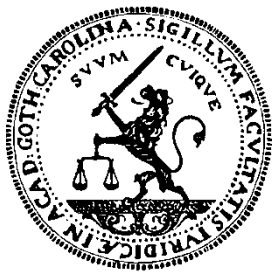

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Responsibilities of the Member States under the Dublin II Regulation from a fundamental rights perspective

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Summary

This essay examines the responsibilities of the Member States in the European Union under the Dublin II Regulation from a fundamental rights perspective. The examination focuses in particular on two main obligations of the Member States – the obligation to assess other Member States' compliance with fundamental rights and the obligation for all Member States to respect fundamental rights in the Union.

Member States have previously been permitted to presume that all Member States of the Union are safe countries for third-country nationals. However, reality shows that grave deficits might exist in the responsible Member State's asylum- and reception system. Both the ECtHR and the CJEU have acknowledged in the cases of *M.S.S.* and *N.S.* respectively that the use of a conclusive presumption therefore could expose asylum seekers to treatment contrary to fundamental rights in transfer situations. At present, the lack of subsequent judgement from the CJEU nevertheless limits the transferring Member State's obligation to assess the responsible Member State's compliance with fundamental rights to the duty of assessing the compliance with the prohibition of torture and inhuman treatment according to Article 4 in the Charter.

It is currently difficult to establish how fundamental rights in the Charter specifically relevant for asylum seeker impact the responsibilities of the Member States under the Dublin II Regulation. The question whether Member States' actions fall within the scope of the Charter appears to be an imminent issue. The absence of preliminary rulings from the CJEU on the interpretation of the scope and meaning of the rights is noticeable. This primarily applies to rights without corresponding provisions in the ECHR. Since the status of the case law from the ECtHR seems to be in dispute, the scope and meaning of corresponding rights may thus not be established for certain without further guidance from the CJEU. Notwithstanding the responsibilities of the Member States with regard to the two main obligations today, there is reason to expect that the future accession of the Union to the ECHR will enhance Member States' responsibilities in general.

Sammanfattning

I denna uppsats undersöks hur grundläggande rättigheter inom EU påverkar medlemsstaternas ansvar vid tillämpning av Dublinförordningen. Uppsatsen inriktas på två huvudsakliga skyldigheter hos medlemsstaterna – skyldigheten att bedöma andra medlemsstaters skydd av grundläggande rättigheter och skyldigheten för alla medlemsstater att respektera de grundläggande rättigheterna inom unionen.

Medlemsstaterna har tidigare, mot bakgrund av syftet med Dublinförordningen, tillåtits att presumera att alla medlemsstater inom EU är säkra för tredjelandsmedborgare vid tillämpningen av reglerna i förordningen. Verkligheten har dock visat att det kan finnas allvarliga brister i medlemsstaters asyl- och mottagningssystem. Både Europadomstolen och EU-domstolen har i *M.S.S.* respektive *N.S.*-målet uppmärksammat att en sådan icke motbevisbar presumption därför riskerar att utsätta asylsökande för brott mot grundläggande rättigheter vid överföring till den ansvariga medlemsstaten. Avsaknaden av ytterligare avgöranden från EU-domstolen gör dock att skyldigheten för överförande medlemsstater att kontrollera huruvida den ansvariga medlemsstaten upprätthåller skyddet för grundläggande rättigheter enligt EU-rätten än så länge är begränsad till att undersöka upprätthållandet av förbudet mot tortyr och omänsklig behandling enligt Artikel 4 i EU-stadgan.

Det är i nuläget svårt att urskilja hur grundläggande rättigheter i EU-stadgan som särskilt berör asylsökande påverkar medlemsstaters ansvar vid tillämpning av Dublinförordningen. Frågan om medlemsstaternas handlingar faller inom ramen för EU-stadgans tillämpningsområde framstår som ett övergripande problem. Bristen på förhandsavgöranden från EU-domstolen om hur innebörden och räckvidden av rättigheterna ska tolkas är anmärkningsvärd. Detta gäller i första hand de rättigheter i EU-stadgan som inte anses korrespondera till rättigheter i Europakonventionen om mänskliga rättigheter. Eftersom det råder osäkerhet i frågan om praxis från Europadomstolen är bindande, kan dessutom innebörden och räckvidden av korresponderande rättigheter inte med säkerhet fastställas utan en mer omfattande vägledning från EU-domstolen. Oavsett hur ansvaret för medlemsstaterna i nuläget ser ut enligt de två huvudsakliga skyldigheterna finns det anledning att anta att medlemsstaternas ansvar generellt kan komma att öka i och med EU:s framtida anslutning till Europakonventionen om mänskliga rättigheter.

Abbreviations

AG	Advocate General
CEAS	Common European Asylum System
CAT	United Nations Convention against Torture
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	United Nations International Covenant on Civil and Political Rights
LTTE	Liberation Tigers of Tamil Eelam
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Purpose and objective

The purpose of this essay is to examine the responsibilities of the Member States in the European Union from a fundamental rights perspective in relation to the Dublin II Regulation. This purpose encompasses the review of two main obligations – the obligation for Member States to assess other Member States' compliance with fundamental rights and the obligation for all Member States to respect fundamental rights as protected in the Union. As will be seen, these two obligations resemble each other and they overlap to a certain degree. Whereas the first one addresses the more comprehensive issue of presuming that transfers of asylum seekers between Member States on the basis of the regulation will not be in conflict with fundamental rights of individuals, the latter one deals more with the potential impact of the Charter of Fundamental Rights of the European Union (Charter) on Member States' responsibilities.

1.2 Method and material

The question on Member States' responsibilities under the Dublin II Regulation from a fundamental rights perspective is approached with a legal dogmatic method. The relevant law will first be identified and subsequently discussed with references to case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), preparatory- and explanatory work on relevant primary and secondary legislation as well as arguments submitted by authors in the academic literature. Sections concerning issues of Union law, particularly difficult from a legal point of view, will be supported by the work of scholars to a large extent, such as the final section on the accession of the Union to the European Convention on Human Rights (ECHR).

1.3 Limitations

In the following, discussions are limited to fundamental rights issues originating from recent decisions of the CJEU concerning the cooperation between Member States under Dublin II Regulation. The selection of rights in the Charter is based on rights the Court previously been requested to interpret as well as pending cases before the Court. Even though it would not be possible here to exhaustively examining the rights in the Charter, the intention is to address rights likely to be affected by Member States' application of the provision in the Dublin II Regulation. Since the Charter quite recently became legally binding, issues surrounding the scope of application and rules of interpretation will be discussed in more general

terms and not strictly in relation to the regulation. The same applies to the final section on the future accession of the Union to the ECHR.

1.4 Outline

The first chapter will provide for a general overview of the Dublin II Regulation. This includes a description of the legal base and the scope of application, the motives behind the regulation and the procedure of deciding the responsible Member State for examining an asylum application lodged in the Union. Chapter 3 is devoted to the concept of 'presumption of safe countries' as it has evolved in relation to transfers of asylum seekers between the Member States within the Union and to states outside the Union. The well-known judgements of *N.S. v. Secretary of State for Home Department* and *M.S.S. v. Belgium and Greece*, delivered by the CJEU and the ECtHR respectively, will be of main importance. Finally, Chapter 4 will turn to the Charter. This chapter begins with the issue on the scope of application of the Charter and the rules of interpretation of the articles in the Charter. Secondly, rights specifically relevant for asylum seekers under the application of the regulation will be examined. This includes the prohibition of torture and inhuman or degrading treatment in Article 4, the right to an effective remedy in Article 47, the right to asylum in Article 18 and the principle of the child's best interest in Article 24 in the Charter. Article 52(3) in the Charter requires the interpretation of some of these rights to be guided by the scope and meaning of corresponding rights in the ECHR. Therefore, the final sections will address the consequences of Article 52(3) and briefly examining the status of the ECHR and the future accession of the Union to the ECHR. Against this background, the responsibilities of Member States under the Dublin II Regulation from a fundamental rights perspective, will hopefully be reflected in an interesting way.

2 Dublin II Regulation

2.1 Legal base and scope of application

The Dublin II Regulation[1] is currently part of the Union's legislative framework for "policies on border checks, asylum and immigration".[2] With the purpose of creating a "common policy on asylum" and in the long run a Common European Asylum System (CEAS), Member States of the Union have been, and remain, obliged to adopt certain legislative measures on different issues relating to the treatment of asylum seekers and the procedures for processing asylum claims.[3] The establishment of a CEAS began in the 1990s when the Member States decided to harmonise their national asylum legislation in order to ensure that asylum seekers and other vulnerable persons would be offered equal protection in the Union and to ensure that the level of protection would correspond to fundamental right obligations in international and European law, especially the prohibition of *non-refoulement*.[4] In Article 78 paragraph 2(e) Treaty on the Functioning of the European Union (TFEU), this duty of adopting asylum legislation specifically covers the adoption of "criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection". As Article 1 of the regulation implies, the Dublin II Regulation is a direct result of this obligation.[5] Additionally, many other secondary measures on asylum have been adopted on the basis of the same article in TFEU. Some of the most important directives are the directive on minimum standards for the qualification and status of third-country nationals, the directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, and the directive laying down minimum standards for the reception of asylum seekers.[6] Together with the Dublin II Regulation, they constitute the main legislative acts within the CEAS.[7]

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

[2] Articles 77 and 78 TFEU.

[3] Article 78 TFEU; Pieter Boeles and others, *"European Migration Law",* 2009 Intersentia, Antwerp, 2009, pp. 318-319 (P. Boeles).

[4] See Presidency Conclusions of the Tampere European Council 15 & 16 October 1999 Nr: 200/1/99, para 13-17; Francesca Ippolito and Samantha Velluti, "*The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness",* Refugee Survey Quarterly, Vol. 30, No. 3, 2011, pp. 32-33.

[5] The former Dublin Convention OJ C 254, 19.8.1997 was replaced by the Dublin II Regulation. See in this regard Steve Peers and Nicola Rogers (eds.), "*EU Immigration and Asylum Law: Text and Commentary"*, Matinus Nijhoff Publishers, Leiden, Boston, (2006), pp. 221-222 (S. Peers and N. Rogers).

[6] Council Directive 2004/83/EC of 29 April 2004, Council Directive 2005/85/EC of 1 December 2005 and Council Directive 2003/9/EC of 27 January 2003.

[7] P. Boeles pp. 321-322. See also http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm.

The Dublin II Regulation addresses the issue of determining which of the Member States is responsible for conduction the examination of "an application for asylum lodged in one of the Member States by a third-country national".[8] This is a pre-step to the actual examination of the grounds for seeking asylum. It is important to emphasise that the harmonisation of Member States' national asylum laws through the implementation of these directives have a significant impact from a fundamental rights perspective since they intend to ensure that individuals are subjected to sufficient treatment and entitled to procedural guarantees during the asylum examination.[9] Even though the regulation is of main interest here, cases such as *M.S.S. v. Belgium and Greece* shows that transfers of asylum seekers on the basis of the regulation could expose an asylum seeker to treatment contrary to international human rights standards when Member States fail to fulfil their obligations under these directives.[10]

2.2 Deciding the responsible Member State

The fundamental purpose of the articles in the Dublin II Regulation is to establish procedures for two separate situations; the appointment of a responsible Member State for conducting an examination of a request for asylum and the potential transfer of an asylum seeker to the responsible Member State.[11] As soon as an application for asylum is submitted in one of the Member States, the responsibility of handling the application will be decided on the basis of specific criteria in Articles 6-14 of the regulation.[12] These articles show that certain circumstances, such as if there is one Member State that has been more involved in an asylum seeker's entry to the Union or if there already are family members of the asylum seeker residing in one of the Member States, will be of major relevance when the responsible Member State will be decided.[13]

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[8] Article 1 Dublin II Regulation.

[9] Opinion of AG Trstenjak in the case C-411/10 *N.S. v Secretary of State for the Home Department*, delivered on 22 September 2011, para. 89-91 (Opinion in *N.S.*). See also P. Boeles pp. 322-323.

[10] *M.S.S v. Belgium and Greece*, Appl. No. 3069/09, judgement of the 21 January 2011 (*M.S.S.*).

[11] S. Peers and N. Rogers p. 222 where the terms "take charge" and "take back" are used.

[12] Articles 3 and 5(1) Dublin II Regulation. For example, applications from unaccompanied minors is regulated in Article 6, asylum seekers with a family member who is either residing as a refugee or waiting for a decision in one of the Member States in Articles 7 and 8, asylum seekers with a residence permit and or a visa in Article 9 and asylum seekers that have irregularly crossed the borders of the Union from a non-EU country in Article 10. See also S. Peers and N. Rogers pp. 222-223.

[13] Recitals 6 and 7 Dublin II Regulation; Explanatory memorandum to the Commission's proposal for the Dublin II Regulation COM(2001) 447 final, pp. 4-5 (Explanatory Memorandum); Eveline Brouwer, *"Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof"*, Utrecht Law Review, Vol. 9, No. 1, 2013, p. 138 (E. Brouwer).

With reference to the upcoming discussions of fundamental rights protection guaranteed in the Charter and recent jurisprudence from the CJEU and the ECtHR concerning rights of asylum seekers in the context of Dublin transfers, it is necessary to explain how the responsibility to examine asylum applications of unaccompanied minors and asylum seekers who enters the Union without permission to do so is distributed. According to Article 2(h) in the regulation, 'unaccompanied minors' covers "unmarried persons below the age of eighteen who arrive in the territory of the Member States unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States". Article 6 in the regulation currently provides for two different solutions when it comes to these applicants. In the first place, if it is "in the best interest" of the child and if the unaccompanied minor has a family member who is entitled to reside in one of the Member States, that Member State will be given the task of processing the application.[14] Secondly, when an unaccompanied minor do not have a family member in the Union, the asylum application should instead be examined by the Member State, which received the application.[15] In the following chapter, the issue of the best interests of the minor under the Dublin II Regulation will be discussed with regard to the case of *MA and others v. Secretary of State for the Home Department*, pending before the CJEU[16]. In the case of asylum seekers who have illegally travelled from a country outside the Union, the responsible Member State can also be appointed in two different ways. The main rule in Article 10(1) simply establishes that the application for asylum shall be examined where the asylum seeker first entered the Union. However, if the rule in paragraph 1 becomes inapplicable or when a certain period of time has passed, the obligation to handle the asylum procedure shall be given to the Member State in which the asylum seeker lately has been present, given that the period of residence in that Member State was without interruption.[17]

Once a Member State receives an asylum application and identifies another Member State as responsible on the basis of the criteria above, it has the possibility to request the other Member State to take over the procedure of examining the asylum application.[18] If the other Member State agrees to take over the responsibility, the asylum seeker will accordingly be transferred to the latter Member State.[19] Transfers may also occur for example when an asylum seeker unlawfully resides in another Member State

[14] Article 6 Dublin II Regulation.
[15] Article 6 Dublin II Regulation. See also S. Peers and N. Rogers p. 222.
[16] Reference for a preliminary ruling from Court of Appeal (England & Wales) (Civil Division) (United Kingdom) made on 19 December 2011 - *MA, BT, DA v Secretary of State for the Home Department*, case C-648/11.
[17] Article 10(2) Dublin II Regulation; S. Peers and N. Rogers p. 223.
[18] Article 17 Dublin II Regulation.
[19] Articles 16, 18, and 19 Dublin II Regulation.

than the responsible one during the asylum examination or after his or her application has been refused.[20]

2.3 Exceptions to the criteria

Regardless of the criteria in Articles 6-14, Member States are allowed to apply exceptions to these main rules. The exceptions are found in Articles 3(2) and 15, and they are referred to as the 'sovereignty- and humanitarian' clauses.

The sovereignty clause in Article 3(2) permits Member States to process a received application for asylum despite the fact that another Member State should be responsible according to one of the other articles in the regulation.[21] By using this option, the Member State accepts the obligations imposed on the responsible Member State in its entirety, including the obligation to complete the asylum examination.[22] As can be seen in the preparatory work to the regulation, the European Commission wanted to offer Member States an opportunity to take account of "political, humanitarian or practical considerations" once the responsible Member State will be decided.[23] Other than that, no further guidelines were originally presented. While subsequent reports show that it may be relevant to use the article for "humanitarian reasons", the attempt to narrow down the situations where Member States assumingly will take recourse to Article 3(2) is apparently difficult due to the fact that the practical application at national level is incoherent.[24] It has for example been applied in situations where the sending Member State is uncertain whether a transfer of an asylum seeker would be contrary to the prohibition of torture and inhuman treatment or whether it would prevent family members from living together.[25] The risk of 'indirect refoulement' is also listed as one of the factors for considering the discretionary power under Article 3(2).[26] Some general guidelines on how to interpret Article 3(2) can be found in the CJEU's reply in the case of *N.S. and others v. Secretary State of Home Department* in which the Court dealt with different aspects of Article 3(2).[27] Article 3(2) was for example discussed in relation to the standards of protection and procedural

[20] See S. Peers and N. Rogers pp. 223-224, referring to Articles 4(5) and 20 Dublin II Regulation.
[21] See examples of other rules in n. 12 above.
[22] Articles 3(2) and 16 Dublin II Regulation. See also Explanatory Memorandum p. 10.
[23] Explanatory Memorandum p. 10. See also S. Peers and N. Rogers p. 231.
[24] Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System COM(2007) 299 final, pp. 6-7; further noticed by A. Hurwitz p. 105; P. Boeles pp. 325-326.
[25] Commission Staff Working Document annexed to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system SEC(2007) 742 final, p. 21 (Commission Staff Working Document).
[26] *Ibid.* The term 'indirect refoulement' will be explained later on.
[27] Joined cases C-411/10 *N.S. v. Secretary of State for the Home Department* and C-493/10 *M.E. v. Refugee Applications Commissioner, Minister of Justice, Equality and Law Reform*, judgement of the 21 December 2011 (*N.S.)*, see questions for referral in para. 50.

guarantees in the Member State to which asylum seekers were to be transferred. The following chapters will discuss *N.S.*, including Article 3(2), in more detail.

The humanitarian clause in Article 15 in the regulation offers in the same way as the sovereignty clause an opportunity for Member States to derogate from the rules in Articles 6-14 of the regulation. At the request of a Member State, another Member State may take over the responsibility in order to keep members of the same family and relatives together when the application of the main rules otherwise would separate them.[28] Article 15(2) and (3) of the article specifically relate to individuals who for reasons such as pregnancy or grave illness rely on the assistance of a relative, and unaccompanied minors who have the possibility to be brought up by family members present in the Union. Article 15 seems, for example, to be associated with similar concerns for the right to respect for private and family life under Article 8 ECHR.[29]

A similarity between these two exceptions is that the wording of the articles invite to discussions regarding their content and scope of application. The CJEU answered questions on the interpretation of Article 15 in a preliminary ruling in the end of 2012.[30] In the case, Austria requested Poland to take charge of an asylum application in accordance with the criteria in the regulation. Present circumstances led the national courts in Austria to ask the CJEU whether humanitarian considerations could render the application of Article 15 mandatory for Austria when there is a "[…] daughter-in-law of the asylum seeker [who] is dependent on the asylum seeker's assistance because that daughter-in-law has a new-born baby and suffers from a serious illness and handicap".[31] This question was answered in the affirmative within the meaning of Article 15(2) and the Court further held it unnecessary to make the application of paragraph 2 dependent on the request of the Member State otherwise responsible under the criteria. For reasons of effectiveness, the Court concluded that once the requirements in the article are fulfilled and the family members already reside together, the requirement of a request from the other Member State would only make the process of deciding the responsible Member State more extended.[32]

2.4 Motives behind the regulation

It follows from the preamble to the Dublin II Regulation as well as other preparatory documents that the regulation encompasses several objectives.[33]

[28] Article 15(1) Dublin II Regulation; Explanatory Memorandum p. 15.
[29] Commission Staff Working Document p. 22. See also P. Boeles p. 326.
[30] C-245/11 *K v. Bundesasylamt*, judgement of the 6 November 2012 (*K*).
[31] *K* para. 26.
[32] *Ibid*. para. 47-54.
[33] For example Recitals 2, 3, and 4 Dublin II Regulation; Explanatory Memorandum p. 3. See also K. Hailbronner, "*EU Immigration and Asylum Law: Commentary on EU*

In this section, selected motives behind the regulation will shortly be presented, which suggestively should be seen in the light of Article 3 in the regulation. Article 3 establishes that Member States actually have an obligation to take charge of asylum applications and that only one Member State shall finally be given the task of doing so on the basis of the criteria in the regulation.

Initiatives to the adoption of the Dublin II Regulation started once it was recognised that there was a need to create a "clear and workable method for determining the Member State responsible". [34] It was also recognised that the regulation should "make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications".[35] Apart from assisting Member States in their cooperation, it was thus of importance to ensure that individuals who are seeking protection get their protective status decided quickly and effectively.[36] In addition to this primary purpose of rapidly deciding which Member States should be responsible, the regulation is further intended to reduce certain situations that can arise in the context of asylum applications. Among them, preventing the issues of 'asylum-shopping' and 'refugee in orbit' appear to be most relevant.[37] The term asylum-shopping refers to the situation where asylum seekers apply for protection in more than one Member State, whereas refugee in orbit means that no Member State recognises the obligation of examining a request for protection.[38] These situations conflicts with the rules in Article 3 of the regulation and they are problematic both from the perspective of the Member States and individual asylum seekers. It is important to emphasise that the Dublin II Regulation is intended to guarantee the fulfilment of all these motives at the same time. Without questioning the purpose behind each one of the motives, the case law from the CJEU in the following will illustrate that these objectives may have an impact on how the Court interprets the articles in the regulation. Preliminary rulings from the Court further indicate that the application of the criteria in the regulation can give rise to situations where it might be difficult to enforce these objectives and individual fundamental rights simultaneously.

Regulations and Directives", Beck, München, 2010, pp. 1375-1382 (K. Hailbronner), where he gives a clear overview of important objectives of the regulation.

[34] Recital 3 Dublin II Regulation: Explanatory Memorandum p. 3.

[35] Recital 4 Dublin II Regulation; Explanatory Memorandum p. 3.

[36] Recital 4 Dublin II Regulation; Opinion in *N.S.* para 93.

[37] K. Hailbronner pp. 1375-1382; P. Boeles p. 324; Angès Hurwitz, *"The Collective Responsibility of States to Protect Refugees",* Oxford University Press Inc., New York 2009, p. 91 (A. Hurwitz).

[38] P. Boeles p. 324.

3 The obligation to assess other Member States' compliance with fundamental rights

The previous chapter served the purpose of introducing and explaining the function of the Dublin II Regulation, namely to provide the Member States with rules on how to distribute the responsibility of examining asylum applications in the Union. With regard to following chapters, the previous chapter highlighted in particular those principles and provisions that have been subjected to preliminary rulings by the CJEU and discussions by scholars in the academic literature. Whereas chapter 4 more closely explore the scope and content of articles in the Charter, this chapter deals with the 'presumption of safe countries' Even though Member States sometimes fail to comply with fundamental rights obligations, the Dublin II Regulation rests upon the presumption that all Member States are safe for third-country nationals and that they all respect the principle of *non-refoulement*.[39]

3.1 The Geneva Convention relating to the status of refugees and the principle of *non-refoulement*

The principle of *non-refoulement* is often referred to as the foundation of asylum law.[40] It is therefore appropriate to describe the principle before examining the presumption of safe countries under the Dublin II Regulation. As stated in Article 33(1) of the 1951 Geneva Convention relating to the status of refugees, state parties to the Convention are prevented from sending a refugee to a country where he or she may be exposed to a risk of life threatening treatment due to reasons such as religion or membership of a political group.[41] The regulation itself those not have a provision explicitly prohibiting refoulement, but the obligation nevertheless exists in other sources of international law.[42] Among the rights relating to refugees in the Convention, the principle of *non-refoulement* is the most central one with regard to European asylum law. Article 78 TFEU requires for example the

[39] Recital 2 Dublin II Regulation.
[40] See for example P. Boeles pp. 253 and 261.
[41] UN Convention Relating to the Status of Refugees, 28 July 1951 and Protocol Relating to the Status of Refugees, 31 January 1967 (Geneva Convention relating to the status of refugees).
[42] For an overview of these sources, see Julia Mink, *"EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and Other Forms of Ill-treatment",* European Journal of Migration and Law, Vol. 14, No. 2, 2012, 119-149, pp. 129-130. See also P. Boeles p. 253, where he explains that sources prohibiting refoulement often relate to provisions on prohibition of torture or ill-treatment, such as Article 3 United Nations Convention against Torture (CAT), Article 7 International Covenant on Civil and Political Rights (ICCPR) and Article 3 ECHR.

Union to take full account of the principle in the development of a uniform asylum policy and in the adoption of secondary legislation within the CEAS.[43] There are also other significant aspects of the Geneva Convention relating to the status of refugees. It is for example relevant to observe that an individual may only rely on the prohibition of refoulement in the Convention if the individual in question is an asylum seeker or can be regarded as a refugee within the meaning of Article 1A(2) of the Convention.[44] The status of a refugee applies to someone who "[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence, is unable or, owing to such fear, is unwilling to return to it".[45] This definition of a refugee is referred to in the CEAS directives on asylum mentioned above as well as in the Dublin II Regulation.[46]

The objective here is not to further explore the requirements in the definition of refugees. However, the protection in Articles 33(1) and 1A(2) in the Geneva Convention relating to the status of refugees also applies in cases of indirect refoulement.[47] As been stated by the ECtHR, the prohibition of indirect refoulement implies that when a state decides to send an asylum seeker to another state, the first state must ensure that the latter one will not return the individual to a location where the asylum seeker would face a real risk of ill-treatment.[48]

3.2 The presumption of safe countries in the regulation

It is necessary to stress that the presumption of safe countries in this essay is linked to the determination of a responsible Member State and to the moment when a Member State of the Union decides to transfer an asylum seeker to the responsible Member State. It is not linked to the responsible Member State's process of delivering a substantive decision of granting or withdrawing refugee status in which asylum standards and practices in other states also may be of concern.[49] In other words, this section focuses on the

[43] K. Hailbronner p.10.
[44] P. Boeles p. 286.
[45] Article 1A(2) Geneva Convention relating to the status of refugees.
[46] Article 2(c) in Council Directive 2004/83/EC of 29 April 2004, Article 2(f) in Council Directive 2005/85/EC of 1 December 2005 and Article 2(e) Council Directive 2003/9/EC of 27 January 2003 and Article 2(g) Dublin II Regulation.
[47] P. Boeles pp. 286-287.
[48] *T.I. v. the United Kingdom*, Appl. No. 43844/98, judgement of the 7 March 2000, p. 15 (*T.I.*).
[49] Council Directive 2005/85/EC of 1 December 2005 deals with minimum standards for granting or withdrawing refugee status. According to Articles 26 and 27, Member States may apply the concepts of "first country of asylum" and "safe third country" respectively.

fact the that Member States may theoretically transfer an asylum seeker without questioning whether the national standards of procedures and treatment in the responsible Member State are in conformity with fundamental rights.[50]

Recital 2 in the Dublin II Regulation states that "[…] the European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees […], thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. In this respect, and without affecting the responsibility criteria laid down in this Regulation, Member States, all respecting the principle of non-refoulement, are considered as safe countries for third-country nationals".

Simply the wording of Recital 2 reveals that there are two main reasons for creating such a presumption of safety. First of all, Member States of the Union are bound by the prohibition of *non-refoulement* in Article 33(1) Geneva Convention relating to the status of refugees. Secondly, the directives of the CEAS are progressively ensuring that national rules on reception conditions and asylum procedures offer asylum seekers adequate treatment.[51] Other sources of fundamental rights preferably provides for additional reasons. Brouwer refers for example to the prohibitions against torture and ill-treatment in Article 4 of the Charter and in Article 3 in the ECHR and to the right to an effective remedy in Article 13 of the ECHR as further support for a such a presumption in the context of refugee protection.[52] Advocate General (AG) Trstenjak explains that the Dublin II Regulation operates within a network of binding fundamental rights obligations and harmonising directives, which makes it legally legitimate to leave out a provision in the regulation obliging the sending Member State to investigate the conditions for asylum seekers in the responsible Member State.[53] By reference to the Court in *N.S.*, the trust between Member States was essentially a prerequisite for the adoption of the CEAS, including the regulation, in the first place.[54] Without a presumption of safety, it seemed unlikely for the Union to fulfil the objectives of improving the effectiveness and legal consistency in the system of receiving asylum applications and distributing the responsibility for taking charge of the applications.[55]

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[50] E. Brouwer p. 138.
[51] *Ibid*.
[52] E. Brouwer, pp. 138-139, where she refers, *inter alia*, to Hemme Battje in "*Mutual Trust in Asylum Matters: the Dublin System",* in Hemme Battje and others, *"The principle of Mutual Trust in European Asylum, Migrations and Criminal Law – Reconciling Trust and Fundamental Rights Utrecht",* FORUM, Institute for Multicultural affairs, 2011, Utrecht, the Netherlands, p. 10. In addition to references made in n. 51 and n. 52 above, see Violeta Moreno-Lax, *Dismantling the Dublin System: M.S.S. v, Belgium and Greece,* European Journal of Migration and Law, Vol. 14, No. 1, 2012, pp. 1-31, pp. 4-5 (V. Moreno-Lax).
[53] Opinion in *N.S.* para. 96.
[54] *N.S.* para. 75-80.
[55] *Ibid.*

Even though the legal reasons for upholding such a presumption of compliance with minimum standards and fundamental rights are convincing, there are few guidelines on how to approach the presumption in practice. As Moreno-Law points out, there are no indications within the Dublin II Regulation on whether the presumption could or should be proven to be false in some cases.[56]

3.2.1 The presumption of safe countries within the ECtHR

3.2.1.1 Early developments in the cases of T.I v. the United Kingdom and K.R.S. v. the United Kingdom

The purpose of section 3.3 and 3.4 is to study how the practical application of the presumption of safe countries has evolved throughout the case law of the ECtHR and the CJEU. Judgements described in the following subsections of 3.3 and 3.4 may also serve as background knowledge for chapter 4.

Within the framework of the ECHR, descriptions and comments on the issue of a presumption of safety under the Dublin II Regulation often begin with a presentation of the case of *T.I. v. the United Kingdom* and the case of *K.R.S. v. the United Kingdom.*[57] In *T.I.,* the applicant originally resided in a Sri Lankan region under the control of the hostile organisation Liberation Tigers of Tamil Eelam (LTTE). On several occasions, he was captivated in order to give the organisation technical support. Once he managed to escape he was believed to be a member of the LTTE and was for this reason harassed by the Sri Lankan army, police force and the Eelam National Democratic Liberation Front.[58] *T.I.* managed to get to Germany where he applied for asylum. The German authorities refused his application, mainly referring to the fact that they could not consider the suggested assaults as actions committed by the Sri Lankan state. Moreover, the Sri Lanka Government had ratified the United Nations Convention against Torture and the German authorities could not find grounds for assuming that the Sri Lankan army and police force would suspect *T.I.* of being a member of the LTTE. With regard to German law and Article 3 ECHR, *T.I.* was therefore not believed to be in danger if he was sent back to southern parts of Sri

[56] V. Moreno-Lax p. 5. She especially empathizes the lack of guidance when it comes to deciding whether or not an appeal against a transfer in accordance with Articles 19(2) or 20(1)(e) is legitimate.
[57] *T.I. v. the United Kingdom*, Appl. No. 43844/98, judgement of the 7 March 2000 (*T.I.*) and *K.R.S. v. the United Kingdom*, Appl. No. 32733/08, judgement of the 2 December 2008 (*K.R.S*). See for example V. Moreno-Lax; E. Brouwer; Cathryn Costello in "*Dublin-case NS/ME: Finally, an end to blind trust across the EU?*" A&MR 2012 Nr.02.
[58] *T.I.* pp. 2-3.

Lanka.[59] *T.I.* finally left for the United Kingdom and lodged an asylum application there. Due to his prior arrival in Germany, the task of examining his asylum application was upon the request of the United Kingdom given to the German authorities.[60] Supported by the previous events, the applicant claimed that the decision of the United Kingdom to send him back to Germany would result in a removal to Sri Lanka and would consequently expose him to the risk of being treated contrary to the prohibition against torture and ill-treatment in Article 3 ECHR and deprive him of the right to an effective remedy in Article 13 ECHR.[61]

In the main proceedings, the ECtHR recognised that earlier judgements established an obligation for states "[…] not to expel a person to a country where substantial grounds have been shown for believing that [the applicant] would face a real risk of being subjected to treatment contrary to Article 3" ECHR regardless of the question whether the state was involved in the harassments at all.[62] In the present case, the potential risk of indirect refoulement created the same obligation for the United Kingdom. Even though the Court did not find a violation of the articles invoked by the applicant, the Court held that the protection of fundamental rights requires Contracting States not to "[rely] automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims".[63] On the basis of these words it is therefore suggested that the previous conclusive presumption of safety became open for rebuttal.[64] Although Moreno-Lax believes that the Court failed to explain how the refutability works in individual cases, she nevertheless emphasises the importance of establishing such a rule in the first place.[65]

K.R.S. concerned an Iranian national who came to the United Kingdom via Greece. The Greek authorities accordingly handled his asylum application.[66] Similar to the situation in *T.I.*, the Court had to consider whether the United Kingdom could be violating Articles 3 and 13 in the ECHR by transferring the applicant to Greece and therefore expose him to a potential risk of being indirectly removed to his country of origin from Greece.[67] In its decision, the Court stated that the general principles underlying these articles in the ECHR and the rule established in *T.I.* were applicable to the present case. The Court also paid attention to reports from

[59] *Ibid.* p. 3.
[60] *Ibid.* pp. 3-4. The legal ground for requesting the German authorities to take over the responsibility of examining the asylum application was a provision in the Dublin Convention that currently corresponds to Article 10 in the Dublin II Regulation.
[61] *Ibid.* pp. 11, 18. In the alternatively, the applicant invoked Article 2 on the right to life and Article 8 on the right to respect for private and family life in ECHR.
[62] *Ibid* p. 14. The Court refers to *Ahmed v Austria*, Appl. No. 25964/94, judgement of 17 December 1996, para. 39-40 (*Ahmed v Austria*).
[63] *Ibid.* pp. 15, 18.
[64] V. Moreno-Lax p. 8; E. Brouwer p. 139.
[65] V. Moreno-Lax pp. 8, 11; E. Brouwer p. 139.
[66] *K.R.S.* p. 2.
[67] *Ibid.* pp. 16-18.

the United Nations High Commissioner for Refugees on the existing situation in Greece. In summary, these reports questioned whether transferred asylum seekers could get access to judicial remedies in Greece as guaranteed by Article 13 ECHR. However, since Greece did not carrying out expulsions of individuals to Iran at that time and the fact that Greece was under the obligation to respect the CEAS directives on the treatment of asylum seekers and procedural guarantees, there were no reasons for presuming that Greece would act contrary to these minimum standards.[68] In addition, the Greek authorities had previously ensured to the United Kingdom that asylum seekers transferred back to Greece on the basis of the criteria in the Dublin II Regulation would have the opportunity to launch an appeal against a subsequent expulsion decision if there is a risk of ill-treatment in the latter state. Greece was therefore presumed to comply with its obligations under the ECHR and the Court did not find that the authorities in United Kingdom would violate the applicant's rights under the ECHR if they decided to transfer the applicant to Greece.[69] In comparison to *T.I,* this judgement has been held to re-introducing a somewhat conclusive presumption of safety since it has been suggested that the Court relied on the arguments originally supporting the creation of a presumption within the framework of the Dublin II Regulation.[70]

3.2.1.2 Recent developments in the case of *M.S.S. v. Belgium and Greece*

The ECtHR's approach towards its previous statements in cases involving obligations for Contracting States applying the rules in the Dublin II Regulation and transferring asylum seekers to the responsible Member State has become less important due to the Court's decision in *M.S.S. v. Belgium and Greece.*[71] Without undermining the condemning of actions committed by Greece, there is reason to limit the review of the judgement in this chapter to the applicant's claims against Belgium. As will be seen, the presumption of safe countries could not be applied to Greece and Belgium consequently failed to comply with the obligation to assess another Member State's compliance with fundamental rights before it carried out a transfer of an asylum seeker on account of the criteria in the regulation. The decision to transfer the applicant finally amounted to a breach of Article 3 and Article 13 ECHR since the transfer exposed the applicant to the flaws in the Greek asylum system as well as to the possibility of being indirectly removed to the risk of ill-treatment in Afghanistan as a result of those flaws.[72]

The applicant in *M.S.S.* first left Afghanistan and arrived in the Union via Greece. He finally reached Belgium where he lodged an asylum

[68] *Ibid.* p. 17.
[69] *Ibid.* pp. 17-18.
[70] V. Moreno-Lax pp. 13-15. For further comments on the judgement, see E. Brouwer p. 39-40 and Cathryn Costello in n. 57 above, p. 85.
[71] *M.S.S.*, see n. 10 above.
[72] E. Brouwer p. 141.

application.[73] Followed by an unanswered request to the Greek authorities to process the asylum application on the basis of Article 10 in the Dublin II Regulation, Greece became responsible in accordance with Article 18(7) in the Dublin II Regulation.[74] Already in the pre-stages of transfer proceedings, the UNHCR advised the Belgium authorities to refrain from carrying out the transfer because of the current situation for asylum seekers in Greece.[75] The applicant's main concerns related to Article 3 ECHR due to the risk of "arbitrary detention" and other forms of ill-treatment. He further challenged the transfer on grounds relating to the possibility of being removed to Afghanistan without having an opportunity to get his asylum application scrutinised.[76] Belgium did however not find any reasons for believing that Greece would expose the applicant to treatment contrary to their international obligations.[77] The ECtHR was also under the impression that Greece would treat the asylum seeker in a manner consistent with the ECHR and informed the Greek authorities that it did not intend to suspend the transfer. The applicant was therefore transferred to Greece in the end.[78] The subsequent course of events in Greece can be summarised as follows; "[…] the applicant was immediately […] placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress on the bare floor".[79] Once upon release, he had to live in a park and there was consequently no way for him to avail himself for information from the asylum authorities.[80] Submitted by the applicant, these events amounted to treatment contrary to Article 3 in the ECHR due to the fact that the Belgium authorities allegedly was aware of the systematic flaws in the Greek asylum system.[81]

Of main importance is how the Court discussed the responsibility of Belgium in relation to ECHR for transferring M.S.S. to Greece. Relying on the rule established in *T.I.*, the Court formulated the issue at stake as the question whether there had been indications, which should have led Belgium to consider the presumption of safety in Greece rebutted.[82] The Court put a decisive weight on the fact that Belgium carried out the transfer in a time when the insufficient conditions and procedural guarantees for asylum seekers in Greece had been recognised.[83] Besides the information surrounding previous judgement from the Court in relation to Greece, several international organisations had for example released reports

[73] *Ibid.* para. 9-11.
[74] *Ibid.* para. 14.
[75] *Ibid.* para. 16.
[76] *Ibid.* para. 21.
[77] *Ibid.* para. 17.
[78] *Ibid.* para. 31-33. The Court considered the application of Rule 39 in the Rules of the Court.
[79] *Ibid.* para. 34.
[80] *Ibid.* para. 43-53.
[81] *Ibid.* para. 323.
[82] *Ibid.* para. 345.
[83] *Ibid.* para. 352, 358, 360; V. Moreno-Lax p. 26-27.

supporting the current complexities for asylum seekers transferred back to Greece.[84] In addition, the European Commission had recently initiated a recast process of the existing secondary Union legislation on asylum in order to protect fundamental rights of individuals.[85] Dialogues between the governments involved in the transfer were deemed not to have a bearing in situations concerning Article 3 in the ECHR.[86] With regard to the right to an effective remedy, the Court did not find Belgium law to be in fully compliance with the principles underlying Article 13 ECHR. For example, even though there was a possibility to shortly suspend the transfer to Greece, the procedure itself failed to comply with the condition of a "close and rigorous" review of the "substance" of the asylum application and it created an unreasonably burden for the individual to prove the risk of violation of Article 3 in the ECHR.[87]

The fact that the Court relied on the availability of information indicating the lack of enforcement of fundamental rights in practice has been identified as one of the main difference between the Court's reasoning in *M.S.S.* and in its earlier judgements.[88] The conclusions reached by the ECtHR in *M.S.S.* on the presumption of safety in relation to the ECHR and Member States' cooperation on the basis of the Dublin II Regulation thus show that the authorities in a transferring Member State have a duty to observe how asylum seekers actually are treated in the receiving Member State before they carry out the transfer.[89]

3.2.2 The presumption of safe countries within the CJEU

The meaning of a presumption of safe countries in relation to transfers of asylum seekers under the Dublin II Regulation between Member States of the Union has also become a relevant question before the CJEU. In *N.S.*, the order to be transferred from the United Kingdom to Greece was disputed by the applicant in the national courts. N.S. argued that the flaws in the Greek asylum system would obliged the United Kingdom to make use of the sovereignty clause in Article 3(2) in the regulation in order to protect him from insufficient treatment in Greece.[90] From the prior proceedings in the national courts, the situation in Greece had been described as follows: "(1) asylum procedures in Greece are said to have serious shortcomings; applicants encounter numerous difficulties in carrying out the necessary

[84] *Ibid.* para. 347-348.
[85] *Ibid.* para. 350.
[86] *Ibid.* para. 353-354.
[87] *Ibid.* para. 386-390. For a discussion on the burden of proof, see E. Brouwer p. 42.
[88] E. Brouwer p. 141-142; V. Moreno-Lax p. 26; Cathryn Costello in n. 57 above, p. 85.
[89] *M.S.S.* para. 359; V. Moreno-Lax pp. 27-28. There are other characteristics of the judgement in *M.S.S.* See for example Marc Bossuyt in, *"The Court of Strasbourg Acting as an Asylum Court"*, European Constitutional Law Review, Vol. 8, No. 2, 2012, pp. 203-245, p. 116 (M. Bossuyt).
[90] *N.S.* para 40.

formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care; (2) the proportion of asylum applications which are granted is understood to be extremely low; (3) judicial remedies are stated to be inadequate and very difficult to access; (4) the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food". [91] Accordingly, the Court was asked to answer, *inter alia*, the questions if a transferring Member State has a duty to examine whether fundamental rights in the Union and the CEAS legislation are respected in the receiving Member State, whether such an obligation would prohibit the transferring Member State to completely rely on the assumption that the receiving Member State would comply with fundamental rights in the Union and the requirements in the CEAS directives, and whether the application of Article 3(2) in the regulation becomes mandatory whenever the right to human dignity in Article 1, the prohibition of torture, inhuman or degrading treatment or punishment in Article 4, the right to asylum in Article 18, the right to protection in the event of removal, expulsion or extradition in Article 19(2) and/or the right to an effective remedy and to a fair trial in Article 47 in the Charter could be at stake in the receiving Member State.[92] The primary question on whether the Charter was applicable when Member States exercise their sovereignty under Article 3(2) in the regulation was answered in the affirmative for reasons explained in the next chapter.

By answering the questions referred, the Court primarily elaborated on the legal sources supporting a presumption of safety when the rules in the Dublin II Regulation are applied. For all the reasons mentioned in the previous chapter concerning the motives behind the regulation, the Court affirms the reasonableness of allowing Member States to cooperate with each other under this premise.[93] When it came to the issue of assessing the presumption of safety in relation to the Charter, the Court therefore established that breaches of fundamental rights in the receiving Member State would not always prevent the transferring Member State from acting in accordance with the criteria in the Dublin II Regulation.[94] This statement can assumingly be applied to at least all of the rights in the Charter invoked by the applicant in the main proceeding. Secondly, if all Member States are presumed to respect fundamental rights, the Court held that it would not be legitimate to refuse them from sending an asylum seeker to the responsible Member State when detected flaws in the receiving Member State's asylum system only concern small aspects of the standards imposed by the CEAS directives.[95] According to the Court, suspending transfers due to small

[91] *Ibid.* para. 44.
[92] *Ibid.* See questions of referral in para. 50, particularly question 4. CJEU rephrases and answers the question together with the second and sixth questions in para. 70-108. Article 19(2) states that:" No one may be removed, expelled or extradited to a State where there is a risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".
[93] *Ibid.* para 75-80.
[94] *Ibid.* para 82.
[95] *Ibid.* para. 84.

breaches of the minimum directives would compromise some of the motives behind the regulation. It would for example effectively hinder the purpose of preserving of quick method for allocating the responsibility of processing an asylum application in the Union.[96]

However, the situation was considered to be different when the standard of treatment of asylum seekers in the receiving Member State reaches a more serious level. On the basis of the judgement in *M.S.S.*, the Court acknowledged that Member States had access to the sources of information referred to in *M.S.S.* and could therefore not consider themselves unaware of complications in the Greek asylum system.[97] Bringing the reasoning into the context of refutability, the Court held that the presumption of compliance with fundamental rights would be rebutted and the transfer precluded "[…] if there are systematic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter".[98] The Court also discussed the consequences from having rebutted the presumption of safety and whether there is an obligation to apply Article 3(2) in the regulation for the purpose of taking charge of the asylum application. Provided that the applicant would not take damage from a long procedure, the Court held that the transferring Member State should continue to assess whether another Member State can be considered responsible on account of the other rules in the regulation. There is only an obligation to use Article 3(2) in the regulation when the transferring Member State deems it "necessary".[99]

There are several relevant aspects of this judgement to discuss. Of main importance here is to observe that the Court's answers in *N.S.* gave rise to an obligation, similar to the one established in the case of *M.S.S.*, to assess Member States' compliance with fundamental rights when they apply the rules in the Dublin II Regulation. This obligation exists even though there is not an automatic obligation to apply Article 3(2) in the regulation in cases where Article 4 in the Charter would prevent a transfer. Moreover, there is reason to recall some of the comments made under the section on the motives behind the regulation. In contrast to the judgements of the ECtHR, it seems like the CJEU had to balance the concern for fundamental rights of individuals against the need of maintaining the fulfilment of fundamental objectives of the regulation. As stated above, the presumption of safe countries is one way of facilitating the fulfilment of these objectives. Without the purpose of arguing for another outcome than the one reached by the Court in *N.S.*, these potential conflicts seem to be of relevance once the responsibilities of the Member States under the regulation is decided.

[96] *Ibid.* para. 84-85.
[97] *Ibid.* para. 88-92.
[98] *Ibid.* para. 86.
[99] *Ibid.* para. 96-97.

4 The obligation to respect fundamental rights

It has now been confirmed both by the CJEU and by the ECtHR that a conclusive presumption of compliance is not allowed under the application of the Dublin II Regulation when it comes to the transfer of asylum seekers to the responsible Member State. While such a presumption is precluded, it is interesting to see in more detail what kind of fundamental rights the Member States have to respect in the context of the Dublin II Regulation.

The regulation applies between Member States of the Union.[100] For this reason, this examination is limited to the applicability of the Charter on Member State actions and to the question on how rights in the Charter relevant to asylum seekers should be interpreted. The prohibition of torture and inhuman or degrading treatment or punishment in Article 4, the right to an effective remedy in Article 47, the right to asylum in Article 18, and the principle of the child´s best interest in Article 24 of the Charter will be examined in this regard. The final sections in this chapter will explore Article 52(3) in the Charter more deeply and there will be brief comments on the status of the ECHR in the Union with respect to the future accession of the Unioin to the Convention.

4.1 The Union Charter of Fundamental Rights

As a consequence of the entry into force of the Treaty of Lisbon, the Charter is currently binding upon the Member States and the institutions of the Union.[101] Its specific field of application is described in Article 51(1) of the Charter, which states that "[the] provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the power of the Union as conferred on it in the Treaties". Opposed to the duties and functions of the EU institutions, the application of the provisions in the Dublin II Regulation remains relevant for Member States, which is why the binding character of the Charter in relation to the Member States will be prioritised here. Hence, the determining factor for applicability of the Charter is whether or not they

[100] Article 1 Dublin II Regulation.

[101] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, entered into force in 2009. Article 6(1) TEU states that "[the] Union recognises the rights, freedoms and principles set out in the [Charter], which shall have the same legal value as the Treaties".

can be considered to be "implementing Union law" when they act on the basis of the regulation.[102]

The absence of an explicit definition of 'implementing Union law' in the article is complemented by guidelines in other sources of interpretation. First, the interpretation of the articles in the Charter shall be guided by the Explanations annexed to the Charter.[103] Accordingly, in the explanation on Article 51(1) in the Charter it is said, *inter alia*, that "[…] it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context is only binding on the Member States when they act in the scope of Union law".[104] In relation to the interpretation of Article 51, Rosas states that many discussions have addressed the question whether the use of different terminologies, in the Charter and in the explanation to Article 51(1) respectively, effects the range of situations in which Member States are bound by fundamental rights obligations.[105] This implies that the scope of application of the Charter is not fully established. Against this background, the meaning of implementing Union law should at least be briefly explored in order to be able to assess when certain national actions under the Dublin II Regulation fall within the scope of the Charter.

From a comprehensive perspective, the binding status of the Charter is not believed to dramatically modify the scope of application of fundamental rights to actions of the Member States.[106] The Member States are under the obligation to ensure that the rights are protected in fields of law governed by the Union.[107] Other provisions in the Treaty on European Union (TEU) as well as the Charter confirm in particular that the Charter does not produce wider competences or any new tasks of the Union and that the articles in the

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[102] Article 51(1) Charter; Allan Rosas, *"When is the EU Charter of Fundamental Rights applicable at national level?",* Jurisprudencija, Vol. 19, No. 4, 2012, pp.1269-1288, p. 1270 (A. Rosas); Koen Lenaerts, "*Exploring the Limits of the EU Charter of Fundamental Rights",* European Constitutional Law Review, Vol. 8, No. 2, 2012, pp. 375-403, p. 377 (K. Lenaerts).

[103] Articles 6(1) TEU and 52(7) Charter. See Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/717, (Explanations to the Charter). These are not laws, see Sionaidh Douglas-Scott, *"The European Union and Human Rights after the Treaty of Lisbon",* Human Rights Law Review, Vol. 11, No. 4, 2011, pp. 645-682, p. 651 (S. Doulgas-Scott).

[104] Among cases establishing this principle, references in the explanation on Article 51(1) are made to the cases of C-5/88 *Wachauf,* judgement of the 13 July 1989, (*Wachuaf),* C-260/89 *ERT,* judgement of the 18 June 1991 (*ERT),* and C-309/96 *Annibaldi,* judgement of the 18 December 1997.

[105] A. Rosas p. 1276.

[106] A. Rosas p. 1276; Xavier Groussot and others, *"The Scope of Application of EU Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication",* Eric Stein Working Paper No 1/2011, p. 20 (X. Groussot and others); Steve Peers, *"Immigration, Asylum and the European Union Charter of Fundamental Rights"*, European Journal of Migration and Law, Vol. 3, No. 2, 2001, pp. 141-169, p. 145 (S. Peers).

[107] Maria Teresa Gil-Bazo, *"The Charter of Fundamental Rights of the European Union and the Right to be granted asylum in the Union's Law",* Refugee Survey Quarterly, Vol. 27, No. 3, UNHCR 2008, pp. 33-52, p. 36, (M. T. Gil-Bazo).

Charter remain attached to the competences of the Union as already established by TEU and TFEU.[108] Several authors have on the basis of Article 51(1) in the Charter and related case law from the CJEU identified the main categories of situations in which Member States are implementing Union law and consequently may be subjected to review by the Court in the context of their obligation to respect fundamental rights as guaranteed in the Union. Although these categories may be described in slightly different ways, two broad categories are referred to here. The first category concerns Member States when they "implement or apply" Union law and the second one encompass situations where Member States "derogate" from Union law.[109] Measures constituting "implementation" have been summarised as including the application of EU secondary legislation, as well as the interpretation and enforcement thereof.[110] Stated differently, Member States seem to be bound by fundamental rights whenever they act in order to "[…] fulfil their obligations under the treaties as well as under secondary EU law".[111] The derogation situations have basically been interpreted to cover situations where Member States act in another way than the one prescribed by EU provisions and Member States must accordingly ensure that the derogation is in line with fundamental rights.[112] Rosas describes in summary that application of the Charter requires that national actions involve a connection between a EU provision and a right or freedom in the Charter.[113]

More recent case law from the CJEU shows that the question on whether a national measure falls within the scope of Union law remains a rather complex issue. The judgement in *Åklagaren v Hans Åkerberg Fransson* can be illustrative for this matter.[114] The case concerned in essence whether the principle of *ne bis in idem* in Article 50 of the Charter precluded a penalty to pay surcharge and a subsequent indictment from the Public Prosecutor on the basis of a single incident.[115] The substance of the ruling is not of particular relevance here. Instead attention should be brought to the Court's discussion on whether it had jurisdiction over the main proceedings since the principle of *ne bis in idem* in the Charter would only apply once it was established that the tax penalty and the criminal charge were implementations of Union law in accordance with Article 51(1) of the Charter. The Court recognised that the penalties partly concerned Åkerberg's failure to report value added tax, for which the Member States are obliged by a directive and primary EU law to ensure through "legislative and administrative measures".[116] The Swedish government argued that the

[108] Articles 5(2), 6(1) TEU, Article 51(2) Charter; A. Rosas p. 1276; K. Lenaerts p. 377.
[109] See X. Groussot and others pp. 3, 7. For a more extensive analysis of these situations, see pp. 3-7 and 7-12. See also K. Lenaerts p. 378-382. All authors refer for example to *Wachuaf* in the first situation and to *ERT* in the second situation, see n. 104 above.
[110] X. Groussot and others pp. 5, 32.
[111] K. Lenaerts p. 378.
[112] *Ibid.* p. 385.
[113] A. Rosas pp. 1277-1278
[114] C- 617/10, *Åklagaren v Hans Åkerberg Fransson*, judgement of the 26 February 2013 (*Åkerberg*).
[115] *Ibid.* para. 12-14.
[116] *Ibid.* para. 24- 25.

national laws, allowing for these penalties, were not adopted because of this directive and could therefore not constitute implementation of Union law.[117] The Court however came to the opposite conclusion by relying on the connection between the purpose of the penalties and the more comprehensive obligation in Union law to protect "the financial interest of the Union". Even if the national legislation was not adopted in order to incorporate the directive, it was used to counter violations of that directive and in a larger context, to protect the Union's financial interests.[118]

Åkerberg is an example where Union law does not regulate all measures taken by Member States in a certain field of law. In a situation like this, these measures may nevertheless by regarded as implementation of Union law and national rules or actions may therefore cause national courts to assess the legality of those rules or measures in relation to the Charter.[119] During such an assessment, the recent case of *Melloni* shows that it might be difficult for a national court to deal with rules on how to interpret the articles in the Charter.[120] Article 53 in the Charter states that "[nothing] in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, [inter alia] by the Member States' constitutions". In *Melloni*, the Court was asked whether Article 53 could be interpreted as preventing the Member State from carrying out a measure imposed by EU law when the measure would be contrary to the protection of individuals in their national constitution.[121] The Court held that when Member States implement Union law within the meaning of the Charter, they may only rely on their national norms in so far as the "[…] level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised".[122]

Member States' actions under the Dublin II Regulation should according to the above be assessed pursuant to these general guidelines on the applicability of the Charter. While the application of the Dublin rules seems rather easy to identify with regard to explicit references to the criteria set out in the regulation, the case of *N.S.* shows that it might not always be true. In *N.S.*, the request for a preliminary ruling included a question of referral on whether a Member State's decision to take over the responsibility based on Article 3(2) in the regulation could be seen as a measure of implementing Union law on the basis of either Article 6 TEU or Article 51(1) of the Charter or by both provisions.[123] As seen by the observations made by international organisations and other Member States, there were arguments put forward both for an affirmative and a negative answer to this

[117] *Ibid.* para. 16, 28.
[118] *Ibid.* para. 28. It is worth noting that AG Cruz Villalón argued for a negative outcome in his Opinion in C-617/10 *Åklagaren v Hans Åkerberg Fransson*, delivered on the 12 June 2012.
[119] *Ibid.* para. 29.
[120] C-399/11 *Melloni*, judgement of the 26 February 2013(*Melloni*).
[121] *Melloni* para. 55.
[122] *Ibid.* See the reasoning of the Court in para. 56-60.
[123] *N.S.* para. 50, 55.

question.[124] For several reasons, the Court held in the end that such a decision in fact fell under the scope of Article 51(1) in the Charter. From the Court's reply it can be said that the freedom granted to Member States in Article 3(2) in the regulation is based in EU primary law since the article is part of the CEAS framework.[125] More explicitly, the Court considered the discretion as one of many mechanisms under the Dublin II Regulation for appointing a responsible Member State and the consequences of being responsible are the same as they would be in cases where other mechanisms are used. The exercise of Article 3(2) must therefore be considered to be an implementation of EU law.[126] Adding to the general guidelines above, the *N.S.* judgement established that Member States are equally bound by the obligation to respect fundamental rights in the Charter when the implementation of EU law allows Member States to take decisions that are more sovereign.[127]

From the foregoing discussions, it is possibly to draw some conclusions. Evidenced by recent cases in the CJEU, the scope of the Charter is not entirely clear and national courts will probably be facing difficulties when they decide whether or not Member State actions falls within the scope of Union law. The notion of implementing Union law has assumingly not yet been interpreted in every possible aspect and preliminary rulings subsequent to the case of *N.S.* envisage that this issue is very much alive. However, the Court's conclusion concerning its jurisdiction in *Åkerberg*, particularly with regard to the fact that the national courts did not act under the impression that they were enforcing the rules in the Union directive, might suggest that the Court established a rather generous interpretation of concept of implementing Union law.

4.1.1 Provisions in the Charter relating to asylum seekers

The purpose of this section is to briefly distinguish the substance of the prohibition of torture and inhuman or degrading treatment or punishment in Article 4, the rights to an effective remedy in Article 47, the right to asylum in Article 18 and the principle of the child's best interest in Article 24 in the Charter and how these rights should be interpreted in relation to Member States responsibilities under the Dublin II Regulation. The general requirements covered by each one of the articles will therefore be commented in a limited way.

Besides the rules on the scope of application of the Charter, there are rules on how to interpret the articles in the Charter. The most essential rule of interpretation here is Article 52(3) in the Charter. It establishes that when

[124] *Ibid.* para. 56-63.
[125] *Ibid.* para. 65.
[126] *Ibid.* para. 67-68.
[127] K. Lenaerts p. 380.

rights in the Charter correspond to those in the ECHR, the provisions in the Charter shall have the same meaning and scope as the ones in the ECHR. Secondly, paragraph 3 in the article ascertains that the Union is free to afford higher protective standards than the ECHR. It is therefore inevitable to discuss the scope and meaning of some of the selected rights without parallel references to the jurisprudence of the ECtHR.[128]

4.1.1.1 The prohibition of torture and inhuman or degrading treatment or punishment

Article 4 in the Charter read as follows: "[no] one shall be subjected to torture or to inhuman or degrading treatment or punishment". In the explanation on Article 4 it is stated that the right corresponds to Article 3 in the ECHR and consequently has the same meaning and scope as the provision in the ECHR.[129] Besides the judgement in *N.S.* there are no cases available on the interpretation of Article 4 in the Charter in relation to the Dublin II Regulation. Discussion of the ECtHR on Article 3 in the ECHR is however a common element in cases involving asylum seekers.[130]

It has already been stated that other provisions than Article 33 in the Geneva Convention relating to the status of refugees integrate the prohibition against *non-refoulement.* Where an individual would risk being exposed to refoulement, the ECtHR has incorporated the principle of *non-refoulement* into Article 3 in the ECHR when such an action would result in a breach of the rights in the same article.[131] The ECtHR held in *Soering* that the absence of an explicit prohibition against refoulement does not mean that such a prohibition does not fall under the scope of Article 3 in the ECHR. Article 3 creates an obligation not to remove a person "[…] where there are substantial grounds for believing that [the person] would be exposed to torture" as well as when there is a risk of being exposed to "inhuman or degrading treatment or punishment".[132] Article 3 ECHR covers in the same way situations where an individual may be subjected to indirect refoulement.[133] Due to the fact that circumstances vary in each individual case, Article 3 ECHR has been held to become applicable when the treatment or punishment in question reaches the requirement of "minimum severity".[134]

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[128] Explanations to the Charter p. 33. Accordingly, jurisprudence from the ECtHR and the CJEU constitute sources for determining the scope and meaning of those rights. See also C-400/10 *JMcB v LE*, judgement of the 5 October 2010 para. 45-47 (*JMcB*).
[129] Explanations to the Charter p. 18; Article 52(3) Charter; Article 15(2) ECHR.
[130] For comments on recent asylum cases from the ECtHR, see M. Bossuyt, pp. 203-245.
[131] See Hurwitz p. 189-190 referring, *inter alia*, to the cases of *Soering v United Kingdom*, Appl. No. 14038/88, judgement of the 7 July 1989 (*Soering*) and *Cruz Varas v Sweden*, Appl. No. 15576/89, judgement of the 20 March 1991. A more recent case involving breaches of Article 3 in the context of sending migrants back to another state is the case of *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, judgement of the 23 February 2012.
[132] *Soering* para 88.
[133] *T.I.* p. 15.
[134] *Soering* para 100.

With reference to the reasoning of the CJEU in *N.S.*, infringements of the rights in the Charter in a receiving Member State have to reach a certain level before they may have an actual impact on the sending Member State's decision to transfer an asylum seeker on the basis of the regulation. Article 4 should be interpreted as prohibiting the transfer when the Member State "[…] cannot be unaware that systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the [receiving] Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision".[135] When CJEU delivered the judgement, the Court relied on the reasoning in *M.S.S.* by the ECtHR. The ECtHR has recently confirmed its interpretation of Article 3 ECHR in *M.S.S.* in the case of *Mohammed Hussein and Others v. the Netherlands and Italy*.[136] The applicants in the main proceedings invoked Article 3 in order to challenge the transfer from the Netherlands to Italy. As claimed by the applicants, there were insufficient reception conditions for asylum seekers in Italy and there was allegedly a risk that the Italian authorities would send them back to their country of origin without an adequate asylum examination.[137] Even though the Court did not find the applicants to have a legitimate claim against the Netherlands under Article 3 ECHR, it compared the present situation with the circumstances in *M.S.S.* and retreated the extension of the protection afforded under the article for asylum seekers subjected to a transfer under the Dublin II Regulation.[138] Considering the way in which ECtHR has developed its reasoning on Article 3 ECHR in relation to Member States' responsibilities in the reviewed cases involving the Dublin II Regulation, the CJEU has so far applied a similar interpretation in relation to Article 4 of the Charter. Along with the descriptions in *M.S.S.*, there are therefore also guidelines for assessing whether lack of sufficient guarantees in a Member State's asylum procedure and reception conditions amounts to systematic differences in the context of Article 4 in the Charter.[139] Article 4 in the Charter may therefore constitute an example where the content and impact of the article in relation to the Dublin II Regulation is relatively clear at the moment.

4.1.1.2 The right to an effective remedy

Article 47 in the Charter includes both the right to an effective remedy and the right to a fair trial. In Article 47, it is stated that: "(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility

[135] *N.S.* para. 106.
[136] *Samsam Mohammed Hussein and Others v the Netherlands and Italy*, Appl. No. 27725/10, judgement of the 2 April 2013 (*Mohammed Hussein*).
[137] *Mohammed Hussein* para. 56.
[138] *Mohammed Hussein* para. 64-68, 72-78.
[139] *Ibid.* para. 89.

of being advised, defended and represented. (3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". The explanation on Article 47 reveals that the scope and meaning of Article 47(1) "is based on" the right to an effective remedy in Article 13 ECHR whereas paragraph 2 and 3 in Article 47 correspond to the right to a fair trial as stated in Article 6(1) ECHR.[140] The explanations describe differences arising between the protection according to Union law and the ECHR. First of all, the Union has a more comprehensive protection due to the inclusion of the right to stand by a court. In comparison, the protection in ECHR covers the right to stand before "a national authority."[141] Another difference between the Charter and the ECHR in this regard is the fact that the right to a fair trial in Article 47(2) is not restricted to criminal and civil matters.[142] The Explanations to the Charter finally states that individuals may invoke Article 47 whenever Member States' implementation of Union law violates a right guaranteed in the Union. Whether the violated right is placed in primary or secondary Union law is without relevance for the purpose of Article 47.[143] Against these primary observations, it is clear that this article in the Charter encompasses several rights and there are more references to ECHR than under Article 4 of the Charter. All together, these factors suggest that Article 47 can be reviewed from a wide range of aspects, including the objectives as set out in this section. In order to narrow down the scope of examination, paragraph 1 of the article will be prioritised.

The right to an effective remedy in Article 47(1) in the Charter has not yet been interpreted in the context of the Dublin II Regulation. Similar to Article 4 in the Charter, it is therefore helpful to examine the case law from the ECtHR on Article 13 in the ECHR.[144] In *M.S.S.*, the ECtHR confirmed its previous case law on the issue of effective remedies in cases involving the risk of direct or indirect refoulement by sending asylum seekers back to the place where he or she allegedly will suffer from ill-treatment. From the case law it follows that Article 13 in the ECHR imposes an obligation for states to adopt national rules, which in practice grants asylum seekers the right to have a potential violation of a conventional right effectively reviewed by a competent body.[145] This means for example that individuals should have a fair chance of getting access to a review.[146] In the light of the effectiveness requirement, the ECtHR has also stated that in cases

[140] Explanations to the Charter p. 29-30.
[141] *Ibid.*
[142] *Ibid.* p. 30.
[143] *Ibid.* p. 29; S. Peers p. 165.
[144] Guidelines from the case law of ECtHR on Article 13 in the ECHR is used even if Article 47(1) is not listed as a corresponding right under the explanation to Article 52(3) Charter. See Explanations to the Charter pp. 29, 33-34.
[145] *M.S.S.* para 288-289. The Court has recently confirmed some of these principles in the case of *Mohammed Hussein* (n. 138 above) para. 80-83.
[146] *M.S.S.* para 290. The right to an effective remedy before a court has been established in the Union in cases such as C-222/84 *Johnston*, judgment of the 15 May 1986, C- 222/86 *Heylens*, judgement of the 15 October 1987 and C-97/91 *Borelli*, judgement of the 3 December 1992.

concerning the risk of violation of Article 3 in the ECHR when an asylum seeker is to be expelled, there has to be a remedy available in the national legal order with "automatic suspensive effect".[147]

Whereas it can be seen in the case law referred to in this essay that both a transferring and a receiving Member State may have different legal remedies available for asylum seekers, they are nevertheless equally bound by the obligation in Article 47 of the Charter to offer asylum seekers effective remedies[148] once there has been a violation of fundamental right protected in the Union. Against the purpose of determining the responsible Member State for processing an asylum application in the Union as explained in the first chapter, the need for further interpretation of Article 47 in the Charter does not necessarily relate to the requirements within the article. This resembles the comments made under Article 4 of the Charter. More importantly, the judgement in *N.S.* makes it difficult to tell whether Article 47 alone would have an impact on Member States' responsibilities under the Dublin II Regulation when it comes to assessing the legality of a transfer of an asylum seeker to the responsible Member State. The CJEU has so far not discussed whether the risk of a violation of other rights than Article 4 in the Charter would be enough to suspend a transfer.[149]

4.1.1.3 The right to asylum

Due to the title of the article and the scope of application of the Dublin II Regulation, attention instantly falls to the right to asylum in Article 18 of the Charter. This article ensures that "[the] right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention […] relating to the status of refugees and in accordance with the [TEU] and the [TFEU]". In recital 15 of the Dublin II Regulation it is said that the regulation specifically "[…] seeks to ensure full observance of the right to asylum guaranteed by Article 18". There are no further indications in the regulation or in the Charter on the scope and meaning of the right to asylum. The explanations to Article 18 specifies that the wording of the article is a result of the Union's obligation in Article 78 TFEU to follow the rules in the Geneva Convention relating to the status of refugees whenever they legislate in the field of asylum.[150]

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[147] *Ibid.* para 293.

[148] Opinion in *N.S.*, para. 160: "The specific procedural form of the effective remedy within the meaning of Article 47 Charter […] is largely left to the Member States. However, this margin of discretion enjoyed by the Member States is limited by the requirement that the effectiveness of the remedy must always be guaranteed". With references, *inter alia*, to *M.S.S.*, AG Trstenjak says in para. 161: " The minimum content of the rights to an effective remedy includes the requirements that the remedy to be granted to the beneficiary must satisfy the principle of effectiveness. According to that principle, the realisation of the rights conferred by EU law may not be rendered practically impossible or excessively difficult".

[149] See E. Brouwer p. 44, where she poses the question whether infringements of other rights than Article 4 may cause the transferring Member State to put aside the criteria in the Dublin II Regulation.

[150] Explanations to the Charter p. 24.

There seems to be no cases available in which the CJEU effectively deals with the substance of the right to asylum in the Charter.[151] The questions referred to the Court in *N.S.* brought the scope and meaning of Article 18 in the Charter under the Dublin II Regulation briefly into question. As previously explained, the applicants argued for the United Kingdom to apply Article 3(2) in the Dublin II Regulation since they claimed that the transfer to the other states would infringe, *inter alia*, Article 18 in the Charter.[152] The Court, however, did only respond to the questions resulting from this argument with reference to the prohibition of torture and inhuman or degrading treatment in Article 4 of the Charter and did not further define the scope and content of the other articles since there were no reasons to believe that Articles 1, 18, 19(2) and 47 in the Charter could bring the Court to a different conclusion than the one reached under Article 4.[153]

It is therefore necessary to examining arguments submitted outside the sphere of the CJEU. Gil-Bazo has identified issues surrounding the scope and meaning of Article 18 in the Charter. Among them, she believes that it is particularly noticeable that the wording of the article does not reveal who should be granted asylum. Seen in the light of a tradition for states to decide on the basis of their sovereignty whether or not to entitle individuals to protection on their territory, she poses the question of whether Article 18 confirms this right for Member States or if the article is meant to be relied on by individuals in order to be granted asylum, without necessary excluding the first one.[154] In support for the latter interpretation, Gil-Bazo makes for example references to the preamble of the Charter, which allegedly verifies the status of the Charter as a collection of rights for individuals instead of rights of Member States.[155] In addition, she further considers the complete absence of any articles in the Charter concerning rights for the Member States as an indication for an interpretation in the suggested direction. In case such an individual right is recognised, issues surrounding the material and personal scope of Article 18 remain.[156] Peers

[151] Some comments on Article 18 Charter can for example be seen in AG Eleanor Sharpton's Opinion, delivered on the 15 May in the case C-179/11 *Cimade and GISTI,* judgement of the 27 September 2012, where she raises the potential risk of violating the principles confirmed in Articles 1 and 18 Charter if a transferring Member State does not entitle asylum seekers to the same standard of reception conditions as ensured by Directive 2003/9 before the transfer is carried out (see para. 55-56 Opinion and para 36 judgement). With references, *inter alia*, to the joined cases C-402/05 P and C-415/05 P *Kadi v. Council of the European Union and Commission of the European Communities*, judgement 3 September 2008, para. 283, UNHCR submits that case law from the CJEU shows that the right to asylum has the status of a general principle of Union law. See UN High Commissioner for Refugees, "*UNHCR Statement on the right to asylum", issued in the context of a reference for a preliminary ruling addressed to Court of Justice of the European Union by the Administrative Court of Sofia lodged on 18 October 2011 - Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees*, August 2012, C-528/11, (*UNHCR Statement*) p. 6.

[152] *N.S.* para 50.

[153] *Ibid.* para. 86-106, 114.

[154] M. T. Gil-Bazo pp. 37-38.

[155] *Ibid.* p. 41, 48. Her argumentation also includes a section on the drafting history of the Charter in pages 42-45.

[156] *Ibid.* p. 45.

states that the right to asylum in Article 18 has a broader scope than the Article 14(1) in the Universal Declaration of Human Rights, which ensures that "[everyone] has the right to seek and to enjoy in other countries asylum from persecution".[157] Article 14(1) in the Universal Declaration of Human Rights will not be further analysed.

It is relevant to highlight the fact that there is currently a case pending before the CJEU, which involves relevant questions for this essay, including the interpretation of Article 18 in the Charter.[158] The national courts of Bulgaria has asked the Court to provide for an interpretation of the content of Article 18 in conjunction with Article 53 in the Charter, Article 2(c) and recital 12 of the Dublin II Regulation.[159] For this reason, UNHCR recently published a statement on how the right to asylum allegedly applies in international and European contexts.[160] When it comes to the European version of the right to asylum, UNHCR states that it follows from the explanation on Article 18 in the Charter that the article imposes two obligations on the Union. The Union must respect the rules in the Geneva Convention relating to the status of refugees, and it must comply with the obligations set out in Articles 78 and 80 TFEU.[161] Whereas the significance of the Geneva Convention relating to the status of refugees in European asylum law and the content of Article 78 TFEU have been explained in the above, Article 80 TEU obliges the Member States to establish cooperation based on solidarity and equal responsibilities.[162] According to UNHCR, it is evident that the Dublin II Regulation and the CEAS directives cover the objective of enforcing the right to asylum in Article 18 in the Charter.[163] In order to determine the scope and meaning of Article 18 in the Charter, UNHCR then appears to combine a reading of Article 18, Articles 78 and 80 TFEU, together with the rules in the Dublin II Regulation and the CEAS directives.[164] Against these articles, the UNHCR identifies a list of rights of individual asylum seekers as well as obligations for Member States covered by Article 18 in the Charter. For example, UNHCR maintains that Article 3(1) in the Dublin II Regulation and Articles 13 and 18 in the directive on minimum standards for the qualification and status of third country nationals[165] result in "an obligation on Member States to ensure, *inter alia*, that an asylum seeker (i) has access to and can enjoy a fair and efficient examination of his or her claim and/or an effective remedy in the receiving states, (ii) is treated in accordance with adequate reception conditions, and (iii) is granted asylum in the form of refugee status when the criteria are

[157] S. Peers p. 161.
[158] See Request for a preliminary ruling from the Administrative Court in Sofia (Bulgaria), case C-528/11 Zuhery Freyeh Halaf v. the Bulgarian State Agency for refugees, received by the Court on the 18 October 2011.
[159] *Ibid.*
[160] *UNHCR Statement*, see n. 152 above.
[161] *Ibid.* p. 6.
[162] *Ibid.* pp. 6-7.
[163] *Ibid.* p. 8.
[164] *Ibid.*
[165] Council Directive 2004/83/EC of 29 April 2004.

met".[166] It is not necessary to present the complete list of rights and obligations included in Article 18 in the Charter. It is however noticeable that Article 18 is found by UNHCR to comprehend more rights than just the right of asylum seekers not to be subjected to refoulement. Due to this extensive scope of protection, UNHCR explains that Article 18 therefore coincides with Articles 1, 4, 19(2) and 47 in the Charter.[167]

Regardless of the Court's reasoning in *N.S.*, there will be opportunities in the future to develop Article 18 in the Charter into a more concrete right, which potentially can be invoked by individuals in order to avoid being transferred.[168] AG Trstenjak argued for example in a different way than the Court. She meant that extreme pressure on a national asylum system would, not necessarily in addition to the risk of violating other rights in the Charter, call upon the sending Member State to assess the legality of its decision to transfer an asylum seeker in the light of Article 18.[169] By virtue of the connection between the principle of *non-refoulement* in Article 33 of the Geneva Convention relating to the status of refugees and Article 18, AG Trsenjak submitted that whenever a transfer from a Member State to another Member State could expose an asylum seeker either to direct or indirect refoulement it would be contrary to Article 18 in the Charter.[170]

Without preliminary rulings from the CJEU, it is not possible for sure to determine whether the right to asylum in the Charter is to be interpreted in accordance with one or more of the suggested interpretations above. It appears to be relatively poor guidelines on how to approach the article in comparison to the number of questions raised with regard to the scope and meaning of Article 18 in the Charter. Common in the foregoing statements is nevertheless the urge for a wide interpretation of the protection guaranteed by the right to asylum. It is however not possible at this stage to see in what ways Article 18 in the Charter specifically means when Member States apply the Dublin II Regulation.

4.1.1.4 The principle of the child's best interest

As partly described before, the rules in the Dublin II Regulation intend to be less intrusive for more vulnerable categories of asylum seekers. The group of unaccompanied minors is one of the categories.[171] Article 24 in the Charter obliges Member States to protect the rights of the child whenever they implement Union law.[172] Accordingly, "(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration

[166] *Ibid.* p. 8. For the complete list of "elements" in Article 18 Charter, see pp. 8-9.
[167] *Ibid.* p. 8.
[168] Cathryn Costello in n. 57 above, p. 88, and in "*Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, Human Rights Law Review, Vol. 12, No. 2, 2012, pp. 287-339, p. 308.
[169] Opinion in *N.S.* para. 111-113.
[170] *Ibid.* 114 -115.
[171] S. Peers and N. Rogers p. 222.
[172] Articles 24 and 51(1) Charter.

on matters which concern them in accordance with their age and maturity. (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests." It follows from the Explanations to the Charter that Article 24 draws inspiration from the provisions in the New York Convention on the Rights of the Child.[173]

Similar to the right to asylum in Article 18 in the Charter, there is no right in the ECHR corresponding to the rights of the child in Article 24 in the Charter. Even though Article 24 has been brought into cases of immigration issues, such as the case of *Gerardo Ruiz Zambrano v. Office national de lémploi*, there are so far no judgements from the CJEU on the interpretation of Article 24 in relation to the Dublin II Regulation.[174] The inclusion of Article 24 in this essay is motivated by the fact that the Court of Appeal in the United Kingdom is currently awaiting answers to questions made in a request for a preliminary ruling in the case of *MA and others v. Secretary of State for the Home Department* on Article 6(2) Dublin II Regulation in relation to Article 24(2) in the Charter.[175] These questions arose in the proceedings of determining the responsibility for processing asylum applications lodged in the Union by three minors from third-countries.[176] Although the joint case is currently pending, AG Cruz Villalón recently delivered his opinion on the case.[177]

When the courts in the United Kingdom determined the Member State responsible, they applied Article 6 of the Dublin II Regulation since the applicants in the pending case are unaccompanied minors.[178] Recalling the requirements for applying Article 6 in the regulation as stated in chapter 2, this case presents rather unique circumstances since none of the unaccompanied minors have family members legally present in the Union and they have all applied for asylum in another Member State before they lodged their asylum applications in the United Kingdom.[179] At the outset, the issues in the main proceedings partly fall out of the scope of Article 6 as well as the regulation as a whole.[180] CJEU will accordingly have to address

[173] Explanations to the Charter p. 25.
[174] See C-34/09 *Gerardo Ruiz Zambrano v. Office national de lémploi,* judgement of the 8 March 2011.
[175] Reference for a preliminary ruling from Court of Appeal (England & Wales)(Civil Division)(United Kingdom) made on 19 December 2011 - *MA, BT, DA, v Secretary of State for the Home Department,* case C-648/11.
[176] Opinion of Advocate General Cruz Villalón, delivered on 21 February 2013 in the C-648/11 *MA, BT, DA, v Secretary of State for the Home Department,* para. 22 (Opinion in *MA*). In para 71, AG Cruz Villalón explains that the application of Article 6 Dublin II Regulation falls under the scope of the Charter for the same reasons as in the case of *N.S.* when Article 3(2) was discussed.
[177] *Ibid.*
[178] *Ibid.* para. 17.
[179] *Ibid.* para. 19.
[180] *Ibid.* para. 2.

to the responsibility issue.[181]Despite the absence of any reference to the principle of the best interest of the child in Article 6(2), the Court is further requested to decide whether this principle still would be of main importance in cases where Article 6(2) in the regulation is applied.[182] Judged from the arguments submitted by governments in some Member States, Article 6(2) in the regulation must be interpreted in a way where either the location of the minors' first or latest application will be of most importance for the responsibility issue.[183] AG Cruz Villalón explains that it is not merely a question of identifying a responsibly Member State, but also a question of deciding which one of the Member States involved should be the one to identify the responsible Member State.[184] There are thus two decisions to be made. AG Cruz Villalón believes that an interpretation of Article 6(2) in the regulation alone will not solve the issues at stake.[185] In a simplified way, AG Cruz Villalón submits that a combined reading of Article 6 in the regulation and Article 24(2) in the Charter results in a solution where the child's best interest should be decisive in both decisions.[186] This further indicates that the Member State in which the minor most recently applied for asylum should be the one to appoint the responsible Member State in the end. Usually, this is where the minor resides at the moment and these authorities would arguably have a better chance to observe the best interest of the minor in question.[187]

Worth mentioning, as claimed by some of the governments and acknowledged by AG Cruz Villalón, is the fact that this recommended solution might cause the Dublin II Regulation to be less effective than it is intended to be.[188] As stated in the above, the regulation has entered into force with the aim if providing the Union with a "clear, [rapid] and workable method" for establishing the responsible Member State.[189] In a potential conflict between the objectives of the regulation and the concern for the child's best interest, AG Cruz Villalón assumes that concerns for the latter will prevail.[190] Similar to other cases, the CJEU might therefore be confronted with a case in which the Court potentially has to strike a fair balance between the reasons for effectiveness and concerns for a fundamental right in the Charter. If the "child's best interest" is decisive in all different scenarios arising from the Dublin II Regulation, the protection of unaccompanied minors would accordingly be preserved in all situations. This should be welcomed from a fundamental rights perspective. When it comes to the perspective of the Member States, the most apparent consequence would assumingly be the creation of a more demanding

[181] *Ibid.* para. 19, 47.
[182] *Ibid.* para. 20,
[183] See arguments in para. 26-39, in particular para. 27, 33, 57.
[184] *Ibid.* para. 63.
[185] *Ibid.* para. 65-66.
[186] *Ibid.* para. 64, 66, 72.
[187] *Ibid.* para. 67, 74, 77, 80.
[188] *Ibid.* para. 38, 76.
[189] Recitals 3 and 4 Dublin II Regulation.
[190] Opinion in *MA* para. 76. AG Cruz Villalón mentions specifically the objective of preventing "asylum-shopping".

procedure for establishing the responsible Member State in cases of unaccompanied minors than there is for other categories of asylum seekers under the regulation. Another complexity could further arise if an unaccompanied minor applies for asylum in more than two Member States under the same circumstances as in the present case since the potential number of Member States responsible would increase. In such a situation it could be difficult for Member States to rapidly assess the meaning of the child's best interest both with regard to the Member State which should determine the responsible Member State and with respect to the decision of a responsible Member State. However, it remains to be seen to what extent Article 24 in the Charter will influence the Court's interpretation of Article 6 in the regulation.

In summary, when comparing Articles 4, 47, 18 and 24 in the Charter, these sections illustrated that the scope, content and interpretation may be more difficult to establish with respect to some of the reviewed articles. At this present stage, there are still remaining questions on their impact on the regulation. It is thus clear that the determination of the responsibilities of Member States in their application of the Dublin II Regulation is dependent on future interpretations of these articles by the Court. The review of the upcoming preliminary ruling in the case of *MA* on the interpretation of the principle of the child's best interest was partly brought into this examination with regard to the latter perspective. Besides individual questions on the interpretation of some of these fundamental rights, the judgement in *N.S.* also raised the issue on the internal relationship between Articles 4, 18 and 19(2) in the Charter. Article 19(2) protects individuals from the risk of death penalty, torture or any other kind of inhuman treatment specifically in cases of removal, expulsion or extradition. There is currently no case law available from the CJEU on how to interpret this article. In the Explanations to the Charter the article is described as a direct result of the principles established by the ECtHR on the basis of Article 3 ECHR in the cases of *Ahmed v Austria* and *Soering.*[191] Peers recognised the unsettled status of Article 19(2) already before the Charter became binding and submitted that the rules of interpretation in the Charter make it plausible to suggest that the introduction of Article 19(2) was solely an example on how to clarify rights less evident than others.[192] Peers further observed that the prohibition of refoulement is common to all three articles.[193] Recalling the statement by the UNHCR on the right to asylum in Article 18, similar observations have been made. However, there is assumingly still a need to clarify the relationship between these rights in order to understand their potential impact on Member States' responsibilities, in particular when it comes to transfer asylum seekers on the basis of the Dublin II Regulation.

[191] Explanations to the Charter. 24. See n. 62 and n. 131 above.
[192] S. Peers p. 159.
[193] *Ibid.* pp. 161-162.

4.2 The relationship between Union law and the ECHR

From the foregoing sections, it becomes clear that there is a genuine link between the Charter and the ECHR. It is thus a relevant factor to consider when the Member States' responsibilities are examined from the perspective of fundamental rights. The final two sections in this essay will therefore address some of the aspects of this relationship.

4.2.1 The rule of interpretation in Article 52(3) of the Charter

Article 52(3) in the Charter contains two different rules. They overlap with each other and will therefore be treated closely together. As earlier specified, the rule of interpretation in Article 52(3) establishes that "[in] so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention". This article also guarantees that the Union may always be free to apply a more extensive protection than the corresponding right in ECHR. Concerning the latter factor, the Explanations to the Charter clarifies that the Union is prevented from imposing more restrictive scopes and contents to the rights in the Charter that correspond to the ones in the ECHR.[194] These factors thus explain why the ECHR is described as minimum standards of protection for corresponding rights in the Charter.[195] From the Explanations to the Charter it is said that paragraph 3 of Article 52 was introduced in order to clarify the relationship between the rights in the Charter and in the ECHR. In more detail, the purpose of paragraph 3 in the article is to ensure that the "autonomy of Union law" and the role of the CJEU as far as possibly remain intact.[196] While the previous review of some of the rights in the Charter partly relied on Article 52(3), the overall objective of this essay makes it appropriate to further explore the meaning of this article.

When it comes to the system of corresponding rights, it is rather easy to identify rights in the Charter that are consistent with articles in the ECHR. Annexed to the explanations under Article 52(3) there are lists specifying the rights concerned.[197] These lists show that there are different ways in which rights in the Charter and the ECHR can correspond to each other. For example, there may be rights considered to have both the same scope and

[194] Explanations to the Charter p. 33. See also S. Peers pp. 158-159.
[195] Tobias Lock, "*The ECJ and the ECtHR: The future Relationship between the Two European Courts"*, The Law and Practice of International Courts and Tribunals, Vol. 8, 2009, 375-398, p. 382 (T. Lock). Fundamentals rights in the EU may also be "general principles of Union's law". ECHR is the main contributor in finding these fundamental rights. See in this regard, Article 6(3) TEU and Cathryn Costello in n. 168 above, p. 307.
[196] *Ibid.*
[197] Explanations to the Charter pp. 33-34.

meaning, or rights with the same meaning but where the Charter right has a wider scope than the one in the ECHR.[198] Recalling the examination of the rights in the Charter above, the right to an effective remedy and to a fair trail in Article 47 in the Charter may constitute an illustrative example in this regard. These lists in the Explanations to the Charter are said to reflect the current status of the corresponding articles in the Charter and the ECHR, but they are open for amendments in consistency with the development of Union legislation.[199] In comparison to existing corresponding rights, when there are articles in the Charter without counterparts in the ECHR, the CJEU is free to develop the meaning and scope of these articles without due account of the ECHR.[200] Neither the right to asylum in Article 18 nor the rights of the child in Article 24 of the Charter have corresponding rights in the ECHR. Based on the review on right to asylum in Article 18 and the principle of the child's best interest in Article 24 above, this seems to be a reason for why it appears to be more difficult to identify the scope and content as well as the impact of non-corresponding rights in the Charter. Yet, these rights exist in the Charter and they may therefore be developed without influences from the ECHR.

From a comprehensive view, the question thus arises whether there are any practical implications originating from Article 52(3) in the Charter that may have an impact on Member States' responsibilities from a fundamental rights perspective. If possible, conclusions under this section will be drawn in the light of the Dublin II Regulation. In the search for implications from the rules established by Article 52(3), questions regarding the system of corresponding rights can be identified in the academic literature. By recognising the ECHR as minimum standards of protection for rights corresponding in the Charter and in the ECHR, Lock raises the question whether it is actually mandatory to rely on the jurisprudence of ECtHR when the corresponding rights in the Charter are being interpreted.[201] Lock argues against the existence of such an obligation. In support for his argumentation he appears to be mostly concerned with the potential effect on the independency of the Union legal order.[202] He poses a scenario where the CJEU always would be obliged to follow the interpretation of the corresponding articles in the ECHR and thereby be subject to the judgements of the ECtHR.[203] Lock nevertheless seems to believe that the jurisprudence of ECtHR on articles in the ECHR corresponding to the Charter is of major importance along with other sources of interpretation.[204] It is important to remember that the interpretation of the articles in the Charter is constantly in progress. Subsequent to the arguments submitted by Lock, there have been new judgements from the CJEU concerning Article 52(3) and corresponding rights. Other authors have for example included the

[198] *Ibid.*
[199] *Ibid.* p. 33.
[200] K. Lenaerts p. 397.
[201] T. Lock p. 383
[202] *Ibid.* In order to follow the complete argumentation, see pp. 383-387.
[203] *Ibid.* p. 383.
[204] *Ibid.* T. Lock p. 383, 387.

case *J McB v LE* in their discussions on the meaning of Article 52(3) and the potential binding nature of ECtHR's jurisprudence.[205] In *J MvB*, the question referred to the Court for a preliminary ruling involved the interpretation of the right to respect for private and family life in Article 7 in the Charter.[206] Accordingly, the Court reiterated the wording of Article 52(3) and stated that Article 7 in the Charter corresponds to Article 8(1) in the ECHR. Citing the Court in this judgement, "Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights".[207] The low number of cases from the CJEU on the interpretation of the corresponding rights covered by Articles 4 and 47 in the Charter in the context of the Dublin II Regulation may probably be reason enough not to engage in a comparative study on whether or not the CJEU follows or would follow the exact same line of reasoning as the ECtHR. It has already been stated that the CJEU and the ECtHR came to similar conclusions in the cases of *N.S.* and *M.S.S.* with respect to Article 4 in the Charter and Article 3 in the ECHR respectively. This is also an explanation to why this examination not includes a comparison on the same articles in another context than the Dublin II Regulation. Against this background and with these limitations, it seems though like the status of the jurisprudence of ECtHR is preferably strong when corresponding rights in the Charter are interpreted.

However, this primary conclusion becomes vague in the light of some of the recent rulings from the CJEU in which the Court has dealt with corresponding rights in the Charter. Even if the following cases concern issues outside the scope of application of the Dublin II Regulation, they may be used for the purpose of showing how the Court most recently has approached the interpretation corresponding rights. The previous mention case of *Åkerberg* concerned the compatibility with the principle of *ne bis in idem* in Article 50 in the Charter and in Article 4 Protocol 7 in the ECHR of a tax penalty and a subsequent criminal charge imposed by the national courts due to one a single offence committed by Åkerberg.[208] Opposed to the provision in the ECHR, the principle of *ne bis in idem* in Article 50 in the Charter "[…] applies not only within the jurisdiction of one State but also between the jurisdiction of several Member States".[209] This means that the articles in the Charter and in the ECHR on the principle of *ne bis in idem* correspond to each other when the principle is challenged in one single Member State and the interpretation of Article 50 in the Charter will

[205] See for example S. Douglas-Scott p. 655, Aidan O'Neill, *"The EU and Fundamental Rights – Part 2",* Judicial Review, Vol. 16, No. 4, 2011, p. 386 (A. O´Neill). See also Christina Eckes in *"EU Accession to the ECHR: Between Autonomy and Adaption",* The Modern Law Review, Vol. 78, No. 2, 2013, pp. 254-285, p. 278 (C. Eckes), where the binding status of the jurisprudence of ECtHR is brought into the discussion on the role of CJEU after the accession by the Union to the ECHR.
[206] See n. 128 above *JMcB* para. 45-47.
[207] *JMcB* para. 53.
[208] *Åkerberg*, see n. 114 above.
[209] Explanations to the Charter pp. 31, 34.

accordingly be guided by the jurisprudence of the ECtHR.[210] The situation in *Åkerberg* thus concerned the issue of interpreting the principle of *ne bis in idem* in an "internal situation" since the Swedish courts alone imposed the penalties.[211] However, when the Court in *Åkerberg* elaborated on the scope of Article 50 in the Charter and specified the criteria used for determining whether the present situation was in violation with the article it did not refer to the case law of the ECtHR concerning the principle of *ne bis in idem*. Instead, the Court kept its reasoning in line with its previous jurisprudence.[212] In contrast, when the Court was asked in the case of *Melloni* to interpret the corresponding rights to an effective remedy and to a fair trial in Article 47, and the corresponding rights of the defence in Article 48(2) in the Charter, parallels to the jurisprudence of the ECtHR on Articles 6(1) and (3) in the ECHR were made.[213] Against these recent judgements from the CJEU, it is therefore difficult to establish the status of the jurisprudence of the ECtHR with regard to corresponding rights in the Charter and in the ECHR. The fact that a case before the CJEU involves an interpretation of a right in the Charter corresponding to an article in the ECHR does not seem to imply that the CJEU necessarily relies on guidelines in the case law of ECtHR.

The question whether Article 52(3) as such causes practical implications in the determination of Member States responsibilities from a fundamental rights perspective is hard to tell. Likewise, the benefits of the article are questionable. It follows from the above that it might be easier to predict and to identify the scope and meaning of corresponding rights in the Charter than non-corresponding rights since there are more sources of interpretation available. Fundamental rights obligations of the Member States may consequently be easier to establish when it comes to corresponding rights. This seems particularly relevant in situations where there are limited numbers of judgements from the CJEU on rights in the Charter. However, since the status of the jurisprudence from the ECtHR appears to be unsettled, the scope and content of a corresponding right in the Charter cannot be fully established until the CJEU deliver an interpretation of the right in question. A similar conclusion should also be possible to draw from the fact that the Union is allowed to make the protection of a corresponding right more extensive than the provision in the ECHR. In the end, Article

[210] K. Lenaerts p. 396. He refers to the Explanations to the Charter p. 31 and to the joined cases C-187/01 *Gözütok* and C-395/01 *Brügge*, judgement of the 11 February 2003. With reference to the case of *Sergey Zolotukin v. Russia*, Appl. No. 14939/03, judgement of 10 February 2009, he states that the courts now interpret the notion *"idem"* in the same way.
[211] K . Lenaerts p. 396 where he uses the expressions "a cross-border situation" and "a purely internal situation".
[212] *Åkerberg*, see in particular para. 34-35, where the Court refers to its previous judgements in C-68/88 *Commissison v. Greece*, judgement of the 21 September1989, para. 24, C-213/99 *de Andrade*, judgement of the 7 December 2000, para. 19, C-91/02 *Hannl-Hofstetter*, judgement of the 16 October 2003, para. 17 and C-489/10 *Bonda*, judgement of the 5 June 2012, para. 37. However, note that para. 37 in *Bonda* includes references to case law of the ECtHR.
[213] Case of *Melloni*, see n. 120 above.

52(3) does not appear to be of particular relevance in the determination of Member States' responsibilities.

4.2.2 The status of the ECHR in the Union and the future accession of the Union the ECHR

The status of the ECHR was partly discussed in the previous section. One way of exploring the status of the ECHR in the Union's legal order outside the framework of Article 52(3) in the Charter is to study Article 6 TEU. This article is held to be of importance once the general protection of fundamental rights in the Union is examined.[214] Article 6(1) TEU was introduced in the beginning of chapter 4 since it establishes the new legal status of the Charter. The same article also describes how other sources of law, such as the ECHR, contribute to the general framework of fundamental rights protection in the Union.[215] As stated in paragraph 3 in Article 6, "general principles of the Union's law" steam from the articles in the ECHR and from "constitutional traditions common to the Member States".[216] More importantly, Article 6(2) TEU obliges the Union to accede to the ECHR. From the work of scholars, it becomes clear that status of the ECHR as well as the relationship between the ECHR and Union law will be affected by the future accession to of the Union.[217] Besides the obligation of the Union to accede to the ECHR, Article 6(2) TEU states that the competences of the Union established in primary Union law shall not be modified by the accession. The main purpose here is to briefly present key factors describing the current relationship between Union law and the ECHR and some of the main reasons behind the accession. Common to some of the previous sections in this essay, this present objective will also be approached in broad context since the accession relates to Member States' responsibilities from a fundamental rights perspective beyond the Dublin II Regulation.

As seen from some of the reviewed judgements from the CJEU and the ECtHR and from observations made by authors in the academic literature, the two courts refer to each other's case law in their own judgements concerning fundamental rights.[218] With regard to Member States of the Union, another key factor on the relationship between Union law and the ECHR constitutes of the fact that the ECtHR sometimes rule on actions committed by Member States on the basis of Union law.[219] The case of *M.S.S.* is one example since the violations of the rights in the ECHR

[214] Damian Chalmers, Gareth Davies, Giorgio Monti, *"European Union Law: Cases and Materials",* 2d edition, Cambridge University Press, New York, 2010, p. 230 (D. Chalmers and others).
[215] *Ibid*.
[216] See also S. Peers and N. Rogers pp.116-118.
[217] See for example T. Lock n. 194 above. Article 52(3) Charter and the Union's accession are main features in his discussion.
[218] A. O'Neill p. 392; T. Lock p. 380.
[219] C. Eckes p. 260; T. Lock p. 377.

originated from actions of Union Member States made under the Dublin II Regulation.[220] Even if it is possible to identify different approaches by the ECtHR in cases where Member States have acted on account of their Union obligations,[221] the case of *Bosphorus* appears to be the most illustrative case in this regard.[222] Without going into the details of the factual circumstances, the CJEU had to deal with the potential conflict between an act by a Member State on the basis of Union law and the right to peaceful enjoyment of property under Union law for an aircraft company.[223] This case was also brought to the ECtHR by the aircraft company with reference to the respect for property rights in Article 1 of Protocol No. 1 ECHR.[224] Provided that there is no discretionary power for Member States under a relevant provision in Union law, the ECtHR stated in the main proceedings that Member States acting on behalf of Union legislation may be regarded as complying with the ECHR when the Union can be presumed to protect fundamental rights in an "equivalent" way as the ECHR.[225] The ECtHR further stated that violations of the ECHR under these circumstances only occur when the "[…] protection of [ECHR] rights was manifestly deficient".[226] It is important to observe that the presumption in *Bosphorus* thus apply only in certain situations.[227] For example, it follows from the criteria established by the ECtHR that the presumption would probably not be applicable in a situation such as the one described in the case of *N.S.* since Member States enjoy discretion in their implementation of Article 3(2) in the Dublin II Regulation.

In the light of these key factors, it is interesting to examining some of the main reasons behind the accession of the Union to the ECHR. When it comes to the Member States' implementation of Union law, it is suggested that it might be difficult for Member States to comply with Union law and the ECHR concurrently in cases where the CJEU and the ECtHR approach fundamental rights in different ways. [228] The accession to the ECHR is consequently seen as an opportunity to regulate the relationship between the two courts and the issue of different interpretations of fundamental rights.[229]

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[220] See C. Eckes p. 261-262. In order to clarify, Eckes uses *M.S.S.* as an example where the ECtHR had to deal with Union legislation, although the ECtHR refrained from ruling on the legitimacy of the rules in the Dublin II Regulation.
[221] C. Eckes pp. 261-262.
[222] *Bosphorus Airways v Ireland*, Appl. No. 45036/98, judgement of the 30 June 2005 98 (*Bosphorus*). For example noted by D. Chalmers and others p. 259; Paul Craig, *"EU Administrative Law"*, Oxford Scholarship Online, 2012, p. 456: C. Eckes pp. 260-261 and T. Lock p. 377.
[223] See C-84/95 *Bosphours*, judgement of the 30 July 1996.
[224] See case in n. 220 above. See also A. O'Neill p. 393.
[225] *Bosphorus* para 154-155. See also C. Eckes p. 261 and T. Lock p. 378.
[226] *Bosphorus* para. 156.
[227] Cathryn Costello, *"The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe",* Human Rights Law Review, Vol. 6, No. 1, 2006, pp. 87-130, pp. 107-108.
[228] A. O'Neill pp. 390-391.
[229] S. Douglas-Scott pp. 658-659: T. Lock p. 381.

Moreover, concerns for fundamental rights protection has increased in consistency with the developments of the competences of the Union.[230] Fundamental rights will therefore be protected more effectively since the Union will be required to respect the rights in the ECHR.[231] Similar to other parties of the ECHR, actions by the institutions of the Union, including judgements from the CJEU, will be subjected to the jurisdiction of the ECtHR.[232] In this respect, it seems relevant to briefly explore whether the ECtHR may be presumed to uphold its assumption that the Union protects fundamental rights in an equivalent way as the ECHR subsequent to the accession.[233] Without denying potential consequences, scholars appear to be more or less of the belief that the ECtHR would be obliged to leave the *Bosphorus* presumption behind.[234] As to the issues with the scope of application of the presumption, Eckes puts forward that the accession of the Union essentially will urge the ECtHR to determine whether the CJEU has delivered judgements in conformity with the ECHR in each specific case.[235] Lock also recognises that the scope of the presumption is limited and the maintenance of the presumption would therefore lead the ECtHR to exclude many cases concerning Union law from scrutiny.[236] With regard to the concept of "equivalent" protection, it is further suggested that it would not be appropriate to assess compliance with the ECHR of the Union and the other parties to the ECHR on different premises.[237]

With the exception to the comments on the *Bosphorus* ruling above, further discussion on potential complications and questions arising from the future accession, including the autonomy of the Union's legal order, are excluded from this examination. There is however reason to expect that the general debate on the accession will be intensified in the near future since it has been reported that the members of the Council of Europe and the Union recently concluded the final draft of the accession agreement.[238]

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[230] D. Chalmers and others p. 259.
[231] *Ibid.* See also T. Lock in *"Walking on a tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order"*, Common Market Law Review, Vol. 48, No. 4, 2011, pp. 1025-1054, pp. 1027-1028.
[232] S. Douglas-Scott pp. 658-659: T. Lock p. s. 395. See also T. Lock n. 213 above, p. 1278.
[233] This arguably concerns both the scope and meaning of the presumption. For a detailed examination of the scope and meaning, see C. Costello n. 226 above, pp. 96-107.
[234] Whereas S. Douglas-Scott recognises that the question cannot be answered for sure at this stage, C. Eckes and T. Lock seem to adopt a more convincing approach. See S. Douglas-Scott pp. 667-668: C. Eckes pp. 279- 280; T. Lock n. 216 above, pp. 395-396.
[235] C. Eckes p. 280.
[236] T. Lock p. 395.
[237] T. Lock p. 395.
[238] See "*Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention of Human Rights – Final Report to the CDDH"*, Strasbourg, 5 April 2013, Council of Europe, available at:
http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008_final_report_EN.pdf
See also press release DC041(2013), *"Milestone reached in negotiations on accession of EU to the European Convention on Human Rights"*, available at :

5 Conclusions

The purpose of this essay is to examine the responsibilities of the Member States in the European Union from a fundamental rights perspective in relation to the Dublin II Regulation. For this reason, the obligation for Member States to assess other Member States' compliance with fundamental rights and the obligation of all Member States to respect fundamental rights in the Union have been examined. While the previous chapters dealt with the responsibilities of Member States in more detail, the purpose of this final section is to present general conclusions regarding these two main obligations.

When it comes to the obligation for Member States to assess other Member States' compliance with fundamental rights, it is clear that the CJEU recognised the presence of such an obligation under the Dublin II Regulation for the first time in the case of *N.S.* With inspiration form the ECtHR, the CJEU found that sending Member States are not allowed to rely on a conclusive presumption of safety when they transfer asylum seekers to the responsible Member State. However, this obligation has only been interpreted in relation to the prohibition of torture and ill-treatment in Article 4 of the Charter. Until the CJEU decides otherwise, this obligation is thus limited to duty of examining whether there is a substantial risk that the responsible Member State would treat an asylum seeker contrary to the rights in Article 4 of the Charter. If such a risk exists, the sending Member State is obliged to suspend the transfer of the asylum seeker to the responsible Member State.

Likewise, there is an obligation for all Member States to respect fundamental rights when they apply the rules in the Dublin II Regulation. Nevertheless, the objective to establish the impact of the Charter and specific rights in the Charter on Member States' responsibilities under the regulation becomes difficult due to several factors. Despite recent judgements from the CJEU, there are still remaining questions on the interpretation of the concept of implementing Union law in Article 51(1) of the Charter. Therefore, it might be difficult to establish whether the Charter is applicable to a certain situation in the first place. The review of the rights in the Charter is further challenged by the fact that there are currently limited numbers of judgements from the CJEU on how to interpret the scope and meaning of these rights. Even though the rule of interpretation in Article 52(3) in the Charter facilitate the examination of corresponding rights in the Charter, since it urges the interpretation to be guided by the case law from the ECtHR, the scope and content of the articles in the Charter will not be fully clear until they been subjected to interpretation of the CJEU. Further

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preliminary rulings from the CJEU is also important with respect to the issue of combining the effectiveness of the regulation and the enforcement of fundamental rights of asylum seekers in the Charter. Finally, whereas the effects of the accession of the Union to the ECHR may be difficult to predict in its entirety, there is reason to assume that there will be a more comprehensive review of the protection of fundamental rights within the Union. The responsibilities of Member States may therefore be enhanced in fields of Union law, including their responsibilities under the Dublin II Regulation.

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