An analysis of the European Commission's proposal to recast the Dublin II Regulation –

Does it sufficiently reflect Member States' international obligations to protect asylum-seekers' fundamental rights?

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European Master's Degree (E.MA) in Human Rights and Democratisation (2010/2011)

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I gratefully acknowledge the help and encouragement given to me by Professor Hildegard Schneider and Mark Provera at Maastricht University, in particular for their enthusiasm and insight into the subject. I am also grateful to my family for their love and support.

To all those who come to Europe in search of international protection.

--------- Abstract ---------

The Dublin II Regulation has been described as 'a cornerstone' of the Common European Asylum System, a system which is intended to be fully committed to the obligations of the Refugee Convention and other relevant human rights instruments and in particular the right to asylum and principle of non-*refoulement*. As a responsibility-sharing mechanism, the Dublin II Regulation works on the assumption that Member States comply with their international obligations with respect to the treatment of asylum-seekers. However, the judgment of the European Court of Human Rights in *MSS v Belgium and Greece* confirmed that certain Member States are falling short of their obligations to protect asylum-seekers' fundamental rights. This paper will discuss the deficiencies in the current Dublin II Regulation and the merits of the Commission's proposal to recast the Regulation. The paper considers whether the Commission's proposal to recast the Dublin II Regulation sufficiently reflects Member States' international obligations in relation to the fundamental rights of asylum-seekers, and in light of the case-law of the European Court of Human Rights.

--------- List of Abbreviations ---------

AFSJ	Area of Freedom, Security and Justice.
APD	Asylum Procedures Directive (2005/85/EC).
CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
CEAS	Common European Asylum System.
Cfr. supra	Reference to a previous footnote.
Charter	Charter of Fundamental Rights of the European Union.
CJEU	Court of Justice of the European Union (formerly the European Court of Justice).
CoE	Council of Europe.
Commission	European Commission.
CRC	United Nations Convention on the Rights of the Child (1989).
DC	Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention (1997).
Dublin II	Council Regulation (EC) No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ('Dublin II Regulation').
Dublin System	The System comprising the Dublin II Regulation and Eurodac Regulation, whereby the Member State responsible for examining an asylum application is determined.
EASO	European Asylum Support Office.
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
ECtHR	European Court of Human Rights.
ECRE	European Council on Refugees and Exiles.
EP	European Parliament.
EU	European Union.
Eurodac	Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.
Explanations	Explanations relating to the Charter of Fundamental Rights.
FRA	Fundamental Rights Agency.
HRC	United Nations Human Rights Committee.
ICCPR	International Covenant on Civil and Political Rights (1966).
Lisbon Treaty	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.
MS(s)	Member State(s) of the European Union.
NGO	Non-Governmental Organisation.

QD	Qualification Directive (2004/83/EC).
RCD	Reception Conditions Directive (2003/9/EC).
Refugee Convention	Convention relating to the Status of Refugees (1951).
TEC	Treaty establishing the European Community.
TEU	Treaty on European Union.
TFEU	Treaty on the Functioning of the European Union.
UDHR	Universal Declaration of Human Rights (1948).
UN	United Nations.
UNCRC	United Nations Committee on the Rights of the Child.
UNHCR	United Nations Refugee Agency.

--------- Contents ---------

--------- Chapter 1 – Introduction ---------

The European Union's ('EU') asylum policy has developed at a significant rate since the 1980s, but not necessarily in favour of individuals in need of international protection. As the United Nations ('UN') High Commissioner for Refugees stated in 2005, 'many industrialised nations continue to impose ever stricter controls on asylum'.[1] In fact, the number of asylum applications made in Europe is falling in comparison to other areas of the world. In 2005 Europe received 60% of all asylum applications worldwide, but this figure fell to 45% in 2009.[2] The EU Member States ('MSs') accounted for 87% of asylum applications made in Europe in 2010, yet they experienced a 5% decrease in applications as compared to the previous year.[3] Within the EU itself there are also significant regional variations. Over the past five years (2006-2010), France, Sweden and the UK have received the largest number of new asylum-seekers to Europe.[4] In 2010 France received the highest number of applications for asylum; followed by Germany, Sweden, Belgium and the UK. These five MSs accounted for more than two-thirds of the total number of asylum applications lodged in the EU-MSs in 2010.[5]

From the 1980s it became increasingly apparent that EU-MSs needed to cooperate on asylum. However, the development of a European asylum policy was incorporated into the broader category of immigration control, within the context of a border-free Europe. It has been noted that, 'Member States appeared to lose sight of the fundamental aspect

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[1] Guild, 2006, p.630.
[2] UNHCR, 'Asylum Levels and Trends in Industrialised Countries', 2010, p.3, available at http://www.unhcr.org/4d8c5b109.html (consulted on 21 June 2011). Note that 'Europe' consists of the 38 countries in Europe, including the 27 EU-MSs.
[3] Ibid., p.5.
[4] Ibid., p.9.
[5] Eurostat, 'Asylum applicants and first instance decisions on asylum applications in 2010', 5/2011, p.2, Table 1a, available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-11-005/EN/KS-QA-11-005-EN.PDF (consulted on 21 June 2011).

of protection and increasingly subjected refugees to the same restrictive trends they imposed on prospective migrants'.[6]

The Dublin II Regulation ('Dublin II'),[7] which took effect on 1 September 2003, was introduced as a short-term measure to establish the criteria and mechanisms for determining the MS responsible for examining an asylum application lodged in an EU-MS by a third-country national. An evaluation of Dublin II was carried out by the European Commission ('Commission') in 2007 to assess its application and a number of deficiencies were highlighted relating to its efficiency and the level of protection afforded to asylum-seekers[8] who are subject to the procedure.[9] As a result, a proposal to recast Dublin II was drawn up by the Commission in December 2008, amendments were added by the European Parliament ('EP') in May 2009 and it is currently awaiting the Council's first reading position.[10]

This paper will look in detail at the main weaknesses that have come to light in the application of Dublin II as a responsibility-sharing mechanism between MSs and the impact these have on the asylum-seeker's fundamental rights. The discussion considers the Commission's proposal to recast Dublin II, and critically analyses whether the proposed amendments conform to international human rights standards. In short, the question asked is whether the Commission's proposal to amend Dublin II sufficiently reflects MSs' international obligations to protect asylum-seekers' fundamental rights.

The question posed is relevant to the current discourse on the development of the EU's asylum *acquis* for three main reasons. Firstly, concerns voiced by critics of the Dublin

[6] Boccardi, 2002, p.33.
[7] Council Regulation (EC) No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1 (herewith referred to as 'Dublin II'). See Article 29 for its entry into force.
[8] The term 'asylum-seeker' will be used throughout this paper to describe those seeking asylum and other forms of subsidiary protection.
[9] COM (2007) 299 final, *Report from the Commission to the European Parliament and Council on the evaluation of the Dublin system*, 6 June 2007.
[10] COD/2008/0243, *International protection: Member State responsible for examining an application by a third-country national or a stateless person* (repeal. Regulation (EC) No 343/2003), Recast, 9 December 2008.

System,[11] including the United Nations Refugee Agency ('UNHCR'), have largely been ignored in the past when there arose the opportunity to overhaul the legislation in a more fundamental way. Therefore, this further opportunity to correct deficiencies is important to safeguard asylum-seekers' fundamental rights.

Secondly, the concerns with regard to the functioning of the Dublin System have become even more salient with recent events both in Europe and beyond. The judgment of the European Court of Human Rights ('ECtHR') in the case of *MSS v Belgium and Greece*[12] will be discussed with regard to the Court's findings on the working of the Dublin System. In particular, the effect that judgment has had on the overall credibility of the Dublin System as a functional, fair and efficient process which guarantees 'effective access to the procedures for determining refugee status'[13] is considered. As the UN High Commissioner for Refugees pointed out at the opening of the judicial year of the ECtHR, the recent judgment 'provides a vivid reminder of just how much still needs to be done, to achieve a truly common European asylum system, in full respect of human rights'.[14]

Finally, the recent influx of North African migrants and asylum-seekers to Italy and Malta have again highlighted concerns over the weaknesses inherent in the EU's Common European Asylum System ('CEAS') and the Dublin System as one component of the CEAS, caused in part by disparities between MSs in asylum procedures and standards of treatment. As the UN High Commissioner for Refugees commented, 'the disparities are caused by both gaps between law and practice as well as differing interpretations by Member States of their obligations'.[15] While some MSs are calling

[11] The 'Dublin System' comprises the current Dublin II Regulation (cfr. supra footnote 7) and Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1 (herewith referred to as the 'Eurodac Regulation').
[12] *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011.
[13] Dublin II, recital 4.
[14] UNHCR, António Guterres, 'United Nations High Commissioner for Refugees Remarks at the opening of the judicial year of the European Court of Human Rights Strasbourg', 28 January 2011, available at http://www.unhcr.org/refworld/docid/4d6377fe2.html (consulted on 21 June 2011).
[15] UNHCR, 'Remarks of United Nations High Commissioner for Refugees António Guterres at the Informal Meeting of EU Ministers of Justice and Home Affairs, Brussels', 15 July 2010m, available at http://www.unhcr.org/4c44034f9.html (consulted on 1 July 2011).

for a complete reform of the Dublin System, other MSs maintain that the proper functioning of the Dublin II Regulation is at the heart of any possible future CEAS.[16]

The research focuses on the Commission's proposal to amend Dublin II with reference to responses from some of the major stakeholders. Where the procedures in the Dublin System correspond to provisions in other legislative instruments in the EU asylum *acquis*, reference is made to those instruments. However, any detailed analysis of the other instruments in the EU asylum *acquis*, and the Commission's proposals to recast those instruments remains outside the scope of this thesis. A detailed discussion of the Dublin System within the national asylum systems of the MSs is also outside the scope of this thesis, although some reference is made to specific circumstances in MSs where particular fundamental rights have been breached.

In order to provide some context to the Dublin System, the development of the CEAS is discussed with reference to the various five-year programmes. In addition, a brief background is given of the other legislative instruments most relevant to the Dublin System: the Reception Conditions Directive ('RCD'), the Qualification Directive ('QD') and the Asylum Procedures Directive ('APD').

The Chapter on the protection of fundamental rights in European asylum law seeks to set out the international standards with respect to the fundamental rights discussed later in the paper. It also looks at regional standards laid down by the European Convention on Human Rights ('ECHR') and the jurisprudence of the European Court of Human Rights ('ECtHR') and the recent addition of the Charter of Fundamental Rights ('Charter') as a legally binding instrument for the MSs and institutions of the EU.

Further to laying out the EU asylum policy and legislative frameworks and the relevant instruments in refugee and human rights law, the discussion turns to the current deficiencies in Dublin II which provide a starting-point from which to analyse the

[16] Council of the EU, '3034th Council meeting Justice and Home Affairs Luxembourg', 7-8 October 2010, PRES/10/262, available at http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/10/262&format=HTML&aged=0&lg=en&guiLanguage=en (consulted on 25 June 2011). Southern MSs such as Greece, Cyprus and Malta are calling for reform of Dublin II and more solidarity.

Commission's proposal. The substantive analysis in Chapter 5 considers the Commission's proposal to recast Dublin II and in particular discusses whether the proposed changes conform to international human rights standards. In Chapter 6 there is additional discussion of the proposal to introduce a provision by which transfers to a MS may be suspended in certain situations. This provision seeks to encourage increased solidarity between MSs, yet it is reportedly the most contentious amendment in the Commission's proposal.

The conclusion seeks to draw together the issues addressed in the substantive analysis, and questions whether the Commission's proposal could go further in certain areas to ensure the protection of asylum-seekers' fundamental rights. In addition, reference is made to other recent developments which have occurred as part of the second phase of the CEAS and whether or not these indicate progress in achieving the objectives of the Stockholm Programme.

--------- Chapter 2 – Context ---------

1 The development of a Common European Asylum System

The Dublin System[17] was established against the background of the internal market first envisaged as an area without internal frontiers (referred to as the Schengen Area). The introduction of the Schengen Implementation Agreement and the Dublin Convention ('DC') established two almost identical systems for determining responsibility for asylum applications among MSs which were initially used to aid intergovernmental cooperation in asylum matters.[18] Whilst the Dublin System only addresses procedural matters, it was envisaged as a short-term measure in the first phase of the development of the CEAS, discussed briefly below.

1.1 The Treaty of Amsterdam

The entry into force of the Treaty of Amsterdam on 1 May 1999 conferred powers on the Community institutions to adopt measures concerning asylum and other forms of international protection.[19] This process of *communitarisation* meant that policies concerning visas, asylum, immigration and judicial cooperation in civil matters, which were previously intergovernmental in nature, became supranational.[20] Under Article 61(a) TEC some measures, including the DC, were given the role of 'flanking measures' to sit alongside the measures aimed at ensuring the free movement of persons outlined in the new Article 14 TEC. In addition, other measures in relation to asylum

[17] Cfr. supra footnote 11.
[18] The Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – 'Dublin Convention' [1997] OJ C 254/1, in force from 1 September 1997. The Dublin Convention replaced Articles 28-38 of 'The Schengen *acquis*', Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders', [2000] OJ L 239; Hailbronner & Thiery, 1997, p.961.
[19] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, [1997], OJ C 340, Article 2(15), which inserts Article 73k into the EC Treaty (renumbered as Articles 63(1) and (2) in the Treaty establishing the European Community (herewith referred to as 'TEC')).
[20] Sidorenko, 2007, p.20.

were to be adopted within five years of the entry into force of the Treaty of Amsterdam.[21] Article 63(1) TEC regulated the introduction of new measures in the asylum field in accordance with the Convention relating to the Status of Refugees (1951) ('Refugee Convention'), the 1967 Protocol 'and other relevant treaties'. The exhaustive list included 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States'.[22]

1.2 The Tampere Conclusions (1999)

The Tampere European Council, held in October 1999, outlined a five year programme for the creation of an area of freedom, security and justice ('AFSJ') in the EU, based on common minimum standards and the principle of mutual recognition of acts of States.[23] The language of the European Council took a more rights-based approach underlining at point 1 of the Tampere Milestones that, '…European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law'.[24] It further confirmed that 'freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens' and as such should not be denied to those 'whose circumstances lead them justifiably to seek access to our territory'.[25] The aim was to build an EU 'fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity'.[26] This rights-based approach was further illustrated by the agreement to set up a body to start work on drafting a Charter of

[21] Article 61(b) TEC.
[22] Article 63(1) TEC. Reference is made to the United Nations Convention relating to the Status of Refugees, 14 December 1950, 189 UNTS 150; and the Protocol relating to the Status of Refugees, 4 October 1967, 606 UNTS, 267 (herewith referred to as the 'Refugee Convention' and '1967 Protocol').
[23] Guild, 2006, p.640.
[24] *Presidency Conclusions, Tampere European Council*, 15 and 16 October 1999, p.1, available at http://www.europarl.europa.eu/summits/tam_en.htm (consulted on 21 June 2011).
[25] Ibid., p.1, para.3.
[26] Ibid., p.2, para.4.

fundamental rights,[27] and for the first time asylum policy was referred to as independent from immigration, albeit noting the close relationship between the two areas.[28]

The EU's 'absolute respect of the right to seek asylum' was emphasised, with reference to developing a CEAS based on 'the full and inclusive application of the Geneva Convention…[and] maintaining the principle of non-*refoulement*'.[29] The Presidency Conclusions endorsed the inclusion of, 'in the short term, a clear and workable determination of the State responsible for the examination of an asylum application', as well as the harmonisation of standards for asylum procedures, minimum conditions for the reception of asylum-seekers, and the approximation of rules for recognising refugee status.[30] It was envisaged that in the long-term, 'Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.[31]

Whilst the Tampere programme was ambitious, many of its objectives were not achieved by the legislative measures, in part due to the wide margin of discretion given to MSs. Concerns were raised about the low standard of safeguards in some of the legal instruments adopted which led to inequality in the protection offered to asylum-seekers. It was advocated that MSs should ensure that legislation and policies went beyond the minimum levels provided for in the EU instruments, so as to conform with the higher standards reflected in international law and best practice.[32]

1.3 The Hague Programme (2004)

The Hague Programme heralded the start of the second phase of the development of a common asylum policy, aimed at establishing a common procedure and uniform status

[27] Ibid., p.1.
[28] Ibid., p.2, para.10.
[29] Ibid., p.2, para.13.
[30] Ibid., p.2, para.14.
[31] Ibid., p.3, para.15.
[32] UNHCR, 'The European Union, Asylum and the International Refugee Protection Regime: UNHCR's Recommendations for the New Multiannual Programme in the Area of Freedom, Security and Justice', 1 September 2004, para.8, available at http://www.unhcr.org/refworld/docid/415c2d964.html (consulted on 21 June 2011).

for protected persons, 'based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation'. This would include the exchange of information, and the monitoring and further harmonisation of legislation between MSs.[33] The Programme reaffirmed the objective 'to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need'.[34] However, no explicit reference was made to the obligation to comply with the principle of non-*refoulement*,[35] noteworthy given that the Hague Programme was criticised for shifting the balance away from the rights-based approach envisaged at Tampere to one where many of the asylum policy measures proposed would in practice shift the responsibility for asylum-seekers to outside the EU. The concept of safe countries of origin, non-suspensive appeal rights, the joint-processing of applications both within and outside the EU, and a focus on return and readmission policies were some of the extra-territorial aspects of the Hague Programme, criticised on the basis that such policies would ultimately exclude those seeking international protection from accessing the right to seek asylum in the EU.[36]

1.4 The Stockholm Programme and the Lisbon Treaty (2010)

The Stockholm Programme seeks to 'ensure uniform status, high common standards of protection in the EU and a common asylum procedure, with mutual recognition as the long term goal', confirming that solidarity between MSs is essential to pursue this goal.[37] The Programme coincided with the entry into force of the Lisbon Treaty[38]

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[33] *Presidency Conclusions, Brussels European Council*, 4-5 November 2004, 14292/1/04 REV1, p.17, para.1.2.
[34] Ibid., p.12.
[35] Ibid., p.17, para.1.3. The principle of non-*refoulement* was expressly mentioned in the Tampere Conclusions.
[36] See for example, Balzacq & Carrera, 2005, pp.5-7; Guild, 2006, pp.645-647, 649; Sidorenko, 2007, pp.207-8.
[37] COM (2010) 171 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme*, 20 April 2010, p.7, para.6.

which has changed the legal basis of European asylum legislation and the role of the Court of Justice of the European Union ('CJEU') with regard to interpreting current asylum legislation. Article 67 TFEU states that 'the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.[39] The EU is tasked with framing 'a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'.[40] Article 78 TFEU confers an obligation on the EU to 'develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-*refoulement*', reaffirming that the policy must be in accordance with the Refugee Convention 'and other relevant treaties'.[41]

Article 78(2) TFEU highlights the enhanced role of the EP and the Council in adopting the measures outlined in that article in accordance with the ordinary legislative procedure. This means that the provisions listed, including those in relation to the 'criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection', now fall to be decided by qualified majority voting and the co-decision procedure, as opposed to unanimity.[42] The changes made to the structure of the AFSJ allow for a more efficient decision-making process with greater parliamentary (both European and national) control and scrutiny to improve democratic accountability.[43]

The full judicial control given to the CJEU over matters concerning the AFSJ is an important development which it is hoped will lead to an increase in the protection of the

[38]Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OJ C 306/01 (herewith referred to as the 'Lisbon Treaty').
[39] The Treaty on the Functioning of the European Union (Consolidated Version) [2008] OJ C 115/47, Article 67 (herewith referred to as 'TFEU'). All measures in the AFSJ fall under Title V TFEU.
[40] Article 67(2) TFEU. Article 80 TFEU reiterates that the policies on border checks, asylum and immigration 'shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.
[41] Article 78(1) TFEU.
[42] Article 78(2)(e) TFEU.
[43] Piris, 2010, p.201.

individual's rights in this area, and better control over the implementation and interpretation of EU legislation. The Lisbon Treaty has removed limitations on which national courts can make preliminary references to the CJEU so that any court or tribunal can now make a preliminary reference, not just the last court of resort.[44] In addition, the Commission or another MS may initiate infringement proceedings before the CJEU where a MS has failed to fulfil an obligation, such as failing to implement an EU directive.[45]

Finally, an essential player in the enhanced CEAS is the European Asylum Support Office ('EASO')[46] which is intended to improve cooperation between MSs by sharing knowledge and expertise in an effort to bring national practices in line with each other. It is hoped that increasing cooperation between MSs will help to achieve a greater degree of uniformity in the interpretation of existing EU legislation so as to achieve a 'level playing field' with equivalent conditions in all MSs.[47]

2 The European asylum *acquis*

The scope of this thesis considers one component of the legislative framework that comprises the CEAS, the Dublin II Regulation. However, a brief overview of the other legislative instruments referred to in Dublin II will be given, particularly with regard to provisions that overlap with the Dublin System. The legislation discussed below is under review as part of the second phase of developing the CEAS and where appropriate the latest proposals from the Commission will be discussed.[48]

[44] Article 267 TFEU. An urgent preliminary ruling procedure is also applicable to references concerning the AFSJ.
[45] Articles 258 and 259 TFEU.
[46] Established by Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, [2010] OJ L 132/11.
[47] Hailbronner, 2010, pp.6-7.
[48] COM (2007) 301 final, *Commission Green Paper on the future Common European Asylum System*, 6 June 2007, p.3.

2.1 The Dublin II Regulation (Council Regulation (EC) 343/2003)

2.1.1 An overview of Dublin II

The Dublin System was confirmed as 'a cornerstone in building the CEAS' by the Stockholm Programme.[49] As discussed in Section 1 of this chapter, the concept was first initiated in the 1980s when binding provisions on the responsibility of States for examining asylum applications were introduced by the Schengen Implementing Agreement and the DC. Dublin II came into force on 1 September 2003, to consolidate and improve the procedures already laid down by the DC.[50] The DC remained in force and continued to apply between Denmark and the MSs until Denmark agreed to participate in Dublin II and Eurodac in 2006.[51] In addition, similar agreements were signed with Iceland and Norway in 2006[52] and with Switzerland and Liechtenstein in 2008.[53]

The Dublin System is based on the mutual recognition that each MS is a 'safe third country'[54] with common asylum procedures, meaning an asylum-seeker should only be allowed to lodge one asylum application in the territory of the EU. Every State that applies Dublin II must be a signatory to the Refugee Convention, the ECHR and other human rights instruments. In particular, the principle of non-*refoulement* must be adhered to as it provides the basis for the presumption that all MSs are 'safe countries'.[55]

Dublin II is based on exclusivity and mutual trust, whereby the responsible MS (according to a list of hierarchical criteria) is obliged to accept responsibility for completing the examination of the asylum-seeker's claim, and for ensuring that the

[49] *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, [2010] OJ C 115/01, para.6.2.1.
[50] Dublin II, recital 10.
[51] Ibid., recitals 18-19; Council Decision 2006/188/EC [2006] OJ L 66.
[52] Council Decision 2006/167/EC [2006] OJ L 57/15.
[53] Council Decision 2008/147/EC [2008] OJ L 53/3; Council Decision 2009/487/EC [2009] OJ L 161/6.
[54] Hathaway, 2005, p.295. The notion of 'safe third country' is the determination that a State to which an asylum applicant may be returned, due to them having passed through that State en route to the country in which they are present, is 'safe' on the basis that the country is prepared to consider the applicant's refugee claim, and will not expose them to persecution, risk of torture or related ill-treatment or *refoulement*.
[55] Dublin II, recitals 2 and 12.

asylum-seeker leaves the territory of the MSs, should the decision on the application be negative. The principle of 'mutual trust' is based on the understanding that the standards of asylum law in each MS meet the minimum requirements to conform with international law, in particular the Refugee Convention and ECHR which all MSs are party to. As a result, MSs consider that they are in conformity with their own responsibilities under those Conventions, in particular the principle of non-*refoulement*.[56]

The criteria for determining responsibility,[57] are based on the presence of a family member with refugee status;[58] the granting or issuance of a residence permit, visa or entry permit (thereby linking EU asylum law to EU visa policy);[59] illegal entry;[60] or actual period of residence.[61] In addition, a MS can exercise its discretion to examine an asylum application, with reliance on either the 'sovereignty' or the 'humanitarian' clauses.[62]

Dublin II is dependent on the application of a centralised system for the storage and exchange of asylum-seekers' fingerprints (Eurodac) between MSs.[63] Eurodac forms the basis for a large number of the decisions with regard to which MS should take responsibility.[64] Detailed rules for the application of Dublin II are also outlined in a separate Regulation.[65] Detailed discussion of both these Regulations, is outside the scope of this thesis.

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[56] Hailbronner & Thiery, 1997, pp.964-5.
[57] Dublin II, Articles 5-14.
[58] Ibid., Article 7. See also: Article 6 in respect to unaccompanied minors whereby the family member must be 'legally present' in the MS.
[59] Ibid., Articles 9 and 11; Peers, 2011 (a), p.297.
[60] Ibid., Article 10.
[61] Ibid., Article 10(2).
[62] Ibid., Articles 3(2) and 15.
[63] Cfr. supra footnote 11.
[64] Dublin II, recitals 10 and 11 and Article 20(1)(b).
[65] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 222/3.

2.1.2 The objectives of Dublin II

The purpose of Dublin II was *interalia*, to provide asylum-seekers with effective access to the procedures for determining refugee status, to prevent the abuse of these procedures, in particular the lodging of multiple asylum applications, to determine responsibility in a timely and efficient way, and to correct inaccuracies detected in the operation of the previous DC.

The fundamental objectives of the Dublin System are to prevent the secondary movement of asylum-seekers within the EU, whilst ensuring they have effective access to procedures for determining refugee status as quickly and efficiently as possible. In particular the Dublin System aims to prevent two phenomena: (i) 'refugees in orbit', whereby asylum-seekers are passed from one MS to another, without any State taking responsibility for processing the claim. The asylum-seeker is effectively left in a state of limbo, without access to the asylum procedure of any one State; and (ii) 'asylum-shopping', whereby an asylum-seeker leaves one MS where a claim has been lodged (and it is either pending, or it has been refused) and seeks asylum in another MS in the hope that the second claim will be successful.

The recitals seek to establish 'a clear and workable method' for determining responsibility, 'based on objective, fair criteria both for the Member States and for the persons concerned'. In order to 'guarantee effective access' to asylum procedures, responsibility should be determined quickly so as to 'not compromise the objective of the rapid processing of asylum applications'.[66] The preservation of family unity is also an aim, 'in so far as this is compatible with the other objectives'[67] and MSs are supposed to derogate from the responsibility criteria where necessary, to bring family members together on humanitarian grounds.

[66] Dublin II, recitals 3, 4, and 5.
[67] Ibid., recital 7.

Dublin II aimed to 'close the loopholes and correct the inaccuracies detected in the Dublin Convention'.[68] Whilst the DC was hailed as 'the first text in international law which guarantees to asylum seekers that at least one State will process their asylum application, and that they will no longer be shuffled from country to country',[69] it was criticised for being neither a fair nor efficient system. Further, it was considered to have a potentially negative impact on MSs' obligations to adhere to the principle of non-*refoulement*, and to place pressure on 'border' EU-MSs who risked bearing the burden of the responsibility-sharing arrangements.[70] The Commission's own evaluation of the DC noted that there was a lack of uniformity between MSs in interpreting certain provisions and definitions, and different procedures between MSs led to an inconsistent understanding of what constituted a formal application of asylum. It was also noted that national courts considered that the DC did not create individual rights which the asylum-seeker may invoke, but that MSs were obliged to take into account the asylum-seeker's situation in particular cases where his/her fundamental rights were at issue and this could prolong and complicate the decision-making process.[71]

Therefore, Dublin II was established with the acknowledgment that MSs still had diverging systems with regard to determining the status of international protection and other procedural issues, but with an expectation that eventually, with the proposals to harmonise all legal frameworks and establish the CEAS, access to protection and the standards of protection would be equal across the EU.

2.2 The Directives on asylum

The right to asylum (as a procedural right) is reflected in the Reception Conditions Directive ('RCD'), the Qualification Directive ('QD'), and the Asylum Procedures

[68] COM (2001) 447 final, *Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 26 July 2001, p.3, para.2.1.
[69] Boccardi, 2002, pp. 41-42.
[70] Hurwitz, 1999, pp.646-677.
[71] SEC (2001) 756, *Commission Staff Working Paper: Evaluation of the Dublin Convention*, 13 June 2001, see in particular pp. 12-15.

Directive ('APD') which make up part of the EU asylum *acquis*.[72] The Directives lay down minimum standards to be implemented by the MSs, but do not prevent MSs from adopting or maintaining more favourable provisions. As with the Dublin System, it was hoped that the Directives would help to limit the secondary movements of asylum-seekers between MSs by harmonising standards.[73] To date, there have been numerous reports on inconsistent standards by which MSs are implementing these measures with the result that procedural standards and support and integration assistance offered to asylum-seekers varies widely between MSs.[74] This has undoubtedly encouraged asylum-seekers to move between MSs, thereby undermining the efficiency and objectives of the Dublin System.

2.2.1 *The Reception Conditions Directive (2003/9/EC)*

The RCD was introduced to lay down minimum standards for the reception of asylum-seekers that would 'normally suffice to ensure them a dignified standard of living and comparable living conditions' in all MSs.[75] The scope of the current Directive extends to all asylum-seekers, including those falling under the Dublin System, 'as long as they are allowed to remain on the territory [of the MS] as asylum seekers'.[76] The initial proposal from the Commission[77] to recast the Directive could not be agreed in the Council so a further proposal was initiated in June 2011 which aims to introduce 'clearer concepts and more simplified rules', whilst allowing MSs 'to address possible

[72] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ('Reception Conditions Directive'), [2003] OJ L 31/18; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('Qualification Directive'), [2004] OJ L 304/12; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ('Asylum Procedures Directive'), [2005] OJ L 326/13.
[73] Ibid. Directive 2003/9/EC, recital 8; Directive 2004/83/EC, recital 7; Directive 2005/85/EC, recital 6.
[74] For example: UNHCR, 'Asylum in the European Union. A Study of the Implementation of the Qualification Directive', November 2007, available at http://www.unhcr.org/refworld/docid/473050632.html (consulted on 27 June 2011).
[75] Directive 2003/9/EC, recital 7. The UK opted-in to the Directive (recital 19); the Directive does not apply to Ireland or Denmark (recitals 20 and 21).
[76] Ibid., Article 3(1).
[77] COM (2008) 815 final, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers* (Recast), 3 December 2008.

abuses in their reception systems'.[78] It should be noted that the new proposal seeks to set 'standards'[79] as opposed to 'minimum standards' although it makes clear that MSs can retain or introduce more favourable standards.[80] The proposal aims not only to facilitate the implementation of measures by making changes as cost-effective as possible, but to achieve high standards of treatment in line with fundamental rights, in particular with regard to detention, vulnerable persons and minors, all of which have particular relevance to the Dublin System.

There have been a number of reports in recent years which show serious inadequacies in the reception conditions in some MSs which fall short of the minimum standards envisaged by the current Directive and have led to concerns that asylum-seekers' human rights are being violated, in particular with regard to the 'right to dignity'[81] and Article 3 ECHR.[82] Whilst detailed discussion of the implementation of the Directive is outside the scope of the thesis, provisions relevant to the Dublin System will be discussed further.

2.2.2 The Qualification Directive (2004/83/EC)

The QD lays down minimum standards for the qualification of third-country nationals and stateless persons as refugees or beneficiaries of subsidiary protection within the EU and sets out the rights attached to each status. The main objective of the Directive is to ensure that common criteria is applied for identifying persons genuinely in need of international protection, and that a minimum level of benefits is available in all MSs.[83]

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[78] COM (2011) 320 final, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers* (Recast), 1 June 2011, p.3.
[79] The wording reflects the legal basis in Article 78(2)(f) TFEU.
[80] COM (2011) 320 final, Article 4.
[81] The 'right to dignity' is enshrined in *interalia* the Universal Declaration of Human Rights (1948), Article 1, the International Covenant on Civil and Political Rights (1966), second paragraph of the Preamble, and Article 1 of the EU Charter of Fundamental Rights.
[82] See for example: Amnesty International, 'The Dublin II Trap. Transfers of asylum-seekers to Greece', Index: EUR 25/001/2010, 22 March 2010, pp.36-38; Juss-Buss and SFH/OSAR, 'Asylum procedure and reception conditions in Italy', May 2011, pp.4-7; *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, paras.88-94, 160, 167-172.
[83] Directive 2004/83/EC, recital 6. The Directive does not apply to Denmark (see recital 40). The UK and Ireland opted-in to the Directive (see recitals 38 and 39).

The scope of the definition of refugee is slightly narrower than as reflected by Article 1A(2) Refugee Convention as it is limited to a 'third-country national' or 'stateless person', as opposed to 'any person'.[84] This confirms that the Directive (and EU asylum law generally) is not considered as applicable to EU nationals.[85] However, the Directive goes further in other respects by introducing the notion of 'subsidiary protection' as a 'complementary and additional' status, if the requirements for refugee status are not fulfilled.[86] The definition of international protection used in the Directive widens the scope of international protection beyond that envisaged by the Refugee Convention to include persons protected by Article 3 ECHR, Article 3 of the UN Convention Against Torture ('CAT')[87] and other international law provisions.[88] However, despite attempts at harmonisation, there remain significantly divergent interpretations on key concepts, resulting in varied rates of recognition of asylum claims between MSs.

The Commission's proposal to recast the Directive aims to uphold the principle of non-discrimination by removing the limitations on the rights of beneficiaries of subsidiary protection.[89] It intends to widen the definition of family member to bring it in line with the proposed changes to Dublin II and the RCD and to comply with the Convention on the Rights of the Child ('CRC').[90] The proposal attempts to close protection gaps and divergent recognition patterns in MSs, so as to ensure equal access to protection and

[84] Ibid., Article 2(c).
[85] Ibid., recital 13, with reference to the Protocol on asylum for nationals of Member States of the European Union, annexed to the Treaty of Amsterdam, [1997] OJ C 340.
[86] Ibid., recital 24 and Article 2(e). For a person to be eligible for subsidiary protection, there need to be substantial grounds for believing that he/she would face, 'a real risk of suffering serious harm…and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'. Article 15 defines 'serious harm'.
[87] European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), 4 November 1950, ETS No. 5, Article 3; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), 10 December 1984, 1465 UNTS 85, Article 3. See Chapter 3 for further discussion of these instruments.
[88] Battjes, 2002, p.178. Note that the scope of the RCD and APD have been brought in line with the QD to cover third-country nationals and stateless persons seeking international protection (i.e. refugee status or subsidiary protection).
[89] COM (2009) 551, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, p.8. Denmark is not bound by the proposed Directive (recital 40).
[90] Ibid., p.5.

justice.[91] It notes the urgency of creating a 'level playing field' so that the Dublin System can operate in a 'fair and efficient manner'.[92]

2.2.3 The Asylum Procedures Directive (2005/85/EC)

The APD aimed to set minimum procedural standards for the granting and withdrawing of refugee status by MSs, including accelerated and border procedures, inadmissible applications and access to an effective remedy.[93] The Commission's proposal to recast the Directive seeks to 'ensure higher and more coherent standards on procedures' for the grant and withdrawal of international protection.[94] However, due to a lack of consensus among MSs, the Commission recently modified the proposal in order to make implementation easier and more cost-effective for MSs.[95] The new proposal sets 'common procedures' instead of 'minimum standards' which reflects the wording in the Lisbon Treaty[96] but still allows MSs to maintain or implement 'more favourable standards'.[97]

The Directive's scope does not extend to procedures dealt with by the Dublin System. However, asylum-seekers in the Dublin System should 'enjoy access to the basic principles and guarantees' in the APD which include, access to the asylum procedure and legal representation, the provision of information, access to an effective remedy, guarantees for the treatment of unaccompanied minors and detention.[98]

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[91] Ibid., p.10, para.3.5.
[92] Ibid., p.10, para.3.3.
[93] Directive 2005/85/EC, recital 5. The Directive does not apply to Denmark (recital 34). The UK and Ireland opted-in to the Directive (see recitals 32 and 33).
[94] COM (2009) 554 final, *Commission Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* (Recast), 21 October 2009, p.4, para.3.1.
[95] COM (2011) 319 final, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status* (Recast), 1 June 2011, p.3, para.2. The UK and Ireland have opted-out of the proposal to amend the Directive but remain bound by Directive 2005/85/EC (see recital 45). The amended Directive will not apply to Denmark (see recital 46).
[96] Article 78(2)(d) TFEU.
[97] COM (2011) 319 final, Article 5.
[98] Ibid., recitals 41 and 42 and Article 4(2)(a). See Chapter II of the recast Directive for the 'Basic Principles and Guarantees'.

---- Chapter 3 – The protection of fundamental rights in European asylum law ----

1 Sources of fundamental rights law

Within the EU asylum *acquis*, international asylum and human rights law has an effect in various ways. EU asylum measures must be 'in accordance' with the Refugee Convention and 'other relevant treaties',[99] and international treaties to which the MSs are parties can serve as a basis for EU law principles. Secondary EU legislation may refer to instruments of asylum law as a direct standard of decision[100] and the Charter must be interpreted in line with international asylum and human rights law.[101] MSs have a responsibility to implement their treaty obligations in good faith;[102] where conflicts arise between EU law and international asylum or human rights law, EU law should be read in such a way as to reconcile it with international law.[103] If this is not possible, then Article 351 TFEU gives precedence to international law.[104]

Whilst national law is outside the scope of this thesis, the fundamental rights relevant to the Dublin System will be discussed below with reference to the introduction of the Charter as a legally binding instrument and the standards of protection as enshrined in the international and regional instruments.

2 The EU Charter of Fundamental Rights

The Stockholm Programme confirms that 'the protection of the rights enshrined in the Charter of Fundamental Rights, which should become the compass for all EU law and

[99] Article 78 TFEU.
[100] See for example, Dublin II, Article 3(3).
[101] Charter of Fundamental Rights of the European Union (referred to as the 'Charter') [2010] OJ C 83/02, recital 5 and Article 53; see also, Battjes, 2006, pp. 108-118.
[102] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Articles 26 and 31. Article 31 states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.
[103] Ibid., Article 30(2) states: 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.'.
[104] Article 351 TFEU.

policies, needs to be given full effect and its rights made tangible and effective'.[105] Since the Lisbon Treaty entered into force, the Charter is legally binding and has 'the same legal value as the Treaties'.[106] The Lisbon Treaty confirms that fundamental rights as guaranteed under the ECHR and constitutional traditions of the MSs are 'general principles of Union law'.[107]

The rights within the Charter are addressed to the EU institutions and legislation it adopts, including the implementation of that legislation, so that it is only legally binding on MSs when they are implementing EU law. Whilst there may not be a significant difference in the position vis-a-vis respecting fundamental rights and the rule of law to the position before the introduction of the Lisbon Treaty, some academics have suggested that the applicable standard of human rights protection might be different according to whether a MS is implementing EU law or national law, and that this could affect legal certainty.[108]

The more pertinent question is how the CJEU will interpret the rights, freedoms and principles in the Charter, to conform to the level of protection guaranteed by corresponding rights in the ECHR. Article 52 of the Charter states that rights corresponding to those guaranteed by the ECHR should be given the same meaning, but that more extensive protection may also be provided.[109] More detail on the interpretation to be given to Article 52 is given in the Explanations relating to the Charter ('Explanations') which confirm that 'the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments [ECHR and the Protocols]', but also by the case-law of the ECtHR and the CJEU.[110] This suggests that the EU and CJEU should also be bound by the minimum standards as have been established and evolved in the case-law of the ECtHR, including in the context of

[105] COM (2010) 171 final, p.3, para.2.
[106] Treaty on European Union (Consolidated Version) (herewith referred to as 'TEU'), [2010] OJ C83/01, Article 6(1).
[107] Article 6(2) TEU.
[108] Van den Berghe, 2010, p.146.
[109] Article 52(3) Charter.
[110] Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 (herewith referred to as the'Explanations').

positive obligations.[111] However, it remains to be seen how the CJEU will interpret the Charter where there is no corresponding right in the ECHR or case-law from the ECtHR, or where there are conflicting judgments between the ECtHR and CJEU.

3 Protection standards in international and regional instruments

3.1 Right to asylum

The right to 'seek and to enjoy…asylum from persecution' is enshrined in Article 14 of the Universal Declaration of Human Rights ('UDHR').[112] Whilst not a legally binding instrument, the UDHR is a universally accepted set of values, the majority of which have been implemented in conventions which are binding on the contracting parties. It is widely accepted, and with reference to the drafting history of the UDHR, that Article 14 refers to a procedural right to an asylum process and not to a substantial right to *be granted* asylum. In other words, States are obliged to allow access to refugee status determination but are not obliged to grant asylum.[113] Therefore, measures which have the effect of blocking access to the asylum procedure may violate the principle of good faith as well as a State's obligations under international human rights and asylum law.

The Charter specifically refers to the 'right to asylum', to be guaranteed 'with due respect for the rules of the Geneva Convention' (Refugee Convention), and based on Article 78 TFEU.[114] Article 18 incorporates both the provisions of the Refugee Convention and the procedural safeguards and minimum standards as contained in the relevant Directives of the EU asylum *acquis*.[115] Whilst the reference to a 'right to

[111] Heringa and Verhey, 2001, p.17.
[112] Universal Declaration of Human Rights Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948, Article 14 (herewith referred to as 'UDHR'). The meaning of 'persecution' is as defined in Article 1A of the Refugee Convention, and if established leads to the granting of refugee status.
[113] Gammeltoft-Hansen & Gammeltoft-Hansen, 2008, p.446.
[114] Article 18 Charter; see also the Explanations (cfr. supra footnote 110).
[115] The RCD, QD and APD (cfr. supra footnote 72).

asylum' could suggest a more expansive interpretation, it is not intended that the Charter elaborates or amends existing rights already recognised under EU law.[116]

Article 18 of the Charter when read together with Article 78 TFEU, confirms that the right to asylum is not extended to a substantive right but that EU policy will develop 'with a view to offering *appropriate status* to any third-country national requiring international protection' (emphasis added).[117] Therefore, the right as enshrined in the Charter, allows some discretion to MSs to consider applicants for subsidiary protection or temporary protection if they do not meet the requirements for refugee status, thereby giving the right a broader scope than under the UDHR.[118] It also does not place any obligation on a MS to consider an application for asylum made by a national of another EU-MS, and any such application may only be declared admissible and given consideration in very limited circumstances.[119]

3.2 Right to non-*refoulement*

While States may not be obliged to grant asylum, international law expressly prohibits '*refoulement*', the sending back of an alien to a place where he/she is at risk of human rights violations.[120] The principle of 'non-*refoulement*' not only covers those who have been granted refugee status, but anyone who enters a State's territory and claims asylum. Therefore, it provides a procedural safeguard by placing an obligation on a State to consider an application for asylum, at least so far as to ensure that it is not sending an individual back to face persecution or other human rights violations.[121] In addition to the Refugee Convention, the principle of 'non-*refoulement*' is embodied in the UN Convention against Torture ('CAT').[122] It has also been implied in Article 7 of

[116] Article 51 Charter.
[117] Article 78(1) TFEU.
[118] Article 14 UDHR refers to 'asylum from persecution' which suggests only as defined by Article 1A of the Refugee Convention. See the earlier discussion on the scope of the QD, Chapter 2, 2.2.2.
[119] Cfr. supra footnote 85.
[120] Article 33 Refugee Convention.
[121] Gammeltoft-Hansen, 2008, p.446.
[122] Article 3 CAT.

the International Covenant on Civil and Political Rights ('ICCPR'),[123] when read together with Article 2(1) ICCPR, to include a duty on a State not to remove a person, 'where there are substantial grounds for believing that there is a real risk of irreparable harm' as contemplated in Article 7, either in the country to which the individual is removed directly, or in any country where they may be subsequently removed.[124] In addition, the principle is generally accepted to constitute a rule of customary international law, or *jus cogens*.[125]

The principle of non-*refoulement* has been recognised by the ECtHR by reading it in to MSs' positive obligations under the ECHR, namely in respect of preventing breaches of the absolute rights enshrined in Articles 2 and 3 ECHR.[126] The jurisprudence of the ECtHR has effectively widened the scope of the principle from its meaning in Article 33 Refugee Convention - there is no need to show that there is a well-founded fear of persecution nor reasons for that persecution, but solely that there is a real risk of exposure to the ill-treatment envisaged in Article 3 ECHR.[127] The ECtHR has confirmed that in view of the absolute character of Article 3, an 'examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one'.[128]

In addition, ECtHR case-law confirms that as the protection offered by Article 3 ECHR is absolute, removal should be prevented irrespective of the individual's conduct.[129] This allows a higher level of protection to the individual than that afforded by the

[123] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Articles 2(1) and 7 (herewith referred to as 'ICCPR').
[124] UN Human Rights Committee, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, 26 May 2004, para.12; See, Goodwin-Gill and McAdam, 2007, pp.208-9 for a more detailed discussion.
[125] Goodwin-Gill and McAdam, 2007, p.248; Peers, 2011 (a), p.317.
[126] Article 2 ECHR ('right to life'); Article 3 ECHR ('prohibition of torture').
[127] *Vilvarajah and Others v United Kingdom*, no. 13163/87, Series A 215, para.103; *Salah Sheekh v the Netherlands*, no. 1948/04, (Third Section), 11 January 2007, para.135. These two decisions also confirmed that the right to political asylum is not contained in either the ECHR or its Protocols.
[128] *Vilvarajah and Others v United Kingdom*, no. 13163/87, Series A 215, para.108.
[129] *Chahal v the United Kingdom*, no. 22414/93, Reports 1996-V, para.80; *Saadi v Italy*, no. 37201/06, 28 February 2008, paras.138-142.

Refugee Convention which permits the expulsion of a refugee if he is regarded as a 'danger to the security of the country in which he is'.[130]

Article 4 of the Charter prohibits torture and inhuman or degrading treatment and punishment and 'has the same meaning and the same scope as the ECHR Article'.[131] Article 19 of the Charter provides additional protection in the event of removal, expulsion or extradition, prohibiting such removal etc. 'where there is a serious risk' that the individual 'would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.[132] The Explanations confirm that this additional provision is intended to incorporate the relevant ECtHR case-law regarding Article 3 ECHR and should therefore be interpreted in line with that case-law.[133]

3.3 Right to liberty and freedom of movement

Article 9 of the Refugee Convention permits a State to take 'provisional measures' 'pending a determination by the Contracting State that the person is in fact a refugee and that the continuance of such measures is necessary…in the interests of national security'.[134] Whilst detention is not explicitly mentioned in Article 9, it is implied as a 'provisional measure'.[135] In addition, it can be inferred from Article 31 Refugee Convention that States are not allowed to detain refugees purely on account of 'their illegal entry or presence', unless they fail to present themselves to the authorities or fail to make a claim for asylum. Article 31(2) also prohibits States from restricting the free movement of refugees unless this is 'necessary' in which case any restriction can only be applied for a limited period.[136] The Refugee Convention therefore offers limited

[130] Articles 32 and 33(2) Refugee Convention.
[131] Explanations (cfr. supra footnote 110).
[132] Article 19(2) Charter.
[133] Explanations (cfr. supra footnote 110). Reference is made to: *Soering v UK*, no. 14038/88, Series A 161; *Ahmed v Austria*, no. 25964/94, Reports 1996-VI.
[134] Article 9 Refugee Convention.
[135] Goodwin-Gill and McAdam, 2007, p.462.
[136] Article 31 Refugee Convention. Article 31(2) states: 'such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country'.

protection against detention - it does not explicitly limit the duration or place any obligations on the State to review the legality of the detention.

International and regional human rights instruments provide additional protection against arbitrary detention, and restrictions on freedom of movement, although not all deprivations of liberty will constitute a violation of a State's obligations.[137] The UN Human Rights Committee ('HRC') has held in its case-law that a person who has duly presented an application for asylum is considered to be 'lawfully within the territory'.[138] The HRC has also affirmed that 'arbitrary' must be given a broad interpretation 'to include elements of inappropriateness, injustice and lack of predicability'.[139]

Article 5 ECHR outlines a more restrictive approach to detention as it sets out an exhaustive list of grounds on which detention may be justified. The ground most relevant to asylum-seekers is at sub-paragraph (1)(f) 'the lawful… detention of a person to prevent his *effecting an unauthorised entry* into the country or of a person against whom *action is being taken with a view to deportation or extradition*'. The ECtHR considered the interpretation of what constitutes lawful detention to prevent someone *effecting unauthorised entry* in the case of *Saadi v United Kingdom.*[140] Despite considering case-law of the HRC,[141] UN documents and oral argument from the UNHCR and various Non-Governmental Organisations ('NGO'), the majority of the Grand Chamber failed to make any distinction between asylum-seekers who had made a claim to the appropriate authorities and illegal immigrants. As such, the ECtHR concluded that Article 5(1)(f) could be a justifiable ground for detaining an asylum-seeker pending determination of his claim, on the basis that the State has not "authorised" entry, and as long as the detention is not arbitrary.[142]

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[137] Articles 3, 9 and 13 UDHR; Article 9 and 12 ICCPR; Article 5 and Article 2 of Protocol No. 4 ECHR; Article 6 of the Charter.
[138] *Celepli v Sweden*, 18 July 1994, CCPR/C/51/D/456/1991, para.9.2.
[139] *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (15 August 1990), para.5.8 with reference to Article 9(1) ICCPR.
[140] *Saadi v United Kingdom* [GC], no. 13229/03, ECHR 2008.
[141] For example: *A v Australia*, no. 560/1993, CCPR/C/59/D/560/1993 (30 April 1997); *C v Australia*, no. 900/ 1999, CCPR/C/76/D/900/1999 (28 October 2002).
[142] *Saadi v the United Kingdom* [GC], no. 13229/03, paras.65-66.

The Charter protects the right to liberty and security in Article 6, which corresponds to Article 5 ECHR. According to the Explanations, the limitations which may be imposed on this right 'may not exceed those permitted by the ECHR' and these limitations are specifically quoted in the Explanations.[143]

With reference to the detention of children, the CRC acts as a *lex specialis* and imposes a stricter test, with a general prohibition on the detention of children, unless used as 'a measure of last resort and for the shortest appropriate period of time'.[144] In addition, there are obligations to take account of the needs of the child according to his / her age; to separate children from adults unless not in the child's best interests; and to provide 'prompt access to legal and other appropriate assistance' including the right to challenge the detention before a court.[145]

3.4 Right to judicial remedy

International conventions offer less guidance on what judicial procedures should be provided in order to ensure that asylum-seekers have access to an effective remedy, in particular to protect against *refoulement*. The Refugee Convention mentions in Article 32(2) that a recognised refugee threatened with expulsion 'shall be allowed to submit evidence…and to appeal and be represented'. The only other relevant international treaty which mentions an obligation to provide a right to appeal in relation to the rights enshrined in it is the ICCPR.[146] It should be noted that although Article 16 of the Refugee Convention provides that 'a refugee shall have free access to courts of law on the territory of all Contracting Parties' and shall enjoy the same access to legal assistance as nationals, the reference to 'habitual residence' suggests that this provision

[143] Explanations (cfr. supra footnote 110).
[144] United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Article 37(b) (herewith referred to as 'CRC').
[145] Article 37(c) and (d) CRC.
[146] Article 2(3) ICCPR, with reference to Article 7 ICCPR. Article 3 CAT remains silent about any obligation on the State to give a right of appeal, however the UN Committee against Torture derived the right to an effective remedy in respect of Article 3 CAT in *Agiza v Sweden*, nr. 233/2003, UN Doc. CAT/C/34/D/233/2003 (20 May 2005). For commentary, see Reneman, 2010, p.422.

is only relevant to those people who have already been granted refugee status and does not extend to asylum-seekers.[147]

In terms of regional protection, asylum-seekers are unable to rely on the right to a fair trial enshrined in Article 6 ECHR as it has been held to only concern procedural rights in relation to the determination of civil rights or criminal responsibility.[148] Therefore, Article 13 ECHR is the only provision which asylum-seekers can use to seek an effective remedy in relation to the asylum determination procedure, but it can only be used in conjunction with an alleged violation of another right.[149] Most asylum cases before the ECtHR have considered Article 13 in conjunction with an alleged claim that expulsion of a failed asylum-seeker will lead to either a violation of Article 2 or Article 3 ECHR. In order to be eligible, the claim must be arguable - the violation of the Convention right does not need to have been established. In addition, where an Article 3 claim has been raised the ECtHR has held that 'an effective remedy under Article 13 requires independent and rigorous scrutiny…and the possibility of suspending the implementation of the measure impugned'.[150]

Article 47 of the Charter refers to the 'right to an effective remedy and to a fair trial', and essentially combines the criteria of Articles 6 and 13 ECHR.[151] However, the Charter extends the scope of Article 13 ECHR by guaranteeing the right to an effective remedy before a court, as opposed to 'a national authority'.[152] In relation to the paragraph corresponding to Article 6(1) ECHR, the Explanations confirm that 'in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations'.[153] However, it remains to be seen how the rights under Article 47 of the Charter will be interpreted in line with the ECHR in cases where rights and freedoms concerning EU asylum law are concerned, particularly bearing in mind that Article

[147] Article 16(1) and (2) Refugee Convention.
[148] *Maaouia v France* [GC], no.39652/98, ECHR 2000 X, para.40.
[149] Staffans, 2010, pp.275-276.
[150] *Jabari v Turkey*, no. 40035/98, ECHR 369, para.50; *Chahal v United Kingdom*, no. 22414/93, Reports 1996-V, para.151.
[151] Article 47 Charter.
[152] Explanations (cfr. supra footnote 110).
[153] Ibid.

52(3) is intended to ensure 'the necessary consistency between the Charter and the ECHR'.[154]

Whether EU law provides for a right to interim protection[155] in asylum cases and if so, whether protection would be broader than under Article 13 ECHR is a question analysed by Reneman in an article on the APD, but it remains to be considered by the CJEU.[156] Although EU law may leave discretion to MSs, it is accepted case-law that this does not allow them to exercise provisions in a manner contrary to the general principles of EU law.[157] It is noted that provisions on effective remedy in EU asylum law should be interpreted in light of the EU principle of effectiveness[158] as well as Article 47 of the Charter.[159] Reneman argues that whilst the CJEU has allowed the expulsion of EU nationals to another MS before judgment on their appeal has been given,[160] in asylum cases the CJEU would have to follow the clear standards laid down by the ECtHR and other international bodies that where irreparable harm may be done, automatic suspensive effect must be granted. Therefore, interim protection against expulsion would have to be granted in all asylum cases, irrespective of their arguability and by doing so EU law would offer broader protection than international human rights law.[161]

3.5 Right to family life

The right to family life is recognised by Article 23 ICCPR and Article 8 ECHR. Article 8 ECHR is a qualified right, so it can be balanced against certain 'legitimate' State aims,

[154] Ibid.
[155] Interim protection includes whether an appeal should have suspensive effect and the ability to make an application for interim relief.
[156] See Reneman, 2010, pp.407-434, for a detailed analysis of this question in relation to the APD.
[157] Ibid., p.414 with reference to Case C-540/03, *Parliament v Council* [2006] ECR I-5769, para.70.
[158] Ibid., p.415. The principle of effectiveness means that national procedures must not render the exercise of fundamental rights 'practically impossible or excessively difficult'.
[159] Ibid., p.408.
[160] Case C-136/03, *Dörr and Ünal* [2005] ECR I-4759.
[161] Reneman, 2010, p.433.

including the State's right to control the entry, residence and removal of aliens.[162] Whilst a full explanation of how Article 8 has been interpreted by the ECtHR in asylum cases remains outside the scope of this thesis, whether or not interference is justified under Article 8 requires a balancing act between the interests of the State and the extent of the interference on the individual's family or private life. Article 7 of the Charter is intended to have the same scope as Article 8 ECHR, including the limitations that may be legitimately imposed on the right.[163]

3.6 Rights of the child

The rights of children are relevant as they form a vulnerable group among asylum-seekers, and more-so when they are unaccompanied. Article 3 of the UN Convention on the Rights of the Child ('CRC') provides that in all actions concerning children 'the best interests of the child shall be a primary consideration'.[164] The provision is binding on all contracting parties to the CRC and cannot be made the subject of a reservation.[165] The rights stipulated in the CRC must be available to all children, 'irrespective of their nationality, immigration status or statelessness' and States are obliged to ensure that the provisions and principles 'are fully reflected and given legal effect in relevant domestic legislation'.[166]

Article 12 CRC obliges States to allow children the right to express their views freely, including in judicial or administrative proceedings (directly or via a legal representative) and Article 13 CRC refers to the right to freedom of expression.[167] States must also ensure the confidentiality of information on children, in line with the child's right to privacy.[168] Article 22 CRC refers specifically to children seeking refugee status, either with their parents or unaccompanied, obligating States to 'take

[162] *Abdulaziz, Cabales and Balkandali v United Kingdom*, nos. 9214/80, 9473/81, 9474/80, 7 EHRR 471, para.67.
[163] Explanations (cfr. supra footnote 110).
[164] Article 3 CRC.
[165] Goodwin-Gill and McAdam, 2007, p.323.
[166] UN Committee on the Rights of the Child, General Comment No.6 (2005), CRC/GC/2005/6, 1 September 2005, paras.12 and 14.
[167] Articles 12 and 13 CRC; Article 13 CRC includes 'freedom to seek, receive and impart information'.
[168] Article 16 CRC; CRC/GC/2005/6, 1 September 2005, paras.29-30.

appropriate measures' to ensure that children, either seeking asylum or once granted refugee status, receive 'appropriate protection and humanitarian assistance', with reference to the need to comply with 'other international human rights or humanitarian instruments. The provision also emphasises the obligation on the State to cooperate with international organisations 'to protect and assist' children and to trace family.[169]

The ECHR does not provide any specific protection to children, but Articles 3 and 8 are likely to be relevant in relation to unaccompanied minors and age and vulnerability would need to be taken into account when assessing whether the right protected has been violated. In addition, Article 53 ECHR makes it clear that none of the rights in the ECHR should be interpreted so as to limit or derogate rights construed in other treaties, such as the CRC.[170]

The Charter does expressly safeguard the rights of the child and clarifies in the Explanations that the article is based on corresponding articles in the CRC, 'particularly Articles 3, 9, 12 and 13' CRC.[171]

3.7 Rights of other vulnerable persons

The UNHCR recognises that women and girls form another vulnerable group during refugee movements, particularly through their targeting as victims of rape, abduction or trafficking.[172] The protection of women from discrimination is recognised in the ICCPR[173] and in the UN Convention on the Elimination of All Forms of Discrimination against Women.[174] While neither of these instruments explicitly refers to women as asylum-seekers or refugees, Parties to the Conventions must bear in mind the provisions in legislation and procedures concerning asylum. The ECHR does not explicitly recognise the rights of women as separate from other fundamental rights but non-

[169] Article 22 CRC.
[170] Article 53 ECHR.
[171] Article 24 Charter; Explanation (cfr. supra footnote 110).
[172] Goodwin-Gill and McAdam, 2007, p.473.
[173] For example, Articles 2 and 26 ICCPR.
[174] United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 UNTS 13. See Article 2.

discrimination is recognised, although it is not a free-standing right.[175] The Charter does not explicitly recognise the rights of women as separate from other fundamental rights but non-discrimination and equality between men and women are recognised.[176]

[175] Article 14, ECHR.
[176] Articles 21 and 23 Charter.

--------- Chapter 4 – Deficiencies in the Dublin II Regulation ---------

Deficiencies in the practical application of Dublin II have had a negative impact on the protection afforded to asylum-seekers who fall to be considered under Dublin II, leading to serious implications for the protection of their fundamental rights. In December 2008, the Commission conducted an Impact Assessment[177] to accompany its proposal to recast Dublin II in which it outlined a number of flaws in the current Dublin System with regard to its efficiency, burden-sharing capabilities and level of protection offered to asylum-seekers. The paper followed a period of consultation with numerous stakeholders including the UNHCR, MSs, the Committee of the Regions, the Economic and Social Committee, academic institutions and NGOs.

1 The scope of the Dublin II Regulation

Dublin II defines an 'application for asylum' as 'a request for international protection from a Member State, under the Geneva Convention' (Refugee Convention), made by a third-country national.[178] The scope of Dublin II is therefore restricted to applications for refugee status under the Refugee Convention and the 1967 Protocol whereby an asylum-seeker has to demonstrate that he/she has a well-founded fear of persecution according to the criteria in Article 1A Refugee Convention.[179]

2 Legal safeguards for asylum-seekers falling under the Dublin System

2.1 Information on procedures

The Commission's Impact Assessment highlighted gaps in the information that MSs provide to asylum-seekers on the Dublin System, in particular on the procedure, time-

[177] SEC (2008) 2962, *Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council (recast), Impact Assessment*, 3 December 2008.
[178] Dublin II, Article 2(c).
[179] Article 1A(2) Refugee Convention; Goodwin-Gill and McAdam, 2007, p.37 sets out the four elemental characteristics that the Refugee Convention requires a refugee to show.

limits and asylum-seekers' rights.[180] The wording of Article 3(4) of Dublin II is very vague and although it obliges MSs to provide certain information, it allows a wide discretion to MSs on how detailed that information should be and when and how it should be disseminated.[181]

The UNHCR's findings in 2006 showed that whilst the majority of MSs provide written information on Dublin II, some provide no information at all, or only provide it verbally.[182] In addition, the quality of the information provided and the languages in which the information is translated varies widely between MSs.[183] A more recent study carried out by the Fundamental Rights Agency ('FRA') found that about half of the EU-MSs include information on Dublin II within the general information on asylum procedures, but only six MSs have developed specific leaflets on the Dublin II process.[184] The Report also found that asylum-seekers in some MSs had difficulties accessing information on the progress of their particular application in the procedure, including when they would be transferred to the other MS.[185]

The lack of clear information on all stages of the Dublin System, places the asylum-seeker in a vulnerable position, without adequate understanding of the procedures being applied, the implications on their claim for asylum, and the rights that they can exercise if they want to challenge a decision. In FRA's report, some asylum-seekers pointed out that if more information was available in the first country of arrival on the impact of the

[180] SEC (2008) 2962, p.16.
[181] Dublin II, Article 3(4): 'The asylum-seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects'.
[182] UNHCR, 'The Dublin II Regulation. A UNHCR Discussion Paper', April 2006, p.13, available at http://www.unhcr.org/refworld/docid/4445fe344.html (consulted on 21 June 2011). For example, Cyprus, Lithuania, Luxembourg, Portugal and Spain.
[183] Ibid., pp.13-15. For example, in France the information was only provided in 3 languages whereas the Irish leaflet was provided in 26 languages.
[184] Fundamental Rights Agency ('FRA'), 'The duty to inform applicants about the asylum procedures: The asylum-seeker perspective', Thematic Report - September 2010, p.38, available at http://www.fra.europa.eu/fraWebsite/attachments/asylum-access-info-report-092010_en.pdf (consulted on 21 June 2011). The MSs providing specific information on Dublin II are: Austria, the Czech Republic, Germany, the Netherlands, Poland and Romania.
[185] Ibid., p.38. Asylum-seekers in Belgium, Bulgaria, France, Germany, Hungary and Ireland faced difficulties accessing information.

Dublin System on their asylum application, it may dissuade them from moving to another MS, particularly if they know that they are likely to be returned in any event.[186]

This lack of information and transparency in the Dublin System, has led civil society organisations to set up projects to fill the gap in protection. One such project, 'The Dublin Transnational Project'[187] aims to improve NGOs' capacity to provide information and assistance through the dissemination of information booklets on national asylum systems, and by conducting individual analyses of asylum-seekers' needs to avoid any interruption in care and support.[188] Information on the legal, social or medical situation of the asylum-seeker can be passed on (at the consent of the individual) to the collaborating NGO in the receiving MS, so that on arrival the NGO can ensure that the person continues to receive the necessary support and can access the asylum procedure as quickly as possible.[189] Whilst there have been some problems accessing asylum-seekers in detention, overall the project has been a success, providing much-needed support to asylum-seekers and improving their understanding of the operation of the Dublin System in the MSs covered by the Project.[190]

2.2 Right of appeal and the denial of suspensive effect of appeal

Dublin II does not specifically oblige MSs to offer an appeal or a review of the transfer decision. The applicable rules lack detail and MSs are given a wide discretion to determine their own procedural guarantees and access to a court.[191] Moreover, there is no automatic suspension of a transfer if an appeal against a decision to transfer is

[186] Ibid., p.39.
[187] Dublin Transnational Project, Final Report, May 2011, available at http://www.dublin-project.eu/dublin/Dublin-news/Transnational-Dublin-project_Final-report_May-2011 (consulted on 21 June 2011). The project was piloted from December 2009 to May 2011 and is funded by the European Refugee Fund Community Action. NGOs from twelve MSs were initially involved: Austria, Belgium, Denmark, France, Hungary, Ireland, Italy, the Netherlands, Poland, Romania, Spain and Switzerland. Associations from Germany, Greece, Slovenia and the United Kingdom have since joined the project, expanding the network to cover sixteen MSs.
[188] Ibid., p.25.
[189] Ibid., p.27.
[190] Ibid., p.95.
[191] Dublin II, Article 19(2) states: '[T]his decision may be subject to an appeal or a review'.

lodged; instead it is left to the court or competent body to decide on a case by case basis '*if* national legislation allows for this' (emphasis added).[192]

In practice all MSs do offer an opportunity to appeal a transfer decision, but as the UNHCR points out, the crucial question is whether the asylum-seeker is able to effectively access the remedy.[193] The inability to access a remedy where there is an alleged violation of an asylum-seeker's fundamental rights (for example, Articles 2, 3, or 5 ECHR) will contravene the right to an effective remedy under Article 13 ECHR. According to the UNHCR, some MSs allow very little time between serving the asylum-seeker with the decision to transfer and carrying out the transfer. In some MSs the transfer takes place on the same day that the asylum-seeker receives notification of the transfer decision, leaving the individual little time to access legal advice.[194]

In cases where an asylum-seeker challenges the transfer on grounds that his fundamental human rights will be breached in the MS to which he is to be returned, there is a serious risk that in the absence of any rigorous scrutiny of the grounds of challenge by a court, the asylum-seeker would face *refoulement* to his country of origin, or other breaches of human rights which may occur in the receiving MS.[195]

Dublin II works on the assumption that all EU-MSs have the same standards that meet international obligations in relation to international refugee and human rights law, yet numerous reports have shown that in practice this is not the case.[196] The ECtHR first recognised this in a judgment considering the risk of 'onward *refoulement*' in relation to a transfer under the DC.[197] The ECtHR's judgment in *TI v United Kingdom* underlined

[192] Ibid.
[193] Cfr. supra footnote 182, p.19.
[194] Cfr. supra footnote 182, pp.19-20. For example, the Czech Republic, Finland, France, Germany and Luxembourg notify the applicant and carry out the transfer on the same day.
[195] See discussion in Chapter 3, 3.4, with reference to *Jabari v Turkey*, no. 40035/98, ECHR 369, para.50.
[196] See for example: European Council on Refugees and Exiles (ECRE), *Report on the Application of the Dublin II Regulation in Europe*, March 2006, available at < http://www.ecre.org/files/ECRE%20Dublin%20Report%2007.03.06%20-%20final.pdf> (consulted on 21 June 2011); and UNHCR, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2006 (cfr. supra footnote 182).
[197] *TI v United Kingdom*, no. 43844/98, INLR 211. See p.15, second paragraph: 'the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to

that MSs, in some circumstances, would have to consider whether the expulsion of an asylum-seeker to another MS complied with its obligations under the ECHR, thereby refuting the assumption that all MSs are safe third countries solely on the basis that they are a party to the Refugee Convention and the ECHR.

Therefore, the denial of the suspensive effect of an appeal against transfers will not necessarily guarantee an individual's right to an effective remedy where it is alleged that the receiving MS may not be acting in accordance with its obligations under the ECHR.

2.3 Detention

Article 18 of the APD prohibits the use of detention solely on the basis that someone has applied for asylum.[198] However, Dublin II contains no specific provisions concerning the detention of asylum-seekers who fall to be considered under the Regulation. This has resulted in diverging practices, with some MSs routinely detaining asylum-seekers in the Dublin System on the basis that they are at risk of absconding.[199] The European Council on Refugees and Exiles ('ECRE') has highlighted its concerns, in particular that a significant number of MSs used detention to facilitate the transfer of asylum-seekers under the Dublin process.[200] Overall, ECRE noted that there appeared to be an increase in the use of detention, with some MSs also detaining Dublin returnees on arrival.[201] The Council of Europe ('CoE') Commissioner for Human Rights has criticised the use of detention as a means to restrict the movement of persons seeking international protection in the EU, commenting that it appears to be part of a worrying

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treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims.'

[198] Directive 2005/85/EC, Article 18.

[199] Cfr. supra footnote 182, p.52.

[200] Cfr. supra footnote 196, p.162. For example, Belgium, the Czech Republic, Finland, Austria, the Netherlands, Luxembourg and the UK.

[201] Ibid., for example, Belgium, the Czech Republic, Germany, Greece and Luxembourg.

trend to criminalize the irregular entry and presence of migrants in Europe, and of a wider policy to manage migration.[202]

In many cases, the detention of asylum-seekers in the Dublin System conflicts with the general principle outlined in Article 18 APD and is particularly concerning when it involves the detention of minors, women and vulnerable persons. In the absence of any clear guidelines on when detention is justified, it is arguable that in many cases MSs are breaching their obligations under EU law and human rights law by detaining asylum-seekers merely to transfer them to another MS under Dublin II. As the CoE Commissioner for Human Rights has emphasised, detention of asylum-seekers should only be allowed:

> *'on grounds defined by law, for the shortest possible time and only for the following purposes:*
> *• to verify the identity of the refugees;*
> *• to determine the elements on which the claim to refugee status or asylum is based;*
> *• to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the country of refuge;*
> *• to protect national security or public order'.*[203]

The CoE's Committee on Migration, Refugees and Population, has also highlighted the growing tendency to detain asylum-seekers, stating that '[T]he detention of asylum seekers and irregular migrants in Council of Europe member states has increased substantially in recent years…to a large extent due to policy and political decisions resulting from a hardening attitude towards irregular migrants and asylum seekers'.[204]

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[202] Council of Europe ('CoE'), The Commissioner's Viewpoint, 'States should not impose penalties on arriving asylum-seekers', 17 March 2008, available at http://www.coe.int/t/commissioner/Viewpoints/080317_en.asp (consulted on 21 June 2011).
[203] Ibid.
[204] CoE, Committee on Migration, Refugees and Population Report, 'The detention of asylum seekers and irregular migrants in Europe', Doc.12105, 11 January 2010, para.1, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12105.htm (consulted on 21 June 2011).

The Report recommended that guidelines should be drawn up to clarify when it is lawful and legitimate to detain asylum-seekers. It also confirmed that whilst there should be minimum standards for conditions of detention, the principle that 'detention should only be used as a last resort' must be emphasised and alternatives to detention must be more widely used than is current practice.[205]

2.3.1 Detention of minors

The detention of minors, particularly those who are unaccompanied, is of further concern. Often detention is justified on the basis that it is necessary and in the best interests of the child due to the risk of absconding. However, there are no clear criteria to meet in order to substantiate that someone is at 'risk of absconding' and it is arguable that the detention of minors is never in the 'best interests of the child'. As the UN Committee on the Rights of the Child ('UNCRC') emphasises, 'detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof'.[206] Detention should only be used as a last resort and where exceptional reasons justify it and all efforts should be made to allow for the immediate release from detention, with a view to placing the child in more appropriate accommodation.

2.4 Effective access to the asylum procedure

The Impact Assessment identified that there is a substantially unequal distribution of asylum-seekers between MSs, with particular pressure being placed on those MSs at the EU's borders.[207] This problem was first raised in the context of the DC,[208] but the divide between central and peripheral MSs has become even more apparent since

[205] Ibid., paras.63-66.
[206] CRC/GC/2005/6, 1 September 2005, para.61.
[207] SEC (2008) 2962, p.14.
[208] See for example Hurwitz, 1999, p.676.

Dublin II has been in operation.[209] The pressure on some EU-MSs has affected the ability of asylum-seekers to access the asylum procedures, including those returned under the Dublin System, creating a barrier to their ability to exercise the 'right to asylum'.

For example, in 2008, the UNHCR highlighted a number of concerns about the treatment of Dublin returnees in Greece, including the treatment of their asylum applications as 'interrupted' as a result of the asylum-seeker having left Greece without informing the authorities.[210] This practice failed to guarantee Dublin returnees with 'interrupted claims' effective access to the asylum procedure on their return to Greece.[211] As has been pointed out, 'the combination of national rules on discontinuation of asylum applications and the European rules of allocating responsibility may, in fact, lead to some asylum-seekers being deprived of the right…to have their claim examined in substance in any one EU State'.[212]

In January 2008 the Commission commenced legal action against Greece for failing to take appropriate measures to ensure that Dublin returnees were given effective access to asylum procedures.[213] The infringement proceedings were later discontinued as Greece changed its national legislation to abolish the 'interruption' procedure.[214] However, UNHCR's follow-up Report in 2009 noted that in reality Dublin returnees continued to

[209] See for example: BBC, 'EU urged to share asylum burden amid N Africa turmoil', 25 February 2011, available at http://www.bbc.co.uk/news/world-europe-12565214 (consulted on 21 June 2011).
[210] UNHCR, 'UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"', 15 April 2008, available at http://www.unhcr.org/refworld/docid/4805bde42.html (consulted on 21 June 2011).
[211] Ibid., p.3, para.9.
[212] Papadimitriou and Papageorgiou, 2005, p.310.
[213] P-1676/2008, European Parliament, 'Parliamentary questions – Answer given by Mr Barrot on behalf of the European Commission', 23 April 2008, available at http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2008-1676&language=EN (consulted on 22 June 2011)
[214] UNHCR, 'UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)', 18 March 2009, p.13, available at http://www.unhcr.org/refworld/docid/49c0ca922.html (consulted on 21 June 2011) (herewith referred to as 'UNHCR Comments, 18 March 2009').

face the same difficulties that other applicants for international protection faced in Greece. Where a final decision had been taken on the application, or a deadline to appeal had expired, the Dublin returnee would be detained for deportation, with no possibility of re-opening the application or challenging the first decision.[215]

3 Family unity, unaccompanied minors and other vulnerable persons

The inconsistency in the way some MSs have applied the provisions relating to family unity and unaccompanied minors has in some cases impacted negatively on the protection of those groups' fundamental rights.

3.1 Family unity

The provisions relating to family reunification allow too strict an interpretation of 'family member'.[216] Diverging practices have been identified in relation to whether recognition is given to the partner of an asylum-seeker if they are not legally married,[217] the evidential proof requested to substantiate a family link, and the status of the family members with whom unification is requested.[218] It is concerning that in some MSs no documentation of a family link is required as long as the asylum-seeker is deemed credible (Austria, Belgium, Sweden), whilst in other MSs DNA testing may be required if documentary evidence is not available (the United Kingdom).[219]

Articles 7, 8 and 14 of Dublin II also place procedural limitations on the ability of an asylum-seeker to be reunited with a family member in another MS. Article 7 only allows reunification with a family member where the family member has been granted

[215] UNHCR, 'Observations on Greece as a country of asylum', December 2009, p.19, available at http://www.unhcr.org/refworld/docid/4b4b3fc82.html (consulted on 21 June 2011).
[216] Dublin II, Article 2(i) limits it 'insofar as the family already existed in the country of origin'.
[217] Ibid, Article 2(i)(i) 'the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens'.
[218] Cfr. supra footnote 182, p.26-27.
[219] Ibid., pp.26-27.

refugee status; Article 8 allows reunification where the family member's 'application has not yet been the subject of a first decision regarding the substance'; and Article 14 only allows for family members to have their applications determined by the same MS if they are submitted 'simultaneously, or on dates close enough for the procedures…to be conducted together'.[220] By allowing procedural factors to outweigh the individual's right to join a family member in another MS, Dublin II fails to give adequate weight to the right to family life as recognised in Article 8 ECHR and Article 7 Charter.

3.2 Unaccompanied minors

The UNCRC identified a number of protection gaps in the treatment of children seeking asylum. Of particular relevance to the Dublin System are those gaps concerning detention, inadequate access to asylum systems, age assessment, family tracing, and legal advice.[221] The ability of MSs to detain minors who fall to be considered under Dublin II is highly controversial and was discussed earlier in this Chapter.[222]

Whereas the wording in the provision on unaccompanied minors purports to act 'in the best interests of the child', the limitations that are placed on uniting an unaccompanied minor with a family member in another MS are too restrictive in practice as they require the 'family member' to be 'legally present' in the other MS. If the limitation is not met, the MS in which the application was lodged will be responsible.[223] However, it will often be in the child's best interests that he/she is reunited with a family member in another MS, irrespective of whether or not that family member has been granted legal status or is awaiting the outcome of their own application.

The restrictive definition of 'family member' in Article 6 includes only 'the father, mother or guardian when the applicant or refugee is minor and unmarried'.[224] This fails to take into account that members of the extended family may be present in another MS

[220] Dublin II, Articles 7, 8 and 14.
[221] CRC/GC/2005/6, 1 September 2005, para.3.
[222] See Section 2.3.1 for discussion on the detention of minors.
[223] Dublin II, Article 6.
[224] Ibid, Article 2(i)(iii).

and in a position to support an unaccompanied minor; that many families are forcibly or unavoidably separated during the journey to seek asylum; and that children who may have lost parents either en route to a safe country or in their country of origin may have extended family who could care for them. Whatever the particular circumstances, it is highly likely that a family member will be able to offer more support, whether it is financial or emotional, than the State is able to offer. The provisions of Dublin II do not in practice fully take into account the best interests of the child, despite the reference to this principle and moreover, in placing restrictions on reuniting children with other extended family members, also impact on a child's right to family life.[225]

3.3 Other vulnerable persons

The Impact Assessment noted significant protection gaps regarding other vulnerable groups of asylum-seekers, in particular those suffering from trauma or persons with medical needs. It noted the risks associated with the transfer of asylum-seekers with special needs to a particular MS, which is then unable to provide adequate treatment. In addition, MSs often failed to share information about an individual's medical condition before the transfer, thereby placing that person at considerable risk. It was noted that although the RCD covers persons with special needs, including those in the Dublin System, the lack of explicit provisions within Dublin II regarding appropriate treatment during transfer to another MS had created a worrying protection gap.[226]

Dublin II does not mention vulnerable persons (apart from unaccompanied minors) as a separate category of persons in need of protection. The only provision that deals with some groups of vulnerable persons is the 'humanitarian clause' which is discussed in more detail below. It has been pointed out that Dublin II fails to give sufficient consideration to vulnerable persons, particularly those who have faced torture, imprisonment or other traumas in the past or have serious health problems. ECRE has

[225] See Chapter 3 with reference to Article 3 CRC, Article 8 ECHR and Articles 7 and 24 Charter.
[226] SEC (2008) 2962, pp.21-23.

recommended that special procedures to prioritise and expedite vulnerable persons should be adopted to ensure that the long-term effects caused by delay, uncertainty and stress are mitigated as much as possible.[227]

4 Efficiency of the Dublin System

4.1 The cessation of responsibility clauses

The proper functioning of the Dublin System has also been affected by the lack of consistency in the way certain provisions are applied by MSs. The wording of the cessation of responsibility clauses in Articles 4(5), 16(3) and 16(4) Dublin II lacks clarity, particularly in terms of which MS bears the burden of proof when substantiating whether the asylum-seeker has left the territory of that MS[228] or of the EU.[229] In addition, it is unclear whether an asylum-seeker would be able to lodge a subsequent claim for asylum in the same MS once responsibility has ceded.[230]

4.2 The discretionary clauses

4.2.1 The 'sovereignty clause'

There is inconsistency in the way that MSs invoke the sovereignty clause (Article 3(2) Dublin II), which allows a MS to exercise its discretion and take responsibility for an asylum application. Some MSs do not follow a two-step procedure, to first determine who should bear responsibility and then to consider whether Article 3(2) should be relied upon. This can negatively impact on the asylum-seeker, for example, if responsibility should fall to another MS because of the presence of a family member, in

[227] ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered', 31 March 2008, pp.19-20, available at http://www.ecre.org/component/content/article/57-policy-papers/134-sharing-responsibility-for-refugee-protection-in-europe-dublin-reconsidered.html (consulted on 29 June 2011).
[228] Dublin II, Articles 4(5) and 16(4).
[229] Ibid., Article 16(3) refers to the obligations ceasing where the third-country national has left 'the territory of the Member States'.
[230] SEC (2008) 2962, p.11.

accordance with Articles 6, 7 or 8. The lack of clear guidelines on when the sovereignty clause should be applied potentially means that it can be used against the best interests of the asylum-seeker, particularly given that no consent is required for its application.[231]

A report conducted by ECRE in 2006 demonstrates the wide divergence in practices between MSs when applying the sovereignty clause. A number of MSs have either never applied the clause, or only very rarely.[232] Some MSs have applied the clause against the wishes of the asylum-seeker showing it can be used to disadvantage the applicant.[233] In addition, MSs who apply the clause apply it for very different reasons. For example, some MSs use it to bring together extended family members or for humanitarian reasons (instead of making a request on humanitarian grounds under Article 15).[234] Other MSs have used it to suspend removals to a particular country due to concerns about the treatment of Dublin returnees.[235] Of most concern, is the use of the clause by some MSs to take responsibility for a claim so that it can be considered under the accelerated and/or manifestly unfounded procedures where there is reason to believe that the asylum-seeker can be returned either to his/her country of origin or to an alternative safe third country outside the EU.[236]

4.2.2 The 'humanitarian clause'

Studies evaluating the operation of Dublin II also indicate that the majority of MSs have not been making full use of the 'humanitarian clause'.[237] The provision allows a State to 'bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations', for example in circumstances where one family member may be dependent on the other for

[231] Ibid., pp.11-12.
[232] Cfr. supra footnote 196, p.156. See responses from Belgium, Greece, Lithuania, Luxembourg, Poland, Portugal and Slovenia.
[233] Ibid., p.154. See responses from Germany, the Netherlands and Norway.
[234] Ibid., p.155, for example, Austria, the Czech Republic, France, Italy, the Netherlands, Norway, Spain and Sweden.
[235] Ibid., p.154, for example, Norway and Sweden in relation to returns to Greece.
[236] Ibid., pp.17, 49 and 154, for example, Austria and Germany.
[237] Dublin II, Article 15.

reasons such as, health, age, and pregnancy. However, as with the 'sovereignty clause' the wording of the provision lacks clarity and MSs have tended to either not use it or to interpret it in an overly restrictive way.[238] For example, some MSs have never or only rarely apply the provision.[239] Other MSs apply it in cases where removal is challenged on the basis of Article 8 ECHR, to reunify extended family, or for cases of severe illness, pregnancy, or other special circumstances.[240]

In addition, although the parties' consent is required in order to exercise the provision, its wording suggests that the individual's wishes do not weigh in the initial decision on whether to apply it.[241] In fact, national courts have interpreted the provision as not conferring any rights on the individual to make a request to be united with a family member in another MS.[242] Further, there are additional provisos in cases of dependency that family ties must have existed in the country of origin, and in the case of unaccompanied minors, that the relative has capacity to take care of the minor.[243]

4.3 Time-limits

Inadequate time-limits were found to affect the efficient functioning of the Dublin System. The lack of specific time-limits for making a take back request[244] to another MS means that in some instances the request is not made to another MS until 3 months after the asylum-seeker lodged the asylum claim.[245] Although there are time-limits

[238] Cfr.supra footnote 182, pp.33-34, para.2.3.3.2.
[239] Cfr.supra footnote 196, p.161. For example, Belgium, France, Germany, Ireland, Luxembourg, Norway and Sweden rarely apply Article 15; Lithuania and Slovenia have never applied it.
[240] Ibid., pp.160-161.
[241] Dublin II, Article 15(1) states: '…that Member State shall, *at the request of* another Member State, examine the application for asylum' (emphasis added).
[242] See for example, *R (G) v Secretary of State* [2005] EWCA Civ 546, para.25. The Court of Appeal stated: 'the effect of Article 15 [of the Dublin II Regulation] is not to confer a free-standing substantive right on individual applicants. Rather it is to regulate the relationship between two or more Member States'.
[243] Dublin II, Articles 15(1) and 15(2).
[244] Dublin II, Article 16.
[245] Cfr.supra footnote 182, p.37.

within which a MS must respond to a take back request,[246] any lengthy delay in initiating the process undoubtedly leaves the asylum-seeker in a state of limbo.

Similarly, the lack of a specific time-frame to respond to requests made on humanitarian grounds can also further delay the process of determining responsibility for an application. In some cases, MSs do not receive any reply to a request made on humanitarian grounds.[247] In addition, some MSs and the UNHCR have complained that the six-month time-limit for responding to requests for information is too protracted and can jeopardise the ability of the requesting MS to adhere to other time-limits laid down by Dublin II.[248]

The lack of adequate time-limits in Dublin II can delay an asylum-seeker's access to the substantive part of the asylum procedure. This not only causes the asylum-seeker uncertainty, anxiety and hardship, but effectively creates a barrier to exercising the 'right to asylum'.[249]

4.4 Effective transfers

Statistical results recording the number of requests made to MSs, compared to the number of effective transfers, demonstrates that the Dublin System has failed to efficiently transfer asylum-seekers between MSs in a timely fashion, despite this being a key objective. Transfers are meant to be carried out within six months of the acceptance of a request (this can be extended to one year if the person is detained or to 18 months if the person absconds), yet MSs reported that many transfers are not carried out at all. The Impact Assessment notes that there was an increase in the number of successful transfers under Dublin II in comparison to the DC, but the proportion of transfers implemented still remained low in comparison to the number of requests to transfer that

[246] Dublin II, Article 20(1)(b) states that the requested MS is obliged to respond within one month, or within two weeks if the request is based on Eurodac data.
[247] SEC (2008) 2962, p.7.
[248] Ibid., p.8. For example, the 3 month time-limit to make a 'take charge' request.
[249] See the discussion in Chapter 3, 3.1.

were accepted. For example, in 2006 only 61.3% of outgoing acceptances and 54.4% of incoming acceptances were actually transferred.[250]

In addition, there are significant differences between the transfer rates of MSs: in 2006 the United Kingdom had the highest transfer rate with 97.06%; five MSs had a rate between 50% and 70% (Germany, Ireland, Netherlands, Portugal and Norway); and Spain had the lowest transfer rate of only 14%.[251] There are also marked differences between the net incoming and outgoing transfers made by MSs. Results for 2009 show that some MSs (Germany, Switzerland, the Netherlands) have a much higher outgoing rate of transfer, thereby relieving their asylum systems while other MSs have higher incoming transfers, placing more of a burden on their asylum systems (Italy, Greece and Poland).[252]

The high proportion of ineffective transfers impacts on the MSs' financial and administrative resources and works against the political objectives of Dublin II. It calls into question the Dublin System's efficiency as a mechanism for preventing secondary movements of asylum-seekers. An ineffective transfer will impact on the asylum-seeker's fundamental rights by delaying access to the asylum procedure, and potentially failing to reunite the asylum-seeker with any family members who are present in another MS.

[250] SEC (2008) 2962, p.8. 'Outgoing acceptances' are applicants sent by the reporting MS to another MS. 'Incoming acceptances' are transfers received by the reporting MS from another MS.
[251] Ibid., p.9.
[252] Dublin Transnational Project, p.19 (cfr. supra footnote 187).

--------- Chapter 5 – The proposal to change the Dublin II Regulation ---------

The Commission's proposal to amend Dublin II (referred to as 'the draft Regulation') focuses on extending its scope, improving its efficiency in allocating responsibility between MSs, and closing gaps in the protection afforded to individuals. In addition, the necessity to address situations 'of particular pressure on Member States' reception capacities and asylum systems' is acknowledged.[253] The EP made some further amendments to the Commission's proposal which will be mentioned.[254]

1 The scope of the draft Regulation

The changes to the scope of the draft Regulation are essential in order to cover applicants for (and beneficiaries of) subsidiary protection in addition to refugee status and to bring the Dublin System in line with the rest of the EU asylum *acquis*.[255] The draft Regulation will determine the responsibility for examining 'an application for international protection',[256] and it will specifically cover stateless persons seeking international protection, which reflects the view that the Refugee Convention does not intend for the treatment of stateless persons to be different from other refugees.[257]

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[253] COM (2008) 820 final, *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 State by a third-country national or a stateless person (Recast)*, 3 December 2008, p.2.

[254] P6_TC1_COD (2008) 0243, *Position of the European Parliament adopted at first reading on 7 May 2009 with a view to the adoption of Regulation (EC) No .../2009 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* (recast), OJ C 212 E/370-404.

[255] COM (2008) 820 final. See Articles 2(a), (d) and (f) for the definition of 'international protection', 'refugee status' and 'person eligible for subsidiary protection', with reference to the QD, pp.23-24.

[256] Ibid., Article 2(b), p.24.

[257] Article 1A(2) Refugee Convention covers persons 'outside the country of his nationality' and those who 'not having a nationality' are outside the country of 'former habitual residence'; Goodwin-Gill and McAdam, 2007, p.67.

2 Legal safeguards for asylum-seekers – do they go far enough?

The Commission's proposal also includes new legal safeguards 'to better respond to the particular needs of the persons subject to the Dublin procedure, while…seeking to avoid any loopholes in their protection'.[258]

2.1 Provision of information

The proposal introduces new obligations on MSs to provide detailed information to asylum-seekers about the Dublin System. Whilst these requirements are primarily to improve efficiency, clearer information will benefit asylum-seekers, enabling them to understand the system, access legal advice and offer any additional information relevant to determining responsibility. These stricter obligations to provide information would hopefully close some of the gaps discussed in Chapter 4 which have led to criticisms that the Dublin System lacks transparency.[259]

2.1.1 Right to information

Draft Article 4 significantly strengthens the obligations on MSs to enhance transparency in the Dublin System by confirming that information must be provided 'as soon as the application for international protection is lodged'. In addition, the draft provision specifies the type of information that must be included, in particular: 'the criteria for allocating responsibility'; 'the general procedure and time-limits'; 'the possible outcome…and their consequences'; and 'the possibility to challenge a transfer decision'.[260] Most importantly, there is now a clear obligation on MSs to provide the asylum-seeker with the information 'in writing in a language that the applicant is reasonably supposed to understand'; and 'where necessary for the proper understanding…the information shall also be supplied orally'; and 'in a manner appropriate to the age of the applicant'.[261]

[258] COM (2008) 820 final, p.6.
[259] See Chapter 4, 2.1.
[260] COM (2008) 820 final, Article 4(1), in particular sub-paragraphs (b); (c); (d); and (e), p.28.
[261] Ibid., Article 4(2), p.28.

Secondly, draft Article 4(1) includes an obligation on MSs to provide asylum-seekers with information pertaining to their data protection rights, including the right to access any data held by the MS authorities and the right to request that any inaccurate data held by a MS is corrected.[262] Whilst a detailed discussion of data protection issues is outside the scope of this thesis, the provisions appear to conform with Article 8 of the Charter which ensures the right to the protection of personal data and the obligation to allow access to that data and to rectify any inaccuracies.[263]

Thirdly, draft Article 4(3)[264] confers on the MSs the obligation to draw up a common leaflet containing the information in Article 4(1) which should ensure that the minimum information provided to asylum-seekers is consistent throughout all MSs. The existence of a common leaflet must not however detract from the obligations on MSs to ensure that verbal explanations are provided in situations where the asylum-seeker may have difficulties understanding, or where the age of the individual means that information may need to be given in a more appropriate manner, so as to conform in particular with Articles 12 and 13 CRC.[265]

2.1.2 Notification of a transfer decision

The draft Regulation makes various changes to the requirements to provide specific information about the transfer to another MS. Draft Article 25 imposes a time-limit of fifteen working days within which a MS must inform an asylum-seeker that the request to take charge or take back their application has been agreed by the responsible MS.[266] This is a significant improvement to the current Article 19[267] which does not impose

[262] Ibid., Article 4(1)(f) and (g), p.28.
[263] Article 8 Charter; the Explanations confirm that the provision is based on *interalia*: Article 16 TFEU and Article 39 TEC (ex Article 286 TEC), Directive 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and on Article 8 ECHR (cfr. supra footnote 110).
[264] COM (2008) 820 final, Article 4(3), p.28.
[265] See the discussion in Chapter 3, 3.6.
[266] COM (2008) 820 final, Article 25(1), p.46.
[267] Dublin II, Article 19.

any time-limits, and would hopefully prevent MSs postponing the notification of the decision to transfer until removal arrangements are in place.[268]

Draft Article 25 places an obligation on the MS to provide a decision which is properly reasoned, setting out the grounds on which it is based and the steps taken to reach that decision.[269] When notifying the asylum-seeker of a decision to transfer, the MS will have to provide information on the procedures, legal remedies available, including the time-limit to appeal a decision and specific places where the asylum-seeker can seek legal advice and representation.[270] The draft provision confirms that a reasonable period of time is required before transfer may take place in order to allow an asylum-seeker to seek a remedy if necessary. These changes significantly increase the obligations on MSs to provide detailed reasons for the decision to transfer to another MS, thereby enabling the asylum-seeker to consider whether he/she has grounds to appeal the decision. These changes are fundamental to ensure that minimum standards are established, both with regard to the standard of decision-making and the information provided to individuals on appeal rights and procedures.

A greater understanding of the Dublin System would hopefully dissuade asylum-seekers from leaving the system altogether and going underground, or moving on to another MS if they know they are likely to be returned. The requirement to supply information both in writing and orally (where necessary) would ensure that more vulnerable persons such as unaccompanied minors and illiterate asylum-seekers are equally aware of their rights. The draft appears to conform with the CRC with regard to disseminating information to children. However, to strengthen the wording further, UNHCR advises that the phrase 'in a language that the applicant is reasonably supposed to understand' is changed in all provisions to 'in a language the applicant understands'.[271] In addition, as there is no

[268] See Chapter 4, 2.1.
[269] COM (2008) 820 final, Article 25(2), p.46.
[270] Ibid.
[271] UNHCR Comments, 18 March 2009, p.15. Note that the EP has taken on board the UNHCR's comments, but it remains for the Council to agree on the wording. See for example, Article 4(2) as amended by the EP: 'The information…shall be provided in writing in a language that the applicant understands or may reasonably be presumed to understand' ([2009] OJ C 212 E/370).

requirement in Article 4 to keep the asylum-seeker informed of the progress of their application, the right to information could be strengthened further by confirming that MSs have an on-going duty to inform asylum-seekers at each stage of the procedure in order to ensure procedural fairness.[272]

2.2 Personal interview

The Commission's proposal adds an obligation on MSs to 'give applicants the opportunity of a personal interview'.[273] Whilst some MSs do already conduct a personal interview, this amendment will ensure greater consistency in procedures between MSs. The personal interview will allow the asylum-seeker an opportunity to raise any family ties, humanitarian, or compassionate circumstances that the MS must take into account at an early stage in the determination procedure.

In *MSS v Belgium and Greece*, the ECtHR confirmed the right of asylum-seekers to information and a proper interview with legal representation in order to ensure that the MS allocating responsibility meets its obligations under Article 13 ECHR (in this case in conjunction with Article 3 ECHR).[274] In light of this judgment, the obligation to provide a personal interview is a necessary addition to ensure that MSs comply with their obligations under the ECHR.

Some NGOs have however expressed a concern that the personal interview could effectively prejudice the substantive consideration of an asylum-seeker's claim for international protection if MSs share the information gathered at the personal interview inappropriately. Accordingly they have called for additional safeguards to ensure that asylum-seekers are aware of the information exchanged between MSs and have an

[272] See for example, FRA, Thematic Report, September 2010, recommendation at p.40 (cfr. supra footnote 184).
[273] COM (2008) 820 final, Article 5(1), p.29.
[274] *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, paras.130, 351 and 366. The Court noted that the interview procedure in Belgium did not allow for applicants to be assisted by a lawyer, nor did it allow for an applicant to state his/her reasons for not wanting to be transferred to another MS.

opportunity to correct any information that they consider to be inaccurate.[275] However, it should be noted that the personal interview must take place 'under conditions which ensure appropriate confidentiality'[276] and the MS with conduct of the interview is obliged to produce a written report with the main information, to be made available to the asylum-seeker and attached to the transfer decision.[277] Therefore, on the basis that the individual should have been informed of the procedure and his/her rights, including with regard to data protection issues (as discussed above), it is arguable that these provisions are sufficiently strong to safeguard an asylum-seeker's right to data protection and confidentiality and to ensure procedural transparency.

2.3 Right of appeal and the denial of suspensive effect of appeal

2.3.1 Right of appeal

Draft Article 26 places an obligation on the MS to give an asylum-seeker the right to appeal a transfer decision 'in fact and in law' and to allow a 'reasonable period of time' for the asylum-seeker to exercise his/her right to an effective judicial remedy.[278] The EP has amended Article 26(2) to specify that the 'reasonable period of time' within which an appeal should be allowed should not be less than ten working days.[279]

This clear obligation on MSs to provide for an effective remedy significantly improves on the provisions in Dublin II,[280] and strengthens further the obligation on States to provide adequate safeguards against *refoulement*.[281] However, it is debatable whether the changes go far enough to comply with the right to an effective remedy as recognised

[275] ECRE, 'Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation', April 2009, p.5, para.2.2, available at http://www.ecre.org/files/ECRE_Response_to_Recast_Dublin_Regulation_2009.pdf (consulted on 21 June 2011) (referred to as 'ECRE Comments, April 2009').
[276] COM (2008) 820 final, Article 5(5), p.29.
[277] Ibid., Article 5(6).
[278] Ibid., Article 26(1) and (2), p.46.
[279] [2009] OJ C 212 E/370, Article 26(2).
[280] Dublin II, Article 19(2) states that the decision to transfer '*may* be subject to an appeal or a review' (emphasis added).
[281] See Chapter 3, 3.2 with reference to Article 2 ICCPR and Article 3 CAT.

by regional and Community instruments[282] and the case-law of the ECtHR,[283] particularly where the appeal challenges the transfer to another MS on the basis that Article 3 of the ECHR would be breached.

2.3.2 Suspensive effect of appeal

The UNHCR Handbook states that an asylum-seeker 'should…be permitted to remain in the country while an appeal…is pending', endorsing the position that an appeal should have automatic suspensive effect.[284] However, there are no specific provisions in international asylum or human rights instruments that specifically support the suspensive effect of appeal (as distinct from the more general right to an effective remedy discussed above).[285]

The Commission's proposal for draft Article 26 leaves it to the discretion of the MSs whether an appeal should have suspensive effect.[286] The draft Article places an obligation on the relevant authority (court or tribunal)[287] to decide within seven working days whether that person has the right to remain in the MS pending the outcome of the appeal.[288]

[282] Article 13 ECHR; Article 47 Charter.
[283] See Chapter 3, 3.4 with reference to *Jabari v Turkey*, no. 40035/98, ECHR 369; *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011 (see discussion below with reference to paras.387-389 and 393).
[284] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', HCR/IP/4/Eng/REV.1, Reedited, Geneva January 1992, para.192(vi) and (vii), available at http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf (consulted on 21 June 2011).
[285] See Chapter 3, 3.4.
[286] This is in line with the Commission's proposal to recast the APD which leaves it to the discretion of the MSs whether to allow appeals to have automatic suspensive effect, while allowing a court or tribunal to rule on whether an applicant should be allowed to remain pending the appeal – see COM (2011) 319 final, Article 46(6), p.73.
[287] COM (2008) 820 final, Article 26(1), p.46.
[288] Ibid, Article 26(3), p.47. It should be noted that the EP has indicated that the time-limit for a decision on whether the appeal should have suspensive effect should be shortened to five working days ([2009] OJ C 212 E/370).

The draft Regulation clarifies the effect a decision to give suspensive effect to an appeal has on the time-limits within which a transfer must be carried out.[289] The CJEU confirmed its interpretation of the corresponding provision in Dublin II in its response to a preliminary reference in January 2009. The Court concluded that where suspensive effect of an appeal is provided for by a MS's legislation, 'the period for implementation of the transfer begins to run…from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation'.[290] The CJEU commented that EU legislature did not intend that the judicial protection guaranteed by the MSs who allowed for the suspensive effect of appeal, 'should be sacrificed to the requirement of expedition in processing asylum applications'.[291]

Critics of Dublin II have consistently called for an appeal to have automatic suspensive effect and state that the Commission's proposal does not go far enough in safeguarding an asylum-seeker's fundamental rights. ECRE points out that the approach proposed 'risks prejudice against an appeal that is denied suspensive effect; the claim could be disadvantaged on the basis of a rapid, incomplete assessment of the case'.[292] Moreover, ECRE suggests that MSs themselves would benefit by granting automatic suspensive effect and conducting a single appeal hearing which fully examines the substance of the claim, as this would speed up the process overall, reduce burdens on the MSs' judicial systems and cut the costs of providing legal representation in two separate proceedings.[293] The costs of legal representation will become more relevant to MSs who do not already provide legal aid as draft Article 26 adds a provision which obliges MSs to ensure asylum-seekers have access to free legal aid if they are unable to meet the costs themselves.[294]

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[289] COM (2008) 820 final, Article 28(1), p.49. The wording makes clear that the six month time limit for transfer runs from (where relevant) 'the *final decision* on an appeal or review where a suspensive effect is granted in accordance with Article 26(3)' (emphasis added).
[290] Case C-19/08, *Migrationsverket v Petrosian*, [2009] ECR I-495, para.53. The preliminary reference concerned the interpretation of Article 20(1)(d) and Article 20(2) of Dublin II.
[291] Ibid., para.48.
[292] ECRE Comments, April 2009, p.6-7.
[293] Ibid., p.7.
[294] COM (2008) 820 final, Article 26(6), p.47.

It is arguable too that the denial of an automatic suspensive effect of appeal does not sit squarely with the right to an effective remedy under Article 13 ECHR, which the ECtHR has interpreted as offering broader protection in asylum cases than international human rights law. The ECtHR has held that a remedy with automatic suspensive effect is essential in cases where there is an arguable claim of a violation of treatment under Article 3 ECHR (and by analogy the principle of non-*refoulement*), given the irreversible nature of the harm that might occur.[295] Moreover, the ECtHR considered that a suspensive effect 'in practice', where the MS provides for an urgent applications procedure, is not enough to satisfy the requirements of Article 13 ECHR, which 'take[s] the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention'.[296]

Recently, in *MSS v Belgium and Greece*, the ECtHR found that Belgium had breached Article 13 ECHR because of its failure to provide an effective remedy to challenge the expulsion order to Greece. The Belgian procedure of allowing an appeal to the Aliens Appeal Board to set aside an expulsion order does not suspend the enforcement of the order, it only automatically suspends the execution of the expulsion measure (the transfer to Greece) for 72 hours whilst the Board reaches a decision on the admissibility of the applicant's appeal. The ECtHR held that the procedure was in breach of Article 13 ECHR as a complaint relating to possible breaches of Article 3 ECHR on return to another country (including another EU-MS) requires 'close and rigorous scrutiny' of 'the substance of the complaint' as established by previous case-law.[297] The Belgian appeal procedure did not allow for such scrutiny as the 'extremely urgent procedure' in practice allowed the State to 'expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible'.[298] In addition, the Court did

[295] *Gebremedhin v France*, no. 25389/05, (Second Section), 26 April 2007, para.66; *KRS v the United Kingdom*, no. 32733/08 (Admissibility Decision), 2 December 2008, p.15.
[296] *Čonka v Belgium*, no. 51564/99, [2002] ECHR 14, para.83. In that case, the authorities were not required to defer execution of a deportation order while an application under the extremely urgent procedure was pending.
[297] *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, para.387.
[298] Ibid., paras.388-389.

not accept Belgium's argument that the asylum-seeker could have continued his appeal against the decision to transfer him to Greece after he had been transferred.[299] The Court failed to see how, 'without its decision having suspensive effect', the Belgian appeals procedure was able to offer 'suitable redress even if it had found a violation of Article 3'.[300]

This ruling appears to advocate that in order to adhere to Article 13 ECHR, MSs should provide for a single appeal hearing which considers both the substance of the appeal and the suspensive effect, as has been suggested by ECRE and other NGOs. This is in contradiction to the model proposed by the Commission in draft Article 26(3) which pre-dates *MSS v Belgium and Greece*. In light of the ECtHR's judgment it is arguable that a suspensive effect of appeal should be automatic and therefore the Commission's proposal is insufficient in ensuring that MSs' comply fully with their obligations to provide an effective remedy in accordance with Article 13 ECHR.

Finally, the vulnerability that asylum-seekers face by being denied the suspensive effect of an appeal is illustrated by the huge rise in requests for interim measures made to the ECtHR.[301] The ECtHR confirmed at the start of 2011 that it had seen an increase of 4000% in the number of Rule 39 requests made between 2006 and 2010 in the area of immigration alone, receiving 4,786 requests in 2010.[302] Whilst not all of these requests will be in relation to Dublin cases, a vast number undoubtedly have involved returns to Greece. This is evidenced in *KRS v United Kingdom*, where the ECtHR confirmed that it had applied Rule 39 in a total of 80 cases between May and September 2008 involving the return of asylum-seekers from the UK to Greece.[303]

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[299] Ibid., para.382.
[300] Ibid., para.393.
[301] A request for an interim measure (i.e. a stay on removal) is made in accordance with Rule 39 of the Rules of the Court.
[302] European Court of Human Rights, 'Statement issued by the President of the European Court of Human Rights concerning Requests for Interim Measures (Rule 39 of the Rules of Court)', 11 February 2011, available at http://www.echr.coe.int/NR/rdonlyres/B76DC4F5-5A09-472B-802C-07B4150BF36D/0/20110211_ART_39_Statement_EN.pdf (consulted on 21 June 2011).
[303] *KRS v the United Kingdom*, no. 32733/08 (Admissibility Decision), 2 December 2008, pp.3-4. The case involved the return of an Iranian asylum-seeker to Greece under Dublin II.

2.4 Detention for the purpose of transfer

The Commission's proposal adds an important provision on detention for the purpose of transfer, clarifying the principle that a person must not be held in detention 'for the sole reason that he/she is an applicant for international protection'[304] and ensuring its consistency with the remainder of the EU *acquis*.[305] The proposal confirms that detention must be applied in line with Article 31 of the Refugee Convention.[306] The EP added a further recital to clarify that ''detention' should not carry a penal or punitive connotation',[307] emphasising that detention should be 'in administrative holding centres distinct from prison facilities'.[308] Bearing in mind that some MSs have been found to routinely detain asylum-seekers under the Dublin procedure, the provisions on detention are essential to ensure that this is no longer the accepted practice.[309]

The EP has also amended the wording of the Commission's draft Article 27(2) to clarify that detention (in a 'non-detention facility') must be used as a last resort, 'only if other less coercive measures *have not been* effective *and*, only if there is a risk of his/her absconding' (emphasis added).[310] It could be inferred by this amendment that MSs would be obliged to show that they had tried other alternatives before resorting to detention, thereby strengthening the legal safeguards against arbitrary detention considerably.[311] It is proposed that in general only judicial authorities can order detention, although in urgent cases administrative authorities would be able to order it, but on the basis that a judicial authority considers its legality within 72 hours.[312]

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[304] COM (2008) 820 final, Article 27(1), p.47.
[305] See for example, Directive 2005/85/EC, Article 18(1) and the recast COM (2011) 319 final, Article 26(1).
[306] COM (2008) 820 final, recital 18, p.18. See also Chapter 3, 3.3.
[307] [2009] OJ C 212 E/370, recital 20.
[308] Ibid., recital 21.
[309] See for example: ProAsyl, 'The situation in Greece is out of control. Research into the situation of asylum seekers in Greece', 20-28 October 2008, p.18, available at http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Asyl_in_Europa/Griechenland/Out_of_contol_Eng_END.pdf (consulted on 21 June 2011).
[310] [2009] OJ C 212 E/370, Article 27(2).
[311] COM (2008) 820 final, p.47. The Commission's draft Article 27(2) reads: 'and if other less coercive measures cannot be applied effectively'. Examples of alternatives to detention are given in Article 27(3).
[312] Ibid., Article 27(6), p.48.

In addition, provisions have been proposed to ensure that the period within which detention may be used is strictly limited to the period between receiving notification of the decision to transfer and the actual transfer taking place.[313] It is emphasised that detention should only be 'for the shortest period possible', and 'no longer than the time reasonably necessary to fulfil the required administrative procedures for carrying out the transfer'.[314] The provisions confirm the obligation on MSs to provide information to the asylum-seeker when they are detained, which should include information about challenging the detention and how to access legal assistance.[315] There is an obligation on MSs to ensure that continued detention is reviewed by a judicial authority 'at reasonable intervals', including at the request of the detainee, and it is clarified that 'detention shall never be unduly prolonged'.[316]

According to the UNHCR, in addition to complying with the Refugee Convention and international law, 'for detention of asylum-seekers to be lawful and not arbitrary…It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist'.[317] The provisions appear to comply with the UNHCR's Guidelines by making it mandatory that the decision to detain is taken by a judicial authority (or in the alternative it is reviewed within 72 hours by a judicial authority) and that it is subject to a regular review procedure.

Whilst the provisions proposed in Article 27 largely conform to international safeguards against arbitrary detention, some criticisms remain with the current wording. Firstly, it is suggested that 'risk of absconding' should be defined with reference to the specific circumstances of the individual's case, and should be narrowly interpreted to avoid it

[313] Ibid., Article 27(4), p.47.
[314] Ibid., Article 27(5), p.48.
[315] Ibid., Article 27(7) and (9), p.48.
[316] Ibid., Article 27(8), p.48.
[317] UNHCR, 'UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers', 26 February 1999, p.2, para.5, available at http://www.unhcr.org/refworld/docid/3c2b3f844.html (consulted on 21 June 2011).

being used in an arbitrary manner by MSs to justify detention.[318] Secondly, UNHCR has suggested that the legality of the detention should be reviewed from the outset and then at periodic intervals, and if requested by the asylum-seeker, to ensure that it remains lawful and in compliance with Article 5(4) ECHR.[319] In addition, in order to comply with Article 5(2) ECHR, the person should be 'informed promptly, in a language which he understands'. The EP has taken on board UNHCR's remarks and has amended the Commission's draft Article 27(7) to read 'in a language which they understand or may reasonably be presumed to understand'; however this amendment would need to be accepted by the Council.[320]

Further, there remains the general issue of whether asylum-seekers who have presented themselves to the authorities should be detained at all, and particularly where detention is arguably being used solely to achieve an administrative goal. Whilst the ECtHR's case-law supports detention being used in respect of asylum-seekers, it should be noted that the decision in *Saadi v United Kingdom* was not unanimous. Of the seventeen Judges of the Grand Chamber, six dissented, stating in their Opinion that while it is 'generally accepted that the aim of the first limb of Article 5(1)(f) of the Convention is to prevent illegal immigration' the majority of the Chamber had instead equated 'the situation of asylum seekers to that of ordinary immigrants'. It was pointed out that this judgment sat uneasily with the case-law of the HRC and Article 18 of the APD. In addition, the fact that the detention was justified in order to ensure the quick resolution of the asylum claim suggested it 'pursued a purely bureaucratic and administrative goal' creating great legal uncertainty for asylum seekers.[321] Whilst this is not a legally binding opinion, it indicates that the use of detention in accelerated asylum procedures,

[318] COM (2008) 820 final., Article 2(l), p.26, defines 'risk of absconding' in a very general way, leaving it to the MSs to identify the objective criteria in national law; ECRE Comments, April 2009, p.8: reference is made to *A v Australia* (para 8.7) where the UN Human Rights Committee held that the justification of detention lies with the State authority 'in the particular circumstances of each case' and is 'not met on the basis of generalised claims that the individual may abscond if released'.
[319] UNHCR Comments, 18 March 2009, p.19.
[320] COM (2008) 820 final, Article 27(7), p.48; Compare with the EP's proposals for Article 27(7) ([2009] OJ C 212 E/370).
[321] *Saadi v United Kingdom* [GC], no. 13229/03, ECHR 2008, Dissenting Opinion; see also Chapter 3, 3.3.

which includes the Dublin System, remains a controversial issue and one which divides the ECtHR at the highest level.

2.4.1 Detention of minors

The draft Regulation imposes a complete prohibition on detaining unaccompanied minors. However, it allows the detention of minors if it is in their best interests, to be assessed in accordance with factors, to include, 'the minor's well-being' and 'safety and security considerations, in particular where there is a risk of the child being a victim of trafficking'.[322] The draft Regulation states that the detention of a minor must only proceed after an individual examination of their situation in line with the requirements under the RCD.[323]

Although these provisions improve the protection afforded to minors, the practice of detaining minors is still of particular concern and has a negative effect on their physical and mental health.[324] As a general rule, unaccompanied or separated children should not be detained, and if there are circumstances justifying detention, it should only be used as a last resort and 'for the shortest appropriate period of time'.[325] In addition, a child must be detained in separate facilities to an adult, unless this is considered not to be in their best interests.[326] The total prohibition on detaining unaccompanied minors is a positive addition to the Dublin System, however stricter guidelines are needed in relation to detaining accompanied minors as the effects of detention are likely to be as harmful to the child's mental and emotional well-being.

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[322] COM (2008) 820 final, Article 27(10) and (11), with reference to Article 6(3), p.48.
[323] Ibid., Article 27(10). For discussion on the corresponding provisions in the RCD, see below at 2.4.2.
[324] Debauche-Discart, L., 'Asylum seekers with special needs: Ministerial Conference 'Quality and Efficiency in Asylum Process'', 13-14 September 2010, p.7, available at http://www.eutrio.be/files/bveu/media/source1854/documents/WS_I_-_Rapporteur__Mrs__L___Debauche_-_Vulnerable_persons_with_special_needs_-_Final.pdf (consulted on 21 June 2011).
[325] Article 37(b) CRC.
[326] Article 37(c) CRC. See Chapter 4, 2.3.1 with reference to UNCRC's General Comment (footnote 206).

2.4.2 Detention conditions – recent developments

Detailed discussion of the RCD is outside the scope of this thesis. However, standards imposed by the Directive with respect to detention conditions are relevant to the Dublin System. As discussed earlier, there are serious concerns that inadequacies in detention and reception conditions may lead to asylum-seekers being treated in a degrading manner, incompatible with their fundamental right to human dignity and Article 3 ECHR.[327] In *MSS v Belgium and Greece*, the Court considered the issue of detention of Dublin transferees and whether the conditions in which the applicant had been detained in Greece amounted to a violation of Article 3 ECHR.[328] It was noted that in Greece there is a 'systemic practice of detaining asylum seekers' including those transferred under Dublin II, with no information being given as to the reasons for detention.[329] The Court considered that the conditions of detention experienced by the applicant 'were unacceptable' and taken together with 'the feeling of arbitrariness...inferiority and anxiety' as well as the effects it had on his dignity constituted degrading treatment contrary to Article 3 ECHR.[330]

Despite the indication from the ECtHR that minimum standards in the current RCD are not being applied in practice in some MSs, the latest recast of the RCD waters down some of the more important provisions regarding the grounds and conditions for detention.[331] For example, an amendment has been made to allow detention to be authorised by administrative authorities in all cases, not just urgent cases;[332] and there will be no requirement to inform asylum-seekers of the maximum period of detention.[333] In addition, it will be possible to detain asylum-seekers in prison facilities if detention facilities are temporarily unavailable.[334] There will no longer be a complete

[327] See Chapter 2, 2.2.1.
[328] *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011. The Court considered that whether ill-treatment attains the minimum level of severity to fall within the scope of Article 3 is relative and must take into account the particular circumstances of the individual (para.219). As an asylum-seeker, the applicant was particularly vulnerable (para.231).
[329] Ibid., para.161.
[330] Ibid., para.233.
[331] For an overview of these changes, see Peers, 2011 (b), p.2.
[332] COM (2011) 320 final, Article 9(2).
[333] Ibid., Article 9(3).
[334] Ibid., Article 10(6).

prohibition on detaining unaccompanied minors – they may be detained in 'particularly exceptional cases'[335] and the requirement that a qualified professional must conduct an individual examination before detaining minors or vulnerable persons has been removed.[336] The detention provisions in the draft Regulation are largely reflected in the Commission's first proposal to recast the RCD. It is concerning that if detention provisions in the draft Regulation are amended in a similar manner to the amendments in the recast RCD, many of the significant improvements made to ensure that asylum-seekers' fundamental rights are protected would be negated.[337]

2.5 Effective access to the asylum procedure

Allowing a Dublin transferee effective access to the asylum procedure in the receiving MS is a fundamental requirement in order to adhere to the right to asylum as laid down by the Refugee Convention and other international instruments. Since the Charter is now legally binding, EU institutions and MSs must also ensure that the right to asylum is fully respected in EU legislation and the Commission's proposal 'seeks to ensure full observance' of this right.[338] Article 18 of the draft Regulation adds an important obligation on MSs to 'examine or complete the examination of the application' once an individual is returned under the Dublin System. It also obliges a MS who had previously 'discontinued the examination' on the basis that the application had been withdrawn by the individual, to revoke that decision and complete the examination.[339] The obligation to examine a withdrawn application has been added to ensure that MSs, who previously treated the departure of the asylum-seeker from their territory as an effective withdrawal of the asylum application, are no longer able to detract from their international obligations to substantively consider the asylum application, once the asylum-seeker has been returned under the Dublin procedure.[340]

[335] Ibid., Article 11(2).
[336] Ibid., Article 11(1) and (2). Compare to COM (2008) 815 final, Article 11(1) and (5).
[337] Compare COM (2008) 815 final, Articles 8-11.
[338] COM (2008) 820 final, recital 34, p.22.
[339] Ibid., Article 18(2), p.38.
[340] See Chapter 4, 2.4.

The ECtHR has considered the lack of effective access to the asylum procedure in *MSS v Belgium and Greece*. In particular, the Court considered the lack of guarantees given by the Greek authorities to substantively examine a complaint under the ECHR , and the lack of access to remedies against arbitrary removal which placed asylum-seekers at serious risk of *refoulement*. It was further noted that Dublin returnees faced the same difficulties in accessing the asylum procedure as other asylum-seekers.[341] The Court considered Greece to be in clear violation of Article 13 ECHR (in conjunction with Article 3) as its failure to properly examine the applicant's asylum request placed him at risk 'of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy'.[342]

Whilst draft Article 18(2) is a step in the right direction to ensuring that MSs adhere to their international obligations to fully examine and assess the substantive grounds of an asylum application, it has been pointed out that the obligation on MSs to examine applications 'withdraw[n] by the applicant', should be broadened to include applications that may have been rejected in the asylum-seeker's absence due to more technical formalities, such as missing a reporting deadline.[343] The amendment proposed by UNHCR would prevent MSs from using technical formalities, which an asylum-seeker may be unaware of, to justify a refusal to reopen a Dublin transferee's asylum application. This is critical to provide another layer of protection against the associated risks of *refoulement* and lack of access to an effective remedy, highlighted in the case of *MSS v Belgium and Greece*.

Finally, it should be noted that the latest recast of the APD has added the possibility for MSs to reject asylum applications considered to have been implicitly withdrawn and allows them to set time-limits after which a case cannot be reopened.[344] Whilst the APD confirms that the provision is without prejudice to the draft Regulation, there is a

[341] *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, paras.300-301.
[342] Ibid., para.321.
[343] UNHCR Comments, 18 March 2009, p.13, para.6.
[344] COM (2011) 319 final, Article 28(2) will allow MSs to impose a time-limit of at least one year after which an application, implicitly withdrawn, can no longer be reopened.

risk that the changes could affect asylum-seekers returned to another MS under the Dublin System from having their asylum application fully examined in accordance with the APD, if they are absent from the receiving MS for longer than a year.[345] It would be advisable to confirm in the draft Regulation whether the time-limits outlined in Article 28 of the APD apply to asylum-seekers returned under the Dublin System, so as to avoid any inconsistent application of these provisions by MSs.

3 Family unity, unaccompanied minors and other vulnerable persons

3.1 Family unity

As discussed in Chapter 4, Dublin II can impede MSs from fully complying with their international obligations with respect to the right to family life, particularly in view of the interpretative and procedural restrictions that Dublin II places on the obligation to reunite family members in different MSs.

The Commission's proposal strengthens the recognition of the principle of the right to family life,[346] confirming that this right should be a primary consideration when applying the draft Regulation.[347] The Preamble advocates the joint processing of applications from members of the same family by one MS, to avoid inconsistent decisions and the separation of families. It also extends the principle of family unity to cover situations where there is 'a relationship of dependency' between the asylum-seeker and extended family members, for reasons of pregnancy, maternity, health or age.[348]

The definition of 'family member' has been widened in the Commission's proposal by removing the requirement that the minor children of the asylum-seeker or spouse/unmarried partner must be dependent,[349] and it is extended to include married minor children of the asylum-seeker or spouse/partner if it is in their best interests to

[345] COM (2008) 820 final, Article 18(2), p.38.
[346] See Chapter 3, 3.5.
[347] COM (2008) 820 final, recital 11, p.17.
[348] Ibid., recitals 12 and 13, p.17.
[349] Ibid., Article 2(i)(ii), p.25.

reside with the asylum-seeker.[350] In addition, the definition now includes the father, mother or guardian of a married minor asylum-seeker, if it is in his/her best interests to reside with that family member.[351] It also includes 'the minor unmarried siblings of the applicant', either when the asylum-seeker is an unmarried minor or, if married, when it is 'in the best interests of one or more of them that they reside together'.[352]

Widening the definition of 'family member' will allow extended family networks to play a more crucial role in providing support to asylum-seekers, particularly those who arrive in the EU as unaccompanied minors. It also recognises the potential that increased support from family networks can have in providing stable financial and emotional support to the asylum-seeker, whilst lessening the burden on the State.[353] In this regard, the wider definition is largely compliant with the relevant provisions of the CRC, in particular with reference to 'the best interests of the child' and 'the rights and duties' of the parents, legal guardians, 'or other individuals legally responsible'.[354]

However, the definition could be expanded further to include adult siblings of a minor asylum-seeker, particularly in cases where the parents of the asylum-seeker are not present and the sibling could provide the necessary economic and emotional support.[355] Such an amendment would recognise that States should comply with Article 5 CRC and respect the 'responsibilities, rights and duties of parents or, where applicable, the members of the extended family'.[356] Finally, an important criticism remains of the definition of 'family member' which has not been changed by the Commission – it is still based on the proviso that 'the family already existed in the country of origin'.[357] This limitation is inconsistent with some of the later provisions in the draft

[350] Ibid., Article 2(i)(iii), p.25. It should be noted that the EP amended this sub-paragraph to include the proviso that the married minor is not accompanied by their spouse ([2009] OJ C 212 E/370).
[351] Ibid., Article 2(i)(iv), p.25. The EP made a similar amendment as discussed in footnote 350.
[352] Ibid., Article 2(i)(v), p.25. The EP made a similar amendment as discussed in footnote 350.
[353] Article 20 CRC imposes an obligation on the State to provide 'special protection and assistance' to a child who is 'temporarily or permanently deprived of his or her family environment'.
[354] See in particular Articles 3, 5, 9 and 10 CRC.
[355] UNHCR Comments, 18 March 2009, p.7.
[356] Article 5 CRC.
[357] COM (2008) 820 final, Article 2(i), p.25.

Regulation,[358] and fails to take into account the displacement experiences suffered by many asylum-seekers, in particular the fact that family circumstances may have changed since the asylum-seeker left the country of origin.[359]

The increased recognition given to the right to family life and family reunification is illustrated by the various criteria for determining the MS responsible in the Commission's proposal. Firstly, draft Article 7(3) states that MSs must not assess the criteria for determining the MS responsible on the first asylum application lodged if this does not ensure respect for family unity and the best interests of the child. Instead, the criteria should be assessed on the basis of the situation when the asylum-seeker lodges 'his/her most recent application…on condition that the previous applications…have not yet been the subject of a first decision regarding the substance'.[360] The provision means that the determination of responsibility must take into account that family unity and acting in the best interests of the child must be prioritised with reference to the most current state of affairs.

Secondly, draft Articles 9 and 10 extend the right to unite with family members who are beneficiaries or applicants of subsidiary protection (as well as those with refugee status) to bring the draft Regulation in line with the rest of the EU asylum *acquis*.[361] However, Article 10 is still limited by its application to a family member who 'has not yet been the subject of a *first* decision regarding the substance' (emphasis added). This wording does not go far enough to ensure that family unity is given primary consideration as it excludes family members who may be awaiting the outcome of an appeal or judicial review in respect of their application for international protection. In order to fully comply with the right to family unity and to ensure that families are not separated, UNHCR has indicated that the provision should be amended to allow for the MS to be responsible for claims made by family members of an asylum-seeker as long as it has

[358] For example, Article 9, p.32.
[359] ECRE Comments, April 2009, p.9. ECRE suggests changing the wording in Article 2(i) to read: '…regardless of whether the family was formed in the country of origin'.
[360] COM (2008) 820 final, Article 7(3), p.30.
[361] Ibid., Articles 9 and 10; Article 12, pp.32-33.

not taken a *final* decision (to include the appeal or judicial review procedure) on the asylum-seeker's claim.[362]

3.2 Unaccompanied minors

The draft Regulation improves the protection offered to minors and unaccompanied minors[363] by adding a number of provisions to ensure that MSs adhere to the principle to act in the best interests of the child.[364] Draft Article 6 outlines guarantees for minors and emphasises that primary consideration be given to the best interests of the child 'with respect to all procedures provided for in this Regulation'.[365] This provision adheres to the UNCRC's guidance on the 'best interests of the child' which stipulates that 'in the case of a displaced child, the principle must be respected during all stages of the displacement cycle'.[366]

Draft recital 10 recognises the need to lay down 'specific procedural guarantees for unaccompanied minors' due to their particular vulnerability.[367] In addition, the definition of 'unaccompanied minor' has been amended to remove the requirement that he/she must be unmarried which is welcome given that this is an irrelevant consideration when the priority should be to act in the child's best interests.[368]

With reference to protection gaps highlighted by the UNCRC,[369] the general obligations on providing information to asylum-seekers in a timely and clear manner and conducting a personal interview will apply equally to unaccompanied minors. Article 6(2) places an obligation on the MS to 'ensure that a representative represents and/or

[362] UNHCR Comments, 18 March 2009, p.8, para.3.3.
[363] For definitions, see COM (2008) 820 final, Article 2(g) and (h), pp.24-25.
[364] As outlined in Article 3 CRC and Article 24 Charter.
[365] COM (2008) 820 final, recital 10, p.16; Article 6(1), p.29.
[366] CRC/GC/2005/6, 1 September 2005, para.19.
[367] COM (2008) 820 final, recital 10, p.16.
[368] COM (2008) 820 final, Article 2(h), p.25.
[369] See Chapter 4, 3.2.

assists the unaccompanied minor with respect to all procedures'.[370] The requirement to provide unaccompanied minors with assistance and support from the outset of the Dublin procedure will hopefully ensure that access to the asylum procedure is guaranteed, in particular once the transfer has taken place.

The provisions in Article 6(3) underline the importance that MSs closely cooperate with each other to ensure that the best interests of the child are upheld when reaching a decision on responsibility, by establishing that a number of factors should be taken into account, including the minor's ethnic, religious, cultural and linguistic background, whether there is a risk that the child is a victim of trafficking, and the views of the minor.[371] The latter addition takes into account Article 12 CRC and the obligation on the State to provide a child with all the relevant information, 'in a manner that is appropriate to the maturity and level of understanding' of the child, including information on their entitlements, the asylum procedure, and family tracing.[372]

Draft Article 6(4) places an obligation on MSs to establish procedures 'for tracing family members or other relatives present in the Member States',[373] at the earliest possible stage after an unaccompanied minor has lodged an application for international protection, thereby closing a protection gap highlighted by the UNCRC. This addition reflects the international obligations under Article 22 CRC that States are to cooperate with other organisations 'to protect and assist…a child and to trace the parents or other members of the family…in order to obtain information necessary for reunification'.[374]

It should be noted that the EP has added a further discretionary clause to Article 6 which allows for MSs to use medical examinations, 'to determine the age of

[370] COM (2008) 820 final, Article 6(2), p.29. The EP has amended this provision to confirm that 'representative' is within the meaning given by the APD (COM (2011) 319 final, Article 2(n)) ([2009] OJ C 212 E/370).
[371] Ibid., Article 6(3), pp.29-30.
[372] CRC/GC/2005/6, 1 September 2005, para.25.
[373] COM (2008) 820 final, Article 6(4), p.30.
[374] Article 22 CRC. Note that the EP has amended the Commission's draft to refer to the assistance of 'international or other relevant organisations' thereby complying more fully with the CRC ([2009] OJ C 212 E/370).

unaccompanied minors', in accordance with the conditions laid down by the APD.[375] The latest recast of the APD has amended the provision relating to age assessment to confirm that, where doubts still persist as to the age of the asylum-seeker after a medical examination, MSs are obliged to assume the person is a minor.[376] This is a welcome amendment, particularly as there have been cases where MSs have erroneously sent back minors to another MS (in the belief they are an adult) without proper consideration of their obligations to give primary consideration to the best interests of the child, and without ensuring that the transfer arrangements in place comply appropriately with the requirements for the transfer of minors, therefore placing the minor in an even more vulnerable situation.[377]

Finally, the Commission's proposal strengthens the criteria for determining responsibility in relation to unaccompanied minors. Proposed Article 8 places a binding obligation on a MS to take responsibility for an unaccompanied minor if there is a relative (in addition to a 'family member') legally present, provided it is in the best interests of the child. In doing so, it strengthens the protection afforded to minors, whilst prioritising the need to act in the child's best interests and ensuring that the right to family unity is respected.[378]

3.3 Other vulnerable persons and 'dependent relatives'

The 'humanitarian' principle in Dublin II is strengthened considerably by the draft Regulation which confirms that in cases where a relationship of dependency exists between the asylum-seeker and his/her extended family, respect for family unity and the best interests of the child must now be mandatory considerations when determining

[375] [2009] OJ C 212 E/370, Article 6(6), with reference to Article 17(5) of recast APD. Note this is now Article 25(5) of COM (2011) 319 final.
[376] COM (2011) 319 final, Article 25(5).
[377] UK Refugee Council, 'Unaccompanied Children and the Dublin II Regulation', November 2006, p.4, available at http://www.refugeecouncil.org.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=B9B09830-1009-4ECE-A26A-E4882398E160&mode=link&guid=b0a8dda1d983413fb9bc4dfc613ab5ce (consulted on 21 June 2011).
[378] COM (2008) 820 final, Article 8, p.31.

responsibility.[379] The existence of a 'dependent relative' now becomes a binding criterion, with the MS 'most appropriate for keeping them together or reunifying them' becoming the responsible MS. The provision covers asylum-seekers who are dependent on the assistance of a relative (or vice-versa) because of 'pregnancy or a new-born child, serious illness, severe handicap or old age'.[380] As such, MSs will have to give more weight to the 'humanitarian' principle, and it is hoped that this will improve the individual's rights by avoiding unnecessary hardship, and in some cases lessening the burden on MSs by prioritising the support provided by extended family networks.

However, the current wording implies that the list of situations where dependency is considered relevant is exhaustive. UNHCR and NGOs have advocated that this should be altered to reflect that situations of dependency, other than those explicitly mentioned in the provision, could arise.[381] Further, if the list is exhaustive, there is the risk that in practice the definition of 'relationship of dependency' could be applied by MSs in a restrictive manner and with an unduly heavy burden of proof placed on the asylum-seeker. To prevent this occurring, it would be advisable that clear guidelines are given to MSs, including the evidence required from the asylum-seeker to demonstrate that a dependent relationship exists.

The draft Regulation makes some minor improvements to further the protection afforded to other vulnerable groups, but only insofar as it relates to the exchange of relevant information between MSs. Draft Article 30 prevents the transfer of persons in poor health and introduces provisions to cover the exchange of information.[382] The proposed changes place an obligation on the sending MS to provide the receiving MS with 'appropriate, relevant and non-excessive' personal data, to ensure that the receiving MS is in a position to provide adequate assistance, in particular any necessary medical care.[383] The proposal places an obligation on MSs to exchange particular

[379] COM (2008) 820 final, recital 13, p.17; Article 11, pp.32-33.
[380] Ibid., Article 11(1), pp.32-33.
[381] UNHCR Comments, 18 March 2009, p.8.
[382] COM (2008) 820 final, Article 30, pp.50-52.
[383] Ibid., Article 30(1), p.50.

information, namely details about family members, information on the level of education (in the case of a minor), the age of the asylum-seeker and other 'essential' information 'to safeguard the rights and special needs of the applicant'.[384] A further provision specifies what information must be transmitted to ensure the continued provision of medical care or treatment, 'in particular concerning disabled persons, elderly people, pregnant women, minors and persons that have been subject to torture, rape or other serious forms of psychological, physical and sexual violence'.[385]

However, safeguards could go further. Firstly, there is no provision detailing who should conduct the assessment that an asylum-seeker is fit to travel – it has been suggested that this should be done by an independent medical professional, trained to recognise the special needs of asylum-seekers.[386] Secondly, the latest recast of the RCD defines 'applicants with special needs' (or vulnerable persons) to include, in addition to those already mentioned in the draft Regulation, 'single parents with minor children, victims of trafficking, persons with serious physical illnesses, mental illnesses, or post-traumatic disorders'.[387] The draft Regulation should be amended to make specific reference to the list of vulnerable persons mentioned in the recast RCD to ensure consistent definitions are used in all instruments in the EU asylum *acquis*.

Finally, as noted above victims of trafficking are not mentioned as a specific group of vulnerable persons, yet there are occasions where they may be considered under the Dublin System.[388] It is recommended that the draft Regulation refers to the relevant EU legislative instruments that have been introduced in light of the MSs' international obligations to combat human trafficking.[389] In particular, Directive 2004/81/EC may be

[384] Ibid., Article 30(3), p.51
[385] Ibid., Article 30(4), p.51.
[386] ECRE Comments, April 2009, p.9, para. 2.5.
[387] COM (2011) 320 final, Article 21. It should be noted that the recast QD is not entirely in line with this definition either, see COM (2009) 551, Article 20(3).
[388] Only Article 6(3)(c) mentions victims of trafficking in the context of minors.
[389] UN Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 15 November 2000, 2225 UNTS 209 (ratified on behalf of the EU by Council Decisions 2006/618/EC and 2006/619/EC of 24 July 2006, [2006] OJ L 262/44). Article 7 of the Protocol places an obligation on State Parties to 'consider adopting

relevant if an asylum-seeker is found to be a victim of trafficking and agrees to cooperate with the authorities.[390] In accordance with the Directive, a MS would issue a six-month residence permit during which no expulsion order can be enforced.[391] The granting of a residence permit effectively means that the MS would also be accepting responsibility for considering the asylum application. Therefore, to ensure that victims of trafficking are treated in accordance with the relevant legislation, the draft Regulation should confirm under what circumstances an asylum-seeker should be treated as falling within the scope of Directive 2004/81/EC, so that the Dublin System is no longer applicable to that individual.

4 Efficiency of the Dublin System

4.1 The cessation of responsibility clauses

The proposal makes changes to the cessation of responsibility clauses, clarifying which MS should bear the burden of proof and the circumstances under which responsibility ceases. Draft Articles 19(2) and 19(3) confirm that when someone leaves the territory of the EU for at least 3 months, either voluntarily or due to administrative removal, but then returns at a later date and seeks to apply for asylum, that application will be treated as a new application.[392] This takes into account that circumstances in an asylum-seeker's country of origin could change, providing a new factual matrix that would need to be considered if that individual sought asylum again in the EU. It also emphasises that MSs have a continual international obligation to allow access to their asylum procedures, irrespective of whether the asylum-seeker has sought to claim asylum on different grounds in the past, thereby ensuring that the right to asylum is respected at all times by MSs.

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legislative or other appropriate measures' that allow victims of trafficking to stay in the territory of that State, either temporarily or permanently.

[390] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, [2004] OJ L 261/19.

[391] Ibid., Article 6.

[392] COM (2008) 820 final, Article 19, p.39.

4.2 The 'discretionary clause'

The Commission's proposal significantly alters the sovereignty and humanitarian clauses[393] by placing them under one 'discretionary clause',[394] thereby widening the scope by which a MS can assume, or request another State to assume, responsibility for an application.

Draft recital 14 and Article 17(1) clarify that a MS may decide to consider an application that it is not strictly responsible for on the basis of 'humanitarian and compassionate reasons',[395] provided that the asylum-seeker and the other MS agree to this, thereby mirroring the current 'sovereignty clause'. Draft Article 17(2) refers to a request to another MS to take charge of an application, 'on humanitarian grounds based in particular on family or cultural considerations', in order to uphold family ties.[396] It is considered that the wording in Article 17(1) should be mirrored in Article 17(2) to allow for a request to be made to another MS in cases extending beyond those based on 'bring[ing] together family members'.[397]

The draft 'discretionary clause' gives more scope to MSs to decide to assume responsibility for an application. In addition, the requirement that the parties must consent to any request made under the clause is crucial, in order to ensure that it is not used in the MSs' own interests but in the interests of the asylum-seeker. However, whilst this suggests a more flexible and rights-based approach, it would be advisable that agreed guidelines are produced, in particular to clearly define 'humanitarian or compassionate reasons' which appears to be a broad concept. Guidelines would encourage MSs to actively use the discretionary clause, whilst ensuring that it is applied in a consistent manner. Otherwise, diverging practices between MSs are likely to continue and asylum-seekers will continue to not be guaranteed similar treatment with full respect for their fundamental rights in all EU-MSs.

[393] Dublin II, Articles 3(2) and 15.
[394] COM (2008) 820 final, Article 17, p.36.
[395] COM (2008) 820 final, recital 14, p.17; Article 17(1), pp.36-37.
[396] Ibid., Article 17(2), p.37.
[397] Ibid.

UNHCR considers that a MS's duty to guarantee the right to asylum and offer protection against *refoulement* takes precedence over the responsibility-allocation arrangements under the Dublin System so that when fundamental rights are not guaranteed, the mechanism provided for under Article 3(2) should be used.[398] Clarification of when a MS's right to derogate should be exercised is raised in several preliminary references to the CJEU, which are still pending.[399] The CJEU has been asked to verify *interalia* whether a MS's duty to observe fundamental rights[400] is discharged when it sends an asylum-seeker to a responsible State, regardless of the situation in that MS, and whether the 'conclusive presumption' that the responsible MS will observe fundamental rights under EU law and/or minimum standards imposed by 'the Directives'[401] is compatible with the sending MS's obligation to observe fundamental rights.[402] Secondly, the Court is asked in what circumstances the sending MS is obliged to exercise its power under Article 3(2) where transferring an asylum-seeker to another MS would expose him 'to a risk of violation of his fundamental rights' and/or the risk that minimum standards of the Directives will not be applied.[403] More specifically, the Court is asked whether the sending MS is obliged to assess the compliance of the receiving MS with Article 18 of the Charter and the Directives.[404] Finally, the Court is asked to consider whether a situation in the receiving MS which poses a threat to the fundamental rights of the asylum-seeker, but is not directly associated with his particular case, would be sufficient to infer that the sending MS has

[398] UNHCR, 'Submissions in *R (Najibullah Saeedi) v Secretary of State for the Home Department* (CO/8660/2009)', pp.12-13, para.28, available at http://www.unhcr.org/refworld/pdfid/4b83fceb2.pdf (consulted on 21 June 2011).
[399] Case C-411/10, *NS v Secretary of State for the Home Department ('SSHD')*, Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) made on 18 August 2010, [2010] OJ C 274/21; Case C-493/10, *M. E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Reference for a preliminary ruling from High Court of Ireland made on 15 October 2010, [2010] OJ C 13/18; Case C-4/11, *Federal Republic of Germany v Kaveh Puid*, Reference for a preliminary ruling from the Hessischer Verwaltungsgerichtshof (Germany) lodged on 5 January 2011, [2011] OJ C 95/3.
[400] As enshrined in Articles 1, 4, 18, 19(2) and 47 Charter.
[401] Directives 2003/9/EC (RCD), 2004/83/EC (QD) and/or 2005/85/EC (APD).
[402] Case C-411/10, *NS v SSHD*, [2010] OJ C 274/21, paras.2 and 3.
[403] Ibid., para.4.
[404] Case C-493/10, *M. E. and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [2010] OJ C 13/18, para.1.

a duty to exercise its rights under the 'sovereignty clause' and if so, on what grounds would that duty be established.[405]

These references to the CJEU demonstrate a lack of understanding of how the 'sovereignty clause' should be interpreted, in particular when the situation in other MSs may place asylum-seekers at risk that their fundamental rights (as recognised by the Charter) would be breached. It is hoped that the CJEU's decision on these preliminary references will aid the interpretation of the 'sovereignty clause' so that any further changes necessary to clarify its scope and usage can be integrated into the draft Regulation.

4.3 Time-limits

The draft Regulation introduces new deadlines to improve efficiency and 'to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures'.[406] It suggests with regard to take back requests that a MS should make the request 'as quickly as possible and in any case within two months' if based on Eurodac evidence, or three months in other cases.[407] Draft Article 17(2) proposes that although a request on humanitarian grounds may be made 'at any time' during the process for determining responsibility, a deadline of two months should be introduced within which the requested MS must respond to a request made on humanitarian grounds.[408] This takes into account that humanitarian grounds may come to light at any time in the assessment process, whilst ensuring that such a request is dealt with within a reasonable

[405] Case C-4/11, *Federal Republic of Germany v Kaveh Puid*, [2011] OJ C 95/3, paras.1-3. In particular the German court asks whether failure to satisfy one or several requirements of the RCD or APD would be sufficient, or whether there would need to be 'particularly serious deficiencies' existing which could 'fundamentally compromise the procedural guarantees or pose a threat to the physical integrity of the asylum-seeker'.
[406] COM (2008) 820 final, recital 5, p.15.
[407] COM (2008) 820 final, Article 23(2), p.43. The EP's amendments shorten the time-limit where Eurodac evidence is available to one month, see Article 23(2) ([2009] OJ C 212 E/370).
[408] Ibid., Article 17(2), p.36.

time-frame so as not to delay the final decision on responsibility and is therefore beneficial to the asylum-seeker.[409]

[409] UNHCR Comments, 18 March 2009, p.10, para.4.3.

--------- Chapter 6 - The suspension of transfer clause ---------

The concept of solidarity and responsibility-sharing in asylum issues has developed steadily in EU rhetoric, particularly since the Stockholm Programme. With the entry into force of the Lisbon Treaty, the notion of solidarity between the EU Institutions and the MSs, as expressed through the sharing of responsibilities, was reaffirmed in Article 80 TFEU.[410] A recent study shows that although there is little agreement among the MSs and EU Institutions on the meaning or scope of solidarity, the notion of 'trust' is a key component, necessary for solidarity to function effectively, and it is gained in part through the correct implementation of EU legislation by the MSs.[411]

The need for greater solidarity and the breakdown in trust between MSs has been evidenced by recent developments in the EU in relation to asylum. Firstly, the decision of the ECtHR in *MSS v Belgium and Greece* confirmed that there are serious deficiencies in the Dublin System and emphasised the need to demonstrate greater solidarity towards those MSs which are under pressure. The Court noted that, 'the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation'.[412] These pressures impact on the ability of asylum-seekers to access asylum procedures and result in a lowering of the standards of reception and detention conditions. Both these developments directly impact on asylum-seekers' fundamental rights, in particular the right to asylum and respect for human dignity.

Secondly, pressures on border MSs have been further exacerbated by the influx of refugees from North Africa this year. An estimated 26,980 people (asylum-seekers and

[410] See Chapter 2, 1.2.3 and footnote 40.
[411] European Parliament, D-G for Internal Policies, 'The Implementation of Article 80 TFEU on the principle of solidarity and fair sharing of responsibility, including its financial implications, between Member States in the field of border checks, asylum and immigration', PE.453.167, 19 April 2011, p.22, available at http://www.europarl.europa.eu/studies (consulted on 24 June 2011).
[412] *MSS v Belgium and Greece* [GC], no. 30696/09, 21 January 2011, paragraph 223.

economic migrants) arrived in Italy between mid-January and April 2011. While the majority are thought to be economic migrants from Tunisia, around 4,000 come from sub-Saharan Africa, mainly Eritrea, Ethiopia, Ivory Coast and Somalia, and are seeking international protection.[413] ECRE has urged MSs to 'engage in concrete solidarity' and responsibility-sharing, in an effort to help those countries facing difficulties and called on MSs to consider whether to temporarily suspend the return of asylum-seekers under Dublin II to particular MSs to help ease the pressure.[414] In a Council meeting held in April 2011 to discuss the immediate management of migration from North Africa to the southern border MSs of Italy and Malta, the Council reaffirmed 'the need for genuine and concrete solidarity' towards those MSs most directly affected.[415]

The Commission's proposal on the draft Regulation seeks to enhance the notion of solidarity by allowing for the temporary suspension of transfers to any MS under particular pressure. Draft Article 31 allows for a MS facing a 'particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure',[416] to make a request to the Commission to suspend transfers under the Dublin System for an initial period of up to six months, which can be extended if necessary.[417] It also allows for any MS to make a request to the Commission if it has concerns that another MS is not providing adequate levels of protection, in line with the minimum standards in relation to the reception of asylum-seekers and access to asylum procedures.[418] The Commission would be required to consider whether the circumstances in that MS meant that asylum-seekers were not

[413] ECRE, 'ECRE Weekly Bulletin: EU developments', 22 April 2011, p.1, available at http://www.ecre.org/media/news/weekly-bulletin.html (consulted on 29 June 2011).
[414] ECRE, 'Letter to Mr Sándor Pintér, Minister of the Interior, EU Presidency, Re: The European Union's response to refugee and migrants flows from Libya and neighbouring countries', 6 April 2011, available at http://www.ecre.org/files/ECRE%20letter%20JHA%20Council%20April%202011_final.pdf (consulted on 21 June 2011).
[415] Council of the European Union, 'Council Conclusions on the management of migration from the Southern Neighbourhood, 3081st Justice and Home Affairs Council meeting, Luxembourg', 11-12 April 2011, para.3, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/121479.pdf (consulted on 22 June 2011).
[416] COM (2008) 820 final, Article 31(1), p.52.
[417] Ibid., Article 31(8), p.53.
[418] Ibid., Article 31(3), p.52.

being offered an adequate level of protection and it could do so either on its own initiative, or in response to a request made by a MS.[419]

Further to comments from stakeholders,[420] the EP added in provisions to Article 31 to include an obligation on the Commission to outline 'measures, benchmarks and timetables…to assess progress toward resolution' of the situation.[421] It also added an obligation on the MS concerned to 'take effective and timely steps to remedy the situation'.[422] These amendments are advisable in order to ensure that the MS concerned takes prompt action to improve the conditions so that the suspension on transfers can be lifted as quickly as possible. It also prevents a MS from delaying taking remedial action in order to prolong the period during which it will not receive Dublin transfers, on the basis that this would alleviate any additional burden these transfers place on its financial and administrative resources.

In addition, the EP added a further clause, referring to a separate proposal to enact other solidarity instruments, to be binding on all MSs by December 2011. These instruments will provide for the secondment of officials from the EU-MSs to assist any MS facing pressures on its asylum system, to be organised through the European Asylum Support Office. A scheme to reallocate beneficiaries of international protection from MSs 'faced with specific and disproportionate pressures' to other MSs is also being established.[423] Both the proposals are already underway – EASO is focussing in particular on providing support to Greece to improve its asylum system and a pilot scheme has been set up for the reallocation of refugees in Malta to other EU-MSs.[424]

[419] Ibid, Article 31(2) and (4), pp.52-53.
[420] See for example: ECRE's Comments, April 2009, p.10-12.
[421] The provision is renumbered in the EP's position as Article 32(4)(e) ([2009] OJ C 212 E/370).
[422] [2009] OJ C 212 E/370, Article 32(8) is inserted by the EP.
[423] Ibid., Article 32(11).
[424] CoE, Committee on Migration, Refugees and Population Report, 'Asylum seekers and refugees: sharing responsibilities in Europe', Doc.12630, 6 June 2011, paras.58 and 66, available at http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12630.pdf (consulted on 24 June 2011).

The suspension of transfer clause is a necessary addition to the Dublin System as the current mechanism which places responsibility on the MS of entry is no longer a viable solution to the challenges faced in managing asylum. It also seeks to enhance the principle of solidarity enshrined in Article 80 TFEU. However, it is notable that of all the amendments in the Commission's proposal, the suspension of transfer clause has met with the most resistance from MSs and as such it is likely to be the hardest measure to get through the Council.

--------- Conclusion ---------

The Stockholm Programme confirmed that the focus of the second phase of the CEAS would be on 'consolidating a genuine common immigration and asylum policy', with 'a long-term vision of respect for fundamental rights and human dignity', and the strengthening of 'solidarity, particularly between Member States as they collectively shoulder the burden of a humane and efficient system'.[425] However, the obligation to protect the rights of refugees and asylum-seekers often conflicts with the responsibility to limit irregular migration and control the EU's external borders.[426] This is evidenced in parts of the EU asylum legislation which seemingly prioritise universal human rights commitments, but in practice often allow too wide a margin of discretion so that MSs' interests prevail.[427]

The ECtHR's decision in *MSS v Belgium and Greece*, affirms this tension by highlighting the limitations of the Dublin System in preventing secondary movements of asylum-seekers and multiple applications, due in part to the obvious variations in the standards of asylum procedures and treatment of asylum-seekers between MSs. The potential risks caused by a responsibility-sharing mechanism that is based on the assumption that common standards in asylum procedures *already* exist are tangible and serious as they impact directly on the asylum-seeker's fundamental rights, in particular the right to asylum and principle of non-*refoulement*. Therefore, the proposals from the Commission to improve the procedural and legal safeguards in the Dublin II Regulation, whilst long overdue, are essential if it is to remain in place as a responsibility-sharing mechanism which also ensures the protection of fundamental rights.

The analysis of the Commission's proposal in Chapter 5 shows that there are some areas where protection should go further to fully reflect MSs' international obligations to protect asylum-seekers' fundamental rights. It is argued that the draft Regulation should be amended to uphold the ECtHR's recent ruling that a suspensive effect of

[425] COM (2010) 171 final, p.7, para.6.
[426] Peers, 2011 (a), p.297.
[427] Pirjola, 2009, pp.357-8.

appeal should be automatic where an alleged violation of an absolute right has been raised.[428] Secondly, whether asylum-seekers should be detained at all remains a divided issue, particularly where detention is primarily being used to pursue an administrative goal such as the transfer to another MS. Whilst the provisions on detention provide some safeguards, the limitations imposed on MSs to avoid its arbitrary use could be strengthened further, by requiring that MSs review the legality of detention from the outset and by clearly defining the criteria necessary to demonstrate a 'risk of absconding'. Thirdly, to ensure effective access to the asylum procedure is guaranteed to asylum-seekers returned under the Dublin System, obligations on MSs should be extended to include the examination of applications rejected in the asylum-seeker's absence due to technical formalities. Placing a positive obligation on the receiving MS to fully examine an asylum-seeker's claim on their return is fundamental to ensuring full respect for the right to asylum and compliance with the principle of non-*refoulement*.

Significant progress is made in the Commission's proposal to ensure that the principle of family unity and acting in the best interests of the child are given priority by MSs when deciding whether to accept responsibility for an asylum claim. However, whilst the scope of 'family member' has been widened, it is still based on the proviso that the family existed in the country of origin, therefore maintaining one of the main limitations on the right to family life and the principle of family reunification. It is also noted that the lack of consistency with other instruments in the EU asylum *acquis*, concerning the protection afforded to vulnerable persons and in particular victims of trafficking, is insufficiently addressed. It is essential that the draft Regulation defines vulnerable persons in line with the remainder of the EU asylum *acquis* so that certain categories of persons are not left unprotected.

However, the Commission's proposal makes significant progress in other areas by increasing MSs' obligations to respect asylum-seekers' fundamental rights. By clarifying the scope of the discretionary clauses, MSs will be expected to exercise more

[428] *MSS v Belgium and Greece* [GC], no. 30696/09, paras.387-389 and 393.

flexibility when deciding whether to take responsibility for an asylum-seeker. It is hoped that the CJEU will shed more light on how MSs should exercise discretion in compliance with their international human rights obligations, particularly with respect to the Charter, when it responds to the preliminary references made in relation to the current sovereignty clause. In addition, the introduction of stricter and more clearly defined obligations on the provision of information, and more efficient time-limits are vital to ensure that the Dublin System operates with greater efficiency and transparency, so that procedural fairness is respected and excessive delays are avoided.

Finally, the new suspension of transfer clause is critical if the Dublin System is to remain workable. However, the provisions need to go hand in hand with improving other responsibility-sharing initiatives between MSs, such as resettlement and relocation programmes and the EASO. The *Action Plan Implementing the Stockholm Programme* indicates that the Commission is to evaluate whether the joint processing of asylum applications within the EU could be a long-term objective, a step that has been called for in the past by the UNHCR and other NGOs, who have highlighted the serious flaws in the Dublin System for a long time.[429]

In the meantime, the Dublin System remains in place and its reform needs to progress as quickly as possible. There have been no further changes to the EP's position since a change in the Parliament in June 2009. This is positive given that the amendments proposed by the EP generally favour the asylum-seeker. However, there is still a lack of consensus among the Council on certain measures in the Commission's proposal, including the suspension of transfer clause, which is holding back further progress on reform.

The bigger picture is also mixed. The development of the second phase of the CEAS is well underway. However, the Commission has already had to review its proposals to recast the RCD and APD because of a lack of agreement in the Council. Changes made to key provisions, including those on detention, vulnerable persons, interview procedures and the withdrawal of asylum claims are of particular concern given the

[429] COM (2010) 171 final, p.55.

overlap with provisions in the draft Regulation. It is worrying that the majority of the changes lower the standards as compared to the earlier proposals, in some cases to below those of the current Directives.[430]

At this stage, one can only speculate on how these changes will affect the corresponding provisions in the draft Regulation. However, if the amendments in the latest recast of the RCD and APD are mirrored in the corresponding provisions of the draft Regulation, then many of the proposed safeguards to ensure that MSs comply with their obligations to protect asylum-seekers' fundamental rights will be watered down. Moreover, if the latest recasts are a reflection of the general direction that the second phase of the CEAS is taking, it is questionable whether the current inadequate standards that have been found to be applied in practice by some MSs will raised at all. In 2004, it was noted on examining the developing EU asylum *acquis* that, 'one has the impression that the Member States are seeking to draw up a whole new *acquis* unencumbered by their international commitments'.[431] The second phase of the CEAS could follow a similar course. The Commission's proposal to recast Dublin II and the findings of the ECtHR in *MSS v Belgium and Greece*, demonstrate the extent to which the Dublin System needs to improve in order that MSs meet their international obligations to protect asylum-seekers' fundamental rights. It remains to be seen whether the MSs themselves will reach a compromise which fully recognises those obligations and in doing so, accomplishes a key objective of the Stockholm Programme.

[430] Peers, 2011 (b), pp.3-4.
[431] Guild, 2004, p.218.

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--------- Annex ---------

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.

(Recast)

COM (2008) 820 final (pp.14-62).

Ⓒ 343/2003/EC
new
2008/0243 (COD)

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 ~~asylum~~ application for international protection lodged in one of the Member States by a third-country national or a stateless person

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63, first paragraph, point (1)(a) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee[21],

Having regard to the opinion of the Committee of the Regions[22],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[23],

Whereas:

new

(1) A number of substantive changes are to be made to Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national[24]. In the interests of clarity, that Regulation should be recast.

21 OJ C [...], [...], p. [...].
22 OJ C [...], [...], p. [...].
23 OJ C [...], [...], p. [...].
24 OJ L 50, 25.2.2003, p.1.

Œ 343/2003/EC recital 1

(2) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

Œ 343/2003/EC recital 2

(3) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals.

Œ 343/2003/EC recital 3

(4) The Tampere conclusions also stated that this system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.

Œ 343/2003/EC recital 4
new

(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining ~~refugee~~ international protection status and not to compromise the objective of the rapid processing of ~~asylum~~ applications for international protection .

Œ 343/2003/EC recital 5

~~As regards the introduction in successive phases of a common European asylum system that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted asylum, it is appropriate at this stage, while making the necessary improvements in the light of experience, to confirm the principles underlying the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities(4), signed in Dublin on 15 June 1990~~

~~(hereinafter referred to as the Dublin Convention), whose implementation has stimulated the process of harmonising asylum policies.~~

new

(6) The first phase in the creation of a Common European Asylum System that should lead, in the longer term, to a common procedure and a uniform status, valid throughout the Union, for those granted asylum, has now been achieved. The European Council of 4 November 2004 adopted The Hague Programme which sets the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect The Hague Programme invited the European Commission to conclude the evaluation of the first phase legal instruments and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before 2010.

(7) In the light of the results of the evaluations undertaken, it is appropriate, at this stage, to confirm the principles underlying the Regulation (EC) No 343/2003, while making the necessary improvements in the light of experience to enhance the effectiveness of the system and the protection granted to applicants for international protection under this procedure.

(8) In view of ensuring equal treatment for all applicants and beneficiaries of international protection, as well as in order to ensure consistency with current EU asylum *acquis*, in particular with Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,[25] it is appropriate to extent the scope of this Regulation in order to include applicants for subsidiary protection and persons enjoying subsidiary protection.

(9) In order to ensure equal treatment of all asylum seekers, Directive […/…/EC] of … laying down minimum standards for the reception of asylum seekers[26] should apply to the procedure regarding the determination of the Member State responsible as regulated under this Regulation.

(10) In accordance with the 1989 United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States in the application of this Regulation. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.

[25] OJ L 304, 30.9.2004, p. 12.
[26] OJ L […], […], p. […].

Œ 343/2003/EC recital 6

~~Family unity should be preserved in so far as this is compatible with the other objectives pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.~~

new

(11) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, respect for family unity should be a primary consideration of Member States when applying this Regulation.

Œ 343/2003/EC (recital 7)
new

(12) The processing together of the ~~asylum~~ applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly and the decisions taken in respect of them are consistent and that the members of one family are not separated .

new

(13) In order to ensure full respect for the principle of family unity and of the best interests of the child, the existence of a relationship of dependency between an applicant and his/her extended family on account of pregnancy or maternity, their state of health or great age, should become binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a relative on the territory of another Member State who can take care of him/her should also become binding responsibility criterion.

Œ 343/2003/EC (recital 7)
new

(14) Any Member State~~s~~ should be able to derogate from the responsibility criteria, ~~so as to make it possible to bring family members together where this is necessary on humanitarian grounds~~ in particular for humanitarian and compassionate reasons and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in the Regulation, provided that the concerned Member State and the applicant agree thereto.

new

(15) A personal interview should be organised in order to facilitate the determination of the Member State responsible for examining an application for international protection and, where necessary, to orally inform applicants about the application of this Regulation.

(16) In accordance in particular with Article 47 of the Charter of Fundamental Rights of the European Union, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established to guarantee effective protection of the rights of the individuals concerned.

(17) In accordance with the case-law of the European Court of Human Rights, the effective remedy should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred in order to ensure that international law is respected.

(18) Detention of asylum seekers should be applied in line with the underlying principle that a person should not be held in detention for the sole reason that he is seeking international protection. In particular, detention of asylum seekers must be applied in line with Article 31 of the Geneva Convention and under the clearly defined exceptional circumstances and guarantees prescribed in Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers]. Moreover, the use of detention for the purpose of transfer to the Member State responsible should be limited and subject to the principle of proportionality with regard to the means taken and objective pursued.

(19) In accordance with Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003[27], transfers to the Member State responsible may be carried out on a voluntary basis, by supervised departure or under escort. Member States should promote voluntary transfers and should ensure that supervised or escorted transfers are undertaken in a human manner, in full respect for fundamental rights and human dignity.

Œ 343/2003/EC recital 8

(20) The progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the Treaty establishing the European Community and the establishment of Community policies regarding the conditions of entry and stay of third country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.

[27] OJ L222, 5.9.2003, p.3.

new

(21) The application of this Regulation may, in certain circumstances, create additional burdens on Member States faced with a particularly urgent situation which places an exceptionally heavy pressure on their reception capacities, asylum system or infrastructure. In such circumstances, it is necessary to lay down an efficient procedure to allow the temporary suspension of transfers towards the Member State concerned and to provide financial assistance, in accordance with existing EU financial instruments. The temporary suspension of Dublin transfers can thus contribute to achieve a higher degree of solidarity towards those Member States facing particular pressures on their asylum systems, due in particular to their geographical or demographic situation.

(22) This mechanism of suspension of transfers should be applied also when the Commission considers that the level of protection for applicants for international protection in a given Member State is not in conformity with Community legislation on asylum, in particular in terms of reception conditions and access to the asylum procedure, in view of ensuring that all applicants for international protection benefit from an adequate level of protection in all Member States

(23) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[28] applies to the processing of personal data by the Member States in application of this Regulation.

(24) The exchange of applicant's personal data, including sensitive data concerning health, to be transferred before a transfer is carried out will ensure that the competent asylum authorities are in a position to provide applicants with adequate assistance and to ensure continuity in the protection and rights afforded to them. Special provision should be made to ensure the protection of data relating to applicants involved in this situation, in conformity with Directive 95/46/EC.

Œ 343/2003/EC recital 9 (adapted)

(25) The application of this Regulation can be facilitated, and its effectiveness increased, by bilateral arrangements between Member States for improving communications between competent departments, reducing time limits for procedures or simplifying the processing of requests to take charge or take back, or establishing procedures for the performance of transfers.

[28] OJ L 281, 23.11.1995, p. 31.

Œ 343/2003/EC recital 10 (adapted)

(26) Continuity between the system for determining the Member State responsible established by the ~~Dublin Convention~~ Regulation (EC) No 343/2003 and the system established by this Regulation should be ensured. Similarly, consistency should be ensured between this Regulation and ~~Council~~ Regulation (EC) No ~~2725/2000 of 11 December 2000~~[.../...] [concerning the establishment of "~~Eurodac~~ EURODAC" for the comparison of fingerprints for the effective application of the Dublin ~~Convention~~ [29] Regulation].

Œ 343/2003/EC recital 11 (adapted)
new

(27) The operation of the ~~Eurodac~~ EURODAC system, as established by Regulation (EC) No ~~2725/2000~~ [.../...] [concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Regulation] and in particular the implementation of Articles ~~4~~ 6 and ~~8~~ 10 contained therein should facilitate the ~~implementation~~ application of this Regulation.

new

(28) The operation of the Visa Information System, as established by Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas[30], and in particular the implementation of Articles 21 and 22 contained therein should facilitate the application of this Regulation.

Œ 343/2003/EC recital 12

(29) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by obligations under instruments of international law to which they are party.

[29] ~~OJ L 316, 15.12.2000, p. 1~~
[30] OJ L 218, 13.8.2008, p. 60.

Œ 343/2003/EC recital 13

(30) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[31].

Œ 1103/2008/EC pt. 3, first sub-paragraph of the Annex (adapted)
new

(31) ~~As regards Regulation (EC) No 343/2003,~~ In particular, the Commission should be empowered to adopt the conditions and procedures for ~~the~~ implementing ~~of the humanitarian clause~~ the provisions regarding unaccompanied minors and the reunification of dependent relatives and to adopt the criteria necessary for carrying out transfers. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation ~~(EC) No 343/2003~~ by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

new

(32) The measures necessary for the implementation of Regulation (EC) No 343/2003 have been adopted by Regulation (EC) No 1560/2003. Certain provisions of Regulation (EC) No 1560/2003 should be incorporated into this Regulation, for reasons of clarity or because they can serve a general objective. In particular, it is important both for the Member States and the asylum seekers concerned, that there should be a general mechanism for finding a solution in cases where Member States differ over the application of a provision of this Regulation. It is therefore justified to incorporate the mechanism provided for in Regulation (EC) No 1560/2003 for the settling of disputes on the humanitarian clause into this Regulation and to extend its scope to the whole of this Regulation.

Œ 343/2003/EC recital 14 (adapted)
new

(33) The effective monitoring of ~~T~~the application of ~~the~~ this Regulation ~~should~~ requires that it be evaluated at regular intervals.

[31] OJ L 184, 17.7.1999, p. 23.

Œ 343/2003/EC recital 15 (adapted) new

(34) ~~The~~ This Regulation ~~observes~~ respects the fundamental rights and observes the the principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union[32]. In particular, this Regulation ~~it~~ seeks to ensure full observance of the right to asylum guaranteed by Article 18 and to promote the application of Articles 1, 4, 7, 24 and 47 of the said Charter and has to be applied accordingly .

Œ 343/2003/EC recital 16 new

(35) Since the objective of the proposed measure, namely the establishment of criteria and mechanisms for determining the Member State responsible for examining an ~~asylum~~ application for international protection lodged in one of the Member States by a third-country national or a stateless person , cannot be sufficiently achieved by the Member States and, given the scale and effects, can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

Œ 343/2003/EC recital 17 (adapted)

~~In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland gave notice, by letters of 30 October 2001, of their wish to take part in the adoption and application of this Regulation.~~

Œ 343/2003/EC recital 18 (adapted)

~~In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation and is not bound by it nor subject to its application.~~

[32] OJ C 364, 18.12.2000, p. 1.

Œ 343/2003/EC recital 19 (adapted)

~~The Dublin Convention remains in force and continues to apply between Denmark and the Member States that are bound by this Regulation until such time an agreement allowing Denmark's participation in the Regulation has been concluded.~~

Œ 343/2003/EC (adapted)
new

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SUBJECT-MATTER AND DEFINITIONS

Article 1

Subject-matter

This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for ~~asylum~~ international protection lodged in one of the Member States by a third-country national or a stateless person .

Article 2

Definitions

For the purposes of this Regulation:

(a) "third-country national" means ~~anyone~~ any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council[33] ;

~~(b) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;~~

~~(c) "application for asylum" means the application made by a third-country national which can be understood as a request for international protection from a~~

[33] OJ L 105, 13.4.2006, p.1.

~~Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless a third country national explicitly requests another kind of protection that can be applied for separately;~~

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new

(b) "application for international protection" means an application for international protection as defined in Article 2(g) of Directive 2004/83/EC;

Œ 343/2003/EC (adapted)
new

(c)~~(d)~~ "applicant" or "asylum seeker" means a third country national or a stateless person who has made an application for ~~asylum~~ international protection in respect of which a final decision has not yet been taken;

(d)~~(e)~~ "examination of an ~~asylum~~ application for international protection" means any examination of, or decision or ruling concerning, an application for ~~asylum~~ international protection by the competent authorities in accordance with ~~national law~~ Council Directive 2005/85/EC[34], except for procedures for determining the Member State responsible in accordance with this Regulation, and Directive 2004/83/EC;

(e)~~(f)~~ "withdrawal of ~~the~~ an ~~asylum~~ application for international protection" means the actions by which the applicant ~~for asylum~~ terminates the procedures initiated by the submission of his/her application for ~~asylum~~ international protection, in accordance with ~~national law~~ Directive 2005/85/EC, either explicitly or tacitly;

(f)~~(c)~~ "~~refugee~~ person granted international protection" means ~~any~~ a third-country national or a stateless person recognised as in need of international protection as defined in Article 2(a) of Directive 2004/83/EC ~~qualifying for the status defined by the Geneva Convention and authorised to reside as such on the territory of a Member State~~;

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new

(g) "minor" means a third-country national or a stateless person below the age of 18 years;

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[34] OJ L 326, 13.12.2005, p.13.

Œ 343/2003/EC (adapted)
new

(h) "unaccompanied minor" means ~~unmarried persons below the age of eighteen~~ a minor who ~~arrive~~ arrives in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of ~~the~~ Member States;

(i) "family members" means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried ~~and dependent~~ and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

new

(iii) the married minor children of couples referred to in point (i) or of the applicant, regardless of whether they were born in or out of wedlock or adopted as defined under the national law, where it is in their best interests to reside with the applicant;

Œ 343/2003/EC (adapted)
new

~~(iv)~~(iii) the father, mother or guardian ~~when~~ of the applicant ~~or refugee~~ when the latter is a minor and unmarried, or when he is a minor and married but it is in his/her best interests to reside with his/her father, mother or guardian ;

new

(v) the minor unmarried siblings of the applicant, when the latter is a minor and unmarried, or when the applicant or his/her siblings are minors and married but it is in the best interests of one or more of them that they reside together;

Œ 343/2003/EC
new

(j) "residence document" means any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay in its territory, including the documents substantiating the authorisation to remain in the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the responsible Member State as established in this Regulation or during examination of an application for ~~asylum~~ international protection or an application for a residence permit;

(k) "visa" means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions:

(i) "long-stay visa" means the authorisation or decision of a Member State required for entry for an intended stay in that Member State of more than three months;

(ii) "short-stay visa" means the authorisation or decision of a Member State required for entry for an intended stay in that State or in several Member States for a period whose total duration does not exceed three months;

(iii) "transit visa" means the authorisation or decision of a Member State for entry for transit through the territory of that Member State or several Member States, except for transit at an airport;

(iv) "airport transit visa" means the authorisation or decision allowing a third-country national specifically subject to this requirement to pass through the transit zone of an airport, without gaining access to the national territory of the Member State concerned, during a stopover or a transfer between two sections of an international flight;

new

(l) "risk of absconding" means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer decision may abscond.

Œ 343/2003/EC (adapted)
new

CHAPTER II

GENERAL PRINCIPLES AND SAFEGUARDS

Article 3

Access to the procedure for examining an application for international protection

1. Member States shall examine ~~the~~ any application for international protection ~~of any~~ by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones ~~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 of this Regulation indicate is responsible.

Œ 343/2003/EC Article 13
new

2. Where no Member State responsible for examining the application for international protection ~~asylum~~ can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for ~~asylum~~ international protection was lodged shall be responsible for examining it.

Œ 343/2003/EC
new

3. Any Member State shall retain the right, ~~pursuant to its national laws,~~ to send an asylum seeker to a safe third country, ~~in compliance with the provisions of the Geneva Convention~~ subject to the rules and safeguards laid down in Directive 2005/85/EC .

Œ 343/2003/EC Article 3(4) (adapted)
new

Article 4

Right to information

~~1~~. As soon as an application for international protection is lodged, the competent authorities of Member States shall inform ~~T~~the asylum seeker ~~shall be informed in writing in a language that he or she may reasonably be supposed to understand regarding~~ of the application of this Regulation~~, its time limits and its effects~~, and in particular of:

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new

(a) the objectives of this Regulation and the consequences of making another application in a different Member State;

(b) the criteria for allocating responsibility and their hierarchy;

(c) the general procedure and time-limits to be followed by the Member States;

(d) the possible outcomes of the procedure and their consequences;

(e) the possibility to challenge a transfer decision;

(f) the fact that the competent authorities can exchange data on him/her for the sole purpose of implementing the obligations arising under this Regulation;

(g) the existence of the right of access to data relating to him/her, and the right to request that inaccurate data relating to him/her be corrected or that unlawfully processed data relating to him/her be deleted, including the right to receive information on the procedures for exercising those rights and the contact details of the National Data Protection Authorities which shall hear claims concerning the protection of personal data.

2. The information referred to in paragraph 1 shall be provided in writing in a language that the applicant is reasonably supposed to understand. Member States shall use the common leaflet drawn up pursuant to paragraph 3 for that purpose.

Where necessary for the proper understanding of the applicant, the information shall also be supplied orally, at the interview organised pursuant to Article 5.

Member States shall provide the information in a manner appropriate to the age of the applicant.

3. A common leaflet containing at least the information referred to in paragraph 1 shall be drawn up in accordance with the procedure referred to in Article 40(2).

Article 5

Personal interview

1. The Member State carrying out the process of determining the Member State responsible under this Regulation, shall give applicants the opportunity of a personal interview with a qualified person under national law to conduct such an interview.

2. The personal interview shall be for the purpose of facilitating the process of determining the Member State responsible, in particular for allowing the applicant to submit relevant information necessary for the correct identification of the responsible Member State, and for the purpose of informing the applicant orally about the application of this Regulation.

3. The personal interview shall take place in a timely manner following the lodging of an application for international protection and, in any event, before any decision is taken to transfer the applicant to the responsible Member State pursuant to Article 25(1).

4. The personal interview shall take place in a language that the applicant is reasonably supposed to understand and in which he is able to communicate. Where necessary, Member States shall select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the personal interview.

5. The personal interview shall take place under conditions which ensure appropriate confidentiality.

6. The Member State conducting the personal interview shall make a short written report containing the main information supplied by the applicant at the interview and shall make a copy of that report available to the applicant. The report shall be attached to any transfer decision pursuant to Article 25(1).

Article 6

Guarantees for minors

1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

2. Member States shall ensure that a representative represents and/or assists the unaccompanied minor with respect to all procedures provided for in this Regulation. This representative may also be the representative referred to in Article 23 of Directive [.../.../EC] [laying down minimum standards for the reception of asylum seekers].

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background;

(c) safety and security considerations, in particular where there is a risk of the child being a victim of trafficking;

(d) the views of the minor, in accordance with his/her age and maturity.

4. Member States shall establish procedures in national legislation for tracing the family members or other relatives present in the Member States of unaccompanied minors. They shall start to trace the members of the unaccompanied minor's family or other relatives as soon as possible, after the lodging of the application for international protection whilst protecting his/her best interests.

5. The competent authorities referred to in Article 33 who deal with requests concerning unaccompanied minors shall receive appropriate training concerning the specific needs of minors.

Œ 343/2003/EC (adapted)
new

CHAPTER III

~~HIERARCHY OF CRITERIA~~

CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSIBLE

Article ~~4~~ 7

Hierarchy of criteria

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his/her application for international protection with a Member State.

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new

3. By way of derogation from paragraph 2, in order to ensure respect for the principle of family unity and of the bests interests of the child, the Member State responsible

in accordance with the criteria laid down in Articles 8 to 12 shall be determined on the basis of the situation obtaining when the asylum seeker lodged his/her most recent application for international protection. This paragraph shall apply on condition that the previous applications of the asylum seeker have not yet been subject of a first decision regarding the substance.

Œ 343/2003/EC (adapted)
new

Article ~~6~~ 8

Unaccompanied minors

1. Where the applicant ~~for asylum~~ is an unaccompanied minor, the Member State responsible for examining the application for international protection shall be that where a member of his or her family is legally present, provided that this is in the best interests of the minor.

Œ 343/2003/EC Article 15(3) (adapted)
new

2. ~~If~~ Where the applicant ~~asylum seeker~~ is an unaccompanied minor who has a relative ~~or relatives~~ legally present in another Member State who can take care of him or her, that Member State~~s~~ shall ~~if possible unite the minor with his or her relative or relatives,~~ be responsible for examining the application, provided that ~~unless~~ this is ~~not~~ in the best interests of the minor.

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new

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

Œ 343/2003/EC
new

4. In the absence of a family member or of another relative, the Member State responsible for examining the application shall be that where the minor has lodged his or her most recent application for ~~asylum~~ international protection, provided that this is in the best interests of the minor.

Œ 1103/2008/EC, pt. 3(1) of the Annex
new

5. The conditions and procedures for implementing ~~this Article~~ paragraphs 2 and 3 ~~including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done~~, shall be adopted by the Commission. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article ~~27(2)~~ 40(3).

Œ 343/2003/EC (adapted)
new

Article ~~7~~9

Family members who are persons granted international protection

Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a ~~refugee~~ person granted international protection in a Member State, that Member State shall be responsible for examining the application for ~~asylum~~ international protection, provided that the persons concerned ~~so~~ expressed their desire in writing .

Article ~~8~~10

Family members who are applicants for international protection

If the asylum seeker has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for ~~asylum~~ international protection , provided that the persons concerned ~~so~~ expressed their desire in writing .

Article ~~9~~11

Dependent relatives

~~2~~1. Where ~~In cases in which~~ the ~~person concerned~~ asylum seeker is dependent on the assistance of ~~the other~~ a relative ~~present in another Member~~

~~State~~ on account of pregnancy or a new-born child, serious illness, severe handicap or old age, or where a relative ~~present in another Member State~~ is dependent on the assistance of the asylum seeker for the same reasons, the Member State responsible for examining the application shall be the one considered the most appropriate for keeping them together or reunifying them, ~~Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States,~~ provided that family ties existed in the country of origin and that the persons concerned expressed their desire in writing. In determining the most appropriate Member State, the best interests of the persons concerned shall be taken into account, such as the ability of the dependent person to travel .

Œ 1560/2003 Article 11(1) (adapted)

~~Article 15(2) of Regulation (EC) No 343/2003 shall apply whether the asylum seeker is dependent on the assistance of a relative present in another Member State or a relative present in another Member State is dependent on the assistance of the asylum seeker.~~

Œ 1103/2008/EC, pt. 3(1) of the Annex

2.5 The conditions and procedures for implementing ~~this Article~~ paragraph 1 ~~including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done,~~ shall be adopted by the Commission. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article ~~27(2)~~ 40(3).

Œ 343/2003/EC (adapted) new

Article ~~14~~ 12

Family procedure

Where several members of a family submit applications for ~~asylum~~ international protection in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to them being separated, the Member State responsible shall be determined on the basis of the following provisions:

(a) responsibility for examining the applications for ~~asylum~~ international protection of all the members of the family shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of family members;

(b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

Article ~~9~~13

Issuance of residence documents or visas

1. Where the asylum seeker is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for ~~asylum~~ international protection .

2. Where the asylum seeker is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for ~~asylum~~ international protection , unless the visa was issued when acting for or on the written authorisation of another Member State. In such a case, the latter Member State shall be responsible for examining the application for international protection ~~asylum~~. Where a Member State first consults the central authority of another Member State, in particular for security reasons, the latter's reply to the consultation shall not constitute written authorisation within the meaning of this provision.

3. Where the asylum-seeker is in possession of more than one valid residence document or visa issued by different Member States, the responsibility for examining the application for international protection ~~asylum~~ shall be assumed by the Member States in the following order:

(a) the Member State which issued the residence document conferring the right to the longest period of residency or, where the periods of validity are identical, the Member State which issued the residence document having the latest expiry date;

(b) the Member State which issued the visa having the latest expiry date where the various visas are of the same type;

(c) where visas are of different kinds, the Member State which issued the visa having the longest period of validity, or, where the periods of validity are identical, the Member State which issued the visa having the latest expiry date.

4. Where the asylum seeker is in possession only of one or more residence documents which have expired less than two years previously or one or more visas which have expired less than six months previously and which enabled him/her actually to enter the territory of a Member State, paragraphs 1, 2 and 3 shall apply for such time as the applicant has not left the territories of the Member States.

Where the asylum seeker is in possession of one or more residence documents which have expired more than two years previously or one or more visas which have expired more than six months previously and enabled him/her actually to enter the territory of a Member State and where he has not left the territories of the Member States, the Member State in which the application for international protection is lodged shall be responsible.

5. The fact that the residence document or visa was issued on the basis of a false or assumed identity or on submission of forged, counterfeit or invalid documents shall not prevent responsibility being allocated to the Member State which issued it. However, the Member State issuing the residence document or visa shall not be responsible if it can establish that a fraud was committed after the document or visa had been issued.

Article ~~10~~14

Entry and/or stay

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22~~18~~(3), including the data referred to in Chapter III of Regulation [concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Regulation] (EC) No [.../...] ~~2725/2000~~, that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for ~~asylum~~ international protection . This responsibility shall cease 12 months after the date on which the irregular border crossing took place.

2. When a Member State cannot or can no longer be held responsible in accordance with paragraph 1, and where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22~~18~~(3), that the asylum seeker - who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established - ~~at the time of lodging the application~~ has been ~~previously~~ living for a continuous period of at least five months in a Member State before lodging the application for international protection , that Member State shall be responsible for examining the application for ~~asylum~~ international protection .

If the applicant has been living for periods of time of at least five months in several Member States, the Member State where this has been most recently the case shall be responsible for examining the application for international protection .

Article ~~11~~15

Visa waived entry

1. If a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member

State shall be responsible for examining his or her application for ~~asylum~~ international protection .

2. The principle set out in paragraph 1 does not apply, if the third-country national or the stateless person lodges his or her application for ~~asylum~~ international protection in another Member State, in which the need for him or her to have a visa for entry into the territory is also waived. In this case, the latter Member State shall be responsible for examining the application for ~~asylum~~ international protection .

Article ~~12~~16

Application in an international transit area of an airport

Where the application for international protection ~~asylum~~ is made in an international transit area of an airport of a Member State by a third-country national or a stateless person , that Member State shall be responsible for examining the application.

CHAPTER IV

~~HUMANITARIAN CLAUSE~~

DISCRETIONARY CLAUSES

Article ~~15~~17

Discretionary clauses

Œ 343/2003/EC Article 3(2) (adapted) new

1. ~~2.~~ By way of derogation from Article 3, ~~paragraph~~ (1), each Member State may in particular for humanitarian and compassionate reasons, decide to examine an application for ~~asylum~~ international protection lodged with it by a third-country national or a stateless person , even if such examination is not its responsibility under the criteria laid down in this Regulation, provided that the applicant agrees thereto .

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~~ applicable , 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 by using the DubliNet electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003 .

The Member State becoming responsible in accordance with this paragraph shall also forthwith indicate in EURODAC that it assumed responsibility pursuant to Article 17(6) of Regulation (EC) No [.../...] [concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Regulation].

Œ 343/2003/EC (adapted)
new

2. ~~1. Any Member State, even where it is not responsible under the criteria set out in this Regulation,~~ The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time, request another Member State to take charge of an applicant in order to bring together family members, as well as other ~~dependent~~ relatives, on humanitarian grounds based in particular on family or cultural considerations, even where this latter Member State is not responsible under the criteria laid down in Articles 8 to 12 of this Regulation . ~~In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned.~~ The persons concerned must express their consent in writing .

Œ 1560/2003 Article 13(2)

The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

Œ 1560/2003 (adapted) Article 13(3)
new

The requested Member State shall carry out ~~the necessary~~ any necessary checks ~~to establish, where applicable, humanitarian reasons, particularly of a family or cultural nature, the level of dependency of the person concerned or the ability or commitment of the other person concerned to provide the assistance desired.~~ to substantiate the humanitarian reasons cited, and shall give a decision on the request within two months of the date on which the request was received. A decision refusing the request shall state the reasons on which it is based

Œ 343/2003/EC (adapted)
new

~~4.~~ Where the requested Member State ~~thus approached ceases to~~ accepts the request, responsibility for examining the application shall be transferred to it.

Œ 343/2003/EC (adapted)
new

CHAPTER V

~~TAKING CHARGE AND TAKING BACK~~

OBLIGATIONS OF THE MEMBER STATE RESPONSIBLE

Article ~~16~~18

Obligations of the Member State responsible

1. The Member State responsible for examining an application for ~~asylum~~ international protection under this Regulation shall be obliged to:

(a) take charge, under the conditions laid down in Articles 21~~7 to 19~~, 22 and 28, of an asylum seeker who has lodged an application in a different Member State;

(b)~~(c)~~ take back, under the conditions laid down in Articles 23, 24 and 28 ~~20~~, an applicant whose application is under examination and who made an application in another Member State or who is in the territory of another Member State without ~~permission~~ a residence document ;

(c)~~(d)~~ take back, under the conditions laid down in Articles 23, 24 and 28 ~~20~~, an applicant who has withdrawn the application under examination and made an application in another Member State;

(d)~~(e)~~ take back, under the conditions laid down in Articles 23, 24 and 28 ~~20~~, a third-country national or a stateless person whose application ~~it~~ has been rejected and who made an application in another Member State or who is in the territory of another Member State without ~~permission~~ a residence document .

2. The Member State responsible shall in all circumstances referred to in paragraph 1 (a) to (d) examine or ~~(b)~~ complete the examination of the application for ~~asylum~~ international protection made by the applicant, within the meaning of

Article 2(d). When the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant, it shall revoke that decision and complete the examination of the application, within the meaning of Article 2(d) .

Article19

Cessation of responsibilities

1. ~~2.~~ Where a Member State issues a residence document to the applicant, the obligations specified in Article 18 ~~paragraph~~ (1), shall be transferred to that Member State.

2. ~~3.~~ The obligations specified in Article18 ~~paragraph~~ (1), shall cease where the Member State responsible for examining the application can establish, when requested to take charge or take back an applicant or another person as referred to in Article 18(1)(d), that the ~~third-country national~~ person concerned has left the territory of the Member States for at least three months, unless the ~~third-country national~~ person concerned is in possession of a valid residence document issued by the Member State responsible.

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new

An application lodged after such an absence shall be regarded as a new application giving rise to a new procedure for the determination of the Member State responsible.

Œ 343/2003/EC (adapted)
new

3. ~~4.~~ The obligations specified in Article 18 ~~paragraph~~ (1)(c)~~(d)~~ and (d)~~(e)~~, shall ~~likewise~~ cease ~~once~~ where the Member State responsible for examining the application can establish, when requested to take back an applicant or another person as referred to in Article 18(1)(d), that ~~has adopted and actually implemented, following the withdrawal or rejection of the application, the provisions that are necessary before the third-country national can go to his country of origin or to another country to which he may lawfully travel~~ the person concerned has left the territory of the Member States in compliance with a return decision or removal order it issued following the withdrawal or rejection of the application .

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new

An application lodged after an effective removal shall be regarded as a new application giving rise to a new procedure for the determination of the Member State responsible.

Œ 343/2003/EC (adapted)
new

CHAPTER VI

PROCEDURES FOR TAKING CHARGE AND TAKING BACK

SECTION I: Start of the procedure

Article ~~4~~20

Start of the procedure

1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for ~~asylum~~ international protection is first lodged with a Member State.

2. An application for ~~asylum~~ international protection shall be deemed to have been lodged once a form submitted by the applicant ~~for asylum~~ or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible.

3. For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i) shall be indissociable from that of his parent or guardian and shall be a matter for the Member State responsible for examining the application for ~~asylum~~ international protection of that parent or guardian, even if the minor is not individually an asylum seeker , provided that this is in his/her best interests . The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

4. Where an application for ~~asylum~~ international protection is lodged with the competent authorities of a Member State by an applicant who is in the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for ~~asylum~~ international protection was lodged.

   The applicant shall be informed in writing of this transfer and of the date on which it took place.

5. An asylum seeker who is present in another Member State and there lodges an application for ~~asylum~~ international protection after withdrawing his first application made in a different Member State during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Articles ~~20~~23, 24 and 28, by the Member State with which that application for ~~asylum~~ international protection was firstly lodged, with a view to completing the process of determining the Member State responsible for examining the application for ~~asylum~~ international protection.

This obligation shall cease ~~.~~ where the Member State requested to complete the process of determining the responsible Member State can establish that ~~if~~ the asylum seeker has in the meantime left the territories of the Member States for a period of at least three months or has obtained a residence document from another ~~a~~ Member State.

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new

An application lodged after such an absence shall be regarded as a new application giving rise to a new procedure for the determination of the responsible Member State.

Œ 343/2003/EC (adapted)
new

Section II: Procedures for take charge requests

Article ~~17~~21

Submitting a take charge request

1. Where a Member State with which an application for ~~asylum~~ international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months of the date on which the application was lodged within the meaning of Article ~~4~~20(2), ~~call upon~~ request the other Member State to take charge of the applicant.

Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for ~~asylum~~ international protection shall lie with the Member State in which the application was lodged.

2. The requesting Member State may ask for an urgent reply in cases where the application for ~~asylum~~ international protection was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order and/or where the asylum seeker is held in detention.

The request shall state the reasons warranting an urgent reply and the period within which a reply is expected. This period shall be at least one week.

3. In both cases, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article ~~18~~22(3) and/or relevant elements from the asylum seeker's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The rules on the preparation of and the procedures for transmitting requests shall be adopted in accordance with the procedure referred to in Article 40(2) ~~27(2).~~

Article ~~18~~22

Replying to a take charge request

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of the date on which the request was received.

2. In the procedure for determining the Member State responsible for examining the application for ~~asylum~~ international protection established in this Regulation, elements of proof and circumstantial evidence shall be used.

3. In accordance with the procedure referred to in Article ~~27(2)~~ 40(2) two lists shall be established and periodically reviewed, indicating the elements of proof and circumstantial evidence in accordance with the following criteria:

(a) Proof:

(i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary.

(ii) The Member States shall provide the Committee provided for in Article ~~27~~ 40 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs.

(b) Circumstantial evidence:

(i) This refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them.

(ii) Their evidentiary value, in relation to the responsibility for examining the application for ~~asylum~~ international protection shall be assessed on a case-by-case basis.

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

6. Where the requesting Member State has pleaded urgency, in accordance with the provisions of Article ~~17(2)~~ 21(2), the requested Member State shall make every effort to conform to the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give the reply after the time limit requested, but in any case within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the ~~provisions~~ obligation to provide for proper arrangements for arrival.

Section III. Procedures for take back requests

Article ~~20~~ 23

Submitting a take back request

Œ 343/2003/EC (adapted)
new

1. ~~An asylum seeker shall be taken back:~~ Where a Member State with which a subsequent application for international protection has been lodged or on whose territory an applicant or another person as referred to in Article 18(1)(d) is staying without a residence document, considers that another Member State is responsible in accordance with Article ~~4~~20(5) and Article ~~16~~18(1) ~~(c)~~(b), ~~(d)~~(c) and ~~(e)~~(d), ~~as follows:~~ it may request that other Member State to take back that person.

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new

2. In case of a subsequent application for international protection, the request to take back the person concerned shall be made as quickly as possible and in any case within two months of receiving the EURODAC hit, pursuant to Article 6(5) of Regulation (EC) No [.../...] [concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Regulation].

If the request to take back the applicant who lodged a subsequent application for international protection is based on evidence other than data obtained from the EURODAC system, it shall be sent to the requested Member State within three

months of the date on which the application for international protection was lodged within the meaning of Article 20(2).

3 Where there is no subsequent application for international protection, and in case the requesting Member State decides to search the EURODAC system in accordance with Article 13 of Regulation (EC) No [.../...] [concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Regulation], the request to take back the person concerned shall be made as quickly as possible and in any case within two months of receiving the EURODAC hit, pursuant to Article 13(4) of that Regulation.

If the request to take back the person concerned is based on evidence other than data obtained from the EURODAC system, it shall be sent to the requested Member State within three months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned.

4. Where the request to take back of an applicant or another person as referred to in Article 18(1)(d) is not made within the periods laid down in paragraphs 2 and 3, responsibility for examining the application for international protection shall lie with the Member State in which the application was subsequently lodged or on whose territory the person is staying without a residence document.

Œ 343/2003/EC (adapted)
new

5 ~~(a)~~ The request for the applicant or for another person as referred to in Article 18(1)(d) to be taken back shall be made using a standard form and including proof or circumstantial evidence and/or relevant elements from the person's statements, ~~must contain information~~ enabling the authorities of the requested Member State to check ~~that~~ whether it is responsible.

~~b~~ The rules of proof and evidence and their interpretation, and on the preparation of and the procedures for transmitting requests, shall be adopted in accordance with the procedure referred to in Article ~~27(2)~~40(2).

Article 24

Replying to a take back request

~~(b)~~1. ~~t~~The requested Member State ~~called upon to take back the applicant~~ shall ~~be obliged to~~ make the necessary checks and shall give a decision on ~~reply to~~ the request to take back the person concerned ~~addressed to it~~ as quickly as possible and ~~under no circumstances exceeding a period of~~ in any event no later than one month from the ~~referral~~ date on which the request was received . When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks.

~~(c)~~2. ~~where the requested Member State does not communicate its decision~~ Failure to act within the one month period or the two weeks period mentioned in ~~sub~~paragraph ~~(b)~~ (1), shall be tantamount to accepting the request , and entail the obligation ~~it shall be considered to have agreed~~ to take back the ~~asylum seeker~~ person concerned , including the obligation to provide for proper arrangements for arrival .

~~(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;~~

~~(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case by case basis if the national legislation allows for this.~~

~~If necessary, the asylum seeker shall be supplied by the requesting Member State with a laissez-passer of the design adopted in accordance with the procedure referred to in Article 27(2).~~

~~The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the asylum seeker or of the fact that he did not appear within the set time limit.~~

~~2. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.~~

~~3. The rules of proof and evidence and their interpretation, and on the preparation of and the procedures for transmitting requests, shall be adopted in accordance with the procedure referred to in Article 27(2).~~

~~4. Supplementary rules on carrying out transfers may be adopted in accordance with the procedure referred to in Article 27(2).~~

Section IV. Procedural safeguards

Article ~~1925~~

Notification of a transfer decision

1. Where the requested Member State ~~accepts~~ agrees ~~that it should~~ to take charge ~~of~~ or to take back an applicant or another person as referred to in Article 18(1)(d) , the requesting Member State ~~in which the application for asylum was lodged~~ shall notify the ~~applicant~~ person concerned ~~of the decision not to examine the application, and of the obligation~~ of the decision to transfer him/her ~~the applicant~~ to the responsible Member State and, where applicable, of not examining his/her application for international protection . Such notification shall be made in writing, in a language which the person is reasonably supposed to understand and within no more than fifteen working days from the date of receipt of the reply from the requested Member State .

2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. , including a description of the main steps in the procedure leading to the decision. It shall contain information on available legal remedies and the time-limits applicable for seeking such remedies, as well as information on persons or entities that may provide specific legal assistance and/or representation to the person . It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place where, and the date ~~at~~ on which the ~~applicant~~ person concerned should appear, if he/she is travelling to the responsible Member State ~~responsible~~ by his/her own means.
The time-limits for carrying out the transfer shall be set in order to allow the person a reasonable period of time to seek a remedy in accordance with Article 26. ~~This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this.~~

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new

Article 26

Remedies

1. The applicant or another person as referred to in Article 18(1)(d) shall have the right to an effective judicial remedy, in the form of an appeal or a review, in fact and in law, of the transfer decision referred to in Article 25, before a court or tribunal.

2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his/her right to an effective judicial remedy pursuant to paragraph 1.

3. In the event of an appeal or review concerning the transfer decision referred to in Article 25, the authority referred to in paragraph 1 of this Article shall, acting ex-officio, decide, as soon as possible, and in any case no later than seven working days from the lodging of an appeal or of a review, whether or not the person concerned may remain on the territory of the Member State concerned pending the outcome of his/her appeal or review.

4. No transfer shall take place before the decision referred to in paragraph 3 is taken. A decision not to allow the person concerned to remain on the territory of the Member State concerned pending the outcome of his/her appeal or review, shall state the reasons on which it is based.

5. Member States shall ensure that the person concerned has access to legal assistance and/or representation and, where necessary, to linguistic assistance.

6. Member States shall ensure that legal assistance and/or representation be granted free of charge where the person concerned cannot afford the costs involved.

Procedures for access to legal assistance and/or representation shall be laid down in national law.

Section V. Detention for the purpose of transfer

Article 27

Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Directive 2005/85/EC.

2. Without prejudice to Article 8(2) of Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers], when it proves necessary, on the basis of an individual assessment of each case, and if other less coercive measures cannot be applied effectively, Member States may detain an asylum-seeker or another person as referred to in Article 18(1)(d), who is subject of a decision of transfer to the responsible Member State, to a particular place only if there is a significant risk of him/her absconding.

3. When assessing the application of other less coercive measures for the purpose of paragraph 2, Member States shall take into consideration alternatives to detention such as regular reporting to the authorities, the deposit of a financial guarantee, an obligation to stay at a designated place or other measures to prevent the risk of absconding.

4. Detention pursuant to paragraph 2 may only be applied from the moment a decision of transfer to the responsible Member State has been notified to the person concerned in accordance with Article 25, until that person is transferred to the responsible Member State.

5. Detention pursuant to paragraph 2 shall be ordered for the shortest period possible. It shall be no longer than the time reasonably necessary to fulfil the required administrative procedures for carrying out a transfer.

6. Detention pursuant to paragraph 2 shall be ordered by judicial authorities. In urgent cases it may be ordered by administrative authorities, in which case the detention order shall be confirmed by judicial authorities within 72 hours from the beginning of the detention. Where the judicial authority finds detention to be unlawful, the person concerned shall be released immediately.

7. Detention pursuant to paragraph 2 shall be ordered in writing with reasons in fact and in law, in particular specifying the reasons on the basis of which it is considered that there is a significant risk of the person concerned absconding as well as the time period of its duration.

Detained persons shall immediately be informed of the reasons for detention, the intended duration of the detention and the procedures laid down in national law for challenging the detention order, in a language they are reasonably supposed to understand.

8. In every case of a detained person pursuant to paragraph 2, the continued detention shall be reviewed by a judicial authority at reasonable intervals of time either on request by the person concerned or ex-officio. Detention shall never be unduly prolonged.

9. Member States shall ensure access to legal assistance and/or representation in cases of detention pursuant to paragraph 2 that shall be free of charge where the person concerned cannot afford the costs involved.

Procedures for access to legal assistance and/or representation in such cases shall be laid down in national law.

10. Minors shall not be detained unless it is in their best interests, as prescribed in Article 7 of this Regulation and in accordance with an individual examination of their situation in accordance with Article 11(5) of Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers].

11. Unaccompanied minors shall never be detained.

12. Member States shall ensure that asylum-seekers detained in accordance with this Article enjoy the same level of reception conditions for detained applicants as those laid down in particular in Articles 10 and 11 of Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers].

Œ 343/2003/EC (adapted)
new

Section VI: Transfers

Article ~~19~~28

Modalities and time-limits

1~~.~~ The transfer of the applicant or of another person as referred to in Article 18(1)(d) from the requesting Member State ~~in which the application was lodged~~ to the responsible Member State ~~responsible~~ shall be carried out in accordance with the national law of the requesting ~~first~~ Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request ~~that charge be taken~~ by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where ~~there is~~ a suspensive effect is granted in accordance with Article 26(3) .

If necessary, the asylum seeker shall be supplied by the requesting Member State with a *laissez passer* of the design adopted in accordance with the procedure referred to in Article 40(2) ~~27(2)~~.

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the ~~asylum seeker~~ person concerned or of the fact that he/she did not appear within the set time limit.

2~~.~~ Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State ~~responsibility shall lie with the Member State in which the application for asylum was lodged~~. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the ~~asylum seeker~~ person concerned or up to a maximum of eighteen months if the ~~asylum seeker~~ person concerned absconds.

new

3. If a person has been transferred erroneously or a decision to transfer is overturned on appeal after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back.

Œ 1103/2008/EC, pts. 3(2) and 3(3) of the Annex

~~45.~~ The Commission may adopt supplementary rules on carrying out transfers. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article ~~27(2)~~40(3).

new

Article 29

Costs of transfers

1. The costs necessary to transfer an applicant or another person as referred to in Article 18(1)(d) to the responsible Member State shall be met by the transferring Member State.

2. Where the person concerned has to be sent back to a Member State, as a result of an erroneous transfer or of a transfer decision that has been overturned on appeal after the transfer has been carried out, the Member State which initially carried out the transfer shall be responsible for the costs of transferring the person concerned back to its territory.

3. Persons to be transferred pursuant to this Regulation shall not be required to meet the costs of such transfers.

4. Supplementary rules relating to the obligation of the sending Member State to meet the costs of transfers may be adopted in accordance with the procedure referred to in Article 40(2).

Article 30

Exchange of relevant information before transfers being carried out

1. In all cases of transfers, the transferring Member State shall inform the receiving Member State if the person concerned is fit for the transfer. Only persons who are fit for the transfer shall be transferred.

2. The Member State carrying out the transfer shall communicate to the responsible Member State such personal data concerning the applicant to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent asylum authorities in the responsible Member State are in a position to provide the applicant with adequate assistance, including the provision of necessary medical care, and to ensure continuity in the protection and rights afforded by this

Regulation and by Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers]. That information shall be communicated at an early stage and at the latest seven working days before a transfer is carried out, except when the Member State becomes aware of it at a later stage.

3. Member States shall in particular exchange the following information:

(a) contact details of family members or of other relatives in the receiving Member State, where applicable;

(b) in the case of minors, information in relation to their level of education;

(c) information about the age of an applicant;

(d) any other information that the sending Member State deems essential in order to safeguard the rights and special needs of the applicant concerned.

4. For the sole purpose of the provision of care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons that have been subject to torture, rape or other serious forms of psychological, physical and sexual violence, the transferring Member State shall transmit information about any special needs of the applicant to be transferred, which in specific cases may include information about the state of the physical and mental health of the applicant to be transferred. The responsible Member State shall ensure that those special needs are adequately addressed, including in particular any essential medical care that may be required.

5. Any information mentioned in paragraph 4 shall only be transmitted by the transferring Member State to the responsible Member State after the explicit consent of the applicant and/or of his representative has been obtained or when this is necessary to protect the vital interests of the individual or of another person where he/she is physically or legally incapable of giving his/her consent. Once the transfer has been completed, this information shall be deleted immediately by the transferring Member State.

6. The processing of personal health data shall only be carried out by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person subject to an equivalent obligation of secrecy. These health professionals and persons receiving and processing this information shall receive appropriate medical training as well as training regarding the appropriate processing of sensitive personal data relating to health.

7. The exchange of information under this Article shall only take place between the authorities notified to the Commission in accordance with Article 33 using the 'DubliNet' electronic communication network set-up under Article 18 of Regulation EC (No) 1560/2003. The authorities notified according to Article 33 of this Regulation shall also specify the health professionals authorized to process the information mentioned in paragraph 4. The information exchanged shall only be used for the purposes set out in paragraph 2 and 4 of this Article.

8. With a view to facilitating the exchange of information between Member States, a standard form for transferring the data required pursuant to this Article shall be adopted in accordance with the procedure laid down in Article 40(2).

9. The rules laid down in Article 32(8) to (12) shall apply to the exchange of information pursuant to this Article.

Section VII: Temporary suspension of transfers

Article 31

1. When a Member State is faced with a particularly urgent situation which places an exceptionally heavy burden on its reception capacities, asylum system or infrastructure, and when the transfer of applicants for international protection in accordance with this Regulation to that Member State could add to that burden, that Member State may request that such transfers be suspended.

The request shall be addressed to the Commission. It shall indicate the grounds on which it is based and shall in particular include:

(a) a detailed description of the particularly urgent situation which places an exceptionally heavy burden on the requesting Member State's reception capacities, asylum system or infrastructure, including relevant statistics and supporting evidence;

(b) a substantiated forecast of the likely evolution of this situation in the short-term;

(c) a substantiated explanation of the further burden that the transfer of applicants for international protection in accordance with this Regulation could add to the requesting Member State's reception capacities, asylum system or infrastructure, including relevant statistics and other supporting evidence.

2. When the Commission considers that the circumstances prevailing in a Member State may lead to a level of protection for applicants for international protection which is not in conformity with Community legislation, in particular with Directive […/…/EC] laying down minimum standards for the reception of asylum seekers and with Directive 2005/85/EC, it may decide in conformity with the procedure laid down in paragraph 4, that all transfers of applicants in accordance with this Regulation to the Member State concerned be suspended.

3. When a Member State is concerned that the circumstances prevailing in another Member State may lead to a level of protection for applicants for international protection which is not in conformity with Community legislation, in particular with Directive […/…/EC] laying down minimum standards for the reception of asylum seekers and with Directive 2005/85/EC, it may request that all transfers of applicants in accordance with this Regulation to the Member State concerned be suspended.

The request shall be addressed to the Commission. It shall indicate the grounds on which it is based and shall in particular include detailed information on the situation in the concerned Member State pointing to a possible lack of conformity with

Community legislation, in particular Directive [.../.../EC] laying down minimum standards for the reception of asylum seekers and Directive 2005/85/EC.

4. Following the receipt of a request pursuant to paragraphs 1 or 3, or upon its own initiative pursuant to paragraph 2, the Commission may decide that all transfers of applicants in accordance with this Regulation to the Member State concerned be suspended. Such decision shall be taken as soon as possible and at the latest one month following the receipt of a request. The decision to suspend transfers shall state the reasons on which it is based and shall in particular include:

(a) an examination of all the relevant circumstances prevailing in the Member State towards which transfers could be suspended;

(b) an examination of the potential impact of the suspension of transfers on the other Member States;

(c) the proposed date on which the suspension of transfers shall take effect;

(d) any particular conditions attached to such suspension.

5. The Commission shall notify the Council and the Member States of the decision to suspend all transfers of applicants in accordance with this Regulation to the Member State concerned. Any Member State may refer the decision of the Commission to the Council within one month from the receipt of the notification. The Council, acting by qualified majority, may take a different decision in one month from the date of the referral by a Member State.

6. Following the decision of the Commission to suspend transfers to a Member State, the other Member States in which the applicants whose transfers have been suspended are present, shall be responsible for examining the applications for international protection of those persons.

The decision to suspend transfers to a Member State shall take due account of the need to ensure the protection of minors and of family unity.

7. A decision to suspend transfers to a Member State pursuant to paragraph 1 shall justify the granting of assistance for the emergency measures laid down in Article 5 of Decision No 573/2007/EC of the European Parliament and of the Council[35], following a request for assistance from that Member State.

8. Transfers may be suspended for a period which cannot exceed six months. Where the grounds for the measures still persist after six months, the Commission may decide, upon a request from the Member State concerned referred to paragraph 1 or upon its own initiative, to extend their application for a further six months period. Paragraph 5 applies.

9. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations arising out of the Community

[35] OJ L 144, 6.6.2007, p.1.

legislation on asylum, in particular this Regulation, Directive […/…/EC] laying down minimum standards for the reception of asylum seekers, and Directive 2005/85/EC.

Œ 343/2003/EC (adapted)
new

CHAPTER ~~III~~ VII

ADMINISTRATIVE COOPERATION

Article ~~21~~ 32

Information sharing

1. Each Member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive for:

   (a) the determination of the Member State responsible for examining the application for ~~asylum~~ international protection;

   (b) examining the application for international protection ~~asylum~~;

   (c) implementing any obligation arising under this Regulation.

2. The information referred to in paragraph 1 may only cover:

   (a) personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);

   (b) identity and travel papers (references, validity, date of issue, issuing authority, place of issue, etc.);

   (c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with Regulation (EC) No ~~2725/2000~~ […/…] [concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Regulation] ;

   (d) places of residence and routes travelled;

   (e) residence documents or visas issued by a Member State;

   (f) the place where the application was lodged;

(g) the date any previous application for ~~asylum~~ international protection was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any.

3. Furthermore, provided it is necessary for the examination of the application for ~~asylum~~ international protection, the Member State responsible may request another Member State to let it know on what grounds the asylum seeker bases his application and, where applicable, the grounds for any decisions taken concerning the applicant. The Member State may refuse to respond to the request submitted to it, if the communication of such information is likely to harm the essential interests of the Member State or the protection of the liberties and fundamental rights of the person concerned or of others. In any event, communication of the information requested shall be subject to the written approval of the applicant for ~~asylum~~ international protection, obtained by the requested Member State. In this case, the applicant must know for what information he/she is giving his/her approval.

4. Any request for information shall only be sent in the context of an individual application for international protection. It shall set out the grounds on which it is based and, where its purpose is to check whether there is a criterion that is likely to entail the responsibility of the requested Member State, shall state on what evidence, including relevant information from reliable sources on the ways and means asylum seekers enter the territories of the Member States, or on what specific and verifiable part of the applicant's statements it is based. It is understood that such relevant information from reliable sources is not in itself sufficient to determine the responsibility and the competence of a Member State under this Regulation, but it may contribute to the evaluation of other indications relating to the individual asylum seeker.

5. The requested Member State shall be obliged to reply within ~~six~~ four weeks. Any delays in the reply shall be duly justified. If the research carried out by the requested Member State which did not respect the maximum time-limit, yield information which shows that it is responsible, that Member State may not invoke the expiry of the time-limit provided for in Articles 21 and 23 as a reason for refusing to comply with a request to take charge or take back.

6. The exchange of information shall be effected at the request of a Member State and may only take place between authorities whose designation by each Member State has been communicated to the Commission in accordance with Article 33(1) ~~which shall inform the other Member States thereof~~.

7. The information exchanged may only be used for the purposes set out in paragraph 1. In each Member State such information may, depending on its type and the powers of the recipient authority, only be communicated to the authorities and courts and tribunals entrusted with:

(a) the determination of the Member State responsible for examining the application for ~~asylum~~ international protection;

(b) examining the application for ~~asylum~~ international protection;

(c) implementing any obligation arising under this Regulation.

8. The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that that Member State has forwarded information which is inaccurate or which should not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.

9. The asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him/her.

If he finds that this information has been processed in breach of this Regulation or of Directive 95/46/EC ~~of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (8)~~, in particular because it is incomplete or inaccurate, he is entitled to have it corrected, or erased ~~or blocked~~.

The authority correcting, or erasing ~~or blocking~~ the data shall inform, as appropriate, the Member State transmitting or receiving the information.

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new

The asylum seeker shall have the right to bring an action or a complaint before the competent authorities or courts of the Member State which refused the right of access to or the right of correction or deletion of data relating to him/her.

Œ 343/2003/EC (adapted)
new

10. In each Member State concerned, a record shall be kept, in the individual file for the person concerned and/or in a register, of the transmission and receipt of information exchanged.

11. The data exchanged shall be kept for a period not exceeding that which is necessary for the purposes for which it is exchanged.

12. Where the data is not processed automatically or is not contained, or intended to be entered, in a file, each Member State ~~should~~ shall take appropriate measures to ensure compliance with this Article through effective checks.

Article ~~2233~~

Competent authorities and resources

1. Each Member State~~s~~ shall notify the Commission without delay ~~of~~ the specific authorities responsible for fulfilling the obligations arising under this Regulation, and any amendments thereto. They ~~and~~ shall ensure that

those authorities have the necessary resources for carrying out their tasks and in particular for replying within the prescribed time limits to requests for information, requests to take charge of and requests to take back asylum seekers.

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new

2. The Commission shall publish a consolidated list of the authorities referred to in paragraph 1 in the Official Journal of the European Union. Where there are amendments thereto, the Commission shall publish once a year an updated consolidated list.

3. The authorities referred to in paragraph 1 shall receive the necessary training with respect to the application of this Regulation.

Œ 343/2003/EC (adapted)
new

~~4~~. Rules relating to the establishment of secure electronic transmission channels between the authorities mentioned in paragraph 1 for transmitting requests , replies and all written correspondence and ensuring that senders automatically receive an electronic proof of delivery shall be established in accordance with the procedure referred to in Article 40(2)~~27(2)~~.

Article ~~2334~~

Administrative arrangements

1. Member States may, on a bilateral basis, establish administrative arrangements between themselves concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness. Such arrangements may relate to:

(a) exchanges of liaison officers;

(b) simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back asylum seekers;

2. The arrangements referred to in paragraph 1 shall be communicated to the Commission. The Commission shall approve ~~verify that~~ the arrangements referred to in paragraph 1(b), after it has verified that they do not infringe this Regulation.

Œ 1560/2003 (adapted)
new

CHAPTER VIII

Conciliation

Article ~~14~~35

Conciliation

1. Where the Member States cannot resolve a dispute~~, either on the need to carry out a transfer or to bring relatives together on the basis of Article 15 of Regulation (EC) No 343/2003, or on the Member State in which the person concerned should be reunited,~~ on any matter related to the application of this Regulation, they may have recourse to the conciliation procedure provided for in paragraph 2 ~~of this Article~~.

2. The conciliation procedure shall be initiated by a request from one of the Member States in dispute to the Chairman of the Committee set up by Article 2740 ~~of Regulation (EC) No 343/2003~~. By agreeing to use the conciliation procedure, the Member States concerned undertake to take the utmost account of the solution proposed.

   The Chairman of the Committee shall appoint three members of the Committee representing three Member States not connected with the matter. They shall receive the arguments of the parties either in writing or orally and, after deliberation, shall propose a solution within one month, where necessary after a vote.

   The Chairman of the Committee, or his deputy, shall chair the discussion. He may put forward his point of view but he may not vote.

   Whether it is adopted or rejected by the parties, the solution proposed shall be final and irrevocable.

Œ 343/2003/EC

CHAPTER ~~VIII~~ IX

TRANSITIONAL PROVISIONS AND FINAL PROVISIONS

new

Article 36

Penalties

Member States shall take the necessary measures to ensure that any misuse of data processed in accordance with this Regulation is punishable by penalties, including administrative and/or criminal penalties in accordance with national law, that are effective, proportionate and dissuasive.

Œ 343/2003/EC (adapted)

Article ~~24~~37

Transitional measures

~~1. This Regulation shall replace the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (Dublin Convention).~~

~~2. However, to ensure continuity of the arrangements for determining the Member State responsible for an application for asylum,~~ wWhere an application has been lodged after the date mentioned in the second paragraph of Article ~~29~~44, the events that are likely to entail the responsibility of a Member State under this Regulation shall be taken into consideration, even if they precede that date, with the exception of the events mentioned in Article 14(2) ~~19(2).~~

~~3. Where, in Regulation (EC) No 2725/2000 reference is made to the Dublin Convention, such reference shall be taken to be a reference made to this Regulation.~~

Article ~~2538~~

Calculation of time-limits

~~1.~~ Any period of time prescribed in this Regulation shall be calculated as follows:

(a) where a period expressed in days, weeks or months is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;

(b) a period expressed in weeks or months shall end with the expiry of whichever day in the last week or month is the same day of the week or falls on the same date as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;

(c) time limits shall include Saturdays, Sundays and official holidays in any of the Member States concerned.

~~2. Requests and replies shall be sent using any method that provides proof of receipt.~~

Article ~~2639~~

Territorial scope

As far as the French Republic is concerned, this Regulation shall apply only to its European territory.

Article ~~2740~~

Committee

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

Œ 1103/2008/EC, pt. 3(4) of the Annex

3. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Œ 343/2003/EC (adapted)

Article ~~29~~41

Monitoring and evaluation

At the latest three years after the date mentioned in the first paragraph of Article 44 ~~29~~, the Commission shall report to the European Parliament and the Council on the application of this Regulation and, where appropriate, shall propose the necessary amendments. Member States shall forward to the Commission all information appropriate for the preparation of that report, at the latest six months before that time limit expires.

After ~~H~~having submitted that report, the Commission shall report to the European Parliament and the Council on the application of this Regulation at the same time as it submits reports on the implementation of the Eurodac system provided for by Article ~~4(5)~~ 28 of Regulation (EC) No ~~2725/2000~~ [.../...] [concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Regulation] .

new

Article 42

Statistics

In accordance with Article 4(4) of Regulation (EC) No 862/2007 of the European Parliament and of the Council[36], Member States shall communicate to the Commission (Eurostat), statistics concerning the application this Regulation and of Regulation (EC) No 1560/2003.

[36] OJ L 199, 31.7.2007, p.23.

Œ

Article 43
Repeal

Regulation (EC) 343/2003 is repealed.

Articles 11(1), 13, 14 and 17 of Commission Regulation (EC) No 1560/2003 are repealed.

References to the repealed Regulation or Articles shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

Œ 343/2003/EC(adapted)
(adapted)
new

Article ~~2044~~

Entry into force and applicability

This Regulation shall enter into force on the ~~20th~~ twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply to ~~asylum~~ applications for international protection lodged as from the first day of the sixth month following its entry into force and, from that date, it will apply to any request to take charge of or take back asylum seekers, irrespective of the date on which the application was made. The Member State responsible for the examination of an ~~asylum~~ application for international protection submitted before that date shall be determined in accordance with the criteria set out in ~~the~~ Regulation (EC) No 343/2003 ~~Dublin Convention~~.

This Regulation shall be binding in its entirety and directly applicable in the Member States in conformity with the Treaty establishing the European Community.

Done at [...]

For the European Parliament
The President
[...]