Authorities should be required to conduct personal interviews to prevent potential refoulement. In this light, the main understanding of the examination of an application should be to protect asylum seekers so they do not become victims of human rights violations, within or outside the EU. To avoid this from happening, there is a need for effective, independent and impartial review of decisions on expulsion, return or extradition. Accelerated procedures should be envisaged by the revised Asylum Procedures Directive in order to make procedural decisions first instance and to avoid the unnecessary length of examination and detention. Effective judicial safeguards must be guaranteed to challenge possible violations and an appeal procedure with suspensive effect should hereon be linked.

The humane conditions of detention must be complemented by creating alternatives to detention, which comply with the fundamental human rights envisaged by the system. Particularly vulnerable groups, such as unaccompanied children and asylum seekers, should be protected in compliance with the Reception Conditions Directive and the ruling in *M.S.S.* In addition, the detention conditions should be controlled by a mechanism to assess compliance with this Directive to ensure that the

²⁴⁷ Jesuit Refugee Service Europe, 2011, p.21.

facilities reflect the conditions set in the Directives that have been agreed upon. The necessity of detention should be proven, which is also envisaged in the proposed amendments of the Receptions Conditions Directive. In case a MS has insufficient resources to comply with the provisions, the EU must financially support them to establish facilities in compliance with the standards. In this light, other MS should accommodate asylum seekers who are residing in a MS that has structural problems to guarantee adequate reception conditions to asylum seekers. Therefore, the re-allocation clause should be established, in respect to the idea of EU inter-state solidarity.

Bilateral ‘friendship’ agreements are a problematic issue because they are based on an unclear mandate and potentially dangerous in light of the non-refoulement principle. Moreover, such agreements render the provisions in the Dublin system, and other international human rights laws, inapplicable and access to protection and fundamental human rights cannot be guaranteed. Bilateral agreements between the MS and non-EU countries should, from the EU level, be required to include a clear human rights protection clause to protect the fundamental rights of asylum seekers. A monitoring mechanism should be installed to establish whether returned migrants are guaranteed to be safe in their country of origin. In this respect, forced returns and sending-backs should be made impossible if the basic human rights of the affected asylum seekers can not be protected or guaranteed, even if such agreement falls outside the direct scope of the EU.

In order to put such safeguards in place, it is necessary to develop tailored training and educational programmes for (law enforcement) officials, police and prison staff to improve their knowledge and understanding of the rights for asylum seekers. This knowledge should be further promoted by informing and creating awareness on e.g. relevant national case-law in relation to challenges on Dublin transfers and on the application of the principle of non-refoulement. Similarly, the reports used in the rulings in *M.S.S* and *N.S., M.E. and Others* should be distributed among the responsible courts of the Member States. Finally, asylum seekers themselves should also be informed upon arrival on the functioning, the criteria, the consequences and their entitlements in relation to the Dublin system.

Many of the introduced mechanism to support overburdened states are not directed to the roots and the true problems, but rather aimed to ad-hoc solutions to combat the effects of the problem. As a consequence, a re-allocation of EU resources

should be considered because resources should also be used for ‘good causes’ and more structural solutions. Moreover, resources should be sufficient and their aims should reflect the highest international standards²⁴⁸, precisely because in the present form, inter-state solidarity seems absent when the reception system of a MS cannot handle the pressure due to a lack of resources.

In conclusion, to truly reform the Dublin system into a functioning system that complies with international human rights standards, there is a great necessity for increased inter-state solidarity. This idea of inter-state solidarity seems absent in light of the implications of the Dublin system and the EU should ensure that their solidarity rhetoric will also apply to the system. The duty holders, the EU and its MS, should ensure that the duty bearers can rely to a system in which the envisaged rights can be guaranteed and in which potential risks are reduced to a minimum. Nevertheless, it is questionable whether any such approach will ever be put in effect. As the Commission’s proposal on the recast of the Dublin system showed, there are clear disagreements between the EU institutions, and therefore the MS themselves, on the future of this system. While the Northern EU states do not want to reform the system and prefer to preserve the status quo, Southern EU states are left in the dark and have to deal with overburdened asylum systems and applications. More importantly, the debate on the necessity to reform the system seems absent in the minds of the leaders, which is worrying given the deficiencies in the Dublin system exposed by this thesis. On the other hand, the ECJ and the ECtHR have provoked new debates on the necessity to reform the system, in which the principle of solidarity ideally has a central role. That being said, national sovereignty remains an important element that should not be forgotten and complicates advances in the protection of asylum seekers under the Dublin system. National courts should continue to be free to interpret the relevant provisions in accordance with their traditions and interpretations. Nevertheless, the minimum standards for the protection of asylum seekers, which are often not respected in practice, should be safeguarded at all times.

²⁴⁸ ECRE, 07.03.2012, p.1.

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