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**COMPATIBILITY OF DUBLIN REGULATION AND
EUROPEAN CONVENTION ON HUMAN RIGHTS: EFFECTS
OF THE NEW PROPOSAL**

Bachelor's thesis

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ABSTRACT

“Dublin system” is a legal tool created by the European Union (EU) to determine the Member State responsible for examining an asylum application lodged into one of its Member States. Nowadays, the system consists of Regulation (EU) No. 604/2013, also known as Dublin III Regulation, and Regulation (EU) No 603/2013. In May 2016 the European Commission gave a proposal to reform the current Dublin system. It has been stated that the current system fails to provide fair, efficient and effective protection to the applicant of international protection. This thesis examines the compatibility of the transfers of third country nationals under the Dublin III Regulation with the European Convention on Human Rights, and what kind of an effect would the Commission proposal have. The aim is to prove that the current system is not functional and also the proposal needs to be amendment more. As the main research methods, to prove the aim, this thesis uses comparative research and literature review.

Keywords: Dublin system, Human Rights, European Convention on Human Rights (ECHR), Asylum, Common European Asylum System (CEAS), Commission proposal 2016

LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EC	European Communities
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
Eurodac	European Automated Fingerprint Recognition System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

As the refugee crisis keeps intensifying, development of a functioning system to handle the flood of applications of international protection is extremely important. In addition to the efficiency and proper functioning, the system needs to be fair and have respect towards legal rights and personal welfare of the applicants. This thesis is about EU's system on determining the Member State responsible for examining an application of international protection lodged into one of its Member States. The system is called "Dublin system" and nowadays it consists of Regulation (EU) No. 604/2013,¹ also known as Dublin III Regulation, and Regulation (EU) No 603/2013,² which establishes the system of EU asylum fingerprint database. Throughout its whole existence the Dublin system has been under criticism as the application of it seems to be in contradictory with human rights legislations such as European Convention on Human Rights (ECHR). There has already been three different legal acts regulating the matter and still it seems that the current Dublin III Regulation is not efficient and fair enough. Consequently in 2016, European Commission issued a proposal to reform the current Dublin III Regulation by Dublin IV Regulation.³

This thesis discloses the unsuccessful history of Dublin system and examines if the new regulation proposal would ensure the realisation of human rights better than its predecessors by providing preferable safe guards for the applicants of international protection. As the main research methods this

¹ 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, OJ L 180, p. 1, (2), 29.6.2013

² Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013

³ 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) 270 final

thesis uses comparative research and literature review. Relevant legislation, including Dublin system related legislation and ECHR, are covered and compared. Evaluation is supported with relevant case law. Analysis is based on the findings from this comparative research, and searching and synthesising of others' publications. The aim of this thesis is to find out if there are any deficiencies in the Dublin III Regulation and Dublin IV proposal from the perspective of ECHR. The research questions used as a support are:

- How does the implementation of current Dublin III Regulation comply with ECHR?
- How does the Dublin IV proposal take into consideration the ECHR?
- If the Dublin IV proposal would be adopted what kind of an effect would it have on the realization of human rights of the applicants of international protection under ECHR?

Thesis first proceeds by introducing the relevant background and legislation regards the current Dublin system and the central provisions of the ECHR. The first chapter is about the development of Dublin system. It gives an overview of the history of the system, and introduces the current Dublin III Regulation and Dublin IV proposal. Chapter also opens up the objectives of the current Dublin III Regulation and criticism on it application. Chapter two gives an overview on the ECHR and introduces few relevant provisions relating to asylum and the application of Dublin Regulation. It also explains the principle of non-refoulement, which is a substantial part of EU's Common European Asylum System. After that, thesis moves on evaluating the simultaneous application of Dublin III Regulation and ECHR to see if there is any contradictories. Evaluation is supported with relevant case law. Finally the new Dublin IV proposal is examined from the point of view whether or not the new proposal is compatible with the ECHR. This thesis also brings up some missing aspects on the matter and presents suggestions for improvement in order to reach the fair an efficient asylum system which is in compliance with ECHR.

Hypothesis of this thesis is that the implementation of Dublin III Regulation is in contradictory with the ECHR as it does not provide protection efficient and fair enough to the third country national seeking for asylum from persecution, and that the Dublin IV proposal does not offer the solution to the problem and needs to be amended more.

1. DEVELOPMENT OF DUBLIN SYSTEM

Under international law everyone has the right to seek and to enjoy in other countries asylum from persecution.⁴ Thus as a principle, area of freedom, security and justice established by EU should be open to everyone who, forced by circumstances and legitimately seek protection of the Union.⁵ Article 78 of the Treaty on the Functioning of the European Union (TFEU) states that “the Union shall develop a common policy on asylum, subsidiary protection and temporary protection which is in compliance with the principle of non-refoulement”. Additionally, this policy must respect states’ obligations under the 1951 Geneva Convention and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties such as European Convention on Human Rights.⁶ As a rule, every single asylum application lodged in the EU territory has to be examined and every Member State has to be able to determine its responsibility for examining that application.⁷ To determine the Member State responsible for examining asylum application EU has generated the so called ‘Dublin system’ which nowadays consists of Regulation (EU) No. 604/2013, also known as Dublin III Regulation, and Regulation (EU) No 603/2013, which is the so called as Eurodac Regulation.

Through the system a single Member State is determined to be responsible for the asylum application and this way overlapping and confusion is prevented.⁸ The core principle behind the Dublin system is that the Member State which played the greatest part in the applicant’s entry to the EU is primarily responsible for examining an asylum claim, which in most cases means the Member State of first

⁴ United Nations, Universal Declaration of Human Rights, adopted: 10 December 1948, art. 14

⁵ Regulation (EU) No 604/2013, *supra nota* 1, p 1, (2)

⁶ European Union Agency for Fundamental Rights, Council of Europe (2013) *Handbook on European law relating to asylum, borders and immigration / European Court of Human Rights ; European Union Agency for Fundamental Rights ; Council of Europe*. 2nd ed. Luxembourg: Publications Office of the European Union, p. 64

⁷ European Commission. *Country responsible for asylum application (Dublin)*. Accessible: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en, 15 February 2018

⁸ European Commission. *THE DUBLIN SYSTEM*. Accessible: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160406/factsheet_-_the_dublin_system_en.pdf, 15 February 2018

entry or the Member State which has issued a visa or a residence permit to the third country national.⁹ The justification behind the one Member State's responsibility is that the Dublin system is based on Member States' mutual trust in their asylum procedures.¹⁰ Thus all EU Member States, are considered as 'safe countries' for third country nationals.¹¹

European Union is a political and economic union consisting of 28 Member States from Europe. What makes EU an unique system is the fact that it constitutes a new legal order in international law for whose benefit the states have limited their sovereign rights.¹² Hence Member States of the Union confer a part of their legislative power to the Union meaning that in situations where there is a conflict between European law and the law of Member States European law prevails the national law.¹³ All regulations, thus including Dublin III Regulation, and Eurodac Regulation, are binding in their entirety and apply directly in all Member States.¹⁴

1.1. History of Dublin Regulation

Dublin regime was first established by Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities,¹⁵ also known as Dublin Convention, which was signed in Dublin, Ireland on the 15th of June 1990 and first came into force on the 1st of September 1997. Before establishing of the Dublin system refugee law avoided answering the question of state responsibility and thus the major problem was how to create a system of state responsibility with respect towards human rights.¹⁶ Adoption of the Dublin system was one of the first attempts in international law to solve the complex and highly controversial question of state responsibility.¹⁷ In 2003, Dublin Convention was replaced by Council Regulation

⁹ *Ibid.*

¹⁰ Hurwitz, A. (1999) The 1990 Dublin Convention: A Comprehensive Assessment. - *International Journal of Refugee Law*, Vol.11, No. 4, p 648

¹¹ Regulation (EU) No 604/2013 (2013) *supra nota* 1

¹² Court decision, 5.2.1963, Van Gend en Loos, C-26/62, EU:C:1963:1, p. 12

¹³ Court decision, 15.7.1964, Flaminio Costa v. ENEL, C-6/64, EU:C:1964:66, p. 594

¹⁴ Craig, P., De Burca, G. (2015) *EU Law: Texts Cases and Materials*. 6th ed. New York: Oxford University Press, p 107

¹⁵ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, European Communities, OJ C 254, 19.08.1997

¹⁶ Marx, R. (2001) Adjusting the Dublin convention: New approaches to member state responsibility for asylum applications. - *European Journal Of Migration And Law*, Vol.3, No. 1, p. 8

¹⁷ *Ibid.*, p. 9.

(EC) No. 343/2003,¹⁸ also known as Dublin II Regulation, which established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.¹⁹ Adoption of the Dublin II Regulation was a significant step towards the creation of Common European Asylum System.²⁰

1.1.1. Dublin Convention

Dublin Convention replaced Chapter VII of the Convention Applying the Schengen Agreement, which formerly set the criteria for determining the responsibility of processing an asylum claim.²¹ The Convention came into force in 1997 as its purpose to determine the Member State responsible for examining applications for asylum lodged in one of the Member States of the European Communities.²² The Dublin Convention established a criteria hierarchy of responsibility in its Articles from 4 to 8. The first criterion is based on the principle of family reunification and the rest of the main criteria are based on the principle that the Member State which is responsible for a person's presence on that territory should also be responsible for the asylum application.²³ The aim of the Convention was to prevent the lodging of simultaneous or consecutive asylum applications in the Member States by setting out criteria to determine only one Member State to be responsible.²⁴ Also another objective of the Convention was to provide asylum seekers safeguards that their claims are actually examined at least in one Member State hence it could be seen as a tool to implement the right to asylum.²⁵

However, Dublin Convention had its flaws. Article 6 of the convention about illegal crossing of the Member States territory has been said to reveal all the contradictions and flaws of the Dublin system.²⁶

¹⁸ Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003

¹⁹ *Ibid.*

²⁰ Lenart, J. (2012) '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*, Vol.28, No. 75, p 5

²¹ Hurwitz (1999) *supra nota* 10, p 647

²² Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1997) *supra nota* 15

²³ Commission of the European Communities, Commission staff working paper, 'Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States', COM(2000)755 final of 22 November 2000, p. 2

²⁴ *Ibid.*, p. 648.

²⁵ Marx (2001) *supra nota* 16, p 9-10

²⁶ Hurwitz (1999) *supra nota* 10, p 657

Article 6 included a condition that in situation where it could be proven that an applicant for asylum has irregularly crossed the border into a Member State from a non-Member State of the Community the Member State entered should be responsible for examining the asylum application or if it could be proven that the applicant had been living in a Member State for at least six months that Member State would be responsible for examining the application.²⁷ Proving was difficult as presenting evidence strong enough of an illegal crossing makes it almost impossible.²⁸ Thus it can be said that the most problematic issue in the implementation of the convention was to prove the responsibility of one Member State.²⁹ Even the European Commission have stated that the Dublin Convention was not functioning as it had been hoped to function.³⁰ In addition, the convention needed to be replaced with a Community instrument due to the adoption of the Treaty of Amsterdam.³¹

1.1.2. Dublin II

In 1999 constituting a Common European Asylum System (CEAS) became an agenda of the European Council.³² In 1999 at Tampere, Finland EU held a summit for the leaders of its 15 member states.³³ The summit was dedicated on working towards CEAS and established as a part of European Council's objective to develop EU as an area of freedom, security and justice.³⁴ The aim of the CEAS was to create a harmonised system of protection in line with international law, and European refugee and human rights law, where every person seeking the protection of the EU will be treated in the same way, on the basis of the same standards.³⁵ Between the years 1999 and 2005 several legislative measures harmonising policies on asylum were adopted.³⁶ Among those legislative measures was the Dublin II Regulation, which replaced the Dublin Convention in 2003, as mentioned before. The

²⁷ *Ibid.*, p. 657.

²⁸ *Ibid.*, p. 657.

²⁹ *Ibid.*, p.670.

³⁰ Commission of the European Communities (2000) *supra nota* 23, p 1

³¹ *Ibid.*, p. 1.

³² Reneman, M. (2014) *EU Asylum Procedures and the Right to an Effective Remedy*. Oxford: Hart Publishing Ltd, p 6

³³ European Commission *Tampere Kick-start to the EU's policy for justice and home affairs* Accessible: http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf, 5 March 2018

³⁴ Reneman (2014) *supra nota* 32, p 29

³⁵ S. Peers, "Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon", *European Journal of Migration and Law*, 10, 2008, 234 referenced in Ippolito, Velluti (Ippolito, F., Velluti, S. The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness, *Refugee Survey Quarterly*, Vol. 30, No. 3, 2011, p 33)

³⁶ European Commission, *Common European Asylum System* Accessible: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en, 5 March 2018

Dublin II Regulation was supposed to remove the deficiencies Dublin Convention had, such as slow operation of the system, uncertainty for applicants and Member States, insufficient remedies in the situations of ‘refugees in orbit’, risk of ‘chain refoulement’, lack of proper readmission rules and supervision and disproportionate burden imposed on Member States in the external borders.³⁷ The main target was however to prevent two of the most undesirable phenomena in the area of refugee law; ‘refugees in orbit’ where refugees are circulating between Member States or within one Member State without being allowed to stay within its territory, nor being able to leave it, and ‘asylum shopping’ where a third country national lodges several applications to different Member State or chooses the one having the most lenient policy.³⁸ One of the changes was also that Dublin system was now regulated by community legislation, instead of convention.

However, like its predecessor, Dublin II Regulation had its flaws. The whole Dublin System has continually faced severe criticism by non-governmental organisations dealing with human rights protection, such as the European Council on Refugees and Exiles (ECRE) and United Nations agencies, particularly the United Nations High Commissioner for Refugees (UNHCR).³⁹ In addition, the whole ideology of mutual trust in Member State’s asylum procedures was shattered as it was found out from the judgement of the European Court of Human Rights (ECtHR), in the case of *M.S.S. v. Belgium and Greece* that the implementation of Dublin II Regulation could lead to serious Human Rights violations.⁴⁰ The case will be discussed more in detail later. The dysfunctional operation of the Dublin system also indicated that EU Member States were widely differed regards their asylum procedures and that some of these systems were far from being in compliance with the principle of non-refoulement or ECHR.⁴¹

³⁷ Commission of the European Communities (Commission), ‘Revisiting the Dublin Convention: Developing Community Legislation for Determining which Member State is Responsible for Considering an Application for Asylum Submitted in One of the Member States’ (Staff Working Paper) SEC (2000) 522 final, points 9, 11, 13, 14, 15, 28 referenced in Lenart (Lenart, J. ‘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*, Vol.28(75), 2012, p 5)

³⁸ *Ibid.*, p. 5.

³⁹ Lenart (2012) *supra nota* 20, p 12

⁴⁰ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, ECtHR, 2011

⁴¹ Mink, J. (2012) EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment, - *European Journal of Migration and Law*, Vol.14, No. 2, p. 121

1.2. Current Dublin III Regulation

In 2013, the Dublin III Regulation was adopted, replacing the Dublin II Regulation.⁴² It is used to determine the Member State responsible for examining an application of international protection.⁴³ As mentioned before Dublin III Regulation and Eurodac Regulation comprises together the current Dublin system. The Dublin system was never designed to achieve solidarity and the fair sharing of responsibility; its main purpose from the very beginning was to assign responsibility for processing an asylum application to a single Member State.⁴⁴ Similarly to Dublin II Regulation, the Dublin III Regulation identifies the EU country responsible for examining an asylum application, by using a hierarchy of criteria such as family unity, possession of residence documents or visas, irregular entry or stay, and visa-waived entry.⁴⁵ In practice, however, the most frequently applied criterion is the irregular entry, meaning that the Member State through which the asylum-seeker first entered the EU is responsible for examining applicant's asylum claim.⁴⁶

1.2.1. Goals of the Dublin system

The main objectives of the amended Dublin Regulation was to enhance the efficient functioning of the previous regulation, and secure high standards of protection to the applicants falling under the responsibility determination procedure.⁴⁷ Dublin III regulation extended its scope to applications of “international protection” instead of “asylum” thus including both applications to seek refugee status and subsidiary protection status.⁴⁸ The Regulations was also extended to apply on “stateless persons”, in addition to “third country nationals”.⁴⁹ With the view of human rights, the regulation was said to provide comprehensive legal framework, by which the fundamental rights of the applicants and other

⁴² Regulation (EU) No 604/2013, *supra nota* 1

⁴³ The UN Refugee Agency. *The Dublin Regulation*. Accessible:

<http://www.unhcr.org/protection/operations/4a9d13d59/dublin-regulation.html>, 25 February 2018

⁴⁴ EU Legislation in Progress: Reform of the Dublin system. European Parliament, Briefing, 10 March 2017. Accessible: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%29586639_EN.pdf, 5 March 2018

⁴⁵ *Ibid.*, p. 2.

⁴⁶ *Ibid.*, p. 2.

⁴⁷ Council of the European Union (2013) *Recast of the Dublin regulation: enhancing the efficiency of the functioning of the current system*. Accessible: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137418.pdf, 24 April 2018

⁴⁸ Desimpelaere, K. (2015) *The Dublin Regulation: Past, Present Future*, Master's thesis, Ghent University, Faculty of Law, 2015, p 74

⁴⁹ *Ibid.*, p. 74.

person entitled were observed.⁵⁰ The Dublin III Regulation was said to strengthened legal safeguards and rights of the applicants for international protection, while focusing on the needs of vulnerable groups such as unaccompanied minors and dependent persons.⁵¹ Also, it was supposed to reduce the abuse of the system and ensure that disputes on the application between the Member States were sorted out more effectively.⁵²

1.2.2. Criticism on the application

Already in 2015, the Commission noted that the Dublin system is not working as it should, even after the entry into force of the Dublin III Regulation, and undertook the mission to evaluate the system in 2016.⁵³ It was found out that in 2014 five Member States dealt with 72% of all asylum applications in the EU.⁵⁴ The Dublin system was not originally designed to face the nature and scale of the inflows the Europe was facing thus many deficiencies such as unfair distribution of asylum applications were revealed.⁵⁵ It has also been argued that the Member States of the EU are either unable or unwilling to address the needs of migrants causing human rights to be either consistently violated or simply ignored when applying the Dublin III Regulation.⁵⁶ It seems to be clear that despite the updated regulation the Dublin system remained to be unfair for both asylum seekers and Member States, and only partially addresses the issue of Member States which are too unsafe to receive Dublin transfers.⁵⁷

1.3. Eurodac

Regulation (EU) No 603/2013,⁵⁸ also known as Eurodac Regulation, establishes an EU asylum fingerprint database in whose Central System the fingerprints of every third country national applying

⁵⁰ Council of the European Union (2013) *supra nota* 47, p 1

⁵¹ *Ibid.*, p. 2.

⁵² *Ibid.*, p. 2.

⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration' COM(2015) 240 final of 13 May 2015, European Commission, p. 13

⁵⁴ *Ibid.*, p. 13.

⁵⁵ *Ibid.*, p. 13.

⁵⁶ Moses, L. (2016) The Deficiencies of Dublin: An Analysis of the Dublin System in the European Union. - *Jackson School Journal*, Vol. 6, No. 2, p. 6

⁵⁷ Desimpelaere, K. (2015) *supra nota* 48, p 87

⁵⁸ Regulation (EU) No 603/2013 *supra nota* 2

the protection of the Union are transmitted.⁵⁹ It is an important tool providing fingerprint comparison evidence when determining the Member State responsible for examining an asylum application and its primary objective is to serve the implementation of Dublin Regulation, as together these two instruments make up the Dublin system.⁶⁰ Dublin Regulation and Eurodac are intended to prevent asylum applicants testing their chances in different Member States or in the Member States of their choice.⁶¹ According to the Article 9 of the Eurodac Regulation each Member State are obliged to take the fingerprints of every asylum applicant and irregular border-crosser over the age of 14 and shall, as soon as possible and no later than 72 hours after the lodging of his or her application for international protection, transmit them into Central System.

Eurodac Regulation came into force in 2013. Before that Council Regulation (EC) No. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention was applied.⁶² The previous regulation recognized that a fingerprint database like Eurodac would help to apply the Dublin Convention and help establish the identity of asylum seekers and that the recording and retention of such data infringes upon the right to privacy and data protection, which is why certain safeguards needs to be put in place.⁶³ Eurodac Regulation has also been heavily criticised. One of the problems identified is that the EU Member States do not follow the regulation as it was meant to.⁶⁴ Also there has been concerns that the changes introduced in the new Eurodac Regulation might be discriminatory and treating asylum seekers as potential criminals.⁶⁵

⁵⁹ European Commission. *Identification of applicants (EURODAC)*. Accessible: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/identification-of-applicants_en, 15 February 2018

⁶⁰ *Ibid.*

⁶¹ Schuster, L. (2011) Dublin II and Eurodac: examining the (un)intended(?) consequences. - *Gender, Place & Culture*, Vol.18, No. 3, p 404

⁶² Lehte, R. (2015) The New EURODAC Regulation: Fingerprints as a Source of Informal Discrimination. - *Baltic Journal of European Studies*, Vol. 5, No. 2, p 113

⁶³ *Ibid.*, p. 113.

⁶⁴ *Ibid.*, p. 108.

⁶⁵ *Ibid.*, p. 109.

1.4. New Dublin IV Proposal

In May 2016, the European Commission presented a draft proposal to reform the Dublin System more transparent and enhance its effectiveness.⁶⁶ The so called Dublin IV proposal was done as part of a proposal to reform the Common European Asylum System.⁶⁷ The reform was proposed even though the CEAS had already been formally concluded with a final phase of legislation in 2013.⁶⁸ However, the current migration and refugee crisis has revealed significant structural weaknesses in the design and implementation of the CEAS and of the Dublin regime and even the European Commission has acknowledged that.⁶⁹

The main elements of the Dublin IV proposal are: a new automated system to monitor the number of asylum applications received and the number of persons effectively resettled by each Member State, a reference key to determine when a Member State is under disproportionate asylum pressure and a fairness mechanism to address and alleviate that pressure.⁷⁰ These tools would have as their objective the fairer distribution of applications of international protection and responsibility of Member States of the EU. They are designed to bring fairness and effectiveness to the processing of the applications of international protection to EU Member States.

As a part of the reform package of May 2016 the Commission also presented a proposal to reinforce Eurodac to reflect more the changes in the Dublin IV proposal and to make sure that it continues to provide the fingerprint comparison evidence it needs to function.⁷¹ In addition, the Commission also considered in its proposal the use of other biometric identifiers to be used for Eurodac, such as facial recognition and the collection of digital photos to counter the challenges faced by some Member States to take fingerprints for the purposes of Eurodac.⁷²

⁶⁶ European Commission. *Supra nota 7*

⁶⁷ *Ibid.*

⁶⁸ Hruschka, C. (2016) Enhancing efficiency and fairness? The Commission proposal for a Dublin IV Regulation. - *ERA Forum*, Vol.17, No. 4, p 521

⁶⁹ European Parliament (2017) *Supra nota 44*, p 2

⁷⁰ *Ibid.*, p. 4.

⁷¹ European Commission, *supra nota 59*

⁷² *Ibid.*

2. EUROPEAN CONVENTION ON HUMAN RIGHTS

European Convention on Human Rights (ECHR) was adopted in 1950 and drafted within the European Council, which is an independent organization outside of EU, as an attempt to unify Europe after the Second World War.⁷³ Although European Court of Justice (ECJ) has never notably ruled that the ECHR is binding upon the EU, or that its provision should be incorporated into EU law, Article 6 of the Treaty of European Union (TEU) has since 1992 referred expressly to the ECHR.⁷⁴ Article 6 of TEU lists European Convention on Human Rights as one of the main sources of human rights law with the Charter of Fundamental Rights of European Union. This is also proven by the fact that ECHR has been treated for decades as a source of inspiration for human rights principles by the ECJ.⁷⁵ Thus European Convention is legally binding to all Member States of the EU and the Council of Europe.

ECHR does not include an explicit reference to the right to asylum.⁷⁶ However, it does not mean that asylum seekers and refugees are not covered by ECHR as protection is found indirectly.⁷⁷ ECHR covers many situations which might fall outside the scope of other legislation intended to ensure international protection of asylum seekers, for example in a case where person not qualifying as a refugee falls outside the scope of the Refugee Convention.⁷⁸ Even the Article 1 of ECHR states that parties “shall secure within their jurisdiction the rights enshrined in the convention” thus implying that everyone should be included to enjoy the protection of the convention not only citizens of the EU.⁷⁹

⁷³ Harris, D., O'Boyle, M., Bates, E., Buckley, C. (2014) *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*. 3rd ed. New York: Oxford University Press, p 3

⁷⁴ Craig, De Burca (2015) *supra nota*, 14, p 385

⁷⁵ *Ibid.*, p. 380.

⁷⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 14 referenced in Lenart (Lenart, J. '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*, Vol.28, No. 75, 2012, p 8)

⁷⁷ Lenart (2012) *supra nota* 20, p 8

⁷⁸ *Ibid.*, p. 8.

⁷⁹ Klabbbers, J. (2017) *International Law*, 2nd ed. Cambridge: Cambridge University Press, p 132

2.1. Principle of non-refoulement

Under EU law any form of removal or transfer of an individual to another EU Member State under the Dublin Regulation must be done in accordance with the right to asylum provided by European Charter of Fundamental Rights and 1951 Geneva Convention relating to the Status of Refugees and the principle of non-refoulement.⁸⁰ Non-refoulement is a fundamental principle of international law which forbids a country receiving asylum seekers from expelling or returning them to a country in which they could face danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion".⁸¹ ECHR does not directly mention the principle of non-refoulement. However, the European Court of Human Rights stated in its judgement in 1989 that "the fact that a specialised 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."⁸² This means that even though ECHR does not contain a direct indication on non-refoulement the prohibition still exists in the Article 3 as it is already incorporated to the general terms of it. Thus, removing of an individual under Dublin Regulation into a country in which he or she could face danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion can be considered as violation of Article 3 of ECHR.

2.2. Article 3 of ECHR

Article 3 of European Convention on Human Rights prohibits subjecting anyone to torture or to inhuman or degrading treatment or punishment.⁸³ United Nations Convention against Torture defines torture as:

"An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on 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,

⁸⁰ European Union Agency for Fundamental Rights, Council of Europe (2013) *supra nota* 6, p 66.

⁸¹ United Nations. 28 July 1951, Convention relating to the Status of Refugees 1951, art. 33

⁸² Soering v. United Kingdom, No. 14038/88, para. 88, ECtHR, 7 July 1989

⁸³ Council of Europe. 3 September 1953, European Convention on Human Rights, art. 3

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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”⁸⁴

Prohibition of torture is a *jus cogens* norm due to its compelling moral character.⁸⁵ *Jus cogens* norms have a privileged status.⁸⁶ Its reach cannot be exempted even though a state would not comply with the norm nor can it be overruled by a treaty as any treaty incompatible with the norm will be null and void.⁸⁷ Thus, prohibition of torture is an absolute norm and cannot be derogated even in the times of war or other public emergency.⁸⁸ As mentioned before the removal or transfer of an individual to another EU Member State under the Dublin Regulation must follow the principle of non-refoulement and thus the prohibition on torture set out in Article 3 ECHR. Some of the Dublin cases include suspected violation of Article 13 read in conjunction with Article 3. This means that that person’s rights and freedoms have been violated by being subjected to torture or to inhuman or degrading treatment or punishment by persons acting in an official capacity and effective remedy before a national authority has not been offered.⁸⁹

2.2. Article 8 of ECHR

Article 8 of the European Convention on Human Rights grants the right to respect for private and family life by stating that: “Everyone has the right to respect for his private and family life, his home and his correspondence.”⁹⁰ In addition, Article 8 also states that: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is

⁸⁴ United Nations. 10 December 1984. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1

⁸⁵ De Wet, E. (2004) The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law. - *European Journal of International Law*, Vol.15, No. 1, p 98-99

⁸⁶ Bradley, C.A. (2016) *Custom’s Future: International Law in a Changing World*. New York: Cambridge University Press, p 107

⁸⁷ Lepard, B. Customary International Law: A New Theory with Practical Application 8 (2010) referenced in Bradley (Bradley, C. *Custom’s Future: International Law in a Changing World*. 1st ed. New York: Cambridge University Press 2016, p 68)

⁸⁸ Article 15(2), Convention referenced in Harris *et al* (Harris, D., O’Boyle, M., Bates, E., Buckley, C. *Harris, O’Boyle, and Warbrick Law of the European Convention on Human Rights*. 3rd ed. New York: Oxford University Press, 2014, p 235)

⁸⁹ Council of Europe, European Convention on Human Rights (1953) *supra nota* 83, art. 13

⁹⁰ *Ibid.*, art. 8.

necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁹¹

In order for an applicant to invoke Article 8, it needs to be shown that his or her complaint falls within at least one of the four interests identified in the Article, namely: private life, family life, home and correspondence.⁹² The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence.⁹³ Article 8 ECHR is connected to asylum in a way that where an individual has close family ties or established family unit in one country, the removal of that individual may amount a violation of Article 8.⁹⁴ Thus a removal or transfer of an individual to another EU Member State under the Dublin Regulation could constitute separation of family and violate the Article 8 ECHR. In 2016 in United Kingdom, Court of Appeal in case *Secretary of State for the Home Department v ZAT* held that Article 8 is capable of overriding Dublin III, but only in the most exceptional of cases.⁹⁵

⁹¹ Mowbray, A (2012) *Cases, Materials, and Commentary on the European Convention on Human Rights*, 3rd ed. Oxford: Oxford University Press, p. 487

⁹² Council of Europe, European Court of Human Rights (2017) *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life*, 1st ed. p. 7

⁹³ *Ibid.*, p. 8.

⁹⁴ Mole, N. (2007) *Asylum and the European Convention on Human Rights*, 4th ed. Council of Europe Publishing, p. 95

⁹⁵ Court of Appeal (England and Wales), Case No: C2/2016/0712, *Secretary of State for the Home Department v ZAT*

3. SIMULTANEOUS APPLICATION OF DUBLIN AND ECHR

As any sort of removal or transfer of an individual to another EU Member State under the Dublin Regulation must follow the principle of non-refoulement and the provisions of the ECHR, it needs to be made sure that the legislations can be applied simultaneously in a way that there is no conflicts. In 2011, two landmark judgments dealing with the application of mutual trust within the framework of the Dublin Regulation were published by respectively the ECtHR and the Court of Justice of the European Union (CJEU).⁹⁶ The judgement of the ECtHR in the case of *M.S.S. v Belgium* and the judgement of CJEU in the case *N.S and M.E*, showed that there is a substantial error in the ideology of mutual trust as an asylum seeker cannot be transferred to the Member State responsible under Dublin system if there is a real risk that the applicant will suffer inhuman and degrading treatment there. The judgements implied that it could not be guaranteed that the implementation of Dublin Regulation would not lead to infringements of the provisions of ECHR as it could not be trusted that the receiving country could provide asylum seekers freedom from torture or inhuman or degrading treatment or punishment.

Since the adoption of Dublin III Regulation, the ECtHR has decided numerous cases with regard to transfers under Dublin III Regulation and except for one case, no violation of Article 3 ECHR was found which could prohibit the transfer.⁹⁷ This was until October 2014 when ECtHR gave few judgements which undersigned the doctrine held in *M.S.S. v Belgium and Greece*.⁹⁸ One of the cases was *Sharifi and Others v Italy and Greece* where Italy was found to be in violation of Article 4 of Protocol 4 ECHR which prohibits the collective expulsion of aliens, and Article 3 and Article 13 of

⁹⁶ Brouwer, E. (2013) Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof, - *Utrecht Law Review*, Vol.9, No. 1, p 135

⁹⁷ Desimpelaere, K. (2015) *supra nota* 48, p 65

⁹⁸ Morgades-Gil, S. (2015) 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, No. 3, p 439

the ECHR when turning a group of Afghan asylum applicants to Greece.⁹⁹ Greece on the other hand was found in violation of Article 2, which is the right to life, and 13 read in conjunction with Article 3 for a lack of access to the asylum procedure in Greece and the risk of deportation to Afghanistan.¹⁰⁰ The Court emphasized that it was for the State's responsibility, when carrying out the return to ensure in the context of the Dublin system, that the country where person is returned offers sufficient guarantees in the application of its asylum policy so that the person is not removed back to his country of origin without proper assessment of the risks.¹⁰¹

Another recent Dublin III Regulation related case of ECtHR is *Tarakhel v Switzerland*.¹⁰² In the case ECtHR found that the return to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together would constitute a violation of Article 3 of the ECHR.¹⁰³ Due to this judgement ECtHR added a new limitation to the implementation of the Dublin system; a procedural obligations in the cases of doubt concerning the availability of sufficient reception conditions in the case of special vulnerability of applicants was set to the Member States.¹⁰⁴

3.1. ECtHR – Case M.M.S v Belgium and Greece

European Court of Human Rights) ECtHR is an international court which was set up in 1959 due to the adoption of the ECHR.¹⁰⁵ The reason for establishing the Court was that the importance of the ECHR, in addition to the scope of the fundamental rights it protects, is to examine alleged violations of human rights and make sure that States follow their obligations under the Convention.¹⁰⁶

⁹⁹ Sharifi and Others v Italy and Greece No. 16643/09, ECtHR, 21 October 2014

¹⁰⁰ *Ibid.*

¹⁰¹ European Court of Human Rights, Council of Europe (2014) *Press release: Indiscriminate collective expulsion by the Italian authorities of Afghan migrants, who were then deprived of access to the asylum procedure in Greece*. Accessible: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-4910702-6007035%22%5D%7D>}, p 6, 28 April 2018

¹⁰² *Tarakhel v Switzerland* No. 29217/12, ECtHR, 4 November 2014

¹⁰³ *Idid.*

¹⁰⁴ Morgades-Gil, S. (2015) *supra nota* 98, p 440

¹⁰⁵ European Court of Human Rights, Council of Europe, *50 YEARS OF ACTIVITY The European Court of Human Rights Some Facts and Figures*. Accessible: https://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf, p 3, 27 April 2018

¹⁰⁶ *Ibid.*, p. 3.

Applications of violations of rights protected by ECHR can be lodged by States but also by individuals.¹⁰⁷ The judgements of the ECtHR are binding to the countries concerning.¹⁰⁸ The case law produced by ECtHR makes the ECHR a powerful instrument for consolidating the rule of law and democracy in Europe.¹⁰⁹ The important task of the court is to safeguard respect towards human rights.¹¹⁰

On 21 January 2011, the ECtHR ruled on the case of *M.S.S v Belgium and Greece* which is a groundbreaking judgment for many reasons as it is the first successful and admissible case regarding the Dublin system.”¹¹¹ With the judgment the so called “sovereignty clause” became the guarantee of protection of human rights in the Dublin system because if transferring of an asylum seeker to the responsible state entailed a serious violation of a specific human right, the member state in which the asylum seeker was present would be forced to take responsibility for the application.¹¹² The judgment of the ECtHR in *M.S.S v Belgium and Greece* is rich with significance in several important areas relating to refugee and human rights law.¹¹³

In the case an Afghan citizen was transferred from Belgium to Greece under Dublin II Regulation to complete his asylum application as Greece was determined to be the Member State responsible. The transfer was ordered despite the fact that UNCHR recommended by letter the Belgian Minister for Migration and Asylum Policy to suspend the transfers to Greece due to serious deviancies in the asylum system of Greece.¹¹⁴ When M.S.S. was transferred to the Greece he was immediately placed in detention sharing a very small room with 20 other detained with only limited access to toilets, without access to up open air, little to eat and inadequate place to sleep.¹¹⁵ In addition other very questionable practises took place by the Greek authorities. Eventually, Greece was found in violations of Article 3 ECHR and Article 13 taken in conjunction with Article 3 ECHR.¹¹⁶ Also Belgium was

¹⁰⁷Council of Europe, European Convention on Human Rights (1953) *supra nota* 83, art. 33-34

¹⁰⁸ *Ibid.*, art. 46.

¹⁰⁹ European Court of Human Rights, *Council of Europe, The Court in brief*. Accessible: https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf, 27 April 2018

¹¹⁰ Advisory Council on International Affairs (2011) *The European Court of Human Rights: protector of civil rights and liberties*. The Hague: Advisory Council on International Affairs

¹¹¹ Lenart, (2012) *supra nota* 20, p 15

¹¹² Morgades-Gil (2015) *supra nota* 98, p 439

¹¹³ Clayton, G. (2011) Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*, - *Human Rights Law Review*, Vol.11, No. 4, p 758

¹¹⁴ *M.S.S. v. Belgium and Greece* (2011) *supra nota* 40, paras. 16-17

¹¹⁵ *Ibid.*, para. 34.

¹¹⁶ *Ibid.*, p. 88-89.

found in violations of the same Articles due to sending the applicant back to Greece and exposing him to the conditions through that.¹¹⁷

3.2. CJEU – Case N.S. and M.E.

Court of Justice of the European Union (CJEU) is a court of EU which comprises of Court of Justice, General Court and Specialised court.¹¹⁸ The role of CJEU is to ensure that EU law is interpreted and applied the same way in every EU Member State, and to make sure that countries and EU institutions actually follow the EU law.¹¹⁹ It also settles legal disputes between national governments and EU institutions.¹²⁰ CJEU constitutes the judicial authority of the EU and ensures the uniform application and interpretation of EU law together with the courts and tribunals of the Member States.¹²¹

N.S. and M.E. is one of the land mark judgements of the CJEU showing the connection between Dublin Regulation and ECHR.¹²² The N.S. judgment eventually clarifies the way in which the overloading of a Member States' asylum system affects the EU arrangements for determining the Member State responsible for asylum applications lodged in the EU.¹²³ Also, through the judgement CJEU created a term defining the criteria under which a transfer based on the Dublin II Regulation to another participating state is impermissible which is called 'systemic deficiencies'.¹²⁴

In the case asylum seekers originating from Afghanistan, Iran and Algeria opposed their transfer from Great Britain and Ireland to Greece.¹²⁵ They claimed that they risked being subjected to inhuman and degrading treatment if transferred to Greece.¹²⁶ The Court ruled that Member States are given a right to examine an application of asylum if there is substantial ground on believing that transfer under

¹¹⁷ *Ibid.*, p. 88-89

¹¹⁸ Craig, De Burca (2015) *supra nota*, 14, p 57

¹¹⁹ European Union, *Court of Justice of the European Union (CJEU)*.

Accessible: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en, 2 May 2018

¹²⁰ *Ibid.*,

¹²¹ Curia, *The institution: General presentation*. Accessible: https://curia.europa.eu/jcms/jcms/Jo2_6999/en/, 9 May 2018

¹²² Court decision, 21.12.2011, N.S. and M.E., Joined cases C-411/10 and C-493/10, EU:C:2011:865

¹²³ Lieven, S. (2012) Case report on C-411/10, N.S. and C-493/10, M.E. and others, 21 December 2011, - *European Journal of Migration and Law*, Vol.14, No. 2, p 224

¹²⁴ Lübke, A. (2015) 'Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR? - *International Journal of Refugee Law*, Vol. 27, No. 1, p 135

¹²⁵ Court decision, N.S. and M.E., Joined cases (2011) *supra nota* 122, para 51

¹²⁶ *Ibid.*, paras. 38 and 40.

Dublin II Regulation would lead to infringement of the prohibition of inhumane and degrading treatment.¹²⁷ Also, the Member State in which the asylum seeker is present must not worsen the situation where the fundamental rights of that applicant have been infringed by using unreasonable amount of time when determining the Member State responsible.¹²⁸

3.3. Fulfilment of Human Rights

Does the implementation of current Dublin III Regulation comply with ECHR is a not a simple question. It has been said that EU should establish Human Rights standards on regulating asylum.¹²⁹ The ECtHR's judgment on the case of *M.S.S. v Belgium and Greece*, and the CJEU's judgment on *N.S. and M.E.*, established an interpretation of the sovereignty clause of Dublin II Regulation by which its activation became mandatory in certain cases of serious risk of human rights violations.¹³⁰ Each Member State was given a chance to examine an application for asylum, even if such examination of it is not its responsibility under the criteria laid down in the Regulation.¹³¹ Sovereignty clause is included in the Article 17(2) of the current Dublin III Regulation which states that "each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation".¹³² This addition made the Dublin III Regulation guarantee that the system respected and protected human rights.¹³³ Dublin III regulation also comprises of the so called "humanitarian clause" which allows a Member State to request another Member State other than the one responsible to take on responsibility for assessing a claim for humanitarian reasons, particularly family or 'cultural' grounds.¹³⁴

¹²⁷ *Ibid.*, p. 41-42.

¹²⁸ *Ibid.*, p 42.

¹²⁹ Costello, C. (2016) *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, p 8

¹³⁰ Morgades-Gil, S. (2015) *supra nota* 98, p 433

¹³¹ *Ibid.*, p. 437.

¹³² Regulation (EU) No 604/2013 (2013) *supra nota* 1, art. 17(2)

¹³³ Morgades-Gil, S. (2015) *supra nota* 98, p 433

¹³⁴ Evaluation of the Implementation of the Dublin III Regulation DG Migration and Home Affairs, Final report, 18 March 2018, European Commission, p 35

According to the ECtHR, a risk to be subjected to a treatment against Article 3 of the ECHR by its self is arguable claim for a transfer obstacle within the Dublin system as judged in the case *Tarakhel v. Switzerland*.¹³⁵ CJEU on the other hand, judged in the case *NS and ME* that in addition to the risk of being subjected to inhuman or degrading treatment the risk must also be due to “systemic deficiencies” in order to be arguable.¹³⁶ The condition of systematic deficiencies was added to Dublin III Regulation as “systematic flaws”. Systemic flaw has been described as “a structure in a system - or a lack of a structure, a structural void - that, for cases passing through this part of the system, leads to an error”.¹³⁷ The application of systematic deficiencies can be found from the Chapter II of the Dublin III Regulation. Article 3(2) of the chapter states that where it is impossible to transfer an applicant to the Member State primarily designated as responsible due to the fact that there exists substantial grounds for believing that there are “systemic flaws” in the asylum procedure and in the reception conditions for applicants in that Member State, which pose as a risk of inhumane or degrading treatment the determining, the Member State shall continue to examine whether another Member State can be designated to be responsible for examining the claim of international protection.¹³⁸

Even though, the Dublin III Regulation comprises the condition of a systematic flaws to exist the prerequisite of it seems inconsistent and unclear. It has been said that systemic deficiencies cannot be a cogent precondition for a transfer obstacle, but when there is a real risk for the individual claimant to be subjected to inhumane and degrading treatment contradictory to Article 3 ECHR the risk alone can be considered as a cogent prediction for a transfer obstacle.¹³⁹ Contradiction between the interpretation of ECtHR and CJEU can be noticed as this opinion would be in accordance with the judgements of the ECtHR, but is in contradictory with the CJEU’s.¹⁴⁰ It seems that the interpretations

¹³⁵ *Tarakhel v. Switzerland* (2014) *supra nota* 102

¹³⁶ Court decision, *N.S. and M.E.*, Joined cases (2011) *supra nota* 122

¹³⁷ Lübbe, A. (2015) *supra nota* 124, p. 137

¹³⁸ Regulation (EU) No 604/2013 (2013) *supra nota* 4, art. 3(2)

¹³⁹ R (on the application of EM (Eritrea)) v Secretary of State for the Home Department Case [2014] UKSC 12 (19 Feb 2014) para 58; R Bank, C Hruschka, ‘Die EuGH-Entscheidung zu Überstellungen nach Griechenland und ihre Folgen für Dublin-Verfahren (nicht nur) in Deutschland’ (2012) 6 ZAR 182–88, 85 f; R Marx, ‘Solidarität im grundrechtskonformen europäischen Asylsystem’ (2012) 7 NVwZ, 409–13, 411. Referenced in Lübbe (Lübbe, A. Systemic Flaws’ and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR? *International Journal of Refugee Law*, 2015 Vol. 27, No. 1, p. 136)

¹⁴⁰ Lübbe, A. (2015) *supra nota* 124, p. 136

of ECtHR and CJEU differ significantly. However, both of the courts judgements have established important safeguards for the protection of human rights set out in the ECHR.

When evaluating the current Dublin III Regulation the Commission recognises the diverging standards between Member States' asylum systems as one of the main obstacles to a sustainable allocation of responsibility.¹⁴¹ As mentioned before the whole ideology of the CEAS and functioning of the Dublin system is the ideology of mutual trust on Member States asylum procedures. However asylum procedures vary significantly between Member States as the procedures are not fully harmonised. Allocation cannot be sustainable if there is diverging standards between Member States' asylum systems. The variation in procedures and ideology of mutual trust will be discussed and analysed more in detail later in this thesis. It seems that the current Dublin system and Dublin III Regulation are not really working how they are supposed to, especially from the perspective of the fulfilment of fundamental human right. Even the ECRE has consistently held that the current Dublin system should be replaced with a system that respects the fundamental rights of asylum seekers. UNHCR has also stated its concerns on the lack of harmonization as it may lead to direct or indirect refoulement and the risk of inhuman or degrading treatment in violation of Article 3 of the European Convention on Human Rights.¹⁴²

¹⁴¹ European Commission DG Home Affairs and Justice: Evaluation of the Implementation of the Dublin III Regulation. Final Report (Report prepared by ICF International for the European Commission), 18 March 2016, p. 4 and 5 referenced in Hruschka (Hruschka, C. Enhancing efficiency and fairness? The Commission proposal for a Dublin IV Regulation – ERA Forum, Vol.17, No. 4, 2016, p 523)

¹⁴² The UN Refugee Agency. *Left in limbo: UNHCR Study on the Implementation of the Dublin III Regulation*. Accessible: <http://www.integrazionemigranti.gov.it/Documenti-e-ricerche/LEFT%20IN%20LIMBO.pdf>, 12 May 2018

4. EFFECTS OF THE NEW PROPOSAL

As mentioned before one of the main objectives of the Dublin IV proposal was to ensure fair distribution of applications of international protection. As a purpose there is to fulfil the aim of quick access to the examination procedure and to protection for those in need of it.¹⁴³ The Commission states in its proposal that the asylum procedures needs be speeded up and become more convergent, thus more uniform rules needs to be adopted on the procedures and rights to be offered to beneficiaries of international protection and reception conditions will have to be adapted, to increase as much as possible harmonisation in the Member States.¹⁴⁴ The wider distribution of applications would most probably speed up the application process and therefore ensure the quick access to protection so that the applicant would not have to live in uncertainty and wait for the decision for long periods of time. Also, the Member States would have time to evaluate the case of an applicant more carefully and profoundly.

However, the ideology behind the “reference key” through which this fairer distribution would be applied is that the applications would be allocated according to a country’s size and wealth.¹⁴⁵ If the number of applications for international protection for which a Member State is responsible exceeds 150% of the figure identified in the reference key the allocation takes place to the Member States with lower number of applications.¹⁴⁶ This could lead to the situation where person applying international protection might not be able to choose the country where the application for protection is examined. In this kind of situations there needs to be safeguards to make sure that the country where applicant is being allocated have the required level to access the protection so that the applicant cannot be predisposed to circumstances prohibited in Article 3 ECHR. Implementation of this practise needs

¹⁴³ Proposal for a regulation (2016) *supra nota* 3, p 14

¹⁴⁴ *Ibid.*, p. 3.

¹⁴⁵ *Ibid.*, p. 18.

¹⁴⁶ *Ibid.*, p. 18-19.

diligence as the previous case law by ECHR and CJEU proves that the international protection procedures vary in different EU Member States.

The proposal states that family members to whom the allocation procedure applies will be allocated to the same Member State and that the corrective allocation mechanism should not lead to the separation of family members.¹⁴⁷ This is an essential safe guard to have so that the allocation does not lead to the violations of right to respect for privacy and family life prohibited under Article 8 of the ECHR which is very important improvement. However, even though the Dublin IV proposal has broadened the definition of a word “family member” by including the siblings of an applicant and family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State, it still leaves out for example the family ties formed in the territory of a Member State and adult children.¹⁴⁸ Thus, allocation of an applicant under Dublin IV puts the families formed in the territory of a Member State in disadvantage position and could still lead to a separation of family and violate the Article 8 of the ECHR. Also, when considering the benefits of the broadened definition of “family member” the fact that its practical relevance applies only in prior to determining a Member State responsible, is said to make only a microscopic improvement.¹⁴⁹

The Dublin IV proposal still includes the condition of systematic flaw to exist in order to constitute a transfer obstacle.¹⁵⁰ This is surprising as the condition is highly criticised for example by European Council of Refugees and Exiles (ECRE) because it may lead to the violation of prohibition of inhumane or degrading treatment and other human rights.¹⁵¹ Also, like mentioned before, the judgements of ECtHR and CJEU show that there is clear inconsistency with the interpretation of the courts; ECtHR does not require the existence of a “systematic flaw” as the serious threat of violation of human rights is enough valid reason to constitute a transfer object. The scope of the sovereignty clause and humanitarian clause, on the other hand, has been restricted.¹⁵² The sovereignty clause can be used only on family grounds and prior determining any Member State to be responsible.¹⁵³

¹⁴⁷ *Ibid.*, p. 19.

¹⁴⁸ *Ibid.*, art. 2(g)

¹⁴⁹ Hruschka, C. (2016) *supra nota* 68, p 525

¹⁵⁰ Proposal for a regulation (2016) *supra nota* 3, art. 3(2)

¹⁵¹ European Council of Refugees and Exiles (2016) ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270, p 2

¹⁵² Proposal for a regulation (2016) *supra nota* 3, art. 9

¹⁵³ *Ibid.*, art. 19(1)

Humanitarian clause is also restricted to be applied prior determining any Member State to be responsible.¹⁵⁴ According to ECRE the restricting the scope of the clauses should be resisted as it eliminates pragmatist assumptions of responsibility by Member States and contradicts Member States' sovereign right to examine an asylum claim on the merits.¹⁵⁵ The restriction of the scope of sovereignty clause to apply only in situation based on family grounds, which is certainly a useful safeguard for families, however, seems to be disadvantageous for the human rights of the applicants who does not go within the scope. This could lead to a serious risk of human rights violations for example violation of Article 8 of the ECHR.

4.1. Effective protection of Human Rights

In addition to fair end effective system on determining the Member State responsible for examining a claim of international protection, the system also needs to guarantee effective protection of human rights. Dublin IV proposal takes into consideration the realisation of human rights in some extent. It aims on improving the application procedure of minors and other vulnerable groups.¹⁵⁶ Other improvement is that the proposal broadens the definition of a word "family member" by including the siblings of an applicant and family relations which were formed after leaving the country of origin. However, other than that it does not noticeably aim to offer any improvement on the other human rights aspect of the applicants, especially under ECHR.

It has even been claim that the change is for worse. For instance, Professor, lecturer and Senior Researcher Hrushka claims in his article that instead of enhancing the protection of individual rights Dublin IV proposal actually reduces human rights protection in the Dublin procedures as some limitations on it may result violations of principle of non-refoulement, in other words Article 3 of ECHR.¹⁵⁷ Hrushka also addresses the concern on further challenges to human rights protection such as challenges to the right to family unity put does not open up those challenges more than that "it will remain to be seen whether these standards will actually "survive" the legislative process".¹⁵⁸ Hrushka

¹⁵⁴ *Ibid.*, art. 19(2)

¹⁵⁵ European Council of Refugees and Exiles (2016) *supra nota* 151, p 2

¹⁵⁶ Proposal for a regulation (2016) *supra nota* 3, p 5

¹⁵⁷ Hrushka, C. (2016) *supra nota* 68, p 530

¹⁵⁸ *Ibid.*, p. 350.

sums up that the Dublin IV proposal is a significant setback for individual human rights protection within the CEAS.¹⁵⁹

ECRE has released several observations and recommendations how the Dublin IV proposal should be altered and thus shares the opinion that there are still significant deficiencies in the proposal.¹⁶⁰ ECRE states in its comment that the proposal attempts at various situations to overturn principles established by ECtHR and CJEU and even claims that they might even attempt to maintain persisting incompatibilities with human rights.¹⁶¹ According to ECRE, the proposal is doing so by keeping a narrow non-refoulement guarantee by including “systemic flaws” as a precondition for a transfer obstacle, which is in contrary to the ECtHR’s judgment in *Tarakhel v Switzerland*.¹⁶² Also, CEAS claim that the proposal ignores the requirements on reception conditions throughout the Dublin procedure set by the CJEU.¹⁶³ CEAS notes the concept of “systemic flaws” does not properly reflect the scope of the principle of non-refoulement as the source of the risk is irrelevant to the level of protection guaranteed by human rights like judged by ECtHR in the case *Tarakhel v Switzerland*.¹⁶⁴ Non-refoulement may arise in relation to violations of Article 3 ECHR regardless of the fact whether they are caused by systemic or non-systemic flaws in the asylum system.¹⁶⁵

The whole Dublin system is based on mutual trust that all Member States are complying with EU law and providing quick and efficient asylum procedures with respect towards a common set of standards.¹⁶⁶ However, like noticed through ECtHR and CJEU it can be noted that asylum procedures vary between Member States and not everyone one of them is able to satisfy the standards of effective human rights protection. It is claimed that the hierarchy of criteria for the allocation of responsibility does not even take into consideration Member States’ capacity to provide protection.¹⁶⁷ Dragan, a Human Rights Master of Law from Central European University, states that, from a human rights perspective, it is evident that the Dublin system still leaves much to be desired as it allows states a

¹⁵⁹ *Ibid.*, p. 350

¹⁶⁰ European Council of Refugees and Exiles (2016) *supra nota* 151, p 2-4

¹⁶¹ *Ibid.*, p. 6.

¹⁶² *Ibid.*, p. 6.

¹⁶³ *Ibid.*, p. 6.

¹⁶⁴ *Ibid.*, p. 20.

¹⁶⁵ *Ibid.*, p. 20.

¹⁶⁶ Dragan, A. (2017) Dublin III and Beyond: Between Burden-sharing and Human Rights Protection, *Pécs Journal of International and European Law*, Vol. 2017/II, p 86

¹⁶⁷ *Ibid.*, p. 85

large margin of discretion of whether to resort to the inherently discretionary sovereignty and humanitarian clauses.¹⁶⁸ It seems that EU is so concerned about the quick access and fair distribution of applicant of international protection from the perspective of the Member States that it seems to be forgetting the applicants and their rights. It can be concluded that the Dublin IV does not really take into consideration previous concerns on the human rights when applying Dublin Regulation, expect for minor improvements for families and vulnerable groups.

4.2. Suggestions for improvements

It is clear that Dublin IV proposal does not, at least significantly, improve the human rights of the applicants of international protection under ECHR when compared to Dublin III Regulation. It can actually be seen that the adoption of it could actually also reduce the human rights of the applicants. Some improvements has to be done as the proposal does not really reach the goal as it was hoped to from the human rights perspective.

Lübbe, a Professor of Public Law and Alternative Dispute Resolution at the University of Applied Sciences in Fulda/Germany and Mercator Senior Fellow at the European University Institute, presents an opinion by which the contradictions between the ECtHR and the CJEU could be avoided.¹⁶⁹ Lübbe claims that there should not be any transfer obstacles where there is no systemic flaw within the receiving country and there should always be transfer obstacle, where there is a real risk of an infringement of Article 3 ECHR.¹⁷⁰ Meaning that in Lübbe's opinion in order to have an arguable claim a systemic flaw is required, and a real risk of an inhuman or degrading treatment in the individual case is sufficient. ECRE on the other hand recommends the removal of the condition of systematic flaws as a transfer obstacle under Dublin system as a legislative limitation on the scope of protected rights to prevent a Dublin transfer is an undue restriction in contradictory with EU primary law and thus protection of human rights.¹⁷¹

¹⁶⁸ *Ibid.*, p. 87.

¹⁶⁹ Lübbe, A. (2015) *supra nota* 124 , p 136

¹⁷⁰ *Ibid.*, p. 136.

¹⁷¹ European Council of Refugees and Exiles (2016) *supra nota* 151, p 20

ECRE also recommends that the definition of family members in the proposal could be further strengthened to enhance integration prospects and fully comply with the right to family life.¹⁷² Even though, Dublin IV proposal aims on improving the rights and safety of families and vulnerable groups such as unaccompanied minors and dependent persons, it still leaves out groups of person in need of protection and support such as families formed after entering the territory of any EU Member State. This can lead to separation of families and violate the right to respect for privacy and family life set out in the Article 8 ECHR. Some kind of safe guard for the families formed after the entrance on the EU territory should be established or otherwise they are put into a disadvantaging position.

If the allocation procedure through reference key is in some point adopted, better safe guards for the implementation of it needs to be established as it is unclear how the Member State of allocation is to be determined. As the whole Dublin system is based on mutual trust in EU Member States asylum procedures, establishment of an effective measure to determinate Member States safety is necessary as it can be noted through relevant case law, that the asylum procedures vary significantly and there is no guarantee that the Member State in which the transfer under Dublin system is done can ensure efficient procedure and take into consideration the safety and human rights of the applicant. In addition, the Member States are given a huge amount of power as they are themselves responsible for determining if a Member State is safe enough for an applicant. The countries are also given the power to determine if there is risk on being imposed to inhumane treatment and power to apply sovereignty clause. However it could be more appropriate if there existed some kind of safeguards for the transfers before those violations could even take place. It can be noted from the case history that same countries are usually accused of violating ECHR when applying Dublin Regulation. Also, the fact that the scope of sovereignty clauses was limited should be resisted according to ECRE as it may lead to serious violations of ECHR.

Dragan brings up in his paper an idea that the stakeholders' views should be taken into consideration when concluding a recast for the present system as when human rights advocates tend to minimise the importance of States' interests and economy capabilities of receiving refugees, governments, on the other hand, tend to overlook human rights violations when establishing their migration policies.¹⁷³

¹⁷² *Ibid.*, p 4.

¹⁷³ Dragan, A. (2017) *supra nota* 166, p 87

Some suggestions on this kind of system have been made and the new Dublin IV proposal has a very similar approach.¹⁷⁴ However, in order to be implemented further studies would be needed so that the human rights are effectively taken into consideration, too.

¹⁷⁴ *Ibid.*, p. 87-88

CONCLUSION

Under International law everyone has the right to seek protection from persecution from another state. EU's legal system on determining the Member State responsible for examining an application for international protection has been criticised throughout its whole existence as implementation of it seems to be in contradictory with the international human rights such as right and prohibitions of ECHR. The system nowadays consists of Regulation (EU) No. 604/2013, also known as Dublin III Regulation, and Regulation (EU) No 603/2013, also known as Eurodac Regulation. Even though through many alteration from Dublin Convention to current Dublin system, Dublin III Regulation does not still comply with the ECHR as it does not provide safeguards efficient enough to protect applicants of international protection from infringements of their fundamental human rights under ECHR.

In 2016, the Commission submitted a proposal to reform the current Dublin system as it aim to create more efficient and fair procedure for international protection. The so called Dublin IV proposal, despite the fact it aims improving the rights and safety of families and vulnerable groups such as unaccompanied minors and dependent persons, still leaves out groups of person in need of protection and support such as families formed after entering the territory of EU, and parent and their adult children. This can lead to separation of families and violate the right to respect for privacy and family life set out in the Article 8 ECHR.

Also, the great improvement gained through the judgements of landmark cases *M.S.S. v Belgium and Greece* and *N.S. and M.E.* has been demolished as the usage of "sovereignty clause" was limited only to apply on family grounds. Also, the application of the clause was limited to be applied prior determining a Member State responsible. These limitations reduces the legal rights and personal welfare of the applicants who do not have the possibility to invoke on family grounds. Sovereignty clause is very important tool to protect applicants from being imposed to inhumane and degrading

treatment prohibited under Article 3 ECHR. Thus, the limitation of the scope to the family grounds is a huge leap back under ECHR. In addition, both Dublin III Regulation and Dublin IV proposal still require systematic flaws to be existent in the asylum procedure of the receiving country in addition to a real risk of being imposed to inhumane or degrading treatment in order to constitute an arguable claim before court. This condition of a systematic flaw has been highly criticised as it is immaterial what constitutes the violation if there is an actual risk of inhumane or degrading treatment.

One of the major issues of the Dublin system is that the whole system is based on mutual trust in EU Member States asylum procedures. However it can be noted through case law that the asylum procedures vary significantly and there is no guarantee that the Member State in which the transfer under Dublin Regulation is done can ensure efficient procedure and take into consideration the safety and human rights of the applicant. Even though the concept of CEAS consists of several legislative measures to harmonise common standards on asylum the fact that infringements, such as prohibition of torture and right to respect for privacy and family life, are still very possible risks for an applicant of international protection, when implementing Dublin Regulation, implies that the harmonisation on asylum procedures granting sufficient protection are still in need of an improvement. In addition, it is evident that Dublin IV proposal does not guarantee better protection to applicants of international protection under ECHR and might even make them worse by removing important safe guards already established.

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