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RENOUNCING THE DUBLIN III: DUBLIN IV PROPOSAL'S COMPATIBILITY TO FUNDAMENTAL AND HUMAN RIGHTS WITH A PERSPECTIVE TO (UN)ACCOMPANIED MINORS.

Bachelor's thesis

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ABSTRACT

The Dublin system was set up as an instrument requiring a Member State to examine an application for international protection lodged by a third-country national. It is an internal tool for managing the sustainable distribution of asylum applications between the Member States, with only one Member State responsible for examining the application. This inevitably leads to the transfer of asylum seekers between the Member States, some of which consist of children who have arrived alone or accompanied. However, the current Regulation and earlier systems have proven unsustainable for several reasons. In 2016, the Commission submitted its proposal to amend the system through which asylum applications are handled. The system applies to third-country nationals below 18-years old (minors) as well as adults. However, since children form a particularly vulnerable group of asylum seekers, their situation calls for a closer look within the Dublin system. The thesis aims to find out what factors have led to the continuous development of the Dublin system and how the rights of children reflect in the current system. The thesis examines how the fundamental and human rights established for children in international law as well as in the case-law of EU and international courts are realised in the light of the new proposal. The result reflects the reasons why the proposal cannot be considered in line with fundamental or human rights. The thesis shall use qualitative as well as comparative research methods.

Keywords: Dublin Regulation, European Convention on the Human Rights, Rights of the Child, Unaccompanied minors, Dublin IV Proposal

INTRODUCTION

European migrant crisis left a lasting mark in the asylum and refugee policy of the European Union (EU) in 2015 and 2016. During the first six months, more than 137 000 refugees rushed from countries such as Syria, Afganistan and Irak mainly to the shores of Greece, Italy, Malta and Spain.[1] By the end of the year 2015, the number turned out to be a drop in the ocean after more than 1,2 million asylum applications were lodged in the EU Member States from which children formed third.[2]

The system through which the international protection applications were handled and processed was found to be slow, unfair and unsystematic. As a result of the refugee crisis, European asylum system was found to be exposed to significant fundamental structural weaknesses that were to undermine the functioning of the rules and prevent sustainable allocation of responsibilities, especially within the Dublin system.[3] The Commission put forward several proposals striving to reform the current asylum framework in the Union and establish a sustainable and fair system for determining the Member State responsible for examining asylum applications. The Commission stated that the Dublin system was not designed to ensure fair sharing of applications across the Union and this had led to some Member States accepting the majority of asylum applications or even in non-compliance with the Union legislation.[4]

As the inevitable need for quick betterment of the EU asylum system arose during the refugee crisis, in 2016 the Commission proposed a new system that would improve the Common European Asylum System (CEAS) and provide a more sustainable approach in managing migration. The 'Dublin IV' would refine the system what is currently called the 'Dublin III' consisting of

[1] UNHCR (2015) *Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record.* Retrieved from https://www.unhcr.org/5592b9b36.html, 9 February 2020.
[2] Eurostat (2015). First time asylum applicants in the EU28 (2015) [e-database]. Retrieved from https://ec.europa.eu/eurostat/news/themes-in-the-spotlight/asylum2015, 9 February 2020.
[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, 3.
[4] *Ibid*.

Regulation (EU) No 604/2013[5], what is known as the 'Dublin III Regulation' and Regulation (EU) No 603/2013[6], called the Eurodac Regulation, which mainly forms a database for the fingerprints of asylum seekers.

This study aims to analyse the compatibility of the Commission's Proposal for Dublin IV Regulation to human rights with a perspective to children who are seeking international protection in the EU. The topic is quite relevant, and there is no prospect that it will lose its topicality shortly. The subject is also necessary in order to examine how children's rights have evolved in the Dublin system and whether they comply with the principles recognised by human rights and international law. The thesis is juridical in that it examines the light in which the rights of children appear within the mechanisms of the Dublin system. On the other hand, it is problem-driven because it looks at the flaws within the system. This thesis reveals the history of the Dublin system and takes a stand on the impact of the current Dublin system on child asylum seekers. The thesis shall mainly use qualitative research methods. This is done by analysing and comparing several sources to an academic extent as well as including relevant legislation and case law to interpret the norms. The academic sources shall include books, articles, journals and other peer-reviewed publications which are compared and evaluated. The legislation shall among others include the Dublin III as well as Dublin IV Regulations with relevant acts and amendments, European Convention on Human Rights (ECHR), Charter of Fundamental Rights of the European Union (ECFR) and Convention on the Rights of the Child (CRC). The research questions are modelled as follows:

1. What has led to the constant changes in the Dublin system and has the changes accorded the current system into a legal state that is capable of safeguarding children's rights and;

[5] 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, 29.6.2013, p 31–59.

[6] 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, OJ L 180, 29.6.2013, p 1–30.

2. whether the ‘Dublin IV Proposal’ is capable of guaranteeing fundamental rights belonging to children seeking asylum in international law, in particular human rights, regardless of whether they have arrived alone or accompanied?
3. How have the decisions of the courts mentioned above influenced the development of the Dublin system concerning children’s rights and in what light do the principles established in them appear in the ‘Dublin IV Proposal’, particularly in Articles 3(2) and 8(2) and 10(5)?

In order to analyse the Dublin IV Proposal and its compatibility with human rights and children, the thesis must begin by defining what the Dublin system is as well as iterate the history of CEAS. Chapter 1 shall also include the criticism the current Dublin system has received and present the need for development. That is where this thesis will begin. In Chapter 2, the thesis shall explain the fundamental rights that belong to children seeking international protection. This chapter provides relevant case law which has affected the Dublin system. These chapters form the basis for Chapter 3, which is the main focus of the thesis. In Chapter 3, the thesis shall continue to more specific procedural issues of the Dublin IV Regulation, such as the treatment of unaccompanied minors. In this section, the thesis shall cover the feedback the Proposal has received from different organisations. The last section shall follow with conclusions and proposed amendments to the Proposal.

This thesis hypothesises that after the implementation of Dublin III Regulation, especially after the proposed amendment of Article 8(4) of the Regulation, the status and rights of children seeking asylum within the system have evolved for the better. However, the introduction of Proposal for the Dublin IV Regulation casts away from the principles established in ECtHR and CJEU case law and therefore does not satisfy human rights nor provides adequate safeguards for children arriving in the EU for international protection.

1. DEVELOPMENT OF COMMON EUROPEAN ASYLUM SYSTEM

Institution of a system for the determination of the Member State responsible for examining an asylum application lodged by a third-country national has been a priority of the EU since the 1980s through Schengen Agreement.[7] The Schengen Agreement established a set of rules and prohibitions which would harmonise the system on the abolishment of checks on persons at common borders and to transfer them to external borders to secure internal security and prevent illegal immigration.[8] The Schengen Agreement was implemented by the Schengen Convention, which clarified the above prohibitions and regulations in an attempt to prevent 'asylum shopping'.[9] The Schengen Convention set out rules governing the responsibility of the processing an asylum application lodged by a third-country national by stating that only one State shall be responsible.[10]

The Implementing Convention of the Schengen Agreement was ultimately replaced by the 1990 Dublin Convention[11], which stepped in to force in 1997.[12] Dublin Convention's purpose was to tackle the issue of 'refugees in orbit' by demanding the states, together with the notion of single responsible State, to ensure that applications were not transferred between states without any of the states first recognising its responsibility in processing the application.[13] One of the notable aspects of these treaties is that an asylum application rejected by one Member State was also recognised in the other Member States.[14] It is also important to note here that the asylum seekers

[7] Moreno-Lax, V. (2012). Dismantling the Dublin System: M.S.S. v. Belgium and Greece. *European Journal of Migration & Law*, 14(1), 1–31, 1.
[8] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000*,* p 13–2., art. 17.
[9] Moreno-Lax (2013), *supra nota* 7, 2.
[10] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22.9.2000*,* p 19–62, art. 29(3).
[11] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254, 19.8.1997*,* p 1–12.
[12] Guild, E. (2006). The Europeanisation of Europe's asylum policy. *International Journal of Refugee Law*, 18(3-4), 630-651, 636.
[13] Hurwitz, A. (1999). The 1990 Dublin Convention: a comprehensive assessment. *International Journal of Refugee Law*, 11 (4), 646–677, 648; Dublin Convention (1997), *supra nota* 11, preamble.
[14] Guild. E (2006), *supra nota* 12, 636.

were not given any rights or procedural guarantees by these treaties in themselves but were treated as "objects" of legislation.[15]

After the Treaty of Amsterdam had stepped in force 1999 and removed the possibility of States to conduct asylum and refugee matters in their own decision making and placing the matters in the competency of the community; the European Council held a meeting in Tampere, Finland in October 1999.[16] What came to be called as the Tampere Conclusions was a practical step towards the establishment of CEAS in its first phase of implementation. According to the Conclusions, CEAS was to be based "on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement."[17] Furthermore, as part of the objective set by the 1992 Treaty of Maastricht, the CEAS was to promote the area of freedom, security and justice with two main goals: it was to introduce a minimum set of standards and attain harmonisation throughout the EU.[18]

Tampere Conclusions set at five-year time-frame to pass a series of legislation related to asylum and refugee agenda.[19] In February 2003, the Council Regulation 343/2003[20], also known as the' Dublin II Regulation', replaced the Dublin Convention and established criteria and mechanisms to swiftly determine the responsible State for examining an asylum application lodged in one of the Member States by a third-country national.[21] Likes its predecessors, its purpose was to bring order into the system processing of applications while ensuring that the phenomenons of 'asylum shopping' and 'refugees in orbit' come to an end.[22]

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[15] *Ibid*.
[16] Staffans, I. (2012). *Evidence in European Asylum Procedures*. Leiden, Netherlands: Nijhoff, 30.
[17] European Council, Tampere 15 and 16 October 1999, Presidency Conclusions, para. 13.
[18] Reneman, M. (2014). *EU Asylum Procedures and the Right to an Effective Remedy.* Oxford, UK: Hart Publishing Ltd., 30.
[19] Staffans (2012), *supra nota* 16, 30.
[20] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p 1–10.
[21] Lenart, J. (2012). Fortress Europe: Compliance of the Dublin II regulation with the European convention for the protection of human rights and fundamental freedoms. *Merkourios-Utrecht Journal of International Law & European Law*, 28(75*)*, 4-19, 5.
[22] *Ibid*., 5.

The second phase of the CEAS began in September 2008 by the introduction of European Pact on Immigration and Asylum.[23] The objectives were defined in the Stockholm Programme.[24] The European Council called for the establishment of a common area of protection and solidarity in which equivalent level of treatment, procedural arrangements and status determination were granted for those seeking international protection.[25]

Perhaps the most essential development of the CEAS was stepping in force the Treaty on the Functioning of the European Union (TFEU), in 2009. Article 78(1) calls for the harmonisation of the common policy on asylum, subsidiary protection and temporary protection while respecting the requirements imposed on the Union by international agreements such as the Geneva Convention of 1951 and Protocol of 1967 concerning the status of refugees. Article 78(2), first primary law provision explicitly referring to CEAS, claims responsibility for the European Parliament and the Council to adopt measures for CEAS.[26] Secondary legislation completed the establishment of CEAS, and in 2013, the Dublin II was superseded by Regulation 604/2013, also known as the 'Dublin III Regulation'.

CEAS, today, include the revised Asylum Procedures Directive (2013/32/EU), the revised Reception Conditions Directive (2013/33/EU), the revised Qualification Directive (2011/95/EU), the revised Dublin Regulation (604/2013) and the revised EURODAC Regulation (603/2013). Its purpose is to set out common high standards and robust cooperation in order to secure a fair and sustainable system for asylum seekers.

In 2016 the Commission proposed a recast on the Dublin III Regulation which would provide a significant reform of the CEAS. The following chapters elaborate on the history of the Dublin system and its recent developments.

[23] European Asylum Support Office (EASO) (2016). *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis.* Retrieved from: https://easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF, 20 February 2020.
[24] The Stockholm Programme - An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, p 1–38.
[25] *Ibid.*, 32.
[26] European Asylum Support Office (2016), *supra nota* 23, 16.

1.1. Antecedents of the Dublin system

As mentioned above the Convention implementing the Schengen Agreement was ultimately replaced by Dublin Convention. The Dublin Convention aimed at replacing Chapter VII of the Schengen Convention as it continued to pursue the establishment of a system where hierarchy criteria determine the State responsible for processing an asylum application.[27]

The main objectives of the Dublin Convention were to avoid the 'in orbit' situations and prevent 'asylum shopping'.[28] The Convention set the criteria for the Member States in such a way that the continuous transmission of asylum applications to other EU countries was not possible.[29] It also imposed an obligation on a single Member State to examine the application for asylum from start to finish.[30] Moreover, the Dublin Convention placed an obligation on states to respect each other's asylum procedures.[31] Thus, by the principle of mutual recognition, if an asylum application was rejected in another Member State, the other Member State could have rejected it directly.[32] In the absence of common asylum procedures, this could have, at least indirectly, led to the deprivation of status for international protection within the EU upon rejection of one Member State and the violation of human rights and Geneva Convention thereof.

With regard to the safeguards of asylum seekers, the Dublin Convention exempted the Schengen Convention in the sense that it ensured that at least one State is responsible for examining the asylum application.[33] It did not, however, guarantee the asylum seeker any material points of view regarding the application.[34] Article 6 also raised difficulties in the application of the Dublin Convention.[35] Transfers of asylum seeker to the alleged first Member State of arrival required proof that the EU external border had been crossed irregularly.[36] Article 6 was the third most used

[27] Hurwitz (1999), *supra nota* 13, 646-647.
[28] Buchhorn, W. (2000). *Practiotioner Commentaires on the EU Acquis on Asylum: Prepared in the context of the PHARE Horizontal Programme for Justice and Home Affairs*. Wien, Austria: European Commission.
[29] Hurwitz (1999), *supra nota* 13, 648.
[30] Buchhorn, W. (2000), s*upra nota* 27, 105.
[31] Hurwitz (1999), *supra nota* 13, 648.
[32] *Ibid*.
[33] Marx, R. (2001). Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications. *European Journal of Migration & Law*, 3, 7-22, 10.
[34] *Ibid*., 9.
[35] Commission of the European Communities (2001). Evaluation of the Dublin Convention. *Commission Staff Working Paper*, SEC (2001) 756 final, 6.
[36] Dublin Convention (1997), *supra nota* 11, art. 6.

criteria in Dublin transfers, but the threshold for using it proved difficult and too demanding to demonstrate.[37]

An attempt was made to remedy the shortcomings of the Dublin Convention by the entry into force of the Dublin II Regulation in 2003. The need for improvement proved to be appropriate as only 6 % of the asylum applications were placed under request for transfer during the years 1998 and 1999.[38] In addition to above, the Dublin Convention was found to be vague, inefficient and ineffective in regards to problems caused by lack of evidence to illegal entry, inequivalent effort in regards of implementation, absence of judicial oversight as well as differences arising from refugee definition and policy and practise between the Member States.[39] The improvement of the criteria of determination of responsible State was meant to create a system of one-shop-stop procedure and valid uniform status and policies throughout the EU while striking a balance between responsibility criteria and the principle of solidarity.[40] The Regulation supplemented and amended the hierarchy criteria established by the Dublin Convention, but the changes were not significant *per se*.[41]

The Regulation introduced a new criterion on unaccompanied children;[42] the Member State responsible was the Member State where child's family member legally resided, if compatible with child's best interest, or, in the absence of the former, the Member State where an application for asylum had been lodged.[43] This criterion was the first to be applied, following family reunion criterion unchanged from Dublin Convention. These, however, proved to be somewhat ineffective due to the narrow definition of a family member and the system did not provide for the possibility of seeking subsidiary protection.[44] The Regulation also established a new third criterion, which required that Member State in which asylum seeker's family member, whose application had not yet been resolved, was responsible for the application.[45]

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[37] Da Lomba, S. (2004). *The right to seek refugee status in the European Union*. Antwerp, Oxford, New York: Intersentia, 135.
[38] Commission of the European Communities (2001), *supra nota* 35, 2.
[39] Commission of the European Communities (2000). 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. *Commission staff working paper*, SEC (2000) 522.
[40] Lenart, J. (2012), *supra nota* 21, 5.
[41] Peers, S. (2016). *EU Justice and Home Affairs Law: Volume 1: EU Immigration and Asylum Law.* New York, USA: Oxford University Press, 297.
[42] *Ibid*., 298.
[43] Council Regulation (EC) No 343/2003 (2003), *supra nota* 20, art. 6.
[44] Peers, S. (2016), *supra nota* 40, 300.
[45] Council Regulation (EC) No 343/2003 (2003), *supra nota* 20, art. 8.

Dublin II Regulation also introduced the use of Eurodac Regulation, which formed a database for the fingerprints of the asylum seekers making it presumably easier to identify the responsible State for examining of the application lodged by a third-country national especially in situations of illegal entry and when no identity documents existed.[46] Dublin II Regulation, along with Eurodac were, however, found to be an expensive waste of time, after Commission revealed that during the years 2003-2005, only 11.5 % of the applications were requested for transfer compared to the 6 % of Dublin Convention.[47] It also failed to operate, under the principle of solidarity mentioned above, as a burden-sharing mechanism.[48]

The Regulation was also criticised by non-governmental agencies such as the European Council on Refugees and Exiles (ECRE) and United Nations High Commissioner for Refugees (UNHCR).[49] Moreover, since trust in uniform asylum procedures and conditions had been impaired, especially after the judgments in *M.S.S.*[50] and *N.S. and M.E.*[51], the need for the Member States to assume their responsibility within the Dublin system increased.[52] The narrow definition of 'family member' made the system cumbersome from the perspective of separated families and especially unaccompanied minors.[53] The system was profoundly found overall imbalanced, and yet Dublin Regulation III made only unpretentious modifications to the system.

1.2. The Dublin III Regulation

As discussed above, Dublin III Regulation became the successor of Dublin II Regulation in 2013. It applies to all applications lodged for international protection after 1.1.2014. As noted above, the Dublin III did not change substantially compared to the previous regime, but some specific reforms were introduced, in particular as regards to the status of the asylum seekers.

[46] Lenart, J. (2012), *supra nota* 21, 14.
[47] Commission to the European Parliament and European Council on the evaluation of the Dublin System. COM(2007) 299 final. EC Commission, 4.
[48] Evaluation of the Dublin system European Parliament resolution of 2 September 2008 on the evaluation of the Dublin system (2007/2262(INI)), OJ C 295E , 4.12.2009, p 4–9.
[49] Lenart, J. (2012), *supra nota* 21, 12.
[50] M.S.S. v. Belgium and Greece, no. 30696/09, ECtHR, 2011.
[51] Court decision, 21.12.2011, N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10, EU:C:2011:865.
[52] Lenart, J. (2012), *supra nota* 21, 12
[53] *Ibid*., 15.

By the Regulation, international protection now also covers subsidiary protection.[54] The goal of the Dublin III Regulation is to create a straightforward and workable method of deciding the Member State responsible for evaluating an asylum application.[55] In addition, it contributes to ensuring quick access to the asylum procedure in one Member State and thus tries to prevent secondary movements of asylum seekers.[56] Furthermore, the Regulation improves asylum seekers' access to information, the status of the minors and expands the definitions of family members and relatives.[57]

1.2.1. Why did it fail?

The adjustments made to the Regulation did not excuse it from criticism. Its unchallenged weaknesses were particularly exposed by the so-called 'refugee crisis' of 2015 and 2016. It was evident that the system was not meant to deal with a mass influx of applications.[58] Furthermore, the system was not designed to ensure a fair sharing of responsibility, nor did it effectively address the equitable distribution of applications.[59] Member States were not able to comply with the rules as required by the Regulation or, if complied with, the conclusions reached were unsustainable.[60] Even though the Regulation tried to curb secondary movements of the asylum seekers and the phenomenon of 'asylum shopping', it failed to so, partly because the hierarchy criteria did not take into account the interests or needs of the applicants.[61] Differences in living standards, labour markets as well as government support systems in the Member States created incentives for asylum seekers to move on from the first country of asylum.[62]

Over a 12-month period in 2015, there were 1 256 000 first time asylum applications lodged in the EU.[63] According to Eurostat, Germany, Sweden, Austria, Italy and France accounted for 75 % of

[54] Peers, S. (2016), s*upra nota* 41, 303.
[55] ICF International for the European Commission, Evaluation of the Dublin III Regulation, Final Report 2015, 5.
[56] *Ibid*.
[57] See § 2, 4 and 6.
[58] ICF International for the European Commission (2015), *supra nota* 55, 4.
[59] *Ibid*.
[60] Guild, E., Costello, C., Garlick, M., Moreno-Lax, V., Carrera, S. (2015). *Enhancing the common European asylum system and alternatives to Dublin. Study for the European Parliament, LIBE Committee.* Retrieved from https://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf, 24 February 2020.
[61] ICF International for the European Commission (2015), *supra nota* 55, 5.
[62] Brekke, J., Brochmann, G. (2015). Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation. *Journal of Refugee Studies*, 28(2), 145–162, 148.
[63] Guild, E, Carrera, S (2016). *Rethinking asylum distribution in the EU: Shall we start with the facts?*. CEPS Commentary. Retrieved from https://www.ceps.eu/publications/rethinking-asylum-distribution-eu-shall-we-start-facts, 7 April 2020.

all the applications.[64] The scale of distribution of unaccompanied minors was even lower as Germany and Sweden together took over 57 000 applications with the next 12 Member States only receiving less than a 100.[65]

1.2.2. (In)effectiveness from the child's perspective

Despite the criticism, it should be noted that the Dublin III Regulation included provisions improving the status of minors. The preamble to the Regulation stated that the best interests of the child should be taken into account when applying the Regulation.[66] Factors that should be taken into account when assessing the best interests of the child included the "well-being of the minor and social development as well as safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background."[67] Thus, the assessment of the best interests of the child could not be based on general considerations but had to be assessed by case-by-case analysis, and was therefore no longer left entirely to the discretion of the State.

Article 6 and 8 of the Regulation emphasised the vulnerability of children arriving unaccompanied and gave special guarantees to minors.[68] This was a significant improvement from Dublin II Regulation, which merely stated the existence of the best interest of the child. The Article 8(4), which was proposed to be amended by the Commission after the CJEU's ruling in *MA and Others*[69] just before the recast regulation stepped into force, can be seen as a lesson learned in the light of the judgment.[70]

Furthermore, Dublin III Regulation introduced an extended scope of the definition of family members, which included married minor children and the parents of the married minor children and a rather obscure clause on the timing of application as regards to hierarchy criteria on family members and children.[71]

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[64] *Ibid*.
[65] Parusel, B. (2017). Unaccompanied minors in the European Union – definitions, trends and policy overview, *Social Work & Society International Online Journal*, 15(1), 1-15, 12.
[66] Regulation (EU) No 604/2013 (2013), *supra nota* 5, recital 13.
[67] *Ibid*., art. 6.
[68] *Ibid.*, recital 13.
[69] Court decision, 6.4.2013, MA and Others v Secretary of State for the Home Department, C-648/11, EU:C:2013:367.
[70] Hruschka, C. (2014). The (reformed) Dublin III Regulation: a tool for enhanced effectiveness and higher standards of protection?. *ERA Forum* 15**,** 469–483, 476.
[71] Peers, S. (2016), *supra nota* 41, 303.

Although in principle the Dublin III Regulation was rather welcome from the perspective of children, it, however, had its flaws. The Regulation did not cover situations of unaccompanied minors whose asylum application had been rejected in one Member State.[72] In the light of the ruling in *MA and Others*, Member States did have the change to disregard the application for asylum in the above-mentioned cases.[73] Secondly, the Regulation did not define what is meant by the obligation to inform the child about Dublin procedures or the obligation to enable the child to apply for asylum effectively in situations where the child has not yet applied for asylum.[74]

1.3. Commission's Proposal for Dublin IV Regulation

In May 2016, the Commission submitted a proposal for the so-called 'Dublin IV Regulation', which would replace the current Dublin III Regulation. According to the Commission, the aim is to undertake an extensive reform of the CEAS, including a recast on the Eurodac Regulation and the establishment of a comprehensive mandate for the European Asylum Support Office (EASO).[75]

More specifically, the Proposal aims to:
1) "enhance the system's capacity to determine efficiently and effectively a single Member State responsible for examining the application for international protection;"[76]
2) "ensure fair sharing of responsibilities between Member States by complementing the current system with a corrective allocation mechanism… activated automatically in cases where Member States would have to deal with a disproportionate number of asylum seekers;"[77]
3) "discourage abuses and prevent secondary movements of the applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry and remain in the Member State determined as responsible."[78]
The Proposal emphasises the fact that the asylum seeker has no right to choose the country in which the international protection application is lodged nor examined.[79]

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[72] Peers, S. (2014, June 27) Unaccompanied minor asylum-seekers: a step in the right direction? [Blog post]. Retrieved from https://eulawanalysis.blogspot.com/2014/06/unaccompanied-minor-asylum-seekers-step.html, 22 February 2020.
[73] *Ibid*.
[74] *Ibid*.
[75] COM(2016) 270 final, *supra nota* 3, 3.
[76] *Ibid.,* 3.
[77] *Ibid*., 4.
[78] *Ibid*.
[79] *Ibid*., 15.

The main features of the new Proposal to accomplish the above-mentioned aims include the above all the corrective allocation mechanism as previously described, pre-procedure with regard to asylum seekers coming from safe third countries, legal obligations to asylum seekers and sanctions in case of non-compliance as well as shortening and streamlining time limits within different procedures.[80]

Furthermore, the Proposal introduces a new responsibility criterion for unaccompanied minors in which the country responsible for examining the asylum application, in the absence of family members or relatives, is the country where the application was **first** lodged.[81] This is a highly relevant alteration from Dublin III Regulation as it departs from case law established in *MA and others.*

The Proposal also highlights the differences in the application and interpretation of the best interests of the child during the validity of the Dublin III Regulation, which has, in some cases, led to mistrust between the Member States.[82] According to the Proposal, for this reason, it seeks to reinforce the principle through a more precise definition of the best interests of the child and to establish a mechanism whereby the best interests of the child can be more accurately reflected in all circumstances entailing a transfer of an unaccompanied minor.[83] This, too, has not been complied with at such level as set out in the *Tarakhel*[84] for assessing the transfer of children.

[80] Progin-Theuerkauf, S. (2017). The Dublin IV Proposal: Towards more solidarity and protection of individual rights? In: *sui-generis* 2017, 61-67, 64-65.
[81] *Ibid*., 65.
[82] COM(2016) 270 final*, supra nota* 3, 9.
[83] *Ibid*., 14.
[84] Tarakhel v. Switzerland, no. 29217/12, ECtHR 2014.

2. JUDICIAL BASIS FOR CHILDREN AS ASYLUM SEEKERS

As a foundation for the asylum seekers' general right to seek international protection can be mentioned the 1951 Refugee Convention and Protocol concluded in 1967. Perhaps the most important clause of the Refugee Convention is the prohibition of non-refoulement under article 33, which is sometimes considered to be *jus cogens*.[85] Children seeking international protection, in particular, are in a situation where they have to be given special protection because of their vulnerable position.

Undoubtedly the most significant treaty protecting children as refugees is the 1989 United Nations Convention on the Rights of the Child. The CRC has been ratified by all EU Member States and candidate countries. CRC obligates contracting states to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction" and provide them with appropriate protection and humanitarian assistance whether they have arrived accompanied or unaccompanied.[86] The prohibition of non-refoulement is indirectly mentioned in Article 37 of the CRC.[87]

Article 3 of the CRC establishes the 'best interest of the child' principle, which has to be taken into account in cases concerning entry as well as the return of children and their families.[88] The principle should be applied on a broad scale, and it does not in itself impose obligations on the Contracting States, nor does it confer rights on children.[89] However, it is one of the most important principles regarding child asylum seekers, and it is, perhaps, for this reason, that its content has been left dynamically open for a positive interpretation.

[85] Klabbers, J. (2017). *International law*. 2nd ed. Cambridge, UK: Cambridge University Press, 133.
[86] Convention on the Rights of the Child, United Nations, 2 September 1989, art. 2(1) and 22(1).
[87] Gammeltoft-Hansen, T. (2011). *Access to asylum : International refugee law and the globalisation of migration control*. Cambridge, UK: Cambridge University Press, 85.
[88] Goodwin-Gill, G. S., McAdam, J. (2007). *The refugee in international law*. (3rd ed.) New York, USA: Oxford University Press, 324.
[89] Lundberg, A. (2011). The best interests of the child principle in Swedish asylum cases: The marginalization of children's rights. *Journal of human rights practice*, 3(1), 49-70, 5.

The concept for special protection for children has its roots in the 1949 Geneva Conventions, the 1977 Additional Protocols and international humanitarian law.[90] The Conventions have emphasised the protection of children by establishing a link to family life.[91] The purpose, ultimately, was to promote and maintain family unity in situations where families have been separated due to armed conflicts.[92] Similar objectives can also be found in the UNHCR Handbook.[93] According to the Handbook even though the 1951 Refugee Convention does not incorporate the principle of family unity in the definition of the refugee, frequently, in situations where the head of the family is granted refugee status, the dependants receive it correspondingly.[94] In these agreements, practical reasons and procedural consistency has led to the determination of the child's status as 'dependent'.[95]

Given the above, seminal fundamental question concerning child asylum seekers is, therefore whether they have arrived accompanied.[96] Although this does not in itself affect the child's right to be recognised as a refugee, unaccompanied children require special attention and a guardian or other person who is capable to protects their interests.[97] While accompanied child's protection status is derivative to the primary application lodged by the parent or legal guardian, unaccompanied minors in search for protection require a more comprehensive approach.[98] To unaccompanied minors, especially the inadequacy or lack of legal representation and problems rising from courts inability to place unaccompanied minors within the correct legal framework brings trouble.[99] The distinction between accompanied and unaccompanied minors should therefore also be recognised as a legal basis for asylum seekers, although it does not in itself affect the status of the child. As will be seen below, the distinction is also relevant in the Dublin context.

[90] Goodwin-Gill, G., McAdam, J. (2007), *supra nota* 88, 475.
[91] *Ibid*., 476.
[92] *Ibid*.
[93] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979.
[94] *Ibid*., para 184.
[95] Goodwin-Gill, G., McAdam, J. (2007), *supra nota* 88, 130.
[96] Goodwin-Gill, G. (1998). *The Refugee in International Law*. 2nd ed. Oxford, USA: Oxford University Press, 356.
[97] *Ibid*., 357.
[98] McAdam, J. (2017). Seeking asylum under the Convention on the Rights of the Child: A case for complementary protection. In: Lambert, H. (ed.), *International Refugee Law* (259-280). London: Routledge, 259; Goodwin-Gill, G. (1998), *supra nota* 96, 357.
[99] Mole, N. (2007). *Asylum and the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 102.

2.1. The principle of the best interest of the child.

The principle of best interests of the child is derived from CRC. It is the fundamental principle paving the interpretation of all children's rights and freedoms.[100] Article 3 of the CRC provides that "the best interests of the child shall be a primary consideration… in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."[101] The exact language of the provision states that the principle should apply to all decisions concerning a child, whether it concerns the child exclusively, for example, through an application for asylum made independently, or indirectly, for instance, through a parent's removal decision.[102]

The Committee on the Rights of the Child (ComRC) monitors and reports the implementation of the CRC and gives comments on its application. In its General Comment No 14, ComRC has underlined that the best interest of the child is a three-fold concept, involving a substantive right, a fundamental, interpretative legal principle and a rule of procedure.[103] The totality of these concepts form the basis for interpretation concerning children as regards to all decision-making and implementation. However, the ComRC has stated that the best interests of the child is not an invariable concept and should not, therefore, be interpreted restrictively at any given situation at any given time.[104] Rather, it must be acknowledged that it is a complex and dynamic concept which leaves room for interpretation to the institution applying it, without it, however, jeopardising the purpose it pursues. Thus, according to the ComRC, no right in the CRC can be overruled by a negative interpretation of the child's best interest since all rights in the CRC are themselves covered by the concept.[105]

More specifically, the assessment of the best interests of the child should be based on an individual case-by-case analysis which takes into account the particular circumstances to which the child belongs such as personal context, needs and situation.[106] These circumstances include a non-

[100] Lundberg (2011), *supra nota* 89, 53.
[101] CRC (1989), *supra nota* 86, art. 3.
[102] Pobjoy, J. M. (2015). The Best Interests of the Child Principle as an Independent Source of International Protection. *International Comparative Law Quarterly 327*, 64(2), 327–363, 330.
[103] UN Committee on the Rights of the Child (2013). *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, *CRC/C/GC/14*. Retrieved from https://www.refworld.org/docid/51a84b5e4.html, 9 March 2020.
[104] *Ibid*., para 11.
[105] *Ibid*., para 4.
[106] *Ibid*., para 32, 48.

exhaustive list of characteristics such as age, sex, level of maturity and social as well as cultural context, including the presence (accompanied) or absence (unaccompanied) of the child's parents.[107] The principle in itself is complex, yet flexible and adaptive, which also leaves it open for manipulation.[108]

Moving from treaty-based international legislation closer to that of the Dublin System, it is worth mentioning that the principle is also included in the EU Charter of Fundamental Rights. The provision under Article 24(2) of the ECFR is in line with CRC. CRC has been recognised as one of the international instruments which are taken into account when applying the principles of Community law.[109] Moreover, in addition to Article 78 of the TFEU as described below, also the current Dublin III Regulation as well as the new Proposal mention CRC in their preambles. Thus, the principle of child's best interest implicated in Article 24 of the ECFR is based on Article 3 of the CRC.[110] The applicability of these principles and rights within the current Dublin system will be tested in the following sections.

2.2. Impact of the ECtHR and CJEU case law on the Dublin system

There is no *de jure* right to asylum in the ECHR.[111] Nevertheless, Article 1 of ECHR guarantees that the Member States shall secure to everyone within their jurisdiction the rights and freedoms therein.[112] Theoretically, this means that aliens, including also asylum seekers, can effectively rely on the agreement irrespective of whether they are nationals of a contracting state.[113] Thus, the Strasbourg Court plays a critical role in construing asylum law through rulings concerning Article 3, which governs the prohibition of torture; Article 8, respect of private and family life and Article

[107] *Ibid*., para 48.
[108] *Ibid*., para 34.
[109] Court decision, 27.6.2006, European Parliament v Council of the European Union, C-540/03, ECLI:EU:C:2006:429, point 37.
[110] Reneman, M. (2014) *supra nota* 18, 57.
[111] Einarsen, T. (1990). The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum. *International journal of refugee law*, 2(3), 361-389, 364.
[112] European Convention on Human Rights, Council of Europe, 3 September 1953, art. 1.
[113] Lambert, H. (2006). *The Position of Aliens in Relation to the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, 8 referenced in Buchinger, K, Steinkellner, A. (2010). Litigation before the european court of human rights and domestic implementation: Does the european convention promote the right of immigrants and asylum seekers. *European Public Law*, 16(3), 419-436, 420.

13, the right to an effective remedy.[114] This has also been the case with the Dublin system. ECtHR has given multiple decisions that have pressured the Dublin system.

As mentioned in the first chapter, by the entry into force of the Amsterdam Treaty in 1999, asylum matters were removed from the third-pillar and placed into the competence of the Union. The authorisation to rule in asylum, therefore, gave CJEU the status of supranational court.[115] Since the interpretation of the ECHR does not fall within the jurisdiction of the CJEU, the conclusion is that the most considerable tool in the interpretation of asylum law at a human rights perspective is the ECFR as it recognises "the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States."[116] The ECFR and ECHR are not, however, independent conventions. The connection between ECFR and ECHR is recognised in Article 52(3), which explains the correspondence of the rights.[117] The CJEU has taken a stand, among others, issues related to Qualification Directive, Procedures Directive and Dublin Regulations. However, for this study, the thesis shall focus on decisions of the ECtHR and CJEU related to child asylum seekers within the Dublin procedure.

2.3. Mixed jurisdiction

Since the Treaty of Lisbon, the Court of Justice of the European Union (CJEU) has been given the competence to interpret EU asylum law, thus construing asylum principles of its own, with an exception to ECHR.[118] According to Article 6 of the Treaty of the European Union (TEU), the Union accedes to the ECHR, thus making it a subject under international law, where ECtHR has its jurisdiction.[119] A critical case on this demarcation is the *Bosphorus*[120], in which the ECtHR signalled that as long as the EU provides an equivalent level of protection to ECHR, the intervention of the court is dispensable.[121] Consequently, both of the courts have jurisdiction in matters relating to asylum.

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[114] Roots, L. (2014). European Court of Asylum – Does It Exist? In: T. Kerikmäe (ed.), *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (129-143). Tallinn: Springer-Verlag Berlin Heidelberg, 131-132.
[115] *Ibid*., 133.
[116] ECFR, preamble.
[117] Roots, L. (2014), *supra nota* 114, 134.
[118] *Ibid*., 132-133.
[119] *Ibid*., 133.
[120] Bosphorus v. Ireland, no. 45036/98, ECtHR 2005.
[121] Cameron, I. (2013). Competing Rights? In: De Vries, S., Bernitz, U., Weatherill, S. (Eds.), *The protection of fundamental rights in the EU after lisbon, volume 15 (Studies of the Oxford institute of European and comparative law* (181-206). Oxford: Hart Publishing Ltd, 195.

2.3.1. Accompanied minors

Tarakhel is one of the landmark cases in EU asylum law given by the ECtHR. Not only it cleared out the dubious concept of 'systematic flaws' but established an obligation to note the particular importance of special protection when it comes matters dealing with children. Judgment was given in November 2014, just after limbing into force Dublin III Regulation at the beginning of 2014.

Tarakhel can be seen as a human rights response from the Strasbourg Court to CJEU in the decision *Abdullahi*[122]. In *Abdullahi*, the CJEU ruled that "the only way in which the applicant for asylum can call into question the choice of that [responsibility] criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum"[123] to the extent that it amounts to a real risk to the breach of Article 4 of the ECFR (respectively Article 3, ECHR).[124] A systematic flaw is a structural error or a void within the asylum system through which the cases flow, causing defects.[125]

The case concerned an Afgan couple and six of their children who first entered the EU territory in Italy.[126] After suffering poor reception and living conditions, they moved to Austria and consequently to Switzerland, applying for asylum in each country.[127] In January 2012, Federal Migration Office (FMO) of Switzerland rejected to examine the applicants' asylum applications by claiming that, following responsibility criteria, Italy was responsible for the examination of the application as being the country of first arrival.[128] After exhausting the domestic remedies, the family filed an application to the ECtHR claiming that their removal to Italy would constitute a breach of Articles 3, 8 and 13 ECHR.[129]

In its judgment, the ECtHR referred to the purpose of the Dublin III Regulation to improve the efficiency and legal safeguards of the Dublin system as well as family unity and the status of unaccompanied children and other specially protected asylum seekers.[130] With a specific reference to the Article 6 of the Dublin III Regulation, which deals with guarantees for minors, it is evident

[122] Court decision, 10.12.2013, Shamso Abdullahi v Bundesasylamt, C-394/12, EU:C:2013:813.
[123] *Ibid*., § 60
[124] *Ibid*.
[125] Lübbe, A. (2015). 'Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?. *International Journal of Refugee Law*, 1(27), 135–140, 137.
[126] Tarakhel v. Switzerland (2014), *supra nota* 84, § 10.
[127] *Ibid*., §§ 11, 12 and 13.
[128] *Ibid*., § 16.
[129] *Ibid.*, § 3.
[130] *Ibid.*, § 35.

that the Court considered it necessary to interpret the situation in terms of family unity and special protection for children. Furthermore, the Court iterated that under the so-called sovereignty clause, Dublin states could derogate from the responsibility criteria.[131] Thus, relying on *Bosphorus*, Switzerland was considered to bear responsibility under Article 3 of the ECHR.[132]

The Court reiterated what had been established in the *M.S.S.* judgment, attaching particular importance to the status of asylum seekers as an "underprivileged and vulnerable population group in need of special protection."[133] In further assessing the rights of a particular group, the Court stated that children, due to their extreme vulnerability, are in a decisive position and override all considerations relating to the status of an illegal immigrant.[134] The Court referred to the CRC and observed that regardless of whether a child has arrived alone or accompanied, states are to take appropriate measures to ensure that child refugee seeker is guaranteed with protection and humanitarian assistance.[135]

Tarakhel emphasised the vulnerability of children as asylum seekers and the protection obligations the government has towards children.[136] Moreover, *Tarakhel* established a paramount significance to the Member States to carefully and with individualised contemplation to assess whether reception conditions in the receiving State comply with human rights norms before transfers within the Dublin system can take place.[137] At the same time, it placed an affirmative legal obligation on the Dublin states to ensure, through thorough and individual consideration, the fairness of the transfers by warranting the applicant's conditions in the receiving State and guarantees of their existence.[138] Child's age, as well as stress and anxiety caused by the conditions, had to be taken account while assessing the suitability of the transfer.[139] Hence it eliminated the concept of 'systematic flaws' by putting an end to automated transfers. The Court stated that if these principles and obligations were to be neglected, they could in themselves, reach the threshold for the breach of Article 3 of ECHR.[140]

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[131] *Ibid.,* § 89.
[132] *Ibid*., §§ 88, 91.
[133] Tarakhel v. Switzerland (2014), *supra nota* 84, § 97.
[134] *Ibid*., § 99.
[135] *Ibid*.
[136] Fullerton, M. (2016). Asylum crisis Italian style: the Dublin regulation collides with European human rights law. *Harvard Human Rights Journal*, 29, 57-134, 121.
[137] *Ibid*., 123.
[138] Costello, C. (2016). *The Human Rights of Migrants and Refugees in European Law.* (1st ed). Oxford, UK: Oxford University Press, 273.
[139] Tarakhel v. Switzerland *(2014), supra nota* 84, § 119.
[140] *Ibid.*

Interpretation methods similar to those asserted earlier in this thesis can be observed from the case. The case is justifiably well-founded and, once the opportunity has been afforded, it does not negate the fundamental special protection which a child seeking asylum must enjoy under the Geneva Convention, whether or not the child has arrived accompanied. The judgment associates the general principles of children as asylum seekers and goals of the Dublin III system as an inseparable part of Dublin transfers. It also shows that without an individual and case-by-case consideration, transfers within the Dublin system may in themselves constitute a risk of breach of Article 3 ECHR. On the other hand, the judgment indicates that the existence of procedural safeguards and guarantees for minors, and their enforcement are inextricably linked to the principle of non-refoulement.

2.3.2. Unaccompanied minors

CJEU's judgment in *MA and Others* concerned three minors who had arrived unaccompanied to the United Kingdom (UK) and applied for asylum therein.[141] With having first applied in Italy, UK officials commenced a request for Italy officials to them take back.[142]

In its judgment given in 2013, the CJEU ruled that in situations, where an unaccompanied minor has lodged an application for asylum in one Member State and then continues to lodge an application in other Member State, the general rule is that the country where the unaccompanied minor is **present** is responsible for examining the application rather than the country where the application for asylum was lodged **first**.[143]

Such an interpretation was considered necessary by the Court, given the linguistic differences between the relevant provisions.[144] While Article 5 of the 'Dublin II Regulation' stated that "the Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application"[145], there was no such mention of 'first' in the Article 6 which governed responsibility criteria regarding unaccompanied minors.[146] Also in the light of the extreme vulnerability of unaccompanied minors, the Court stated,

[141] MA and Others v Secretary of State for the Home Department (2013), *supra nota* 69, §§ 14, 15, 19, 20 and 24.
[142] *Ibid*.
[143] *Ibid*., § 66.
[144] Peers, S. (2016), *supra nota* 41, 298.
[145] Council Regulation (EC) No 343/2003 (2003), *supra nota* 20, art. 6.
[146] *Ibid*., art. 5 and 6.

that as a rule, they should not be transferred to another Member State and the Dublin procedure should not be prolonged anymore than strictly necessary.[147] Lastly, the Court referred to the principle of child's best interest as stated in the Article 24 of ECFR, and pointed out that Article 6 cannot be interpreted as dismissing the principles enshrined in the ECFR.[148]

MA and Others took into account the child's vulnerability in order to avoid the transfer within the Dublin procedure according to the responsibility criteria.[149] This can be seen in line with CRC, as previously mentioned in this thesis. The ruling imposed an obligation to consider transfers under the Dublin system beyond material consideration, especially, in relation to simple deliberation of whether or not, the minor to be transferred would be subjected to torture, inhuman or degrading treatment in accordance with Article 4 of ECFR. The Court found the principle of child's best interest to be the clincher. Furthermore, unlike in *Tarakhel*, the reception conditions in the receiving State were not contested, but taking into account that the subjects were unaccompanied minors, the Court seemed to stress the personal situation of the children arriving unaccompanied. In stating that Article 6 of the Dublin II Regulation "cannot be interpreted in such a way that it disregards that fundamental right"[150], it is apparent that the Court also incorporated the fundamental, interpretative legal principle of child's best interest. This principle, which necessitates that "the interpretation which most effectively serves the child's best interests should be chosen"[151], may be seen leading the Court to state that the Member State responsible is the one "in which the minor is present after having lodged an application there."[152] Thus, the effect of Article 24 ECFR in conjunction with Article 51, is that the best interests of the child shall also be a primary consideration in decisions adopted by the Member States when deciding on the Member State responsible.[153]

[147] MA and Others v Secretary of State for the Home Department (2013), *supra nota* 69, § 55.
[148] *Ibid*., §§ 57, 58
[149] 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*, 27(3), 433–456, 453.
[150] MA and Others v Secretary of State for the Home Department (2013), *supra nota* 69, § 58.
[151] UN Committee on the Rights of the Child (2013), *supra nota* 103, para 6.
[152] MA and Others v Secretary of State for the Home Department (2013), *supra nota* 69, § 60.
[153] Ippolito, F. (2015). Migration and Asylum Cases Before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test. *European Journal of Migration and Law*, 17(1), 1-38, 24.

2.3.3. A legislative repercussion

The principles established in the *MA and Others* decision led to a proposal for the revision of Article 8(4) of the Dublin III Regulation.[154] In the light of the ruling, the Commission proposed clearer rules on the responsibility criteria for the unaccompanied minors who have no family, siblings or relatives in the EU.[155] Following the CJEU's judgment, the subparagraph 4(a) of Article 8 would impose an obligation to examine an application lodged by an unaccompanied minor in the Member State where the minor is present, provided that it is in the best interest of the child.[156] Notwithstanding the above, the regulation has not, however, been amended following the Commission's proposal. Despite the European Parliament's support, the Council was of the opinion that unaccompanied children should be returned to the Member State in which they submitted their first application for asylum.[157] As will be seen in the upcoming chapters of this thesis, this course has also been followed in the new Proposal for Dublin IV Regulation.

[154] Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State, COM/2014/0382 final.
[155] The Commission (2014). *Press release: Clearer EU rules for unaccompanied minors seeking international protection.* Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_14_723, 22 May 2020.
[156] COM/2014/0382 final (2014), *supra nota* 154, 7.
[157] Council of the European Union, Council document 15567/14, 2014, 9.

3. ISSUES OF DUBLIN IV PROPOSAL REGARDING (UN)ACCOMPANIED MINORS

The Proposal claims to be fully compatible with fundamental rights and general principles of EU and international law.[158] Furthermore, recital 45 states, with regard to persons falling within the scope of the regulation, that the Member States are bound by the principles of international law and the relevant case-law of the ECtHR.[159] The Proposal assures, that asylum seekers are to be placed in decent reception conditions and that their applications for international protection are effectively processed on the condition that their claims are found to be grounded.[160] Article 3(2) which governs the 'systematic flaws' issue within Dublin transfer has been left unchanged from the Dublin III Regulation. In this regard, the Proposal clashes with case-law established in *Tarakhel*. It also leaves an equivocal amount of room for discretion for the Member States to decide whether reception conditions are to a satisfactory level in another Member State.

As mentioned above, ECtHR found in *Tarakhel* that Dublin transfer may constitute a 'real risk' of the breach of Article 3 ECHR, if the transfer were to take place without guarantees from the receiving State and individual and thorough assessment of applicants' personal situation, especially if the applicants were minors. The fallacy of supposition of common standards and the so-called automated transfers had therefore been put to an end. However, these principles seem to have been ignored in the new Proposal. Contrary to the ECtHR's view in *Tarakhel*, 'substantial grounds' for believing that there are systematic flaws in the asylum procedure or reception conditions of the other Member State remains as the threshold to the impossibility of the transfer. It, therefore, neglects, at least indirectly, the positive obligation of states to ensure that the Dublin transfer does not violate the principles set out in the ECHR, in particular with regard to the personal circumstances and extreme vulnerability of the applicants as minors. Thus, by analogy, the

[158] COM(2016) 270 final, *supra nota* 3, 13.
[159] *Ibid*., recital 45.
[160] *Ibid*., 1.

'systemic flaws' test cannot give a definitive answer as to whether there is a risk of infringement of Article 3 ECHR and respectively, Article 4 ECFR.[161]

3.1. The omission of procedural guarantees and safeguards for unaccompanied minors

According to the Proposal, the lack of information given to the applicants on the Dublin system and diverging applications of the best interest of child principle as well as dereliction of personal interviews remain the main problems in the Dublin III Regulation with regard to procedural guarantees and safeguards.[162]

Notwithstanding the failure to comply with the obligation mentioned in the previous chapter concerning asylum-seeking minors in general, Dublin IV Proposal would, however, seem to address some of the principles established in the *Tarakhel* decision in regard to unaccompanied minors. According to the Proposal, the rights of unaccompanied have been bolstered through a better definition of the best interests of the child and a mechanism has been put in place to implement it in every circumstance implying the transfer of a minor.[163] Furthermore, the provision of guarantees for unaccompanied minors has been refashioned to make the principle of the best interest of the child more operational.[164]

Perhaps the most troubling restrictions regarding unaccompanied minors are introduced in Articles 8(2) and 10(5) of the new Proposal. According to the new Article 8(2), "each Member State where an unaccompanied minor is obliged to be present shall ensure at a representative represents and/or assists the unaccompanied minor with respect to relevant procedures provided in the Regulation."[165] Thus, unaccompanied children who have participated in secondary movement and who are not obliged to be present are left without representation and assistance.[166] In accordance with Article 10(5) of the new Proposal, in the absence of a family member or relative of an

[161] Radović, M. L., & Čučković, B. (2018). Dublin IV Regulation, the Solidarity Principle and Protection of Human Rights–step (s) Forward or Backward?. *EU and Comparative Law Issues and Challenges Series*, 2, 10-30, 20.
[162] *Ibid*., 9.
[163] COM(2016) 270 final, *supra nota* 3, 14.
[164] *Ibid*., 17.
[165] *Ibid*., art. 8(2).
[166] Klaiber, D. (2019). A Critical Analysis of the Dublin-IV Proposal with Regards to Fundamental-and Human Rights Violations and the EU Institutional Battle. *Nordic Journal of European Law*, 2(2), 38-55, 42.

unaccompanied minor, the Member State responsible for examining the asylum application is the one where the minor first lodged the application **unless** it is demonstrated that it is not in the best interest of the child.[167] Not only do the provisions contradict with what was established in the *MA and Others* but also shifts the burden of proof from the State to the child.[168] Under Article 8(4) of the Dublin III Regulation transfers of unaccompanied minors are possible **provided** that it is in the best interest of the child. Dublin IV Proposal rebuts this assumption by removing the burden of proof on the State to prove that the transfer is in the best interest of the child. Thus, the legal default under Dublin IV Proposal is that the decision of the State is in the best interest of the child unless otherwise demonstrated.

The Commission's rationale for these provisions can be found in recital 20 of the new Proposal. According to the Commission, because secondary movements are not in the best interest of unaccompanied minors, the responsible State should be the one where he or she first lodged the application for international protection.[169] However, the default value of the rationale based on this assumption of the best interests of the child is incorrect in principle. CRC Article 3 and respectively, Article 24 of ECFR demand that the best interest of the child be a primary consideration in all decision-making. Given the fundamental, interpretative legal principle of the best interests of the child, according to which the one which best protects the best interests of the child must be chosen, it cannot be in the best interests of the child that the legal default of the provisions mentioned above is against the child himself. The rationale does not provide a satisfactory explanation as to why the State is exempt from *ex officio* assessments of the best interests of the child.[170] Furthermore, the provision eminently runs against what CJEU had confirmed in MA and Others: "…as a rule unaccompanied minors should not be transferred to another Member State."[171]

3.2. Criticism by European Parliament, ECRE and UNHCR

In the European Parliament Report, the 'systematic flaws' test is lifted and replaced with what had been established in the *Tarakhel* case; transfers are not to take place if "there are substantial

[167] COM(2016) 270 final, *supra nota* 3, art. 10(5)
[168] Klaiber, D. (2019), *supra nota* 166, 42.
[169] COM(2016) 270 final, *supra nota* 3, recital 20.
[170] Klaiber, D. (2019), *supra nota* 166, 42.
[171] MA and Others v Secretary of State for the Home Department (2013), *supra nota* 69, § 55.

grounds for believing that the applicant would be subjected to a real risk"[172] of severe infringement of Article 3 ECHR.[173] The report also follows *Tarakhel* in that it requires a closer look at the applicant's personal circumstances. The amendment to Article 8(4) states that a decision to transfer or not to transfer an unaccompanied child must be subjected to a multidisciplinary assessment of the child's best interest.[174]

Additionally, the report also removes the problematic obligation to provide assistance only to those unaccompanied children who are obliged to be present. The report proposes that assistance and representation be provided in all procedures for unaccompanied children who are merely present.[175] Thus, the report allows assistance and representation for all unaccompanied children regardless of whether they have participated in secondary movement.

Unlike the Commission's Proposal, the report does not make the presumption that secondary movements are not in the best interests of the child. Instead, the report states that the Member State responsible for examining the asylum application of unaccompanied children without family members or relatives is determined by relevant provisions of the Regulation.[176] Notwithstanding the above, any decision and allocation must be carried out in a versatile view of the best interests of the child.[177]

European Council for Refugees and Exiles takes the same view in its comment on the Proposal: as found in *Tarakhel*, the nature of the risk is irrelevant to the extent of human rights safeguarded.[178] Orthodox assessment for non-refoulement in terms of Article 3 ECHR faces a real risk of a severe violation.[179] ECRE concludes that in its present language, Article 3(2) does not cover these violations.[180] ECRE reminds that the determination of responsible State is inseparably linked to the best interests of the child, and therefore, at its current state, Article 8(2) distorts the best interests principle.[181]

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[172] European Parliament Report on the Commission Proposal for Dublin IV Regulation, 6 November 2017, A8-0345/2017.
[173] *Ibid*., 35.
[174] *Ibid*., 57.
[175] *Ibid*., 53.
[176] *Ibid*., 62
[177] *Ibid*.
[178] ECRE Comments of the Commission Proposal for Dublin IV Regulation, October 2016.
[179] *Ibid*., 19.
[180] *Ibid*.
[181] *Ibid*., 10.

According to ECRE, Commission's Proposal on the first country of application rule lacks legal justification.[182] Although ECRE states as an '*obiter dictum'*, that while CJEU's decision in *MA and Others* does not rule out the expressing of first country of application as responsible, it is more important to note instead that the transfer of an unaccompanied child in cases which are contrary to their interests is prohibited.[183] ECRE sees the problematic nature of the Article 10(5) and its contradiction with the ECFR as arising specifically from Commission's adverse interpretation of the legal presumption established in the *MA and Others* decision, and thus from the shifting of the burden of proof to the children.[184]

Similarly to the European Parliament and ECRE, the UNHCR calls for a reconsideration of Article 3(2). UNHCR considers that the provision does not fall within the sphere of individualised assessment requirements as established in *Tarakhel*.[185] Whereas the UNHCR supports the Commission's Proposal to strengthen the protection of children and welcomes a more effective assessment of the best interests of the child, it takes, much like its predecessors, a more critical tone with problems in Articles 10(5) and 8(2).[186] UNHCR claims Article 10(5) to be contrary to EU case law and urges its deletion.[187] Furthermore, according to UNHCR, the indication provided by Article 8(2) that a representative is provided to only those children who are obliged to be present in a Member State "raises serious concerns… which exposes an evident protection gap".[188] UNHCR believes that child should always have access to a qualified guarding and expert legal assistance independent of the implementing authorities of the Regulation.[189]

[182] *Ibid*., 11.
[183] *Ibid*.
[184] *Ibid*.
[185] UNHCR Comments on the Commission Proposal for Dublin IV Regulation, December 2016.
[186] *Ibid*., 4.
[187] *Ibid*., 27.
[188] *Ibid*.
[189] *Ibid*., 28.

CONCLUSION

It should be noted at the outset that, despite several changes, the Dublin system has not been able to find its way to a satisfactory level in order to meet its obligations under international and Union law in relation to human and fundamental rights. Throughout its existence, the system has been subjected to various criticisms. At times unexpected phenomena, such as the influx of refugees in 2015 and 2016, have exposed the system's inevitable weaknesses. However, it has not always been unpredictable events, but, as shown above, an inability or political reluctance to react in norms established by the EU and international courts. The purpose of the system to prevent asylum seekers from engaging to secondary movement has been held to tooth and nail, even to the extent that it violates CJEU's interpretation in *MA and Others*. The Dublin system can be considered to have evolved in line with problems in its implementation in practice. The problems in the various Dublin regulations have not arisen in a legal vacuum. Instead, they are underlined by a limited interpretation of the provisions, which in the circumferential conclusion inevitably leads to a lack of coherence and precision in the Articles.

Despite the constant debate on the effectiveness of the system, changes in previous Dublin systems have undeniably led to an improvement in the position of children in the current system. The Dublin III Regulation improved the situation of children, inter alia by broadening the definition of family members and clarifying the factors to be taken into account when assessing the best interests of the child. In particular, the interpretation given by the CJEU in *MA and others* decision seemed to give a positive development to the interpretation in the best interests of the child from a procedural perspective, although the provision governing the matter itself was left unchanged. The Dublin III Regulation has been haunted by the principles set out in cases of *Tarakhel* and *MA and Others*. Notwithstanding the above, with the introduction of the Dublin IV Proposal, the protective wall emphasising the unique position of children as a vulnerable group of asylum seekers is being traversed by even tougher means.

In the *Tarakhel* judgment, the Strasbourg court made Dublin transfers subject to personal and individual assessment, particularly emphasising the vulnerability of children regardless of whether

they had arrived accompanied or unaccompanied. Furthermore, the States were no longer exempt from examining the circumstances which the applicant would be subjected to in the host State. Exceedingly problematic is the fact that, despite the binding nature of ECtHR's decisions, the systematic flaws test continues in the Dublin IV proposal as the threshold for (dis)allowing transfers. Nor has individual and circumstantial consideration been included in Article 3(2) or elsewhere in the Regulation. It should be noted that the consideration of transfers under Article 8 (4), despite its other shortcomings, only applies to unaccompanied children and therefore accompanied children are excluded from this consideration. These deficiencies are in themselves enough to constitute a breach of Article 3 of the ECHR and Article 4 of the ECFR. On the other hand, the provision also violates the unconditional priority given to child's best interest principle mentioned in the CRC and the ComRC General Comment No. 14 on its application, regardless of whether the children arrived alone or accompanied.

The principle of the best interests of the child gained a strong position with the *MA and others* decision. In the *MA and Others* decision, the CJEU stated that children should not, as a general rule, be transferred to another Member State. The Court can be considered to have reached the solution explicitly employing teleological interpretation, in which the aim (*telos*) has been explicitly to achieve the best possible interests of the child. However, this legal presumption appears to be rebutted in the revised Article 10(5). The Commission's reasoning on the point is based on *prima facie* assessment that secondary movements are not in the best interests of the child. The Article obliges the child to prove that the transfer is not in his or her best interests and thus eliminates the *ex officio* assessment of the child's best interests by the transferring State. It also follows from these factors that the Article as a whole is a major setback and contrary to the ruling of CJEU in *MA and Others* and Article 24(2) ECFR. It is reasonable to assume that Article 10(5) may give rise to a breach of the principle of non-refoulement in situations where it requires the return of the child to the first Member State, but the child is returned because he or she has not been able to show that the return is contrary to his or her interests.

Another severe failing of the new Proposal is the deprivation of procedural safeguards and guarantees in Article 8(2). The troublesome clause of 'obliged to be' can be seen as incompatible to fundamental rights belonging to children. Term's existence in itself is a 'prison' for unaccompanied minors who have for one reason or another participated in secondary movement. It is reasonable to assume that the above-mentioned Articles may lead to a breach of the principle of non-refoulement in situations where 'systematic flaws test' under Article 3(2) remain as the

threshold for the transfer and Article 10(5) obliges the minor to return to the first Member State when the minor has not been able to show, due to the reversed burden of proof, that the transfer is against his or her best interests. The same would apply, *mutatis mutandis*, in situations where the transfer should be prevented based on the principle of non-refoulement or the best interests of the child but goes unnoticed due to the lack of procedural safeguards and guarantees. It is therefore clear that the particular principles for children cannot be entirely assessed on the basis of the provisions of the legislation, but that their implementation requires monitoring in the light of preliminary rulings, to which compliance, EU has acceded.

Article 3(2) should include a clause obliging the transferring Member State to provide a guarantee that the conditions in the receiving Member State satisfy the requirements established in the law. Due to the ruling in *Tarakhel,* a discretionary clause should have been imposed to ensure that the Member State has ascertained, prior to the implementation of the Dublin transfer, by an individual and thorough consideration of the applicant's personal circumstances, whether the Dublin transfer risks infringing the principle of non-refoulement, in particular where the transfer involves children. The inevitable change will also be needed concerning Articles 8(2) and 10(5) if serious human rights violations are avoided in the future. The notion of the first Member State is in contradiction with the ruling in *MA and Others* and should, therefore, be omitted. Enforcement authorities must prove that the transfer of the minor is in his or her best interests. On the other hand, the omission of procedural safeguards and guarantees is in principle against fundamental rights belonging to children and can, as mentioned above, lead to human rights violations. Particularly Article 8(2) raises concerns about its compatibility to the right to an effective remedy, which could be a good topic for further investigation.

In the light of all the above, despite the momentary improvement in the situation of children under the Dublin III system, the Dublin IV Proposal is liable to violate the principles recognised for children in international law and human rights. Thus, Dublin IV is not compatible with fundamental and human rights and does not provide adequate safeguards for minors arriving in the EU for international protection.

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