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The Dublin System on Asylum
-An Assessment of the Responsibility Allocating
Mechanism of the Dublin System in Light of the
Right to Family Unity

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Abbreviations

AAB	Swedish Aliens Appeals Board (<i>Utlänningsnämnden</i>)
CEAS	Common European Asylum System
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
MB	Swedish Migration Board (<i>Migrationsverket</i>)
SEA	Single European Act
TEC	Treaty Establishing the European Communities (Rome Treaty)
TEU	Treaty on European Union (Maastricht Treaty)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series

1 Introduction

At the Tampere European Council in 1999, the Member States of the European Union agreed on an ambitious plan to realise the ‘Common European Asylum System’ (CEAS) in the Union. The long-term goal of this approach was to establish a common asylum procedure and a uniform status for those granted asylum that would be valid throughout the Union. In the short term, on the other hand, the introduction of minimum standards on various asylum related matters was envisaged. The agenda would also include a “clear and workable determination of the State responsible for the examination of an asylum application”.¹ The instrument to achieve this last objective is the so-called Dublin Regulation, which entered into force in the Member States of the European Union on 1 September 2003. The Regulation includes criteria to identify the Member State that shall be responsible for processing an asylum claim lodged in one of the Member States. This State shall assume responsibility on behalf of all other Member States, thus eliminating the possibility to lodge multiple asylum applications in different countries. Objective criteria, such as possession of a visa or the travel itinerary, are applied in the process of identifying the responsible State.

The Dublin Convention, on which the Regulation is modelled, was applied within the Union from 1997, until the entry into force of the Regulation, with limited success. Various difficulties arose in the implementation of the Convention and it proved to be an additional obstacle to the swift processing of asylum claims. Furthermore, since the criteria to determine responsibility did not take the wishes of the asylum-seeker into account, and no mandatory provisions were included to ensure the protection of family unity, its strict application could lead to the separation of family members between different States.

The right to family unity is considered a basic human right and is well established internationally in relation to refugees. Moreover, Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) extends the right to private and family life to everyone, thus obliging a State to respect family life not only of its own nationals, but also of third country nationals such as refugees and asylum seekers. However, there is no case law of the European Court of Human Rights (ECtHR) where asylum applicants claim that there has been a violation of their right to family unity following a strict application of the Dublin mechanism.

¹ European Council, *Presidency Conclusions*, Tampere, 16.10.1999, para. 14.

1.1 Purpose

Two discretionary provisions, allowing the Signatory States not to apply the Dublin Convention in individual cases, were also included in the Dublin Regulation. These provisions are named the sovereignty and the humanitarian clauses, and may be used in humanitarian cases, where family or cultural grounds are explicitly mentioned as examples. However, the clauses are used at the full discretion of the States, and do not confer any rights on the individual asylum seeker. This in turn explains why Member States have been applying the clauses restrictively. Given that asylum procedures are often lengthy, the application of the Dublin Convention could lead to persistent family splitting. Compared with the Convention, the Dublin Regulation does include some new mandatory provisions on the protection of family unity. However, the question is if this protection reaches a satisfactory level. There is still no mandatory provision *guaranteeing* processing by one single State of the applications of members of the same family.

The purpose of this thesis is to evaluate the protection awarded to the unity of asylum seeking families by the Dublin system, especially by the use of the sovereignty and humanitarian clauses. This assessment will be conducted in the light of the right to family unity, enshrined in international human rights instruments in general and in Article 8 of the European Convention on Human Rights and Fundamental Freedoms in particular. This last Article provides for the right of respect for family life, and extends to everyone without discrimination. Case law of the European Court of Human Rights points to the fact that Article 8 does in certain instances limit the scope of the States' power to decide when a non-citizen can enter or remain on its territory. A discussion will be made on whether the application of the Dublin mechanism for allocating responsibility to deal with asylum applications may raise issues under Article 8 of the ECHR. The main focus of the thesis is on a discussion of the provisions of the Dublin system, which have a bearing on the unity of the family during asylum procedures, especially the new provisions of the Regulation.

Not all asylum seekers are genuine refugees, but they nevertheless have claims to have the unity of their families respected. However, this thesis assumes that asylum seekers are *bona fide* refugees.²

² A person is a refugee within the meaning of the 1951 Refugee Convention as soon as he or she fulfils the criteria contained in the definition, which necessarily occurs prior to the formal refugee status determination. Thus refugee status in the meaning of the Convention has a declaratory, but not a constitutive function. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, para. 28.

1.2 Method and Materials

The method used in this thesis is a combined descriptive and analytical study of different legal instruments and case law of relevance to family protection, to clarify the scope of the right to family unity in the European context. The interview method has also been used to a limited extent, to outline Swedish practice as regards family unity under the Dublin Convention. To this end, interviews with officials of the authorities competent in trying Dublin cases in Sweden have been conducted.

The material used is European Community as well as international human rights instruments, doctrinal writings and recommendations of intergovernmental and Non-Governmental Organisations on the topic. Also, the case law of the European Court of Human Rights has been studied, to allow for an analysis of the scope of the right to family unity awarded by article 8 of the ECHR. Finally, Swedish case law on the sovereignty clause has been used, in order to exemplify the application of the Dublin Convention in one Member State.

1.3 Delimitations

On the first of May 2004, ten European States were welcomed as new members of the European Union. The Dublin Regulation became applicable in these new Member States upon accession to the Union. The problems related to an expanded Europe and the moving of the external frontiers are not irrelevant to the questions of asylum policy and family unity discussed in this work. However, due to limitations of space, the impact of this expansion will not be pondered in this thesis.

1.4 Outline

Chapter two is divided into three sections. The first section gives a general background on the developments in the field of asylum and migration in Europe during the last decades, leading up to the full 'communitarisation' of these policies. The two final sections of Chapter two will describe a specific aspect of common EU policy on asylum and migration, namely the determination of responsibility for trying asylum applications as elaborated in the Dublin Convention and subsequently the Dublin Regulation. The following two Chapters, Chapter three and four, constitute the core of the thesis. Chapter three, on the one hand, provides for an analysis of the principle of family unity, both in general international law and more specifically under Article 8 of the ECHR. The fourth Chapter, on the other hand, goes on to analyse the specific allocation mechanisms of the Dublin System that take into account the right of the family to stay together or to reunite, in the light of the principles drawn up in Chapter three. The fifth Chapter deals with practice in Sweden on the application of the sovereignty

and humanitarian clauses in family cases, and the final and sixth Chapter sums up the first Chapters and gives concluding remarks.

2 Background - Development of a Common European Asylum System

The question of migration has always been a part of the European integration project. When establishing the European Communities in the 1950s, migratory questions were viewed in the context of constructing a large European market with no internal frontiers, allowing for the free movement of goods, capital, services and persons. The freedom of movement for persons was a right for workers to move from one Member State to another, and not a generalised right open to all.³ Market-making and economic integration were key drivers when establishing the provisions regarding free movement of nationals of Member States, elaborated in the 1960s and 1970s. The question of admission of third country nationals and refugees, on the other hand, remained strictly national concerns.

Today, however, immigration and asylum policies have been formally introduced under the Community framework and the establishment of a common European asylum system has become a priority on the European Union agenda. The 1997 Treaty of Amsterdam⁴ defines common asylum and refugee policies as central elements in creating an “area of freedom, security and justice” in Europe. This position was reiterated at the Council meeting in Tampere in October 1999, where the Council after emphasising the importance of an absolute respect of the right to asylum, called for the establishment of a Common European Asylum System. The long-term goal of this policy agenda was to establish a common asylum procedure and uniform status for those granted asylum, valid throughout the Union. In the short term, on the other hand, the elaboration of common minimum standards on various asylum related matters was envisaged, in view of harmonising national asylum legislation. Finally, the policy scheme included the implementation of a “clear and workable determination of the State responsible for the examination of an asylum application”.⁵ The instrument relevant in this respect is the Dublin Regulation.⁶

The conclusions of the Tampere European Council, as reaffirmed in the subsequent Councils of Laeken⁷ and Seville⁸, provided substantive input, and the Common European Asylum System has been realised at a fast pace.

³ Geddes, A., *The Politics of Migration and Immigration in Europe*, SAGE Publications Ltd, London, 2003, p. 129.

⁴ OJ C 340, 10.11.1997. The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999.

⁵ European Council, *Presidency Conclusions*, Tampere, 16.10.1999, para. 14.

⁶ See 2.3 and 4.3.

⁷ European Council, *Presidency Conclusions*, Laeken, 15.12.2001.

⁸ European Council, *Presidency Conclusions*, Seville, 22.06.2002.

Today, the proposals of the European Commission cover almost all aspects of immigration and asylum.⁹ This Chapter starts by describing the co-operation on asylum and immigration matters in Europe throughout the past decades. Beginning on a strictly intergovernmental level in the 1980s, the co-operation was brought under the Community framework in the 1990s. The second section of this Chapter lays out the main features of the Dublin Convention, which was an instrument of international law to deal with the allocation among Member States of the responsibility to try asylum claims. The Convention was considered to be the first step towards a common European asylum policy.¹⁰ The third and final section goes on to analyse the instrument to replace the Dublin Convention at the Community level, namely the Dublin Regulation, or ‘Dublin II’.

2.1 From National Sovereignty to European Harmonisation

When the provisions regulating free movement of nationals of Member States were elaborated following the founding of the European Economic Community in 1957, asylum and immigration policies were left aside. The chief reason for this was a lack of political will among Member States to consider them at the time. The admission of third-country nationals was regarded as the core part of their national sovereignty, and the Member States were eager to preserve their national prerogative in this respect.¹¹ Moreover, there was no substantive legal basis in the Treaty of Rome (TEC)¹² to bring them into the framework of joint policy-making.

National immigration policies did however develop, and following the relatively generous immigration policies of the 1950s and 1960s, many European States began to introduce restrictive regulations in the 1970s. Thus, at the beginning of the 1980s, intra-EU migration policies were based on inclusive ideals, while the extra-EU migration, lying within the realm of national decision-making, was based on more restrictive policies, with exception made for international human rights obligations, most notably in relation to refugees as defined in the 1951 Convention on the Status of Refugees. With the halt of foreign labour recruitment in the mid 1970s, the asylum right, together with the right of family reunification, became the only legal avenues for immigration to the European Union. This contributed to the overburdening of asylum systems in many countries and an increasing perception of an abuse of the right to asylum. As a consequence, many

⁹ Brinkmann, G., *The Immigration and Asylum Agenda*, European Law Journal, Vol. 10, No. 2, March 2004, p. 186.

¹⁰ Marinho, C., (ed.), *The Dublin Convention on Asylum, Its Essence, Implementation and Prospects*, European Institute of Public Administration, Maastricht, 2000, p. 69.

¹¹ Brinkmann, *supra* note 9, p. 183.

¹² The 1957 Treaty of Rome, establishing the European Economic Community, OJ C 325, 24.12.2002.

countries further restricted the processing of asylum claims.¹³ The will to control immigration resulted in asylum issues being treated in relation to immigration issues, which too often resulted in the disregard of the specific need of protection that asylum-seekers and refugees have.

2.1.1 Intergovernmental Co-operation on Asylum and Immigration

Following the adoption of the Single European Act (SEA)¹⁴ in 1986, the first steps towards common standards on immigration and asylum policy were taken, although on a strictly intergovernmental level. Article 8A of the Act, dealing with the free movement for persons, confirmed the political determination of Member States to realise the single market project and to abolish internal borders by 1992. Now, with the revitalisation of the single market project and the establishment of a borderless Union, the concurring policies related to asylum, immigration, external borders and security needed to be addressed. Although co-operation was approved, it was outside the formal Community framework and without involvement of its supranational organs. There was still no explicit treaty basis for immigration and asylum policies and many States were reluctant to extend the competence of supranational institutions into these areas, especially UK, Denmark and Greece.¹⁵ Co-operation was instead pursued in different intergovernmental fora composed of like-minded Member States. In 1985, a smaller group of States, namely France, Germany, and the Benelux countries, signed the Schengen Agreement.¹⁶ Supplemented by an implementing Convention, the Agreement came into effect in 1995. The Agreement constituted a far-reaching attempt to abolish border controls between the signatory States, enabling people to move freely between the Schengen countries.¹⁷ Common rules regarding visas, measures related to asylum and checks at external borders of the Schengen area were adopted as 'flanking measures', to allow the free movement of persons within the signatory States without disturbing law and order.¹⁸

¹³ Lavenex, S., *The Europeanisation of Refugee Policies*, Ashgate Publishing Ltd, Burlington, 2001, p. 3.

¹⁴ Single European Act, 9 September 1985, OJ (1987) L 169/1.

¹⁵ Geddes, A., *Immigration and European Integration, Towards Fortress Europe?*, Manchester University Press, Manchester, 2000, p. 25.

¹⁶ Agreement between the Governments of the States of Benelux economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders of June 14, 1985.

¹⁷ Geddes, A., *supra* note 3, p. 131.

¹⁸ The Schengen co-operation expanded little by little to include first Italy, then Spain and Portugal, followed by Greece, Austria, Denmark, Finland and Sweden. The Schengen *acquis*, including its two agreements and all adopted implementing measures, has been integrated into the European Union framework, following the ratification of the Amsterdam Treaty in 1999. The United Kingdom and Ireland only participates in some aspects of the Schengen co-operation.

In 1986, the *Ad Hoc Group on Immigration* was created, partly as a reaction to the endeavours of the more integration-minded Schengen signatories.¹⁹ This group consisted of the interior and immigration ministers of the EC Member States, and was joined by one representative from the Commission, who was only allowed to follow the work of the Group. The Ad Hoc Group on Immigration presented two draft Conventions, namely the Dublin Convention discussed below, and the Convention on External Frontier Controls. The latter Convention was never adopted, however, due to political disagreement between Spain and the UK on the status of Gibraltar. The Ad Hoc Group also prepared the so-called ‘London Resolutions’, which were adopted in 1992. These non-binding resolutions address questions on asylum procedures, manifestly unfounded applications, safe third countries and family reunification.

The two main weaknesses of the described informal approach were, firstly, its inefficiency given the difficulty to ratify agreed measures, and secondly, that it was undemocratic since decisions were made without democratic or judicial accountability at the national or European level.²⁰ The informal intergovernmental co-operation has furthermore incited criticism for focusing on the safeguarding of internal security by combating terrorism, drug trafficking and illegal immigration, with little emphasis on improving the protection standards of genuine refugees.²¹ This in combination with the lack of transparency and information was seen as problematic.

2.1.2 Community Competence in the Field of Asylum and Immigration

A step closer to European integration in relation to asylum was made in 1992, when the Treaty of Maastricht on European Union (TEU) declared that asylum was a matter of common interest²² for Member States. With the Maastricht Treaty, the issues were formally introduced under the Community framework, and placed in an intergovernmental third pillar titled Justice and Home Affairs.²³ For the States that preferred intergovernmentalism, the advantage of the pillared arrangement was that it minimised the involvement of supranational institutions on the sensitive issues of migration and asylum. Extended powers for the European Commission and Court of Justice were thus avoided and the *modus*

¹⁹ The Ad Hoc Group on Immigration grew out of the so-called ‘Trevi Group’, which was established in 1975 to co-ordinate Union-wide efforts against terrorism, drugs and illegal immigration.

²⁰ Geddes, *supra* note 3, pp. 133-134.

²¹ The European Parliament, the CoE and the UNHCR have taken a different approach. These bodies have underscored the States’ international obligations and the human rights dimensions of the policy field as opposed to the single market project.

²² Not common *policies*, however.

²³ The three ‘pillars’ covering Justice and Home Affairs, Common Foreign and Security Policy and the Community pillar would be the foundations of the newly created European Union.

operandi was decision-making in the Council of Ministers based on unanimity.²⁴

With the 1997 Treaty of Amsterdam, the issues of asylum and migration policy were introduced under title IV of the TEC, and thereby drawn closer to the Community method of decision-making. However, although asylum and migration policy was moved to the first pillar, intergovernmental decision-making and the requirement for unanimity decisions were kept.²⁵ The legal basis for instruments on asylum is Article 63 (1)(2) of the TEC, allowing only minimum standards.²⁶ The instruments on asylum shall be adopted by unanimity in the Council, while the Parliament shall be consulted. However, the system is transitional and once common rules and basic principles have been adopted, the road is open towards a substantial increase in qualified majority voting in the Council and the co-decision procedure.

2.2 The Dublin Convention

In June 1990, the Member States of the European Union met in Dublin to conclude a Convention that would determine the State responsible for examining applications for asylum lodged in one Member State, better known as the Dublin Convention.²⁷ The Convention was signed as an intergovernmental agreement by the at the time twelve Member States,²⁸ with the exception of Denmark, which signed the agreement on 13 June 1991. As the Convention was not an instrument of Community law, but a treaty under international law, ratification by all signatory States was necessary to put it into effect. This ratification process was not concluded until 1997, and the Convention entered into force on 1 September 1997 for the original signatory States.²⁹ The Dublin Convention replaced the essentially similar provisions on asylum law in Articles 28-38 of the Schengen Implementation Agreement (SIA). Like those provisions, the Dublin Convention established uniform criteria for determining the State responsible for examining applications for asylum.

²⁴ Geddes, *supra* note 3, p. 136.

²⁵ Article 67, TEC.

²⁶ This is apart from paras 1(a) and 2 (b).

²⁷ OJ C 254, 19.08.1997, hereinafter Dublin Convention or simply the Convention.

²⁸ Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

²⁹ The Convention entered into force on 1 October 1997 for Austria and Sweden and on 1 January 1998 for Finland. It was additionally applicable in Norway and Iceland by way of a separate agreement, (OJ L 93, 03.04.2001) since only EU Member States could sign or accede to the Convention, see Article 21(1) of the Convention.

2.2.1 Purpose and Scope of the Dublin Convention

The Dublin Convention was considered the first step towards a Common European Asylum System.³⁰ As outlined in its preamble, the main purpose of the Convention was to end the possibility to lodge multiple asylum applications in different Member States, and to guarantee a material determination on an asylum claim in one of the Member States.³¹ Put differently, this was to remedy on the one hand situations where protection seekers lodged asylum applications in several Member States simultaneously or successively, also referred to as ‘asylum shopping’. On the other hand, orbit situations, where claimants were shuttled around without any of the Member States acknowledging responsibility for examining the asylum application on its merits, were to be limited.³²

The Convention was elaborated in view of setting up a clear and viable system for sharing the burden of trying asylum applications filed in the Union. It was to meet a number of objectives, most notably rapidity and certainty, which would be achieved by applying formal criteria. The system did not, however, intend to take the individual asylum-seekers’ own wishes into account. The possibility of giving the applicant the choice of country was rejected on the grounds that asylum-seekers, unlike immigrants, are supposed to go wherever possible and not plan their emigration.³³ At the time of its adoption, the Convention was welcomed by i.e. the United Nations High Commissioner for Refugees (UNHCR) on the grounds of the guarantee that an asylum claim would, in principle, be adjudicated by one of the Member States. This was seen as a positive development, potentially limiting the number of orbit cases.³⁴

An important restriction made in the Convention was that it only applied to claims for protection under the 1951 Refugee Convention. Thus, subsidiary protection categories, which involve a great number of persons, were excluded.

2.2.2 The Safe Third Country Concept

The Convention established that an asylum application should be examined by the responsible Member State in accordance with its national laws and its international obligations.³⁵ The system of the Dublin Convention was based

³⁰ Van Krieken, Peter J., *The Asylum Acquis Handbook, The Foundation For a Common European Asylum Policy*, TMC Asser Press, The Hague, 2000, p. 273.

³¹ Dublin Convention, para. 4 of the Preamble. See also Article 3(2), stating that an application should be examined by a single Member State.

³² Goodwin-Gill, G., *The Refugee in International Law*, 2nd ed, Oxford University Press, Oxford, 1996, p. 338.

³³ Joly, D., *Refugees –Asylum in Europe?*, Minority Rights Publications, London, 1992, p. 100.

³⁴ UNHCR, *Position on Commission Working paper on revisiting the Dublin Convention*, 19 January 2001, p. 2.

³⁵ Dublin Convention, Article 3(3).

on the concept of safe third countries, according to which all the Member States were considered safe. Thus, it relied on the assumption that equivalent protection was awarded in all of the Member States and therefore a protection seeker had nothing to gain from circumventing the rules laid down in the Convention by lodging an asylum application in a particular Member State. However, the system was ‘limping’, as there was a vast discrepancy between the levels of protection offered in law and in practice by different Member States.³⁶ As emphasised by the UNHCR, the credibility of any mechanism for transfer of responsibility is contingent upon the existence of harmonised standards in several other substantive and procedural areas of asylum. The lack of a unified interpretation of the 1951 Convention refugee definition and the scope of complementary forms of protection, were troublesome.³⁷

With the responsibility rule of the Dublin Convention, the contracting parties agreed to examine the asylum applications falling under their responsibility, and, correspondingly, to refer other claimants who did not fall under these categories to the responsible State. This represented a departure from the traditional system of refugee protection, which bound every individual State to provide protection under the 1951 Refugee Convention.³⁸

It is important to note that the Member States retained the right to return an asylum seeker to a non-EU country, without having a substantial examination by the Member State that would be responsible under the criteria of the Convention. This was possible by virtue of article 3(5) of the Convention, allowing for safe country clauses in domestic law to take precedence over the Convention mechanism.³⁹ This exception ran counter to the objective of securing the examination of every application for asylum by a *Member State*, set out in the preamble of the Convention.⁴⁰ From this follows that even if the Dublin Convention put an end to the problem of ‘refugees in orbit’ in the European Union, the Member States still contributed to this phenomenon in the rest of the world.⁴¹ The UNHCR has demanded that the applicant should be able to request a review of removal to a safe third country, and that an appeal shall have suspensive effect.⁴²

³⁶ See below under 2.2.5.

³⁷ UNHCR, *Position on Commission Working Paper on Revisiting the Dublin Convention*, *supra* note 35, p. 7.

³⁸ Lavenex, *supra* note 13, p. 96.

³⁹ This provision is retained in Article 3(3) of the Dublin Regulation.

⁴⁰ Preamble para. 4 and Article 3(1). Noll, G., *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Kluwer Law International, The Hague, 2000, p. 193.

⁴¹ Hurwitz, A., *The 1990 Dublin Convention: A Comprehensive Assessment*, *International Journal of Refugee Law*, 11(4) 1999, p. 650.

⁴² UNHCR, *Implementation of the Dublin Convention: Some UNHCR observations*, May 1998.

2.2.3 Identifying the Responsible State

The responsible State was determined through a range of objective criteria, listed in the order they would be applied. The first criterion was if the applicant had a family member who had acquired refugee status in a Member State, where this State should assume responsibility. The subsequent criteria, enumerated under Article 5-8, were visa or residence permit, illegal border crossing and responsibility for border control. Basically, responsibility for handling an asylum claim was placed on the State that first enabled the entry of an asylum seeker into the Union territory, with the important exception with regard to family unity.⁴³ This 'enabling' entailed either granting a residence permit or an entry visa, or by failing to protect the external border from illegal crossing. If none of these criteria were applicable, responsibility was allocated to the State in which the claim was lodged. The said aim of applying these formal criteria was to hasten asylum procedures.

The following criteria, applicable in the order in which they appeared, were used to determine which Member State was responsible for examining the application.⁴⁴

Article 4. If the applicant for asylum has a family member who has been recognised as having refugee status within the meaning of the 1951 Refugee Convention in a Member State, and is legally resident there, that State will be responsible, provided the person concerned so desires.

Article 5(1). If the applicant is in possession of a valid residence permit, the Member State that issued it will be responsible for examining the application for asylum.

Article 5(2). If the applicant is in possession of one or more valid visas, the Member State that issued it/them will be responsible for examining the asylum application.

Article 6. If it can be proved that the applicant for asylum irregularly crossed the border into a Member State by land, sea or air, having come from a non-member State, the Member State thus entered will be responsible, unless the applicant has been living in the Member State where the application for asylum was presented for at least six months before making the application.

Article 7. The Member State responsible for controlling the entry of the applicant into the territory of the Member States will be responsible for examining the application for asylum unless the applicant first entered a Member State where the visa obligation is waived, before presenting an

⁴³ Article 4, Dublin Convention, *see further* under 4.1.

⁴⁴ Article 3(2), Dublin Convention.

application for asylum in another Member State where the visa obligation is also waived.

Article 8. If none of these criteria apply, the first Member State where the application for asylum is lodged is responsible for examining it.

A distinct set of criteria, to ensure that only the responsible State would examine the application, were inserted in Articles 10-13 of the Dublin Convention. According to article 12-13, the responsible Member State was required to take back the applicant for asylum whose application was being examined, who had withdrawn his/her application or whose application had been rejected and who was illegally in another Member State. Alongside these allocation and readmission provisions, the Convention also included clauses to enable Member States to address cases where family unity would be jeopardised by the application of the Convention's criteria or where other humanitarian circumstances were involved. These sovereignty and humanitarian clauses will be further elaborated under Chapter four of this thesis.

2.2.4 Information Sharing and Fingerprinting

The Dublin Convention also provided for the sharing of information about national legislative measures and practices applicable in the field of asylum and about statistical data on monthly arrivals of asylum applicants and their breakdown by nationality.⁴⁵ Following the conclusion of the Dublin Convention, the Member States realised that they would have difficulties in identifying third country nationals who had already lodged an application in another Member State. For that reason, the Member States agreed, in 1991, to establish a Community-wide system for the comparison of fingerprints of asylum applicants. On 11 December 2000, the Council adopted a Regulation concerning the establishment of 'EURODAC' for the comparison of the fingerprints of applicants for asylum and certain other aliens.⁴⁶ The Regulation established a central database containing the fingerprints of asylum-seekers and illegal immigrants and thus facilitated the application of the Dublin Convention. The Central Unit of EURODAC began operating on 15 January 2003 with an empty database.⁴⁷

2.2.5 Problems of Interpretation and Implementation

The Member States encountered difficulties in implementing the different criteria of the Convention, and the decisions adopted by the Committee set

⁴⁵ Articles 14-15, Dublin Convention.

⁴⁶ Council Regulation 2725/2000.

⁴⁷ Commission Staff Working Paper, *First annual report to the Council and the European Parliament on the activities of the EURODAC Central Unit*, 2004.

up by Article 18 of the Convention⁴⁸ did not provide substantive help. One critical issue was the difficulties to provide evidence, in the absence of a visa or other travel documents, in order to establish that the applicant had been to one Member State before filing an application in a second one.⁴⁹ Moreover, the achievement of one of the main objectives of the Convention, namely not leaving asylum seekers uncertain of the outcome of their application for too long was compromised, due to the excessive time limits placed on the procedures for determining the State responsible. The implementation of the Convention proved to be time consuming and costly and few applicants were ultimately transferred. Finally, the Convention incited criticism for its underlying assumption that the different Member States had determination systems fully in line with the terms of the 1951 Refugee Convention.⁵⁰ This was not the case and many scholars as well as Non-Governmental Organisations considered the inception of the Dublin Convention premature, calling for a Union-wide harmonisation of material asylum law. In the words of Noll, the solution devised by the Member States more resembled a procedural fix than a material cure.⁵¹ The lack of harmonisation of material legislation led to unforeseeable and even unfair results for the individual asylum seeker. In this system, the outcome of an asylum application was highly dependent on the material asylum law of the country in which the asylum seeker first arrived. This, in turn, would lead to unredeemable *refoulements*, since the decision of the responsible State was binding on all the others.⁵² These and other considerations explain the widespread agreement that the Convention was not functioning in the way it was intended.

2.3 The Successor Regulation

2.3.1 Legal Basis and Adoption

In March 2000, following the entry into force of the Amsterdam Treaty and the conclusions of the Tampere European Council, the European Commission started the preparation of a proposal for a Regulation to replace the Dublin Convention. The Dublin Regulation implements Article 63(1)(a) of the TEC by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application submitted with one of the Member States. The Amsterdam Treaty stipulates the adoption of “criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a

⁴⁸ The so-called ‘Article 18-Committee’ had the responsibility to examine questions of application and interpretation and delivered four decisions. One of its decisions, namely on the implementation of the sovereignty and humanitarian clauses, will be discussed in 4.2.4.

⁴⁹ This determination has been much facilitated by the inception of the EURODAC central database, *see supra* 2.2.4.

⁵⁰ *See supra* 2.2.2.

⁵¹ Noll, *supra* note 40, p.183.

⁵² Joly, *supra* note 33, p. 110.

national of a third country in one of the Member States” by the year 2004.⁵³ The Commission put forward a proposal for a Council Regulation⁵⁴ and the Dublin Regulation was adopted on 18 February 2003. The Regulation, which is commonly known as ‘Dublin II’, means to fulfil the requirements of the Tampere European Council conclusions, stating that the criteria and mechanisms for determining the Member State responsible for examining an application for asylum should be based on a ‘clear and workable method’ forming part of ‘a fair and efficient asylum procedure’.⁵⁵ ‘Dublin II’ is thus a first pillar instrument replacing the Dublin Convention as the mechanism for deciding which EU country is responsible for processing an asylum claim. As for the Dublin Convention, the main principle behind ‘Dublin II’ is that the country that let an asylum seeker into the EU, whether legally or by failing to prevent their illegal entry, must take responsibility for their asylum claim. Although ‘Dublin II’ includes some novelties in order to improve the problems encountered in applying the Dublin Convention, most of the provisions are similar and the system itself relies on the same principles. A major difference concerns the shorter procedural deadlines to ensure the rapid processing of asylum applications⁵⁶ and a provision to the effect that a Member State becomes responsible for trying an application if it tolerates the illegal presence of a third country national on its territory.⁵⁷

Strengthened measures to secure the unity of protection seekers’ families are welcome new elements of the Regulation.⁵⁸ It adds further criteria including *inter alia*, where an asylum seeker is an unaccompanied minor, responsibility for considering the claim shall be the State where a member of his or her family is legally present. There is no stipulation as to the formal status of the family member. These novelties and their practical importance will be further scrutinised in Chapter four.

2.3.2 Non-Suspensive Effect of Appeal

Although the Regulation includes a provision allowing for appeal or review of a decision to transfer an applicant, this provision does not provide for a suspensory right of appeal pending a decision.⁵⁹ Thus, a transfer of the appellant may be effectuated to the responsible State before a decision is made on the appeal in the first State. This non-suspensive effect of appeal represents a retrograde development of the Regulation in relation to the Convention. The UNHCR considers that a suspensive effect is important both to avoid unnecessary hardship in the case that the appeal is successful,

⁵³ Article 63(1)(a) TEC.

⁵⁴ COM(2001) 447 final, 26 July 2001.

⁵⁵ Proposal for a Council Regulation, 2001, (447), p. 5.

⁵⁶ Battjes, H., *A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation*, European Journal of Migration and Law, Vol. 4, 2002, p. 182.

⁵⁷ Article 10(2), Dublin Regulation.

⁵⁸ Especially preamble paras. 6 and 7 and Articles 6-8.

⁵⁹ Article 20(1)(e), Dublin Regulation.

but also for reasons of procedural efficiency.⁶⁰ Furthermore, while Member States have different interpretations of Article 1(A) of the Refugee Convention, a transfer to another Member State applying a more restrictive interpretation may amount to chain *refoulement*. The European Council on Refugees and Exiles (ECRE) considers that at a minimum, the applicant must have suspensive right of appeal against a removal to another Member State where the applicant considers that transfer to that State would be in violation of Article 33 of the 1951 Refugee Convention or Article 3 of the ECHR.⁶¹

2.3.3 Jurisdiction of the European Court of Justice

One of the most important aspects of the new Regulation is that it places the implementation of its provisions under common legal scrutiny. Thus, the European Court of Justice will have jurisdiction to interpret the Regulation and to rule on disputes between the Member States in relation to the Regulation.⁶² However, the *locus standi* by individuals in single Dublin cases is limited, and a preliminary ruling by the Court on the interpretation of the Regulation can in principle only be instigated by a national court or tribunal against whose decision there is no judicial remedy in national law.⁶³

2.3.4 Concluding Remarks

The shortcomings of the Dublin system that were highlighted even before its entry into force have been confirmed in the actual operation of the Dublin Convention. These shortcomings were reiterated before the drafting of the Regulation that was to replace the Convention. However, the Regulation copies the Convention to a large extent and the criteria are still based on the principle that responsibility shall lie with the Member State which played the greatest part in the applicants' entry or residence in the Union. This principle is underlined by new provisions attributing responsibility to Member States where the applicant illegally remained. An alternative way of attributing responsibility, signalled by the Commission, would be to depend solely on where the application is lodged.⁶⁴ Experience indicates

⁶⁰ UNHCR, *Observations on the European Commission's Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Geneva, February 2002, p.5.

⁶¹ The Articles contain the prohibition against torture and inhuman or degrading treatment or punishment. ECRE, *Comments on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national*, London, December 2001, p. 13.

⁶² This follows from Articles 68 and 234 TEC.

⁶³ Noll, G., *Denying the Difference: The Dublin Successor Regulation*, in Eile, J. and Karlbrink, L., (eds), *Asylum in Europe: Strategies, Problems and Solutions*, Raoul Wallenberg Institute Series, 2002, p 15.

⁶⁴ Explanatory Memorandum to the Commission proposal for a Council Regulation, para. 2.2.

that asylum seekers tend to integrate more easily in the State they choose themselves, for several reasons. However, observations of the adverse effect of the Dublin Convention criteria in different respects, i.e. on integration of asylum seekers, have been neglected when agreeing on the Regulation.⁶⁵

Finally, for the Regulation to be effective, it should be part of a complete harmonisation of asylum provisions, in order to ensure that applicants are not suffering any detriment if they are moved to other EU States.

⁶⁵ Battjes, *supra* note 56, p.184.

3 Protection of Family Unity in International Law

The family has been recognised as the fundamental group unit of society by all major legal systems of the world, and constitutions of at least 50 countries provide for family protection.⁶⁶ The right to family life is also included in numerous instruments concerning international protection of human rights. To begin with, the 1948 Universal Declaration of Human Rights (UDHR) stipulates that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁶⁷ The very wording of Article 16(1) of the UDHR has been incorporated in Article 23(1) of the 1966 International Covenant on Civil and Political Rights. Additionally, Article 12 of the UDHR and Article 17 of the Covenant provide, *inter alia*, that no one should be subjected to arbitrary interference with his family, and that everyone has the right to protection of the law against such interference. For the purpose of this thesis a study of the right to family life as enshrined in Article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms⁶⁸ will be central. This Article has been invoked with success before the European Court of Human Rights⁶⁹ by non-nationals, in matters where members of a family had been separated as a result of decisions of deportation from the territory of the State.

3.1 Family Unity in the Refugee Context

The right of family unity applies to all human beings, regardless of their status.⁷⁰ In refugee situations, it can be held that the family assumes a greater than usual importance, since the individual refugee, not least a separated child, is highly vulnerable and in great need of the physical protection and emotional support of the family. The separation of a refugee family is seldom intended to be permanent, although initially the separation

⁶⁶ Anderfuhren-Wayne, C.S., *Family Unity in Immigration and Refugee Matters: United States and European Approaches*, International Journal of Refugee Law, 8(3) 1996, p. 348.

⁶⁷ Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 December 1948, Article 16(3). The principle is also found in, among other treaties, the American Convention on Human Rights, Article 17(1), the African Charter on Human and People’s Rights, Article 18(1), the International Covenant on Economic, Social and Cultural Rights, Article 10 and the Convention on the Rights of the Child, Article 9 and 10. Regarding the latter Convention, *see further* 3.1.2.

⁶⁸ European Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, 213 UNTS 221 (1950).

⁶⁹ The European Court of Human Rights, hereinafter ECtHR or the Court, is situated in Strasbourg.

⁷⁰ Jastram K. and Newland, K., *Family Unity and Refugee Protection*, in Türk, F., and Nicholson, F., (eds), *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection*, Cambridge University Press, Cambridge, 2003, p. 556.

may be a chosen strategy. Often, however, separation is an unintended consequence of forcible displacement. Although recognition of a right to family unity is inherent in recognising the family as a group unit,⁷¹ there is little said in human rights instruments how this right is to be effected when families have been separated across international borders. In other words, the right to *reunification* of refugee families does not readily follow from express provisions of international law. At the same time, the effective implementation of the right to family unity in the refugee context requires not only that the State refrain from actions that would disrupt an intact family, but also that it take positive action to allow a dispersed family to reunite.

In separated refugee family cases, since family life per definition cannot be enjoyed in the country of origin, a right to family unity thus implies a right to reunification in a country of asylum. As already noted there is wide recognition that family unity may require that a State take positive action to allow a dispersed family to reunite. On the other hand, current restrictive trends in migration and asylum policies and the concerns of governments to control migration are sometimes at odds with acknowledged obligations with regard to the unity of the refugee family. Many governments are following an increasingly narrow interpretation of their obligations to protect the refugee family, due to migration control concerns.⁷²

3.1.1 Family Unity in the 1951 Refugee Convention and other international instruments

The general concepts and ideals of contemporary international refugee law are to a great extent based on the Convention relating to the Status of Refugees.⁷³ The relevance of the 1951 Refugee Convention to asylum seekers stems from the already noted declaratory function of the Convention, and the fact that asylum seekers may be *bona fide* refugees.⁷⁴

The 1951 Refugee Convention does not address the right to family reunification *per se*.⁷⁵ However, a strongly worded recommendation approved unanimously by the Conference of Plenipotentiaries that adopted the Convention does so. This non-binding recommendation considers that

⁷¹ If members of a family did not have a right to live together, there would be no ‘group’ to respect or protect. Jastram and Newland, *ibid.*, p. 566.

⁷² Jastram and Newland, *ibid.*, pp. 557-558.

⁷³ 1951 Convention relating to the Status of Refugees, adopted by a Conference of Plenipotentiaries of the UN, 28 July 1951, 189 UNTS 137. Hereinafter 1951 Refugee Convention.

⁷⁴ *See supra*, note 2.

⁷⁵ The 1951 Refugee Convention does provide protection for the family in several Articles, i.e. Article 4, referring to “freedom as regards the religious education of their children”, and Article 12(1) providing that “rights attaching to marriage, shall be respected”.

the unity of the family is an ‘essential right’ of the refugee.⁷⁶ Additionally, the Executive Committee of the High Commissioner for Refugees repeatedly recalls that States should ensure that family unity is maintained or re-established.

Detailed provisions on families dispersed by war can be found in international humanitarian law. Thus, the 1949 Fourth Geneva Convention⁷⁷ provides mechanisms for, *inter alia*, registration of children to enable family communication and, ‘if possible’, family reunification.⁷⁸ In the context of human rights law, a provision that should be mentioned is Article 44(1) of the 1990 International Convention on the protection of all Migrant Workers and Members of their families.⁷⁹ Also this article recognises that the family is the natural and fundamental group unit of society and that States shall take ‘appropriate measures’ to ensure the protection of the unity of the families of migrant workers.

3.1.2 The Convention on the Rights of the Child

The principle of family reunification is perhaps most strongly reaffirmed in article 9 and 10 of the Convention on the Rights of the Child (CRC).⁸⁰ Article 9 requires that States “*shall* ensure that a child *shall* not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, (...), that such separation is necessary for the best interest of the child”.⁸¹ Unlike i.e. Article 8(2) of the ECHR, allowing for a number of exceptions to the prohibition on interference with family life,⁸² the wording of article 9 of the CRC is absolute in that it does not recognise a public interest to be weighed against the involuntary separation of the family. The only exception allowed is when separation is necessary for the protection of the best interest of the child. The core of the right to family reunification is found in Article 10(1) CRC, providing that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification *shall* be dealt with by States Parties in a *positive, humane and expeditious manner*”.⁸³ This suggests that there is not only a negative obligation on States not to separate children from their

⁷⁶ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 1951, UN doc.A/CONF.2/108/Rev.1, 26 November 1952, Recommendation B.

⁷⁷ Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 UNTS 287.

⁷⁸ Article 50, 1949 Fourth Geneva Convention.

⁷⁹ Adopted by the General Assembly of the United Nations on 18 December 1990, not yet in force.

⁸⁰ Convention on the Rights of the Child, 1989, UNGA Res. 44/25, adopted on 20 December 1989. The CRC has been almost universally ratified, and its Article 9 has been reiterated at the political level in the Commission on Human Rights, Resolution 2001/75 on the Rights of the Child, UN Doc. E/CN.4/2001/75, para.11(c).

⁸¹ Article 9, CRC. Emphasis added.

⁸² See below 3.2.5.

⁸³ Article 10(1), CRC. Emphasis added.

families, but also a positive one, requiring from the States Parties positive action regarding families divided by its borders.⁸⁴ However, several States have made reservations to the CRC provisions on family reunion, despite the importance otherwise given to the family as the basic unit of society.

3.1.3 Scope of the Right to Family Unity- Definition of the ‘Family’

International instruments recognising a right to family unity vary in determining which categories of persons are to be considered members of the family. While all of them include a person's spouse and minor children, the status of minor children of a spouse by a previous marriage, illegitimate children, aged parents and dependent relatives is unclear. In UNHCR's view, States should adopt a pragmatic and flexible interpretation of the family, recognising economic and emotional dependency factors as well as cultural variations.⁸⁵ However, domestic policies and practices on the scope of the family included for family reunification purposes vary greatly. According to domestic legislation of European States, reunification is generally recognised in relation to the nuclear family of the refugee, i.e. spouse and minor children.⁸⁶ As to other dependent relatives, policy and practice is not uniform.

3.1.4 Asylum Seekers

The uncertain situation of asylum seekers is a major obstacle to the possibility of swift family reunification. Since no decision has been made on the legal status of asylum seekers, it is difficult to determine what country bears the responsibility for giving effect to the right of reunification. Unlike beneficiaries of temporary or subsidiary protection, who in some States enjoy the right of reunification with close family members, asylum seekers are mostly denied the right to family reunification, although it is considered a basic human right.⁸⁷ States are of the view that their prerogative regarding immigration and admission policy overrides the interest of the individual of family reunification during asylum procedures.

3.1.5 A Right to Family Reunification?

Despite the absence of an express right of family reunification in the 1951 Refugee Convention, the right has evolved and its existence can be

⁸⁴ Jastram and Newland, *supra* note 70, p. 578.

⁸⁵ UNHCR, *Background Note: Family Reunification in the Context of Resettlement and Integration*, Annual Tripartite Consultations on Resettlement between UNHCR, resettlement countries and NGO's, Geneva, 20-21 June 2001.

⁸⁶ Lambert, H., *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Unity*, *International Journal of Refugee Law*, 11(3), 1999, p. 430.

⁸⁷ *Ibid.*

established through subsequent developments in general international law.⁸⁸ General international law instruments do not prove the existence of a right to family reunification, but they indicate a *widespread acceptance* that States should facilitate admission to their territories, where it is unreasonable to expect the family to reunite elsewhere. Furthermore, subsequent soft law instruments, two UNHCR Executive Committee conclusions,⁸⁹ and State practice are all indicative of a policy of reunification in connection with the principle of family unity. The rights on which family unity is based are often qualified, with provisions for the State to limit the right under certain circumstances. Sometimes the only imperative upheld is to act in the best interest of the child.⁹⁰ To conclude, although the question whether the family of a refugee can be reunited is ultimately determined by domestic provisions on asylum and immigration, States normally recognise an obligation to reunite close refugee family members who are unable to enjoy the right to family unity elsewhere.⁹¹

3.2 Article 8 of the European Convention on Human Rights and Fundamental Freedoms

The right to family unity is well established under the regional regime of the ECHR, elaborated by the Council of Europe (CoE). All EU Member States are parties to the ECHR. Article 8 of the ECHR provides for the right to respect for everyone's private and family life and reads as follows:

“(1)Everyone has the right to respect for his private and family life, his home and his correspondence.

(2)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 necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others”.

Article 8 contains a right to a privacy sphere, under which family rights fall. “Private and family life” has been interpreted by the Court as to encompassing the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature.⁹² The following analysis is restricted to the protection of family life, since other private life considerations fall outside the scope of this thesis.

⁸⁸ On treaty interpretation, *see* Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, Article 31.

⁸⁹ ExCom Conclusions No. 9 (XXVIII) and No. 24 (XXXII) of 1981, paras. 1 and 5 and, in the same vein, UNHCR Handbook, paras. 181-184.

⁹⁰ *See supra* 3.1.2. However, some States are not even aware of their obligations in this important respect.

⁹¹ Jastram and Newland, *supra* note 70, p. 576.

⁹² *See i.e. Corfi v. Belgium*, Judgment of 7 August 1996.

As we have seen previously in this Chapter, the right to family unity is widely recognised in theory, but its effective protection is often problematic in practice, especially when it comes to reuniting a family dispersed by international borders. Case law of the ECtHR, however, indicate that protection awarded to family unity by Article 8 does impose certain obligations on the contracting States, limiting the scope of their power of removal or refusal of entry of non-nationals. In the European context, family unity can therefore be said to be more than a mere humanitarian principle. However, although the States must respect their treaty obligations in good faith, the judgements of the Court are merely declaratory.⁹³

The European Court of Human rights has not developed precise criteria on the application of Article 8.⁹⁴ The assessment is made on a case-by-case basis. When establishing a violation of Article 8, the Court first looks at the existence of a family. Then, the Court proceeds to establish the existence of an interference with family life by a public authority according to Article 8(2). Lastly, if interference has been found, the Court looks at circumstances that can justify the same, listed in Article 8(2). In cases of third-country nationals and Article 8, the jurisprudence of the Court reveals that a distinction is made between cases of removal, causing a splitting of families and, on the other hand, cases of entry of non-citizens for the purpose of family reunification.⁹⁵ The latter cases are dealt with in a more restrictive manner.⁹⁶ The Court has not had the opportunity to pronounce on the relationship between the Dublin Convention and Article 8 of the ECHR. However, some observations of interest to the analysis of the right of family unity of asylum seekers can be made from the case law of the Court.

3.2.1 The Existence of ‘Family Life’ Within the Meaning of Article 8

Article 8 presupposes the existence of a family. When an applicant complains to the Court invoking Article 8, it will first have to be established whether the family ties involved fall within the scope of Article 8. The Court decides on this matter on a case-by-case basis, putting greatest weight on relations within the nuclear family. However, members of a family protected by Article 8 of the ECHR can also be other close relatives, as older, dependent parents and grown-up children. The family life considered is not *de jure* family life, but *de facto* family life,⁹⁷ where the genuineness of the family ties is examined. While genuine ties are often presumed for

⁹³ Van Dijk, P., van Hoof, G.J.H. *et al*, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague, 1998, p. 21.

⁹⁴ As has been done in relation to i.e. Article 3.

⁹⁵ The ECHR does not contain an express provision regarding the right to family reunification, but the Court has pronounced that this right is an integral part of the right to family life as enshrined in Article 8(1).

⁹⁶ Lambert, *supra* note 86, p. 429.

⁹⁷ Van Dijk, van Hoof *et al*, *supra* note 93, p. 504.

nuclear family members, they depend on various factual circumstances in other relationships. As regards family life between parents and adult children, for example, there needs to be evidence of *further element of dependency*, involving more than the normal emotional ties. Shared household and economic dependency are factors that can be taken into account for the purpose of establishing family life in these cases. However, there is not much case law when these further elements of dependency have been found to exist.⁹⁸

In the *Marckx* case⁹⁹ the Court took the view that the fact of birth, i.e. the biological tie between mother and child, created family life in the sense of Article 8, irrespective of the fact that the child was born outside of marriage.¹⁰⁰ In the *Berrehab* case,¹⁰¹ the Court held that a legal as well as actual relationship between the applicant and his daughter constituted a family in the sense of article 8 of the ECHR, although the applicant was divorced and lived apart from his daughter. Family life for the purpose of Article 8 is not limited to the traditional Western concept of family, but may also include a family composed according to a different cultural pattern.

3.2.2 Intended Family Life

As for intended family life, it does not necessarily fall outside the scope of Article 8. This follows from the holdings of the Court in the *Abdulaziz* case.¹⁰² Here, the Court declared Article 8 to be applicable in a situation where admission was sought by newly married couples for the purpose of establishing family life.¹⁰³

3.2.3 Deportation of Third-Country Nationals

There are few Article 8-cases where the applicant is a refugee or protection seeker, and none where the applicant is an asylum seeker. This can be explained by the fact that these cases are often decided under Article 3 of the ECHR¹⁰⁴ and do not address the question of interference with family life.¹⁰⁵ However, there are many cases relating to long-term residents and

⁹⁸ Steijn, A. van, *Protection of the Refugee Family and Article 8 of the Convention*, Paper presented at the ELENA International Course, Strasbourg May 1997.

⁹⁹ *Marckx v. Belgium*, 31 ECtHR (ser. A) (1979).

¹⁰⁰ Anderfuhren-Wayne, *supra* note 66, p. 357.

¹⁰¹ *Berrehab v. the Netherlands*, Judgment of 21 June 1988, A. 138.

¹⁰² *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECtHR, Judgment of 28 May 1985, Series A, No. 94.

¹⁰³ In this case, however, no interference with family life was found, since it was not unreasonable to expect the applicants to establish family life elsewhere.

¹⁰⁴ Article 3 contains the prohibition against torture, *see supra* note 61, from which no derogation is permitted; Article 15(2) ECHR. Two landmark cases, where Article 3 was considered in relation to non-nationals are *Chahal v. United Kingdom*, Judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V and *Soering v. United Kingdom*, 7 July 1989, Series No. 161.

¹⁰⁵ Lambert, *supra* note 86, p. 448.

second-generation immigrants, where, in face of deportation, a violation of Article 8 has been found. The interpretations of the Court when a State refuses entry for the purpose of family reunification are, on the other hand, more restrictive.

The Court repeatedly recalls that the ECHR does not as such guarantee a right for an alien to enter or to reside in a particular country. This was recently reiterated in *Amrollahi v. Denmark*.¹⁰⁶ However, the immigration policy of the Contracting State has to be in conformity with its obligations under the Convention. In the cases dealing with expulsion or deportation of third country nationals, the ECtHR has decided that Article 8 does not provide for an absolute protection against these measures, although it amounts to an interference with family life.¹⁰⁷ In cases of disputes arising under Article 8, the Court must balance two sets of competing interests. These are the interests of the Community as a whole on the one hand, and the right of the individual to family life on the other. When it comes to deportation of second generation immigrants and long term residents, it has often been due to a crime committed and the State has referred to the interests of preventing disorder and crime.¹⁰⁸ In the cases of expulsion or deportation of a person with family in the deporting country, the Court has however on several occasions found that the deporting State has violated its obligations under Article 8 of the ECHR. The measure of the State has been regarded as disproportionate to the aims pursued, and the interest of the individual to family life outweighed the concerns of the State.¹⁰⁹ The question whether removal or exclusion of a person from a Contracting State is incompatible with the requirements of Article 8 will depend on factors such as the extent of family ties in the deporting country and the links a person has maintained with his country of origin.

3.2.4 A Positive Obligation?

The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. Put differently, the State must not interfere with the enjoyment of the right to family life. Alongside this negative obligation, there may also be positive obligations inherent in the *effective* respect for family life.¹¹⁰ This is because the aim of the ECHR is to protect the effective, rather than the theoretical enjoyment of rights. This in turn suggests an obligation to take some positive steps to ensure family unity and to implement procedures necessary to protect family life. The first case to deal with positive obligations is the *Marckx* case,¹¹¹ which called for the termination of procedures that discriminated against illegitimate children. In

¹⁰⁶ *Amrollahi v. Denmark*, ECtHR, Judgement of 11 July 2002, para. 26.

¹⁰⁷ Hailbronner, K., *Immigration and Asylum Law and Policy of the European Union*, Kluwer Law International, The Hague, 2000, p. 497.

¹⁰⁸ On restrictions on the right to family life, *see below* 3.2.5.

¹⁰⁹ *See i.e. Moustaquim v. Belgium*, 193 ECtHR (ser. A) (1991).

¹¹⁰ Lambert, *supra* note 86, p. 433.

¹¹¹ *Supra* note 99.

immigration and asylum matters, a positive obligation arises when a non-citizen seeks to enter a Member State, to be reunited with a family member lawfully residing there.¹¹² However, the Court repeatedly notes that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.¹¹³ Taken this fact into consideration, the State may however be under a positive obligation, depending on the individual facts of the case, to allow the entry of an alien for the purpose of family reunification.

In the *Abdulaziz* case¹¹⁴ the Court took a rather restrictive approach with respect to positive obligations, as it was argued that the State was not under a positive obligation to secure family life in a preferred country of residence.¹¹⁵ In this latter landmark case concerning Article 8 and the entry of non-nationals, the husbands of three applicant women residing in the United Kingdom, were denied permission to enter the country. Although the Court noted that Article 8 in cases of genuine marriages includes a right to live together, it does not confer on the persons a right to choose the country in which they want to pursue family life. In the present case, it was not unreasonable to expect the couples to establish family life in their respective countries of origin. Thus, no interference on the right to family life was found. However, the Court stated that “there may be circumstances in which the State should admit to its territory the spouse of a settled immigrant in order to secure to the couple effective enjoyment of their family life”.¹¹⁶

In the *Gül v. Switzerland* case,¹¹⁷ the applicant, who had been granted a residence permit in Switzerland on humanitarian grounds, was denied to have his minor son join him. Firstly, the Court found that family ties between the applicant and his son existed. Where the Court was to assess whether there had been an *interference* with the applicant’s rights, however, it first noted that the boundaries between a State’s positive and negative obligations were hard to delimit. In both contexts, a fair balance had to be struck between the competing interests of the individual and the State. However, it balanced the applicant’s right to family life against the State’s interests¹¹⁸ at the early stage of establishing an interference. As a consequence, no interference was found, since there were strictly speaking no obstacles for the applicant to join his son in the country of origin. According to a dissenting opinion of judge Martens to the case,¹¹⁹ the examination of the interests of the State ought only to take place when assessing whether an interference is *justified*, therefore after it has been found that there has indeed been an interference. The case has been criticised, because of the very restrictive criteria under which positive

¹¹² Lambert, *supra* note 86, p. 438.

¹¹³ See i.e. *Al-Nashif v. Bulgaria*, ECtHR, Judgment of 20 June 2002, para. 114.

¹¹⁴ *Supra* note 102.

¹¹⁵ para. 34, *Abdulaziz* case.

¹¹⁶ *Ibid.*

¹¹⁷ *Gül v. Switzerland*. Judgment of 19 February 1996.

¹¹⁸ The claimed interest was the economic well being of the country.

¹¹⁹ *Gül v. Switzerland*, dissenting opinion of judge Martens, para. 7.

obligations could be established which would allow for family members, even minor children, to join parents lawfully residing in a Contracting State.¹²⁰

3.2.5 Restrictions on the Right to Family Life

As noted, the right to family unity is not absolute. Even if the Court has concluded that a State is the author of an interference, the same can be justified with reference to the second Paragraph of Article 8, providing that:

“There shall be no interference by a public authority with the exercise of this right except such as *in accordance with the law* and *is necessary in a democratic society* in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.”¹²¹

Thus, the State has room for derogation from the duty to respect the right to family life. Derogation from Article 8(1) can be justified with reference to the promotion or protection of the interests of the Community as a whole, enumerated in the second paragraph. The restrictive measures must however be in accordance with the law and necessary in a democratic society.

3.2.5.1 'In accordance with the law'

In the enumeration of limitations to the right to respect for family life, it is expressly stated that the latter must be in accordance with the law. The ECHR refers to the legal system of the State involved, which must provide an adequate basis for the restrictive measure, and be certain and sufficiently clear. However, it is not necessary that it is the national law, it may also be a provision of international law that forms the basis for the restrictive measure. The requirement that a measure be in accordance with the law has never been disputed before the Court in cases dealing with non-nationals¹²²

3.2.5.2 'Necessary in a democratic society'

If the Court is satisfied that the restriction has a legal basis and that the legislation actually aims at the protection of the listed interests, the Court proceeds to consider whether the interference is necessary in a democratic society.¹²³ However, the interests listed as grounds for restrictions have not been given much independent attention by the Court.¹²⁴ When assessing whether the interfering measure is necessary in a democratic society, the Court has to balance the individual's right to private and family life against

¹²⁰ Steijn, *supra* note 98, p. 12.

¹²¹ Article 8(2) ECHR. Emphasis added.

¹²² Lambert, *supra* note 86, p. 443.

¹²³ Van Dijk, P., van Hoof, G.J.H. *et al*, *supra* note 93, p. 771.

¹²⁴ *Ibid.* p. 772.

the community's interest. In this weighting of interests, the Court relies on this principle of proportionality, and the more far-reaching the infringement or the more essential the aspect of the right that has been infringed with, the more substantial the aims pursued must be.¹²⁵ However, as mentioned earlier, the State authorities are afforded a wide margin of appreciation in the field of immigration, which is kept in mind by the Court.

3.2.6 Article 8 and Asylum Seekers

Article 8 grants protection of the right to family life to everyone, regardless of his or her status. Thus, asylum seekers also have the right to have their family life respected.¹²⁶ However, as noted under section 3.1.4, the situation of an asylum seeker in relation to family reunification is especially sensitive, since it is problematic to establish which country shall give effect to the right to unity. There are no Article 8-cases where the applicant is an asylum seeker.¹²⁷ Although the Court has not tested the relevance of Article 8 of the ECHR in relation to asylum seekers, some speculations can be made on how the Court would deal with such cases. As noted, the interpretations of the Court when a State refuses entry for the purpose of family reunification have been restrictive, when family life can be pursued in the home country. This might not be possible for asylum seekers. Although the Court would in principle acknowledge the right of asylum seekers to family life, it would proceed to balance the interests of the State and those of the individual, which would come out in favour of the State. The Court would probably give precedence to the interests of the State to control migration over the individuals' right to family unity during asylum procedures. These arguments will be further elaborated in relation to the Dublin system in the conclusions of the thesis.

¹²⁵ *Ibid.* p. 537.

¹²⁶ Löper, F., *The Dublin Convention on Asylum, Interpretation and Application Problems*, in Marinho, (ed.), *supra* note 10, p. 26.

¹²⁷ *See supra* 3.2.3.

4 Family Unity and Responsibility Allocation under the Dublin System

Although dealing primarily with the mere procedural aspect of the asylum system, the Dublin System also contains references to another aim, namely the safeguarding of the individual's rights. A reference in the preamble to the 1951 Refugee Convention and the guarantee that the refugee's application will be examined by a Member State in due course point to this commitment, as does the reference to the principle of family unity. Nevertheless, the Dublin System on occasion conflicts with the individual's interests and rights. A question that can be legitimately raised is whether its provisions and implementation takes sufficiently into account the individual's interests and rights with regard to family protection.¹²⁸ This Chapter aims to give an overview of the provisions of the Dublin System dealing particularly with family unity and analyse their scope. As noted earlier, the Regulation copies the provisions of the Convention to a large extent. The study will centre on the Convention, where the provisions are equivalent.¹²⁹ However, there are some important new elements of the Regulation to the effect of strengthening the right to family unity. These provisions will be separately highlighted and discussed.

4.1 Article 4 of the Dublin Convention –Refugee Family Reunification

The Dublin Convention contains an important assignment of responsibility in favour of family unity in Article 4, which is to be applied before the other allocation criteria of the Convention.¹³⁰ Article 4 provides that “where an applicant for asylum has a family member who has been recognised as having refugee status in a Member State and is legally resident there, that State shall be responsible for examining the application, *provided the persons concerned so desire*”.¹³¹ Firstly, this provision applies only to family members of aliens with refugee status, and not to family members of aliens with subsidiary forms of protection statuses, even if they are legally staying in a Member State. Secondly, the concept of family is very narrowly defined, since only members of the nuclear family are included. These two

¹²⁸ Klug, A., *The Humanitarian Clause of the Dublin Convention and Family Protection*, in Marinho, (ed.), *supra* note 10, p. 69.

¹²⁹ This structure seems appropriate, since most case law and scholarly inquiry is devoted to the application of the Convention, given the short period of operation of the Regulation.

¹³⁰ Articles 5-8, Dublin Convention.

¹³¹ Article 4, Dublin Convention, emphasis added. As to the consent by the persons concerned, it has to be given in writing.

factors together explain why the criterion only has a limited meaning in quantitative terms.¹³²

Article 4 of the Dublin Convention constitutes the general expression of the principle of family unity also found in Article 8 of the ECHR. Furthermore, it is fully in line with domestic law and practice of European States, generally recognising reunification in relation to the refugee and his or her family, as discussed in Chapter three. As to the definition of the ‘family’ in paragraph 2 of Article 4, it includes only spouse and minor children, which corresponds to the Western concept of nuclear family and is similar to that used in most family reunification laws.¹³³ This is the most restrictive interpretation allowed by the UNHCR Handbook, which recommends that also other dependants, such as aged parents of refugees be included for family reunification purposes, provided they have been sharing the same household.¹³⁴ The Parliamentary Assembly of the Council of Europe has made recommendations to the same effect.¹³⁵ Many European countries apply an extended definition of nuclear family in their domestic legislation, including i.e. unmarried couples and same-sex partners. However, this fact has not altered a strict application of the provisions of Article 4.¹³⁶

4.2 The Sovereignty and Humanitarian Clauses of the Dublin Convention

There is no provision in the Dublin Convention guaranteeing that one Member State only shall be responsible for examining the asylum applications of members of the same family. Article 4 does not, as we have seen, cover cases where a family is applying for asylum in one Member State, but the family members hold visas to different Member States or have taken different travel routes. The consequence may be that responsibility for trying the asylum claims is divided among different Member States.¹³⁷ This, in turn, may lead to a prolonged separation of family members, given the length of asylum procedures and the limited possibility to travel while an asylum application is under consideration.¹³⁸ This is not desirable from a humanitarian perspective.

¹³² Noll, *supra* note 40 p. 188.

¹³³ Hurwitz, *supra* note 41 p. 653.

¹³⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979, para. 185. See also UNHCR, *ExCom Conclusion No. 24 on Family Reunification*, 32nd Session (1981), paras. 1 and 5.

¹³⁵ Council of Europe Parliamentary Assembly, Recommendation No1327 (1997), *On the Protection and Reinforcement of the Human Rights of Refugees and Asylum Seekers in Europe*, article 8 (vii) (o) and (p).

¹³⁶ Danish Refugee Council, *The Dublin Convention - Study on its Implementation in the 15 Member States of the European Union*, January 2001, p. 83.

¹³⁷ According to Article 5ff of the Convention, see *supra* 2.2.3.

¹³⁸ UNHCR, *Implementation of the Dublin Convention, Some UNHCR Observations*, Geneva, May 1998.

Two clauses of the Dublin Convention are of central importance to this study, namely the sovereignty and humanitarian clauses, found in Article 3(4) and Article 9 of the Convention, respectively. The clauses allow Member States to examine an asylum application, even if it does not come under its responsibility according to the criteria of the Convention. When applied in a liberal manner, the provisions can be useful in finding acceptable solutions to different problems encountered, i.e. to avoid family separation or to reunify previously separated family members.

4.2.1 The Sovereignty Clause, Article 3(4)

Also referred to as the ‘opt-out’ clause, Article 3(4) provides that each Member State retains the right to examine any asylum application, even if it is not the responsible State under the criteria of the Convention. The Article reads as follows:

“Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto. The Member State responsible under the above criteria is then relieved of its obligations, which are transferred to the Member State which expressed the wish to examine the application. The latter State shall inform the Member State responsible under the said criteria if the application has been referred to it.”

Article 3(4) merely states the obvious, which is that every State has the right to examine an application for asylum submitted to it. In other words, the ‘inherent’ right of sovereign States to examine an application for asylum is not restricted by the Dublin Convention.¹³⁹ There are no conditions attached to the application of the clause, and the States are under no duty to present the reasons for their decision.¹⁴⁰ An individual asylum seeker cannot invoke the clause, since it creates rights and obligations only for the Member States.¹⁴¹ It would be wrong, however, to conclude that the reunification of families is assured in most of the cases through the application of the sovereignty clause.

The application of the sovereignty clause has been justified for other purposes than ensuring family unity. These include strictly humanitarian cases, i.e. where the applicant is pregnant, or accompanied by infants. Also procedural deficiencies on the part of the State have justified ‘opting out’, such as passing of a reasonable deadline to transfer an applicant. Lastly, but not least important, the clause has been invoked on grounds of divergent

¹³⁹ Vermeulen, B. P., *The Application of Article 3(4) of the Dublin Convention on Asylum in Dutch Case Law*, in Marinho, (ed.), *supra* note 10, p. 54.

¹⁴⁰ Klug, *supra* note 128, p. 70.

¹⁴¹ Hurwitz, *supra* note 41, p. 659.

asylum policies and practices, the ‘mutual trust’ among the Member States in their respective asylum systems aside.¹⁴²

4.2.2 Positive and Negative Application of the Sovereignty Clause

The sovereignty clause can be used either to the benefit or the detriment of the asylum seeker. It is positive when the Member State uses it to allow for family unity in cases not covered by Article 4, or when the State has a more liberal recognition practice than the State to which allocation would have taken place under the Dublin criteria, as described above. Conversely, Member States can also use Article 3(4) to the detriment of the applicant. In particular, this is the case when a State decides to process an application under manifestly unfounded or accelerated procedures, which allows for a rapid removal to the country of origin, instead of conducting the Dublin procedure and transfer the applicant to the responsible State.¹⁴³ Following the explicit wording of the Article, the asylum seeker has to consent to its application.¹⁴⁴ Most Member States share the view, however, that an asylum seeker implicitly agrees to have his or her application examined there, by lodging an application in a given country. According to this view, the agreement from the individual of the application of 3(4) exists implicitly, and is not sought before instituting an accelerated removal.¹⁴⁵ The UNHCR has condemned this practice on the ground that the sovereignty clause is supposed to work in the best interest of the individual. However, most officials argue that the objective of the Dublin Convention is to ensure an efficient treatment of asylum claims, and that an application of the sovereignty clause in such cases is lawful.¹⁴⁶

4.2.3 The Humanitarian Clause, Article 9

Article 9 of the Dublin Convention reads as follows:

“Any Member State, even when it is not responsible under the criteria laid out in this Convention, may, for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires. If the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.”

¹⁴² See *supra* 2.2.5. For an account on case law where the sovereignty clause has been applied as a consequence of disparities in protection levels among Member States, see Noll, G., *Formalism v. Empiricism: Some Reflections on the Dublin Convention on occasion of Recent European Case Law*, *Nordic Journal of International Law*, 70: 171-182, 2001.

¹⁴³ Danish Refugee Council, *supra* note 136, p. 90.

¹⁴⁴ Article 3(4), para. 1, *in fine*.

¹⁴⁵ Danish Refugee Council, *supra* note 136, p. 94.

¹⁴⁶ Johannes van der Klaauw, cited in Hurwitz, *supra* note 41, p. 660.

According to this Article, which was drafted after a similar provision of the Schengen Convention,¹⁴⁷ any Member State may, at the request of another Member State, take over the responsibility for an asylum applicant for humanitarian reasons. The provision explicitly refers to family grounds as a specific humanitarian ground.¹⁴⁸ In most Member States, the separation of the family as such is not considered sufficient reason for the application of Article 9, regardless of whether the couple has minor children or not. Noteworthy is that the use of article 9 is much less frequent than the use of article 3(4), since States seem reluctant to examine the claim of an individual for whom it is not responsible and who is not even on its territory.¹⁴⁹ On the other hand, a different outcome is to expect where family members are already together in one Member State. In some jurisdictions, there is agreement on a different policy in these cases, where family unity is normally maintained, in application of the sovereignty clause.

4.2.4 Implementing Guidelines by the Article 18-Committee

For a long time, there was no agreement on whether and when the maintenance or re-establishment of family unity was sufficient reason for the application of Article 9 and 3(4).¹⁵⁰ The implementation of the provisions was further complicated since the different Member States apply different definitions of family. The confusion among Member States on the application of the discretionary clauses led to undesirable inconsistencies. The need for developing a common approach to the application of the derogation was acknowledged early by the European institutions.¹⁵¹ However, it proved difficult to reach an agreement on the streamlining of the operation of the clauses, and it was only in the fall of 2000 that the Committee set up by Article 18 of the Dublin Convention gave their implementing guidelines in a Decision, which was adopted by the Justice and Home Affairs Council.¹⁵² In its preamble, the Decision confirms the obligations of the Member States in the field of international law under Article 8 of the ECHR, to ensure respect for private and family life.¹⁵³ The Decision goes on to state that responsibility for dealing with applications for asylum by family members should *in principle* be determined in accordance with the criteria laid down in Articles 4-8 of the Dublin Convention.¹⁵⁴ However, family reunification may take place, if there are humanitarian

¹⁴⁷ Schengen Implementation Agreement, Article 36.

¹⁴⁸ Klug, *supra* note 128, p. 70.

¹⁴⁹ Hurwitz, *supra* note 41, p. 661.

¹⁵⁰ Klug, *supra* note 128, pp. 72-73.

¹⁵¹ Action Plan of the Council and the Commission on how best to implement the provisions in the Treaty of Amsterdam establishing an area of freedom, security and justice, adopted on 7 December 1998, OJ C 19/1 of 23.1.1999, para. 36 (i), referred to in Hurwitz, *supra* note 41, p. 662.

¹⁵² Decision No 1/2000 of 31 October 2000 of the Committee set up by Article 18 of the Dublin Convention concerning the transfer of responsibility for family members in accordance with Article 3(4) and Article 9 of that Convention, hereinafter the Decision.

¹⁵³ Preambular para. 1 of the Decision.

¹⁵⁴ Article 2(1) of the Decision.

reasons within the meaning of Article 9 of the Convention. The judgment whether such humanitarian reasons are at hand is to be made on a case-by-case basis, where, *inter alia*, cohabitation in the country of origin previous to flight and progress of the individual asylum proceedings are factors that may be taken into account.¹⁵⁵ These implementing guidelines have not, however, completely solved the problems of interpretation encountered by the Member States as regards especially article 9.¹⁵⁶

4.2.4.1 Family members

‘Family members’ for the purpose of the application of Articles 3(4) and 9, is the nuclear family, in other words the spouse of an applicant for asylum, and his or her unmarried child who is a minor under the age of 18. Furthermore, if the applicant is himself or herself an unmarried child under the age of 18, his or her parents are included in the family definition.¹⁵⁷

4.2.4.2 Other dependant relatives

Also other close relatives of an applicant for asylum, not mentioned in Article 1, shall be considered under the sovereignty and humanitarian clauses. This is provided that either the applicant for asylum or that close relative wholly or mainly *depends on support* from the other who will effectively provide that support and that the persons concerned were living together as a family unit before they left their country of origin.¹⁵⁸

4.3 New Elements of the Dublin Regulation with Regard to Family Unity

As we have seen, the implementation of the Dublin Convention may have an adverse effect on the effective enjoyment of family unity and reunification. This is so since it failed to take due into account the legitimate interests and rights of the individual asylum seeker with respect to family protection. The discretionary nature of the sovereignty and humanitarian clauses, which were inserted to allow for flexible solutions, made them rarely used in practice. In the face of developing Community legislation on responsibility allocation, the Commission issued in March 2000 a working document¹⁵⁹ offering a critical analysis of the objectives and the functioning of the Dublin System, and presented possible alternatives for its

¹⁵⁵ Article 2(2) of the Decision.

¹⁵⁶ European Commission Staff Working Paper, *Evaluation of the Dublin Convention*, SEC (2001) 756, Brussels, June 2001, p. 11.

¹⁵⁷ Article 1(1) of the Decision.

¹⁵⁸ Article 1(2) of the Decision.

¹⁵⁹ European 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*, SEC (2000) 522, March 2000, hereinafter Dublin Working Paper.

replacement. The practical implementation of the Convention in the Member States was also evaluated.¹⁶⁰ In the first mentioned working paper, the Commission noted that the Dublin Convention lacks objective criteria to reunite the family where an applicant has a family member who is legally resident, but not a refugee, in one of the Member States.¹⁶¹ The Commission stated that:

“Further work on the Dublin Convention should investigate the scope for additional provisions enabling responsibility for dealing with the members of the same family to be conferred on one Member State where the application of the responsibility criteria would involve a number of States. The aim should be to develop binding rules which ensure family unity in such cases, rather than guidelines which make the application of this principle discretionary.”¹⁶²

The Article 18-Committee decision outlined above merely suggested that Member States assume responsibility to ensure respect for the unity of families on the basis of the sovereignty and humanitarian clauses in certain cases. However, some of the implementing guidelines of the decision have been used in the drafting of the new Regulation. For example, the more liberal definition of family members in Article 2(i) and a criterion on reunification with unaccompanied minors in Article 6 is drawn from the Decision. The Regulation however includes in its preamble a statement that family unity should only be preserved, in so far as this is compatible with the *other objectives* pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.¹⁶³

4.3.1 Family Members

Two important updates made in the Regulation will be outlined in this subsection. Firstly, a general expansion of the ‘family’ for the purpose of applying the Dublin mechanism has been made and secondly, the conditions for reunification with a family member who has been recognised as a refugee have been altered. The family definition has been expanded to the effect of including not only legally married spouses and legitimate children, but also unmarried partners in a stable relationship and their unmarried minor children.¹⁶⁴ The inclusion of these persons is however premised on two conditions, namely that the family was formed in the country of origin,¹⁶⁵ and that the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its

¹⁶⁰ Commission Working Paper, *Evaluation of the Dublin Convention*, *supra* note 156.

¹⁶¹ Dublin Working Paper, para. 46.

¹⁶² Dublin Working Paper, para. 47.

¹⁶³ Preamble para. 6, Dublin Regulation. These other objectives are to deal with asylum applications as quickly as possible, using a fair and efficient procedure.

¹⁶⁴ Article 2(i)(i) and (i)(ii), Dublin Regulation.

¹⁶⁵ Article 2(i), Dublin Regulation.

aliens law.¹⁶⁶ The equivalent of Article 4 of the Convention¹⁶⁷ is article 7, which does not include a limitation of the family members to the spouse and unmarried child. Thus, the new definition of the family described above is also applicable to this article, on condition that the domestic legislation of the State concerned recognise non-married couples. However, Article 7 states that the precondition that the family was formed in the country of origin is irrelevant. This will potentially expand the numbers of persons considered for family reunification with a recognised refugee.

4.3.2 Unaccompanied Minors

The protection of unaccompanied minors has been strengthened through Article 6 of the Regulation, providing that, where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be the one where a member of his or her family is legally present. This is provided that it is in the best interest of the minor. There is no stipulation as to the formal status of the other relative. Member of the family includes, insofar as the family already existed in the country of origin, the father, mother or guardian of the minor.¹⁶⁸ Cases of unaccompanied minors were often dealt with under the sovereignty or humanitarian clauses previous to the inception of the Regulation, but this was not guaranteed. There are instances where States have refused the application of the sovereignty clause for minors, resulting in them being left behind unattended.¹⁶⁹ Needless to say, this new mandatory provision represents an important improvement with respect to the protection of unaccompanied minors, and lies in line with obligations of Member States under the CRC.¹⁷⁰

4.3.3 Family Reunification with an Asylum Seeker

Another criterion, inserted in a new Article 8, allocates responsibility for assessing the claim to a Member State where there is another family member who is an asylum seeker and who is awaiting a decision under the normal procedure.¹⁷¹ This provision will also contribute to the preservation of family unity, although it is partially aimed at efficient processing of asylum applications.¹⁷²

¹⁶⁶ Article 2(i)(i), Dublin Regulation.

¹⁶⁷ Reunification with a recognised refugee, *see supra* 4.1.

¹⁶⁸ Article 2 (i) (iii), Dublin Regulation.

¹⁶⁹ The application of the sovereignty clause was refused by the UK in a case where minors wished to join their mother in the UK. Hurwitz, *supra* note 41, p. 661.

¹⁷⁰ *See supra* 3.1.2.

¹⁷¹ As opposed to this only being possible for family members of a recognised refugee under Article 4 of the Dublin Convention, *see supra* 4.1.

¹⁷² Comment on Articles in the Dublin Regulation Proposal.

4.3.4 Simultaneous Applications

Another new provision with regard to families is Article 14, which regulates the situation where several members of a family submit applications for asylum in the same Member State at the same time, or on dates close together. This article gives that where the application of the criteria set out in the Regulation would lead to the separation of the family members, the Member State responsible will be determined on the basis of which State is, according to the criteria, responsible for the majority of the family members.¹⁷³ If this is not possible, the responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.¹⁷⁴

4.3.5 New Wording of the Humanitarian Clause –Article 15

Article 15 of the Dublin Regulation begins by:

“Any Member State, even where it is not responsible under the criteria set out in this Regulation, *may* bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State *shall*, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.”¹⁷⁵

Thus, if a non-responsible Member State decides to bring together family members, it shall, at the request of the responsible State, examine the application of the person concerned. So far, the provision in principle corresponds to article 9 of the Dublin Convention. The family members are those defined in Article 2. Article 15 of the Regulation then proceeds to give a non-exhaustive¹⁷⁶ list of situations of dependency between the family members, where Member States shall normally keep or bring them together:

“In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall *normally* keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.”¹⁷⁷

This new wording is taken from Article 2(2) of the Decision, and represents, to some extent, a codification of already existing practice. This new

¹⁷³ Article 14(a), Dublin Regulation.

¹⁷⁴ Article 14(b), Dublin Regulation.

¹⁷⁵ Article 15(1), Dublin Regulation, emphasis added.

¹⁷⁶ “Situations that can arise are so diverse that they cannot all be covered by special provisions, (...) a discretionary humanitarian clause remains necessary in the interests of Member States and asylum seekers”, *Explanatory Memorandum to the Proposal for a Council Regulation*.

¹⁷⁷ Article 15(2), Dublin Regulation, emphasis added.

provision is to be welcomed, since it clarifies what circumstances are to be given specific consideration by Member States in applying the Humanitarian clause, allowing for a more coherent application as between the Member States. The discretionary nature of the provision nevertheless remains a fact, and there is no guarantee that the family unity is protected, not even when combined with a specific dependency factor. The State still has a wide margin of appreciation in applying the provision.

4.4 Intermediary observations

This Chapter has dealt with the provisions of the Dublin Convention that have a bearing on the unity of an asylum seeking family. The Convention only included one Article providing for the reunification of families, namely Article 4, where nuclear family members of a recognised refugee were allowed to have their asylum applications tried in the country where the refugee family member legally resided. In other situations, the maintenance or reestablishment of family unity was completely up to the Contracting States, and the practice on the application of the sovereignty and humanitarian clauses was not uniform. With the Regulation, several gaps have been filled. For example, the provision making States obliged to try an asylum application of a minor who has a relative in the same State, irrespective of the status of this relative, is to be welcomed. Other Articles, allowing unity when a family lodges applications at the same time, or when an application of one family member is pending under the normal procedure, have been inserted. The administrative and procedural benefits of trying the applications of family members by one single State is obvious, given that the asylum claims are often interrelated. In the same time, these provisions allow family members not to be separated during asylum procedures.

5 Application of the Sovereignty and Humanitarian Clauses in Sweden

This Chapter aims to analyse practice in one Member State of the European Union on the application of the Dublin system in relation to the maintenance or re-establishment of family unity of asylum seekers. For this purpose, especially the use of the sovereignty and humanitarian clauses under the Dublin Convention will be looked into. The aim of this study is merely to give an example of the application of the clauses in one State, and not to give a complete picture of its practice. Sweden has been selected on account of the possibility to access updated cases and information on the application of the clauses. The material available is mostly limited to cases on the application of the Dublin Convention, since the Regulation has been in force only a short period of time. Thus, reference will mostly be made to the Convention.

5.1 The Sovereignty Clause

The Dublin Convention entered into force in Sweden on 1 October 1997. When ratifying the Convention, the Swedish Government stated that a prerequisite for its application was that the applicant for asylum was protected against both direct and indirect *refoulement*.¹⁷⁸ In a leading decision from 1998,¹⁷⁹ the Aliens Appeals Board (*Utlänningsnämnden*)¹⁸⁰ concluded, on the other hand, that the scope for *not* invoking the allocation criteria of the Dublin Convention in an individual case must be presumed to be very limited, since each Member States party to the Convention are all considered similarly placed to protect people's needs and rights.

The Swedish Migration Board (*Migrationsverket*)¹⁸¹ is the first instance authority responsible for asylum applications in Sweden. According to a survey made by the Danish Refugee Council on the application of the Dublin Convention in the Member States, conducted in 2001,¹⁸² the Swedish MB has applied the sovereignty clause in several decisions and taken over responsibility for asylum applications on account of family ties with Sweden. The sovereignty clause has been applied for instance for some

¹⁷⁸ Proposition 1996/97:87, p.11.

¹⁷⁹ Decision of 11 November 1998 (UN-348-98).

¹⁸⁰ The AAB or the Board is an administrative appeal body with powers similar to those of a court. The AAB has overall responsibility for the development of case law regarding the Swedish Aliens Act. Under specific circumstances, the Board can refer cases to the Government for decision.

¹⁸¹ Formerly known as the Swedish Immigration Board. Hereinafter referred to as the MB.

¹⁸² Danish Refugee Council, *supra* note 136. Hereinafter the Dublin Study.

of the family members, where a family has applied for asylum in Sweden, and the majority of the family members are under the responsibility of Sweden. On the other hand, if another Member State was responsible for 50 percent of the family members or more, a request that the other State assume responsibility for the whole family under article 9 was sent to the responsible State. If that State refused to accept the whole family, the MB proceeded to try the applications of all members.¹⁸³ Thus, the MB has not contributed to the splitting of families in these cases. If, on the other hand, the other State accepted transfer, but the individuals would refuse to give their consent, the view was that the individuals themselves had chosen not to stay together as a unit.¹⁸⁴

The MB:s decisions to refuse entry and request transfer to another Member State include information on appeal rights and may be appealed to the AAB within three weeks of notice.¹⁸⁵ However, the AAB very seldom amends decisions by the MB on the application of the Dublin Convention. In the few cases where MB decisions have been overruled, strong humanitarian considerations, sometimes in connection with close family ties, have been involved.¹⁸⁶ There are no specific guidelines regarding the use of the two discretionary clauses to guide officers responsible for handling Dublin cases. Therefore the case law that has been developed by the Board is rendered all the more important to lead the decision-makers. Three cases, where the Board has considered humanitarian and family grounds in relation to the application of the sovereignty clause of the Dublin Convention, will be presented in the following. In one of these cases, the AAB has overruled a MB transfer decision. In the other two cases, the Board has dismissed appeals on transfer decisions, and thus concluded not to apply the sovereignty clause.

5.1.1 Non-Application of the Sovereignty Clause by the Aliens Appeals Board

In the aforementioned leading case from 1998,¹⁸⁷ the Swedish Immigration Board refused the asylum applications of a family from the Federal Republic of Yugoslavia, consisting of husband, wife and six children. The reason for rejection was that the family had already applied for asylum in Germany, and that therefore Germany was the country responsible for trying their asylum applications. The transfer decision was appealed to the AAB

¹⁸³ Interview with Therese Lindström, Responsible for Dublin cases at the MB Unit at Arlanda airport.

¹⁸⁴ *Ibid.*

¹⁸⁵ Dublin Study, p. 64.

¹⁸⁶ Formgren, A., and Berselius, B., *Swedish Case Law with Regard to Decisions Involving the Application of the Dublin Convention on Asylum*, in Marinho, (ed), *supra* note 10, p. 206.

¹⁸⁷ *Supra* note 179. This case does not involve family ties with Sweden, but is referred to since it is the first leading decision giving guidelines as to the scope of the application of the sovereignty clause.

on the grounds that readmission to Germany would lead to them being immediately forced to return to Kosovo, since the German authorities had ultimately rejected their asylum claims. One of the children was severely ill, which was also put forward by the applicants. The AAB dismissed the appeal and stated that the instances where the authorities would omit to apply the Convention were few. The Board proceeded to give some examples where this might be the case, under the principle of ‘first country of asylum’, which was the rule applicable in relation to other European states before the entry into force of the Dublin Convention. Such cases included instances where the asylum seeker was in need of advanced or emergency hospital care not available in the first country of asylum. The Board also referred to cases where the alien’s spouse, child or parent was legally resident in the country and there was no equally close tie with the country to which the alien was to be removed. In these instances, the first country of asylum principle was not applicable, and Sweden should try the asylum application.

The AAB noted that in the *travaux préparatoire* of the rules on the entry into force of the Dublin Convention, the Government had not declared that the Dublin Convention was to be applicable in the same way as the first country of asylum principle. For example, the ‘en-route’ principle¹⁸⁸ had no counterpart in the Dublin Convention. In its present decision, the Board reached the conclusion that Dublin cases were assessed differently than first country of asylum cases, where family connections with a particular country were concerned. The Board concluded that although there was some room to refrain from invoking the Dublin procedure in individual cases not covered by article 4 of the Convention, there was no implication in the law of an *obligation* to do so. In the case it was found that in Germany, the family would be protected from *refoulement*, and that the humanitarian reasons pleaded were not of the kind as to render readmission to Germany inappropriate.

In another decision from the AAB¹⁸⁹ where applicants from Yugoslavia were to be sent back to Austria, the appellants put forward strong humanitarian reasons against applying the provisions of the Dublin Convention as well as family ties with one of the couple’s parents and siblings living in Sweden. The Board reiterated the conclusions of its decision of 11 November 1998, namely that while the authorities *may* refrain from invoking the rules of the Dublin Convention, this possibility in humanitarian and family cases must be presumed to be *very limited*. The AAB did not consider the humanitarian reasons strong enough, nor did the family connection provide a reason for refraining from implementing the Dublin Convention.

¹⁸⁸ That is if the applicant has only spent a short period of time or merely passed through a State before lodging an asylum application in a second State, the first State will not be considered the first country of asylum.

¹⁸⁹ Decision of 1 March 1999.

5.1.2 Application of the Sovereignty Clause by the Aliens Appeals Board

In a recent case, the AAB tried an appeal from a Turkish applicant, facing transfer to Denmark.¹⁹⁰ The MB refused the asylum application on the ground that Denmark had accepted transfer under the Dublin Convention. In the appeal, the applicant relied on the fact that his wife was a Swedish citizen and that the couple recently had a daughter. Apart from these family grounds, the applicant also put forward humanitarian reasons against the transfer of responsibility, namely that his wife suffered from physical and psychological illness, and that their child suffered from respiratory problems. The wife of the applicant had been hospitalised for a couple of days. During this period, the applicant took care of the infant. The family had no other relatives in Sweden. The AAB noted that the applicant had a strong connection with Sweden, through his wife and child. However, in referring to its leading decision of 1998,¹⁹¹ the Board held that these family grounds alone were not sufficient to justify a derogation from the application of the Dublin criteria. On the other hand, these factors combined with considerations of the child's health were considered sufficient reasons for using the sovereignty clause, and trying the application. The fact that the transfer of the applicant would have an adverse effect on the child's health was decisive in the case, and the AAB therefore overruled the decision of the MB.

From these referred decisions, it can be concluded that the body responsible for trying appeals in Dublin cases in Sweden appears to use the sovereignty clause restrictively. The practice by the AAB in relation to Article 3(4) can be summarised as follows. The article is applicable when a physical transfer would seriously endanger the applicant's health, where there is a risk that the applicant commits suicide if faced with a transfer decision, and, finally, in cases involving *simultaneously medical reasons and family links in Sweden*, outside the scope of Article 4.¹⁹² The AAB has argued that the authorities might apply Article 3(4) when the applicant has family members in Sweden, who are not members of the nuclear family or recognised refugees, thus falling outside the scope of Article 4. However, family grounds have never been used by the AAB as the sole basis for a decision to opt out from the Dublin Convention. On the other hand, as noted above, several decisions by the MB to the effect of protecting the unity of families other than those falling under Article 4, have been made. For instance, prior to the introduction of the mandatory provision on unaccompanied minors in the Regulation, the MB always used the sovereignty clause to allow minors,

¹⁹⁰ Decision of 19 December 2003.

¹⁹¹ *Supra*, note 179.

¹⁹² Dublin Study, p. 82.

who would otherwise stay behind unaccompanied, to remain with his or her parents, present in Sweden.¹⁹³

5.2 The Humanitarian Clause

When a person applies for asylum in Sweden, the MB always investigates the existence of family ties with another Member State, and on the basis of this information, a request under article 9 can be made to another Member State, if the applicant agrees hereto. Compared to other Member States, Sweden has applied a relatively strict definition of the family for the purpose of the humanitarian clause.¹⁹⁴ Nuclear family members are considered, and here non-married partners and their children have been included. As for other close relatives, a strong dependency between the family members is crucial, where cohabitation in the country of origin and length of the period of separation are decisive factors. Relevant factors are weighed together on a case-by-case basis. When the dependency link is seen as strong enough, Sweden has been rather generous in accepting transfer from another Member State under Article 9. However, in absolute terms, the number of requests received has been limited. The number of requests made by Sweden to other Member States has slightly exceeded the ones received.

All in all, the application by the Swedish authorities of the sovereignty and humanitarian clauses under the Dublin Convention is, as we have seen, rather restrictive.¹⁹⁵ In 1997, the MB handbook on the application of the Dublin Convention included detailed information on all the Articles, except the sovereignty and humanitarian clauses.¹⁹⁶

5.3 The Dublin Regulation

The Dublin Regulation entered into force in Sweden, as in the other Member States, on 1 September 2003. Given its short period of operation, it is too early to pronounce on its practical effects in Sweden. Some remarks can be made, however. The application of the Humanitarian clause of the Regulation will be in line with the application of the same under the Convention, since Sweden accepted the transfer of members of the extended family (that is non-married partners) even under the Convention. Furthermore, many of the situations where the protection of family unity was depending on the use of the sovereignty and humanitarian clauses have vanished, since there are new provisions dealing with simultaneous applications and applications pending under the normal procedure.

¹⁹³ Interview with Peter Moqvist, head of division of the Migration Board Operative Unit in Solna.

¹⁹⁴ Interview with Therese Lindström. Italy is mentioned as a country with a wider definition of the family for the purpose of applying Article 9.

¹⁹⁵ This has also been confirmed by Michael Williams, Head of Swedish Council for Refugees (FARR) in a telephone conversation on 21 May 2004.

¹⁹⁶ *Ibid.*

6 Conclusion

This thesis has examined the Dublin system on asylum in relation to the internationally recognised principle of family unity. Some reoccurring aspects of this examination will be highlighted and conclusions will be drawn in this final Chapter.

Initially, the thesis has dealt with the principle of family unity as it stands in international human rights law in relation to refugees and other displaced persons. The right to family unity has been found to be widely recognised in theory, but is not easy to assess how this right is to be attained in practice, where the separation of family members between different States is a fact. The effective enjoyment of this particular right will in many instances be depending upon the States' willingness to admit to its territory the family members of these persons, thus implying some kind of positive action by the State. Will the State merely pay lip-service to the right of family unity or will it in fact take positive action to ensure effective family protection? It is ultimately up to the State to decide, but in Europe, most countries allow family members of recognised refugees into the State for reunification purposes. As for persons with other forms of protected statuses, law and practice differ among the States. So does the question which category of persons are to be included in the family definition for the purpose of family reunification.

This thesis has found that the State might be under a duty to reunite a dispersed family, which has no other means of being reunited than on the territory of the State. It depends on the special circumstances of each situation, and especially where minor children are involved, a strong case for reunification can be made. The ECtHR has interpreted the rights enshrined in Article 8 in its case law, and a discussion on the interpretations on Article 8 in relation to third-country nationals has been made. The Court has pronounced on the positive obligation to admit to its territory a non-national in a restrictive manner, and it has often been found that no interference has been made by the State, given the possibility for the applicants to reunite elsewhere. An observation that has reoccurred throughout the thesis is that there is no right for the individual to choose the country in which to pursue family life. This holds true internationally for refugees and asylum seekers, and is repeatedly stated by the ECtHR. This principle is also obvious for asylum seekers who are being processed under the Dublin regime, since it is construed around objective criteria for allocating responsibility.

The Dublin Regulation expands the meaning of 'family' to some extent, as compared with the Convention. I will make some reflections on the family definition of the Dublin Regulation and compare them with the one adopted by the ECtHR. The definition of nuclear family for the purpose of applying the Regulation has been expanded to also include non-married couples and

their children. In cases where a member of the family has refugee status in a country, that country shall be responsible for also a non-married partner, provided that the domestic legislation of the State recognise non-married partners. In relation to the other provisions of the Regulation dealing with family members, there is an additional condition, namely that the family was formed in the country of origin. This excludes newly established families from the application of the Regulation. The ECtHR, however, has held that intended family life is not necessarily excluded from the family definition. As to other dependant relatives, the Court has developed a fairly liberal definition, although it is not frequently applied in practice. Also families composed according to a different cultural pattern have been included. In applying the Regulation, the definition of the family is still often depending on the domestic legislation of the Member State. This is so where close relatives, others than the nuclear family are concerned under the Humanitarian clause. This leaves room for the States to apply a restrictive family definition. One could only wish that the States would consider a more pragmatic definition of the family when applying the Regulation, one that would be more in line with the one adopted by the ECtHR.

The Dublin Convention, as it stood, did not offer a guarantee for an asylum seeking family to have their asylum applications processed in one single Member State, or for asylum applicants to have their applications tried in the State where family members were legally resident (others than refugees). In many cases under the Dublin Convention, the States reached satisfactory solutions to problems that could arise in the strict application of the allocation criteria, by using the sovereignty and humanitarian clauses. The States would strive to keep an asylum seeking family together, but if they were not willing to apply the sovereignty clause, or if they could not agree on the application of article 9, the family was in fact split or kept apart. The competent authorities in Sweden, however, taken as an example, did not contribute to the splitting of families, where a family applied for asylum in Sweden at the same time, while another State was responsible for some of the applications. If there was no other way out, the MB proceeded to process all applications together on the basis of the sovereignty clause. Families were separated only in such cases where the family was given the opportunity to have their applications processed together in another Member State, but refused to give their consent to being transferred. Where a whole family was the responsibility of another State, however, a strict application of the Dublin Convention was upheld, although there were strong family ties in the country. Sweden has been fairly liberal in accepting responsibility under the Humanitarian clause, although the number of requests under this Article was limited.

Given the restrictive use of the sovereignty and humanitarian clauses in most Member States, separation of asylum seeking families could occur. This separation would raise issues under Article 8 of the ECHR, since the Article also provides for the right of asylum seekers to have their family life respected.

The discussion on positive and negative obligations under Article 8, and the cautious stance taken by the Court in relation to positive obligations deserves some final attention. The discussion on the justification of the State for measures interfering with the right to family unity is often constructed around negative obligations, thus that the State is not to *interfere* in the rights of individuals to family life. However, in the Dublin context, the argument has to centre on positive obligations, where the use of the sovereignty and humanitarian clauses of the Dublin Convention would involve a positive obligation of the State, *allowing* an asylum seeker *into its asylum procedure*, although it is under no obligation under the Dublin régime to do so. Although the Court has said that it is difficult to draw a line between positive and negative obligations and that the outcome for the individual would turn out the same, it is important to emphasise the existence of a positive component in the States' duty to respect family life under Article 8. The existence of positive obligations does not readily follow from the case law of the Court, but there are strong indications to this effect. One is a dissenting opinion of the *Gül* case, where judge Martens noted that the difference in treatment between positive and negative obligations had gradually dwindled away in the Courts' reasoning.

Although an interference in the right of respect for family life of an asylum seeker has been found, the authorities can always argue that the intervention is legally provided for and represents a measure that is necessary in a democratic society.¹⁹⁷ Here, the State would put forward the Dublin Convention as the legal ground for the intervention.

Lastly, the question whether the measure is necessary in a democratic society, and the following balancing of interests, would come out in the following. The interests of the State in applying the Dublin Convention strictly are the sovereignty in relation to immigration and admission policy, where there is a wide room for discretion. These interests are to be weighed against the interests of the applicant. Here, the proportionality test should be applied, and if there would be no proportionate balance between the interests of the State and those of the asylum seeker, there is disproportion between the means and the pursued goals. If this were the case, a violation of the Article would be found. However, the argument that there is a possibility for family reunification with family members *after* the status determination (at least where the person is found to be a refugee) would be put forward. Thus, a *temporary* separation from his or her family would not be considered disproportionate.

To conclude, the strict application of the Dublin mechanism for identifying the State responsible for trying an asylum application can in principle raise an issue under Article 8 of the ECHR. However, the wide margin of appreciation afforded to the States in determining the steps to be taken in

¹⁹⁷ “(...)in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others”.

relation to asylum and immigration would make claims of a violation hard to make. However, from a humanitarian perspective, any asylum seekers may be *bona fide* refugees and they might have good reasons for not being apart from their family members during asylum procedures.

The Dublin Regulation takes into account the unity of families of asylum seekers to a greater extent than the Convention. According to some views expressed, the Dublin Regulation goes further than the ECHR in protecting the unity of families. To conclude this thesis, the Regulation will hopefully increase the number of cases where asylum seeking families, who previously risked being separated, will be allowed to stay together during asylum procedures, ending situations of “families in orbit”.

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