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THE COMPATIBILITY OF EUROPEAN UNION DUBLIN REGULATION WITH THE ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Master thesis

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INTRODUCTION

The problem of the current research is the compliance of the European Union Regulation No 604/2013 (hereinafter Dublin III Regulation)[1] with the fundamental rights enshrined in Article 3 of the European Convention on Human Rights (hereinafter – ECHR).

The Dublin system as a whole is based on the presumption that all States are bound by its provisions either because of the European Union (hereinafter the EU) membership or the existence of bilateral agreements[2] to act according to the prescribed standards of fundamental human rights protection. In other words, the Dublin system facilitates the functioning of the principle of mutual trust and cooperation within the EU, where all the Member states protect fundamental rights of asylum seekers in line with the EU law and international law.

Prohibition of torture and inhuman or degrading treatment defined in the Article 3 ECHR is one of the most fundamental, absolute and non-derogable human rights that must be upheld even "in time of war or other public emergency threatening the life of a nation[3]". The right is expressed in a number of international human rights instruments and has been elaborated upon in the case law of the European Court of Human Rights (hereinafter – the ECtHR) and the Court of Justice of the European Union (hereinafter – the CJEU).

Nevertheless, the expulsion of asylum seekers following the application of the provisions in the Dublin III Regulation might still become a ground of violation of Article 3 ECHR, since neither there is a right to asylum mentioned in the ECHR, nor does it explicitly include a prohibition of refoulement[4]. The only explicit restriction to expulsions can be found in the Article 3(1) and Article 4 of the Protocol No. 4 to the ECHR, which prohibit the expulsion by the state its own nationals and the collective expulsion of aliens, respectively[5].

However, the ECtHR in its jurisprudence has derived the principle of non-refoulement from the absolute nature of the right to prohibition of torture, thus increasing its importance and

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[1] European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU) No 604/2013, available at: https://www.refworld.org/docid/51d298f04.html [accessed 1 February 2020].

[2] Iceland, Liechtenstein, Norway, Switzerland that have Schengen agreements on the abolition of border controls.

[3] Article 15(1), Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 29-01-2020]

[4] Specifically in the Dublin III Regulation, there is no explicit mentioning of the principle of the non-refoulement, even though it includes it tacitly through the extensive jurisprudence of the ECtHR under Art. 3 of the Convention.

[5] Articles 3(1), 4, Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46. Available at: https://www.refworld.org/docid/3ae6b3780.html [accessed 29-01-2020]

providing certain guidelines to deciding upon the cases where the Article 3 has been invoked. Nevertheless, the jurisprudence of the Strasbourg and the Luxembourg Courts is still inconsistent about the thresholds that should be met in order to rebut the 'mutual trust' principle between the Member States. Even though, it is clear that a person cannot be returned to a State that does not provide the necessary protection of fundamental rights enshrined in Articles 3 ECHR and the Article 4 Charter of Fundamental Rights of the European Union (hereinafter EUCFR)[6], there are still no common guidelines on how to act in case the asylum seeker cannot be returned to the competent Member state[7].

Moreover, the Courts' references to concepts like «systemic deficiencies» and "individualized risks" in their decisions on the expulsion in "Dublin cases" also constitute a problem, since neither of these concepts is defined in the ECHR or the EU law.

For this reason, the Member States have to present certain level of balancing in order to ensure the protection under both sets of human rights standards (CoE and the EU), as far as the Member States are Parties both to the EU and the ECHR. Clearly, the Courts practice should not be seen as conflicting or in breach with the Convention, but the interpretative approach followed by the CJEU might appear to be problematic, since it introduces the restrictive interpretation of human rights and fundamental freedoms recognized, inter alia, in the ECHR.

Moreover, the mechanism of diplomatic assurances suggested by the ECtHR in *Tarackel* judgement[8], might be seen as incompatible with the mutual trust principle within the EU and create difficulties in preserving the functioning of the Dublin III Regulation by simultaneously granting the necessary protection of fundamental rights[9]. For this reason, it is important to ensure the coherent interpretation of human rights treaties and provide harmonization of the migration and asylum policies in order to get a consistent legal practice and case law on application of the Dublin III Regulation, which has already deeply rooted in the EU legal order.

The relevance of the current research is revealed in the refugee crisis that has hit the world over the last decade. Even though, the EU Member States and the EU officials are stressing that the 'post crisis' period is currently taking place, new challenges like "Brexit", the mass refugee flows, governmental attempts to close borders (e.g. Greece, Italy) undermine the efficiency of the Dublin system and unmask all its flaws in human rights protection.

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[6] Charter of Fundamental Rights of the European Union (2012/C 326/02) Official Journal of the European Union C 326/391 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN [accessed 26-02-2020]

[7] Vicini G., The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?, 2015, The Journal of Legal Studies 8(2): 50-72 at 52.

[8] Tarakhel v. Switzerland, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: https://www.refworld.org/cases,ECHR,5458abfd4.html [accessed 7-03-2019]

[9] Vicini G., The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?, 2015, The Journal of Legal Studies 8(2): 50-72, at 52.

During the fragile period of post crisis recovery, the European Commission faced with the need to develop the proposal of the reform to the current Dublin system, which had almost collapsed during the crisis[10]. Such an opportunity might be a perfect chance to align the Dublin stipulations with the provisions of the ECHR and develop a uniform case law that would complement each other.

Indeed, the question of the efficiency of the CEAS has been a cornerstone of the last decade, and both Courts have been engaged in a jurisprudential dialogue whether the implementation of the Dublin provisions regarding the return of asylum seekers to the responsible Member state were strict obligations or was there a margin of discretion left.

At the same time, ECtHR while interpreting the right defined in the Article 3 ECHR relies on rather vague concepts such as "substantial grounds[11]" and "knowingly to surrender[12]" that if following by the Member states might grant a wide margin of discretion and can often lead to derogations that are not allowed under the Article 3 ECHR.

Dublin III Regulation also prohibits indirect expulsions of asylum seekers to an intermediary country in which he or she might be subjected to torture or other risk of ill-treatment. Therefore, the receiving state must be "safe" for the individual, which means that this country must meet the requirement of "effective protection"[13]. However, the concept of "safe third country" in the Dublin III Regulation is silent about the process of examining the level of the state's effective protection. Thus, the paragraph 2 of the Article 3 Dublin III Regulation only mentions that the transfer of an applicant to the Member state primarily designated as responsible cannot be carried out if "there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of the Article 4 of the CFREU[14]". Following, the abovementioned provision, the level of the protection in the Competent Member state should be defined based on some general situation there and in most cases without any communication with the receiving state.

Based on materials studied, **the novelty of the current research** is revealed in analyzing the provisions of Dublin III Regulation and the provisions of the new Draft Dublin IV Regulation regarding the protection of asylum seekers from expulsions and ensuring the

[10] The suspension of application of the regulation vis-a-vis certain EU MSs that were faced with enormous pressure on their asylum and reception systems (Greece, Italy, etc.); asylum shopping because of the deficient mechanism of responsibility allocation in the Dublin III Regulation triggering returns and violations of human rights, etc.
[11] ECtHR, Hirsi Jamaa and Others v. Italy, No. 27765/09, Judgment [GC] of 23 February 2012, para. 114
[12] ECtHR - Soering v. The United Kingdom, Application No. 14038/88, 7 July 1989, para. 87-88
[13] Costello C., The Human Rights of Migrants and Refugees in European Law, Oxford University Press; 1 edition 2015, p.301- 306, at 303.
[14] Article 3.2, Dublin III Regulation (supra note 1).

implementation of human rights during the return to the territory of a responsible state or the third country designated as safe.

As far as the case law of both the Strasbourg and the Luxembourg Court involve many inconsistencies and different approaches regarding how similar cases should be decided, the present research would be aimed to analyze the case law of both International Courts regarding the compatibility of Dublin III Regulation with the international human rights instruments.

Novelty will be also revealed while analyzing the changes brought up by the provisions of the Dublin IV Proposal that is aimed to combine the approaches provided by the CJEU and the ECtHR. Moreover, the Draft Proposal is aimed to combat the transfers between Member States by introducing the new corrective allocation mechanism and promoting the concept of solidarity within the EU that will serve the fair responsibility and cost sharing.

Since the principle of non-refoulement and prohibition of torture have been studied under the microscope of academics, doctoral candidates, professors and researchers already for some period of time, there is a lot of material that provides detailed analysis of these topics. Therefore, it will be challenging to bring something new into the international scholarship. Nevertheless, the world is constantly changing and developing, especially in the sphere of migration. New Regulations are being adopted, States are changing their policies or decide to exit the EU.

For this reason the current research will be based not only on works of various scholars but also on the European Union and international laws, such as the EU Charter, ECHR[15], EU Directives and Regulations, the Refugee Convention 1951, International Covenant on Civil and Political Rights[16], International Covenant on Economic, Social and Cultural Rights[17] and case law of the ECtHR and CJEU. Moreover, the thesis will contain studies and guidelines provided by the UNHCR and non-political view on asylum developments published by the European Council on Refugees and Exiles (hereinafter - ECRE).

The theoretical value is revealed in the necessity to provide comments on the compliance of the Dublin III Regulation and the Draft Proposal for Dublin IV Regulation with the Article 3 of the ECHR and introduce suggestions for implementation of some developments into the functioning of the Dublin system.

[15] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 23-02-2020]

[16] UN General Assembly, International Covenant on Civil and Political Rights, 16.12.1966, United Nations, Treaty Series, vol. 999, p.171. Available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 23-02-2020]

[17] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16.12.1966, UNTS, vol. 993, p.3. Available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 23-02-2020].

Inconsistency in deciding the cases by the Courts, using of different standards where the Article 3 might be invoked, vague concepts, which give States the discretion to interpret them in the way affecting human rights and fundamental freedoms as recognized, inter alia, in the ECHR.

For this reason, it is important to provide a comprehensive investigation of the Dublin III Regulation provisions and their compliance with Article 3 ECHR.

Moreover, the practical value of the thesis is connected to the fact the it will be one of the few works to analyze the main changes enshrined in the new Draft Proposal of the Dublin Regulation from the perspective of the compliance with the Article 3 ECHR.

Current work contains references to current European and international legal sources, literature reviews, case law on asylum issues and structured conclusions based on the correspondence of the Dublin Regulation with the ECHR.

Object of the thesis is the compatibility of the Dublin Regulation with the fundamental rights enshrined in Article 3 o ECHR and critical analyses of the judgments delivered by the ECtHR and the CJEU on this matter.

Dublin system has always been subjected to certain level of criticism regarding its contradictory nature with human rights instruments, like ECHR. Seems like three generations of Dublin Regulation were not able to efficiently regulate this issue, therefore in 2016, European Commission issued a proposal to adopt the Dublin IV Regulation, aimed to combine the approaches provided by the CJEU and the ECtHR and to combat the situation when transfers between Member States, which, however, still should be approved and adopted.

The aim of the current research is to provide a deep analysis of compliance of the Dublin III Regulation and the Dublin IV Proposal with the Article 3 ECHR.

Due to the sensitive nature and importance of the problems raised, the analysis should go beyond simple analysis of the provisions of the Convention and Regulations and include case law of the International Courts on this issue. Therefore, the **current research is targeted**:

1. To define the basic elements of Article 3 ECHR within the context of the non-refoulment principle enshrined in the Dublin III Regulation;
2. To evaluate the possibility of application of the ECHR to “Dublin cases”;
3. To provide a deeper understanding of the changes introduced in the Dublin IV Proposal and its efficiency in ensuring the fair asylum system compatible with the Article 3 ECHR.

Research methodology in the current thesis focused on evaluation of the compatibility of the Dublin Regulation with Article 3 of the ECHR. Evaluation is supported with relevant case law. The work mainly based on **methods of literature review and conceptual analysis** when analyzing the existing legal framework and scientific researches in the sphere of asylum and

human rights law; **method of comparative legal research** while comparing the relevant European and international legislation (Dublin Regulation and the ECHR); **cross-disciplinary research method** was used in the work when showing the interconnection and interdependence of asylum law and human rights law. During the work with legal sources like Conventions, Regulations and Soft law instruments, **method of legal interpretation** was applied.

The structure of the work consists of three Chapters, each of which contains three subsections. The first Chapter is aimed to reveal the theoretical basis of the Article 3 ECHR within the context of the non-refoulement, which is a substantial part of the EU's Common European Asylum System (hereafter – the CEAS). In addition, the Chapter evaluates the possibility of the application of the ECHR provisions in Dublin cases in order to find out the differences or contradictions between the Human rights and EU approaches. The Chapter moves on with analyzing the principle of mutual trust, its current flaws and the possible tension between the concept of mutual trust within the EU and the protection of fundamental human rights.

Chapter 2 analyzes the confusion between the concepts of "systemic deficiencies" and "individualized risks' test in the case law of the CJEU and the ECtHR. The Chapter also explores the possible shift of "sovereignty clause" under the Dublin III Regulation from the category of discretion to the obligation imposed on Member states to take charge of the asylum seeker in cases of systemic deficiencies in the asylum system in the receiving state. The conclusion of bilateral agreements to return asylum seekers to safe third countries as a way of circumvention the Dublin III Regulation is explained in the subsection 2.3 of the thesis.

Finally, in the Chapter 3 the Draft Proposal for the Dublin IV Regulation is examined from the point of compatibility with the ECHR. The thesis analyzes the reforms brought up by the Draft Regulation and their effects on Member states and asylum seekers. Subsection 3.1 of the thesis is devoted to the principle of solidarity in the Dublin IV Regulation and its influence on the protection of human rights within the Dublin system. Further the Chapter analyzes the novelties in the application of the "safe third country concept and the new admissibility check mechanism under the Dublin IV Proposal. An analysis of the "systemic flaws" test in the Dublin IV Proposal is discussed in the subsection 3.3 of the thesis.

Defense statements of this thesis:

1. The Dublin III Regulation does not provide a sufficient protection to the asylum seeker from the expulsion to the situation of torture, inhuman or degrading treatment and does not fully comply with Article 3 of the ECHR.
2. The adoption of the present draft of the Dublin IV proposal may not provide the necessary solution to the problem of compliance and needs further improvement.

LIST OF ABRIVIATIONS

EU	European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights and Fundamental Freedoms
EUCFR	Charter of Fundamental Rights of the European Union
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).
Dublin IV Proposal	Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 3 December 2008, COM(2008) 820 final.
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
UNHCR	United Nations High Commissioner for Refugees
ECRE	European Council on Refugees and Exiles
TEU	Treaty of the European Union
Refugee Convention	Convention Relating to the Status of Refugees
EBCG	European Border and Coast Guard
EASO	European Asylum Support Office
CEAS	Common European Asylum System
CAT	Convention against Torture
EURODAC	European Asylum Dactyloscopy Database

1. RELATIONSHIP BETWEEN THE DUBLIN III REGULATION AND THE ECHR

1.1. Basic elements of the article 3 ECHR within the context of the non-refoulement principle

The principle of non-refoulement is the fundamental principle of international refugee law, which forbids a country receiving asylum seekers from expelling or returning them to a country, where they could face danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion[18]". This principle applies to those, who meet the requirements set in the Article 1A (2) of the Convention Relating to the Status of Refugees (hereinafter 1951 Refugee Convention), and do not come within the scope of one of the exclusion provisions in Article 1F[19].

Under the Dublin III Regulation the principle of non-refoulement is mentioned in the Article 3(2) stating that "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because of *substantial grounds for believing* that there are *systemic flaws* in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a *risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter*, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible[20]".

Such a provision does not expressly mention the ECHR, since it relies on the CFREU. Nevertheless, Article 6 of the Treaty of the European Union (hereinafter TEU)[21] prescribes that the EU shall accede to the ECHR, leaving, however, the Charter a status of primary law, since according to the Article 52.3 CFREU, these two legal sources correspond to each other, determining equal human rights.

The connection between the ECHR and the EU law installed by the Article 52(3) CFREU is defined as a 'dynamic reference', including the case law of both the Luxembourg and Strasbourg courts[22].

Therefore, Article 4 CFREU on which the Dublin III Regulation relies in its Article 3(2) corresponds to Article 3 ECHR and, therefore, they have the same meaning. This means that the

[18] Article 33, UN High Commissioner for Refugees, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 2011. Available at: https://www.refworld.org/docid/4ec4a7f02.html [accessed 26-02-2020].
[19] Ibid., Article 1(A), 1(F).
[20] Article 3(2) Dublin III Regulation (supra note 1).
[21] European Union: Consolidated versions of Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and Charter of Fundamental Rights of the European Union (CFREU) (as amended by the Lisbon Treaty) OJ C 83/47, 30.3.2010 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [accessed 15-02-2020].
[22] Moreno-Lax V. "Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law", Oxford: Oxford University Press, 2017, ISBN 9780198701002, p. 230.

Regulation must respect the ECHR as much as it respects the CFREU. It also applies to the case law developed by the ECtHR. As far as the Dublin III Regulation in the Recital 39 expressly recognizes that the regulation adheres to the Charter, this implicitly means that the jurisprudence of the ECtHR with regard to the Article 3 is also applicable to it. For this reason, Dublin system should respect the ECHR and the case law of the ECtHR.

The principle of non-refoulement, however, is not explicitly mentioned under the Article 3 ECHR, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

However, the case Soering v. United Kingdom was one of the first where the Court found that "the fact that specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the ECHR"[23]. The Court also added that "while not explicitly mentioned in the general wording of the Article 3, extradition in such circumstances would be contrary to the spirit and intendment of the Article"[24].

Therefore, even though the ECHR does not expressly mention the principle of non-refoulement, the prohibition still exists in the Article 3 being already incorporated to the general terms of it through the extensive jurisprudence of the ECtHR. For this reason, removal of an individual under the Dublin system to a country, in which he or she could face the risk of torture, inhuman or degrading treatment can be considered as violation of Article 3 of ECHR. Thus, asylum seekers in the EU can freely rely on the ECHR provisions in cases of expulsions where the Dublin system proves to be ineffective.

Despite being guaranteed by the ECHR, the right of the prohibition of torture is also expressed in such international law instruments as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Geneva Conventions of 1949 and their Additional Protocols of 1977, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the Rome Statute of the International Criminal Court of 1998[25]. For instance, the United Nations Convention against Torture defines torture as:

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[23] ECtHR - Soering v. The United Kingdom, Application No. 14038/88, 7 July 1989, para 88.
[24] Ibid., para 88.
[25] Article 5, the United Nations. (1948). Universal Declaration of Human Rights. Available at: https://www.un.org/en/universal-declaration-human-rights/ [accessed 29-02-2020]; Article 7, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 29-02-2020]; Article 8-2, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html [accessed 29-02-2020]; Common Article 3, the Geneva Conventions of 12 August 1949, International Committee of the Red Cross (ICRC), 12 August 1949, 75 UNTS 31. Available at: https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf [accessed 29-02-2020].

"An act by which severe pain or suffering, whether physical or mental, intentionally inflicted to a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating, or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person acting in an official capacity"[26].

Even though, the wording is similar in both the CAT and the ECHR, the legal scope of the provision enshrined in the CAT seem to be limited only to acts that amount to torture, thus, excluding pain or suffering arising only from other cruel, inhuman or degrading treatment or punishment. Therefore, it can be seen that the principle of non-refoulement can still be traced from the general spirit of the principle of prohibition of torture, enshrined in a number of international acts, inter alia, in the Article 3 of the ECHR.

Despite the broad interpretation of the human rights principle, it is also more expansive than the principle set in the traditional refugee context. The difference is that the European human rights law forbids to return *anyone* to a State where there are serious risks of inhuman or degrading treatment, while the asylum law speaks only about the expulsion of *refugees* (people meeting certain characteristics) to places where their lives or freedom would be endangered based on their race, religion, nationality, political opinion or membership in a social group.

From the first glance, it may seem that European human rights law and European asylum law are functioning in parallel complementing each other. Nevertheless, these two systems offer different remedies, meaning that even obtaining the protection under the ECHR, an asylum seeker may not be eligible for protection under refugee law principles. Only the asylum system can determine whether the person meets the refugee criteria and is entitled to a residence permit or other guaranties prescribed by the EU law to those in need of international protection[27].

Within the EU, Dublin system is in charge for determining the Competent Member state and issuing decisions to transfer, therefore it is frequently being challenged by the asylum seekers who claim that the operation of the Dublin Regulation is against international human rights treaties containing provisions that would expose them to risk of inhuman or degrading treatment or even death.

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[26]Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment United Nations. 10 December 1984. Available at: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx [accessed 27-02-2020].

[27] Fullerton M., "Asylum Crisis Italian Style: The Dublin Regulation Collides with European Human Rights Law," 2015.Harvard Law Review 29:57-134, at 49.Available at: http://www.kalhan.com/wordpress/wp-content/uploads/2016/01/Fullerton-2016-forthcoming-Asylum-Crisis-Italian-Style.pdf [accessed 21-02-2020].

As a matter of fact, the whole EU system is built on the principle of mutual trust, considering all the EU Member States as safe with adequate asylum procedures and reception conditions. Unfortunately, the case law is full of examples when transfers based on mutual trust have led to indirect violation of article 3 ECHR, asylum procedures were ineffective and long-lasting and reception conditions were considered inhumane and degrading[28].

It goes without saying that the landmark case directly connected with the "Dublin transfers" and prohibition of torture was the case M.S.S. v Belgium & Greece that occurred following a result of transfer of an Afghan asylum seeker by Belgium to Greece under the Dublin II Regulation. The Court once again pointed at the flaws of the concept of mutual trust and automatic application of Dublin rules regarding transfers without a complete examination of the applicant's personal circumstances and the situation in the Competent Member State. Even though the case was not the first enshrining similar problems of the Dublin cases, however, it is considered by scholars as the pilot judgement[29] that pronounced that the presumption of compliance of the Dublin II Regulation with the human rights standards must be rebuttable, and challenged the legality of transfers to Member States where asylum seekers might face real risks of serious violations of Article 3 ECHR or Article 4 of the EU Charter[30]. At the same time, the permissibility of detention of asylum seekers for the purpose of transfer under the Dublin Regulation still exists in practice of the majority EU Member States[31].

Not all kinds of mistreatment, even if illegal, give rise to an issue under Article 3. What distinguishes torture from other forms of ill-treatment, which include other cruel, inhuman or degrading treatment and outrages upon personal dignity, is the purposive aspect. This is reflected in the Court's case-law, for instance in the case Saadi v. Italy the Court stated that the suffering or humiliation must go beyond of what is inevitable considering the form of the legitimate

[28] See ECtHR, 7 March 2000, T.I. v United Kingdom, Decision as to the admissibility of the claim no. 43844/98, concerning the transfer of a Sri Lankan asylum seeker by the UK to Germany on the basis of Dublin Convention. Germany did not recognize as Germany did not recognize persecution by non-state agents as a ground for refugee status, so the applicant risked being expelled back to Sri Lanka in violation of Article 3 ECHR; ECtHR, 2 December 2008, K.R.S. v United Kingdom, Decision as to the admissibility of the claim no. 32733/08 where the Iranian asylum seeker was sent by the UK to against his expulsion by the UK to Greece under the Dublin Regulation and faced the risk of ill-treatment contrary to Article 3 ECHR; ECtHR, MSS v Belgium & Greece Application no. 30696/09, Judgment of 21 January 2011.

[29] Judgment that triggered changes in the legislation, making national governments to bring their domestic legislation in line with the Convention, specifying measures that are to be taken.

[30] ECtHR, MSS v Belgium & Greece Application no. 30696/09, Judgment of 21 January 2011; Tarakhel v Switzerland, Application no. 29217/12, Judgment of 4 November 2014; CJEU, 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, Court of Justice of the European Union, Judgment of 21 December 2011, para 94.

[31] Sweden: AIDA Country Report Sweden: Second Update, April 2015, p.44. Available at: http://bit.ly/1AAceVn [accessed 22-02-2020]; Austria: AIDA Country Report Austria: Third Update, December 2014, p.72.Available at: http://bit.ly/1HPdOm8 [accessed 22-02-2020].

treatment or punishment in question for it to constitute ill-treatment prohibited by Article 3[32]. The ill-treatment is, however, of a relative nature and depends on the personal characteristics together with the manner and method of execution of punishment[33].

Moreover, in the case Ireland v. the United Kingdom the ECtHR held that the ill-treatment "must attain a minimum level of severity" that together with the duration, physical or mental effects on the victim as well as the sex, age and health of the victim in some cases form the threshold necessary to constitute a violation of the Article 3 ECHR[34].

The risk of being subjected to torture or inhuman or degrading treatment must also be "real" in the country, to which the applicant is transferred. This concept is very vague and the Court has never provided a proper definition of the "real risk" standard, and there are not so much clarification offered for its application.

The Court mentions also other formulations, such as a "high likelihood" or "beyond a reasonable doubt" requirement in order to invoke the breach of Article 3[35]. This is a very high standard and the omission to define it may seem to be intentionally done by the Court in order to give the discretion to the states in assessing all the relevant circumstances.

A good example of an unreasonably high evidentiary threshold for applicants to prove that a State Party violated Article 3 is a so-called Vilvarajah test defined by the ECtHR in case Vilvarajah and others v. the United Kingdom in 1991. The Court ruled that the mere situation of general instability would not give rise to a breach of Article 3 ECHR unless there was evidence that the returnee's personal situation was worse than that of the generality of other members of his group. Even though it was evident that some applicants were subjected to ill-treatment upon their return, the Court did not consider that as a ground for claiming the violation of Article 3 ECHR, since the risk of ill-treatment was found to be too general and not a specific persecution that the applicants faced[36]. Even though the test is not common nowadays and personal circumstances are currently taken into account, this is a good example how far-reaching the Court made the Article for the individuals to get the protection.

Therefore, in order to invoke the violation of the article 3 ECHR, the risk of ill-treatment must be real, intentional and specific, with a particular level of severity and have a particular humiliating or other negative influence on person's dignity.

[32] ECtHR – Saadi v. Italy, Application No. 37201/06, 28 February 2008, para. 135.
[33] Tyrer v. The United Kingdom, No. 5856/72 25 April 1978, para 30
[34] Ireland v. The United Kingdom, No. 5310/71, 18 January 1978, para 162.
[35] ECtHR, Azimov v. Russia, No. 67474/11, 18 April 2013, para 128; Shamayev and Others v. Georgia and Russia, 12 April 2005, paras 338, 353; Garabayev v. Russia, 7 June 2007, para 76.
[36] ECtHR Vilvarajah and others v the United Kingdom, App no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgement of 30 October 1991, paras 109-116.

Recognition of such a high threshold to prove the violation undermines the protection under the Article 3, making too difficult for the applicant to benefit from it and giving more option for the states to circumvent it.

At the same time, Article 3 ECHR proves to be very individualistic and its invoking often depends on the personal circumstances of each applicant in need of protection. Therefore, sometimes, the case law is not consistent in its decisions, claiming in one case violation, while rejecting it in another. For instance, the case D. v. the United Kingdom the Court constituted that the applicant's expulsion would be a violation of Article 3 based on the applicant's health condition, mentioning that the circumstances of alleging the violation of Article 3 are very exceptional and "the decision to remove an alien who appeared to be close to death to the country where he could not obtain any nursing or medical care and had no family to care for him or provide him with even a basic level of food, shelter or social support would raise an issue under Article 3" [37]. Similar approach will be later presented by the CJEU, taking into account not only physical, but also psychological health of the mother with a newborn child that precluded the transfer[38].

However, in Ahorugeze v. Sweden the Court taking into account the high standard of Article 3, considered that the applicant's heart problems could not be considered serious enough for raising an issue under the Article 3 and that there were no compelling humanitarian grounds against his extradition to Rwanda due to his medical condition[39].

Interestingly, that the refoulement of an asylum seeker would unlikely lead to the same responsibility of the sending State in case of the possibility of the violation of other fundamental rights rights enshrined in the Convention.

The burden of proof lies on the applicant who needs to present that he or she would face a real risk of treatment contrary to Article 3 in case of expulsion. The respondent state can present doubts about that to the Court.

However, in the case J.K. v. Sweden, the Court partially redistributed the burden of proof due to the applicant's weaker position and lack of means. The Court decided that applicant should bear the burden of proof regarding personal circumstances and the states - regarding the general situation in the country concerned, the respondent government should bear the burden of proof instead of the applicant[40].

[37] ECtHR, D. v. the United Kingdom, No. 30240/96, Judgment of 2 May 1997, para. 42.
[38] CJEU (GC), 16 February 2017, PPU C. K. and Others v. Supreme Court of Republic Slovenia, application case C-578/16, para. 67
[39] ECtHR, Ahorugeze v. Sweden, No. 37075/09, Judgment of 27 October 2011, para.89.
[40] ECtHR - J.K. and Others v. Sweden, Application no.59166/12, 23 August 2016, paras 96-98.

When the burden of proof is met, another problem, however, emerges that is connected with the balancing rule between the risk of ill-treatment and the national security.

In theory, the prohibition of torture is of an absolute nature and precludes all balancing, therefore even small deviation is precluded in any circumstances[41]. Nevertheless, countries protect themselves and adopt policy rules regarding the entry, residence and expulsion of aliens within their jurisdiction that justify the extradition, even though it resulted in torture. Justifications are usually found in the general interest of the community and the requirements of the protection of the individual's fundamental rights[42]; national security[43] or economic interests of the community as a whole[44].

Such deviation is extremely problematic, since it creates a double standard approach that may indirectly allow deviation from a declared absolute prohibition under the Article 3 and equalize it with other human rights that allow a certain level of such deviation[45].

The most recent case regarding such deviation of the State under the Dublin system from the obligation not to expel people to the situation of torture was noticed in the case A.N. v. Switzerland regarding the Dublin transfer of victim of torture to Italy. The decision was brought by the UN Committee against Torture (hereinafter CAT) alleging the violation of the Article 3 of CAT. The applicant, a political prisoner, arrived to Switzerland in a distressed mental health state, which prompted his immediate hospitalization[46]. He applied for asylum, however Swiss authorities deported him back to Italy under the Dublin Regulation.

The Committee's conclusion was that the Swiss government failed to meet the standard of "substantial grounds for believing there is a real risk of treatment prohibited by Article 3 upon return to Italy". The burden of proof was laid on the complainant who had to present that the danger of being exposed to torture is foreseeable, personal, present and real[47]. The Committee also considered that the State's party failed to assess the personal circumstances and the risk of torture of the applicant, considering his specific vulnerability, insufficient medical rehabilitation

[41] Ireland v. the United Kingdom, , No. 5310/71,18 January 1978, para 163.
[42] ECtHR - Soering v. The United Kingdom, Application No. 14038/88, 7 July 1989, para 89.
[43] Chahal v. the United Kingdom, Application no. 22414/93, 15 November 1996, para 76. The Court rejected the government's position and stated that the activities of the individual in question cannot be given any significance, however undesirable or dangerous they are and there is absolutely no room for balancing the risk of ill-treatment against the reasons for the expulsion, para.80-81.
[44] N. v. the United Kingdom, Appl. No. 26565/05, 27 May 2008, para 44. The state claimed not to be obliged to facilitate the medical help by offering unlimited health care to aliens as it would place a disproportionate burden on the Contracting States.
[45] Pokhodun Y., 'Expulsion of asylum seekers under the Dublin System as the ground of violation of Article 3 ECHR', EU Justice and Home Affairs Research Papers in the Context of Migration and Asylum Law, Ed. by Bence Kis Kelemen and Ágoston Mohay, 2019, p.147-158, at 151.
[46] A.N. v. Switzerland, communication no. 742/2016, UN Committee against Torture (CAT), 3 August 2018, available at: https://www.refworld.org/cases,CAT,5b964c664.html [accessed 7 March 2019].
[47] Ibid, para. 8.4.

and living conditions in Italy, thus amounting to violation of Articles 3, 14 and 16 of the Convention against Torture[48].

This case once again showed that the principle of non-refoulement is often interpreted through the connection with the fundamental human right of prohibition of torture, inhuman and other degrading treatment. Although, the scope of the Article 3 of CAT is a bit limited, comparing to the one stated in the Article 3 ECHR, however, non-refoulement is implied in the general spirit of all provisions defined in international human rights acts that in some way connected with torture, or other forms of ill-treatment.

Therefore, states while implementing the Dublin Regulation must act in accordance with human rights, being also members to the ECHR. Moreover, the safeguards provided by the ECHR are much stronger and effective.

However, the interpretation of the ECtHR regarding the absolute nature of the Article 3 contains concepts such as "high likelihood" or "beyond a reasonable doubt" that together with the Vilvarajah test put an unreasonable high threshold for proving the violation of Article 3 ECtHR, thus making it too difficult for the applicant to benefit from its protection.

Such a high threshold added by the vague concepts of "real risk" and "knowingly to surrender[49]" on practice can grant a wide margin of discretion to the Member States to decide what means to adopt in their domestic legal systems for the fulfillment of their international obligations. Nevertheless, such discretion can often lead to derogations that are definitely not allowed under the Article 3 ECHR.

[48] Ibid, para.8.6.
[49] ECtHR - Soering v. The United Kingdom, Application No. 14038/88, 7 July 1989, para. 87-88.

1.2. Application of the European Convention of Human Rights in Dublin cases

Within the European legal order, the ECHR possess a 'special significance'[50] that has been mentioned in the Article 6 TEU, according to which "fundamental rights, as guaranteed by the [ECHR] … result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[51].

Currently, the ECHR has become the most important regional document for the human rights protection, which must be followed by all the other special acts dealing with human rights within the European continent. It was already mentioned that, unlike the 1951 Refugee Convention and Dublin III Regulation, everyone could apply for the protection of their rights under the ECHR as long as they are under the jurisdiction or a territory of a state party[52].

The principle of non-refoulement, however, is not an equivocal concept with a uniform content definition – it can considerably vary according to the harm, which is going to be prevented or the individual risk the person might face[53]. Therefore, the principle can get a different understanding according to the document applied in a specific case or the approach developed by the responsible institution.

It was shown that Dublin III Regulation in the Article 3(2) does not mention the ECHR in its text, while defining the principle of prohibition of transfers that would result in a risk of inhuman or degrading treatment through the Article 4 of the CFREU. Only after the analysis provided in the sub-section 1.1, the conclusion was reached that according to Article 52(3) CFREU these two legal sources (ECHR and CFREU) correspond to each other, determining equal rights.

Thus, Member states must comply both documents while performing transfers under the Dublin system. Nevertheless, the practical problem arises, since the principle of non-refoulement is not directly mentioned neither in the text of the Convention and incorporated through the extensive case law of the ECtHR. The principle is, however, enshrined in the text of the CFREU,

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[50] Case C-402/05 and C-415/05, Kadi and Al Barakaat International Foundation v Council and Commission [2005] ECLI:EU:T:2005:332, para 283.

[51] Vicini, G., The Dublin Regulation Between Strasbourg and Luxembourg: Re Shaping Non-Refoulement in the Name of Mutual Trust?, European Journal of Legal Studies, No. 8/2, 2015, p. 56.

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

[53] Wouters, C.W., 'International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture' Doctoral Thesis, Intersentia, 2009, p. 577, at 525. Available at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/13756/000-wouters-B-25-02-2009.pdf?sequence=1 [accessed 29-02-2020].

specifically in the Article 19 prohibiting collective expulsions and expulsions to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment[54].

Therefore, in order to follow the principle of non-refoulement, the sending state must follow the approaches elaborated by the Strasbourg Court on the one side and the principle enshrined in the Article 19 of the Charter and the relevant case law of the CJEU on the other, ensuring that main concepts are properly applied while dealing with the expulsion cases. This can cause tensions between the fulfillment of the State's obligations under the EU law and the protection of human rights.

As the accession of the EU to the ECHR is still on the level of negotiations, the Luxembourg Court in its rulings relies on the Charter, which was recognized as legally binding document within the EU by the Lisbon Treaty in 2009, thus extending the competences of the CJEU with regard to human rights protection. Even though, articles 52 and 53 of the CFREU provide that its provisions corresponding to the ECHR provisions must be interpreted in conformity with the Convention, the Court under the EU law is able to provide a more extensive human rights protection. Thus, the Charter offers equal protection of the human rights that are also defined in the Convention protect human rights, not being limited to it.

CJEU is not primarily a human rights court and is not bound by the rulings of the ECtHR, however, it must respect supreme human rights principles and provide external monitoring on human rights preservation by all the EU institutions and Member states. The Court, however, is empowered by the article 52(3) CFREU to broaden the minimum standard of human rights protection granted by the ECHR, which goes not in conflict with the ECtHR precedent, but beyond it[55].

Some clarity has been determined by the ECtHR, creating the presumption that under the Community law fundamental rights were protected in an 'equivalent' way to that provided by the Convention[56]. The so-called Bosphorus doctrine originated in 2005 stating that the State did not depart from the requirements of the ECHR while implementing international legal obligations following from its membership in an international organization as long as the latter offers the

[54] Article 19, Charter of Fundamental Rights of the European Union (2012/C 326/02) Official Journal of the European Union C 326/391. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN [accessed 26-02-2020]

[55] Butti E., The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection, online journal Jurist: Legal News and Research. A collaboration of the university of Pittsburg, 2013. Available at: https://www.jurist.org/commentary/2013/09/elena-butti-lisbon-treaty/ {accessed 26-02-2020]

[56] Ippolito F., Velluti S., The relationship between the ECJ and the ECtHR: the case of asylum. In: Dzehtsiarou K., Konstadinides T., Lock T., O'Meara N., (eds.) Human rights law in Europe influence, overlaps and contradictions of the EU and ECHR. Routledge Research in Human Rights Law. Routledge, London, pp. 156-187, 175.

'equivalent' protection of human rights[57]. After this concept emerged, the ECtHR had to define whether it is applicable to the Member states while implementing the Dublin allocation criteria. In other words, whether they were obliged to do so under the Dublin rules or still enjoyed discretion.

Interestingly, that even though the ECtHR has elaborated on the Bosphorus doctrine, it could not provide a certain answer to the question of its applicability to the cases involving the expulsion of asylum seekers in the EU Member States. For instance, in the T.I. v. the UK case the Court said that the state cannot "rely automatically…on the arrangements made in the Dublin Convention", but has to ensure that the receiving state can provide necessary protection of the rights under Article 3 ECHR[58]. However, in K.R.S v. the UK the Court stated that the return was "an implementation of a legal obligation by the State in question, which flows from its participation in the asylum regime created by that Regulation", thus making the Bosphorus ruling applicable with regard to the Dublin II Regulation[59].

The inconsistency in the application of Bosphorus doctrine vis-à-vis the Article 3(2) of the Dublin II Regulation was simply the reflection of the concept of mutual trust within the EU that underpinned the CEAS and exempted Member states from the obligation to review the observance of human rights by other Member states, so to apply Dublin rules automatically, unless exceptional circumstances served a ground for the transfer suspension[60].

Indeed, expulsion cases were dealt by the Strasbourg and the Luxembourg Courts, however, the former one relied on the presumption of mutual trust, considering returns within the EU automatic and completely safe for the asylum seekers.

Therefore, it is no surprise that ECtHR finally in the M.S.S. case found the Bosphorus doctrine inapplicable to the case of Dublin transfers, at least because such transfers do not strictly fall within the implementation of the State's international legal obligations[61].

Thus, even accepting the jurisdiction of the Luxembourg Court, the Strasbourg Court seems not willing to fully renounce to its jurisdiction, making its applications conditional.

Therefore, on practice there are two institutions on the European Continent empowered to decide on human rights issues applying two corresponding documents. Nevertheless, there are still differences in their functioning. Although the decisions of both the ECtHR and the CJEU are binding on the Member States, ECtHR's rulings have never had a direct binding and *erga omnes*

[57] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], app. no 45036/98, ECHR 2005-VI, paras. 155–57.
[58] T.I. v. the United Kingdom, No. 43844/98, Decision of 7 March 2000, para.15.
[59] K.R.S. v. United Kingdom, Application no. 32733/08, Council of Europe: European Court of Human Rights, 2 December 2008, p. 16. Available at: https://www.refworld.org/cases,ECHR,49476fd72.html [accessed 12-02-2020]
[60] Opinion 2/13, Accession of the European Union to the European Convention of Human Rights, Opinion of 18 December 2014, paras. 191-194.
[61] ECtHR, M.S.S v. Belgium and Greece App no 30696/09, Judgement of 21 January 2011, paras 339-340.

effect, being constrained by the state sovereignty[62]. Therefore, regarding the binding effect in the domestic legal order, decisions of the ECtHR are more gradual and their implementation depends on whether the state follows monistic of dualistic approach of the relationship between international law and national law in its Constitution. Moreover, the EU is not a party to the ECHR, being not directly bound neither by it, nor by the decisions of the ECtHR.

On the contrary, the CJEU due to its place in the EU legal order is entitled to apply and interpret the EU law. Along with the concept of primacy of the EU law, this means that all rulings of the CJEU are binding not only on the referring Member state but also on the other courts within the EU creating a provision or principle of Community law[63]. Rules created by the CJEU in its decisions become as binding as the written EU law. For this reason, the decisions taken with regard to "Dublin transfers" should also have a direct binding effect for the national authorities, "forcing" their implementation. Therefore, failure of the Member state to comply with the preliminary rulings or other decisions of the CJEU would mean the failure to comply with the EU law and lead to the State's liability[64]. From this point of view, the CJEU seems to be more effective in the human rights protection, not originally being a human rights court.

The aforementioned statement is especially valid after analyzing several judgments of the CJEU where it expressed a clear intention to become the "Constitutional court" within the "EU constitutional legal order"[65].

The *Kadi* case is the most famous example of the tension between international bodies and constitutional courts over questions of due process and protection of fundamental rights, where national courts emerge as an instance of control and judicial review of transnational and international adjudication[66]. In the case, the CJEU showed that the validity of the international norm could be challenged by invoking fundamental legal principles of the Community law[67]. The CJEU has placed its own identity as a legal community above the commitment under the

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[62] John Tobin, Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation, Harvard Human Rights Journal Vol. 23, 2010, p. 43. Available at: https://harvardhrj.com/wp-content/uploads/sites/14/2010/10/1-50.pdf [accessed 27-04-2020]

[63] Freija; Lutere-Timmele and Vasariņš. Prejudiciālais Nolēmums, in Lutere-Timmele, D.L. (scient. ed.). Eiropas Savienības Tiesību Piemērošana. Rokasgrāmata PraktizējošiemJjuristiem. Otrais Papildinātais Izdevums. 2008, 138 in Mikelsone G., 'The binding force of the case law of the court of justice of the European Union' Jurisprudencija, 2013, No.20(2): 469–495, 478. Available at: https://www.mruni.eu/upload/iblock/3ef/JUR-13-20-2-06.pdf [accessed 27-04-2020]

[64] See CJEU, Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others. [1996] ECR I-01029, para, 57; Case C-224/01, Gerhard Köbler v. Republik Österreich, [2003] ECR I-10239, para. 56.

[65] Case 284/16 Slovak Republic v. Achmea, EU:C:2018:158. Judgment of 6 March 2018. Available at: http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TXT&ancre. [accessed 28-03-2020]

[66] Lustig D. and Weiler J. H. H. "Judicial review in the contemporary world—Retrospective and prospective" International Journal of Constitutional Law, Volume 16, Issue 2, April 2018, Pages 315–372, Available at: https://doi.org/10.1093/icon/moy057 [accessed 01-03-2020]

[67] Case C-402/05 and C-415/05, Kadi and Al Barakaat International Foundation v Council and Commission [2005] ECLI: EU: T: 2005: 332, Judgment of 3 September 2008.

treaty, which can be regarded as a start of a concern for the constitutional identity of the formation where the Court is the guardian.

There is a similar ongoing process in the relationship between the CJEU with the ECtHR. The jurisprudence of the CJEU with regard to the human rights protection is gradually increasing its importance. The Luxembourg Court goes "beyond" the accepted approaches by the ECtHR regarding the protection of fundamental rights or principles through an autonomous interpretation of the EU law.

In *Samba Diouf* case, the Court clearly stressed the growing centrality of the CFREU as well as its interpretative autonomy "guaranteed by the European Union law [in the CFREU – namely Article 47][68]. Autonomous interpretation was only strengthened in *Elgafaji* case[69] where the Court questioned the compliance of the article 15(c) of Qualification Directive of 2004[70] with the Article 3 ECHR.

According to the Court, the content of the Article 15(c) of the Qualification Directive differs from that of Article 3 ECHR and could be interpreted autonomously and the provisions of Directive 2004/83 were fully compatible with the ECHR, including the case law of the ECtHR relating to violation of the Article 3 ECHR. Even though such a reference was aimed to avoid conflicts of interpretations between the two European human rights jurisdictions, the CJEU once again confirmed its right to autonomous interpretations of the fundamental rights[71].

Therefore, it becomes more and more difficult for the states to treat the case law of both institutions with the same respect. In addition, after the changes adopted by the Lisbon Treaty in 2009, the EU implicitly has become a self-sufficient and closed legal system. For this reason, except of mutual respect, there is a huge "jurisdictional overlap as both courts are coming to the age as European constitutional courts"[72].

At the same time, the prohibition of torture is an absolute right, which cannot stand dubious interpretations or balancing between approaches of different institutions, providing the protection under both sets of Human Rights standards.

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[68] Opinion of AG Cruz Villalon, Case C-69/10, Samba Diouf v. Ministre du Travail, de l'Emploi et del'Immigration, n. 53, para. 39. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CC0069&from=EN [accessed 28-02-2020].

[69] Case C-465/07 Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie Judgment of the Court (GC) of 17 February 2009, ECR I-921.

[70] European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC. Available at: https://www.refworld.org/docid/4157e75e4.html [accessed 01-03-2020]

[71] Ippolito F., Velluti S., 'The relationship between the ECJ and the ECtHR: the case of asylum' in; Dzehtsiarou K., Konstadinides T., Lock T., O'Meara N., (eds.) Human rights law in Europe: influence, overlaps and contradictions of the EU and ECHR. Routledge Research in Human Rights Law. Routledge, London, 2014, pp. 156-187, 168.

[72] Douglas-Scott S., 'The European Union and human rights after the Treaty of Lisbon', Human Rights Law Review 11(4):645-682, at 657. Available at: http://www.corteidh.or.cr/tablas/r27635.pdf [accessed 02-03-2020].

Thus, there are two independent courts on the European continent that partially share their material and territorial jurisdiction without having any institutional link[73]. Even though, conclusions reached by these two institutions are guided by documents that protect human rights equally, delivered opinions might be quite divergent that bear a risk of undermining the protection of human rights in the region, especially when it comes to the protection of the fundamental non-derogable rights, where balancing is not allowed.

The CJEU is not consistent in its judgements by following the approach of the ECtHR in the N.S./M.E. case on the one hand, and opting out in *Samba Diouf* where the Court clearly stressed the growing centrality of the CFREU as well as its interpretative autonomy "guaranteed by the European Union law[74].

Therefore, scholars are persistently claiming on the importance of EU accession to the ECHR, which might contribute to the development of the "integrated European approach" to the protection of fundamental rights in Europe, with fully compatible decisions.

Such a merger of two equivalent legal systems would be beneficial in many ways for Member States and individuals in need of protection, however due to the aim of the CJEU to constitutionalize, preserving and strengthening its autonomy and primacy in human rights protection, this might be the fastest way to achieve it.

[73] Ravasi E., Human Rights Protection by the ECtHR and the ECJ. A Comparative Analysis in Light of the Equivalency Doctrine, International Studies in Human Rights, Vol. 118, Leiden; Boston: Brill Nijhoff, 2017, pp.425, at 2.
[74] Opinion of AG Cruz Villalon, Case C-69/10, Samba Diouf, n. 53, para. 39

1.3. Compatibility of the principle of mutual trust and human rights protection

Despite all the inconsistencies and ambiguous interpretations, both the ECtHR and the CJEU have raised in their rulings the question of compatibility of the Dublin Regulation with the fundamental rights enshrined in the ECHR and the EUCFR, respectively.

Dublin system is based on the presumption that all member states are considered safe countries for third-country nationals with effective asylum systems and sufficient level protection of fundamental rights against the expulsions to the country where the applicant would face torture, or degrading of inhumane treatment.

The principle is not an invention of the Dublin system, but has been a cornerstone in the cooperation within the EU, since the efficient functioning of any kind of union depends on the level of mutual trust between its members[75]. The CJEU has applied the principle of the mutual recognition for the first time in the well-known Cassis de Dijon judgment. Following the Court, Member States are obliged to trust the legislation or practice of other Member States and do not apply specific rules to the importation of goods, "provided that they have been lawfully produced and marketed in one of the Member States"[76].

Both principles of mutual trust and mutual recognition have become the safeguards of the free movement of not only goods and services, but also have become important for the cooperation in immigration law.

The establishment of mutual trust within the EU was the main goal of the meeting of the European Council in Tampere in 1999, so to establish the genuine area of freedom, security and justice within the European Union[77].

Recital 3 of the Dublin III Regulation mentions Tampere Conclusions with regard to the maintaining of the principle of non-refoulement and ensuring that nobody will be sent back to persecution. Thus, all Member States are parties to the CEAS by respecting the principle of non-refoulement are considered as safe countries that can provide the same level of protection for third country nationals[78].

Nevertheless, we have already seen that the issue of expulsions still lack harmonization and divergent practices exist regarding the treatment of asylum seekers in different Members

[75] Brouwer E., Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof, Utrecht Law Review, 9(1), pp.135–147, p. 136 DOI: http://doi.org/10.18352/ulr.218
[76] Case C-120/78, Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649, para. 14.
[77] Presidency Conclusions - Tampere European Council, 15 and 16 October 1999. [ON-LINE]. [s.l.]: Council of the European Union, [accessed 01-03-2020]. 200/1/99. Available at: http://www.cvce.eu/obj/conclusions_of_the_tampere_european_council_15_and_16_october_1999-en-32135242-b375-47fe-adb4-e02ab2432945.html [accessed 10-03-2020]
[78] Recital 3, Dublin III Regulation (supra note 1).

States. The fact that international Courts cannot reach the mutual understanding only adds the relevance to this topic.

Despite Tampere conclusions and the CEAS partnership, there are also other instruments, adopted to attain the minimum level of protection for asylum seekers and to deepen the mutual trust. Asylum rules that are obligatory for the Member states to fulfil are enshrined in the Asylum Procedures Directive 2013/32/EU (recast), Qualification Directive 2011/95/EU (recast), Reception Conditions Directive 2013/33/EU (recast), etc[79].

In the Dublin III Regulation, the principle is mentioned in the Recital 22 as the one that helps to "ensure robust cooperation between the Member states" and would allow the EU to "promote preventive measures where the smooth functioning of the system was jeopardized as a result of particular pressure and/or deficiencies in the asylum systems in one or more Member States"[80]. Moreover, solidarity and trust are viewed as two complementary principles that go "hand in hand" and are equally important for the functioning of the CEAS with regard to sharing the burden of responsibility among the Member States.

Even though the principle has been known since 2000, it has rooted deeper, since the establishment of the CEAS. As far as the system is bound by the provisions of the Geneva Convention and all the Member States are also members to the ECHR, the principle should have provided a better level of harmonization in the asylum systems within the EU[81]. However, in reality national asylum systems and reception conditions differ due to various economic and political factors that make it difficult to implement the mutual trust concept.

For this reason, instead of initial principle of burden-sharing the Dublin system have led to the protection-gap between Member States by shifting the responsibility from the sending to the receiving country. As a result, some Member States with limited reception conditions have been put under the disproportionate burden of responsibility.

The principle of burden-sharing and the concept of mutual trust, even though, claimed to be included in the Dublin III Regulation, do not have their actual practical application. After the

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[79] Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU. Available at: https://www.refworld.org/docid/51d29b224.html [accessed 24-03-2020]; Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26. Available at: https://www.refworld.org/docid/4f197df02.html [accessed 11-03-2020]; Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), , OJ L. 180/96 -105/32. Available at: https://www.refworld.org/docid/51d29db54.html [accessed 11-03-2020].

[80] Recital 22, Dublin III Regulation (supra note 1).

[81] Brouwer E. "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", Utrecht Law Review, 9(1), pp.135–147, p. 138 DOI: http://doi.org/10.18352/ulr.218

close analysis, it does not seem to have a pure legal nature but also a political and economic one. Obviously, human rights cannot be sacrificed in any case, but there are various complex reasons that force governments to omit human rights violations when implementing national migration policies. Moreover, there is always public opinion that stands behind every governmental step, preventing reforms that offer more resources or accept more refugees or asylum-seekers[82].

Such system is not completely fair both for asylum seekers who are in need of protection and for the Member states that struggle with financial and economic problems of their own citizens leaving aside the citizens of other countries. Lack of full harmonization in the asylum legal framework, differences in the quality of national asylum procedures and economic problems have led to the situation of "asylum lottery" for asylum seekers who cannot be sure that their human rights will definitely be protected in the responsible Member state[83].

Most of the asylum seekers are well aware of such situation in certain Member states and travel across the EU filing multiple applications in Member State in order to get protection in the country with the most attractive asylum system. This problem has been characterized as "asylum shopping" and has been raised by the CJEU in the N.S./M.E and Abdullahi cases describing the principal objectives of the Dublin system[84] and claimed to be one of the principal problems in the Dublin II Regulation and all the Member States were encouraged to tackle with it.

Nevertheless, rather strange mechanisms of dealing with the problem have been chosen where the principle of mutual trust becomes not that "mutual" anymore, since an asymmetrical rule has now been adopted by the Dublin system. This means that Member states decide to follow only negative asylum decisions of other Member States, and decide not to be bound by the positive ones[85]. This is a rather selective application of the principle of mutual recognition, which does not make sense, since one Member state follows the negative decision of another in order to find a claimant unworthy of protection EU-wide, however, the trust is not that absolute when it comes to the decision of the actual recognition of an applicant as a refugee.

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[82] Dragan A., Dublin III and Beyond: Between Burden-Sharing and Human Rights Protection, 2017/II, Pécs Journal of International and European Law, pp.84-89, at 87. Available at: https://www.researchgate.net/publication/339956444_Dublin_III_and_Beyond_Between_Burden-sharing_and_Human_Rights_Protection [accessed 05-03-2020].

[83] ECRE. (2015 A). Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis. Annual Report 2014/2015: ECRE Weekly Bulletin 11 September 2015, at 18. Available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf [accessed 04-03-2020].

[84] 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, Court of Justice of the European Union, 2011, para 79 Available at: https://www.refworld.org/cases,ECJ,4ef1ed702.html [accessed 23-02-2020]: CJEU - C-394/12, Shamso Abdullahi v Bundesasylamt, para 53.

[85] Guild, E. (2006) 'The Europeanisation of Europe's Asylum Policy', International Journal of Refugee Law 18(3-4): 630-651, at 636 in Mouzourakis M.'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union, Working Paper Series NO.105, Refugee Studies Centre University of Oxford, 36 at 23.

In my opinion, the adoption of this rule instead of fighting with the problem of 'asylum shopping' is going to cause exactly the opposite effect and only increase irregular migration and multiple asylum applications.

Therefore, we may speak about the perverse impact of the Dublin principle of mutual trust, since instead of bringing fast and efficient asylum procedures, it invokes secondary migratory flows and increases the risk for the human rights violations.

Indeed, the principle of mutual trust does not require the sending Member state to check the effectiveness of the asylum procedure and reception conditions in the receiving Member state, which might entail a serious risk for the asylum seeker's rights in case asylum conditions in the latter are deficient.

The discussion regarding the appropriateness of automatic transfers by applying the rules of the Dublin Regulation on the one hand and the protection of human rights on the other, has been a central issue in the jurisprudential dialogue between the ECtHR and the CJEU that had an enormous impact on the functioning of the Dublin system.

The risk of the automatic transfers and all the flaws of the presumption of mutual trust were described in the M.S.S. case, where asylum procedures and reception conditions of certain EU Member states like Greece or Italy clearly do not satisfy the standards required by both international human rights treaties and the EU law itself. Such a situation was qualified by the UNHCR in 2010 as a "humanitarian crisis"[86], and completely undermined the presumption of safety of all the countries within the EU for the third country nationals.

This case is just another proof that most of the asylum legislation has only a declarative character and lack adequate practical application. While the provisions of the Reception Conditions Directive 2013/33/EU say that all applicants should be granted equal standards of reception, which "ensure them a dignified standard of living […] in all Member States[87]", not all parties to this Directive can comply with it.

There is, however, a provision under the Dublin III Regulation, requiring the Member State to terminate the transfer where it would be incompatible with the Member State's international obligations, thus resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter[88].

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[86] UNHCR: Submission by the UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Greece, November 2010, pp.13 at 8. Available at: https://www.refworld.org/pdfid/4cd8f2ec2.pdf [accessed 04-03-2020]

[87] Recital 11, Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), , OJ L. 180/96 - 105/32. Available at: https://www.refworld.org/docid/51d29db54.html [accessed 11-03-2020].

[88] Article 3(2), Dublin III Regulation (supra note 1).

For instance, in N.S. v. Secretary of State for the Home Department, dealt under the Dublin II Regulation, the Court affirmatively answered the question of UK and Irish courts whether the discretionary power allows to derogate from the rules defined in the Article 3(2) of the Dublin Regulation, under certain circumstances could turn into an obligation. The Court claimed the presumption in the Regulation that asylum seekers will be treated in a way compatible with fundamental rights, is rebuttable and obliges the sending State to check all the necessary conditions before deciding to expel the person to the country of origin, even if the CEAS is based on the full and inclusive application of the Geneva Convention and guarantees that nobody will be sent back to a place where they again risk being persecuted[89].

Thus, the CJEU have delivered a decision analogical to those issued by the ECtHR considering the Dublin Regulation not an excuse for the return of an asylum seeker to a country, in which the individual's rights under the ECHR would be violated.

Seems that currently, both Courts have similar view that the mutual trust presumption, on which the Dublin Regulation is based, must be rebuttable in order to build a more humane asylum system where individuals would not be returned to situations of torture, inhuman or degrading treatment. In order to support this approach, it would be reasonable to implement the case law rule into the text of Dublin Regulation as a rule, officially obliging sending Member states before the transfer to analyze all the relevant information about the asylum procedure, reception conditions in the competent State and whether they are in line with both the international human rights instruments and CEAS principles.

[89] 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, Court of Justice of the European Union, 2011, para. 75. Available at: https://www.refworld.org/cases,ECJ,4ef1ed702.html [accessed 23-02-2020]

2. JUDICIAL DIALOGUE ON COMPATIBILITY ISSUES: THE ILLUSION OF COMPROMISE

2.1. The confusion between systemic deficiencies and individualized risk

The CJEU and the ECtHR have always treated the limits of the mutual trust presumption in different ways. The ECtHR takes into account the individual risk for the person who would be returned to the responsible State under the Dublin system[90]. Therefore, the state cannot "blindly" rely on the Dublin provisions without providing an individualized assessment of risks of ill-treatment that the applicant might face in the receiving state or be expelled to another state without the opportunity to appeal the decision.

Such a prohibition was defined by the court for the first time in T.I. v. UK with regard to the transfer to Germany under the Dublin system, and revisited the concept in 2008 in the K.R.S v. UK regarding the Dublin transfer to Greece[91]. Moreover, the Court stressed that automatic reliance on the agreement, as a Dublin Regulation will be incompatible with the object and purpose of the ECHR, if the parties to such agreements would have to sacrifice human rights by fulfilling the obligations of the international agreement or partnership in the international organization[92].

In M.S.S. the Court accused Belgium of routinely use of "Dublin" transfers without a due regard of the individual situation[93]. Moreover, the Court seriously mentioned that such a transfer would entail the risk of responsibility for both the sending and the receiving Member states. For instance, in M.S.S. case, Greece was liable for violating Article 3 ECHR because of the poor living conditions and the detention of asylum seekers, and for the risk of a refoulement of the asylum seeker to the country of origin, and Belgium was held liable for failing to provide individual guarantees for the applicant during the transfer[94].

The CJEU agrees with the ECtHR that this presumption must be relative and regarding this issue, the Courts even have similar opinions. At the same time, however, the CJEU focuses more on the general situation in the receiving state and its asylum system. The Court insists on the concept of "systemic deficiencies", disregarding the claims based solely on the individual

[90] Vicini, G., The Dublin Regulation Between Strasbourg and Luxembourg: Re Shaping Non-Refoulement in the Name of Mutual Trust?, European Journal of Legal Studies, No. 8/2, 2015, p. 56.
[91] T.I. v. United Kingdom, Application No. 43844/98, Decision of 7 March 2000; K.R.S. v. United Kingdom, Application No. 32733/08, Decision of 2 December 2008
[92] K.R.S. v. United Kingdom, Application no. 32733/08, Council of Europe: European Court of Human Rights, 2 December 2008, available at: https://www.refworld.org/cases,ECHR,49476fd72.html [accessed 15 February 2020]
[93] M.S.S. v Belgium and Greece, Application No. 30696/09, Judgment of 21 January 2011, para. 396.
[94] Ibid., paras. 358-359.

risk of harm. This was confirmed in the Abdullahi case, where the Court defined "systemic deficiencies" as the "only way" for the asylum seeker to challenge the transfer[95].

However, the Luxembourg court in the N.S./M.E. case recognized that no irrebutable presumption of safety could be recognized with regard to Dublin transfers. The Court confirmed that Member States are bound to respect fundamental human rights and cannot transfer an individual when they "are aware that systemic deficiencies…[in the competent MS] amount to substantial grounds for believing that the asylum seeker would face the risk of being subjected to inhuman or degrading treatment under the Article 4 of the Charter"[96]. By mentioning "systemic deficiencies" the Court implied only "major operational problems" in the receiving state[97] that are necessary to invoke a violation. Such a high threshold appears to be quite challenging for the regular implementation of the burden-sharing system.

On the one hand, the adoption of such a high threshold may be explained by the very nature of the Court that aims to act as a Constitutional Court the EU, and to preserve the functioning of the Dublin system and the principle of mutual trust between the Member states, confirming the total alignment of such a position with it[98]. In addition, the CJEU wants to ensure the capability of the Regulation to serve its primary objectives "to organize responsibilities among the Member States, to ensure speed in the processing of asylum applications and to prevent forum shopping[99]". However, it does not take into account the applicant's individual risk in the receiving state, thus limiting the grounds, on which a Dublin transfer could be challenged. Such an approach has been criticized, since it deviates from the principles set in Articles 52 and 53 CFREU and makes the presumption of mutual trust *de facto* irrebuttable and, thus, incompatible with the ECHR, which might be a ground for the violation of the Article 3 ECHR.

Even though, there were opinions declared by scholars that concepts of "systemic deficiencies" and "individualized risk" are just two components of the same aim to preclude the Dublin transfer[100]. This statement, however, is not correct, since defining these two concepts as equal would mean that proving the one, would be enough to stop the refoulement, however, the CJEU does not recognize a right to remedy when only "individual risk" has been shown.

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[95] C-394/12, Abdullahi, Judgment of 10 December 2013, paras. 60-62.
[96] C-411/10 and C-493/10, N.S./M.E. and others, ECR, 2011, I-13905, paras 50 and 53.
[97] Ibid, para 81.
[98] Ibid. paras. 52-53; See also C-4/11, Bundesrepublik Deutschland v Kaveh Puid, Judgment of 14 November 2013, para 62.
[99] Recital 5, Dublin III Regulation. See also: Case C-245/11 K v Bundesasylamt [2012] ECLI:EU: C:2012:685, para 48; Opinion of AG Jääskinen in Case C-4/14, Bundesrepublik Deutschland v. Kaveh Puid [2013] ECLI:EU: C:2013:244, para 62
[100] Lübbe, "'Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR", IJRL, 2015, p. 135 ff., p. 137 in Pergantis, V., 'The 'Sovereignty Clause' of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence? '(2019). Bruno G. C., Fulvio M. Palomino, Di Stefano A., (eds), Migration Issues before International Courts and Tribunals, CNR Edizioni, Rome, 2020, Forthcoming at 9. Available at SSRN: https://ssrn.com/abstract=3476987 [accessed 12-03-2020]

There is another view, where "systemic deficiencies" indirectly include the criterion of "individualized risk" and there is no need to prove the latter separately. Thus, proving that the state has problems with the asylum procedure or reception conditions would automatically entail the risk of human rights violation[101]. Neither of these statements was accepted by the ECtHR, which in the *Tarakhel* decision refused to acknowledge the systematic flaws test and once again explicitly confirmed the need to assess the individual risk of each applicant.

In case of Tarakhel v. Switzerland, the Swiss authorities refused to examine the application of the Afghan family with six children, who left Italy (the country of first entry) without a permission to travel and filed an asylum application first in Austria and then in Switzerland. Taking into account the Dublin rule that the state of first entry is responsible for the consideration of that claim, Swiss authorities decided that the couple and their six children should have been sent back to Italy for further examination of their application[102].

The ECtHR's judgement was based on the previous case law, especially on the *Soering* case where the Court reminded that "[t]he source of the risk…does not exempt the sending State from carrying out a thorough examination of the situation of the person concerned and from suspending of the removal order where the risk of ill-treatment is established"[103].

Thus, the applicants could not have been moved to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the transfer would be compatible with the Article 3 ECHR. The individual guarantees provided by the Receiving state shall reveal the information with regard to the each specific case, so to make sure that an individual will be treated according to his/her needs and situation. The applicant in *Tarakhel* case had six children of different age, thus the way of treating should have been adapted to the children's age and the fact that all the family should be kept together[104]. The Court had taken into account the vulnerability of all applicants as an element of assessing the individual risk of an asylum seeker to suffer inhuman treatment that falls within the scope of the Article 3 ECHR.

At the same time, the criterion of individual assessment appears to be ambiguous, since the applicant does not have to prove the existence of systemic deficiencies or the individualized risk. Instead, the applicant has to present the "substantial grounds for believing" that the person might face a "real risk" of facing ill-treatment in the receiving country[105]. Such a change may seem advantageous for the applicants, lowering the threshold for the application of the systemic flaws test, making it applicable when not the whole national asylum system is collapsed, but

[101] Ibid., 9.
[102] ECtHR (GC), Tarakhel v. Switzerland, Application No. 29217/12, Judgment of 4 November 2014, paras 8-21.
[103] Ibid., para. 104.
[104] Ibid., para. 122.
[105] Ibid., para 104.

when some of its elements fail to function well[106]. However, this can also cause longer and more difficult investigation procedure, which could itself be a violation of human rights.

As far as the whole situation is concerned, previously, it was enough to present the general information about such deficiencies in order to perform the transfer, however, now the stricter criterion is implemented, requiring a thorough examination of each individual situation[107]. From this point of view, the systemic deficiencies test works as a balancing one, not requiring the asylum seeker to prove the existence of distinguishing features or the personal risk[108]. The CJEU has not responded to the *Tarakhel* ruling, so the tension between the two Courts remained intact and Member States are free to interpret it. What is now relevant is to see whether the Dublin IV Regulation will include the standards set by the ECtHR in the *Tarakhel*.

Nevertheless, while analyzing the recent case law, one might get an impression that the CJEU has smoothly started to change its approach to more individualistic one in resolving expulsion cases, taking into account also the risk that the asylum seeker might be exposed to.

Such a conclusion can be reached while considering the ruling made under the Dublin III Regulation by the CJEU in the case PPU C. K. and Others v. Supreme Court of Republic Slovenia. The Court stated that the prohibition of inhuman or degrading treatment of the Article 4 Charter corresponds to the prohibition in the Article 3 ECHR, and, in accordance with the Article 52(3) Charter, its meaning and scope must be the same as conferred by the ECHR[109]. Thus, the Court imposed a positive obligation on the Member States "to verify whether the person's state of health may be sufficiently protected by implementing the precautions in the Dublin III Regulation"[110]. Such precautions are necessary even when there are no serious grounds for believing that there are systemic failures in the national asylum system but a transfer itself can entail a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. Therefore, although there were no systemic flaws in Croatia, it was impossible for Slovenia to transfer a couple and their newborn child due to the mother's psychological state of health. The ruling shows the general evolution of the CJEU case law with regard to ensuring the effectiveness of the Dublin system also through the protection of the applicants' human rights[111].

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[106] Peers S.,'Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?', EU Law Analysis, 2014. Available at: http://eulawanalysis.blogspot.com/2014/11/tarakhel-v-switzerland-another-nail-in.html[14-03-2020].

[107] Marin L., "Only You": the emergence of a temperate mutual trust in the AFSJ and its underpinning in the European composite constitutional order, European Papers, 2017-2, pp. 141-157, at141. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3393405 [accessed 13-03-2020]

[108] Morgades-Gil S., "The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses after the Interpretations of the ECtHR and the CJEU?", International Journal of Refugee Law, Vol. 27, Issue 3, October 2015, Pages 433–456, at 446. Available at: https://doi.org/10.1093/ijrl/eev034 [accessed 12-03-2020].

[109] CJEU (GC), 16 February 2017, PPU C. K. and Others v. Supreme Court of Republic Slovenia, application case C-578/16, para. 67.

[110] Ibid., para. 77.

[111] C-63/15, Ghezelbash, Judgment of 7 June 2016, para. 52

Moreover, after the wave of criticism that has hit the approach of "systemic failures" adopted by the CJEU, it had to reconsider it and concluded that not only systemic but also deficiencies of a general nature may make a Dublin transfer incompatible with fundamental rights as guaranteed by EU law. Thus, in the most recent case law, the CJEU ruled that "it is not however inconceivable that [the asylum-] system may experience major operational problems in a given Member State, meaning that there is a substantial risk that applicants for international protection may be treated in a manner incompatible with their fundamental rights". It further held that "where the court or tribunal…has evidence provided by the person of the existence of such risk, that court or tribunal is obliged to assess, on the basis of information that is objective, reliable, specific and properly updated whether there are deficiencies, which may be systemic or generalized"[112]. Such a decision radically changes the position grounded in the jurisprudence of the CJEU and expands fundamental rights safeguards included in the Dublin III Regulation[113].

Thus, the Court has chosen a pro-human approach that is repeatedly mentioned in the recent case law. In the *Jafari* case, for instance, the Court applied Article 3(2) Dublin III Regulation without explicit mentioning of the systemic flaws criterion or the differences with the Dublin II Regulation as it did in *Ghezelbash* judgment of 2016[114]. Later the Court continued developing the new approach by referring to fundamental rights in the framework of Dublin transfers. In the recent *M.A* case the Court stated that under the Dublin system Member states are also bound by the case-law of ECtHR on Article 3 ECHR and by Article 4 of the Charter[115]. This decision goes beyond just the Article 3(2) concerning systemic flaws and refers to two main European acts on human rights protection.

The new approach installs a limitation to the principle of mutual trust within the EU, which makes it easier for an asylum seeker to get protection in case of his refoulement to the State where he might face an inhuman or degrading treatment. Moreover, the Court has finally explicitly mentioned that the obligation not to expel an individual under the Dublin system to the state where he or she would face the risk of inhuman or degrading treatment goes beyond the "systemic flaws" criterion. Such an obligation is deeply rooted into the international human rights obligations and cannot be derogated via secondary Union law such as Dublin III Regulation.

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[112] C-163/17, Abubacarr Jawo v Bundesrepublik Deutschland Judgment of the Court (GC) of 19 March 2019, ECLI:EU:C:2019:218, para. 83, 90.

[113] Pergantis, V., 'The 'Sovereignty Clause' of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence? '(2019). Bruno G. C., Fulvio M. Palomino, Di Stefano A., (eds), Migration Issues before International Courts and Tribunals, CNR Edizioni, Rome, 2020, Forthcoming, at 11. Available at SSRN: https://ssrn.com/abstract=3476987. [accessed 12-03-2020]

[114] C-646/16, Khadija Jafari and Zainab Jafari, Judgment of 26 July 2017, ECLI:EU:C:2017:586, para. 101.

[115] C-661/17, M.A. et al., Judgment of 23 January 2019, para. 84; C-163/17 Jawo case, paras. 87-89. See also the reference to Recitals 32 and 39 of the Dublin III Regulation.

2.2. Limits of sovereignty clause in expulsion cases: from discretion to obligation and back

From the moment of its first mentioning in 1576 by the French scholar Jean Bodin in his treatise Les Six Livres de la République ("Six Books of the Republic"), the concept of sovereignty has become more liberal and has shifted from the laws of states towards the laws of peoples[116]. The processes of integration and globalization along with the formation of supranational complex communities, international organizations and multinational corporations, make it impossible to draw the definite line where the national ends and the international begins. Thus, more and more scholars nowadays are starting to talk about the global law where all the legal acts are interconnected and interdependent[117].

Certainly, the European Union, being an important complex international structure, has a great impact on such processes and plays a huge role in the formation of internal policies of Member States. For this reason, scholars are now speaking about the obsoleteness of the concept of sovereignty (at least within the EU) and the impact of globalization on the state sovereign powers. Indeed, economic interdependence, global communications, capital and people mobility have turned sovereignty into a concept that forces states to share their powers and competences with national and supranational institutions in a complex legal structure[118].

Despite economic and legal borders, globalization erases also territorial borders, since free movement of persons has been one of the four pillars of the European single market[119]. Thus, the issue of migration has always been the cornerstone in the EU, since the abolishment of the internal borders would logically facilitate secondary migratory movements within Europe and diminish the state sovereignty in controlling immigration into their territories.

States still tried to preserve their sovereignty in deciding on immigration and asylum issues, which resulted in inclusion of sovereignty and humanitarian clauses into the texts of Schengen Agreement of 1985[120] and Dublin Convention of 1990[121]. This enabled States to get a

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[116] Held, D. 2002. "Law of States, Law of Peoples: Three Models of Sovereignty," Legal Theory Vol.8 (1):1-44. DOI: https://doi.org/10.1017/S1352325202081016

[117] See Anne Peters 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' Leiden Journal of International Law, 19 (2006), pp. 579–610, p. 602.

[118] Kohen Marcelo G. "Is the Notion of Territorial Sovereignty Obsolete?", in: M. A. Pratt and J. A. Brown (eds), Borderlands under Stress, Dordrecht, Kluwer, 2000, pp. 35-47, at 35. Available at: http://intranet.graduateinstitute.ch/files/live/sites/intranet/files/users/admin_students/Prof_Kohen_website/Publications%201/23%20-%20Territorial%20Sovereignty.pdf [accessed 18-03-2020];

[119] The foundations therefor were laid down in the White Paper on the Internal Market: Commission of the European Communities 'White Paper on Completing the Internal Market' [1985] COM(85) 310.

[120] Article 6, European Union, 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 ("Schengen Implementation Agreement"), 19 June 1990. Available at: https://www.refworld.org/docid/3ae6b38a20.html [accessed 18-03-2020]

relief of its obligations regarding the substantive issues for granting asylum, thus leaving those for the State to decide under its national law. Nevertheless, it is undeniable that globalization and irregular migration have severely affected the states' sovereign powers[122]. The transformation of the state sovereignty triggered the establishment of stricter immigration and asylum policies.

As a result of changes, there is also an assumption followed by the CJEU and ECtHR case law that the 'sovereignty clause' under the Dublin Regulation has shifted from the category of discretion to the obligation imposed on the Member states to take charge of the asylum application in case of systemic flaws in the asylum system of the Competent state.

Dublin III Regulation in the Article 3(2) states that: "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter…the determining Member State shall become the Member State responsible[123]". This is the provision under the Dublin III Regulation expressing the obligation of non-refoulement, however, there is one more provision in the Article 17(1) that defines a possibility of the Member state to examine the asylum application, even is that state is not initially responsible for that asylum seeker.

Both the CJEU and the ECtHR divide the obligation to examine the application and the obligation of non-refoulement. The former, however, by the reference to the Article 3(2), while the latter usually applies the Article 17(1) Dublin III Regulation.

Therefore, before exercising its sovereignty, the State has to assess the risk of possibility of inhuman or degrading treatment in the receiving state, after to check whether there is an obligation of non-refoulement might be raised and finally, whether the state other than the responsible one is obliged to examine the asylum application or enjoys a discretion to do that[124]. Usually, the application of sovereignty clause is discretion when the transfer of an asylum seeker would be incompatible with its international obligations and fundamental human rights.

At the same time, legal contours of the sovereignty concept were formed only by the Dublin III Regulation, since the former version contained only the relevant provision under the Article 3(2) establishing a State's discretion to examine the application, while no reference to the

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[121] Article 3(4), Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, OJ C 254, 19.8.1997. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41997A0819(01)&from=EN [accessed 18-03-2020]

[122] Dauvergne, C. 2004. "Sovereignty, Migration and the Rule of Law in Global Times," The Modern Law Review 67(4): 588-615, at 590.

[123] Article 3(2), Dublin III Regulation (supra note 1).

[124] Pergantis, V., 'The 'Sovereignty Clause' of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence? '(2019). Bruno G. C., Fulvio M. Palomino, Di Stefano A., (eds), Migration Issues before International Courts and Tribunals, CNR Edizioni, Rome, 2020, Forthcoming, at 13-14. Available at SSRN: https://ssrn.com/abstract=3476987 [accessed 12-03-2020]

obligation to non-return was present, since the safety presumption at that time allowed automatic transfers within the Dublin system[125].

Such automaticity after a number of rulings establishing human rights violations, had finally led to the M.S.S. case where the ECtHR challenged automatic application of Dublin ruled related to transfers of asylum seekers. The Court delivered the concept of sovereignty clause in the different light, obliging the national authorities of the sending Member State to suspend the transfer where there are substantial grounds existed for believing that an asylum seeker would be exposed through a Dublin transfer to a real risk of inhuman or degrading treatment[126].

Similar conclusion was reached by the CJEU in the *N.S./M.E.* judgement where the Court stressed that no irrebutable presumption of safety could be recognized when the Sending state is aware about the systemic deficiencies in the asylum system in the competent Member state[127]. In addition, no other Member state can send asylum seeker to the state with "systemic deficiencies". At the same time, no reference to the Article 3(2) Dublin II Regulation meant that no obligation of non-refoulement could stem from the application of sovereignty clause.

Even though this conclusion radically changed the perception of the sovereignty clause under the Dublin Regulation at that time and served an example for the current wording of the Article 3(2) in the Dublin III Regulation, many authors argued that no reference to the Article 3(2) by the CJEU and fleeting reference in the M.S.S case obliged States only to examine the application but not to refuse the transfer in general[128]. Thus, even after the M.S.S. decision, the Sending state after establishing the inappropriateness of the Competent State remained free to send the applicant to some other Member State responsible under the Dublin criteria[129].

Currently, these findings are incorporated into the text of Dublin III Regulation, and under the Article 3(2) the obligation of non-refoulement does not automatically give rise to an obligation of the Member state to start examination of the application. Therefore, the state shall continue examining the criteria, and becomes the one responsible for the asylum application only if no other State can be found or if the search takes an unreasonable length of time[130].

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[125] Ibid, p. 16.

[126] M.S.S. v Belgium and Greece, Application No. 30696/09, Judgment of 21 January 2011, paras 358-360.

[127] C-411/10 and C-493/10, N.S./M.E. and others, ECR, 2011, I-13905, paras 82-86.

[128] Morgades-Gil S., "The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses after the Interpretations of the ECtHR and the CJEU?", International Journal of Refugee Law, Volume 27, Issue 3, October 2015, Pages 433–456, at 442. Available at: https://doi.org/10.1093/ijrl/eev034 [accessed 12-03-2020].

[129] Pergantis, V., 'The 'Sovereignty Clause' of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence? '(2019). Bruno G. C., Fulvio M. Palomino, Di Stefano A., (eds), Migration Issues before International Courts and Tribunals, CNR Edizioni, Rome, 2020, Forthcoming p. 17. Available at SSRN: https://ssrn.com/abstract=3476987 [accessed 12-03-2020].

[130] Vicini G., The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?, 2015, The Journal of Legal Studies 8(2): 50-72, p. 68. The imposition of the responsibility has been described as constituting a transformation of the sovereignty clause of Art. 17(1) into a mandatory one.

Moreover, the current Regulation leaves a large margin of discretion to the Member states to interpret discretionary sovereignty clause in the Article 17(1), according to which not initially responsible Member state enjoys discretion whether to take up the asylum application.

Even though, the CJEU case law over the last decade seems to be consistent with regard to the obligation to apply these clauses in the abovementioned cases, the case law is not strictly aligned with regard to the obligation of non-refoulement. Member states tend to apply a restrictive approach with regard to the application of their sovereignty, usually because of the political interest or economic issues that prevent states from increasing the protection.

At the same time, "systemic flaws" defined in the Article 3(2) is not the only criterion that can trigger the obligation of non-refoulement. It can also exist under the circumstances of flagrant violations of other human rights under the Article 4 CFREU and the Article 3 ECHR[131]. Such "additional" obligation of non-refoulement usually arises by the reference to the Article 17(1) of the Dublin III Regulation, which turns into a mandatory in that case and obliges Member state to examine the application and suspend the transfer, even if it was not initially responsible to do so. On the contrary, application of the "systemic flaws" criterion under the Article 3(2) allows further searching for the responsible Member State under the Dublin criteria, creating less severe consequences, comparing to those resulting from the individualized risks[132].

The practical example of application of the Article 17(1) was shown in the *PPU C.K.* case, where the CJEU suspended the transfer because of the psychological state of health of the asylum seeker[133].

The decision to apply Article 17(1) and to examine the request can be delivered by the national competent authorities, since they are under the obligation to eliminate any aggravation of the person's state of health. However, this cannot be considered as an obligation, since the transfer may be just delayed until the applicant's health condition allows the transfer.

In case the improvement is unlikely to happen "in the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned, the requesting Member State may choose to conduct its own examination of the application by making use of the 'discretionary clause' in the Article 17(1) of Regulation no 604/2013[134]". National authorities usually wait for the permitted six months period and after apply the normal

[131] Pergantis, V., 'The 'Sovereignty Clause' of the Dublin Regulations in the Case-Law of the ECtHR and the CJEU: The Mirage of a Jurisprudential Convergence? '(2019). Bruno G. C., Fulvio M. Palomino, Di Stefano A., (eds), Migration Issues before International Courts and Tribunals, CNR Edizioni, Rome, 2020, Forthcoming p. 17-18. Available at SSRN: https://ssrn.com/abstract=3476987 [accessed 12-03-2020].

[132] Hruschka C., Maiani F., "Dublin III Regulation", in Hailbronner K., Thym D.(eds.), EU Immigration and Asylum Law: A Commentary, 2nd ed., München, 2016, pp.1700 at 1478.

[133] CJEU (GC), 16 February 2017, PPU C. K. and Others v. Supreme Court of Republic Slovenia, application case C-578/16, para. 77.

[134] Ibid., paras. 96-97.

rules in Article 29 of the Dublin III Regulation, so that the responsible State is relieved of its obligations to examine the claim and the responsibility is transferred to the requesting State[135].

The decision delivered by the CJEU in *PPU C. K.* case once again proves the intention of the Court to shift to more individualistic approach in order to extend the level of fundamental rights' protection under the Dublin system. Indeed, granting the asylum seeker the right to appeal the transfer on the basis of other than just "systemic flaws" in the asylum procedure or reception conditions has become plausible, including the examination of the application from the perspective of both the asylum seeker and the receiving Member State.

Mentioning of the remedy in question has appeared in the case law of both Strasbourg[136] and Luxembourg[137] Courts, the latter, however, insisted on the necessity of the claim raised by the asylum seeker, thus rejecting the idea of an ex officio assessment[138].

Moreover, in the recent preliminary ruling concerning the effects of "Brexit" the CJEU insisted on leaving the Article 17(1) discretionary even when there is an obligation of non-refoulement, claiming that this article is entirely optional for the Member States and reflects the state's sovereign prerogative to take up the asylum application when granting the international protection[139]. The Court, however, left some room for the applicant to get the protection, challenging the refusal indirectly by insisting on the examination of the legal and factual situation in the Member state[140].

Therefore, it can be concluded that there is no shift in the application of the sovereignty provisions under the Dublin Regulation, even though the Court still imposed a new positive obligation on the national authorities to verify the applicant's situation even beyond the concept of "systemic deficiencies", while issuing the decision of transfer, making it incompatible with the Article 4 of the Charter or Article 3 ECHR. At the same time, application of the non-refoulement obligation under the Article 3(2) does not automatically give rise to an obligation to examine the asylum application. Nevertheless, such an obligation can arise under the Article 17(1) when the test of "individualized risks" is applied.

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[135] Dublin III Regulation Version 2.0 "Transferring asylum claimants into and out of the UK where responsibility for examining an asylum claim lies with the UK or with another EU Member State or Associated State", Home Office Guidance on Dublin III Regulation 18 April 2019,pp.46 at 18. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797216/Dublin-III-regulation-v2.0ext.pdf [accessed 12.02.2020]

[136] See Tarakhel v. Switzerland, Application No. 29217/12, Judgment of 4 November 2014, mentioning "The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person's removal", paras. 103-104.

[137] CJEU, C-578/1616, PPU C. K. and Others v. Supreme Court of Republic Slovenia, February 2017, paras. 75-77

[138] Ibid., para. 94; See also Joined cases C-582/17 and 583/17, Staatssecretaris van Veiligheid en Justitie v H. and R.., Judgment of 2 April 2019, para. 84.

[139] Ibid., paras 58-60.

[140] C-661/17, M.A. et al v The International Protection Appeals Tribunal and Others, Judgment (First Chamber) of 23 January 2019, paras. 78-79.

2.3. Conclusion of bilateral agreements to return asylum seekers to safe third countries

Despite the obligation of non-refoulement, not all returns of asylum seekers, irregular migrants, etc. are necessarily against the law. Returning of third-country nationals who do not meet the conditions for entry, stay or residence in the EU is important for the functioning of the Dublin system and the EU common asylum policy as a whole.

For the implementation of the abovementioned returns the Return Directive 2008/115/EC has been adopted in order to provide common standards and procedures for the Member States to perform returns of migrants following the conclusion of readmission agreements[141]. Such agreements are aimed to regulate the transfer and usually involve two parties: the state of destination and the state of origin from where the individual will be transferred.

During the last 20 years, the EU has concluded readmission agreements with 18 countries[142], readmission clauses frequently appear in other types of agreements like EU partnership, association and cooperation agreements.

In general, bilateral readmission agreements should not be problematic, since most of them contain non-affection clauses, requiring the Parties to comply with the standards provided under the international refugee and human rights instruments. Nevertheless, it will be further shown that their implementation might entail the risk of violation of refugee rights because of the return, since the EU Member States very often conclude agreements with unsafe countries with weak economy or political situation where the torture of asylum seekers, their detention and inhumane reception conditions is a frequent practice.

Therefore, readmission agreements have been severely criticized by international human rights organizations for "placing barriers to entry or forcibly returning asylum-seekers and refugees"[143]. For this reason, several questions arise whether such bilateral agreements comply with both the criteria and safeguards set in Dublin III Regulation and international human rights instruments, and what are the legal consequences of these bilateral agreements in the EU legal system?

EU Member States have developed a strong mechanism of shifting the responsibility for asylum seekers by performing external transfers outside the EU through the Dublin concepts of "safe third country" and "first country of asylum". Nevertheless, formal reciprocity is simply

[141] Return and Readmission, From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019 pp.131-143, at 133 Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[142] European Commission, "Return & readmission". Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en [accessed 07-03-2020].

[143] Ibid, 28.

aimed to regulate the rate of irregular migration, since third countries concerned are usually an influential source of it[144]. Indeed, practical implementation of readmission agreements constitutes a powerful weapon of the Member States to oblige third countries to accept more refugees.

The concept of safe third country is defined in the Article 3 of the Dublin III Regulation and prohibits removing the person who seeks asylum to an intermediary country in which he or she might be subjected to torture or other risk of ill-treatment[145]. This should be applicable both to direct and indirect returns regardless of whether the intermediary country is party to the ECHR or participates in the Dublin system[146]. However, the clause under the Dublin III Regulation does not provide any further definition or explanation of the access to the procedure to examine the asylum application, leaving a wide margin of discretion to decide when the third state is safe enough for the asylum seekers.

The international Courts have provided certain clarification for the States[147], however, no explicit obligation to provide an access to minimum economic, social and cultural rights for irregular migrants in the receiving country or to check whether that country observes fundamental rights is mentioned in the legislation. Even more, the CJEU allows Member States in their relationships with other EU Member states under exceptional circumstances to "presume the observance of the fundamental rights in that Member state[148]".

Therefore, under the EU law still no obligation for the States to collect the data concerning the asylum procedure and reception conditions in the "safe country" before the transfer, send notification about the return and get the diplomatic assurances that the asylum seeker will be granted all the necessary protection there. Such "obligations" are defined only in the case law (mostly by the ECtHR) and depend solely on the goodwill of the Contracting states to cooperate, provide documents and assist in readmission.

Indeed, the whole process of readmission lacks transparency and accountability, thus, there is no guarantee that the readmitted person will be treated differently than any other asylum seeker in that state[149].

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[144] Return and Readmission, From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) Philippe De Bruycker Marie De Somer Jean-Louis De Brouwer, European Policy Centre, December 2019 pp.131-143, at 133 Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[145] Article 3, Dublin III Regulation (supra note 1).

[146] ECtHR, Hirsi Jamaa and Others v. Italy, No. 27765/09, Judgment [GC] of 23 February 2012, para 147.

[147] ECtHR, M.S.S. v. Belgium and Greece, No. 30696/09, Judgment [GC] of 21 January 2011; ECtHR, Hirsi Jamaa and Others v. Italy, No. 27765/09, Judgment [GC] of 23 February 2012, para.156; C-411/10 and C-493/10, N.S./M.E. and others, ECR, 2011, I-13905 referring to the concept of "systemic deficiencies".

[148] CJEU, Opinion 2/23 of the Court 12 December 2014, para 191-192. Available at: http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN [accessed 04-04-2020]

[149] Hurwitz A.G. "The collective responsibility of states to protect refugees" Oxford; New York: Oxford University Press, 2009, pp.350, at 71.

The situation is only worsened when states conclude informal so-called "Administrative arrangements" - informal instruments on operational issues and actions facilitating the readmission of irregular migrants who do not fulfil the conditions for entry, stay or residence in the EU Member State. Considering the content of arrangements, they can be regarded as international treaties in a simplified form, not requiring ratification or the Parliament consent[150]. Moreover, the Dublin III Regulation itself allows the conclusion of such arrangements concerning its practical implementation, in order to facilitate its application and increase its effectiveness[151]. Thus, arrangements are in line with the EU law.

Nevertheless, given the complex structure of the EU and its legal system, such agreements are only allowed outside the areas of the EU exclusive competence that according to the Article 4 of the Treaty of Functioning of the European Union as shared competences and cover, inter alia, the area of freedom, security and justice, which later in the Article 78 of the Treaty is stated to be legal basis for the EU's common asylum policy[152]. Thus, the asylum policy corresponds to the area of shared competences, however, in case of conflict between the EU law and national provisions, the former prevails.

Dublin III Regulation is a document of a direct effect, obliging all the Member states to comply with its provisions unconditionally. The most pressing potential problem that bilateral agreements might entail is the risk of imposing alternative rules beyond the obligations and mechanisms and/or limiting the safeguards established in Dublin III Regulation[153]. Moreover, limiting the scope of the Regulation would automatically mean restricting the access to human rights protection, since the latter is a founding principle of the Dublin system in general.

Among all the readmission agreements concluded between the Member States, by the Member States (or the EU) with third countries, the most prominent are the EU-Turkey readmission agreement[154], Spanish-Moroccan readmission agreement[155] and German-Greek arrangement[156].

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[150] Poularakis S. "The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"? 2018. Available at: https://www.asylumlawdatabase.eu/en/journal/case-administrative-arrangement-between-greece-and-germany-tale-%E2%80%9Cparadublin-activity%E2%80%9D [accessed 07-03-2020]

[151] Article 36, Dublin III Regulation (supra note 1).

[152] Articles 4 and 78, Consolidated version of the Treaty on the Functioning of the European Union Official Journal C 326/49, 26/10/2012 P. 0001 – 0390. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [accessed 09-03-2020].

[153] Poularakis S. "The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"?, 2018. Available at: https://www.asylumlawdatabase.eu/en/journal/case-administrative-arrangement-between-greece-and-germany-tale-%E2%80%9Cparadublin-activity%E2%80%9D [accessed 07-03-2020]

[154] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization OJ L 134, 7.5.2014, p. 3–27. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN [accessed 09-03-2020].

The first one signed in 2014 has invoked a large amount of critics of whether the agreement is legal and compatible with human rights instruments. First of all, there is a doubt that Turkey can and should be viewed as a "safe-third country", considering the human rights track record with cases of closing the borders and killing Syrian refugees without the access to basic human rights[157]. Moreover, only the country with effective asylum procedure can be considered as "safe" and Turkish asylum procedure and its national law clearly does not fit those requirements[158]. This was recognized in the ECtHR case law where the Court accused Turkey of violation of articles 3, 5, 13 of the ECHR due to multiple returns of asylum seekers to their countries of origin, where they might face the risks of persecution and inhumane or degrading treatment[159].

Another issue to consider is that fact that Turkey agreed to re-admit only refugees coming from the territory of EU, imposing limitations on the rights of non-EU refugees, in particular, Syrian asylum seekers who cannot be recognized as refugees in Turkey. They are forced to stay under the "temporary protection status", deprived of the possibility to obtain citizenship, social rights, health care and education[160].

Therefore, the EU-Turkey agreement has many flaws and has been severely criticized as such that violates human rights and supporting the oppression of Syrian refugees at the Syrian-Turkish border.

The conclusion of bilateral agreements can be triggered by many factors as geographical proximity, economic or political incentives of the states, or all of those. This is particularly the case of Spanish-Moroccan, Italian-Egyptian readmission agreements[161]. These third countries

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[155] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the Movement of People, the Transit and the Readmission of Foreigners Who Have Entered Illegally, 1992. Available at: https://therightsangle.files.wordpress.com/2013/12/19920213-spain-morocco-readmission-agreement-eng.pdf [accessed 09-03-2020]; Hallee C, Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement? Belgrade Centre for Security Policy, Journal of Regional Security (2017), 12:1, 27–50, at 31.

[156] Administrative Arrangement between Ministry of migration Policy of the Hellenic Republic and the Federal Ministry of Interior of the Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border, August, 2018. Available at: https://www.frnrw.de/fileadmin/frnrw/media/EU_Asylpolitik/Germany_Greece_Deal_eng.pdf [accessed 12-03-2020]

[157] ECtHR - Abdolkhani and Karimnia v. Turkey, (no. 30471/08), 22 September 2009.

[158] According to the Articles 35 and 38 of the Asylum Procedures Directive (supra note 79).

[159] Ibid.

[160] Akdeniz D, 'EU- Turkey agreement on refugees; assessment of the deal', 2017 Research paper. Available at: https://www.researchgate.net/publication/321110430_EU-_Turkey_agreement_on_refugees_assesment_of_the_deal [accessed 09-03-2020]

[161] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the Movement of People, the Transit and the Readmission of Foreigners Who Have Entered Illegally, 1992. Available at: https://therightsangle.files.wordpress.com/2013/12/19920213-spain-morocco-readmission-agreement-eng.pdf [accessed 09-03-2020]; Cooperation agreement on readmission between the government of the Italian Republic and the government of the Arab Republic of Egypt, 2007. Available at: https://therightsangle.files.wordpress.com/2014/03/20070109-italy-egypt-readmission-agreement-eng.pdf [accessed 10-03-2020]

cannot "a priori" cannot be considered safe for asylum seekers, with inappropriate reception conditions, malfunctioning asylum procedure and unstable economic and political situation. Readmitting people to such countries could result in returns to their countries of origin, collective expulsions and other violations of human rights and international law instruments.

Unfortunately, the cooperation behind the agreement seems to be more important, making third countries to conclude agreements in order to get the lifting of visa requirements, financial and military assistance, border security, etc.

What is really confusing, is how after such a long-lasting wave of critique, Member States still conclude agreements that cause violations of human rights and jeopardize the functioning of the entire Dublin system. The most recent example of such bilateral treaty that might negatively influence of the EU asylum policy is the political arrangement between Germany and Greece in 2018[162]. According to it, Germany will send to Greece any third-country national (except unaccompanied minors) who has already applied for the asylum there or Greece has been registered in the European Asylum Dactyloscopy Database (hereinafter EURODAC) as his/her country of the first entry[163]. The return should be performed within 48 hours after the person has been apprehended, however, Greek authorities retain the right to object to the transfer within the six hours' time limit.

At the same time, no requirement mentioned about the obligation of German authorities to request individual guarantees, so that asylum seekers will not be subjected to torture or other inhume or degrading treatment at the border and that the receiving state will adhere to all the procedural standards regarding each applicant[164].

Thus, the agreement basically sets up an automatic transfer to Greece of applicants that fulfill its requirements, which explicitly violates the principle of non-refoulement and individual examination defined by the ECtHR and the CJEU. Greek asylum procedure has a bad reputation and it was proved true once again during the first transfer following the agreement in question, which has resulted in keeping the asylum seeker in conditions that constitute inhuman and

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[162] Administrative Arrangement between Ministry of migration Policy of the Hellenic Republic and the Federal Ministry of Interior of the Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border, August, 2018. Available at: https://www.frnrw.de/fileadmin/frnrw/media/EU_Asylpolitik/Germany_Greece_Deal_eng.pdf [accessed 12-03-2020]

[163] Hruschka C., The border spell: Dublin arrangements or bilateral agreements? Reflections on the cooperation between Germany and Greece / Spain in the context of control at the German-Austrian border, Max Planck Institute for Social Law and Social Policy, Munich 2019. Available at: https://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/ [accessed 10-03-2020].

[164] Poularakis S. "The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"?, 2018. Available at: https://www.asylumlawdatabase.eu/en/journal/case-administrative-arrangement-between-greece-and-germany-tale-%E2%80%9Cparadublin-activity%E2%80%9D [accessed 07-03-2020].

degrading treatment while a readmission was pending to Turkey[165]. Therefore, such an agreement does not comply with the principle of non-refoulement enshrined in the Article 3 of the ECHR, Article 4 of the Charter and Article 3(2) Dublin III Regulation.

For this reason, the conclusion of the German-Greek agreement constitutes a derogation from the EU law, interfering into the execution of its full purpose and objectives[166].

As far as abovementioned examples of the bilateral readmission agreements are concerned, it can be seen that their main objective is to shift the burden of responsibility for asylum seekers to third countries, designated as safe. Except for the questionable "safety" of the countries, agreements conflict with a principle of non-refoulement and prohibition to transfer people to countries with systemic deficiencies in asylum procedures and reception conditions.

Moreover, procedural rules defined in the agreements do not comply with the legal and procedural safeguards specified in the Dublin III Regulation, creating limitations circumventing and frustrating its direct application, ECHR and the Charter. Thus, the conclusion of bilateral agreements can result in the manifest violations of the rights of asylum seekers and refugees trapped in the repression web between the Contracting Parties, which is called a readmission.

Although readmission agreements seem to be a real solution for the European states to share responsibility, still legislative and policy measures should be undertaken for their better regulation. Among others, are the strengthening of the fundamental human rights safeguards, preference of the voluntary departure instead of forced transfers, confirming the safety of the third state and constant update of the applicant's situation in that country.

Overall, if the Dublin system is so easy to circumvent, no powerful EU Member State will be interested in reforming it. Bilateral readmission agreements might deprive other states the possibility of positive revision of the Dublin III Regulation.

[165] Bru H., Aikaterini A., and Heini H. "The Circumvention of the Dublin III Regulation through the Use of Bilateral Agreements to Return Asylum Seekers to Other Member States." 2019. Ghent University, Faculty of law and criminology, p.28, at 14. Available at: https://www.asylumlawdatabase.eu/en/content/circumvention-dublin-iii-regulation-through-use-bilateral-agreements-return-asylum-seekers [accessed 01-03-2020].
[166] Ibid..

3. DUBLIN IV PROPOSAL - REVIVIFICATION OR THE LAST CHANCE OF THE DUBLIN SYSTEM?

3.1. Dublin IV Proposal in Light of the Duty of Solidarity of EU Member States

In May 2016, the European Commission presented a draft proposal of Dublin IV Regulation to make the CEAS more transparent and effective[167]. Under the reform will be put not only the Dublin III Regulation, but also the recast of the EURODAC Regulation, a proposal for establishing a European Union Agency for Asylum, as well as the reform of the Asylum Procedures and Qualification Directives, and of the Reception Conditions Directive[168].

The need for reforms of the Dublin system as an essential part of CEAS was triggered by the intense migratory flows in 2015 and refugee crisis that showed the complete inefficiency of the current system in providing effective mechanisms of protection and dealing with massive influx of refugees.

The problem, however, is not the number of asylum seekers arriving to the EU, but the lack of solidarity between the member states, inefficient legislative framework of asylum regulation and poor implementation of human rights within the asylum policy[169].

Therefore, the Commission in the Proposal for the Dublin IV Regulation has been focused on creating the system based on solidarity, fairness and burden-sharing unlike being previously keen on allocation of responsibility and providing an access to international protection[170]. Therefore, the priorities have obviously changed in the fourth generation of Dublin, however, the question remains whether this new improved solidarity-based Dublin will favor the position of asylum seekers or continue benefitting the Member states, granting them a wide margin of discretion to decide upon transfers?

Solidarity is one of the basic EU values that determine EU policy, both internal and external. Solidarity is mentioned when it comes to the shortage of energy, products supply,

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[167] European Commission. Country responsible for asylum application (Dublin). Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en [accessed 15-03-2020]

[168] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 3 December 2008, COM(2008) 820 final, at p. 2-3. Available at: https://www.refworld.org/docid/493e8e3a2.html [accessed 07-03-2019].

[169] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 89. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[170] Evaluation of the Dublin III Regulation, Final Report, DG Migration and Home Affairs, 4 December 2015, p. 17. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf [accessed 16-03-2020]

terrorism and environmental problems[171]. States invoke solidarity while concluding international Treaties, however, none of them gives a full definition of the solidarity, which gives discretion to the States to define it in national policies[172]. This is conditioned by the sole concept of the "spirit of solidarity" that rejects the possibility of its legal codification and approves only specific measures that are taken in line with the principle and following the legal procedure[173].

The increased attention to the duty of solidarity within the EU in asylum sphere was initially paid in 2015 when the European Council enacted two provisional measures to cope with the situation in Italy and Greece[174]. Both of them were based on the Article 78(3) and Article 80 of TFEU that empower the Council to adopt provisional measures if "one or more Member states are confronted by an emergency situation characterized by a sudden inflow of nationals of third countries", in line with the "principle of solidarity and fair sharing of responsibilities".

The CJEU reflected on the principle of solidarity in the Slovakian-Hungarian case in 2017[175], where the Court specified that the "solidarity' imposes an obligation on the EU Member States to act for the benefit of other Member States even when such actions are not in their own interest. Thus, the Court obliged all Member States to share the burden put on states in crisis, even if that does not comply with their own national policies[176]. This shows a good example of changing roles when a principle that seemed to be merely a non-compulsory source of policy inspiration became a constitutional paradigm, which can limit the state's sovereignty, so to implement the EU asylum and migration policy.

Within the Dublin III Regulation, the model of solidarity is quite state-centered. The Regulation poses challenges on asylum seekers in getting an asylum by introducing an inefficient mechanism of allocation of responsibility that considers asylum procedure from the perspective of the state and not from the affected individuals. This is confirmed in the Preamble to Dublin III that describes the system as aimed to enhance mutual trust and cooperation within the Member states that along with solidarity constitute a pivotal element of the CEAS functioning[177].

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[171] Articles 122(1), 222, 194 respectively, Consolidated version of the Treaty on the Functioning of the European Union Official Journal C 326/49, 26/10/2012 P. 0001 – 0390. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [accessed 09-03-2020].

[172] Goldner Lang I., The EU Financial and Migration Crises – Many Facets of EU Solidarity, in Biondi A., Dagilyte, E., Küçük, E. (eds.), Solidarity in EU Law: Legal Principle in the Making, Edward Elgar Publishing, 2018, pp. 133-160 at 136. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3110544 [accessed 16-03-2020]

[173] Daniela Obradovic, Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy, European Law Blog, 2 October 2017. Available at: https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/ [accessed 16-03-2020]

[174] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJL 248/80 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1601&from=EN [accessed 16-03-2020]

[175] Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the EU, 2017 para. 291.

[176] Ibid., 329.

[177] Recital 22, Dublin IV Regulation Proposal (supra note 168).

The ineffectiveness of the current mechanism was shown in 2016 when four states, namely Germany, Italy, France and Greece received 80% of all asylum applications that were submitted in Europe[178]. Moreover, around 70% of all agreed transfers were not implemented, leaving individuals without a possibility to get a definite outcome, which in addition generates many 'extra costs' such as the direct financial and administrative costs of Dublin procedures, for delays of transfers, costs for the hardship caused to applicants and their families, etc.[179].

Indeed, the Dublin III Regulation has been under a long-standing critique in the academic circles considered as an instrument that "fights" for efficiency rather than the protection of asylum seekers' rights[180].

The traditional approach to "burden-sharing" involved two key players: the EU and Member states, while the position of the asylum seeker was not taken into account. Usually the concept of solidarity in the European Asylum law is understood as the burden-sharing concept that protects national systems both legally and financially. Unfortunately, currently there is no workable system that would be able to handle with massive flows of asylum seekers, therefore the implementation of solidarity is usually performed through a fair budget distribution and cost-sharing, joint EU funding, 'sharing' refugees in the relocation system or operational activities at the EU level[181].

However, no system of responsibility allocation can function correctly if there is a huge gap in alignment of reception and protection practices between the members of that system. Such disparities are extremely destructive for the functioning of the CEAS, since they undermine the mutual trust and support irregular movements. Therefore, it is crucial to provide solidarity schemes that can be effective also in the times of crisis and only then introduce corrective allocation mechanisms.

Nevertheless, what is definitely known is that the whole mechanism of responsibility allocation should be amended. As a result, a few different methods have been introduced by the

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[178] Eurostat News Release, 'Asylum in the EU Member States' (2017), at p. 2. Available at: https://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1 [accessed 17-03-2020]

[179] Maiani F., "Responsibility allocation and solidarity" From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 103-118, at 106. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[180] Lenart L., 'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Utrecht Journal of International and European Law, 28(75), 2012, pp.4–19, at 7. DOI: http://doi.org/10.5334/ujiel.bd; Mitsilegas V., 'Solidarity Beyond the State in Europe's Common European Asylum System', E-International Relations ISSN 2053-8626, 2018, pp.1-10, at 2. Available at: https://www.e-ir.info/2018/08/27/solidarity-beyond-the-state-in-europes-common-european-asylum-system/ [accessed 18-03-2020]

[181] Goldner Lang I., The EU Financial and Migration Crises – Many Facets of EU Solidarity, in Biondi A., Dagilyte, E., Küçük, E. (eds.), Solidarity in EU Law: Legal Principle in the Making, Edward Elgar Publishing, 2018, pp. 133-160 at 145. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3110544 [accessed 16-03-2020]

European Commission in the Dublin IV Proposal[182], by the European Parliament[183] and the one offered by the scholarship.

The traditional Dublin approach, reinforced in the Dublin IV proposal obliges asylum seekers who "entered irregularly to into the territory of the Member States, to file an application in the Member State of the first entry"[184]. Therefore, the Commission makes frontline Member states responsible for preventing unjustified secondary movements of asylum seekers within the territory of EU.

This, however, puts a disproportionate burden both real and financial on the states located at the Union's external borders and certainly does not comply with the Article 80 TFEU[185]. Basically, Dublin IV Proposal turns those Member states into the "gatekeepers" of the CEAS, obliging them to identifying the applicants, register their claims, carry out admissibility screening, and taking responsibility for inadmissible applications, therefore dealing with a sizeable share of the returns of rejected asylum seekers[186].

The criterion of "irregular entry" has been considered as a potential threat to human rights protection and installment of solidarity, however, the Proposal has even exacerbated it by imposing a portion of tasks on the Member states at the EU borders. The amendment might make them reluctant even to register the asylum applications, even though the Proposal provides a possibility to invoke a corrective allocation mechanism where the Member state works above 150 % of its capacity level[187]. This moment is defined as a disproportionate asylum pressure and the figure is referred as a reference key.

Thus, when a State works the reference key applies and all further asylum applications are being sent to other less busy Member states, however, the first state will still be responsible for admissibility checks. Capacity level is calculated with regard to the country's population, territorial size and Gross Domestic Product, since these are objective criteria that should be taken into account while calculating the pressure that the Member State has been put under.

Even though this mechanism might release some states that are in a risk of migration crisis of certain burden and involve all countries into participation in CEAS, the threshold set in

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[182] Chapter VII, Dublin IV Regulation Proposal (supra note 168).
[183] Report on the proposal for a regulation of the European Parliament A8-0345/2017, 6 November. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2017-0345_EN.html#title1 [accessed 29-03-2020]
[184] Article 4, Dublin IV Regulation Proposal (supra note 171).
[185] Maiani F., "Responsibility allocation and solidarity" From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 103-118, at 109. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]
[186] Maiani, F. "The Reform of the Dublin III Regulation", Study for the European Parliament LIBE Committee, June. 2016, pp.72 at 36 Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf [accessed 09-04-2020]
[187] See Article 35, Dublin IV Regulation Proposal (supra note 168).

the Proposal is disproportionately high and would be very difficult (if not impossible) to activate[188].

Although the Draft Proposal provides a corrective allocation mechanism, on which overwhelmed Member States could rely, the measure has been criticized as too difficult to activate.

Therefore, the amendment might diminish practical usefulness of the Regulation. ECRE in its comments on the Commission Proposal for a Dublin IV Regulation characterized the corrective allocation mechanism as such that "unjustifiably exacerbates inequalities and unfairness in treatment between asylum systems by applying a selective logic to reception capacity"[189].

Indeed, the mechanism does not take into account the reception capacity of some Member states that without a sufficient legal and financial back up cannot normally work even to their full capacity (100%). Therefore, the threshold of 150% might be detrimental and lead to human rights violations like in case with Italy and Greece that could have received more asylum applicants, however their reception systems were collapsed and could not have provided adequate protection even to a lower number of asylum seekers.

One can also regard the implementation of this threshold as something conditioning the application of solidarity concept, making it applicable only in case of an emergency. This is definitely not in line with the Article 80 TFEU that presumes solidarity for all Member states that will be applicable at all times and not just in crisis. At the same time, since protection costs are usually borne by national budgets, the proposed system could only be accepted in case all costs would be fairly shared between all the Member states.

No system can function without a full respect for fundamental rights and obviously, an adoption of the fully automatic allocation mechanism would be against this principle. The new mechanism may cause human rights problems by creating a situation when an asylum seeker is being transferred throughout the EU for some time without a possibility to protect his rights. Thus, an asylum seeker has a family in a Member state other than a "Member State of allocation" and he will firstly be transferred from the state of stay to the state of allocation and after to the state where his/her family is. Therefore, the new automated system with its "reactive" rather than "proactive" attitude[190] may trigger human rights violations due to repeated transfers and delays.

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[188] Opinion of the European Committee of the Regions — Reform of the Common European Asylum System OJ C 185, 9.6.2017, p. 91–104, at 98. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016AR3267&from=GA [accessed 02-05-2020]

[189] ECRE, Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 34. Available at: https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf [accessed 18-03-2020]

[190] Wagner M., et al., 'The Implementation of the Common European Asylum System', European Parliament, Directorate General for Internal Policies, 2016, pp. 1-128, at 51. Available at:

Similarly to the Commission, the problem of burden-sharing was raised by the European Parliament, however, the latter offered a completely different approach where instead of an 'irregular entry' only 'real (or meaningful) links' criterion would be taken into account during the determination of the responsible Member state[191]. At the same time, it is worth mentioning that this amendment would not in any way undermine the ordinary rules on family reunification that is currently present in the Regulation, since the criterion is introduced as an additional to family reunification.

This model is more focused on the integrational aspects of the applicants and to fully realize 'solidarity and fair sharing' in the CEAS through the permanent and mandatory transferring to the least burdened states[192]. Indeed, this system will definitely serve the preservation of human rights, limiting unjustified transfers of people that may trigger chain refoulement or human rights violations, specifically the Article 3 ECHR that may result in putting an individual in the situation of torture or other forms of ill-treatment.

Naturally, giving applicants a possibility to choose would make the system too attractive and stimulate people to come and seek for an asylum, thus overloading the system. Moreover, this would create an unofficial list of "most desirable" and "least desirable" states among the applicants and concentrate responsibilities in a few states, being against the solidarity concept.

Therefore, effective decision advocated by many scholars would be to give the applicants "a reasonable range of options" [193] that would include a list of countries according to the "links" of each applicant, thus motivating them to apply for protection in one of those countries, and preventing secondary movements. Moreover, the limitation of "free choice" would unload the over-burdened states by suggesting the applicants without a clear "real link" to select a state from the list of the least-burdened[194].

The system is called "Dublin minus", being simplified without the criteria based on documentation, residence and entry. However, it is also likely to bring nearly identical results as

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https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU(2016)556953_EN.pdf [accessed 19-03-2020]

[191] Amendment to the Article 19(2) Report on the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270 – C8-0173/2016 – 2016/0133(COD)), A8-0345/2017, 6.11.2017. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2017-0345_EN.html#title1 [accessed 29-03-2020]

[192] Maiani F., "Responsibility allocation and solidarity" From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 103-118, at 110. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[193] European Parliament Enhancing the Common European Asylum System and Alternatives to Dublin; Study written by Guild, E; Costello, C; Garlick, M; Moreno-Lax, V; Carrera, S for the LIBE Committee, 2015, p.56. Available at: http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_STU(2015)519234 [accessed 04-03-2020]

[194] Ibid., 113.

the current Dublin system, leaving the unfair distribution, incentives to circumvent the system, 'mismatches' between applicants and the responsible states largely unchanged[195].

These problems could be only solved through the fundamental reforms and creation of mechanisms that would fill in all the 'implementation gaps' in CEAS and make all the Member states equally attractive to asylum seekers without systemic flaws and human rights violations.

One more amendment that also jeopardizes the human rights protection is the introduction of the buy-out option allowing the Member States (obviously rich ones) to declare themselves unavailable as Member States of allocation for 12 months if the pay a 'solidarity contribution' of 250,000 euros for each application, which would have been allocated to them[196].

Such discretion is severely criticized by ECRE as such that allows avoiding any meaningful engagement with the obligations under the CEAS through financial compensation[197].

Obviously, except solidarity issues, the amendment effects the implementation of human rights protection, since exclusion of certain states from the allocation mechanism might lead to the obstruction of family reunification or cause chain refoulement, thus putting a person in risk of torture or other forms of ill-treatment.

This can also be regarded as a discrimination of poorer states that, besides having "systemic flaws" in asylum systems and reception conditions have to cope with more asylum applications, because some states refused to participate. Such discretion can generally question the necessity of the Union existence, since states can opt-out from the obligations they "do not like", while continuing to consume all the benefits of cooperation. Therefore, it is reasonable to delete the Article 37 and Recital 35 from the Proposal and not to negotiate on them at all.

Instead of introduction of this amendment, the distribution of the EU budget should be considered in order to promote solidarity and better react to the needs of the Member states, since the reasons why Member states avoid responsibility is an improper funding that covers only minor expenses, forcing the states to reject applications or not to register them at all[198].

It is widely suggested to enhance the concept of solidarity and fair distribution through the creation of the European centralized fund that will be in charge of collecting and allocating the funds to the states in need and control their fair distribution. Moreover, solidarity can be promoted through the intervention of agencies such as the European Border and Coast Guard

[195] Ibid., 112.
[196] Recitals 35, 37, Dublin IV Regulation Proposal (supra note 168).
[197] ECRE, Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 37. Available at: https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf [accessed 18-03-2020]
[198] Goldner Lang I., 'Financial Framework' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, at 17 Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

(EBCG) and the European Asylum Support Office (EASO)[199]. With regard to operation during crises, the codification of the EASO's operational activities in Greece and Italy on processing and planning support to member states during the times of crisis should be taken into account[200].

Such EU "supervisors" are more likely to guarantee the effectiveness of the asylum procedure and contribute to the improvement of fundamental rights considerations due to the close and direct interaction with individual migrants and asylum seekers, therefore, their experiences would be essential to analyze before proposing any changes to the system.

After the analysis provided, it can be concluded that the EU concept of solidarity and a new allocation mechanisms are aimed to limit the pressure on Member States, having a huge political echo behind. Such state-centeredness and securitization, however, does not take into account the interests and rights of people, namely the interests of third country nationals that are not included into the solidarity concept[201]. Therefore, the approach should be switched to a "refugee-centered" with the respect to human rights and rejection of the 'automatic' allocation mechanism.

Unfortunately, there is no effective system in the EU that can handle massive flows of asylum seekers, thus, introduction of workable solidarity mechanisms are necessary. The main challenge is a long-standing "sharing" of people instead of creating the effective mechanism of sharing the funding and transfer people only in case it is really justified. Moreover, it is important to develop a unified and unconditional definition of solidarity that would be more understood as an international collective responsibility rather than an internal problem[202].

Attraction of agencies, adoption of new effective allocation mechanisms might simply be unreachable today; however, the solutions are urgently needed. Therefore, it is suggested to ensure a better implementation of the current CEAS legislation based on solidarity and fair sharing and focus on analyzing the experiences of handling massive flaws of refugees rather inventing new practices that might give positive results in future.

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[199] Tsourdi E., 'EU agencies' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, at 34 Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[200] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 92. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[201] Mitsilegas V., 'Solidarity Beyond the State in Europe's Common European Asylum System', E-International Relations ISSN 2053-8626, 2018, pp.1-10, at 2. Available at: https://www.e-ir.info/2018/08/27/solidarity-beyond-the-state-in-europes-common-european-asylum-system/ [accessed 18-03-2020]

[202] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 92. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

3.2. The concept of safe third country under the Dublin IV Proposal

The question of ensuring the fundamental rights of refugees and asylum-seekers, the Dublin Regulation discusses also through the rules on the safe third country concept. The new draft Proposal on Dublin IV Regulation besides solidarity and financial contributions of the Member States also concentrates on shifting responsibility to the state of first entry, safe countries of origin, and safe third countries that will remain in force within the Union.

The major change was introduced regarding the application of an inadmissibility procedure, since the Article 3.3 of Dublin IV Proposal obliged the Member states to check whether the third country is really safe for the applicant before deciding to send the person to that country, citing the rules and safeguards laid down in Articles 33(2)(b)-(c) and 31(8) of Directive 2013/32/EU[203].

Therefore, any Member state is empowered to declare any application inadmissible based on four criteria:

1. First country of asylum
2. Safe third country
3. Safe country of origin
4. Security risk

These modifications are purposed to prevent all the applicants with inadmissible claims who are unlikely to be in need of international protection or those who are considered as threat the national security or public order of the Member state[204].

The "first country of asylum" means the non-EU state that has granted the asylum seeker a refugee status prior he/she came to the EU. The "country of origin" refers to the country of nationality of the asylum seeker. The check of "safe country of origin" and "security risk" refers to accelerated procedures that are separate from two others under the Articles 3.3.b and 40 Dublin IV Regulation Proposal.

With regard to the criterion of "security risk" that is introduced as a ground for admissibility check of the asylum application, its application already on this level causes certain questions whether the amendment is compatible with the 1951 Refugee Convention[205].

The Convention indeed establishes that certain refugees may not benefit from international protection, because of the security concerns that countries adopt to protect themselves. However, according to the Convention, so-called Exclusion Clauses defined in the

[203] Asylum Procedures Directive (supra note 79)
[204] Recital 17, Dublin IV Regulation Proposal (supra note 168).
[205] UN High Commissioner for Refugees (UNHCR), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 2011. Available at: https://www.refworld.org/docid/4ec4a7f02.html [accessed 23-04-2020]

Article 1F Refugee Convention should be applied only after the proper application of the Inclusion clauses. In other words, at first it is necessary to establish whether a person meets all the requirements of refugee definition in the Article 1A Refugee Convention, and then to analyze whether the person deserves international protection.

From the wording of the Article 33 Refugee Convention, it is clear that the security concerns as a ground for exclusion is rather an exception and can only be invoked in exceptional circumstances, therefore, application of Exclusion clauses on a general basis before the examination the asylum application in substance would not be compatible with the 1951 Refugee Convention[206].

Thus, frequent application of security consideration may undermine the human rights protection and cause violation of the principle of non-refoulement by sending an individual to the situation of torture.

The amendment contained in the Article 3.3 of the Draft Proposal, obliging the Sending State to examine whether the third country is safe for the applicant pursuant to the Article 33(2) letters b) and c) of Directive 2013/32/EU before deciding to transfer the applicant to that country[207] might seem progressive. Indeed, the practice of the CJEU and the ECtHR following the application of both the Dublin II[208] and Dublin III Regulations[209] has finally been implemented into the legislation.

At the same time, the concept of safe third country still lack further clarification and the determination criteria, that might result into sending asylum seekers back to life-threatening conditions without considering individual circumstances. The legislator leaves the same standard of prohibition to expel when "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the CFREU[210]".

The conditions of systemic flaws are left untouched and are interpreted in a manner that is not fully compatible with well-established human rights standards. Being based on mutual

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[206] Murillo, J. C.. The legitimate security interests of the State and international refugee protection. Sur, Rev. int. direitos human, Vol.6, N.10, 2009, pp.120-137, at 121. Available at: https://www.scielo.br/pdf/sur/v6n10/en_a07v6n10.pdf [accessed 02-05-2020]

[207] Article 3.3 (a), Dublin IV Proposal (supra note 168).

[208] N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform para. 105, stated that "the obligation to respect fundamental rights while transferring precludes the application of a presumption that the MS, which Dublin Regulation indicates as responsible actually observes fundamental rights of the EU".

[209] CJEU, C-695/15 Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal, Judgement of 17 March 2016, para.53, stating that the MS had the right to send the applicant to the safe third country only after that Member State has accepted that it is responsible,.

[210] Article 3.2, Dublin III Regulation (supra note 1).

trust between the members to the Refugee Convention and their adherence to the article 33, "safe third country" concept undermines the functioning of the system of international protection and contributes to the human rights violation. As far as the international case law is concerned, the fact of being an EU Member does not guarantee a full and sufficient protection[211], since there is still no obligation for the sending state to request all the information about the asylum procedure and reception conditions in the safe third country. Such a drawback may result in the risk of chain refoulement and violation of the article 3 ECHR when presumption of safety does not correspond with de facto safety[212].

Namely, in cases N.S. and M.E. before the CJEU and M.S.S. v Belgium and Greece decided by the ECtHR asylum seekers were returned to Member states systemic deficiencies in their asylum systems. Both Courts concluded that no irrebuttable presumption of safety can be applied under the Dublin Regulation and no transfer is possible unless the responsible Member state observes fundamental rights enshrined in the Article 4 of the CFREU and Article 3 ECHR[213]. After such decisions delivered by the Courts no similar problems appeared until 2015 case of *Shiraz Baig Mirza*. In this case, the CJEU chose to ignore the risk of chain refoulement and subsequent violation of the prohibition of torture by not requiring the sending Member State to be informed of the practice in the receiving Member State of sending applicants to safe third countries[214]. Such an approach of Dublin IV Regulation conflict with the well-established human rights standards and the practice of the ECtHR in N.S. and M.E or M.S.S. cases, leaving alone the provision of necessary safeguards that are also missing.

Despite not improving the concept of safe third country, there have been used the 'sufficient protection' concept by the recast Procedures Directive[215]. However, no clear definitions has been provided that might result into a number of refoulements throughout the EU leading to violations of human rights defined in the Article 4 CFREU and Article 3 ECHR.

Giving to the unique structure of the EU, it is usually presumed that that the level of protection is measured with regard to the level of protection in the EU, however, the protection

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[211] CJEU, C-695/15 Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal, Judgement of 17 March 2016, para. 53, despite the uncertainties the CJEU found recognition of Serbia as a "safe third country" and the return acceptable; at the same time in the M.S.S. case v. Belgium and Greece, the ECtHR found the transfer of the asylum seeker to Greece contrary to the principle of non-refoulement, owing to poor reception conditions and insufficient procedural safeguards in Greece, paras. 263 f, 321 f.

[212] Pokhodun Y., 'Expulsion of asylum seekers under the Dublin System as the ground of violation of Article 3 ECHR', EU Justice and Home Affairs Research Papers in the Context of Migration and Asylum Law, Ed. by Bence Kis Kelemen and Ágoston Mohay, 2019, p.147-158, at 156.

[213] Lukić Radović M, Čučković B. 'Dublin IV Regulation, the Solidarity Principle and Protection of Human Rights –Step(S) Forward Or Backward?' EU and Comparative Law Issues and Challenges Series – Issue 2, pp.10-30, at 17. Available at: https://hrcak.srce.hr/ojs/index.php/eclic/article/view/7097/4589 [accessed 29-04-2020]

[214] Case C-695/15 PPU Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal [2016], paras. 53-63.

[215] Recital 43, Asylum Procedures Directive (supra note 79)

within the EU varies greatly. Member states show different practices of accepting and treating asylum seekers due to the economic and political position.

It is still unclear what level of protection it is needed in order for the third country be considered safe and due to the criterion of the "sufficient protection" people might potentially be sent to countries where there is no effective protection[216]. Moreover, application of the "sufficient protection" criterion both to the "first country of asylum" and "safe third country" does not seem to be right, as far as these two concepts have different legal meaning and their unification leads to lowering of protection in the safe third country. First country of asylum' concept applies to persons who have obtained protection status, whereas 'safe third country' concept applies to those who were not granted protection.

Therefore, it is essential to provide a clear definition of the concept of 'sufficient protection' in connection to the principle of non-refoulement and enforce it with the help of asylum legislation, so not to allow the Member states to determine themselves whether an asylum seeker enjoyed sufficient level protection in a third country of transit[217].

The introduction of pre-Dublin checks was critically met, since they pose a danger for human rights and might encourage the application of coercive measures by the states and undermine the efficiency of the asylum procedure.

Member states will be empowered to dismiss the asylum claim on a generalized safe third-country basis, since the asylum seeker in question travelled through a "safe" non-EU Member State before reaching EU jurisdiction[218]. Especially, it is dangerous for individuals coming from Turkey and Libya, which have a long-standing practice of chain returns and human rights violations, but to which asylum-seekers can be returned through readmission agreements concluded with the Union.

Leaving alone the additional costs and work, the EU by sending asylum seekers to countries outside the Union, expands its extraterritorial jurisdiction, which, however, does not foresee the effective control over the third country and, thus, the EU power of making promises about adequate levels of safety there is questionable[219].

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[216] The CEAS Reform Package: The Death of Asylum by a Thousand Cuts? Jesuit Refugee Service Europe Working papers No.6, 2017, at 34. Available at: https://jrseurope.org/assets/Regions/EUR/media/files/JRS-Europe-CEASreformWorkingPaper6.pdf [accessed 25-03-2020]

[217] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 98. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[218] Mortenlind J. "Dublin IV -Making transfers (im)possible. An analysis of human rights concerns in the envisioned Dublin IV Regulation", Master thesis, Lund University, Faculty of Law, 2018, at 69. Available at: https://lup.lub.lu.se/student-papers/search/publication/8965465 [accessed 25-03-2020]

[219] Costello C., The Human Rights of Migrants and Refugees in European Law (1 edn, OUP 2015) 277.

In the introduced mechanism of pre-Dublin checks, pose a danger to the compliance with the principle of non-refoulement, since admissibility checks will obviously take place before the substantive claim examination, a little chance of establishing the refoulement. As a result, the asylum seekers whose applications were considered inadmissible will not be able to get any substantial procedural safeguards by relying on the principle of non-refoulement[220].

Even though there might be a chance to appeal, this amendment would greatly influence the access of the applicant to an effective remedy, since the chances for its success are small and depend on the evidence in each case.

Nevertheless, even if the safe third-country concept and first country of asylum were properly applied, they would still be incompatible with the fundamental human rights, because of the mandatory application. The whole procedure will be based on the automatic decision-making, which would entail the risk of non-individual assessment without a prior analysis of family considerations, asylum seekers with special needs, or protection of unaccompanied minors.

Some amendments were introduced by the Dublin IV Proposal regarding the protection of the rights of unaccompanied minors through a more capacious definition of the best interests of the child and introduction of a mechanism of preserving those interests in case of return of the minor[221]. Under the revised Recital 20 the Member state where the minor lodged an application for the first time would be considered a responsible one, unless it is proved that this is not in the child's best interests. The proposed procedure would make the determination of the responsible Member state more precise and ensure the effective application of the Reception Conditions Directive.

However, the Proposal does not focus on unaccompanied minors or vulnerable asylum seekers with serious health problems, leaving them without any special guarantees or procedure under the new system. Therefore, "systemic flaws" test provided in Article 3 of the Dublin IV Proposal remains the only safeguard for such categories of asylum seekers, not considering the 'individual circumstances' test, despite its wide recognition in the ECtHR case-law.

The European Economic and Social Committee consider the requirement of individual examination as an obstacle for the establishment of mandatory admissibility checks. The individual examination is additionally stressed in the Article 10(3) of the Asylum Procedures Directive requiring an objective and impartial assessment of the claim for international protection before returning an applicant back to the state of first entry or to the safe third

[220] Wray H., 'Dublin Regulation IV and the Demise of Due Process', Immigration, Asylum and Nationality Law (J.I.A.N.L.) Vol 31, no. 1 (2017) 34, 37.
[221] See p. 15, Dublin IV Regulation Proposal (supra note 168).

country[222]. Therefore, sticking to the "systemic flaws" test could be regarded not only against the ECtHR case law but also against the EU legislative instruments.

The United Nations High Commissioner for Refugees (hereinafter UNHCR) and ECRE are also against the mandatory application of safe country concepts in admissibility procedures, since they lack individual assessment. In addition, ECRE raises a question of putting a disproportionate burden on the external EU borders due to the imposition of the obligation to process all asylum applications falling under the "first country of asylum", "safe third-country" or "safe country of origin" categories[223]. Despite the negative effect on solidarity concept, mandatory admissibility checks would also lead to the responsibility shift to the so-called "gatekeepers" or states with war regions or conflict zones[224], which would largely undermine the protection of human rights within the EU and limit the access to effective remedies.

Despite all the progressive novelties presented in the Dublin IV Proposal, its provisions regarding the prohibition of torture still does not reflect the sufficient human rights standards. The Commission's proposed amendment in the Article 3(3) regarding admissibility check prior to the determination of the responsible Member State may compromise the procedural guarantees and safeguards for asylum seekers defined in the 1951 Refugee Convention and international human rights instruments. Such a procedure would result into a non-individual assessment of the asylum application, place risks to family reunification and the best interest of the child. "Dublin transfers" might continue applying the problematic safe third country concept without any clarification and guarantees of getting an effective remedy in a country where the asylum seeker will be sent after the enforcement of pre-Dublin checks.

Therefore, in case of accepting the mandatory admissibility check mechanism it would be essential to provide the guidelines of determination of safe third countries taking into account all the flaws and previous failures. In addition, all the transfers before and after should be monitored by the European asylum agencies like EASO.

[222] Article 10(3), Asylum Procedures Directive (supra note 79)
[223]ECRE, Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 2. Available at: https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf [accessed 18-03-2020]
[224] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 98. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

3.3. The preservation of the concept of "systemic flaws" as a flaw of the Dublin IV Proposal.

Despite all the criticism, hitting the approach of "systemic flaws" under the Dublin III Regulation in both the case law and the scholarship it is still deeply rooted into the practice of the Member states and EU institutions. Apparently, this was the reason why the authors of the Dublin IV Proposal decided to leave it in the Article 3(2), forbidding the sending Member state to transfer the applicant to the "Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State[225]".

Therefore, the requirement of systemic flaws remains a threshold for the suspension of the transfer to the State dangerous for the applicant. It is understandable that the Commission was guided by the CJEU decisions issued before the 2016, focusing on the general situation in the receiving state and its asylum system. Therefore, the Commission sticks to the approach set by the CJEU in the N.S./M.E. judgement and the restrictive interpretation of the right to dignity in the Article 4 of the CFREU[226]. At the same time, the approaches that have already been developed by the ECtHR on Article 3 ECHR[227] with the prevailing individualistic approach[228] were not taken into account.

The decision to keep the criterion of "systemic flaws" in the Dublin IV Regulation as the only one able to suspend the transfer contributes to preserving incompliances with the human rights standards.

Using "systemic flaws" as a precondition for hampering the transfers in the meaning that was predominant at the time the Commission offered a Proposal, implying referring to "major operational problems"[229] and considering them as the "only way" for the asylum seeker to challenge the Dublin transfer[230]. Such an approach would imply the restrictive approach to guaranteeing the observance of non-refoulement principle defined in human rights law.

As the time goes by, naturally, the approaches are subjected to modifications, therefore, both the CJEU and the ECtHR that have gone beyond the criterion of "systemic flaws",

[225] See art.3(2), Dublin IV Regulation Proposal (supra note 168).
[226] C-411/10 and C-493/10, N.S./M.E. and others, Judgement of 21 December 2011, paras 50-53; C-394/12, Abdullahi, Judgment of 10 December 2013, paras. 60-62.
[227] C-661/17, M.A. et al v The International Protection Appeals Tribunal and Others, Judgment (First Chamber) of 23 January 2019. See also the reference to Recitals 32 and 39 of the Dublin III Regulation.
[228] Tarakhel v. Switzerland, Application No. 29217/12, Judgment of 4 November 2014.
[229] C-411/10 and C-493/10, N.S./M.E. and others, Judgement of 21 December 2011, para. 81.
[230] C-394/12, Abdullahi, Judgment of 10 December 2013, paras. 60-62.

recognizing deficiencies of a general nature[231] and considering health condition as a ground to suspend the transfer[232], are shifting to more individualistic approach.

Therefore, the criterion does not fully comply with the nowadays reality, cannot be used in the meaning valid in 2016 and should be either interpreted according to the modern understanding or introducing the possibility of individualized risks assessment (prevailing in the ECtHR practice) should be included into the text of the Dublin IV Proposal.

Speaking about the ECtHR case law, in the *Tarakhel v Switzerland* the Court clarified that the source of the risk is also irrelevant to the level of protection guaranteed by human rights, thus taking into account the person's medical condition, family issues, unfair asylum procedure, risk of return to the country of origin, etc. in order to find an infringement[233]. In such cases, the transfer may be performed only after the sending Member state obtains individual guarantees from the receiving state that the applicants will get all the necessary protection and treatment according to their individual situations after the transfer[234].

Not only the ECtHR is focused on the individual examination of the asylum application, but also the CJEU has modified the pre-emptive requirement during the last few years, specifying that systemic flaws need not be present, as long as the particular circumstances of the asylum seeker demonstrate a "real and proven risk" of inhuman or degrading treatment[235].

Thus, the transfer may be justified when the threshold of inhuman or degrading treatment and the living conditions set by the Court has been met, which after the decision issued in 2019 amount to no less than "extreme material poverty". Such a requirement should be understood as a situation of not allowing the applicant "to meet his/her most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity[236]".

However, the current EU law provides little guidance regarding the meaning of 'systematic deficiencies' or 'extreme material poverty', leaving a too wide margin of appreciation to the Member states and national courts to interpret them. Such a gap may lead to

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[231] C-163/17, Abubacarr Jawo v Bundesrepublik Deutschland Judgment of the Court (GC) of 19 March 2019, ECLI:EU:C:2019:218, paras. 83, 90.
[232] CJEU (GC), 16 February 2017, PPU C. K. and Others v. Supreme Court of Republic Slovenia, application case C-578/16, para. 67.
[233] ECtHR, Tarakhel v Switzerland, Application No 29217/12, Judgment of 4 November 2014, para 104 cited in ECRE, Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, 19. Available at: https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf [accessed 18-03-2020]
[234] Ibid.
[235] CJEU (GC), 16 Feb. 2017, PPU C. K. and Others v. Supreme Court of Republic Slovenia, application case C-578/16, paras. 91–96.
[236] CJEU, C-163/17, Abubacarr Jawo v Bundesrepublik Deutschland Judgment of the Court (GC) of 19 March 2019, ECLI:EU:C:2019:218, paras. 91–93.

the situation when a large amount of applications will be left undecided causing many human rights violations.

In case of linking Dublin exceptions to human rights concepts, it might be necessary to introduce further guidance, for instance provided by the independent asylum agency (e.g. EASO), on their application in case of the transfer suspension.

Moreover, following the *Tarakhel* ruling, it would be reasonable to organize the mechanism for the sending Member state of acquiring those assurances and monitor the process of transfers by the European asylum agency in order to reduce the risk of breaching the Article 3 ECHR [237].

The Article 3(2) of the Dublin IV Proposal refers in its wording to the Article 4 of the Charter stating the risk of inhuman or degrading treatment. This decision of the Commission, however, constitutes a limitation of the Article just to the scope prohibition of torture, inhuman or other degrading treatment described in the Charter, leaving the other fundamental rights violations unconsidered. At the same time non-refoulement can also arise when other fundamental rights are at risk, such as the right to a fair trial[238], private life[239] or freedom of religion[240], to name a few.

Therefore, limiting it just to prohibition of torture might cause many practical uncertainties, since the assessment of compatibility of transfers with fundamental human rights must be conducted independently by the courts without any legislative restrictions.

Moreover, the limitation of the scope of the Article 3(2) to "systemic flaws" is also in breach with the right of asylum seekers to access an effective remedy defined in the Article 28 of the Dublin IV Proposal that also cites the former article.

Considering the case law of the CJEU, the right to an effective remedy should be interpreted meaning that an asylum seeker is entitled to appeal the decision to transfer based on any of the criteria laid down in Chapter III of the Dublin Regulation for responsibility determination, not being limited to relying on the risk of inhumane and degrading treatment[241].

Therefore, the criterion of systemic flaws affects not only the principle of non-refoulement but also constrains the right of asylum seekers to get an effective remedy in case of unlawful return.

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[237] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 94. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

[238] ECtHR, Othman (Abu Qatada) v United Kingdom, Application No 8139/09

[239] ECtHR, F v United Kingdom, Application No 17341/03, Judgment of 22 June 2004.

[240] ECtHR, Z and T v United Kingdom, Application No 27034/05,

[241] CJEU, Case C-63/15 Ghezelbash v Staatssecretaris van Veiligheid en Justitie, Judgment of 7 June 2016, para.37; C-155/15 Karim v Migrationsverket, Judgment of 7 June 2016, para.22.

This was also enlightened in ECRE report recommending removing the condition of "systemic flaws" as an undue restriction in contradictory with EU primary law and thus protection of human rights[242]. It is suggested to amend the wording of the Article 28 of the Proposal and to delete the reference to the Article 3(2) in line with the CJEU's rulings in *Ghezelbash* and *Karim*, ruling that such a limitation on the scope of the right to appeal a transfer decision is incompatible with the right to an effective remedy under the Dublin III Regulation[243].

Logically, this also requires amending the Article 3(2), which continues to refer to the existence of systemic flaws in a Member State's asylum system. Thus, the European Parliament offered to amend the Article 3(2) of the Dublin IV Proposal and instead of "systemic flaws" criterion to add the criterion of "the applicant would be subjected to a real risk of a serious violation of his or her fundamental rights[244]" without mentioning any human rights instruments. However, the notion of a serious risk is also mentioned in the Article 19(2) CFREU, stating that no one can be removed, expelled or extradited to a State where there is a serious risk that he or she will be subjected to the death penalty, torture, or other inhumane or degrading treatment or punishment[245].

The suggestion is also in line with the ECtHR's jurisprudence meaning that even in the absence of systemic flaws in the national asylum system, the transfer of an asylum seeker must be hampered due to the "real and proven risk of the person concerned suffering inhuman or degrading treatment[246]". Even though "systemic deficiencies" could not be assessed in the *Tarakhel case*, since it is not under the Court's jurisdiction, however, it would be beneficial to take into account also its case law as far as the cases on human rights violations with regard to "Dublin transfers" are frequently heard by the Strasbourg Court as well.

Such an amendment would definitely extend the protection of applicants under the Dublin system, including not only the assessment of the general situation in the receiving Member state but also focus on the assessment of the individual risk that each asylum seeker might face in that country.

The proposed approach also lowers the threshold, since to prove the violation regarding each individual applicant is much easier than to check the asylum procedure and reception conditions in the entire State. Moreover, such an approach increases the margin of discretion

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[242] ECRE, Comments on the Commission Proposal for a Dublin IV Regulation COM (2016) 270, 20. Available at: https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf [accessed 18-03-2020]

[243] CJEU, Case C-63/15 Ghezelbash v Staatssecretaris van Veiligheid en Justitie, Judgment of 7 June 2016, para.60; C-155/15 Karim v Migrationsverket, Judgment of 7 June 2016, para.22.

[244] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2017-0345_EN.html#title1 [accessed 29-03-2020]

[245] Article 19(2), Charter of Fundamental Rights of the European Union (2012/C 326/02) OJEU C 326/391 Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN [accessed 26-02-2020]

[246] Tarakhel v. Switzerland, Application No. 29217/12, Judgment of 4 November 2014, para. 104.

granted to the international Courts and the Member states to decide what human rights are at risk, aligning the understanding of the principle of non-refoulement with the human rights instruments[247].

Summarizing, the decision of the Commission to keep the criterion of "systemic flaws" in the Dublin IV Regulation untouched in the meaning present at the time of the Proposal conclusion would likely entail the incompliances with the human rights standards. As far as the approaches both of the CJEU and the ECtHR have gone beyond the criterion of "systemic flaws", recognizing deficiencies of a general nature and considering health condition as a ground to suspend the transfer, the criterion should be interpreted according to the modern understanding in the case law, taking into account the individual risk of each applicant to be subjected to torture, inhuman or degrading treatment in the responsible Member state. Moreover, further guidance should be provided in case of linking "systemic deficiencies" test to the human rights concepts.

[247] Jakulevičienė L., 'The Common European Asylum System' From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration (eds.) De Bruycker P., De Somer M., De Brouwer J.L., European Policy Centre, December 2019, pp. 87-102, at 94. Available at: http://odysseus-network.eu/from-tampere-20-to-tampere-2-0-towards-a-new-european-consensus-on-migration/ [accessed 04-03-2020]

CONCLUSIONS

1. As far as the relevant provisions of the Dublin III Regulation regarding the returns of asylum seekers are concerned, they cannot be considered fully compatible with the Article 3 ECHR and the relevant case law of the ECtHR.

2. The principle of non-refoulement is often interpreted through the connection with the fundamental human right to prohibition of torture, inhuman and degrading treatment defined in many international human rights instruments. Even though the scope and wording of this non-derogable human right may differ according to the document analyzed, non-refoulement is implied from the general spirit of all provisions defined in international human rights acts that in some way connected with torture, or other forms of ill-treatment. Therefore, states while implementing the Dublin III Regulation must act in line with human rights, being also members to the ECHR.

3. The principle of mutual trust, on which the Dublin system is based, does not take into account differences in economic and political situations in Member states, which obstruct the full implementation of the principle. This have led to the hybrid result of responsibility shifting instead of sharing, putting a disproportionate burden of responsibility on some Member States that struggle with financial and economic problems of their own citizens setting aside the citizens of other countries. Perverse effects of the Dublin system[248] are only intensified by the adoption of the asymmetrical rule where Member states apply the principle of mutual recognition selectively by only following negative asylum decisions not taking into account positive ones.

4. Current Dublin system with regard to transfers of asylum seekers lacks consensus of what is unacceptable on a general level. National authorities, international Courts, scholars are ping-ponging between the application of the "systemic flaws" or "individualized risks" tests. Even though, CJEU has a deeply rooted practice of following the "systemic flaws" test, the close analysis of the recent case law gives an impression that the Court has smoothly switched to more individualistic approach, considering the applicant's personal circumstances during the transfer, such as a health condition. The Court has also extended the test, applying it also to deficiencies of a general nature that preclude the transfer. The most recent ruling of the CJEU refers to two main European acts on human rights protection, which goes beyond just the systemic flaws criterion and installs a limitation to the principle of mutual trust within the EU, which makes it easier for an asylum seeker to get a protection in case of his refoulement.

[248] Meaning secondary migratory flows, "asylum lottery" and human rights violations instead of fast and efficient asylum procedures.

5. No shift has been seen in the application of the sovereignty provisions under the Dublin III Regulation, even though the CJEU in the recent case law imposed a new positive obligation on the national authorities to verify the applicant's personal situation beyond the concept of "systemic deficiencies". At the same time, application of the non-refoulement obligation under the Article 3(2) does not automatically give rise to an obligation to examine the asylum application, allowing further searching for the responsible Member State under the Dublin criteria. Nevertheless, such an obligation can arise under the Article 17(1), which turns into a mandatory when the test of "individualized risks" is applied, creating more severe consequences for the Sending Member state.

6. The conclusion of the bilateral readmission agreements between the EU Member states and third countries should be regarded as strong mechanism of shifting the responsibility for asylum seekers by performing external transfers outside the EU through the Dublin concepts of "safe third country" and "first country of asylum". Except for questionable "safety" of the countries concerned, agreements create limitations circumventing the Dublin III Regulation and frustrating its direct application, ECHR and the Charter, which goes in conflict with a principle of non-refoulement and violates the rights of asylum seekers and refugees trapped in the readmission web between the Contracting Parties.

7. As the Commission's Dublin IV Proposal was scrutinized searching for provisions compatible with the Article 3 ECHR, it, therefore, can be concluded that the document is still full of incompliances with human rights standards, especially after the introduction of the corrective allocation mechanism, mandatory admissibility checks and preservation of the initial meaning of the "systemic flaws" criterion in the Article 3(2). Such incompliances might cause practical problems, bearing the risk of undermining the protection of human rights in the region, especially when it comes to the protection of the fundamental non-derogable rights, where balancing is not allowed.

8. However, the acceptance of the European Parliament's amendments to the Commission's Proposal would bring the Draft Proposal closer to coherence with the ECtHR case law regarding the issue of non-refoulement for Dublin transfers.

9. Dublin system, being not originally focused on responsibility sharing, prioritized the promotion duty of solidarity in its fourth generation. Unfortunately, currently no workable system exist that would be able to handle with massive flows of asylum seekers, thus, the improvement of operational capacity and introduction of effective solidarity schemes that can be effective also in the times of crisis is needed. Instead of constant transfers of asylum seekers, it is more justified to revise the EU budget distribution and ensure a better implementation of the current CEAS legislation based on solidarity and fair sharing. Thus, changing the focus to the

protection of the human rights and analysis of already existing practices of handling massive flows of refugees would be more effective than inventing new practices that might start giving positive results in future.

10. Introduction of the compulsory admissibility check prior to the examination of the application in substance under the Article 3(3) of the Dublin IV Proposal may undermine the procedural guarantees and safeguards for asylum seekers. Automatic declaration of inadmissibility solely on the fact that the asylum seeker has travelled through a non-EU Member State listed as "safe" would entail the risk of non-individual assessment without prior analysis of family considerations, vulnerable asylum seekers with special needs, or protection of unaccompanied minors. Moreover, the requirement to examine whether the third country is safe for the applicant referring to the Article 33(2) b), c) of Directive 2013/32/EU before transferring the applicant to that country is not followed by any clear guidance of "safety" determination criteria, putting asylum seekers under the risk of human rights' violations, especially the right of prohibition of torture.

11. Leaving the "systemic flaws" criterion in the Article 3(2) untouched without any progress made to align the provision with the human rights law requirements might entail further incompliances with the human rights standards. Such a decision was critically accepted by the EU Parliament, ECRE, UNHCR and other competent European agencies, claiming it as a restrictive approach to guaranteeing the principle of non-refoulement. Therefore, the criterion should be amended in order to extend the protection of applicants' human rights and access to an effective remedy for those, who have suffered from the unlawful transfer.

12. EU agencies such as the EBCG and the EASO are becoming central for the promotion of solidarity and mutual trust within the EU. However, the enforcement of truly efficient reforms that will improve the functioning of the CEAS, responsibility allocation and ensure adequate human rights protection would require potentially far-reaching reforms of their functioning and the functioning of the EU judiciary. Therefore, it might be reasonable to provide no reform at all than to introduce bad ones, even though they might look good on the paper.

RECOMMENDATIONS

1. Given the lack of alignment of the CJEU and ECtHR decisions, it is suggested for the EU to accede to the ECHR, which will contribute to the development of the "integrated European approach" to the principle of non-refoulement, which currently differs according to the document applied or the approach followed by the responsible institution. A merger of two equivalent legal systems would create a coherent system of fundamental rights protection in Europe.
2. It is proposed to harmonize the rules in national asylum procedures within the EU and to align them with the human rights standards regarding the infringements to the prohibition of torture when implementing Dublin Regulation, depending of the economic and political situation in the Member state. Harmonization of the case law is also essential, so it is suggested for the CJEU to respond on the Tarakhel ruling, so to provide a precise interpretation for the Member states, so to limit their discretion to do that and to integrate into the EU law the approach of individual examination of the applicant's personal circumstances during the return. This can be done by taking into account "individual risks" test in the Dublin IV Proposal or amending the current wording of the Article 3(2).
3. It is suggested to implement into the Dublin Regulation the case law rule on the imposition on the sending Member states the obligation to analyze all the information about the asylum procedure, reception conditions in the competent State and whether they are in line with both the international human rights instruments and CEAS principles before issuing a decision to transfer.
4. It is suggested to align the case law of the international Courts regarding the application of sovereignty clause with the obligation of non-refoulement in the context that goes beyond the "systemic flaws" criterion. In this way, it would be reasonable to revise the legal construction of the Article 3(2) and 17(1) in order to align the consequences for the Sending Member states for the activation of non-refoulement in cases of invoking the individual risks and systemic flaws tests. This would limit the discretion granted to the Member states in interpreting the sovereignty clause contained in the Article 17(1) Dublin III Regulation and increase the protection of asylum seekers.
5. Given the lack of transparency and accountability in the process of readmission to the "safe third country", it is recommended to strengthen fundamental rights safeguards by ensuring the transparent readmission procedures that would be controlled by the European Parliament, along with the expertise from the Fundamental Rights Agency and the EASO. Preference to voluntary departures should be given, which are easier to manage with third countries instead of forced transfers. Return policy of each Member state should be assessed by the supranational

asylum authority that will be collecting and updating data about the asylum procedure and reception conditions in the "safe third country", notify about the readmission and get the diplomatic assurances that the asylum seeker will be granted all the necessary protection there.

6. It is suggested to increase intervention of the agencies such as the European Border and Coast Guard and the European Asylum Support Office to the promotion of solidarity within the EU through the codification of the actual operational activities undertaken by the EASO in the hotspot areas such as Greece and Italy. This would increase the role of EASO in the process of asylum decision-making in the hotspots.

7. As far as the new allocation mechanism is concerned, it is suggested to follow the suggestion of the European Parliament to take into account the 'meaningful links' criterion proposed by the European Parliament and to express the Article 19(2) as the following:

The Member State in which an application for international protection **is made** or the **Member State responsible**, may, at any time before issuing the a first decision in substance, request another Member State to take charge of an applicant in order **to bring together any family relations, on humanitarian grounds based in particular on family, cultural or social ties, language skills or other meaningful links which would facilitate his or her integration into that other Member State,** even where that other Member State is not responsible under the criteria laid down in Chapters III and IV. The persons concerned must express their consent in writing.

8. It is suggested to exclude the criteria of security risk from the list of admissibility assessment grounds as being incompatible with the provisions of the 1951 Refugee Convention and posing a danger to the implementation of human rights protection within the EU.

9. It is recommended to follow the wording of the Article 3(2) proposed by the European Parliament and instead of "systemic flaws" test to add the criterion of "**the applicant subjected to a real risk of a serious violation of his or her fundamental rights**" without mentioning any human rights instruments. Such an amendment would extend the protection and increase the margin of discretion granted to the international Courts to decide on what human rights are at risk, not being limited to any particular legislative act. Moreover, the proposed criterion would include not only the assessment of the general situation in the receiving Member state but also focus on the assessment of the individual risk that each asylum seeker might face in that country, aligning the understanding of the principle of non-refoulement with the human rights standards.

10. Considering the general tendency of the Dublin IV Proposal amendments, it is recommended to provide a further work to improve the implementation of the existing CEAS legislation (including the Dublin III Regulation itself) and to resolve operational problems based on solidarity and fair sharing rather than trying to find a solution good in perspective.

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SUMMARY

The research reveals an important problem of compliance of the European Union Regulation No 604/2013 with the right of prohibition of torture enshrined in Article 3 of the European Convention on Human Rights. The thesis is also valuable for providing an analysis of the main changes enshrined in the new Draft Proposal for Dublin IV Regulation from the perspective the compliance with Article 3 ECHR.

Principle of non-refoulement is not expressly mentioned in the Article 3 ECHR, however, it can be traced from the general spirit of the principle of prohibition of torture and inhuman or degrading treatment and be explained as the most fundamental absolute and non-derogable human right that excludes any balancing. Nevertheless, Member states still perform expulsions following the principle of mutual trust and automatic application of Dublin rules that might result into the violation of Article 3 ECHR. In addition, the jurisprudence of the Strasbourg and the Luxembourg Courts is still inconsistent about the thresholds that might rebut the 'mutual trust' principle between the Member States, which also trigger frequent human rights violations during the “Dublin transfers”.

Therefore, states while implementing the Dublin III Regulation must act in accordance with human rights standards, being also members to the ECHR. Moreover, the safeguards provided by the ECHR are much stronger and can be obtained even when the protection granted by other international legal instruments seems to be ineffective.

Dublin III Regulation contains concepts, such as “systemic flaws”, “safe third country”, etc. that lack clear definition and guidelines for the Courts to apply them correctly and consistently, which grant a discretion to interpret them in the way affecting human rights and fundamental freedoms as recognized, inter alia, in the ECHR. In addition, confusion between the application of the “systemic deficiencies” and “individualized risks” tests in the case law regarding the expulsion cases should also be a problem that risks undermining human tights within the EU, since neither of these concepts are mentioned in the ECHR or the EU law. For this reason, it is important to provide a comprehensive investigation of the provisions of the Dublin III Regulation and their compliance with Article 3 of the ECHR.

Current work contains references to current European and international legal sources, literature reviews, case law on asylum cases and suggests structured conclusions based on the compliance of the Dublin Regulation with the European Convention on Human Rights.

ABSTRACT

Dublin system has always been subjected to certain level of criticism regarding its contradictory nature with human rights legislations such as ECHR. Being based on the principle of mutual trust and cooperation, the regulation does take into account differences in economic and political positions in Member states.

Prohibition of torture, inhuman or other degrading treatment in the Dublin III Regulation is expressed through the Article 4 CFREU, which corresponds to the general spirit of the Article 3 ECHR, having the same meaning and protecting equal human rights.

Article 3 RCHR consistently provides that prohibition of torture and inhuman or degrading treatment is one of the most fundamental and non-derogable human rights, even though certain degree of unclarity can be found while analyzing the text of the article. A more detailed analysis of the Strasbourg and Luxembourg Courts case law shows that in practice the prohibition of torture is subject to inconsistent interpretations that require the States to balance between the jurisprudence of the abovementioned institutions, being parties to both the ECHR and CFREU.

The introduction of the Draft Proposal for the Dublin IV Regulation was hoped to balance the inconsistencies in the practices of the CJEU and ECtHR and combat the situation of expulsions to unsafe third countries, however, it is rather questionable whether the changes proposed will be able to improve the situation in the nearest future.

KEYWORDS: CEAS, Dublin III Regulation, human rights, prohibition of torture, expulsion, Dublin IV Proposal.

HONESTY DECLARATION

13/05/2020

Vilnius

I, **Yuliia Pokhodun**, student of Mykolas Romeris University (hereinafter referred to University), Law School, Institute of International and European Law, International Law study programme, confirm that the Master thesis titled:

"The Compatibility of European Union Dublin Regulation with the Article 3 European Convention on Human Rights":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania, Ukraine or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.



Yuliia Pokhodun