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Is the Cornerstone of the Common European Asylum System crumbling?

A Study on the Compliance of the Dublin II
Regulation with human and fundamental Rights
Provisions

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Abstract

In general, this thesis is examining the Dublin II Regulation and whether the principles of mutual trust and mutual recognition, as imposed in the Regulation, might be in breach with human rights and fundamental freedoms and therefore jeopardize the protection of refugees and asylum seekers. With the examination of the cases M.S.S. against Belgium and Greece, as well as the case N.S., M.E. and others against the Secretary of State for the Home Department, it became obvious, that mutual trust in the asylum system of another Member State and its compliance with human rights is no longer sufficient. Hence the automaticity in the inter-state cooperation in the field of asylum in the EU and especially in the allocation of the responsible Member State for an asylum application is longer justified.

This calls for a reform of the Dublin system in order to guarantee the protection of refugees and asylum seekers in all MS.

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List of Abbreviations

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
EC	European Communities
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
EEC	European Economic Community
ERF	European Refugee Fund
EU	European Union
JHA	Justice and Home Affairs
SEA	Single European Act
SIA	Schengen Implementing Agreement
TCN	Third-country national
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

In many parts of the world violence and systemic human rights violations are generating more and more displacement situations. Due to those geopolitical reasons the phenomenon of looking for asylum in Europe has been widespread in the last years.¹

Especially in the past two decades more than six million people have applied for asylum in the European Union (EU).² Furthermore the EU is the destination for around 2/3 of all asylum seekers who find their way to the developed world. Recently not only for Afghani and Syrian nationals,³ but also for other people that come from countries devastated by war or dominated by suppressive regimes, the EU seems to be a safe haven.

The concept of the internal market and the abolishment of internal barriers, as well as the common borders has prompted the free circulation of goods and the free movement of persons within the common market. Together with the large influx of asylum seekers this called for an enhanced and stronger control of the external borders of the EU and stricter policies when it comes to third-country nationals. Therefore in 1999, the EU Member States (MS) have committed themselves to create a Common European Asylum System (CEAS) in order to tackle the growing asylum challenges at the European level. Over the following years, the EU has adopted a number of important legislative measures that harmonise common minimum standards for asylum. The most prominent ones are the following: the Qualifications Directive (2004/83/EC), the Minimum Standards of Reception Directive (2003/9/EC), the Procedures Directive (2005/85/EC) and the Dublin Regulation (343/2003/EC) (hereinafter: Dublin II Regulation). Although all of the mentioned Directives are from great importance for the CEAS, it is the Dublin II Regulation, which can be seen as a cornerstone of the CEAS.

The purpose of the Dublin II Regulation was to “*lay down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national*”.⁴ The objectives behind this provision are to prevent asylum seekers from lodging several applications (“asylum shopping”) by laying down criteria determining the Member State responsible for the examination of an asylum application and to eliminate the phenomenon of “refugees in orbit”,⁵ hence refugees without a country of asylum.

¹Nielsen,N. (2013). EU Asylum Applications on the rise. *EUobserver*. Retrieved from: <http://euobserver.com/social/119556>.

² http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-07-110/DE/KS-SF-07-110-DE.PDF.

³ In the 3rd quarter of 2012, 6905 asylum applicants came from Afghanistan, while 7760 were Syrian nationals http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-12-014/EN/KS-QA-12-014-EN.PDF.

⁴ Council Regulation (EC) No 343/2003 of 18 February 2003, Article 1.

⁵ Sylvie Da Lomba, “The Right to seek Refugee Status in the European Union”, *Intersentia* 2004,p.31.

Despite the attempts to eradicate the before-mentioned problems, the Dublin II Regulation has been criticised highly recently. With the judgments of the European Court of Human Rights (ECtHR) in the case *M.S.S against Belgium and Greece* ⁶ and of the European Court of Justice (ECJ) in the case *N.S., M.E. and others against the Secretary of State for the Home Department*,⁷ the compliance of the Dublin II system with basic human rights and fundamental freedoms has been questioned, although the membership in the EU normally is presuming the full respect of fundamental rights by all the Member States, which is creating mutual trust. This is in turn justifying automaticity in inter-state cooperation in the field of asylum in the EU.

Therefore this thesis will examine the potential non-compliance of the Dublin II Regulation with human rights and fundamental freedoms. Special emphasis will be on the conformity of mutual trust and mutual recognition in connection with human rights. For this reason, the thesis will evolve around the following main research question:

“To what extent are mutual recognition and mutual trust as interpreted in the Dublin II Regulation, compatible with human rights and fundamental freedoms?”

In order to answer this research question, a positive legal case study will be conducted. The legal research approach has been chosen in order to critically examine the given law, in this case, EU asylum law and in particular the Dublin II Regulation, and in a further step provide stimulus for reform-oriented research. A legal case study seems to be the best research method, in the sense that it makes it possible to analyse the problems and controversial issues connected to the Dublin II Regulation and its compliance with human rights provisions, and subsequently enables to draw own conclusions from the analysis.

The second chapter of this thesis will give an outline of the human and fundamental rights provisions on which asylum seekers and refugees in the European Union can rely upon. Next to this the origins of the EU’s asylum law will be presented in order to better understand the position that the Dublin II Regulation holds within the European legal order. After the development of the EU asylum law, the current European asylum acquis will be discussed in the fourth chapter.

In the fifth chapter, the Dublin II Regulation will be analysed in-depth with special emphasis on mutual recognition and the possible challenges that the provisions of the Dublin II

⁶ ECtHR (21/01/2011) *M.S.S v Belgium and Greece*, Application no. 30696/09.

⁷ *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011.

Regulation might cause, will be outlined.

This will follow an analysis of the compliance of the Dublin II Regulation with human and fundamental rights using the cases *M.S.S v Belgium and Greece*⁸ and *N.S v Secretary of State for the Home Department*⁹ in the sixth and seventh chapter. As a final point, proposals towards a reformed Dublin II Regulation will be delivered.

As a concluding remark, it can be said that after the examination of the recent case law, the weaknesses of the Dublin II Regulation become apparent. Mutual trust, as it is imposed in the Dublin II Regulation, is no longer satisfactory to guarantee that the human rights of asylum seekers are protected in all Member States of the European Union. Hence, Member States are no longer able to presume that the other Member States are complying with human rights, accordingly an automatic transfer of asylum seekers to the responsible Member States is no longer tolerated. In turn, this questions the underlying principles of the Dublin II Regulation and therefore, in order to assure the effective operation of the Regulation a need for reforms becomes noticeable.

⁸ ECtHR *M.S.S v Belgium and Greece*, 21/01/2011 Application no. 30696/09.

⁹ *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011.

2. The protection of refugee and asylum rights

Before the development towards an EU common asylum system will be discussed, it is of great importance to take a closer look at the different provisions that ensure, that the rights of refugees and asylum seekers are protected. The first regime of international protection of asylum seekers and refugees is the 1951 Geneva Convention.

As it will be seen the CEAS is based on the full and inclusive application of the 1951 Geneva Convention, thus it is ensuring that nobody is sent back to his/her home country to persecution. Given that the Dublin II Regulation and the CEAS are based on the principles introduced by this Convention; before taking into consideration the developments that have gradually led to the introduction of common asylum legislation, the main provisions of the 1951 Geneva Convention will be briefly discussed.

The right to asylum, as we know it today, made its first appearance in 1948 with the Universal Declaration of Human Rights (UDHR).¹⁰ In the UDHR it was stated that “*everyone has the right to seek and enjoy in other countries asylum from persecution.*”¹¹

A few years later, in 1951, the Geneva Convention was adopted.¹² At the beginning, this Convention only had a limited influence, since its aim was to protect persons who have fled from their countries of origins before 1951 as a result of World War II. Next to this, the 1951 Geneva Convention contained a geographic restriction to displaced persons within Europe.¹³ Both limitations were removed with the adoption of the 1967 Protocol, hence the Convention obtained universal coverage and it became one of the crucial regimes in the field of international protection of asylum seekers and refugees.¹⁴

Nowadays, the 1951 Geneva Convention and the 1967 Protocol can be seen as the cornerstone of the protection of refugees, due to the fact that they have been ratified by a majority of sovereign states, including all of the EU Member States.

Furthermore, the Convention and the Protocol are providing the definition of a “refugee” and they set out the rights of refugees and asylum seekers. Therefore, according to the 1951 Geneva Convention, “*a refugee is someone who is unable or unwilling to return to their country of origin, owing to a well-founded fear of being persecuted for reasons of race,*

¹⁰UN General Assembly (1948). *Universal Declaration of Human Rights*. A/RES/217 A (III).

¹¹ Ibid. Article 14.

¹² UN General Assembly (28 July 1951). *Convention Relating to the Status of Refugees*, United Nations, Treaty Series, vol. 189, p. 137.

¹³ Ibid.

¹⁴ UN General Assembly (31 January 1967). *Protocol Relating to the Status of Refugees*. United Nations, Treaty Series, vol. 606, p. 267.

religion, nationality, membership of a particular social group, or political opinion.”¹⁵

Besides, the 1951 Geneva Convention sets out the obligations and duties, as well as the rights of the refugee and the host-State. The basic rules for the host-State that need to be followed are those of non-discrimination concerning race, religion or country of origin of the refugee¹⁶, non-penalization of the refugee, even if he entered the host-State unlawfully,¹⁷ and finally non-expulsion, hence the principle of non-refoulement.¹⁸ Finally, the Convention lays out the minimum standards of protection that a State should provide to refugees. Among others these rights contain judicial protection of the refugees,¹⁹ access to elementary education,²⁰ and access to social security and administrative assistance.²¹

Drawing on the inspiration of the UDHR and the 1951 Geneva Convention, a regional system of human rights protection operation across Europe was the next logical step. Therefore the Council of Europe drafted the European Convention on Human Rights in 1950, and it entered into force on the 3rd September 1953.²² One of the major advantages of the ECHR and a point that is highlighting the importance of this Convention is the fact, that it is still the only international human rights agreement that is providing such a high level of individual protection.²³ The reason for this is, amongst others, the European Court of Human Rights (ECtHR), which was established through the Convention. Any individual who feels that his rights are violated under the Convention by a state can take a case to the Court.

Although there is no explicit reference to the right of asylum in the European Convention on Human Rights, refugee rights do find protection indirectly in the ECHR. The ECHR is covering many situations that fall outside the scope of other instruments intended to ensure international protection of asylum seekers, e.g. a case of a person not qualifying as a refugee, would fall outside the scope of the 1951 Geneva Convention; but such a person would nonetheless be protected by the ECHR.

Nevertheless, mainly because there is no direct reference to asylum, some doubts could be

¹⁵ UN General Assembly (28 July 1951). *Convention Relating to the Status of Refugees*. United Nations, Article 1A.

¹⁶ UN General Assembly, *Convention Relating to the Status of Refugees*. Article 3.

¹⁷ UN General Assembly, *Convention Relating to the Status of Refugees*. Article 31 (1).

¹⁸ Ibid, Article 33.

¹⁹ Ibid, Article 16.

²⁰ Ibid, Article 22.

²¹ Ibid, Articles 24 & 25.

²² Council of Europe (3rd September 1953). *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*.

²³ Lenart, J. (2012). „Fortress Europe“: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Merkourios Vol.28 (75)*. pp.04-19, p.9.

raised to the applicability of the ECHR in asylum matters. However these doubts were dismissed by the European Court of Human Rights with its judgment in the case Cruz Varas against Sweden, in which the application of the criteria set out in the Soering case²⁴ were extended to cases involving refused asylum seekers.²⁵

In the case Soering against the UK, the Court stated that the decision to extradite a fugitive to another country might be in breach with Article 3 of the ECHR in the case where substantial grounds are apparent that prove, that the person concerned might be in danger of being subject to torture or to inhuman or degrading treatment or punishment in the other country.²⁶

It is worth noting, that not only Article 3 of the ECHR could potentially be invoked in cases of refusal of asylum or in the case of transfers of an asylum seeker. Other rights in respect to asylum could be derived from Article 2 (right to life), Article 5 (right to liberty and security of the person, Article 6 (right to a fair trial) or Article 8 (right to respect for family and private life), just to name a few.²⁷

But the disadvantage with these provisions is that they require a high standard of proof, so it seems much less likely that they would be successfully invoked in comparison to Article 3 of the ECHR, as can be seen in the case law.²⁸ Furthermore Article 3 is having one major advantage - namely that its scope is covering situations, where there is a risk of other rights enshrined in the ECHR being violated even without sufficient evidence to prove it.²⁹

An important fact, which has to be kept in mind for the further analysis, is that the EU is not yet a party to the ECHR³⁰ and therefore it is not subject to scrutiny by the ECtHR nor is it bound by its decisions. So the judicial mechanisms of the ECtHR theoretically do not apply to EU actions; although MS of the EU, as parties to the Convention, have an obligation to respect the ECHR even when applying or implementing EU provisions.³¹

²⁴ ECtHR (07 July 1989). *Soering v the United Kingdom*. Application no. 14038/88.

²⁵ ECtHR (20 March 1991). *Cruz Varas and Others v. Sweden*. Application no.46/1990/237/307, paragraphs 69-70.

²⁶ ECtHR (07 July 1989). *Soering v the United Kingdom*. Application no. 14038/88, paragraph 111.

²⁷ Mole,N. & Meredith, C. (2007). Asylum and the European Convention on Human Rights. *Human Rights Files No.9*. retrieved from: <http://www.echr.coe.int/NR/rdonlyres/41ABBE90-E2BE-4021-B42D-02AE18E58E26/0/DG2ENHRFILES092000.pdf>

²⁸ Interesting cases in this respect are:ECtHR(20 January 2009). *F.H. v. Sweden*, Application no. 32621/06. (with regard to Article 2 ECHR); ECtHR (29 January 2008). *Saadi v. United Kingdom*. Application no. 13229/03. (concerning Article 5 ECHR); or ECtHR (11 November 1996). *Chahal v. The United Kingdom*. Application no. 70/1995/576/662. (with regard to Article 8 ECHR).

²⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 15 (2).

³⁰ Although the accession to the ECHR became a legal obligation with the Treaty of Lisbon and the negotiation process is ongoing.

³¹ Waagstein,P.R. (2010). Human Rights Protection in Europe: Between Straßbourg and Luxembourg. *Spice Stanford*. Retrieved from : http://iis-db.stanford.edu/docs/441/humanrights_ineurope_Layout_1.pdf.

To conclude, the 1951 Geneva Convention and the 1967 Protocol, together with the ECHR, form a solid protection for the rights of asylum seekers and refugees. Although it seems that the ECHR is less specific when it comes to refugee protection, the safeguards that are provided therein seem to be stronger and covering a broader range of situations. Hence, if the protection granted by other international legal measures, such as the 1951 Geneva Convention fail, refugees and asylum seekers may still rely on protection set out in the ECHR.³²

While the EU MS are bound to the protection of human rights by being parties to the 1951 Geneva Convention and the ECHR, and references to the ECHR were incorporated into EU legal provisions,³³ the EU was lacking its own written catalogue of human rights. This changed with the proclamation of the European Charter of Fundamental Rights at the European Council in Nice in 2000.³⁴ The Charter is including all the political and civil rights, as enshrined in the ECHR, as well as other existing EU rights, such as economic social and cultural rights.

Thus, technically EU MS are subject to three distinct layers of human rights protection: the ECHR together with the 1951 Geneva Convention, the Charter of Fundamental Rights, and national human rights law. Accordingly, one might think, that asylum seekers and refugees can fall back on the protection of their fundamental human rights. But as it will be seen later, even this safety-net seems to have loop-holes.

³² Lenart, J. (2012). *Opt cit.* p.10.

³³ For instance a reference to the ECHR was incorporated into the SEA in 1986.

³⁴ European Union (7 December 2000). *Charter of Fundamental Rights of the European Union*. Official Journal of the European Communities, 18 December 2000 (OJ C 364/01).

3. Laying the foundations for a common EU asylum system

In order to understand which position the Dublin II Regulation has within the EU legal order, one has to go back to the conditions and actions that have led to the adoption of this Regulation.

With the Treaty of Rome in 1957 the European Economic Community (EEC) was created.³⁵ It is important to keep in mind that in the beginning the EEC was aimed at creating a European economic market and enhancing the economic cooperation among its Member States. At this point, issues concerning immigration and asylum were mainly arranged through bilateral or multilateral agreements by the Member States and other third countries. Hence, asylum and immigration issues were purely domestic matters, because those matters were the exclusive competence of the Member States.

3.1. Economic Integration before Schengen - The Single European Act

This began to change with the introduction of the Single European Act (SEA) in 1986. With the SEA the internal market idea was introduced.³⁶ The internal, or respectively the single, market is by definition *“an area without internal frontiers in which persons, goods, services and capital can move freely in accordance with the Treaty establishing the European Community”*.³⁷ At first glance this concept of the “internal market” might look similar to the concept of the “economic market” of the EEC, but it is not. In fact the Member States of the EEC made one step further towards the establishment of an area of freedom of movement *“without internal frontiers”*,³⁸ due to the fact that it was no longer only limited to the economic cooperation and integration of the Member States but it was a move towards an ever closer union and relations among the MS. Thus the internal market comprised an area without internal borders, in which the free movement of goods, persons, services and capitals is ensured. The right for people to move freely from one to another Member State is thus one of the distinctive characteristics of the internal market. In order to create a real internal market, as suggested by the SEA, it would be necessary to abolish the checks on persons at the common, internal borders between the Member States. Even though the Member States agreed upon the creation of an internal market, some of them were hesitant to transfer their competences concerning border-policies to the EEC. This reserved standpoint would lead to

³⁵Treaty Establishing the European Economic Community (1957). Retrieved from: http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf.

³⁶ Single European Act (1986). OJ L 169, 29.6.1987.

³⁷ http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/index_en.htm.

³⁸ Consolidated version of the Treaty on the Functioning of the European Union (2010). OJ C 83 Vol. 53. Article 26 (2) TFEU (formerly Art.14 TEC) “The internal market shall comprise an area without internal frontiers...”.

the failure of the idea behind the notion of the internal market and of the free movement of persons within the territory of the EEC.

3.2. The EU as a territory without borders – The Schengen Agreement

Therefore, in the same period as the creation of the Single European Act, the Schengen Agreement was reached in 1985, which was aimed at the gradual abolition of checks and controls at the common internal borders. Before the Schengen Agreement became part of the EU legal order, the Schengen Agreement was primarily an international agreement among the Federal Republic of Germany, France and the Benelux Economic Union. The main aim of the Agreement was the creation of a territory without checks at the internal borders and a system to handle the external frontiers.³⁹ Those states later also signed the Convention Implementing the Schengen Agreement (SIA) on the 19th of June 1990 dealing with the gradual abolition of checks at their common borders.⁴⁰

As a result of the adoption of the Schengen Agreement and the SIA, the checks on persons were steadily abolished on the internal borders, so that the free movement of persons within the internal market was guaranteed. In contrast to this, compensatory measures were implemented at the external borders, in order to counteract the removal of the checks on persons at the common internal borders.⁴¹ Therefore people crossing the external borders became subjects to stricter controls and checks, such as passport or visa controls.⁴² This point is of particular importance when it comes to asylum matters, for the reason that asylum seekers at some point have to enter the EU via those external borders and after that, if they were not controlled, they theoretically can move freely within the EU.

The Schengen Implementing Agreement (SIA) can be seen as a forerunner of the Dublin Agreement, in the sense that it also established rules determining the State responsible for the examination of an asylum application. The Schengen Implementing Agreement entered into force 1993 and it took effect on the 26th of March 1995 creating the Schengen Area.

The Schengen Area was aimed at being an area without checks and frontiers at the internal borders of the participating States. It was only with the Treaty of Amsterdam of 1997 that the Schengen acquis was integrated into the existing EU framework and States that were originally not participating in the Schengen Agreement, accepted the Schengen acquis as part

³⁹The 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 . OJ L 239, 22/09/2000.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, Article 3-8.

of the EU law with their accession to the EU.⁴³ With the abolishment of the internal borders and checks, as well as the free movement of goods, persons, capital and services, the external borders became the main entrance to the Schengen area. This fact is from particular interest for asylum matters, since in theory if an asylum seeker enters the Schengen area, he can move freely from one Member State to another Member State.

3.3. First step towards determining responsible Member States - The Dublin Convention of 1990

The first step to create a system allocating the responsibility of a Member State to examine an asylum application was the Dublin Convention.⁴⁴ The Dublin Convention was signed on the 15th of June 1990 as a treaty under international law; therefore it was not part of EU law in the sense of the Treaty establishing the European Communities (TEC). It entered into force on the 1st of September 1997 in the twelve participating countries⁴⁵ and later also in Austria, Sweden and Finland. The main idea of the Convention was that every asylum application should be processed by one Member State. Therefore the Convention determined which Member State was responsible to examine every asylum claim. In more detail, if a Member State has already granted refugee status to a family member of the asylum seeker, this Member State is also responsible for the examination of the asylum application of the given asylum seeker (Art.4). A Member State is also responsible for an asylum application, if it had issued a valid residence permit or a visa for an asylum applicant (Art.5) or if this Member State is the first entry point of an illegal applicant (Art.7). In all the other cases, the State that is responsible for an examination is the one where the first application for asylum was filed in (Art.8). In the case where an asylum seeker was removed from the State where he has asked for asylum to another Member State, the latter one has the opportunity to send him back to the State, where he originally lodged his application (Art.3/10). Finally, all Member States recognised the right to send back an asylum seeker back to a third State, without prejudice to the national laws and the 1951 Refugee Convention (Art.3(5)).

Having said this, it is important to add that in order to avoid tensions between the Schengen acquis and the Dublin Convention; the Member States agreed that with the entry into force of

⁴³ Art.25 TFEU (formerly Art.12 (5) TEU).

⁴⁴ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention (1990). *OJ C 254, 19.8.1997*.

⁴⁵ Belgium, Denmark, Federal Republic of Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, United Kingdom.

the Dublin Convention the Schengen acquis would cease to apply.⁴⁶ For this reason since September 1997 the Dublin Convention was the only tool for the examination of asylum claims.

On the whole, the main advantage of the Convention was that it was theoretically based on mutual trust, which guaranteed that all the Member States of the EU respect the EU acquis and the minimum standards set out for the protection of asylum seekers and consequently promoted the solidarity and cooperation among the Member States.⁴⁷

Besides this, the Dublin Convention did not require the Member States to recognise the asylum decision of another Member State. To put it briefly, the Dublin Convention did not create a common asylum policy, since according to Art.3 of the Convention, the Member States continued to examine asylum pledges on ground of their domestic laws. However it can be seen as a first step towards closer cooperation in asylum affairs.

3.4. The creation of the European Union - The Maastricht and Amsterdam Treaties

With the Maastricht Treaty, which entered into force on the 7th of February 1992,⁴⁸ the EU came into existence. The Treaty furthermore introduced the three pillar structure of the EU. The first pillar consisted of the European Communities, while the second pillar dealt with the Common Foreign and Security Policy (CFSP). The third pillar comprised policies on Justice and Home Affairs (JHA). It is important to note, that the second and third pillar enhanced intergovernmental cooperation, thus also asylum matters, which was part of the second pillar, became intergovernmental.⁴⁹

The Treaty of Amsterdam (1997)⁵⁰ meant a transfer of asylum matters from the third to the first pillar. This was part of the communitarisation of the Union, meaning that Member States no longer had the exclusive competences in asylum matters; it had become a shared responsibility of the EU together with its Member States.

3.5. Foundation of the CEAS - The Tampere European Council

The most important milestone in the creation of a common asylum policy was the European Council in Tampere in 1999, which developed the first multi-annual programme for the AFSJ.

⁴⁶ Olga Ferguson Sidorenko.(2007).*The Common European Asylum System, Background, Current State of Affairs, Future Direction*.TMC Asser Press.The Hague.p.15.

⁴⁷ Heinonen,M. & Marinho,C. (1998). Dublin After Schengen: Allocating Responsibility for Examining Asylum Application in Practice. *EIPASCOPE*, 1998 (3). pp. 1-12.

⁴⁸ European Union. (7 February 1992).*Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*.OJ C 325/5; 24 December 2002.

⁴⁹ Ibid.

⁵⁰ European Union. (2 October 1997).*Treaty on European Union (Consolidated Version)*, *Treaty of Amsterdam*. OJ C 340,10 November 1997.

The Tampere European Council committed itself once again to the aim of developing the EU into an “*Area of Freedom, Security and Justice*”⁵¹ and it stated that the future asylum system will be in compliance with the 1951 Geneva Refugee Convention and other relevant human rights instruments.⁵²

According to the Tampere European Council the future asylum system should further include “*in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection.*”⁵³ Furthermore it added that in “*the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union*”.⁵⁴

The main justification for the adoption of this objective can be found in the avoidance of asylum shopping. As the reception and protection conditions of refugees differ in the MS, asylum seekers may choose their destination country on the basis of a preference for the country that provides the best treatment – which is known as the asylum shopping strategy.⁵⁵ Avoiding asylum shopping as a main objective was also obvious in the 1990 Dublin Convention with the creation of the hierarchy of criteria defining the Member State responsible and it remained a feature of the Dublin II Regulation. Consequently asylum seekers were no longer able to lodge applications in several Member States or choose the one having the most lenient policy or practice in this respect.⁵⁶

In a nutshell it can be said that the Tampere European Council gave a motion to the EU and its Member States to establish a CEAS based on the Dublin Convention and the *raison d’être* of the CEAS are the “*concept of internal market and the consequences of the implementation of the Schengen acquis.*”⁵⁷

⁵¹ European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999.

⁵⁵ Barbou des Places, S. & Deffains, B. (2004). Cooperation in the shadow of regulatory competition: the case of asylum legislation in Europe. *International Review of Law and Economics* 23. Pp.345-364, p.350.

⁵⁶ Lenart, J. (2012). „Fortress Europe“: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Merkourios* Vol.28 (75).pp.04-19.

⁵⁷ Olga Ferguson Sidorenko “The Common European Asylum System, Background, Current State of Affairs, Future Direction”, The Hague, 2007, p.39.

As a conclusion, it can be said, that the creation of the internal market led to the gradual abolition of controls and checks on persons at the common internal borders between the Member States, which was achieved through the Schengen agreement. Furthermore through the “open” internal borders, common tools in order to strengthen the external borders of the EU were introduced in order to facilitate the free movement within the EU on the one hand; and on the other hand to prevent illegal immigration. The Treaty of Amsterdam implemented the Area of Freedom, Security and Justice, while the Tampere European Council stressed the importance of asylum matters and endorsed the commitment of the EU to the obligations under the 1951 Geneva Convention by respecting the right to seek asylum.

Consequently, the *raison d’être* of the CEAS can be found in the concept of the internal market and the effects of the implementation of the Schengen Agreement. The strengthening of the controls at the external borders called for an adjustment in order to comply with the obligations under the 1951 Convention concerning asylum matters at a European level.

Thus, the creation of a CEAS was the corollary of this development. The introduction of the AFSJ together with the internal market could not be realised without common policies. Since, asylum and immigration can be seen as crucial components of policies dealing with security and justice, common policies on asylum and immigration were needed in the EU.⁵⁸

⁵⁸ Sidorenko, O (2007). *op.cit.* p.39.

4. The scaffold of the current European asylum acquis

After the course for a common asylum system has been set at the Tampere European Council and following the Amsterdam Treaty of 1997, which required the European Council to adopt “*measures on asylum, in accordance with the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees and other relevant treaties*” by 2004, a variety of Directives were adopted. Article 63 TEC has given some direction for the layout of the CEAS. Firstly it pointed out four different categories of protection: refugee status, temporary protection, international protection and the protection of asylum seekers. As to the refugee status, Article 63 is requiring rules on the qualification, as well as on the procedures for the granting or withdrawing of the status. Concerning the asylum seeker status, the Article is asking for reception standards, and mechanisms and criteria for the allocation of the asylum applicants.⁵⁹

If one compares those requirements with the aims of the pieces of EU legislation on asylum, one can say, that in theory they are addressing all the topics set out in Article 63. The Qualifications Directive is setting the rules on the qualification as a refugee, as well as the content of the protection that has to be granted. The Procedures Directive, on the other hand, is setting rules on the procedures for granting and withdrawing the refugee status; while the Reception Directive is determining the rights of the asylum applicants. Finally, the Dublin II Regulation is dealing with the allocation of the asylum applicants in the EU. In the event of a mass influx, the Temporary Protection Directive is establishing standards for temporary protection.

Although it seems that all these Directives and Regulations are independent pieces of legislation, they nevertheless are interconnected. The Procedures Directive is addressing procedures on how to deal with asylum applications. So to some extent it defines the beginning and the end of asylum seeker status, and hence it constitutes the entitlement to the benefits assigned in the Reception Standards Directive. The Procedures Directive further is requiring the examination of asylum applications, and the examination should address whether the asylum application is well-founded. An exception to the examination is made in cases, where the Dublin II Regulation applies. This means that, an asylum application has not to be examined, if it turns out that another Member States is responsible for the asylum seekers claims. In the case, where an examination of an asylum application has brought forward that the applicant qualifies for the refugee status as it is defined in the Qualifications

⁵⁹ Consolidated version of the Treaty on the functioning of the European Union (TFEU, 2007). OJ C 83, 30.3.2010. Article 78 (ex. Article 63 TEC).

Directive he or she enjoys the rights and benefits attached to this status as determined in the Directive.⁶⁰

Recapitulatory, one can say, that all of the mentioned Directives and the Dublin II Regulation address different facets of one asylum system.

In a subsequent step, the aims and contents of the different Directives will be discussed. Next to this some flaws and weaknesses of those Directives will be examined.

4.1. Temporary Protection Directive

The first Directive, which was adopted after the Tampere Summit and representing a motion towards the CEAS, was the Temporary Protection Directive (2001/55/EC). The purpose of the directive is to “*establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons*”.⁶¹ Next to this, the Directive puts in place immediate temporary protection of those people and is promoting the concept of solidarity and burden sharing between the Member States to provide protection to displaced persons.

According to the Temporary Protection Directive, Member States must grant those people, who are under temporary protection a residence permit, which is valid for the whole period the temporary protection is applied.⁶² Furthermore Member States are obliged to grant persons with temporary protection a variety of rights (the right to have access to suitable accommodation, to employment, education and the assistance in social welfare).⁶³

Next to these rights, persons who enjoy temporary protection must have the opportunity to lodge an application for asylum.⁶⁴ In this case the Member State that received the person is responsible for the examination of the application.⁶⁵

4.2. Reception Conditions Directive

The second Directive, which was adopted, was the Reception Conditions Directive (2003/9/EC). The objective of the Directive “*is to lay down minimum standards for the reception of asylum seekers in Member States*”⁶⁶ and it applies to “*all third country nationals*

⁶⁰ Battjes, H. (2006). Op.cit. p. 196 ff.

⁶¹ Council Regulation 2001/55/EC of 20 July 2001 Article 1.

⁶² Council Regulation 2001/55/EC of 20 July 2001, Article 8.

⁶³ Ibid, Articles 13, 14.

⁶⁴ Ibid, Article 17.

⁶⁵ Ibid, Article 18.

⁶⁶ Council Directive 2003/9/EC Article 1.

*and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers”.*⁶⁷

Under the Reception Conditions Directive, Member States are obliged to guarantee the following measures to the asylum seekers: Material reception conditions (accommodation, food and clothing), family unity, medical and psychological care and finally access to the education system and language courses. Furthermore Member States cannot deny asylum applicants the access to the labour market and vocational education 6 months after they have lodged their application for asylum.⁶⁸ Although the main goal of the directive is to ensure comparable conditions in all Member States, Member States are still allowed to decide on the scope of the Reception Directive.

The Reception Directive can be seen as an important part of the CEAS, because the differences in the reception conditions in the EU Member States can be a factor for migratory movement of asylum seekers within the EU. This point is also interesting, if one takes into consideration that based on the Dublin II Regulation asylum seekers can only lodge an asylum application once in the EU. Hence, the conditions in which they are being received are of great importance in their choice. With the Reception Directive, the reception conditions are harmonised in the varying Member States, so that the phenomenon of asylum shopping can be avoided.⁶⁹

One of the most heavily discussed provisions of the Reception Conditions Directive is the access to employment and the delay in access to it as well as the complicated procedure attached to it.⁷⁰ Nevertheless, it is already a big step, that the Member States are obliged to open the access to employment as well as vocational training to the asylum seeker, due to the fact, that before the adoption of the Directive, Member States were rather reluctant to grant asylum seekers the access to the labour market.⁷¹

4.3. Qualifications Directive

The third Directive, which is relevant for the implementation of the CEAS, is the Qualifications Directive (2004/83/EC). Its purpose is *“to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who*

⁶⁷ Ibid, Article 3.

⁶⁸ Ibid, Chapter II.

⁶⁹ Hailbronner, K. (2004). Asylum Law in the Context of a European Migration Policy, in N. Walker (ed.). *Europe's Area of Freedom, Security and Justice*. Oxford: Oxford University Press, p.78.

⁷⁰ Guild, E. (2004). Seeking asylum: stormy clouds between international commitments and EU legislative measures. *European Law Review*, 29(2).

⁷¹ Ibid, p.215.

otherwise need international protection and the content of the protection granted".⁷²

According to the Directive, a refugee is *"any non-EU country national or stateless person who is located outside of his/her country of origin and who is unwilling or unable to return to it owing to fear of being persecuted"*.⁷³

Furthermore the Directive sets out how "persecution" is constituted to qualify as a refugee.⁷⁴ In order to assess the application, the Member States have to take into consideration the laws and regulations of the country of origin, serious indication of a well-founded fear of persecution or a real risk and the individual circumstances of the applicant.

If the third country national or stateless person is qualified as a refugee or for subsidiary protection status, he enjoys the following set of rights, which have to be guaranteed by the Member State:

- The right of non-refoulement (Art.21)
- The right to information in a language they understand (Art.22)
- The right to a residence permit valid for at least three years and renewable for refugees and a residence permit valid for at least one year and renewable for persons with subsidiary protection status (Art.24)
- The right to travel within and outside the country that granted refugee or subsidiary protection status (Art.25)
- The right to take up paid employment or to work on a self-employed basis and the right to follow vocational training (Art.26)
- Access to the education system for minors and to retraining for adults (Art.27)
- Access to medical care and any other necessary forms of care, particularly for persons with special needs (minors, victims of torture, rape or other forms of psychological, physical or sexual violence, etc.) (Art.29)
- Access to appropriate accommodation (Art.31)
- Access to programmes facilitating integration into the host society and to programmes facilitating voluntary return to the country of origin (Art.33)

In a nutshell, one can say that the Qualifications Directive is addressing many issues in substantive asylum law, which have forced divergences in the domestic practices before.⁷⁵ Next to this the Directive is increasing the protection, due to the fact that the established

⁷² Council Directive 2004/83/EC of 29 April 2004.

⁷³ Ibid, Article 2b.

⁷⁴ Ibid, Articles 9 &10.

⁷⁵ Kaunert, C. (2009). Liberty versus Security? EU Asylum Policy and the European Commission. *Journal of Contemporary European Research*. 5 (2), pp. 148-170.

grounds for persecution match those set out in the 1951 Geneva Convention. Finally, the Directive introduced three new forms of persecution, which have not been applied by the Member States before, namely persecution that stems from non-state actors and child-specific and gender-specific forms of persecution.⁷⁶ With the introduction of those new forms of persecution, the Directive goes beyond the already existing refugee rights enshrined in international human rights provisions.

4.4. Asylum Procedures Directive

The fourth adopted Directive is called the Asylum Procedures Directive (2005/85/EC). The Directive aims at providing “*minimum standards on procedures in Member States for granting and withdrawing refugee status*”.⁷⁷ Under the provisions of this Directive Member States have to guarantee that applicants for refugee status are entitled to stay in the country while their application is pending and they should be informed about the procedure, their rights and obligations. Besides this, Member States have to provide the service of an interpreter in case it is needed to the applicant and they have to have to opportunity to consult a legal adviser.⁷⁸

In general harmonised asylum procedures in the EU Member States are of great importance for the functioning of a common asylum system. First of all, the harmonisation contributes to the prevention of secondary movements of asylum seekers. Next to this harmonised procedures are vital for the asylum seekers in order to maintain fairness towards people in need of protection.

However the Procedures Directive is one of the most criticized directives of the CEAS. The main point of criticism is the supposed incompatibility with international obligations.⁷⁹

Next to this, Costello (2005) is questioning the three controversial concepts introduced through this Directive: first country of asylum, safe country of origin and the safe third country concept. The concept of the first country of asylum allows applications to be rejected in the case where asylum applicants have already been recognised as refugees in another country. The concept of safe country of origin is allowing to consider a group of applications of nationals of a particular country as unfounded, while the “safe third country” assumption is allowing the transfer of responsibility for the examination of an asylum application to

⁷⁶ Hailbronner (2004). Op.cit. p 60.

⁷⁷ Council Directive 2005/85/EC of 1 December 2005, Article 1.

⁷⁸ Ibid, Chapter II.

⁷⁹ European Council for Refugees and Exiles (ECRE), Amnesty International and Human Rights Watch (2004). *Refugee and Human Rights Organisations across Europe express their deep concern at the expected agreement on asylum measures in breach of international law*. Brussels: press release 28 April 2004.

countries of transit to the EU. According to Costello (2005) these concepts threaten to undermine many of the other positive features brought forward by the Tampere process, such as the Qualifications Directive.⁸⁰

After the examination of the different Directives on an individual basis, one can see that they have common objectives, as well as connections. So they rather represent constituents of an integrated system, namely the CEAS.

All of the Directives explicitly define as their main purpose laying down standards on the subject matter which they address. Furthermore all of them serve the aim of “*the progressive establishment of an area of freedom, security and justice*”⁸¹, hence promoting the freedom of movement of EU citizen, security and respect for the fundamental rights of TCN.

Besides the aim of creating an area of freedom, security and justice, especially the Qualification, Reception Conditions, Procedures and Temporary Protection Directives aim at “*limiting secondary movements*” of asylum seekers.⁸² In that respect, these Directives can be seen as intertwined measures in order to ensure the freedom of movement of EU citizen. Finally a shared objective of the Directives is that respect for the rights of third country nationals is ensured and that the “*area of freedom, security and justice is open to those who legitimately seek protection in the Community*”.⁸³ In this respect, it is also surprising, that none of the Directives is explicitly referring to any sort of prohibition of refoulement, even the Qualifications Directive is only referring to the “*international obligations under human rights instruments*”.⁸⁴

With less reservation, the Directives are referring to the Charter of Fundamental Rights of the EU. All of the Directives, except for the Temporary Protection Directive “respect” the Charter and “*seek to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members*”,⁸⁵ hence they oblige themselves to comply with Articles 1 and 18 of the Charter.

Besides, the common objectives of the Directives, all CEAS legislation is attempting to set

⁸⁰ Costello, C. (2005). The Asylum Procedures Directive and the proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection. *European Journal of Migration and Law*, 7(1), pp.35-69.

⁸¹ Preamble recitals of the Qualification Directive, Procedures Directive, Reception Conditions Directive and the Temporary Protection Directive.

⁸² Ibid.

⁸³ Preamble recitals of the Qualifications (2004/83/EC), Procedures (2005/85/EC), Reception conditions (2003/9/EC) and temporary protection directives (2001/55/EC).

⁸⁴ Council Directive 2004/83/EC of 29th 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. OJ L 304. 30.9.2004, Preamble.

⁸⁵ Preamble recitals.

“minimum standards”: This means that the relevant legislation must be observed by the Member States, but they have the possibility to adopt or keep national standards which are more favourable for the asylum applicant. So the Directives on Procedures, Qualification and on the Reception Conditions state that *“Member States may introduce or retain more favourable standards..., in so far as those standards are compatible with this Directive”*.⁸⁶ Finally, all Directives aim at a certain degree of harmonisation, whereas two different levels of harmonisation become apparent comparing the Directives. The Qualifications Directive aims at “common criteria” in order to identify *“persons genuinely in need of international protection”*.⁸⁷ From this it follows, that a rather high degree of harmonisation is intended. In contrast to this, the Procedures Directive is aiming at the introduction of a *“minimum framework on procedures”*,⁸⁸ while the Reception Conditions Directive aims at setting *“minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living”*.⁸⁹ So, one can say, that on matters concerning the asylum procedures and the reception conditions, a rather modest level of harmonisation is emphasized.

4.5. Eurodac

Next to the Directives, the Eurodac System is part of the CEAS and it is closely linked to the Dublin II Regulation. The Eurodac Regulation was adopted in December 2000 and it aspires in supporting Member States to identify *“applicants for asylum and persons apprehended in connection with the unlawful crossing of the external borders of the Community”*.⁹⁰

Eurodac is encompassing of *“the Central Unit, a computerised central database in which the data are processed for the purpose of comparing the fingerprint data of applicants for asylum and of the categories of aliens and of means of data transmission between the Member States and the central database”*.⁹¹ Every Member State ought to take the fingerprints of every asylum seeker over 14 years and should transmit this to the Central Unit.⁹² This data should then be directly recorded in the central database.

⁸⁶ Article 3 of the Qualifications Directive (2004/83/EC), Article 4 of the Procedures (2005/85/EC) and Reception Conditions Directive (2003/9/EC).

⁸⁷ Council Directive 2004/83/EC of 29th 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. OJ L 304. 30.9.2004, Preamble.

⁸⁸ Council Directive 2005/85/EC of the 1st December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. OJ L 326.13.13.2005, Preamble.

⁸⁹ Council Directive 2003/9/EC of 27th January 2003 laying down minimum standards for the reception of asylum seekers. OJ L 31. 6.2.2003, Preamble.

⁹⁰ Council Regulation (EC) No 2725/2000 of 11 December 2000 Preamble.

⁹¹ Ibid.

⁹² Ibid, Article 4(1).

The Eurodac system is functioning in the following manner: “ *Fingerprint data transmitted by any Member State, shall be compared by the Central Unit with the fingerprint data transmitted by other Member States and already stored in the central database*”.⁹³ After this “*the Central Unit shall forthwith transmit the hit or negative result of the comparison to the Member State of origin*”.⁹⁴

On account of the fact, that due to the Eurodac system, asylum seekers who have lodged several applications in different Member States can be traced and then send back to the first country where they filled the application, Eurodac is preventing the phenomenon of “asylum shopping”. Consequently the Eurodac system plays a prominent role in the European Asylum System and is to some extent important for the functioning of the Dublin II Regulation.

In conclusion, Eurodac was designed in order to streamline the system for asylum applications. It enables Member States to check if an asylum seeker has previously lodged an asylum application in another Member State. Where this is the case, the asylum seeker can be transferred to the Member State where he lodged his first asylum claim.

⁹³ Ibid, Article 4(3).

⁹⁴ Ibid, Article 4(5).

5. The corner pillar of the CEAS: The Dublin II Regulation

5.1. The Regulation and the Common European Asylum System (CEAS)

While the Directives mentioned in the previous part form the foundation of the CEAS, the Council Regulation (343/2003/EC)⁹⁵ can be seen as the cornerstone of the CEAS. In order to understand the position that the Dublin II Regulation holds within the European legal order, it is of great importance to take a look at the conditions that have led the EU to adopt this regulation.

From the preamble of the Dublin II Regulation it becomes clear, that the Regulation can be seen as a first attempt to create a common policy on asylum within the EU. The first paragraph emphasizes that “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*”.⁹⁶ This objective was also strongly highlighted during the Tampere Summit and was captured in the Tampere Presidency Conclusions, which, as already mentioned, were a decisive move towards the development of the CEAS. It continues with a description, of how the CEAS should look like, namely “*this System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application*.”⁹⁷

Thus, one can see, that the Dublin II Regulation in theory marks a crucial foundation for the functioning of the CEAS.

5.2. Aim of the Regulation

The overall aim of the Dublin II Regulation is to lay down “*the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national*.”⁹⁸ So the Regulation attempts to establish a hierarchy of criteria in order to facilitate the examination of asylum applications. With this basic principle, which is present in all the provisions of the Dublin II Regulation, namely that every asylum application should be examined by a single Member State, two other aims become apparent.

First of all, with the determination of the Member State responsible , one try to “*prevent*

⁹⁵ 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. *OJ L 50, 25.2.2003, p. 1–10*.

⁹⁶ Council Regulation (EC) No 343/2003 of 18th February 2003, Preamble.

⁹⁷ Ibid.

⁹⁸ Council Regulation (EC) No 343/2003 of 18th February 2003, Article 1.

*abuse of asylum procedures in the form of multiple applications for asylum submitted simultaneously or successively by the same person in several member States with the sole aim of extending his stay in the European Union,”*⁹⁹ hence the prevention of secondary movement. The second aim is to secure the access to protection. If several Member States regard each other as safe third countries, probably none of them would examine the merits of the claim of an asylum applicant but expel them to the other Member State.¹⁰⁰ This would in turn, lead to the phenomenon of a “*refugee in orbit*”, which means that the refugee will neither be expelled to his/her country of origin, nor would be able to be granted asylum in a safe country.

Thus, the principles underlying the Dublin II Regulation are that the asylum applicant’s claim should be examined by one Member State only, that the asylum applicant receives access to protection and that the decision-making should be rapid.

In order to determining the Member State responsible, the Dublin II Regulation states in Articles 6 to 14 the criteria for determining the Member State. The criteria in general can be divided into three main groups:

A. Criteria concerning family unity. In this case, Articles 6-8 and 14 refer responsibility to the Member State where a family member of the asylum seeker is present.

When an asylum seeker can be characterized as an unaccompanied minor, the responsibility for the examination of the asylum request falls upon the Member State “*where a member of his or her family is legally present.*”¹⁰¹

If the asylum seeker is an adult, the responsibility for the asylum request examination falls on the Member State where the spouse or unmarried partner, or a minor child is already recognized as a refugee.¹⁰² If these grounds are not applicable, but the asylum seeker has a family member in a Member State, where the family member has lodged an application on which no decision so far has been taken, this Member State “*shall be responsible for examining the application for asylum, provided that the persons concerned so desire.*”¹⁰³

In the case, that none of the above mentioned Articles apply, the application of the

⁹⁹ Commission of the European Communities. “*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*”, COM (2001) 447 final.

¹⁰⁰ Battjes, H., (2006). “*European Asylum Law and International Law*” .p.388. Martinus Nijhoff Publishers, Leiden/Boston.

¹⁰¹ Ibid, Article 6.

¹⁰² Council Regulation (EC) No 343/2003 of 18th February 2003, Article 7.

¹⁰³ Ibid Art.8.

following articles, namely Articles 9 to 13 apply, which in turn could lead to the separation of the asylum seeker and concerned family members. In order to avoid family separation, Article 14 ensures that in such a case, only one Member State is responsible for the asylum application of both the asylum seeker and his/her family members. Hence family reunification is guaranteed in the case, where family members arrive together, but different Member States would be responsible.¹⁰⁴

- B. Criteria concerning a state's involvement in the legal or illegal entry of the asylum seeker. A state is therefore responsible if
- (a) it issued a visa or residence permit to the applicant¹⁰⁵
 - (b) the asylum applicant entered it illegally, coming from a non-EU Member State But this ground of responsibility only lasts for 12 months from the time the asylum seeker entered the Member State¹⁰⁶ - or
 - (c) if the previous grounds are not applicable, the asylum seeker has lived for a continuous period of at least five months in it¹⁰⁷
 - (d) if the asylum seeker did not need a visa to enter the Member State, so entered it legally;¹⁰⁸
 - (e) the asylum applicant, on his way to a non-EU Member State, lodged his asylum request at the transit zone of an airport on its territory.¹⁰⁹
- C. In the case, where none of these criteria apply, the Member State responsible for the asylum request is the one, where the applicant lodged his application.¹¹⁰

In general, it is important to say, that these criteria do not exhaustively regulate the allocation of the responsibility for the examination of asylum applications, the Dublin II Regulation rather sets supplementary rules. The obligations implied by responsibility end, when the asylum seeker has left the territory of the responsible Member State for at least three months¹¹¹ or in the case when another Member State has issued a residence document to the asylum applicant. Next to this, failure to meet the time limits in the procedures means a transfer of responsibility.

¹⁰⁴ Ibid, Article 14.

¹⁰⁵ Ibid, Art.9.

¹⁰⁶ Ibid Art.10(1).

¹⁰⁷ Ibid, Art.10(2).

¹⁰⁸ Ibid, Art.11.

¹⁰⁹ Ibid, Art.12.

¹¹⁰ Ibid, Art.13.

¹¹¹ Council Regulation (EC) No 343/2003 of 18th February 2003 ,Art.16(3).

As a final point, Member States can themselves voluntarily assume responsibility, since the “*sovereignty clause*”¹¹² confirms the right of the Member States to process or examine any asylum application lodged with them. Furthermore, Member States have the possibility to assume responsibility for claims lodged in another Member State, and for which they normally would not be responsible following the Art.5-14, on “*humanitarian grounds*”.¹¹³ This so-called “*Humanitarian clause*” allows in some cases, that Member States can derogate from the hierarchy established in the previous chapters. In more detail, “*any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives on humanitarian grounds based in particular on family or cultural considerations*”.¹¹⁴

It is important to mention, that both clauses are rather used in a restrictive manner by the Member States with only a few MS sending outgoing requests. It seems that Member States are unwilling to apply the humanitarian clause and the sovereignty clause in order to take responsibility for asylum claims. This can be seen in the statistics, which show that only a very small number of cases have responsibility assigned on the basis of the discretionary provisions.¹¹⁵ In the following Chapter “Taking Charge and Taking Back” of the Dublin II Regulation, further arrangements can be found that underline the aim of limiting the phenomenon of “*asylum shopping*”. In this sense “*where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may... call upon the other Member State to take charge of the applicant*”.¹¹⁶

5.3. Presumptions of Compliance with Human Rights Treaties

Overall one can say that the Dublin II Regulation seems to be a comprehensive system on which the EU Member States can rely on transferring an asylum seeker to another Member State. Nevertheless, although the Member States transferred their powers on asylum matters to the EU, they are still required by the Vienna Convention on the Law of Treaties to comply with their obligations arising out of the particular international treaties they signed before the transfer of competences to the EU.¹¹⁷ The consequence out of this is that the EU Member States still have to comply with human rights obligations originating out of the treaties they

¹¹² Ibid, Art.3.

¹¹³ Ibid, Art.15.

¹¹⁴ Ibid.

¹¹⁵ European Council on Refugees and Exiles (2013).*Dublin II Regulation: Lives on hold - European Comparative Report*.

¹¹⁶ Ibid Art.17.

¹¹⁷ Pacta sunt servanda principle; § 26 of the Vienna Convention on the Law of Treaties (1969): “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*”.

are signatories to.

So, although the Dublin II Regulation harmonized a variety of aspects dealing with domestic asylum systems in the EU, the final responsibility still lays with the Member States themselves whether or not they grant international protection to asylum seekers.

Even though only the Member States, instead of the EU, are Contracting Parties to the Geneva Convention, the EU acknowledges the provisions stated in the Convention and includes, e.g. in Article 78 TFEU and Article 18 of the Charter that the right to asylum shall be guaranteed with taking into account the Refugee Convention.

Consequently, it can be said, that the EU Member States, which are theoretically bound by the same human right obligations, rely on a double presumption: Namely, that all Member States act in respect to the principle of *non-refoulement* and that all Member States of the EU can be seen and considered as safe countries.¹¹⁸

Those two presumptions constitute a part of the mutual trust which is expected between the Member States. The core of this mechanism is that Member States accept national standards by other EU Member States. Applying this to the Dublin II Regulation, one can say that the Regulation is about the allocation of the responsibility for asylum seekers. Thus, it is based on mutual trust, e.g. on the assumption that each MS is treating asylum seekers and their claims according to the general rules of national, EU and international law. Accordingly, mutual trust in the context of the Dublin II Regulation is about the examination of the request for asylum by the other Member State, as well as about the treatment of the asylum seeker during this examination.

Justifications for mutual trust and mutual recognition can also be found in the Dublin II Regulation. The first justification for mutual trust can be found in the Preamble of the Dublin II Regulation, where it is stated that all Member States “*respecting the principle of non-refoulement are considered as safe countries for third-country nationals*”.¹¹⁹ This is a reference to the Refugee Convention, to which the MS are parties to and to provisions laid down in the CEAS.

The second rather indirect basis for mutual trust can be found in the European Convention on Human Rights. The ECHR presents a basis due to the fact, that all member states are parties

¹¹⁸ Moreno Lax *op. cit.*

¹¹⁹ Council Regulation (EC) No 343/2003 of 18th February 2003, recital 15.

to this instrument and are therefore presumingly complying with the underlying obligations.¹²⁰

So although a direct reference to mutual trust and mutual recognition respectively is not present in the Dublin II Regulation, mutual trust is certainly an implicit foundation of legal instruments, which bind the state that is receiving asylum seekers.

As a consequence of the presumptions, that all Member State act in respect to the principle of non-refoulement and can be considered as safe countries, a quasi automatic transfer of asylum seekers by the national migration authorities to the responsible Member State was often the case. Taking into consideration the assumptions behind the principles of mutual trust, or respectively mutual recognition, it can be argued that those proceedings can be justified from a theoretical point of view.

Nonetheless, a transfer of an asylum seeker under the Dublin II system is an expulsion measure which is falling under the scope of the prohibition of non-refoulement. Therefore, normally the national authorities have to make sure that the asylum seeker they want to transfer to another Member State will be safe in this State, and if there is a serious risk that the concerned Member State does not respect the obligations of protection, the first Member State should not rely on mutual trust and should not relocate the asylum seeker, due to the fact that in this case it would act in breach with human rights obligations.

5.4. Article 10 & Article 15: Possible Controversies

Although in theory the Dublin II Regulation was thought to be a complete system allocating the responsibility of asylum application to EU Member States, there are provisions of the Dublin II Regulation, which might lead to conflicts. One of these controversial Articles, is Article 10, which concludes that if “*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*”.¹²¹ In essence, this provision has a tremendous impact on the border Member States of the EU. Because of Article 10, it was obvious from the beginning of the Dublin system that countries on the periphery of the EU would have to bear the burden of the examination of a majority of the asylum application. One of the EU Member States which seems to be burdened the most is Greece. With its location in South Eastern Europe and its long and porous borders and coastlines, Greece can be seen as the bridge between the Middle East, Africa and Europe.

¹²⁰Battjes,H.,(2006). “*European Asylum Law and International Law*”. Martinus Nijhoff Publishers, Leiden/Boston.

¹²¹ Council Regulation (EC) No 343/2003 of 18th February 2003,Article 10(1).

Hence many asylum seekers try to enter the EU via Greece in order to find a new home or even in order to reach the more industrial EU Member States in Northern Europe, where they will have more job opportunities, so Greece is only a transit country for those asylum seekers.

Taking a look at the numbers available, one can clearly see, that the intended concept of “burden sharing”, which is one of the main aims of the Dublin II Regulation,¹²² is not working in reality. According to Human Rights Watch “*about 75 percent of the 106.200 irregular migrants entering the EU in 2009 first arrived in Greece; that percentage has risen to 80 percent in the early months of 2010*”.¹²³ Hence, the provisions of the Dublin II Regulation, which lead to these huge numbers of asylum applications, complicate it for the Greek authorities to provide the asylum seekers with the needed protection, as it is written in the 1951 Refugee Convention as well as in the Dublin II Regulation.

Consequently Greece, in spite of being a Member of the EU and one of the signatory parties to both the ECHR and the UDHR, was sentenced by the European Court of Human Rights for violating Articles 3 and 13 of the ECHR, in the cases M.S.S against Greece and Belgium,¹²⁴ as well as in the case N.S and others against the Secretary of State for the Home Department.¹²⁵

Other problematic provisions of the Dublin II Regulation are the discretionary clauses, namely Article 3 (2) and Article 15.

According to the so-called “*sovereignty clause*” of Article 3, each Member State has the opportunity to “*examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility...*”.¹²⁶ For this reason this Article gives leeway to a Member State, which normally would not be responsible under the criteria set out in the Regulation, to examine an application for asylum lodged with it. At first glance, it might seem that Member States enjoy full discretion as to the examination of an application, which might also be the intention behind this clause, but it seems to gain a different scope, if one takes into account the recent judgements and the current situation in Greece.¹²⁷ Inasmuch as this opt-out or sovereignty-clause could not only be seen as an opportunity for the examination of an asylum application by a Member State, but also as a duty or obligation for

¹²² Ibid. Preamble paragraph 8 “*...Makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity*”.

¹²³ <http://www.hrw.org/news/2010/09/20/greece-asylum-reform-delay-unacceptable>.

¹²⁴ M.S.S v Belgium and Greece, Application no. 30696/09, 21 January 2011, ECtHR.

¹²⁵ Case C-411/10 N.S and C-493/10, M.E. and others, 2011.

¹²⁶ Council Regulation (EC) NO 343/2003 of 18th February 2003, Article 3(2).

¹²⁷ <http://www.spiegel.de/international/europe/amnesty-international-blasts-greece-on-treatment-of-asylum-seekers-a-874073.html>.

Member States in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum applicants.

The same is true for Article 15, which gives a Member State the option to take the responsibility for an asylum application in the case, where the Member State “*may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations*”.¹²⁸

To conclude, both Articles entail a certain amount of discretion, but the choice of a Member State might turn into an obligation in the case where human rights are taken into account.

5.5. Drawbacks of the Dublin II Regulation

Next to aforementioned controversial provisions, also other aspects of the Dublin II Regulation have been criticised highly by the different non-governmental organisations, which deal with human rights protection, such as the European Council on Refugees and Exiles (ECRE) or the UNHCR. One of the drawbacks of the Dublin II Regulation is that there is no equivalence of protection throughout the EU, which is leading to the “*asylum lottery*” phenomenon. In theory, one goal of the Regulation was to avoid negative effects for the Member States’ interest; hence the asylum request examination should take place under equal conditions in all Member States.¹²⁹ But in practice asylum seekers are deprived of a choice to choose the country, where they pledge their asylum request. Several scholars therefore argue, that the provisions and criteria establishing the Member State responsible for an asylum application as set out in the Dublin II Regulation is incompatible with international law, due to the fact that the Refugee Convention is granting a right to seek recognition of refugee status in any state being a Contracting Party to the Convention.

Additionally, as already mentioned, the Dublin II Regulation attempts to strike “*a balance between responsibility criteria in a spirit of solidarity*”, it cannot really be seen as an instrument of burden-sharing, it rather intends to minimize secondary movements and to legalise the process of allocating the responsibility for asylum claims in the EU.¹³⁰ Consequently it cannot really be seen as a burden-sharing instrument. Furthermore the Dublin system was designed in a way, that it was based on “*objective, fair criteria both for the*

¹²⁸ Council Regulation (EC) No 343/2003 of 18th February 2003, Article 15 paragraph 1.

¹²⁹ Commission Communication „*Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*“ COM (2000) 755.

¹³⁰ Commission of the European Communities, „*Revisiting the Dublin Convention: Developing Community Legislation for Determining which Member State is Responsible for Considering an Application for Asylum Submitted in One of the Member States*“ (Staff Working Paper) SEC (2000) 522 final.

Member States and for the persons concerned”,¹³¹ but it is rather difficult to assess the fairness of the Regulation, if nearly most of the responsibility of examining asylum applications is put especially on the Southern and Eastern Member States, which are the ones that are at the border regions of the EU. Besides it is questionable if it is fair, to burden exactly those Member States with the asylum applications and the transfers of asylum seekers without taking into account their capabilities in terms of reception of asylum seekers, as well as their economic or financial circumstances.

Moreover, another shortcoming of the Dublin II Regulation, which has to be indicated, is that the Dublin system could be characterised as a system based on sanctions for those Member States which allow irregular immigrants on the territory of the EU and therefore are held responsible for those immigrants. This connection between the allocation of responsibility for the examination on asylum applications and the failure to carry out effective entry controls can clearly be seen in the Chapter III of the Regulation. In this Chapter, Article 18 is putting responsibility on a Member State who let the asylum seeker into the EU, based on submitted proof and circumstantial evidence, in form of EURODAC data; while Article 9 puts responsibility on a Member State who has granted a visa or residence permit to an asylum applicant. This kind of policy is in general noncompliant with human rights provisions, which are obliging the Member States to grant protection to all those who need it, in the sense that Member States are obliged by international law to grant protection to “*everyone who is seeking asylum from persecution*”.¹³² So according to this, one might argue, that those Member States who comply with those human rights provisions and grant asylum to people, are in a certain manner punished for their compliance.

The list of the above mentioned weaknesses of the Dublin II Regulation is not exhaustive, and there might be more criticisms. But a recurrent theme in all the delivered points of criticism is probably the lack of compliance of the Dublin II Regulation with human and fundamental rights. The conclusive presumption that the Regulation is in accordance with human rights provisions was challenged in the following case-law and it questioned the Dublin system as such.

¹³¹ Dublin II Regulation op.cit.

¹³² United Nations (1948). Universal Declaration of Human Rights. Article 14(1) “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*”.

6. A first shaking for the Dublin II Regulation - The Case M.S.S against Belgium and Greece

The year 2011 can be seen as a crucial year for the European asylum law, in the sense that it was framed by two essential judgements, which shook to the very foundations of the provisions of the Dublin II Regulation, namely the verdict in M.S.S¹³³ at the beginning of 2011 followed by the judgment in N.S. and M.E¹³⁴ in December 2011.

To put it briefly, one can say that the verdict in the M.S.S case underlined the deficiencies and shortcomings of the Dublin II Regulation when it comes to the protection of human and fundamental rights in the case of the transfer of asylum seekers to another Member State, where they might be exposed to inhuman treatment, which would be in breach with Article 3 of the ECHR.

Before taking a closer look at the consequences, which the judgement had on the application of the Dublin II Regulation provisions, the factual background of the case M.S.S v Belgium and Greece will be examined.

6.1. Background

M.S.S, who is an Afghan national, left Kabul in 2008, and entered the EU through Greece, after travelling via Turkey and Iran. On the 10th of February 2009, M.S.S arrived in Belgium, where he lodged an application for asylum. According to the Dublin II Regulation, the Belgian Aliens Office asked the Greek authorities to take charge of the asylum application of M.S.S, since the first country he entered in the EU was Greece.

While the case was still pending, the UN High Commissioner for Refugees sent a letter to the Belgian Minister for Migration and Asylum Policy condemning the deficiencies in the asylum procedure and the reception conditions of asylum seekers in Greece. Furthermore he strongly advocated the suspension of asylum seeker transfers to Greece.

In mid - 2009, the Belgian Aliens Office, despite the recommendation of the UNHCR, ordered that M.S.S has to leave the country for Greece, where he would have the possibility to submit another application for asylum. In the following the Belgian authorities did not receive any answer from their Greek colleagues within the two-month period, as it is provided for by the Dublin II Regulation, which can be seen as an acceptance of its request.

The applicant lodged an appeal with the Belgian Aliens Appeal Board, insisting that he was in risk of detention in Greece in insufficient conditions and he feared being sent back to

¹³³ M.S.S v Belgium and Greece, Application no. 30696/09, 21 January 2011, ECtHR.

¹³⁴ Case C-411/10 N.S and C-493/10, M.E. and others, 2011.

Afghanistan without a proper examination of his reasons for the fled to the EU, where M.S.S claimed he had escaped a murder attempt by the Taliban, due to the fact that he was working as an interpreter for the air force troops stationed in Kabul.

After his application for a stay of execution has been rejected, M.S.S was transferred to Greece on the 15th of June 2009. When he arrived at the airport in Greece, he was directly placed in detention, where according to his testimony; he stayed in a tiny room with 20 other detainees, with restricted access to the toilets, no possibility to be in the open air, degrading living conditions and insufficient nutrition.

On the 18th of June 2009, after he was released and received an asylum seeker's card, the applicant had to live on the streets without any support. As a result, he tried to leave Greece with a false identity card, but was arrested once more and placed in a detention facility, where, according to his information, he was beaten by police officers. Having been released, M.S.S continued to live on the street, where he sporadically received support from the church and local residents.

M.S.S asserted that his detention conditions as well as his living conditions in Greece can be seen as inhuman and degrading treatment, being in breach with Article 3 of the European Convention on Human Rights, and that he had no effective remedy in the Greek law concerning his complaints under Articles 2 and 3 of the European Convention on Human Rights, which in turn was in breach with Article 13 of the Convention.

Furthermore he made a complaint that Belgium has exposed him to the risks resulting from the flaws in the Greek asylum procedure, which violated once again the Articles 2 and 3 of the Convention; and the living conditions to which asylum seekers are a subject to in Greece, which was in breach with Article 3 of the Convention. As a final point, he criticized that there was no effective remedy under the Belgian law in respect of the before-mentioned complaints, leading to a violation of Article 13 of the European Convention on Human Rights.

On the 21st of January 2011 the Grand Chamber of the European Court of Human Rights issued a judgment which was in favour of the applicant. In general the ECtHR ruled that there were several violations of human rights based on Article 3 and Article 13 of the ECHR in conjunction with Article 3 of the Dublin II Regulation.

In more detail, the Grand Chamber acknowledged the unequivocal burden, which is placed on the border countries of the EU and the difficulties arising out of it, but this situation would not absolve Greece of its obligations under Article 3 of the ECHR, given the absolute

character of this provision.¹³⁵ According to the Court, when M.S.S arrived in Greece, the Greek authorities were aware of his identity as a potential asylum seeker. Nevertheless, he was placed into detention without prior explanation. It was noted, that the statements of M.S.S can be undermined by a variety of accounts collected from international organizations, such as the European Committee for the prevention of Torture.¹³⁶

Although the applicant was kept in detention for only a rather short time period, the Grand Chamber stated, that the conditions of detention, which M.S.S had to experience were definitely unacceptable. Hence, the applicant, who already had traumatic experiences due to his migration, was subject to degrading treatment, when it comes to the detention conditions in the Greek holding centre. So, the Court concluded that the detention conditions were in fact violating Article 3 of the ECHR.¹³⁷

Next to the terrible detention conditions, the applicant also accused the serious living circumstances in Greece. In this respect, the Court ruled that, the applicant in fact was in a particular serious situation and that Greece, although it was under the obligations of the EU Reception Directive and their own domestic legislation; let the applicant live in extreme poverty for months, without the means to cater his most basic needs. Also this assumption was highlighted by a variety of international bodies, such as the UNHCR. Although Greece, claimed that it did not had the necessary means or facilities to alleviate the suffering of the applicant; the Court ruled that also the living conditions were a violation of the Article 3.¹³⁸

Secondly, the applicant complained that he had no effective remedy in Greek law in respect of his complaints in conjunction with Articles 2 and 3, which would be in breach with Article 13 of the ECHR, which is assuring that *“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*

The Court, in this respect ruled, that it is undisputable that the applicant can be classified as a vulnerable person and together with the known situation in Afghanistan, it was in the first place for the Greek authorities to examine the request of the applicant. Although the Greek legislation had a variety of guarantees in order to protect asylum seekers against arbitrary removal, they were not being applied in practice and furthermore the asylum procedure was

¹³⁵ M.S.S v Belgium and Greece, Application no. 30696/09, 21 January 2011, ECtHR. Paragraph 223.

¹³⁶ Ibid, paragraphs 225-226.

¹³⁷ Ibid, paragraph 234.

¹³⁸ Ibid, paragraphs 251-264.

marked by a number of deficiencies. This led to the result, that asylum seekers had only a little chance of having their applications examined. In view of those shortcomings, the Court therefore concluded, that there had been a violation of Article 13 in conjunction with Article 3.¹³⁹

But not only the Greek authorities were acting in violation with human rights provisions, also the Belgian authorities were criticised. The Court also found fault in the Belgian decision to expose the applicant M.S.S to the asylum procedure in Greece. According to the Court, the present drawbacks when it comes to the asylum procedure in Greece must have been known to the Belgian authorities as they issued the order of expulsion against M.S.S and therefore he should not have borne the entire burden of proof concerning the risks he faced by the expulsion to that procedure. Furthermore the Belgian authorities have been notified by the UNHCR about the deficiencies of the Greek asylum procedures while the case of M.S.S was still pending.¹⁴⁰

Having this as a background, according to the Court, the Belgian authorities should have not only merely assumed that the applicant would be treated in line with the ECHR guidelines; but they were also under the duty of verifying how the Greek legislation was applied in practice. Hence, the transfer of the applicant from Belgium to Greece constituted a violation of Article 3.¹⁴¹

Not only the decision by the Belgian authorities to expose M.S.S to the asylum procedure in Greece was questioned, but also the decision to expose the applicant to detention and the living conditions in Greece. The reasoning here is similar as before, since the Court had already found that the living and detention conditions of the applicant in Greece were degrading, and that these facts were undermined by a variety of objective and international organizations, and this situation was already present before the transfer of M.S.S to Greece. According to this, the Court declared that with the transfer of the applicant to Greece, the Belgian authorities consciously exposed the applicant to the detention and living conditions, hence they violated Article 3.¹⁴²

To conclude, one can say that in the case M.S.S v Belgium and Greece, the Court decided in favour of the applicant by pointing out that both Greece and Belgium acted in violation of Articles 3 and 13 of the ECHR.

¹³⁹ M.S.S v Belgium, paragraphs 294-321.

¹⁴⁰ Ibid, paragraph 347.

¹⁴¹ Ibid, paragraph 350-361

¹⁴² Ibid, paragraphs 366-368.

6.2. Consequences for the Dublin II Regulation

M.S.S v Belgium and Greece can be seen as a ground-breaking judgement due to the following reasons: Firstly, it can be seen as the first successful case regarding the Dublin II Regulation, due to the fact that Member States can no longer take it as given that the Dublin system is absolving a transferring state of the responsibility for the asylum application procedure in the receiving state nor that the living conditions are not degrading.¹⁴³

This marks a significant change from the earlier position taken by the ECtHR in the case K.R.S against the United Kingdom.¹⁴⁴ The case concerned an Iranian who claimed asylum in the UK after transiting through Greece. Following the Dublin criteria, the UK sent a request to accept responsibility for the examination of his application to the Greek authorities. Fearing deportation, K.R.S. applied to the ECtHR, claiming that his transfer to Greece would be in breach with Article 3 taking into consideration the situation of asylum seekers in Greece. In the case K.R.S against the UK, the ECtHR decided that the application of K.R.S was inadmissible and that *“in the absence of any proof to the contrary, it must be presumed that Greece, will comply with obligations in respect of returnees”*.¹⁴⁵ Thus, with its judgment in K.R.S against the UK, the Court reinforced the non-refutability of the presumption of safety underlying the Dublin II Regulation, allowing for quasi-automatic reliance on inter-state mutual trust. In M.S.S the Court took the opposite conclusion, hence they established the refutability of the presumption of safety underpinning the Dublin II Regulation.¹⁴⁶

Secondly, the Court affirmed the responsibility of Member States, the receiving one and the transferring Member State. Finally, the judgement raised questions in connection to the EU as an actor which is observing human rights and the compliance of the regulation with the European Convention on Human Rights.

The verdict of the ECtHR is from particular interest due to the fact that the respect of fundamental rights, as encompassed in the ECHR, is prohibiting the EU Member States from blindly trusting other Member States under the Dublin II Regulation provisions. It therefore is in a certain way representing a brake to the principle of mutual trust, which is applied by the Member States under the Dublin II Regulation.

Therefore the transfer of an asylum seeker to another EU Member State could be seen as an expulsion measure and would thus fall under the scope of the non-refoulement principle. This

¹⁴³ Clayton, Gina.(2011). Asylum Seekers in Europe: M.S.S. v Belgium and Greece. *Human Rights Law Review*, Vol.11 (4). Pp. 758-773.

¹⁴⁴ ECtHR. K.R.S. v. UK. Application no. 32733/08, 2nd December 2008.

¹⁴⁵ ECtHR. K.R.S. v. UK. Application no. 32733/08, 2nd December 2008, p.18.

¹⁴⁶ Moreno-Lax, Violeta. (2012). Dismantling the Dublin System: M.S.S v. Belgium and Greece. *European Journal of Migration and Law*. Vol. 14 pp.1-31. p.12.

tool cannot be taken when there is a profound threat present that the responsible Member State would not respect its obligations of protection under the ECHR. In this case, the sending country would act in breach with Article 3 of the UN Convention against Torture, which is prohibiting parties from returning or extraditing any person to a state “*where there are substantial grounds for believing that he would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment*”.¹⁴⁷

Another important aspect, that was brought forward the M.S.S judgement was the fact, that not only can a Member State no longer take it for granted that the responsible Member State is going to protect the fundamental rights of the asylum seekers, but also a Member State has no longer the opportunity to assume that the asylum seeker will be safe from refoulement in the given Member State. In general, Member States can no longer be seen as safe countries before it is established that there is no direct threat or risk of refoulement, or that the asylum seeker will not be detained for no reason and finally that the reception and living conditions are not degrading.¹⁴⁸ In this sense, the Court stated that “*the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill- treatment...where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention*”.¹⁴⁹

So EU Member States have to read a positive obligation to protect the freedoms of refugees and asylum seekers in the context of the Dublin II Regulation. The presumption that all EU Member States can be seen as safe countries underpinning the Regulation cannot outweigh the reality which is disclosed in information provided by reliable actors, such as NGOs.¹⁵⁰ Since the ECtHR did not deliver an exhaustive list with refutability conditions, it is up to the national authorities to examine every asylum application in a close and rigorous manner.¹⁵¹

Therefore mutual trust is no longer sufficient when it comes to ensuring an effective protection of the fundamental and human rights. Furthermore the Court in the M.S.S case is stating that the presumption of the compliance with human rights cannot be absolute. Consequently on the one hand, the principle of non-refoulement entails the evaluation of the

¹⁴⁷ United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (1984). Article 3.

¹⁴⁸ M.S.S v Belgium and Greece, paragraph 365.

¹⁴⁹ Ibid, paragraph 353.

¹⁵⁰ Moreno-Lax, Violeta. (2012). Dismantling the Dublin System: M.S.S v. Belgium and Greece. *European Journal of Migration and Law*. Vol. 14 pp.1-31. p.28.

¹⁵¹ Mainani, F. & Hruschka, C. (2011). Le partage de responsabilités dans l'espace Dublin, entre confiance mutuelle et sécurité des demands d'asile. *ASYL* (12).

risks the asylum seeker might be exposed to the responsible Member State. On the other hand, a violation by this responsible Member State of its obligations is possible. So in the case where serious risks are apparent a Member State must refuse to follow the provisions of the Dublin II Regulation and not transfer the asylum seeker.

This reasoning can also be seen in the judgement against Belgium, where the Court reasoned in a three step approach. Firstly, Belgium must have known of the situation in Greece. Therefore Belgium should have clarified if the asylum procedure as well as the living conditions in Greece offered sufficient guarantees to the asylum seeker. As a second step, Belgium could refuse the transfer of the asylum seeker to Greece making use of the sovereignty clause included in Article 3 of the Dublin II Regulation.¹⁵² Finally, taking the previous steps into account, Belgium was under the obligation of avoiding the transfer of the asylum seeker.¹⁵³

The judgement points out the balance between the criteria determining the Member State responsible for the asylum application and its exception.¹⁵⁴ Hence it abolished the principle of automatic mutual trust as it used to be interpreted until then.

In conclusion, one can say that in the M.S.S case the Court underlined the primacy of the non-refoulement principle, thus fundamental rights, over the automatic application of the Dublin II provisions.¹⁵⁵

A further intriguing fact is, that it is the first time the Court in Strasbourg declared the acts of two contracting parties, which are also EU member States, to be in violation with the Convention. Accordingly, Greece and Belgium, by simply applying the Dublin II Regulation, infringed upon the guaranteed rights provided for in the Convention.¹⁵⁶

Next to this, with the judgement it also became evident, that the transfer of asylum seekers to a country, where they might become the victims of a serious risk of degrading treatment, leads to an indirect breach of Article 3 of the ECHR, if the given Member State is enjoying a certain level of discretion in deciding on whether or not using the sovereignty clause of Article 3(2) of the Dublin II Regulation.¹⁵⁷

¹⁵² Council Regulation (EC) NO 343/2003 of 18th February 2003, Article 3(2).

¹⁵³ M.S.S. v. Belgium and Greece, paragraph 360.

¹⁵⁴ Moreno Lax, *op.cit.*

¹⁵⁵ Maiani, F. And Neraudau, E. (2011). "L'arret M.S.S. Grèce et Belgique de la Cour EDH du 21 janvier 2011. De la détermination de l'État responsable selon Dublin à la responsabilité des États membres en matière de protection des droits fondamentaux." *Revue du droit des étrangers*, 162.

¹⁵⁶ M.S.S. v. Belgium and Greece, *op.cit.*

¹⁵⁷ Dr. Gragl, Paul, "The shortcomings of Dublin II: Strasbourg's M.S.S Judgement and its Implications for the European Union's Legal Order".

The Court exposed that the overall idea of the Dublin II Regulation is based on a variety of shortcomings, such as the premise that asylum seekers can rely on equal access to fundamental rights protection in every Member State. Therefore it had to denounce the rigorous application of the Article 3(1) of the Regulation by Belgium with respect to Greece. This in turn is placing a tremendous burden upon the Member States of the EU, in the case where they act under the provisions of the Dublin II Regulation. Furthermore it has stressed the fact that the membership in the EU is not directly guaranteeing that the principle of non-refoulement is ensured.¹⁵⁸

Exactly at this point, Member States could face difficulties between their obligations under human rights provisions on the one side; and under the Regulation, hence EU law, on the other side.

As a concluding remark, one can say that there are a variety of consequences of the M.S.S case on the Dublin II Regulation. First of all, the judgement might act as a regulatory effect on the behaviour of the other EU Member States, in the sense that the judgement could serve as a guideline when making the decision to transfer asylum seekers under the provisions of the Regulation. A further problem, which the M.S.S case brought, was whether the judgement of the ECtHR will lead to the transformation of the discretion of the Member States which they enjoy under the sovereignty clause in Article 3(2) of the Dublin II Regulation into a duty to examine asylum applications in every cases where the transfer or expulsion of an asylum applicant to the theoretical state responsible under the Dublin II provisions would lead to the threat of exposing asylum seekers to degrading treatment.

Ultimately, with the judgement M.S.S. against Belgium and Greece, it became clear, that the Dublin II Regulation is far from being perfect and rather in need of amendments which respect the asylum seekers and the refugee rights. In this sense, according to the former ECRE Secretary General Bjarte Vandvik the case M.S.S. against Belgium and Greece should lead to a reform of the whole Dublin II Regulation. According to Vandvik this judgement represents a major blow to the Dublin system. Assuming that all Member States respect fundamental rights and that it is therefore safe to automatically transfer asylum seekers between EU countries is no longer possible. Therefore *“Europe must seriously rethink the Dublin system*

¹⁵⁸ Mitsilegas, V. (2012). The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual. *Yearbook of European Law* Vol.31(1). Pp.319-372.

and replace it with a regime that ensures that the rights of asylum seekers are respected.”¹⁵⁹

¹⁵⁹ ECRE (2011). Press release on the case M.S.S. against Belgium and Greece. Retrieved from: <http://www.ecre.org/media/news/press-releases/29-the-european-court-of-human-rights-condemns-belgium-and-greece.html>.

7. The corner-stone begins to crack - The Case N.S and M.E. against State for the Home Department

7.1. Background

After the judgment of M.S.S v Belgium and Greece, the ECJ handed down a judgment on the 21st of December 2011, which was long awaited by legal scholars, namely the judgment in the N.S and M.E. case.¹⁶⁰

The N.S case concerned an asylum seeker from Afghanistan, who lodged an asylum application in the UK, after he had travelled through a variety of other EU Member States, including Greece. N.S was claiming, that he was arrested in Greece and held in detention for four days, but he did not make an asylum application there, so following his release, the Greek authorities gave him the order to leave the country within 30 days. According, to the applicant, when he tried to leave Greece, he was once again arrested by the Greek police and expelled to Turkey, where he was again detained and held in degrading conditions for two months. Eventually after he escaped from the place of detention, N.S. travelled to the UK, where he lodged an asylum application on the 12th of January 2009.

Due to the fact, that N.S. entered the EU via Greece, the United Kingdom could transfer him back to this country, since Greece was the responsible Member State for the asylum application under the Dublin II Regulation. Hence the Secretary of State requested Greece to take charge of the asylum application of N.S pursuant to Article 17 of the Dublin II Regulation. In a subsequent step, N.S. was informed that he would be removed to Greece on the 6th of August 2009.

On the 31st of July 2009, the appellant requested the Secretary of State to exercise his discretion under Article 3(2) of the Dublin II Regulation to accept responsibility for his asylum application on the ground that *“there was a risk that his fundamental rights under European Union law, the ECHR and/or the Geneva Convention would be breached if he was returned to Greece”*.¹⁶¹

Next to permission for judicial review and a plea to the Court of Appeal, proceedings concerning a transfer of N.S. in the United Kingdom were annulled and the European Court of Justice (ECJ) was asked for a preliminary reference, which revolved around the two following issues:

¹⁶⁰ N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform , C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011.

¹⁶¹ N.S. v Secretary of the State Department (2011),para.40.

1. In how far is the duty of an EU Member State to observe EU fundamental rights discharged when an asylum seeker is transferred to the Member State responsible, not considering the situation in this Member State.
2. Whether a Member State is under the obligation to exercise its discretion under Article 3(2) of the Dublin II Regulation to take responsibility for an asylum application if the transfer of the asylum seeker to the responsible Member State would lead to the exposure of the asylum seeker to a risk that his fundamental rights might be violated.

In the following, the ECJ decided to join the proceedings in the case N.S. with the case of M.E. and Others v Refugee Applications Commissioner, which dealt with a proposed transfer of five asylum seekers to Greece from the Republic of Ireland.

The case M.E. and Others concerned five unconnected appellants from Afghanistan, Algeria and Iran. All of them travelled via Greece, where they were arrested for the illegal entry of the country. After their detention, each of them travelled to the Republic of Ireland where they lodged an asylum application.

Three of the appellants lodged the asylum application without the disclosure that they entered the EU via Greece, while the other two admitted that their country of first entry into the EU was Greece. This was further confirmed by the fact, that the five appellants were registered in the Eurodac system, which recorded that they entered the EU via Greece without claiming asylum there.

By the same token as in the N.S. case, Ireland, according to Article 17 of the Dublin II Regulation, could have sent the five appellants back to Greece. But the five asylum seekers resisted returning to Greece arguing that the procedures and conditions for asylum seekers in Greece are inadequate and degrading, hence Ireland should be required to make use of the sovereignty clause of Article 3(2) of the Dublin II Regulation and accept the responsibility for examining and deciding on their asylum applications.

Having this, the High Court decided to stay the proceedings and to refer the next questions to the ECJ for a preliminary reference:

1. Is the transferring Member State required to evaluate the compliance of the receiving Member State with human and fundamental rights provisions?
2. If this should be the case, and assumed, that the receiving Member State is found not to be in compliance with human and fundamental rights provisions, is the transferring Member State obligated to accept the responsibility for the examination of an asylum application under Article 3(2) of the Dublin II Regulation?

In order to give a preliminary ruling to the above-mentioned questions, the ECJ started from the premise that a decision taken by a Member State of the EU on the basis of Article 3(2) of the Dublin II Regulation is falling within the scope of EU law for the purposes of Article 6 or respectively Article 51 of the Charter of Fundamental Rights of the EU (CFR). On these grounds, if a Member State is exercising its discretionary power under Article 3(2), it is theoretically implementing EU law for the objectives set out in Article 6 TEU and Article 51 CFR.¹⁶²

Furthermore the ECJ is arguing that, the CEAS is based on the presumption that the EU Member States comply with EU law and fundamental rights, therefore the ECJ held that “*it would not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker*”.¹⁶³

On the contrary, if there are “*substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants...resulting in inhuman or degrading treatment...the transfer would be incompatible with that provision*”.¹⁶⁴

Following a similar reasoning the ECJ answered the questions whether the transferring Member State was under the obligation to examine the compliance of the receiving Member State with EU law; if it could make use of a conclusive presumption that the particular state would observe the rights of the asylum seeker; and if the transferring Member State was obliged to take the responsibility for an asylum application in the case where other Member States could not be considered as safe countries.

The ECJ points out that the CEAS was created in a framework allowing the presumption that the participating Member States respect fundamental rights and as a result the Member States could trust each other in this respect.¹⁶⁵

However the ECJ is admitting that the CEAS could face difficulties or problems, which might lead to the fact, that an asylum seeker could find himself in a situation, where he would be treated in a manner that is incompatible with its fundamental rights, regardless of the requirements imposed by the EU asylum acquis and international treaties.¹⁶⁶

As a consequence, a conclusive presumption, according to which all Member States can be

¹⁶² Ibid. paragraphs 67/68.

¹⁶³ *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011. paragraph 84.

¹⁶⁴ Ibid, paragraph 85.

¹⁶⁵ Ibid, paragraph 59.

¹⁶⁶ Ibid, paragraph 81.

seen as safe countries for asylum applicants, is in breach with the Charter of Fundamental Rights of the European Union, in the sense that it would make the exercise of Charter rights inoperative.¹⁶⁷ So it is rather a rebuttable presumption that asylum applicants are treated in a manner that is complying with fundamental rights in all Member States of the EU.

In a following step the ECJ specified that not every infringement of fundamental rights by a Member State will have impact on the application of the Dublin II Regulation by other Member States.¹⁶⁸

Only in cases, where there are systemic flaws in the asylum procedure or reception conditions in the responsible Member State, which might lead to degrading or inhuman treatment, the transfer of an asylum applicant to the responsible Member State would be in breach with the CFR.¹⁶⁹

If in this case, an asylum applicant cannot be transferred to the responsible Member State, the other Member State should take into consideration whether another Member State might be responsible for the asylum request under the provisions of Chapter III of the Dublin II Regulation. Ultimately, if no other Member State can be determined, the Member State should take responsibility for the examination of the asylum application itself under the Article 3(2) of the Dublin II Regulation.

7.2. Consequences for the Dublin II Regulation

In the case N.S., the ECJ confirmed that the exercise of the sovereignty clause falls within the scope of EU law. Accordingly to this, EU human rights law will sometimes require Member States to refuse the transfer of an asylum seeker. This duty, according to the ECJ, is triggered if the transferring authorities in a Member State cannot be unaware that systemic deficiencies amount to substantial grounds for believing that there is a real risk of treatment, which is contrary to Art. 3 of the ECHR. A question in this respect that remains unanswered is what constitutes a “systemic flaw”.

The N.S. judgement further did confirm that Member States are responsible for the implementation of the provisions of the EU asylum system to suitable standards and that a failure to do so might bring them into conflict with their international legal obligations. Hence Member States cannot blindly follow the provisions of the EU asylum system as a defence to actions which may put a risk or violate the fundamental rights of individuals seeking asylum

¹⁶⁷ Ibid, paragraph 100/101.

¹⁶⁸ Ibid, paragraph 82-85.

¹⁶⁹ *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, paragraph 86.

or subsidiary protection.

In its judgement the ECJ is emphasizing that mutual trust is essential to the CEAS, but it is also recognizing that mutual trust cannot be blind trust where breaches of fundamental rights are concerned. In practice this means that the removal of an asylum seeker will be unlawful only in very limited circumstances.

The ECJ ruled out the use of a conclusive presumption that an asylum seeker's fundamental rights will be respected upon return to another Member States. However, Member States are not prevented from operating a rebuttable presumption.

Nevertheless, after the judgement it appears that the burden of rebutting the presumption of the safe-country concept lies on the asylum seeker. Hence it is up to the asylum applicant to demonstrate, that there were systemic flaws in the domestic asylum system of a Member State and that the fundamental rights of the asylum seeker have been violated. The question in this case is what evidence will be needed in order to successfully rebut the safe-country presumption.

According to Mitsilegas, the N.S. judgement constitutes a turning point in the evolution of the inter-state cooperation in the AFSJ.¹⁷⁰ National authorities who are asked to execute a request for cooperation are now under the obligation to examine, on a case-by-case basis, the individual circumstances in each case and the human rights implications of a transfer in each particular case. Therefore an automatic transfer of individuals is no longer allowed under EU law.

National authorities are obliged to refuse to execute such requests when the transfer of the affected asylum seeker will result in the breach of their fundamental rights within the terms of N.S.

¹⁷⁰ Mitsilegas (2012). Op.cit.

8. Is it possible to prevent the collapse of the cornerstone? – The Recast of the Regulation

After the presented judgments, it becomes clear, that the Dublin II Regulation fails to reflect the present realities. The Dublin II regime has proven to be unfair and inefficient in practice. It tends to aggravate pressures on those Member States situated at the external borders of the EU that are anyway experiencing severe challenges in hosting asylum seekers; which is detrimental to the principles of solidarity and the fair sharing of responsibility.¹⁷¹ This unequal distribution of the asylum seekers across the EU is leading to the fact, that some Member States adopt more restrictive asylum measures, consequently they are denying the access to fair and effective asylum procedures to the asylum applicants.¹⁷²

Hence, unfairness is not only affecting Member States, it also touches upon the refugees and asylum seekers themselves, due to the fact that the Dublin II Regulation is effecting the way in which countries in the EU are interpreting their protection obligations, which are not always in conformity with human rights. Furthermore one of the main shortcomings of the Dublin II Regulation is that it is based on the assumption that asylum seekers may rely on equal access to justice and protection in each Member State, but at present there are huge disparities between the Member States.¹⁷³ As one can see, the Dublin II Regulation is in urgent need for a comprehensive reform.

This urgency in a reformed Dublin II Regulation was recognized by the European Commission in 2008. The Commission proposed to introduce the right to information on the application of the Dublin II Regulation, including details on possible outcomes of the procedure and opportunities to challenge a transfer decision. Another proposal was to include the opportunity of a personal interview with national authorities in order to lay down the asylum seekers' individual situation.

Additionally, the Commission advised to issue the decision to proceed with a transfer in a language that the concerned asylum applicant understands; and that he is granted access to representation and to legal, as well as linguistic assistance in the case of further proceedings.

But all of these proposals did not revise the presumption of security of transfers. There was still no explicit regulation in the sovereignty clause or elsewhere in the revised text of the Dublin II Regulation on how and when the presumption can be considered as rebutted and

¹⁷¹ Moreno Lax (2012). Op.cit.

¹⁷² Ippolito, F. & Velluti, S. (2011). The Recast of the EU Asylum System: A Balancing Act Between Efficiency and Fairness. *Refugee Survey Quarterly*, Vol.30, No.3. p.24-62.

¹⁷³ Ippolito, F. & Velluti, S. (2011). Op.cit.

which the implications of a rebuttal would be in the specific case.

Therefore, the sovereignty clause is continuing to be drafted in discretionary terms, creating the impression that there may be no obligation to have recourse to it when refusing the responsibility for the examination of an asylum application could lead to an infringement of the non-refoulement obligations.

Besides this, the Recast Proposal of the Dublin II Regulation remains premised on the assumption that there is an equal level of standards of protection across the EU. So, the Recast proposal failed to take into consideration the inconsistent level of protection in the Member States. This together with the unchanged system of the responsibility determination leads to the fact, that even the recast-form of the Dublin II Regulation is unfair both to asylum seekers and certain Member States.¹⁷⁴

Also the controversial issue, on when to suspend the transfer of asylum seekers to the responsible Member State has been touched upon in the recast of the Dublin II Regulation. In this respect, the Article 31 of the Recast says that the decisions to suspend transfers of asylum seekers should be based on “*an examination of all relevant circumstances prevailing in the Member State*”. Furthermore the Commission in the case of a suspension of transfers has to clarify the reasons for this decision and specify conditions, which have to be fulfilled by the concerned Member State in order to annul the suspension of transfers.

Although this seems to be a good starting point, this provision should be enhanced in order to require Member States to act to remedy the situation that actually gave rise to the suspension of transfers. So, for instance an idea would be that, those Member States could be monitored and they should report their progress, on before established benchmarks, to the Commission in order to annul the suspension of transfers.

All in all, the recast of the Dublin II Regulation did only slightly improve the shortcomings of the Dublin II system. The responsibility criteria were left essentially untouched and it is striking that there was not really a significant attempt to reassess the fundamentals of the Dublin II Regulation, even though they have led to significant human rights abuses.¹⁷⁵ While the improved rules on information for asylum applicants and the legal safeguards, that were proposed in the recast of the Regulation, are welcome and the rules on detention are better than nothing, they cannot compensate for the failures of the Regulation.¹⁷⁶

¹⁷⁴ Ibid.

¹⁷⁵ Peers, S. (2011). *Statewatch Analysis: The revised directive on Refugee and Subsidiary Protection Status*.

¹⁷⁶ Ibid.

Subsequently, the question remains, if it is possible to reform the Dublin II Regulation in order to avoid conflicts with human rights obligations. According to Moreno Lax (2012) the allocation of responsibility for asylum seekers can only work if (a) there is a clear definition of the “safe third countries” concept and (b) if the EU solves the burden-sharing of the asylum application.

Another suggestion in order to improve the Dublin system is the creation of a European board, which would be in charge of deciding on the asylum applications. This would guarantee a fair and equal treatment of all asylum applications.¹⁷⁷ In this respect, another possibility would be to extend the competences of the EU Asylum Support Office and entrust this agency with the duty to inform the national authorities of the Member States of any fact, court case or report relevant to the handling of asylum applications. This would in turn ensure, that none of the Member States would transfer asylum seekers to Member States where their fundamental rights might be violated.¹⁷⁸

The European Council on Refugees and Exiles (ECRE) is going a step further and proposes an alternative system for allocating responsibility which is only based on the following criteria: Firstly, the Member State, where family members of an asylum seeker are present, should take the responsibility for the examination of an asylum request. Secondly, if the first criterion cannot be applied, the Member State, in which an asylum claim was first lodged, should take the responsibility.¹⁷⁹ In this context asylum seekers would no longer attempt to reach only those countries, where they think they might benefit the most out of an asylum application. Furthermore a system, which is based on the asylum seekers’ familial or cultural connections to a Member State would favour the integration of the asylum seeker, and reduce the dependence on the State, as well as discourage irregular migration.¹⁸⁰

Besides the modification of the responsibility determination criteria, ECRE is proposing the creation of a variety of responsibility-sharing tools and practical cooperation measures aimed at increasing the capacity and efficiency of the domestic asylum systems. Examples for those tools and measures might be the creation of common coordinating bodies or structures, or a financial burden-sharing system.

¹⁷⁷De Jong, C.D.(2000). Harmonisation of Asylum and Immigration Policies, in *The Asylum Acquis Handbook*. Van Krieken, P.J. (Ed.), TMC Asser Press. The Hague.

¹⁷⁸ Ibid.

¹⁷⁹ ECRE (2008). *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*.

¹⁸⁰ ECRE (2008). Op.cit.

9. Conclusion

After the analysis of the Dublin II Regulation and the examination of the case law, which question the application of the Dublin II regime, it becomes clear that it has many weaknesses.

With the adoption of the Dublin II Regulation, the EU aimed at facilitating the process of applying for asylum for the Member States, in the sense that the Regulation set out rules which determine which MS is responsible to examine an asylum claim. Furthermore the Dublin II Regulation aimed at preventing asylum shopping and avoiding the phenomenon of “refugees in orbit”. So on paper the Dublin II Regulation sounds good, but in reality the Regulation is facing severe criticism.

One of the main controversial points is the fact that mutual trust and mutual recognition in the quality and efficiency of each other’s asylum system is a prerequisite for the effective operation of the Dublin II system. This means that, since all Member States are bound by the same human rights obligation, they presume that all fellow Member States act with respect to the principle of non-refoulement; and that all Member States can be seen as safe countries. The consequence of these presumptions was that an automatic transfer of asylum seekers by the domestic authorities to the responsible Member State was often the case. And it was exactly this automaticity, with which the national authorities transferred asylum seekers to the responsible MS, that was challenged in the cases M.S.S. and N.S.

In the M.S.S. judgment, the Court ruled that no Member State can take it for granted that the fundamental rights of an asylum seeker will be protected in the receiving Member State. Next to this, MS can no longer assume that an asylum seeker will be safe from refoulement in the receiving Member State.

Hence mutual trust, as imposed in the Dublin II Regulation, is no longer sufficient to ensure that the human rights of asylum seekers are protected.

This line of reasoning was further developed in the judgment N.S. In this ruling, the ECJ introduced the obligation that Member States have to examine an asylum application itself, if doing otherwise would worsen the situation of the asylum seeker. Thus, one can say, that the sovereignty clause lost its “sovereign” nature and it has become a duty or obligation.

In order to conclude, the rulings have shown that the presumption of the safe country is rebuttable, and that Member States are required not to turn a blind eye on available evidence of present human rights violations.

After the examination of the recent judgments, it became obvious, that the Dublin II Regulation is in need of a reform. Although the Commission had the chance to revise the Regulation and learn from the past, it seems as if they have missed the opportunity to do so. The recast of the Dublin II Regulation shows no substantial changes, and the changes, that have been made, only reflect the established case law. So probably the Dublin II Regulation will continue to be more dependent on the role of the courts than upon the EU institutions. In this sense, the future will almost certainly bring further cases questioning the Dublin II regime to the courts, until the EU institutions are willing to consider a radical reform of the system. In order to revise and improve the Dublin system and the allocation of asylum requests, it is important, that the EU institutions, especially the Council and the EP, instead of working against each other, work together on the recast of the EU asylum system. Furthermore the MS should not only take their own interests into account while negotiating, but rather broaden their horizon and consider the problems of especially the bordering MS. Without the willingness of all concerned political actors, the adopted changes of the Dublin II Regulation will not improve the deficiencies, but they will be merely cosmetic changes to the current inadequate situation.¹⁸¹

¹⁸¹ Peers, S. (2011). Revised EU asylum proposals: “Lipstick on a pig”. Statewatch Analysis. Retrieved from: <http://www.statewatch.org/analyses/no-132-asylum.pdf>.

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