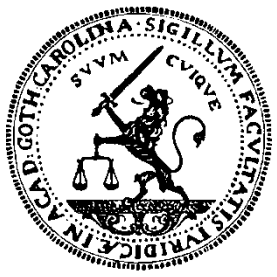

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Dublin IV – Making transfers (im)possible

An analysis of human rights concerns in the envisioned Dublin IV Regulation

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Vladislava Stoyanova

Semester of graduation: Period 1 Autumn Semester 2018

Contents

Summary

This thesis aims to analyse the prohibitions of transfers of asylum seekers in the Dublin System, and how compatible the Commission's Proposal for a Dublin IV Regulation is with human rights law.

The Dublin System is meant to allocate responsibility between Member States regarding asylum applications. After the responsible Member State has been decided according to certain criteria, the asylum seeker is meant to be transferred to a receiving Member State. However, the Dublin III Regulation has been struggling with inefficiency, due to its lengthy procedures and lack of procedural guarantees and safeguards.

The Dublin III Regulation has been criticised due its incompliance with human rights law. Transfers under the Dublin system were prohibited in several so called 'Dublin cases' by the European Court of Human Rights, as the living conditions and flawed asylum procedures in Greece and Italy violated Article 3 of the European Convention of Human Rights. The most notable cases are *M.S.S. v. Belgium and Greece* and *Tarakhel v. Switzerland,* which requires Member States to conduct individual assessments and offer individualised guarantees to asylum seekers that their right to *non-refoulement* will not be violated.

The requirements of individual assessments and guarantees in Dublin transfers is problematic for the EU, as the transfer system is based upon a presumption of that all EU Member States comply with human rights. Ergo, an individualised control should not be necessary. The reasoning is derived from the principle of mutual trust between EU Member States. The Court of Justice of the European Union has therefore been reluctant to prohibit Dublin transfers on human rights grounds. In the ruling *N.S. and M.E,* the Court limited the prohibition of transfers to cases where there are systemic flaws in the receiving Member State.

The European Commission lodged a Proposal for a Dublin IV Regulation in December 2016, aiming to reform the Dublin System and increase its efficiency. The Proposal does not make the Dublin System coherent with human rights law, and has been criticised by the European Parliament, UNHCR, ECRE and the EESC. In three different issues, there is a continued risk for *non-refoulement* violations according to Article 3 and 13 of the ECHR. Firstly, the prohibition of transfers remains limited to systemic flaws in the receiving Member State's asylum system. Secondly, the introduction of generalised inadmissibility checks based on safe country considerations risks similar violations. Thirdly, the withdrawal of procedural guarantees and safeguards for unaccompanied violates both the right to *non-refoulement* and the principle of the best interest of the child.

The European Parliament subsequently amended the Commission's Proposal. The Parliamentary amendment is, in contrast to the Commission's Proposal, largely coherent with human rights law. It remains to be seen whether the Dublin IV Regulation will be passed, and if so in what version. This thesis reaches the conclusion that the Commission's Proposal would make Dublin transfers impossible, as the proposal is incoherent with human rights law and risks continuous violations of Article 3 and 13 of the ECHR.

Sammanfattning

Denna uppsats syftar till att analysera förutsättningarna för att förbjuda förflyttningar av asylsökande inom det gällande Dublinsystemet, samt hur kompatibelt den europeiska kommissionens förslag för en Dublin IV Förordning är med mänskliga rättigheter.

Dublinsystemet har till syfte att fördela skyldigheten att hantera asylansökningar mellan medlemsstaterna inom EU till en ansvarig medlemsstat. Sedan en ansvarig medlemsstat har bestämts, ska den asylsökande förflyttas till den mottagande medlemsstaten. Dublin III Förordningen har problem med dess ineffektivitet till följd av utdragna procedurer och en avsaknad av garantier och rättsskydd för asylsökande.

Dublin III Förordningen har kritiserats på grund av dess bristande enlighet med mänskliga rättigheter. Europadomstolen har förbjudit förflyttningar inom Dublinsystemet i flera så kallade ’Dublinfall’. Detta då levnadsförhållanden och bristande asylprocedurer i Grekland och Italien stred mot artikel 3 och 13 EKMR. De framträdande fallen i Europadomstolens praxis är *M.S.S. v Belgium and Greece* och *Tarakhel v. Switzerland,* där Europadomstolen kräver att medlemsstaterna ska utföra individuella bedömningar och erbjuda individualiserade garantier till asylsökande att deras rätt till *non-refoulement* förblir okränkt.

Kraven på individuella bedömningar och garantier vid Dublinförflyttningar är problematiska för EU, eftersom förflyttningssystemet är baserat på presumtionen att samtliga medlemsstater agerar i enlighet med mänskliga rättigheter. Följaktligen borde individualiserade kontroller inte vara nödvändiga. Resonemanget kan spåras till principen om ömsesidigt förtroende mellan EU:s medlemsstater. EU-domstolen har därför varit skeptisk till att förbjuda Dublinförflyttningar till följd av mänskliga rättigheter. Vid avgörandet *N.S. and M.E* begränsade EU-domstolen

förbudet till de fall där det förekommer systematiska brister i den mottagande medlemsstaten.

Den Europeiska kommissionen lade fram ett förslag för en Dublin IV Förordning i december 2016, som syftade till att reformera Dublinsystemet och öka dess effektivitet. Förslaget bidrar inte till att göra Dublinsystemet enhetligt med mänskliga rättigheter, och har kritiserats av Europaparlamentet, UNHCR, ECRE och EESC. Vid tre olika frågor, föreligger en fortsatt risk för kränkningar av rätten till *non-refoulement* enligt artikel 3 och 13 EKMR. För det första, är förbud av Dublinförflyttningar fortsatt begränsad till fall där det förekommer systematiska brister i den mottagande medlemsstatens asylsystem. För det andra, introduceras en generaliserad inträdeskontroll som kan leda till avslag baserat på att den asylsökande färdats genom ett säkert tredje land. För det tredje, undandras procedurella garantier och rättsskydd för ensamkommande barn vilket kränker både rätten till *non-refoulement* och principen om barnets bästa.

Europaparlamentet har sedermera lagt ett ändringsförslag till kommissionens förslag. Ändringsförslaget är, till skillnad från kommissionens förslag, till stora delar förenligt med mänskliga rättigheter. Det återstår att se huruvida Dublin IV förordningen kommer antas och i vilken form. Denna uppsats når slutsatsen att kommissionens förslag skulle omöjliggöra Dublinförflyttningar, då förslaget är oförenligt med mänskliga rättigheter och riskerar fortsatta kränkningar av artikel 3 och 13 EKMR.

Preface

I would like to thank my supervisor Vladislava Stoyanova, for her brilliant analytic input to the thesis and pointing me to the right direction in the academic jungle of human rights law.

Thanks to professor M.I.A. Zieck at Amsterdam Law School that led the course in International Refugee Law which inspired me to write about the Dublin System from a human rights perspective.

My thanks to my dear co-workers at Zeijersborger & Co Advokatbyrå in Malmö, with whom I have discussed the asylum system and gained valuable insight. A special thanks to Anton Wahlström, for proofreading the thesis with a sharp eye, and to Kristian Holm, who has guided me through the linguistic, structural and pedagogical aspects of thesis. Furthermore, I would like to thank Peter Zeijersborger, for motivating me to dive into the field of asylum law.

My family deserves a warm thanks for their unconditional support. Thanks to my mother and father, for raising me to care about human rights. And thanks to my grandmother Margot, who kept asking how my thesis was going so many times that I lost count.

Lastly, my dear Emmi Nahi deserves a special thanks for her support and brilliance in political science, that has led to many interesting discussions and a deeper understanding of the European Union policy.

Abbreviations

1951 Refugee Convention	The 1951 convention relating to the status of refugees
1967 Additional Protocol	Protocol of 31 January 1967 relating to the status of refugees
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union *or* the Luxembourg court
CFREU	Charter of Fundamental Rights of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights *or* the Strasbourg court
ECRE	European Council on Refugees and Exiles
EESC	European Economic and Social Committee
EU	European Union
IGO	Inter-governmental organisation
NGO	Non-governmental organisation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Asylon is a word originating from ancient Greek times meaning 'inviolable' or 'free from seizure'. An *Asylon* was more specifically a sanctuary for a fugitive on the run from a malevolent pursuer.[1] One may only speculate on what destiny awaited the fugitive if the provider of the sanctuary withdrew the protection. Fast forwarding two and a half thousand years, *asylon* has become the English word asylum.

The original meaning of the ancient Greek term can be recognised in contemporary international law. Asylum is not only a legal term, but a human right protected by international law. The modern definition of asylum refers to 'protection granted by a state to an individual against persecution or harm done by another state, normally the individual's home state'.[2]

Art 14 of the Universal Declaration of Human Rights (Hereinafter UDHR) reads that everyone has the right to seek and to enjoy asylum from persecution. However promising this may sound, current international law understands the human right as the right to seek asylum, not to actually be granted an asylum. The enjoyment of asylum refers to the right to not be extradited once asylum has been granted.[3]

Following the second world war, the right to seek asylum was given a legal framework in the 1951 Convention Relating to the Status of Refugees (hereinafter the 1951 Refugee Convention) and subsequently the Protocol of 31 January 1967 relating to the status of refugees (hereinafter the1967

[1] Boeles et al., *European Migration Law,* p. 243.
[2] Boeles et al., *European Migration Law,* p. 243; G.S Goodwin-Gill and J. McAdam, *The Refugee in International Law,* pp. 355-358.
[3] Boeles et al., *European Migration Law,* p. 244.

Additional Protocol). A key right of the Refugee Convention is the Article 33 (1) right referred to as *non-refoulement.*[4] The principle provides an obligation that 'States are not allowed to return refugees to territories where there is a risk that their lives of freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion'. The reason this principle is described as a cornerstone of international law is that in the absence of an individual right to be granted an asylum, *non-refoulement* guarantees that refugee remains safely out of reach of a persecuting State as long as the refugee can prove that the fear of persecution remains well-founded.[5]

The development of the European Union (hereinafter the EU) project of 'ever closer union among the peoples of Europe', described as EU's own end destination or *telos*, has led to an internal liberalization for EU nationals. For third-country nationals seeking asylum in EU as their chosen *chora*, the end-point of the migrant's journey, the EU Common European Asylum System (hereinafter the CEAS) follows a contrasting exclusionary logic. This insider-outsider dichotomy of the EU forms the basis of the legal structure in EU migration law.[6]

Following an increasing influx of arrivals at the EU external borders, problems arose as the implementation of the CEAS legislation differed amongst the member states. The exceeding influx of refugees into the EU during the 2010s aggravated the weaknesses of the Dublin asylum system, by putting an increasing pressure on Member States. Importantly, the Dublin Regulation system of responsibility allocation amongst Member States suffered as it was not properly implemented in all Member States.[7]

[4] Boeles et al., *European Migration Law,* p. 244.
[5] Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A commentary.*
[6] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 4.
[7] COM 2016(270) 'European Commission Proposal for a Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international

The problem rose to its peak in 2015, when over one million third-country nationals migrated to the EU due to armed conflicts in Syria, Iraq, Afghanistan and poverty, according to the UNHCR. This represent a five-fold increase from 2014 were 216 000 third-country nationals migrated to the EU.[8] The European Commission reacted by putting forward reform proposals, explaining that the migratory and refugee crisis exposed significant structural weaknesses and shortcomings in the design and implementation of the European asylum system, and of the Dublin rules in particular. The Commission proceeded by stating that the current Dublin system was not designed to ensure a sustainable sharing of responsibility for applicants across the Union. This has led to situations where a limited number of individual Member States had to deal with the vast majority of asylum seekers arriving in the Union, putting the capacities of their asylum systems under strain and leading to some disregard of EU rules.[9]

The increasing movement of people to Europe fleeing war and persecution primarily from Middle Eastern States and authoritarian African States, referred to in European mass media as the 'refugee crisis', has impacted the Common European Asylum System of the EU. This had led to an increasing number of applications from asylum seekers submitted before the European Court of Human Rights (hereinafter the ECtHR), claiming human rights violations. In these cases, Article 3 of the European Convention on Human Rights (hereinafter the ECHR) is underlying the importance of protection. The provision protects asylum seekers from being subjected to torture or to inhuman or degrading treatment. The ECtHR interprets Article 3 as encompassing the right to both direct and indirect *non-refoulement*, meaning that the EU Member States may not expulse an asylum seeker to a State

protection lodged in one of the Member States by a third-country national or a stateless person (recast)', p. 2.
[8] UNHCR, Operational Portal, Refugee Situations, Mediterranean Situation 2015-2018, https://data2.unhcr.org/en/situations/mediterranean visited 20 Nov 2018.
[9] COM 2016 (270), p. 3.

where the individual faces a risk of torture or inhuman and degrading treatment.[10]

As a need for a reform of the inefficient Dublin III Regulation was evident, the drafting work began. After taking many turns, the EU Commission lodged its Proposal for a Dublin IV Regulation as a part of a major CEAS reform package in May 2016. The outspoken aim was to work towards a more sustainable approach to managing migration for those in need of international protection and end irregular movements, and most of all to increase the efficiency of the Dublin System.[11] It is here where this study starts, as I engage in the task of analysing what the EU Commission's proposal means.

1.2 Aim of the study

The study has the aim to analyse certain fundamental rights of asylum seekers subjected to Dublin transfers, and how compatible the Commission's Proposal for a Dublin IV Regulation is with these rights. The fundamental rights I focus on is the right to *non-refoulement* under Article 3 of the ECHR, together with the right to an effective remedy under Article 13 of the ECHR. In order to analyse the future legal implications that Dublin IV may impose upon asylum seekers, one must initially asses the current legal positions under the Dublin III regulation and thus offer an entry point into the forward-looking analysis.

However, the main focus of the analysis is to assess what impact the Dublin IV Regulation proposal may have on prohibiting Dublin transfers based on the human rights law requirements set up by the ECtHR. I therefore have to describe what Dublin transfers are, under which preconditions they are prohibited and what human rights law has to say on the topic before I start analysing the Dublin IV Regulation proposal.

[10] Jacob, White, Ovey, *The European Convention of Human Rights,* pp. 194.
[11] COM 2016(270), pp 2.

Firstly, the analysis therefore aims to examine the development of the ECtHR and Court of Justice of the European Union (hereinafter the CJEU) case law regarding the right to *non-refoulement* for asylum seekers subjected to transfers in the Dublin System. This requires an analysis of the jurisprudence developed by the Strasbourg court, and how the Luxembourg court has reacted to it. Hence, the intention is to assess the standing legal position of asylum seekers from both an EU law and a human rights law perspective, in order to clarify the discrepancy between the CJEU and the ECtHR case law.

Secondly, the analysis aims to assess what consequences the amendments in the Dublin IV Regulation proposal may have on prohibiting Dublin transfers on the ground of *non-refoulement.* the legal position of future asylum seekers. By critically scrutinizing the proposed Dublin IV regulation amendments from a forward-looking human rights perspective, I will provide clarity on the proposal's coherency with human rights law.

1.3 Research question

In order to fulfil the aim of the study, I have formulated three research questions. It is by answering the research questions through a legal analysis that the aim of the study is completed.

Question 1 and 2 focuses on how human rights law can have an impact on the Dublin system. To further elaborate, question 1 focuses on the development of EU law propelled by the case law of the ECtHR and the intricate relationship between the CJEU and the ECtHR. Question 2 discusses whether the Dublin III Regulation, including the CJEU case law surrounding Dublin transfers, is coherent with the human rights law requirements set up by the ECtHR. The final questions 3 raises a forward-looking perspective to analyse the proposed Dublin IV Regulation

amendments set forth by the EU Commission and its compatibility with human rights law.

1. How does the principle of *non-refoulement* prohibit Dublin transfers pursuant to the CJEU and ECtHR case law?

2. Is the EU law regulating preconditions for prohibiting Dublin transfers in compliance with human rights law, in particular the ECtHR case law?

3. What changes does Dublin IV envision regarding prohibitions of Dublin transfers, and are these changes compatible with human rights law, especially the principle of *non-refoulement*?

1.4 Delimitations

The Dublin System is highly complex and covers many different topics. I have limited myself to analysing the prohibition of transfers under the Dublin System on the grounds of human rights law, especially the right to *non-refoulement*. A too wide approach to analysing the Dublin III Regulation would be fruitless, as it would only scratch the surface of the issues. For that reason, I have chosen a topic that is narrow enough to make an in-depth analysis possible.

The Asylum Procedures Directive is also being reformed into a regulation as a part of the CEAS reform package proposed by the Commission. I have entered the Asylum Procedures Directives on a few occasions, as the Dublin Regulation provisions references there. Aside from those references, I delimit this study from the Asylum Procedures Directive. It is an interesting part of the CEAS and the Commissions reform proposal of the Asylum Procedures Directive definitely deserves an analysis of its own, however it falls outside of the purposes of this study.

As far as CJEU and ECtHR case law is concerned, I have chosen to place focus on the most relevant case law. However, I have briefly summarised the development of case law during the Dublin Regulation, as it demonstrates a pattern of how the CJEU and ECtHR interact. It is also necessary to look backwards in order create a deeper understanding of the current position of the legal order. Even though I have aimed to spend more focus on the most relevant cases, I further aim to give the case law development a proportional amount of attention.

The EU Commission's Dublin IV Proposal is a substantial piece of legislative work, as it reforms the entire Dublin System. In addition, the European Parliament's proposed amendments to the Commission's proposal suggest a different reform of the Dublin System. I have therefore narrowed my analysis to focus on three procedural issues identified in the Dublin IV Proposal that risk violating the fundamental rights of asylum seekers. These three issues are firstly the requisite *systemic flaws* in Article 3(2)(2), secondly the introduction of an inadmissibility check in Article 3(3), and thirdly the withdrawal of procedural rights for unaccompanied minors in Article 8(2) and Article 10(5).

Naturally, one may argue that the entire system indirectly risks violating fundamental rights due to its inefficiency. Although that is a valid point, such an analysis would require a substantive study on its own. I have chosen to focus on how asylum seekers directly can be affected by the Dublin IV Regulation proposal.

A number of EU institutions, governments, inter-governmental organisations (hereinafter IGOs) and non-governmental organisations (hereinafter NGOs) have published reports, opinions and comments regarding the EU Commission's Proposal for a Dublin IV Regulation. I had to draw a line as to which voices to include and which not to include. My choices are made upon the basis of which organisations have the most credibility according to human rights law doctrine and practice.

1.5 Material and previous research

The material used for the research in this study is of varying character as it consists of everything from legislation, case law, academic literature and articles, proposals from EU institutions as well as comments and opinions from IGOs and NGOs. The material is chosen on the basis of the legal dogmatic research method, in order to provide relevant and credible sources for the study.

The research material involves EU primary and secondary law legislation, especially the Charter of Fundamental Rights of the EU and, naturally, the Dublin III Regulation. Both the Treaty of the European Union (hereinafter the TEU) and the Treaty on the Functioning of The European Union (hereinafter the TFEU) is referred to on occasions, so are the Asylum Procedures Directive and the Reception Conditions Directive.

In the focus stands the EU Commission's Proposal for a Dublin IV Regulation, as well as the European Parliament's Report that amends the Commission's proposal. The European Parliament's Draft Report has also been the subject of research, in order to gain insight of the legislative process. The European Economic and Social Committee's Opinion on the Dublin IV Regulation has also been included in the research, as the EESC raises several concerns relevant to the subject of this study.

The CJEU case law regarding Dublin transfers has been used as material for the research. The cases chosen represents the most relevant and quoted ones in the legal doctrine, especially *NS/ME* and *MA.* I also include the Opinion 2/2013 of the CJEU, which provides insight into how the CJEU regards the EU accession to the ECHR and the CJEU's relationship to the ECtHR.

As for the ECtHR, the most important cases for the purposes of answering the research questions of this study are *M.S.S. v Belgium and Greece* and

Tarakhel v Switzerland. The cases represent the development of the ECtHR case law regarding Dublin transfers, and has an impact on the Member State application of EU law.

The United Nation's High Commissioner of Refugees (hereinafter the UNHCR) Comments on the Dublin IV Regulation has been included in the research material since the UNHCR is a globally respected IGO in the field of international refugee law and human rights law. Its comments raises several vital human rights concerns regarding the prohibition of transfers during the Dublin system.

The European Council on Refugees and Exiles (Hereinafter ECRE) is a highly respected NGO in the field of international refugee law, as a pan-European Alliance of 101 NGOs in 41 countries protecting and advancing the rights of refuges.[12] Its comments on the Dublin IV Regulation raises the collective concern of European NGOs and points out several flaws of the Commission's proposal for a Dublin IV Regulation.

The case law from both the CJEU and ECtHR is analysed in the legal doctrine. Amongst the human rights law researchers, Cathryn Costello, associate professor in International Law and Refugee law at Oxford University, and Violeta Moreno-Lax, associate professor at Queens Mary University are the most referenced authors in this study, as their work provides detailed analysis of the EU law compatibility with human rights. Especially *The Human Rights of Migrants and Refugees in European Law* by Cathryn Costello offers an interesting analysis of the Dublin System from a human rights law perspective. However, the works of a number of other prominent researchers are also referenced to, such as Goodwin-McGill, Hathaway, Boeles, Peers, Zimmerman and Jacobs-White-Ovey. Substantial previous research has thus been done in the field of Dublin transfers through a human rights perspective. As the Commission's proposal

[12] ECRE, Mission Statement, https://www.ecre.org/mission-statement/ visited 14 Dec 2018.

for a Dublin IV Regulation and the European Parliament's Report amending the Commission's proposal are new and the legislator process still ongoing, the research on these legal propositions are limited. Therefore, there is a relevance and a need for research on these propositions from a human rights law perspective.

1.6 Research method

For the purposes of research and analysis I apply the legal dogmatic research method. I analyse existing legal norms, based on the accepted methods of interpretation in EU law and human rights law, such as the Vienna Convention Law of Treaties Article 31-33. That is, the text of the norms, the purpose, the objective, and how courts analysed the norms.

Human rights law is in the core of the thesis. The analysis of norms is hence made in the light of human rights law. The objects of the law are human beings that are entitled to human rights law. The human rights law perspective is incorporated by using a number of relevant sources in the human rights law, such as multilateral conventions, the ECHR and the ECtHR, the UNHCR, ECRE and the academic doctrine of prominent researchers in the particular field.

1.7 Outline

The outline of this study follows a largely chronological pattern, in a pedagogical purpose. This study does not have a separated chapter that only contains my own analysis, as this structure would prevent the fluency of the study. Instead, the analysis is incorporated in chapter 3 and chapter 4. The differentiation between my analysis and the wordings of others is illustrated by the lack of an ending footnote.

Chapter 2 addresses how transfers of asylum seekers functions under the Dublin III Regulation. The chapter starts with a summary of the CEAS, to provide the framework for which the Dublin III Regulation operates in. In a similar manner, I proceed by explaining the Dublin III Regulation and how the allocation of responsibility works amongst the Member States, as the practice determines transferring and receiving Member State. Thereafter, I address the preconditions for prohibiting Dublin transfers.

The following Chapter 3 analyses the impact of fundamental rights on the prohibition of Dublin transfers. After an explanation of the interrelation between the CFREU, the ECHR and in particular Article 3 of the ECHR I approach the case law of the ECtHR. I analyse how the ECtHR case law has gone from approving the Dublin system, to applying pressure on and eventually disapproving the Dublin system. I then turn my analysis towards the CJEU, in order to analyse how the CJEU responded to the Strasbourg case law. Lastly, I turn back to the ECtHR to asses how the Court in its latest and most important ruling increasingly takes its stand on what requirements that are expected from the Member States operating in the Dublin system.

In Chapter 4, I analyse certain provisions in the EU Commission's Proposal for a Dublin IV Regulation that has an impact on the prohibition of Dublin transfers. The three issues that I have selected are analysed separately in section 4.2., 4.3. and 4.4. In each section, I provide how the European Parliament Report amends the Commission's Proposal. In addition, I raise criticism of the UNHCR, ECRE and EESC regarding the Commission's Proposal. In the end of each section, I incorporate human rights doctrine into the analysis and draw my own conclusions regarding the issue.

The final chapter 5 summarises conclusions that aims to answer the three research questions. Section 5.1. answers research question 1, section 5.2. answers research question 2 and section 5.3. answers research question 3. In the concluding section 5.4., I raise some end remarks through an outlook on

the future of the Dublin system and personal opinions on the topic of prohibiting Dublin transfers on fundamental rights grounds.

2 Transfers under the Dublin III Regulation

2.1 The Common European Asylum System

Initially, the research question regarding internal transfer measures under the Dublin system has to be positioned in its legal context. I therefore commence by briefly describing the evolvement of the European asylum law to draw up the legal framework in which the internal transfer measures under the Dublin III regulation operates in.

The origin of the Common European Asylum System can be found in the Schengen Agreement of 1985. As complementary measures to setting up a borderless Single Market area, the Member States laid down common rules to identify responsibility for processing asylum applications. A first objective was to address the phenomenon of 'refugees in orbit', by providing a single responsible Member State that is to examine the asylum seekers application. Member States could no longer refer asylum seekers from one Member State to another without any of these acknowledging responsibility, hence placing the asylum seeker in an orbit.[13]

Another outspoken objective was to avoid what was portrayed as abuse of the asylum system through 'asylum shopping'. Regardless of where an asylum seeker lodges an applicant, only one contracting party would be responsible for processing that application. The elimination of the asylum seekers free choice of where to lodge an application in the Schengen

[13] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31. pp. 2.

Contracting Parties was based on the assumption that all State Parties offered similar levels of protection.[14]

The Treaty of Amsterdam was signed in 1997 and entered into force in 1999.[15] The Amsterdam Treaty extended the legislative competence of the EU in a wide range of social policy areas, civil and criminal justice and immigration and asylum.[16] This allowed the EU to vastly proceed its development of binding legal structures regulating the freedom of movement, one of the 'four freedoms' upon which the EU was founded.[17]

Through the resulting Treaty establishing the European Community (Hereinafter the TEC) Article 62-63, the Member States provided the EU with the competence and thus a legal basis to adopt binding measures in the field of asylum.[18] In the following years of 2001-2005 a series of legal instruments such as directives and regulations were adopted. This was the legislation meant to fulfil the objective from the Amsterdam Treaty. The European Union was to be an area of freedom, security and justice in which freedom of movement on the one hand was assured, but in conjunction with appropriate measures with respect to external border controls, asylum, immigration and crime prevention.[19]

The CEAS represents a further development of the European migration policy. The outspoken aim of the European Commission in 2007 was to remove disparities between Member States by replacing minimum standards with a set of common standards for all the EU Member States.[20] The CEAS can be described as a legislative framework established by the EU that sets a

[14] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31. pp. 2.
[15] Treaty of Amsterdam Amending the Treaty of the European Union, The Treaties Establishing the European Communities and Certain Related Acts, 2nd Oct 1997.
[16] Clayton, *Immigration and Asylum Law,* p. 101.
[17] Clayton, *Immigration and Asylum Law,* p. 104.
[18] Hailbronner (ed.), Hailbronner, *EU Immigration and Asylum Law – Commentary,* p. 1; Boeles et al., *European Migration Law,* p. 245.
[19] Hailbronner (ed.), Hailbronner, *EU Immigration and Asylum Law – Commentary,* p. 3.
[20] Hailbronner (ed.), Hailbronner, *EU Immigration and Asylum Law – Commentary,* p. 6.

common EU standard in the field of international protection, by intending to harmonise the interpretation and application of asylum law among EU member states.[21] In 2009 the European Commission submitted a series of directives and regulations that was subsequently passed. A recast for the Procedures Directive (2013/32 EU), a recast for the Qualification Directive (2011/95 EU), a recast of the Directive on reception of asylum seekers (2013/33 EU), a recast of the Dublin Regulation (No 604/2013) and a regulation establishing the European Asylum Support Office (No 439/2010) was all passed in the following years and together they form the CEAS.[22]

The EU project transformed migration between Member States into liberalized mobility, following a logic of internal liberalization as to open up a free internal market. This freedom however was reserved for EU citizens. In contrast to this internal freedom of movement for persons, the treatment of third-country nationals followed an exclusionary logic. Thus, an insider-outsider dichotomy was drawn up between migrants between EU Member States, and migrants from non-EU States.[23]

The establishment of the CEAS can thus be explained as a consequence of this abolition of internal frontiers in the EU. More specifically, the purpose was to prevent secondary movement of asylum-seekers within the EU. In the absence of a harmonised asylum system, asylum seekers would freely travel across the EU and choose to apply for asylum in any EU Member State based on personal, political or economic reasons. This issue of secondary movement was considered a problem by the EU Member States in the 1990s. The member states deemed it necessary to take action by both strengthening external border controls as well as setting up a system of cooperation in the field of asylum and immigration from third-country nationals.[24]

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[21] European Asylum Support Office, *An Introduction to the Common European Asylum System for Courts and Tribunals, A Judicial Analysis*. p. 13.
[22] Hailbronner (ed.), Hailbronner, *EU Immigration and Asylum Law – Commentary,* pp. 6.
[23] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 4.
[24] European Asylum Support Office, *An Introduction to the Common European Asylum System for Courts and Tribunals, A Judicial Analysis*. p. 13.

Importantly, the CEAS provides the right to have an asylum claim examined according to a minimum procedural standard. However, full harmonisation has not as of yet been achieved. Most instruments hands considerable discretion for Member States as long as the minimum procedural threshold is met.[25]

Through Article 78 of TFEU, as introduced by the 2009 Lisbon Treaty, the EU was given the competence to further harmonise asylum law. However, an agreement on a fully integrated asylum system has not yet been agreed upon.[26] It remains to be seen whether the European Commission's attempt to reform the Dublin IV regulation will be passed, however it would take a step towards harmonisation of the CEAS.[27]

Following the massive influx of refugees to the EU in 2014-2016, referred to the European Commission as 'large-scale uncontrolled arrivals', the CEAS was put under excessive strain leading to an increasing disregard of the EU laws. In a moment of self-criticism the European Commission admitted that the situation exposed a fundamental weakness in the CEAS causing inefficiency and unsustainable sharing of responsibility between the Member States.[28] The European Commission's proposal is analysed in Chapter 5.

Regardless of how flawed the current regime is, firstly the existing Dublin III Regulation must be examined, in order to comprehend today's legal position of asylum seekers subjected to internal transfers between EU Member States.

[25] Boeles et al., *European Migration Law*, p. 246.
[26] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.
[27] European Commission COM(2016) 270, p. 2.
[28] European Commission COM(2016) 270, p. 2.

2.2 Dublin III System

This chapter serves to provide an overview of the Dublin System in the post-Lisbon era. The Dublin system establishes inter-state cooperation amongst Member States for transferring asylum seekers between Member States. The system is based on automaticity and mutual trust amongst the Member States. Therefore, the Dublin system assumes that all Member States comply with the requirements of the EU Charter, the 1951 Refugee Convention and the ECHR. [29]

As Karageorgiou points out, the form of inter-state cooperation based on the presumption of human rights coherent treatment was challenged by the CJEU in the joint case of *N.S. and M.E.* The CJEU based its reasoning on the groundbreaking ECtHR ruling *M.S.S. v. Belgium and Greece.* In its ruling, the ECtHR did not question the rules of the Dublin III Regulation, but rather the EU law cannot absolve a state from its obligations under the ECHR.[30] Prior to analysing the case law of Strasbourg and Luxembourg, I thereby proceed with describing the relevant rules of the Dublin III Regulation that concerns transfers of asylum seekers within the Dublin System.

2.2.1 General remarks

The legal basis of the Dublin Regulation is found in EU primary law. Article 78(1) of the TFEU requires that the EU shall develop a 'common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the 1951 Refugee

[29] Karageorgiou, *Rethinking Solidarity in European Asylum Law*, p. 125, 154.
[30] Karageorgiou, *Rethinking Solidarity in European Asylum Law*, p. 154, 158; See chapter 3.4.1.

Convention and the 1967 Additional Protocol, as well as and other relevant treaties.'[31]

According to Article 78(2)(e), the EU shall adopt measures for a CEAS comprising criteria and mechanisms for determining which Member State is responsible for considering an application of asylum or subsidiary protection. It is upon this primary law premise that the Dublin Regulation is based. Recital 5 in the Dublin Regulation states that the main objective of the Dublin System is to guarantee effective access to the procedures for granting international protection. This responsibility-allocation system was considered a compensatory measure to the abolition of controls on persons at the common EU borders.[32]

The Dublin Regulation addresses the question of responsibility-allocation between Member States for examining applications for international protection by third-country nationals or stateless persons.[33] It is described as an essential part or even a cornerstone in the building of the CEAS.[34] Its nickname the Dublin Regulation is derived from the 1990 Dublin Convention (entered into force 1997), which was followed by the Dublin II Regulation (EC) No 343/2003, and the Dublin III (EU) Regulation No 604/2013.[35]

The allocation of responsibility is shared amongst the Member States of the EU, Norway, Iceland, Switzerland, Lichtenstein and Iceland. Denmark has a

[31] Hailbronner (ed), Hruschka, Maiani. *EU Immigration and Asylum Law – Commentary*, p. 1486.
[32] Hailbronner (ed), Hruschka, Maiani. *EU Immigration and Asylum Law – Commentary*, p. 1486.
[33] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
[34] Hailbronner (ed.), Hermann, *EU Immigration and Asylum Law – Commentary*, p. 1370.
[35] Hailbronner (ed.), Hruschka, Maiani, *EU Immigration and Asylum Law – Commentary*, p. 1486 (2016).

separate agreement with the EU that entered into force in 2006.[36] The United Kingdom and Ireland also has specific opt-out agreements with the EU.[37] The concept behind the Dublin Regulation is to avoid an 'in orbit phenomenon' were refugees move between the European countries, by requiring that only one State have exclusive responsibility to examine said refugee's asylum application.[38]

2.2.2 Allocation of responsibility

Article 3(1) Dublin Regulation establishes a clearly defined right for an asylum seeker (third-country national or stateless person) to have an application for international protection examined by an EU Member State, by imposing a corresponding obligation upon the Member State to examine said application.[39] Furthermore, Article 3(1) sets forth the principle of single Member State responsibility. The application for international protection shall be examined by one single Member State. The allocation of the single responsible Member State is decided by the criteria set out in Chapter III of the Dublin Regulation.[40]

Articles 7-15 in Chapter III of the Dublin III Regulation lays down the hierarchy for criteria, which operates as a determinative checklist were the first listed provision that matches the applicant's factual situation points out the responsible Member State. Hence the criteria for determining the responsible Member States shall be applied in the order set out in Chapter III, according to Article 7(1). The allocation criteria can be divided into three categories; guarantees for minors and families (Article 8-11),

[36] Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, 29 June 2005.
[37]Hailbronner (ed.), Thym, *EU Immigration and Asylum Law – Commentary*, p. 274.
[38] Hailbronner (ed.), Hermann, *EU Immigration and Asylum Law – Commentary*, p. 1371.
[39] Boeles, *European Migration Law*, p. 258; Peers et al. (ed.), *EU Immigration and Asylum Law (text and commentary: Second Revised Edition – Volume 3: EU Asylum Law*, p. 351.
[40] Boeles, *European Migration Law*, p. 258.

facilitated legal entry (Article 12 and 14) and illegal entry (Article 13). In the case that none of the criteria matches the applicant's factual situation, Article 3(2) subparagraph 3 provides a residual rule stating that the first Member State in which the application was lodged is responsible, if the transfer to any other designated Member State cannot be made.[41]

Since the allocation criteria for determining the responsible Member State are compulsory obligations, the individual applicant is deprived of his or her liberty to freely choose which Member State to lodge an asylum application in. This is not a coincidence. On the contrary, the principle stating that an asylum application could only be filed in one of the Member States serves to prevent what is referred to as the phenomenon of 'asylum shopping'. This informal term is defined by the European Commission as a situation where a third-country national applies for international protection in more than one Member States, despite already having received international protection from another Member State.[42]

Chapter V of the Dublin Regulation provides the obligations of Member States to execute a decision made based on the responsibility allocation criteria. These procedural and administrative measures are referred to as *take charge* and *take back* requests, aiming to transfer the applicant to the responsible Member State, see Article 18-25. As described in Article 18(1), take charge means that the Member State takes over the responsibility of an asylum applicant who lodged an application in another Member State. Correspondingly, a Member State is obliged to take back an applicant who previously lodged an asylum application in this Member State but who e.g. is irregularly on the territory of another Member State.[43]

[41] Boeles, *European Migration Law*, pp. 258; See chapter 2.2.3.
[42] Boeles, *European Migration Law*, p. 33, 265; European Commission, SEC(2008) 2029/2 Policy Plan on Asylum, p. 9.
[43] Hailbronner (ed.), Hruschka/Maiani, *EU Immigration and Asylum Law – A Commentary*, p. 1542.

Despite the take charge or take back obligations, there is no enforcement mechanism to actually force a Member State to cooperate. This results in that a Member State can refuse another Member State's take charge or take back requests without consequences.[44] The lack of enforcement mechanisms rendered the Dublin system inefficient, since the core obligation arising from the Dublin III Regulation is that the responsible Member States must take back asylum seekers and process the asylum claims.[45] The allocation criteria are in the vast majority of cases ignored by Member States to the extent that they are criticised as 'unworkable and dysfunctional', inevitably leading to that responsibility ultimately lies with the Member State were the application was first filed.[46]

If applied correctly, the impact of the transfers based on the responsibility allocation criteria leads to a shifting of responsibility away from northern and western Member States and toward the southern and eastern Member States. Due to economic differences between the Member States, the south and eastern Member States may face difficulties with meeting even the basic EU law and human rights law obligations.[47] The issue is clearly illustrated by Greece's difficulties of conforming to the EU minimum standard, following warnings from the UNHCR in April 2008 that EU Member States should suspend transfers back to Greece. [48] Following further complaints from not only NGOs, but also the European Parliament and even the starting of infringement proceedings by the European Commission, the Greek disregard of human rights finally caught the attention of the ECtHR.[49]

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[44] Hailbronner (ed.), Hruschka/Maiani, *EU Immigration and Asylum Law – A Commentary*, p. 1542.
[45] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 255.
[46] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 256; European Parliament, PE 410.690. Maiani, F, Vevstad, V. 'Reflection Note on the Evaluation of the Dublin System and the Dublin III Proposal'.

[47] Peers et al., *EU immigration and asylum law (text and commentary: Second Revised Edition – Volume 3: EU Asylum Law,* p. 347; ECtHR app. no. 30696/09 *M.S.S. v. Belgium and Greece,* app. no. 16643/09*;* CJEU Case C-411/10 *NS*, Case C-493/10 *ME*, Case C-4/11 *Puid*.
[48] UNHCR, *Position on the Return of Asylum-Seekers to Greece under the 'Dublin Regulation'* (UNHR 15 15 April 2008).
[49] Costello, *The Human Rights of Migrants and Refugees in European Law,* pp. 255; ECtHR app. no. 32733/08 *KRS v United Kingdom;* See chapter 3.3.

2.2.3 Preconditions for Dublin transfers

The Dublin system is based upon a number of premises declared in the Preamble Recital 3. In this recital, a seemingly presumptuous statement is made; all Member States are considered as safe countries for third-country nationals. Since the EU agreed at the 1999 Tampere summit to work towards establishing the CEAS based on the full and inclusive application of the Refugee Conventions, asylum applicants are supposedly assured that the Member States will not send back an applicant to persecution, i.e. maintaining the principle of *non-refoulement.* This has been interpreted as that asylum applicants will be granted "appropriate protection according to internationally agreed standards".[50] The Preamble Recital 3 is considered to set an assumption of mutual trusts between Member States regarding compliance with human rights standards.[51]

Article 3(2) subparagraph 2 was introduced in the Dublin III regulation as a codification of the CJEU case law developed under the Dublin II regulation, influenced by the rulings of the ECtHR.[52] The Article provides a solution for cases when it is "impossible to transfer an applicant" to the designated Member State according to the responsibility-allocation criteria due to human rights violations in said Member State. A threshold is set up regarding what may be considered a human rights violation that renders the transfer impossible. The Article states that there must be substantial grounds for believing that there are systemic flaws in a Member State's asylum procedure. If the conditions are met, the determining Member State shall continue to examine the allocation criteria in search of another Member State. As a last resort, the determining Member State have to apply Art 3(2) subparagraph 3 and thus itself become the responsible Member State.

[50] Boeles, *European Migration Law,* p. 260.
[51] Peers et al., *EU immigration and asylum law (text and commentary: Second Revised Edition – Volume 3: EU Asylum Law,* p. 352.
[52] Peers et al., *EU immigration and asylum law (text and commentary: Second Revised Edition – Volume 3: EU Asylum Law* p. 352; CJEU Case C-411/10 *NS,* Case C-493/10 *ME,* Case C-4/11 *Puid.*

2.2.4 Inefficiency of the Dublin III Regulation

Under the Dublin III Regulation an applicant may have to wait up to 10 months in the case of tack back requests and 11 months in the case of take charge request, just to be assigned a responsible Member State. That means almost a year of waiting before the responsible Member State starts to examine the asylum seeker's claim for international protection. This undermines the Dublin System's aim to ensure swift access to the asylum procedure.[53]

The total number of take charge and take back request in 2014 was 84 586, 13 % of the total asylum application made in the EU. Hence, a substantial number of the asylum seekers are deemed to a Dublin transfer according to the Member State. Out of all requests, 33 % were rejected by the receiving Member State. The rejection could be based on fundamental rights considerations, or simply a political unwillingness to accept a transfer. However, of the remaining 66 % that is accepted by the receiving Member State, only a quarter actually result in a physical transfer. The Commission explains that an important reason behind the low rate of transfer is that the correspondingly high rate of absconding during the Dublin procedures. This meaning that the asylum seeker departs in a sudden manner. As the numbers illustrate, implementation of transfers under the Dublin III Regulation is rendered ineffective leading to significant shortcomings of the Dublin system.[54]

To illustrate the inefficiency of the Dublin System, one may look at the crisis situation that emerged in Greece and Italy during 2015, which forced the European Council to take drastic emergency measures. In response to the crisis situation in Greece and Italy following large-scale arrivals of asylum seekers, the European Council adopted two temporary and ad hoc

[53] COM 2016(270), p. 9.
[54] COM 2016(270), p. 3, pp. 10.

relocation decisions in September 2015. The relocation decisions were an emergency measure to relieve some of the burden the responsibility of Greece and Italy, by transferring certain asylum seekers to other Member States and thus also relocating the responsibility of examining their asylum application.[55]

The relocation decision by the European Council on September 14th 2015 was describes as a response so an emergency situation characterised by a sudden inflow of nationals from third-countries.[56] The provisional measures applied by the European Council was made in order to better cope with the arising emergency situation.[57] The measures including the transfer of 40 000 asylum applicants from Italy and Greece, to other EU Member States.[58] Merely one week later, another relocation decision was made on the same grounds, transferring 120 000 asylum applicants from Italy and Greece.[59]

[55] COM 2016(270) p. 5.
[56] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Recital 1.
[57] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Article 1.
[58] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Article 4.
[59] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Article 4.

3 Impact of Fundamental rights

3.1 The EU Charter and the European Convention on Human Rights

The Charter of the Fundamental Rights of the European Union (Hereinafter the CFREU) entered into force in 2009 by the Lisbon Treaty, leading to an essential enrichment of the EU fundamental rights paradigm. The CFREU has since been the primary binding source on rights freedoms and principles for all situations were EU law is applicable. The TEU Article 6(1) recognises that the rights freedoms and principles set out in the CFREU shall be given the same legal value as the TEU and the TFEU. The CFREU is applicable whenever a situation falls within the scope of EU law and its provisions must be abided with by the Member States.[60]

The CFREU draws inspiration from the ECHR. According to Article 53(3) the meaning and scope of rights in the Charter that correspond to rights guaranteed by the ECHR, shall be the same as those laid down by the ECHR. However, the EU law is not prevented from providing more extensive protection.[61] This is illustrated in CFREU Article 4 which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The article reflects what is stated in Art 3 of the ECHR, which has the exact same wording.

The European Court of Human Rights ECtHR exercises indirect jurisdiction over the EU through the Member States in individual cases when the Member States implement EU law. The collective responsibility of the Member States for human rights violations rooted in EU law have been made apparent in the case of *Matthews v. UK*.[62] The Strasbourg court may

[60] Boeles, *European Migration Law*, pp. 42.
[61] Boeles, *European Migration Law*, p. 45.
[62] Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 52; ECtHR, (1999) 28 EHRR 361.*Matthews v. United Kingdom*.

thus scrutinize EU acts if there is a lack of judicial protection for fundamental rights within the EU system. The ECtHR case law was further developed in *Bosphorus v Ireland.* According to the ruling, a national measure required by EU law enjoys the presumption of equivalent protection with ECHR standards, unless there is a manifest deficiency in protection.[63] This limitation, referred to as the *Bosphorus* presumption, is criticized by Costello since the presumption is applied too liberally by the ECtHR in subsequent cases and thus hands the EU too much of a defence, allowing Member States to escape responsibility since they acted under EU law requirements and the circumstances in the case did not break the presumption. Although somewhat constrained by the *Bosphorus* presumption, the ECtHR is still able to indirectly review EU acts.[64]

3.2 Article 3 ECHR – The right to *non-refoulement*

The right to *non-refoulement* was born out of international refugee law. The 1951 Refugee was signed in Geneva on 28 July 1951 and entered into force in 1954.[65] Subsequently it was extended by the 1967 Additional Protocol that entered into force the same year.[66]

Article 33(1) of the 1951 Refugee Convention states that no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[63] ECtHR, app. no. 45063/98, *Bosphorus v Ireland.*
[64] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 52; See ECtHR app. no. 71412/01 *Behrami and Behrami v France* and EHRR 45 SE10 (2007) *Saramati v France, Germany and Norway.*
[65] United Nations Treaty Series, Vol 189, No 2545 (1954), p. 150.
[66] Protocol of 31 January 1967 relating to the status of refugees.

Since the *Soering v UK* case of 1989, the ECtHR has developed a line of case law the constrains removal of aliens to another State's territory on grounds of *non-refoulement* based on Article 3 of the ECHR. The court laid emphasis on the absolute and non-derogable nature of the provision. However, a minimum level of severity is required before Article 3 protection is triggered.[67] The Court imposes a duty of non-removal where there is a real risk of torture, inhuman or degrading treatment or punishment according to Article 3 of the ECHR, as expressed in *Said v. the Netherlands.*[68]

A violation of the right to *non-refoulement* according to Article 3 can also be combined by a violation of Article 13 ECHR, which provides for a right to an effective remedy. The Strasbourg Court is concerned of examining the effectiveness of the Member State's asylum procedures and ensure that they respect human rights. This involves considerations of whether the remedy is available and effective in practice.[69]

Moreno-Lax sets forth four elements to be listed as the main characteristics of effective remedies under Article 13 of the ECtHR. First of all, a remedy must be accessible both in law and in practice. Secondly, sufficient procedural guarantees must be in place to avoid any irreparable damage from occurring. Thirdly, the remedy must ensure that an arguable claim of an Article 3 breach is duly appraised and granted the appropriate relief. If the claim is not examined properly it is hardly an effective remedy. Lastly, the substance of the claim must be put under independent and rigorous scrutiny by a competent authority. The ECtHR is not satisfied with merely a theoretical remedy, but applicants must be offered a realistic opportunity to prove their claims. [70]

[67] ECtHR, 11 EHRR 439, *Soering v UK* (1989); Costello *The Human Rights of Migrants and Refugees in European Law*, pp. 180.
[68] ECtHR, app. no. 2345/02 *Said v The Netherlands.* Decision of 5 July 2005,
[69] Jacobs, White, Ovey, *The European Convention on Human Rights*, p. 142.
[70] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, p. 23.

The ECtHR has examined violations of Article 3 and Article 13 of the ECHR in a number of so called EU 'Dublin Cases', which will be analysed in the following section.

3.3 How has ECtHR case law pressued the Dublin System?

As for stopping Dublin transfers due to human rights violations, the ECtHR has developed its case law under Article 3 ECHR. The Article is an absolute right, stating that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Even though the article is of an absolute nature in the sense that it can never be justifiably infringed and must be fulfilled without any exceptions, its applicability requires that a certain threshold is met. The ill-treatment must reach a minimum level of severity in order to trigger Article 3 protection. When assessing this minimum level of severity, the duration of ill-treatment, physical and mental effects, sex, age and health of the victim can all be taken into account. This relative contextual assessment sets focus on the victim's circumstances in each individual case.[71]

3.3.1 T.I. v. the United Kingdom

In *T.I. v. the United Kingdom,* a Sri Lankan national had first went to Germany and then to the United Kingdom, where the Sri Lankan national filed an asylum application. The United Kingdom sent a transfer request to Germany in order for German authorities to take charge of the asylum application. The applicant claimed that there was a real risk of him being subjected to treatment contrary to Article 3 ECHR if returned to Sri Lanka, fearing that German authorities would simply send him back. Noteworthy

[71] Costello pp. 190.

is that this ruling is from 2000 and thus the Member States did not apply the Dublin regulation, but the Dublin Convention.[72]

The ECtHR ruled that a Member State is not relieved from its duty arising from Article 3 ECHR of ensuring that a Dublin transfer does not result in exposure to a real risk of ill-treatment, and thus established the prohibition of *refoulement.*[73] In the case, the ECtHR established the principle of refutability, meaning that the Dublin system's 'presumption of safety' can be refuted on the basis of a risk of *refoulement.* Importantly, the ECtHR found that indirect removal of an asylum seeker through an intermediary State did not affect the responsibility of the transferring State. Hence, both direct and indirect *refoulement* is covered by Article 3 of the ECHR.[74] However, the ECtHR declared the case inadmissible since the application was deemed manifestly ill-founded, since a real risk of that Germany would return the applicant to Sri Lanka in violation of Article 3 had not been established. Importantly though, the removal of the applicant to a third-country did not absolve the United Kingdom of its indirect responsibility under Article 3.[75]

3.3.2 K.R.S. v. the United Kingdom

The next relevant ruling in Strasbourg case law is *K.R.S. v. the United Kingdom* of 2008, and thus concerned Member State obligations arising from the Dublin II Regulation. The case was one of many 'emergency application' to the ECtHR regarding Greece aiming to preclude a transfer there.[76] An Iranian national passed through Greece before travelling onwards to the United Kingdom, where he submitted an asylum application. The British authorities filed a take charge request to Greece, who accepted to take responsibility for the applicant's asylum request. In contrast to *T.I v.*

[72] ECtHR, app. no. 43844/98, *T.I. v. the United Kingdom*, (dec.) 7 March 2000.
[73] ECtHR, app. no. 43844/98, *T.I. v. the United Kingdom*, (dec.) 7 March 2000.
[74] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31. pp. 7.
[75] ECtHR, app. no. 43844/98, *T.I. v. the United Kingdom*, (dec.) 7 March 2000.
[76] Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 260.

the United Kingdom, the applicant based his claim on the situation of asylum seekers in Greece. The Strasbourg court had to face the question of what evidence was required to prove that the situation of asylum seekers in Greece, both the legislative procedure and the living conditions, constituted ill-treatment and were in contrast to Article 3.[77] Initially the ECtHR granted a Rule 39 order, meaning that the applicants removal to Greece was temporarily suspended due to this interim measure. The Rule 39 order was based on the April 2008 UNHCR intervention. Despite the interim suspension, the Strasbourg Court ended up deciding against the applicant.[78]

The Strasbourg court assessed that the evidence provided did not indicate that Greece would remove the applicant to his country of origin. More controversially, the court upheld the presumption of Greece as a safe country. It ruled that in absence of any proof stating the contrary, it was to be presumed that Greece would comply with the procedural standards. Hence the interim measures in the Article 34 ECHR and Rule 39 of the Rules of Court, was presumed to be followed both practically and effectively.[79]

The case should be viewed against the backdrop of repeated UNHCR criticism directed against Greece regarding aspects of the Greek asylum legislation that had negative consequences on asylum seekers returned there through Dublin transfers.[80] *K.R.S v. United Kingdom* expressed a presumption that Member States would provide a safe return of asylum seekers in the framework of the Dublin system. However, the presumption came to be revoked in *M.S.S. v Belgium and Greece.*[81]

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[77] ECtHR app. no. 32733/08 *K.R.S. v the United Kingdom* (dec.) 2 Dec. 2008.
[78] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 261.
[79] ECtHR 2 Dec. 2008, *K.R.S. v the United Kingdom* (dec.), No. 32733/08.
[80] Boeles, *European Migration Law,* p. 60; Council Regulation (EC) No. 343/2003 of 18 February 2003; UNHCR, 'Updated UNHCR memorandum on the law and practice of Greece', Geneva, 30 November 2005; 'UNHCR position on the return of asylum-seekers to Greece under the 'Dublin regulation", Geneva, 15 April 2008.
[81] Jacobs, White, Ovey, *The European Convention on Human Rights,* p. 195.

3.3.3 M.S.S. v. Belgium and Greece

The human rights considerations raised by the ECtHR came to play a key role in setting aside Dublin criteria for take charge requests directed to Greece in the 2000s, most notably in the case of *M.S.S. v Belgium and Greece*.[82] In this landmark case from 2011, the ECtHR established the refutability *in concreto* of the presumption of safety underpinning the Dublin regime.[83] The ECtHR seemed to have changed its mind following *K.R.S v. the United Kingdom,* and disapproved of the Greek asylum procedure and reception conditions in *M.S.S. v. Belgium and Greece.* The case is described by Costello as a 'much needed opportunity for the Grand Chamber to revisit the *K.R.S.* ruling.'[84]

M.S.S. v. Belgium and Greece concerned an Afghan asylum applicant who worked as an interpreter for international forces in Afghanistan, an occupation entailed with a serious risk of persecution. The Afghan national came to Belgium to seek asylum after having transited through Greece. Belgian authorities disregarded a UNHCR recommendation of suspending transfers to Greece and issued a take charge request which Greece accepted.[85] Once transferred to Greece, M.S.S. was detained and lived in a reduced space with 20 other detainees with no place to sleep, extremely poor hygienic conditions and insufficient meals. Upon release he had no place to stay and ended up living in a park in a state of complete destitution.[86]

[82] ECtHR 21 Jan. 2011, *M.S.S. v Belgium and Greece*, No. 30696/09.
[83] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, pp. 20.
[84] Costello, p. 262.
[85] ECtHR (GC) app. no. 30696/09 *M.S.S. v. Belgium and Greece* 21 Jan. 2011, paras 16, 194-195.
[86] ECtHR (GC), app. no 30696/09 *M.S.S. v. Belgium and Greece* 21 Jan. 2011, paras 34-37, 161-166.

3.3.3.1 Greece – Direct violation of *non-refoulement*

With regard to the failure to comply with Article 3 ECHR standards, the ECtHR condemned Greece. Since Article 3 is of absolute character, the court did not take into account the disproportionate protection burden laid upon Greece as a result of its location at the external borders of the EU. The circumstance that the Greek asylum system was severely burdened was thus not taken into account, and must not deprive asylum seekers of human rights law protection.[87]

Furthermore, Greece was reproved on account of deficient asylum procedures, and consequently violated the right to an effective remedy under Article 13 ECHR in conjunction with Article 3. The Court considered the short time limits to submit asylum applications, the lack of adequate information and communication and attached more weight to the applicant's story than the one of Greece. The applicant's story was supported by a vast number of different witness accounts that served to convince the ECtHR.[88]

The Strasbourg court was particularly concerned of that the right to a remedy that must be available and effective in practice. The Greek remedies were not considered effective and available in practice due to shortcomings in access to the asylum procedure in Greece, insufficient information for asylum seekers about procedures, lack of legal aid, lack of competent staff to conduct individual interviews and excessively lengthy delays. The Greek authorities' inaction rendered the applicants rights under the Receptions Conditions Directive inaccessible. Consequently, the flawed asylum procedure in Greece resulted in a violation of Article 13 in conjunction with Article 3 of the ECHR.[89]

3.3.3.2 Belgium – Indirect and direct violation of *non-*

[87] ECtHR (GC), app. no. 30696/09 *M.S.S. v. Belgium and Greece*, 21 Jan. 2011, para 223.
[88] Moreno-Lax. 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, pp. 23.
[89] Jacobs, White, Ovey, *The European Convention on Human Rights*, p. 143.

refoulement

According to Belgium, there was no reason to suspect that Greece would violate its international commitments. Belgium claimed that it did not find any concrete evidence demonstrating that the individual applicant would be affected by the general situation in Greece.[90]

The ECtHR considered that when applying the Dublin Regulation, a transferring State must make sure that the receiving State's asylum procedure affords sufficient guarantees to avoid removal without an evaluation of a risk of refoulement.[91] The Strasbourg clarified impact of the *Bosphorus* principle of equivalent protection on Dublin transfers, and concluded that the principle was not applicable to the present case. Consequently, Belgium could not presume that the Greek asylum system offered equivalent protection for asylum seekers.[92]

Belgium was condemned by the ECtHR for an indirect violation of the right to *non-refoulement* by transferring the applicant to Greece through the Dublin system, risking that Greece would remove the applicant to a third-country where he risked being subjected to torture or degrading or ill-treatment. However, Belgium also directly violated the right to *non-refoulement* by transferring the asylum seeker to Greece, with regard to the degrading detention and living conditions. The Strasbourg Court nonetheless found that Belgium violated Article 3 due to the real risk of ill-treatment to an asylum seeker if returned to Greece. [93]

[90] ECtHR (GC), *M.S.S. v. Belgium and Greece,* Appl. No 30696/09, 21 Jan. 2011, paras 16, 194-195.
[91] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, p. 25; ECtHR (GC), *M.S.S. v. Belgium and Greece,* Appl. No 30696/09, 21 Jan. 2011, para 342.
[92] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, p. 25; ECtHR (GC), *M.S.S. v. Belgium and Greece,* Appl. No 30696/09, 21 Jan. 2011, para 338.
[93] Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, p. 26.

In conclusion, the Strasbourg court found a violation of Article 3 of the ECHR by both Greece and Belgium on the grounds of direct and indirect *non-refoulement.*[94]

3.4 CJEU reponse to Strasbourg *M.S.S.* case law

The CJEU was faced with several requests from preliminary rulings regarding the interpretation of the Dublin transfer provisions following the Strasbourg court's ruling in *M.S.S.* This section addresses the most relevant cases in the CJEU's response to the ECtHR's ruling.

3.4.1 *N.S. and M.E.* Case

In the *N.S. and M.E.* joint cases, the CJEU was faced with a dilemma concerning the assumption of mutual trust regarding the presumption of Member Staate compliance with human rights law standards set up by the ECtHR in *M.S.S. v. Belgium and Greece*.[95]

The appellant N.S. was an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. In September 2008 he was arrested by Greek authorities, but did not lodge an asylum application in Greece. According to him, he was arrested and detained for four days before being ordered to leave Greece within 30 days. Upon attempting to leave Greece he was arrested again and expelled to Turkey, being detained there in appalling conditions for two months. Following an escape from Turkey, N.S. states that he travelled to the United Kingdom and lodged an asylum application there on the day of arrival in January 2009.[96]

[94] Jacobs, White, Ovey, *The European Convention on Human Rights*, p. 195.
[95] Joined Cases C-411/10 *NS* and C-493/10 *ME*, judgement of 21 Dec. 2011.
[96] Joined Cases C-411/10 *NS* and C-493/10 *ME*, paras 34-35.

In the following proceedings, the UK authorities submitted a take charge request to Greece, in order for Greece to examine his asylum application. Since Greece failed to respond to the request within the time limit, Greece was considered to have accepted the responsibility for examining N.S. asylum claim.[97] The UK Court of Appeal processing the case expressed concerns regarding that the asylum procedures in Greece have a number of serious shortcomings. The asylum seekers claims are not examined with due care, the proportion of granted applications are extremely low, judicial remedies are inadequate and very difficult to access and the reception conditions are inadequate as applicants are either detained in inadequate conditions or left to live outside in destitution without shelter or food.[98] Hence the UK Court of Appeal referred a number of questions to the CJEU for a preliminary ruling aiming to answer whether a Member State's duty to observe EU fundamental rights precludes transferring the asylum claimant where there is a risk of violation of fundamental rights.[99]

The CJEU responded by interpreting Article 4 of the CFREU as meaning that the Member States may not transfer an asylum seeker to the 'Member State responsible' under the Dublin II Regulation if the following conditions are met; the transferring Member State *cannot be unaware of systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in the other Member State that amounts to *substantial grounds* for believing that the asylum seeker would *face a real risk* of being subjected to inhuman or degrading treatment.[100]

The CJEU hence applied the reasoning of the ECtHR in the case of *M.S.S v Belgium and Greece* by considering that Article 4 of the CFREU precludes Member States from transferring an asylum seeker pursuant to the Dublin Regulation given that the circumstances in the case meet the conditions of

[97] Joined Cases C-411/10 *NS* and C-493/10 *ME,* para 35; See also Article 17 and 18(7) of Regulation No 343/2003 (Dublin II Regulation).
[98] Joined Cases C-411/10 *NS* and C-493/10 *ME,* para 44.
[99] Joined Cases C-411/10 *NS* and C-493/10 *ME,* para 50.
[100] Joined Cases C-411/10 *NS* and C-493/10 *ME,* ruling para 2.

systemic deficiencies, substantial grounds and *real risk.* In other words, a transfer may not be carried out if the responsible Member State fails to be what Boeles refers to as 'the obligation to be a safe state'.[101]

The criteria set up by the CJEU were slightly altered in the codification of the Dublin III Regulation Art 3(2) subparagraph 2. *Systemic deficiencies* was changed to *systemic flaws,* and *real risk of being subjected to inhuman and degrading treatment* was changed to *risk of inhuman and degrading treatment.* However, the impact that human rights law have on the Dublin system was by now confirmed. Originating from the ECtHR, then through the CJEU into the Dublin III regulation.

As regards to how the risks posed by Dublin transfers are to be assessed, the CJEU incorporated the Strasbourg court's finding in *M.S.S. v. Belgium and Greece* that there was a 'systemic deficiency' in the Greek asylum system. The 'regular and unanimous reports' several NGOs, input of the UNHCR and EU Commission Reports on Dublin was taken into account by the CJEU in the same way as the ECtHR did. Arguments from the Belgian, Italian and Polish governments that the CJEU lacked the necessary instruments to assess other Member State's fundamental rights compliance was thus rejected by the CJEU. Accordingly, the CJEU held that conclusive presumptions of fundamental rights compliance were incompatible with EU law and thus also precluded by EU law.[102]

3.4.2 *Puid* and *Abdullahi* cases

A problem remained after *NS/ME* whether there was still a duty to process the asylum claim if removal was prohibited on fundamental rights ground. In *Puid,* the CJEU clarified that the Member State must continue to examine

[101] Boeles, *European Asylum Law,* pp. 260.
[102] Joined Cases C-411/10 *NS* and C-493/10 *ME,* paras 90, 91, 99; Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 269.

the allocation criteria in order to establish whether another Member State can be identified as responsible.[103]

In *Abdullahi,* a ruling under the Dublin II Regulation, referred to by Costello as 'troubling', the CJEU limited the possibilities for asylum seekers to challenge Dublin deportations. The court ruled that asylum seekers could only challenge Dublin deportations by 'pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum'. Only if those circumstances are met, the deportation was considered to amount to a violation of Article 3 CFREU and Article 3 ECHR.[104] The *Abdullahi* ruling served to increase tension with ECtHR standards set up in *M.S.S. v. Belgium* and was criticised to be incoherent with another current in CJEU case law, such as *MA.*[105]

3.4.3 *MA* Case

The CJEU's *MA* ruling of June 2013 moved in a direction towards strengthening procedural guarantees for minors, by creating a presumption that stop transfers to other Member States in cases concerning unaccompanied minors. The case concerned the interpretation of Article 6 in the Dublin III Regulation, which provides guarantees for minors who are subject to transfers under the Dublin System. The CJEU stated that due to the weight given the 'best interest' of children, and due to their vulnerability, CJEU stated that 'as a rule, unaccompanied minors should not be transferred to another Member State'. Due to that *MA* concerned unaccompanied minors, this particular CJEU case law may face difficulty in being generally applied. The *MA* case nonetheless served to highlight that an individual that finds him or herself in a position of vulnerability, such as

[103] Case C-4/11 *Puid*, paras 33-36; Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 269.
[104] Case C-394/12 *Abdullahi,* para 60; Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 270.
[105] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 270.

being an unaccompanied minor, can lead to a prohibition of Dublin transfers.[106]

In *MA,* the CJEU interpreted Article 6 of the Dublin III Regulation as meaning that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.[107]

In summary, the CJEU case law was incoherent after the Strasbourg court's *M.S.S.* ruling. However, the *MA* ruling stood out as a case where unaccompanied minors where protected by applying a presumption that prohibited Dublin transfers, which could only be rebutted on account of a best interest of the child assessment. The incoherent case law illustrated the need for clarification regarding under which circumstances the Dublin transfers can be stopped.

3.5 ECtHR *Tarakhel* Case – Clearing the issue of systematic breaches

Following the CJEU *NS/ME* ruling, confusion surrounded the issue of 'systematic breaches', leading to many incorrect rulings regarding Dublin transfers. After the breakdown of the Greek asylum system, cases attempting to halt Dublin deportations to Italy made their way to the ECtHR. The reception conditions and gaps in protection provided for by Italy was the subject of criticism by the UNHCR. But the UNHCR had not taken a step further and issued a request to suspend transfers to Italy.[108] A number of German national courts ruled on halting transfers to Italy through

[106] Case C-648/11 *MA*, paras 60-64.
[107] Case C-648/11 *MA*, para 67 (ruling).
[108] Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 270; UNHCR, *Recommendations on important aspects of protection in Italy* (UNHCR July 2012), p. 9-12.

applying *MSS* and *NS/ME* and pointing out the systematic breaches in the Italian asylum system and reception conditions. When the Strasbourg court decided to take a stand in the matter in the cases *Mohammed Hussein v the Netherlands and Italy* as well as *Daytbegova and Magomedova v Austria*, transfers to Italy did not consider to amount to violations of Article 3 ECHR since the reception conditions in Italy did not meet the 'exceptional *MSS* threshold'.[109]

This legal uncertainty concerning what sort of evidence was required to rebut the presumption of EU Member States as 'safe countries' and meet the requirement of 'systematic breaches' remained. In November 2014, the ECtHR Grand Chamber resolved the issues in the case of *Tarakhel v. Switzerland*.[110]

In *Tarakhel*, Swiss authorities refused to examine an asylum application lodged by an Afghan family. After arriving in Italy in 2011 and having their fingerprints registered in the EURODAC system, the family had left an Italian reception centre for asylum seekers without permission and travelled to Austria. The family lodged an asylum application in Austria which was rejected, and Italy accepted the take charge request. The family travelled onwards to Switzerland and lodged an asylum application there as well. Austrian authorities submitted a take charge request to Switzerland. Swiss authorities decided that the couple and their six children were to be sent back to Italy according with the Dublin III Regulation. Switzerland accordingly issued an order for the applicants' removal to Italy since it considered Italy to be the State responsible for examining the application.[111]

The ECtHR ruling builds upon the previous case law and sets up requirements of individuals guarantees in Dublin transfer procedures. The Court held that if the applicants were to be returned to Italy without the

[109] Costello, *The Human Rights of Migrants and Refugees in European Law*, pp. 270*;* ECtHR app. no. 27725/10 *Mohammed Hussein v the Netherlands and Italy*, app. no. 6198/12 *Daytbegova and Magomedova v Austria.*
[110] Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 272.
[111] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, paras 8-21.

Swiss authorities having first obtained individual guarantees from the Italian authorities, there would be a violation of Article 3 of the ECHR. The individual guarantees shall clarify that the applicants would be taken charge of in a manner that was adapted to the children's age and that the family would be kept together.[112]

The overall situation for asylum seekers in Italy was not comparable to that of asylum seekers in Greece, according to the ECtHR and that the specific circumstances of *Tarakhel* was different to *M.S.S.*[113] Nonetheless, the Strasbourg court reiterated the need for individualised assessments required by Article 3 ECHR, depending on the individual's circumstances in the specific case. Furthermore, asylum seekers are considered a particularly underprivileged and vulnerable group that requires special protection under Article 3 ECHR.[114]

The ECtHR took into account the situation regarding the Italian asylum reception system and to the absence of detailed and reliable information concerning the specific facility of destination to which the applicants would be sent. These circumstances convinced the Court that the Swiss authorities did not possess sufficient assurances that the applicants would be taken charge of in a manner adapted to the age of the children, if returned to Italy.[115] In conclusion, unless an individualized assessment by the sending state in addition with individualized guarantees by the receiving state is carried out, the transfer is considered to violate Article 3 of the ECHR.[116]

[112] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, para 122.
[113] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, para 117.
[114] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, para 118.
[115] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, para 121.
[116] Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 270.

3.6 Conclusions regarding transfers under the Dublin III Regulation

The Dublin III Regulation Article 3(2) codifies the *NS/ME* case law of systemic deficiencies, but it does not reflect the Strasbourg case law following the *Tarakhel* ruling which requires thorough and individualised assessments in all cases. The CFREU Article 52(3) calls for consistency between the Charter and the ECHR. The Charter rights, such as Article 4 of the CFREU which matches Article 3 of the ECHR, shall coincide with the convention freedoms. This consistency means that the provisions shall have the same meaning and scope, determined not merely by the convention text but also in accordance with the relevant case law of Strasbourg and Luxembourg. This bridge between the EU law and ECHR law made by Article 52(3) CFREU is termed a 'dynamic reference', meaning it also includes the jurisprudence of the Strasbourg court. Hence the dominant position is that the ECHR standards shall be coherently followed.[117]

Despite this established role of the ECHR in EU law, significant friction surrounds the CJEU rulings regarding Dublin transfers. This has been illustrated by the Luxembourg case law in *NS/ME, Puid,* and *Abdullahi.* The point of conflict with the ECtHR case law has in particular concerned that asylum seekers transfers, according to the CJEU, can only be prevented in case of 'systemic deficiencies' in the reception or procedural structure of the Member State, on the basis of 'mutual trust'. Following the Strasbourg court *Tarakhel* ruling that clarified that a 'real risk' of breaching Article 3 does exist in Dublin transfers, and that these risks must be amended by individual guarantees between the Member States.[118]

The Court did note that available accommodation and the conditions of detention in Italy was not as inadequate as in Greece. However, the Court

[117] Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2016), p. 230.
[118] Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (2016), p. 232.

still applied the principles laid down in *M.S.S.* and stated that return of asylum seekers to Italy under the Dublin system would violate Article 3 of the ECHR, due to the circumstances in the particular case. Referring to asylum seekers who are children as being in a position of 'extreme vulnerability', the Court found that Switzerland had not obtained a guarantee of age appropriate accommodation for a family.[119]

One may draw the hastened conclusion that the Strasbourg court were convinced by the prospect of children's extreme vulnerability in *Tarakhel*, and thus there is no need for individual guarantees in each and every transfer case, but only for those with children involved. That line of reasoning could result in Member States applying a limited practice where an individual guarantee is only applied for children. That could result in a summaric process, confined to examining an identity number. However, the Strasbourg court's use of the requisite 'extreme vulnerability' does not apply only for children, but also for e.g. to the sick or disabled. It is therefore necessary for States to expand the practice to individual guarantees, which must be based on individual assessments of each asylum seeker. For how could a State know what guarantee is appropriate, unless an individual assessment first has been made?

After assessing the Dublin transfer provisions and the CJEU case law interpreting them, numerous conclusions can be drawn. Even post-*M.S.S.* the CJEU case law was ambiguous and at least semi-divergent from Strasbourg case law. However, one may safely state that there is a discrepancy between the post-*Tarakhel* and the latest CJEU case *NS/ME*. As of yet, the CJEU has not responded to the *Tarakhel* ruling. Perhaps, the CJEU is perplexed by an uncomfortable political situation regarding migration in the EU and awaits the European Parliament and European Council to pass the Dublin IV Regulation. Until then, Member States are free to interpret *Tarakhel* as the Strasbourg case law remains the latest point

[119] Jacobs, White, Ovey, *The European Convention on Human Rights,* p. 195.

of reference. With that conclusion in mind, the next relevant question is to assess whether the Dublin IV Regulation will conform to the post-*Tarakhel* standards set up by the Strasbourg.

4 Procedural issues in the Dublin IV Proposal

4.1 General remarks

In the following chapter, I will present and analyse a number of procedural issues related to the Dublin IV Proposal made by the Commission, that have an impact on the fundamental rights of refugees according to Article 3 and Article 14 of the CFREU. Through this analysis I aim to answer the research question regarding how the proposed amendments in the Dublin IV regulation may have an impact on the preconditions for prohibiting Dublin transfers on grounds of *non-refoulement* based on the human rights law requirements set up by the ECtHR. I discuss criticism and opinions from several instances such as the European Parliament, the European Economic and Social Committee, The United Nations High Commissioner for Refugees and the European Council on Refugees in order to enrichen the analysis.

According to the Commission, lacking information to the asylum seeker, omitted personal interviews and the misinterpretation of the 'best interest of the child' amongst Member States are main issues in the asylum procedure under the Dublin III Regulation, which stipulates a demand for procedural guarantees and safeguards in benefit of the asylum seeker.[120]

[120] COM 2016(270), p. 9.

4.2 Art 3(2) The issue of *non-refoulement* left unresolved

According to the proposal, asylum seekers are to be ensured decent reception facilities and support in the Member State responsible to deal with their applications, both while the process is ongoing and beyond that if the claims are found to be grounded.[121] The Commission insists that the proposal is fully compatible with fundamental rights and general principles of EU law and international law. However, the Commission does not explicitly address the risk of asylum seekers being treated in violation with Article 3 ECHR or Article 4 CFREU.[122]

Art 3(2) of the Dublin III Regulation has been left unchanged by the Commission. Instead, the Commission's proposal maintains the phrasing under the Dublin III Regulation, thus the requisite of 'substantial grounds for believing that there are *systemic flaws* in the asylum procedure and reception conditions for applicants in that Member State' remains. Only if these preconditions are met and results in a risk of inhuman or degrading treatment within the meaning of Article 4 of the CFREU, a Dublin transfer is to be considered impossible.[123] Hence, the requisite *systemic flaws* remains as a threshold. The Commission ignored the case law of *Tarakhel,* which states that a 'real risk' of breaching Article 3 does exist in Dublin transfers and that these risks must be amended by individual guarantees between the Member States, which are preceded by individual assessments of the asylum seeker.[124]

[121] COM 2016(270), p. 2.
[122] COM 2016(270), p. 13.
[123] COM 2016(270), p. 39.
[124] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, para 104.

4.2.1 European Parliament Proposed Amendment

The European Parliament report on the Commission's reform proposal agrees with the Commission's description of the flaws with the current Dublin system. The flaws are of fundamental and structural nature, and hence the Dublin regulation needs a fundamental reform in order to enable a "structured and dignified reception of asylum seekers in Europe, whilst at the same time allowing Member State to effectively manage their borders".[125]

The European Parliament calls for a "bold but pragmatic" proposal, that is workable in practice. The Parliamentary amendments to the proposed system is estimated to function both in times of normal migratory flows as well as in times of crisis. The Parliament reminds that all Member States need to accept a fair sharing of the responsibility to receive asylum seekers in Europe, as they are all signatories to the 1951 Refugee Convention.[126]

Importantly, the European Parliament's Proposal suggest an amendment that introduced a new Recital 3(a) to the Dublin IV Regulation. The recital states that Article 18 of the CFREU provides that the right of asylum is guaranteed with due respect for the rules of the 1951 Refugee Convention and the 1967 Additional Protocol, and in accordance with the TEU and the TFEU.[127]

The amendment in the new Recital 3(a) is given a brief justification, explaining that the right of asylum *shall* be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Additional Protocol.[128] The text resembles what is stated in Article 18 of the CFREU, which provides for respect of the right to seek asylum. Article 19(2) of the CFREU is also

[125] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November 2017, p. 112.
[126] Ibid, p. 112.
[127] Ibid, p. 6.
[128] Ibid, p. 6.

of interest, as it provides that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Naturally, Article 19(2) is an extension of Article 4 of the CFREU, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

In the light of the proposed Recital 3(a), the European Parliament proposes an amendment to the controversial Article 3(2)(2) that was left unchanged by the Commission. The amendment provides a lower threshold for finding transfers of asylum seekers impossible. It reads as follows;

Where it is impossible to transfer an applicant to the Member State designated as responsible because there are substantial grounds for believing that **the applicant would be subjected** to a **real risk** of a **serious violation** of **his or her fundamental rights**, the determining Member State shall continue to examine the criteria set out **in Chapters III and IV** in order to establish whether another Member State can be designated as responsible.[129]

To illustrate the difference through comparison, I also include the standing phrasing in Article 3(2)(2). There are several details in the phrasing that may lead to significant differences in how the provision impacts fundamental rights of asylum seekers. These are marked in bold letters;

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are **systemic flaws** in **the asylum procedure** and in the **reception conditions for applicants** in that Member State, resulting in a **risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter** of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in **Chapter III** in order to establish whether another Member State can be designated as responsible.[130]

The European Parliament Proposal can be analysed by the difference in wording. Firstly, the phrasing puts focus on the individual applicant. It is the real risk that *the applicant would be subjected to* a real risk. Not *applicants* in general terms, as stated in the Commission's proposal. This is a phrasing which opens for individual assessments of a particular applicant, rather than

[129] Ibid, p. 35.
[130] COM 2016(270), p. 39.

the risk of applicants in general. Furthermore, the violation concerns *his or her fundamental rights.* This phrasing also contributes to placing the focus on the individual applicant.

Secondly, the European Parliament proposal lowers the threshold of application compared to the Commissions proposal. As it states *a real risk of a serious violation of his or her fundamental rights.* The ground for which to asses whether a violation has taken place is therefore changed compared to the Commission's proposal, which states that the *there are systemic flaws in the asylum procedure and reception conditions.* From an evidence point of view, it is much harder to prove and assess substantial grounds for that there are *systemic flaws in the asylum procedure and reception conditions*. Such proof requires a rigorous study of an entire State's asylum system. To prove substantial grounds for that a particular individual faces a *serious violation of his or her fundamental rights* is more direct and achievable. Although the proposal of the European Parliament confines the duty for States not to transfer to cases where there is a *real* risk of a *serious* violation, it is still an improvement compared to the Commission's proposal which follows the wording of Article 19(2) of the CFREU.

Thirdly, the Parliament phrasing widens the scope of violations. It opens up for all cases where there is a real risk of violation of *his or her fundamental rights.* The Commission's proposal is restricted to only concern a risk of *inhuman or degrading treatment within the meaning of Article 4* of the CFREU. This means that other fundamental rights violations may be left unconsidered by the Member States.

Although the European Parliament Report offers scarce, if any, justifications for the proposed amendments, the preceding European Parliament Draft Report offers more elaborated justifications. According to the draft report, the definition of systemic deficiencies has caused divergent rulings from different national courts. This in despite of the guidance from the ECtHR in

the *Tarakhel* case. The changes suggested by the European Parliament are made in order to ensure legal clarity and uniform application of the principle that "people should not be transferred if they face a real risk of serious-ill treatment under article 3 of the ECHR (article 4 of the Charter).[131]

The justification to Article 3(2)(2) in the Draft Report was subsequently removed in the final European Parliament report, due to that it faced opposition in the European Parliament. However, the wording was largely kept intact. This leads me to the conclusion that the clear purpose of the amendment is to ensure legal clarity and uniform application of the principle of *non-refoulement* in the EU.

In conclusion, the European Parliament Proposed amendment of Article 3(2)(2) follows a more human rights compatible path. It is closer to the case law of *M.S.S* and *Tarakhel* rulings from the ECtHR, whereas the Commission's proposal upholds the line of reasoning by the CJEU in *NS and ME*.

4.2.2 UNHCR Comments

The UNHCR has closely observed the Dublin system over many years. In its comments on the Commission's proposal for a Dublin IV Regulation, the UNHCR points out a number of shortcomings in the current Dublin system such as the lack of proactive solidarity in the interaction between Member States, and the lack of cooperation with applicants. The UNHCR finds it furtherly aggravating, that the basic assumption underlying the CEAS and thereby the Dublin system remains unfulfilled. The missing premise is that asylum seekers are able to enjoy adequate and generally equivalent levels of procedural and substantive protection, pursuant to harmonised laws and practices, in all Member States. As has been demonstrated, the Member States implementation of the CEAS, referred to as the asylum acquis, has varied greatly amongst the Member States. There are not only large

[131] European Parliament Draft Report, 2016/0133 (COD), 24 February 2017, p. 25.

differences in the implementation, but also fundamental and sometimes systemic deficiencies in some of the national asylum systems.[132]

Consequently, the UNHCR links these divergences in implementation and deficiencies to the lack of efficiency in the CEAS. They are drivers of onward movement and undermine the Dublin system's assumption that all applicants will be treated equally in the EU, no matter where they lodge an asylum application. In its general observations of the Dublin System, the UNHCR therefore recommends the Commission that the reform process should have due regard to the requirements of Article 78 of the TFEU. According to Article 78 TFE, the CEAS needs to be fully consistent with the 1951 Refugee convention, the 1967 Additional Protocol and to fundamental rights, in particular the EU Charter.[133]

In the Commission's proposal Recital 45, which remains unaltered, the Member States are to respect the treatment of persons falling within the scope of the Dublin Regulation, as they are bound by their obligations under instruments of international law, including the relevant case-law of the ECtHR.[134] The UNHCR reminds the Commission of this recital, and proceeds by raising criticism towards Article 3(2) of the Dublin IV Regulation. The proposed recast remains unaltered, but the material scope of the provision pertains *non-refoulement* only to cases of systemic deficiencies. Ergo, the provision appears to fall short of the individual-focused approach set out by the ECtHR in the *Tarakhel* ruling.[135]

For the aforementioned reasons, the UNHCR recommends that the lack of amendment of the proposed Article 3(2) should be re-considered. The

[132] UNHCR, *Comments on the European Commission proposal for a Dublin IV Regulation.* December 2016, pp. 6.
[133] UNHCR, *Comments on the European Commission proposal for a Dublin IV Regulation.* December 2016, p. 9.
[134] COM 2016(270), p.32.
[135] UNHCR, *Comments on the European Commission Proposal for a Dublin IV Regulation.* December 2016, p. 24.

provision should not only be limited to situations of systemic deficiencies. Rather, the material scope should include a more rights-focused approach in accordance with the ECtHR case law.[136]

4.2.3 ECRE Comments

ECRE's comments is in line with the criticism raised by the UNHCR. However, ECRE's comments elaborates further on the topic of incompliance with human rights law. ECRE raises criticism towards the Commission's proposal, stating that the Commission "regrettably leaves the test for preventing a transfer to another Member State in cases of human rights risks intact". The concerns raised by ECRE targets both the personal scope and the material scope of Article 3(2) of the Dublin IV Regulation.[137]

Concern is raised regarding the personal scope of application in Article 3(2), calling it a "narrow interpretation of *non-refoulement*", as it only applies to the *applicant.* The wording only refers to asylum seekers as per the definition in Article 2(c) of the Dublin III Regulation, meaning a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken. Beneficiaries of international protection under Articles 26 and 30 the Dublin III Regulation are thus excluded from the personal cope. This means that for example, a person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document, is not covered by the personal scope according to Article 20(1)(c) and Article 26 of the Dublin IV Regulation.[138]

[136] UNHCR, *Comments on the European Commission Proposal for a Dublin IV Regulation.* December 2016, p. 24.
[137] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation.* October 2016, p. 18.
[138] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation.* October 2016, p. 19.

As far as the material scope of Article 3(2) is concerned, the wording incorporates merely the ratio set up by the CJEU in its *NS and ME* ruling, by setting up a requisite threshold of systemic flaws to trigger the risk of a violation of Article 4 CFREU. The ECRE deems this threshold incompatible with EU primary law, as it does not reflect the scope of the *non-refoulement* principle as enshrined in human rights law. The restrictive threshold fails to incorporate that violations of *non-refoulement* may occur regardless of whether these are caused by systemic flaws or non-systemic flaws in the asylum procedure and reception conditions of the Member State. In support of its argument ECRE refers to the *Tarakhel* ruling, which clarifies that the source of the risk is irrelevant to the level of protection granted by human rights. Rather, the ECtHR sets up an orthodox assessment in *Tarakhel*, that the relevant requisite is whether the beneficiary of international protection faces "a real risk of serious violation". With its current wording, such situations are left uncovered by Article 3(2). The real risk of violation is echoed in Article 19(2) in the CFREU, which stipulates that no one may be removed, expulsed or extradited to a State where there is a *serious risk* that he or she will be subjected to the death penalty, torture, or other inhumane or degrading treatment or punishment.[139]

Furthermore, the confinement of *non-refoulement* to apply only in situations covered by Article 4 of the CFREU constitutes a flaw of the current Article 3(2) formulation. The ECtHR has expressly acknowledged that *non-refoulement* protection can be triggered in other cases than those covered by Article 4, such as flagrant breaches of the prohibition of slavery (Article 5 CFREU), the right to liberty (Article 6 CFREU), the right to private life (Article 7 CFREU) and freedom of religion (Article 10 CFREU).[140]

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[139] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation.* October 2016, p. 19.

[140] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation.* October 2016, p. 20; For relevant cases see e.g. ECtHR, *Ould Barar v. Sweden*, Application No 42367/98, Judgment of 19 January 1999; ECtHR, *Chowdhury v Greece*, Application No 21884/15, Case Communicated on 9 September 2015; ECtHR, *Tomic v United Kingdom*, Application No 17387/03, Judgment of 14 October 2003; ECtHR, *F v United Kingdom*, Application No 17341/03, Judgment of 22 June 2004; ECtHR, *Z and T v United Kingdom*, Application No 27034/05, Judgment of 28 February 2006.

ECRE requires the legislative limitation of the personal and material scope of the fundamental rights protection to be removed from Article 3(2), as it is breaches by unduly restricting the Charter's applicability. The limitations set up prevents compliance with primary law and legal certainty. Therefore, the assessment of compatibility of transfers with the right of *non-refoulement* for asylum seekers should instead be made independently by the courts.[141]

4.2.4 Human rights concerns

Without an amendment to Article 3(2), there is a continued risk that Member States will breach their *non-refoulement* obligations according to Article 3 of the ECHR and Article 4 of the CFREU. The risk is largely worsened due to the 'safe third-country' practice, which leads to indirect *non-refoulement* violations such as in *M.S.S. v. Belgium and Greece.* A chain *refoulement* effect may occur where for example Member State A would transfer an asylum seeker to Member State B, without a sufficient individualised assessment or demanding of individualised guarantees. In the next step, Member State B could transfer the asylum seeker onward to a third country, where the asylum seeker is exposed to a real risk of ill-treatment. In such a case, both Member State A and Member State B violates the principle of *non-refoulement.* According to the Commission's Proposal for a Dublin IV Regulation, the Member State A would be forced to blindly trust that Member State B conforms to Article 3 of the ECHR.

Although the prohibition of *non-refoulement* in Article 33 of the 1951 Refugee Convention precludes States from returning asylum seekers to their countries of origin, it does not necessarily forbid States to return asylum seekers elsewhere. Being aware of this, the EU asserts a right to allocate responsibility elsewhere by forcibly removing asylum seekers to so-called

[141] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation.* October 2016, p. 20.

'safe third-countries'. The 1951 Refugee Convention does not offer an explicit basis for this practice, but neither does it prevent the widespread proliferation of what is known as safe third-country practice.[142]

The safe third-country practice has been abused by the EU Member States to return refugees. An uncomfortable example is the Italy-Libya push-back that was condemned by the ECtHR in *Hirsi v Italy.* Libya did not even meet basic protection against inhuman and degrading treatment and *refoulement*.[143] But the practice has also stipulated human rights violations within the Dublin System, through transfers amongst EU Member States.

As made clear, there is a discrepancy between the CJEU case of *NS and ME,* and the ECtHR. The CJEU admitted that EU human rights law sometimes requires Member States to refuse transfer of the asylum seeker on the ground of e.g. Article 4 of the CFREU. Although this requirement is to be maintained, it has been confined to a duty triggered only if the transferring Member State authorities "cannot be unaware" that systemic deficiencies in the receiving Member State amount to substantial grounds for believing that there is a real risk of treatment contrary to Article 4 of the CFREU.[144] These confining requisites constitute heavy obstacles that raises high thresholds for the Member States to refuse a transfer under the Dublin System. It is most troublesome that the Commission has decided not to remove the phrasing of the Dublin III regulation that sets up a threshold of "systematic flaws in the asylum procedure or reception conditions" and "substantial grounds for believing", as they stand in stark contrast to the Strasbourg Court's *Tarakhel* ruling.

According to Costello, The Dublin system presupposes a degree of sufficient similarity amongst the EU Member States regarding protection

[142] Costello, The Human Rights of Migrants and Refugees in European Law, p. 252.
[143] ECtHR, App. No. 27765/09. *Hirsi and others v Italy*, Judgement on 23 February 2012; Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 253.
[144] CJEU, Case C-411/10 *NS* and C-493/10 *ME,* para 94 and 106.

standards, procedures and most importantly outcomes that simply does not exist in reality. Without sufficient similarities across the EU and beyond, there is not enough necessary trust for the Dublin System to work.[145] Studies by ECRE and the EASO provides empirical evidence that divergency rates differ greatly amongst EU Member States for Iraqi and Syrian asylum seekers.[146] This is where the core conflict of interest is found. As *Tarakhel* ruling demands a thorough and individualised assessments of all asylum seekers and a duty not to deport anyone to a place where the relevant risk of inhuman and degrading treatment is established.[147]

The safe third-country concept, based on the false presupposition of sufficient similarities between EU Member State, leads to generalized assessments of safety regarding the State to which the asylum seeker is to be transferred. With the current Dublin IV Regulation proposal is up to the jurisprudence and courts to question and examine these generalized assessments based on the Strasbourg case law in *M.S.S.* , *Hirsi* and *Tarakhel* in particular. However, the unwillingness of both the CJEU in *N.S. and M.E.* as well as the Commission in its Dublin IV Regulation Proposal to follow the established Strasbourg jurisprudence has an explanation.[148]

In the CJEU Opinion of the Court from 2014 regarding the EU's accession to the ECHR, the CJEU held the principle of mutual trust of fundamental importance in EU law, given that it allows an area without internal borders to be created The principle requires that all Member States consider eachother to be complying with EU law and particularly with the fundamental rights recognised by EU law, save in exceptional circumstances. The CJEU refers to *N.S. and M.E.* to demonstrate the effect

[145] Costello, *The Human Rights of Migrants and Refugees in European Law,* pp. 257.
[146] ECRE, *Five Years on Europe is Still Ignoring its Responsibilities towards Iraqi Refugees* (2008), AD1/03/2008/ext/ADC; EASO, *Annual Report on the Situation of Asylum in the European Union,* p. 28.
[147] ECtHR (GC), App. No. 29217/12 *Tarakhel v. Switzerland*, para 105.
[148] Costello, *The Human Rights of Migrants and Refugees in European Law,* pp. 275.

of how this principal statement shall be applied.[149] States may therefore under EU law be "required to presume that fundamental rights have been observed by the other Member States". Save in exceptional cases, the CJEU states that Member States may not even check whether other Member States has actually, in a specific case, observed the fundamental rights guaranteed by the EU.[150]

Costello argues that the Opinion 2 of 2013 suggests that the CJEU regards mutual recognition amongst Member States "not as a flexible policy too, but as an aim in itself".[151] I respectfully disagree, as I find this conclusion far stretched. The outspoken aim is to create a common European area without internal borders. However, the mutual recognition is a necessary tool to achieve this aim. The problem, in my opinion, is rather that in its eager to maintain the common EU area, the ECtHR case law that stipulates individual assessments is disregarded by both the CJEU and the Commission. Instead, the Commission reserves examination to situations where there are substantial grounds for believing that there are "systemic flaws" in the Member State reception conditions and asylum procedure. This provision is coherent with line of reasoning by the CJEU in the Opinion 2 of 2013, which states reserves examinations of other Member States fundamental rights compliance to "exceptional cases".

Ironically, the solution may be found by further harmonising EU legislation in the CEAS to the point that the differences in domestic legislation and practice amongst EU Member States is wiped out, resulting in a sufficient degree of similarity. The Dublin IV Regulation Proposal does take a step towards further harmonisation. However, the empirical reality of Member State practice demonstrates an asylum practice that is highly incoherent, the EU cannot pass a provision that turns a blind eye to the violations of asylum seekers fundamental rights.

[149] CJEU, Opinion 2/23 of the Court 12 December 2014, para 191.
[150] CJEU, Opinion 2/23 of the Court 12 December 2014, para 192.
[151] Costello, *The Human Rights of Migrants and Refugees in European Law*, p. 276.

In conclusion, and to answer the research question regarding how the Dublin IV regulation may have an impact on prohibiting Dublin transfers on grounds of *non-refoulement* based on the human rights law requirements set up by the ECtHR, there is no progress made as far as Article 3(2) is concerned. As the Commission's proposal leaves the provision unaltered, the problems for both the asylum seekers and Member States as to implementing the Dublin Regulation will remain. Several institutions, both those within the EU such as the European Parliament, key actors in the international refugee law such as the UNHCR, esteemed NGOs such as ECRE has criticised the lack of amending Article 3(2). However, if the EU passes the European Parliament's suggested amendment of Article 3(2), the Dublin IV Regulation will take crucial step closer to coherence with the ECtHR case law in the issue of *non-refoulement* for Dublin transfers. At the date of writing, it remains to be seen whether the European Parliament's suggested amendment of Article 3(2) of the Dublin IV Regulation will be passed. Hence, the impact is as of yet unclear. It could be a leap forward for human rights within the EU's asylum *acquis*, or a blunder that maintains the troublesome incoherence with human rights law that currently persists.

4.3 Article 3(3) inadmissibility examination

In Article 3(3) the Commission introduces a new provision that obliges the Member States to examine inadmissibility of the asylum seeker's application. The inadmissibility check is to be conducted prior to the determination of responsible Member States through the allocation criteria. An application is considered inadmissible if the asylum seekers firstly has passed through a country which is not a Member State, is considered as a first country of asylum, safe country of transit or a safe third-country for the applicant.[152]

[152] COM 2016(270), pp. 39.

The Commission sees the new provision as a step in streamlining and improving the efficiency of the Dublin Regulation. It explains that the Member State of application is obliged to check whether the application is inadmissible, on the grounds that the applicant comes from a first country of asylum or a safe third-country. If this is the case, the applicant will be returned to either the first country of asylum or the safe third-country. Consequently, the Member State who made the inadmissibility check will be considered responsible for that application. Furthermore, the Member State of application must also check whether the applicant comes from a safe country of origin or presents a security risk, in which case the Member State of application has to apply an accelerated procedure for examining the application.[153]

4.3.1 European Parliament Report

The European Parliament disapproves of the new Article 3(3) proposal set forth by the Commission and requires it to be deleted from the Dublin IV Regulation. The European Parliament's report does not offer any justification as to why the new Article (3)(3) in the Commission's proposal was deleted.[154]

Similarly, in the case of this provision, the European Parliament Draft Report provides a lengthy justification where the Final Report is silent. The Draft Report justification recalls that the issue of admissibility checks is linked with the Asylum Procedures Regulation, which regulates the use of these procedures.[155] The Asylum Procedure Regulation is a part of the

[153] COM 2016(270) pp. 15.
[154] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November 2017, p. 36.
[155] European Parliament Draft Report on the Dublin IV Regulation, 2016/0133(COD), 24 February 2017, p. 27.

Commission's CEAS reform package, which is to replace the Asylum Procedures directive.[156]

Once a responsible Member State has been determined through the criteria allocation mechanism in the Dublin System, it is possible for that Member State to perform an admissibility check. However, the introduction of these admissibility checks before the Dublin criteria is applied is problematic for multiple reasons. The task of admissibility checks would imply a significant additional burden on the Member States in the frontier of the EU, as they receive the most asylum seekers. Furthermore, an initial admissibility check would reduce the incentives of the Member States to properly register applicants and incentivise secondary movements.[157]

4.3.2 EESC Opinion

The EESC is critical towards the Commission's changes to the process of determining which Member State is responsible for examining an application for international protection. Assessing admissibility as a first step, without prior analysis of family member connection in Member States or the special needs of minors, may be at odds with the right to family life under Article 7 of the CFREU and Article 8 of the ECHR.[158]

An automatic application of the safe third-country concept and first country of asylum may lead to situations of discrimination based on either nationality or the choice of migratory routes. In addition, in the case of a safe third-country and security risk, the Article 3(3) stipulates that an accelerated procedure should apply. The EESC uses strong wording, and states that the accelerated procedure "may not under any circumstances"

[156] COM 2016(467) final. Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.
[157] European Parliament Draft Report on the Dublin IV Regulation, 2016/0133(COD), 24 February 2017, p. 27.
[158] European Economic and Social Committee. SOC/543. CEAS reform I. Opinion 4(4).

cause the procedural guarantees to be undermined due to the speed of deadlines. Importantly, it risks resulting in a non-individual assessment of the application for international protection, which is prohibited under Article 10(3)(a) of the Asylum Procedures Directive.[159]

This is particularly interesting, as the Asylum Procedures Directive Recital (3) affirms the principle of *non-refoulement* as stated in the 1951 Refugee Convention and ensures that nobody is sent back to persecution. Thus, the Asylum Procedures Directive shall be read in the light of *non-refoulement* according to international law. The Article 10(3)(a) that the EESC refers to sets up requirements for the examination of applications for international protection. The provision requires that Member States shall ensure that decisions on applications for international protection shall be taken after an appropriate examination. To that end, Member States shall ensure that applications are examined and decisions are taken individually, objectively and impartially.[160]

4.3.3 UNHCR Comments

The UNHCR point out that the safe country considerations part of the admissibility check may raise concerns regarding international protection. It sees a problem in that the admissibility check is done before an actual assessment according to the allocation criteria has been made. The asylum seeker could e.g. have family links to a Member State but still have his or her asylum claim rendered inadmissible. An asylum claim cannot be rejected on the basis of a safe country designation solely. The assessment of an asylum claim must take into account the individual's risk of violations in relation to the "safe country" that the asylum seeker has travelled through.[161]

[159] European Economic and Social Committee. SOC/543. CEAS reform I. Opinion 4(4).
[160] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[161] UNHCR Comments on the Dublin IV Regulation, p. 14.

The assessment of the responsible Member State that is take charge of the asylum seekers claim is made through the allocation criteria, which takes into account family links. Since the Dublin IV Regulation's proposal states that the admissibility check should take place *before* the assessment of family links, the proposal risks violating the principle of family union of Article 7 CFREU and Article 8 ECHR, as well as the principle of the best interest of the child if minors are involved. Ergo, an application should not be rejected on the basis that the applicant is believed to come from a safe third-country.[162]

Furthermore, the UNHCR takes a sceptical stand towards the practice of safe country concepts in admissibility procedures. The practice should only be used where precise, impartial and up-to-date information is available on the safety of a particular country. The applicant must have an effective opportunity to rebut the presumption of safety in the light of individual circumstances. And lastly, the safe country concept should not apply to vulnerable applicants such as children.[163]

4.3.4 ECRE Opinion

ECRE joins the UNHCR and European Parliament in the criticism, and also finds that the proposed obligation in Article 3(3) on Member States to check the inadmissibility of asylum claims prior to the application to the Dublin criteria assessment should be deleted. The inadmissibility check provision proposed by the Commission "disregards protection obligations regarding asylum seekers family unity", and "exacerbates distribution inequalities" amongst the Member States. The latter meaning that all external border countries of the EU will be imposed an obligation to process all asylum applications falling under the "first country of asylum", "safe third-country" or "safe country of origin" categories.[164] The external border countries such

[162] UNHCR Comments on the Dublin IV Regulation, p. 14.
[163] UNHCR, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 14.
[164] ECRE, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 2.

as Greece and Italy are already facing difficulties meeting even basic standards for the asylum procedure and reception conditions. To place an additional burden on these pressured Member States is to further aggravate the instability of their asylum systems. Importantly, as these Member States' asylum procedures has been disapproved by the ECtHR for violating Article 3 in conjunction with Article 13 due to insufficient access to effective remedies, the risk for continued and violations is obvious. The introduction of accelerated procedures of admissibility checks also worsens the risk of violations, as the short time frames makes it unrealistic for a Member State to properly conduct an individualised admissibility check.

4.3.5 Human rights concerns

The right to *non-refoulement* for refugees is applied as soon as anyone presents themselves at a frontier post, port or airport etc. since refugee is within State territory and jurisdiction. An analysis of whether the principle of *non-refoulement* has been breached requires full account of State practice since the moment asylum seekers present themselves for entry, either within a State or at its border. A realistic appraisal of the *non-refoulement* requires that the rule is examined not in isolation, but is interpreted in a dynamic sense and in relation to the concept of asylum and the pursuit of durable solutions.[165]

With these international law concerns in mind, a need for the Member State to make an individual assessment is stipulated by the Strasbourg case law from the *Tarakhel* ruling is triggered as soon as refugees present themselves at or inside an EU Member State. The concept of whether a country is a safe third-country or not must therefore be tried not in general, but through an individualised assessment based on the specific needs of the particular asylum seeker. Otherwise, there is a risk of continued violation of Article 3 of the ECHR by the Member States.

[165] Goodwin-Gill, *The Refugee in International Law,* p. 206.

As Costello points out, a seeker of international protection encounters a layer of legal deflection as she enters the EU jurisdiction. The mechanisms for allocation of responsibility for 'safe third-country' rules embodied in the Asylum Procedures Directive and the Dublin System. States can be seen attempting to rely on "legal fictions" in order to form a uniform expanded area of protection, and thus concluding that the asylum seekers may be assumed to be safe in a third-country. The Strasbourg court struck down on EU law responsibilities in *Tarakhel*, as a critical response to the Luxembourg court's dissatisfactory *NS/ME* ruling.[166] To place an inadmissibility check prior to the determination of responsibility without any substantial procedural safeguards is especially problematic. The asylum seeker's claim risks being dismissed without an individualised assessment. The right to asylum can thus be dismissed simply on a generalised safe third-country basis, meaning that the asylum seeker travelled through a "safe" non-EU Member State before reaching EU jurisdiction.

The right to *non-refoulement* is not restricted to cover merely situations of torture, inhumane or degrading treatment or punishment, but its material scope is acknowledged by the ECtHR to cover other fundamental rights, e.g. the right to family life.[167] This line of reasoning is also supported by how the previously discussed European Parliament Amendment to Article 3(2) suggests that the provision shall cover all serious violations of fundamental rights, not merely those under Article 4 of the CFREU.

In this sense, the question of procedural guarantees and safeguards is closely connected to the issue of *non-refoulement* as the procedure can result in a removal to a country where there is a risk of fundamental rights violations. The lack of individualised assessments and guarantees for asylum seekers therefore results in a risk for treatment in violation of Article 3 and 13 of the ECHR, where the asylum seeker may be subject to direct and/or indirect *non-refoulement.*

[166] Costello, *The Human Rights of Migrants and Refugees in European Law,* p. 234.
[167] ECRE, Comments on the Commission Proposal for a Dublin IV Regulation, p. 20.

In conclusion, the Commission's proposed Article 3(3) regarding admissibility check prior to the determination of the responsible Member State may compromise the procedural guarantees and safeguards for asylum seekers. Especially the accelerated procedure risk to undermine the procedural guarantees due to the short deadlines. Importantly, it risks to result in a non-individual assessment of the application for international protection. Furthermore, a procedure which rejects asylum claims solely, on the basis of safe country considerations, without any individual assessment, risks violation of the principle of family union and the best interest of the child. The concept of whether a country is a safe third-country or not must therefore be tried not in general, but through an individualised assessment based on the specific needs of the particular asylum seeker. Otherwise, there is a risk that the Member State will violate the right to an effective remedy and return asylum seekers to a country where he or she may be subject to inhumane or degrading treatment or punishment.

4.4 Article 8(2) – Withdrawal of procedural guarantees and safeguards for unaccompanied minors

The Commission's proposal addresses procedural safeguards and guarantees regarding the rights of unaccompanied minors. The proposal aims to better define the principle of the best interest of the child. Furthermore, a mechanism for making a best interest of the child-determination in all circumstances implying the transfers of minors is instated.[168] These suggestions does initially seem to entail a movement towards the ECtHR case law in *Tarakhel*, stating that unless an individualized assessment by the sending state in addition with individualized guarantees by the receiving state is carried out, the transfer is considered to violate art 3 of ECHR.[169]

[168] COM 2016(270), p. 13.
[169] See chapter 3.5.

The Dublin IV Proposal, Recital 20, states that before transferring an unaccompanied minor to another Member State, the transferring Member State should make sure that the receiving Member State will take all necessary and appropriate measures to ensure the adequate protection of the child, and in particular the prompt appointment of a representative or representatives tasked with safeguarding respect for all the rights to which they are entitled. Any decision to transfer an unaccompanied minor should be preceded by an assessment of his or her best interests by staff with the necessary qualifications and expertise.[170] Thus an obligation is placed upon the transferring Member States to 'make sure' that the receiving Member State ensures adequate protection.

The Dublin IV Proposal, Article 8, specifies this guarantee for unaccompanied minors and the corresponding obligation of the Member States. Before transferring an unaccompanied minor, the transferring Member State shall make sure that the receiving Member States take measures to ensure that the unaccompanied minor is granted education according to Article 14 of the Reception Conditions Directive and is ensured a representative to care for the minor's well being and social development according to Article 24 of the Reception Conditions Directive.[171] The transferring Member State shall likewise make sure that the unaccompanied minor is granted the procedural guarantees put forth in Article 25 of the Asylum Procedures Directive. The measures shall be taken 'without delay', although the proposal lacks a determined time limit.[172]

The Member State is meant to 'make sure' of that the aforementioned conditions referred to in the proposal Article 8(4) are fulfilled by making an

[170] COM 2016(270), p. 25.
[171] COM 2016(270), p. 44; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).
[172] COM 2016(270), p. 44; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

assessment based on the factors listed in Article 8(3). The factors are (a) family reunification possibilities, and (b) the minor's well-being and social development. Factor (c) is safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking. Lastly, factor (d) is the views of the minor in accordance with his or her age and maturity. All the factors shall be taken due account in order to assess the best interest of the child. The Member States shall closely cooperate with each other in the assessment. Article 8(4) concludes by the stating that the assessment shall be done swiftly (again no time limit) and with the qualification and expertise necessary to ensure that the best interest of the minor is taken into account.[173] Thus, an obligation to conduct an individualised assessment based on clear factors regarding the best interest of the child is posed upon the Member States.

In the Proposal Article 10(5) the Commission changes the allocation criteria for determining which Member State should be responsible for an unaccompanied minor's asylum application. In absence of family members or relatives, the Member State responsible for processing the claim shall be the one where the unaccompanied minor *first* lodged his or her application for international protection. However, the responsible Member State can be another one, if it is demonstrated that this is not in the best interest of the minor. The previous wording of this provision under the Dublin III Regulation did not include the word *first.* The Commission has therefore created a presumption that the first Member State of application shall be responsible, unless it can be demonstrated otherwise on account of the best interest of the child.[174]

There is a highly troublesome restriction of this obligation, which is found in Article 8(2). The Commission's Proposal Article 8(2) provides that only those Member States "where an unaccompanied minor is *obliged to be present"* shall ensure that a representative represents and/or assist the

[173] COM 2016(270), p. 44.
[174] COM 2016(270), p. 46.

unaccompanied minor. This means that unaccompanied minors who depart from the Member State where he or she is obliged to be present, and travels to another Member State, stands without legal representation and guardianship in the Dublin procedure.

The Commission motivates this withdrawal of legal representative and guardianship in Recital (2) of the Dublin IV Regulation Proposal is made "in order to discourage secondary movements of unaccompanied minors". The Commission proceeds by stating that the secondary movement are not in the best interest of unaccompanied minors, and that the Member State responsible should be that where the unaccompanied minor first has lodged his or her application for international protection, unless it is demonstrated that this would not be in the best interest of the child.[175] The Commission therefore creates a presumption that the Member State where the minor firstly lodge an asylum application should be the one to take responsibility of the asylum assessment. The presumption can be rebutted by proving it is not in the best interest of the child to remain in the Member State where he or she first applied for international protection.

4.4.1 European Parliament Report

In the European Parliament Report, the troublesome clause of *obliged to be present* in Article 8(2) is removed. The restriction of unaccompanied minors right to procedural guarantees and safeguards to solely the Member State where the minor first filed his or her asylum application is therefore lifted. Instead the European Parliament Report simply suggest that any Member State where the minor is *present*, is obliged to provide the unaccompanied minor with procedural guarantees and safeguard.[176] Ergo, the unaccompanied minor should *always* have a right to procedural guarantees and safeguard, no matter where in the EU he or she is present.

[175] COM 2016(270), p. 25.
[176] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November 2017, p. 53.

In addition, the European Parliament clarifies and strengthens the content of the procedural guarantees and safeguards in Article 8(2). The European Parliament Report states that a *guardian,* not a *representative* as proposed by the Commission, shall represent and assist the unaccompanied minor with respect to *all* procedures, not *relevant* procedures as the Commission proposed. Furthermore, the guardian shall have the qualification, training, expertise and independence to ensure that the best interests of the minor are taken into consideration during the Dublin transfer procedure. The guardian must be appointed as soon as possible, but at latest within 24 hours of making the application.[177]

In consequence, the European Parliament Report also amends of Recital 20 of the Commission's proposal. The Parliament's amendment obligates a transfer Member State to obtain individual guarantees from the receiving Member State that it will take all necessary and appropriate measures to ensure the adequate protection of the child, and in particular the prompt appointment of a guardian tasked with safeguarding respect for all the rights to which the child is entitled to. Any transfer shall be preceded by a multidisciplinary best interest assessment of the individual child, in participation with his or her guardian and legal advisor.[178] Note that the Parliament's amendment is well aligned with the Strasbourg court's ruling in *Tarakhel*¸ which requires these individual assessments and guarantees for minors.

The Commission's proposed Article 10(5) of the Dublin IV Regulation is also met with criticism, and is amended in the European Parliament Report. The amendment removes the presumption of that the Member State of first application should be responsible for the unaccompanied minor's asylum

[177] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November 2017, p. 53.
[178] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November 2017, p. 11.

application. Instead, the responsible Member State shall be determined in accordance with the allocation mechanism presented by the European Parliament, and be preceded by a multidisciplinary assessment of the best interest of the minor.[179]

4.4.2 Opinion of the EESC

The European Economic and Social Committee declares that the provisions regarding unaccompanied minors go against the best interests of the minor given that in the many cases where minors depart from the Member State where the first application was made, unaccompanied minors is denied access to an effective remedy to process the application for international protection. Importantly, neither does the provisions ensure an assessment of the minor's individual needs.[180]

4.4.3 UNHCR Comments

The UNHCR strongly supports the Commission's aim of enhancing child protection. On a positive note, the enhanced provision with the criteria for best interest assessments are welcomed by the UNHCR, although they argue that the procedures should be further developed and operationalized.

After the introductory appraisal of the Commission's aim, criticism on several aspects of the proposal is brought forward. The UNHCR raises the same procedural issue as the European Parliament, and the EESC, the one regarding unaccompanied minors. The possibility that a child could only be appointed a legal representative in the Member State where the child is obliged to be present "exposes an evident protection gap, as children would not receive assistance during take back procedures and transfers".[181]

[179] European Parliament Report on the Dublin IV Regulation, A8-0345/2017, 6 November 2017, p. 62.
[180] European Economic and Social Committee, SOC/543. CEAS reform I. Opinion 4(1).
[181] UNHCR, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 4.

In addition, the UNHCR express concern over the proposed measure of transferring unaccompanied children to the Member Sate of first application in order to dissuade irregular onward movements. This procedure is at variance with the UNHCR's position in the matter, namely that children should not unnecessarily be transferred to other Member States unless it is in their best interest. The reason behind this position is that transfer procedures delays the child's access to the asylum procedure.[182]

The Commission's proposed Article 8(2) is criticised by the UNHCR because it is seen as contrary to the CJEU's ruling in *MA*. Concern is expressed over that the Commission reversed the presumption that the CJEU created in *MA.* To be clear, the CJEU finds that it is in the best interest of a child *not to be transferred*, unless proven contrary. The Commission on the other hand, finds that it is in the best interest of a child *to be transferred* to the first country of application, unless proven contrary. UNHCR's position is that children should only be transferred for family reunion purposes. In other situation, it is in the best interest *not to transfer* a child because it unnecessarily prolongs the procedure and thus delays the children's access to an asylum procedure.[183] On the aforementioned grounds, the UNHCR recommends that the Commission's presumption in Article 8(2) should be deleted from the proposal as it is contrary to EU case law.[184]

4.4.4 ECRE Comments

ECRE shares the opinion of the European Parliament, the EESC and the UNHCR regarding the procedural issues for unaccompanied minors. ECRE is of the opinion that the Commission's proposal attempts to overturn the principles established by the CJEU by reversing the CJEU's *M.A.* ruling on the responsibility of the Member State in which an unaccompanied child is

[182] UNHCR, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 4.
[183] UNHCR, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 26.
[184] UNHCR, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 27.

present to process his or her claim.[185] This due Article 8(2) of the proposal poses a substantial restriction on the obligation of Member States to ensure representation and assistance to unaccompanied children on regarding the Dublin Procedure. This due to the reason that only the Member State "where an unaccompanied minor is obliged to be present" has a duty to ensure that the minor receives a representative who assists and represents the minor during the Dublin procedure.[186] Consequently, an unaccompanied minor stands without procedural guarantees of legal representation if the minor is obliged to be present in e.g. Greece, but flees Greece and makes an asylum application in Germany.

In result, the Proposal in Article 8(2) has the following consequences for a case where the starts a procedure in a different Member State then the one where the minor is *obliged* to be present. It assumes that the unaccompanied should seeking international protection be able to single-handedly communicate with state authorities without representation in order to determine his or her own best interest, and consequently designate the responsible Member State. ECRE states that this "perverts the best interest principle in a way that contravenes Article 24(2) of the Charter". The provision would furthermore lead to highly dysfunctional best interest determination procedures in the Member States.[187]

Any transfer of unaccompanied children which is presumed to be contrary to the best interest of the children is prohibited under Article 23(2) of the CFREU. This has been analysed by the CJEU in the *M.A.* ruling, which created a presumption that transfers to another country are not in the children's best interest. Unaccompanied minors form a category of particularly vulnerable persons. It is important not to prolong the asylum procedure for determining the Member State responsible. A transfer procedure may prolong the determination of the responsible Member States

[185] ECRE, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 6.
[186] ECRE, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 10.
[187] ECRE, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 11.

by 10-12 months. Giving weight to the importance of increasing the effectiveness, transfer procedures should thus not be undertaken regarding unaccompanied minors.[188]

4.4.5 Human rights concerns

The prospect of leaving an unaccompanied minor without legal representation and guardianship in a complex Dublin transfer procedure is an obvious breach of the right to access to an effective remedy under Article 13 of the ECHR. The child's best interest should be respected, no matter where in the EU the child files an asylum application. Keep in mind that an unaccompanied minor is a child who seeks refugee in Europe without any family members present. The obligation of the Member State to provide a representative for the minor corresponds with the minor's fundamental right to effective access to a remedy.

To remove the unaccompanied minor's right of a legal representative or a guardian, is to withdraw the access to an effective remedy. To this one may analyse the four elements Moreno-Lax listed as the main characteristics of effective remedies under Article 13 ECHR, based on the ECtHR *M.SS. v Belgium and Greece* ruling. [189] First of all, a remedy must be accessible both in law and in practice. This remedy of protesting a Dublin transfer is not accessible for the unaccompanied minor in practice, as he or she lacks a legal representative to represent him or her towards the authorities. Secondly, sufficient procedural guarantees must be in place to avoid any irreparable damage from occurring. The irreparable damage in the case of unaccompanied minors is that the transfer would violate best interest of the child. Again, it does not matter if there is a theoretical possibility to appeal the authorities' assessment if the unaccompanied minor lacks a representative. Thirdly, the remedy must ensure that an arguable claim of an

[188] ECRE, Comments on the Commission's Proposal for a Dublin IV Regulation, p. 11.
[189] Moreno Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' in European Journal of Migration and Law 14 (2012) 1-31, p. 23.

Article 3 breach is duly appraised and granted the appropriate relief. In the case of unaccompanied minors, the claim of transfer prohibition on the grounds of *non-refoulement* does not even have the opportunity to be duly appraised, as the minor is without any representative to legally argue on his or her behalf against the Member State authorities. A claim cannot be presented and thus examined properly is hardly an effective remedy. Lastly, the substance of the claim must be put under independent and rigorous scrutiny by a competent authority. Hence the court is not satisfied with merely a theoretical remedy, but applicants must be offered a realistic opportunity to prove their claims.

In conclusion, the Commission's proposed Article 8(2) and Article 10(5) has a negative impact on the prohibition of Dublin transfers from a human rights law perspective. The proposed provisions are incompatible with both CJEU of *MA* and ECtHR case law of *M.S.S.* and *Tarakhel* regarding fundamental rights and effective access to remedies for asylum seekers. The question of procedural guarantees and safeguards is connected to the issue of *non-refoulement*. The lack of individualised assessments and procedural guarantees for asylum seekers results in a risk for treatment in violation of Article 3 in conjunction with Article 13 of the ECHR and thus the asylum seeker may be subject to direct and/or indirect *non-refoulement.* Especially the withdrawal of guardians and legal representatives for unaccompanied minors is fundamentally breaching the right to an effective remedy, as the remedy in practice becomes useless for the child without any support to access the remedy.

5 Conclusions

5.1 Discrepancy in CJEU and ECtHR case law

1. How does the principle of non-refoulement prohibit Dublin transfers pursuant to the CJEU and ECtHR case law?

The first research question focuses on how the principle of *non-refoulement* prohibits Dublin transfers in CJEU and ECtHR case law. To start with the CJEU, its case law on the prohibition of Dublin transfer on ground of *non-refoulement* is illustrated in *NS/ME* and *MA.* In the case of *NS/ME,* the CJEU held that conclusive presumptions of fundamental rights compliance are incompatible with EU law and thus also precluded by EU law. The United Kingdom (transferring Member State) could not be considered unaware of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in Greece (receiving Member State) that amounted to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment. Hence, the CJEU draws the line of prohibition of Dublin transfer where there are serious shortcomings, even systemic deficiencies, in the asylum procedure and reception conditions of asylum seekers.

It must be noted that the *NS/ME* ruling is from 2011, and therefore predates the Dublin III Regulation, where the preconditions for prohibiting Dublin transfers changed. In the Dublin III Regulation, Article 3(2)(2) followed the *NS/ME* ruling, although the wording was slightly changed. It was evident that the ECtHR *M.S.S* ruling had an impact on the Dublin System. However, the CJEU case law was incoherent after the Strasbourg court's *M.S.S.* ruling. However, the *MA* ruling stood out as a case where unaccompanied minors without family links in the EU Member States were protected by the CJEU, as they are a particularly vulnerable group of asylum seekers. The unaccompanied minor was protected by the CJEU applying a presumption

that prohibited Dublin transfers, which could only be rebutted on account of a best interest of the child assessment.

As regards to the ECtHR, the *Tarakhel* case draws a clear line on what the Strasbourg court requires from the Member States of the Dublin System, and that Dublin transfers consequently is prohibited on grounds of *non-refoulement* if the requirements are breached. The ECtHR ruling builds upon the previous case law and sets up requirements of individuals guarantees in Dublin transfer procedures. The Court held that if applicants are returned to a receiving Member State without the transferring Member State having first obtained individual guarantees from the receiving Member State, there would be a violation of Article 3 of the ECHR. The individual guarantees shall clarify that the applicants would be taken charge of in a manner that was adapted individual applicant. Unless an individualized assessment by the sending state in addition with individualized guarantees by the receiving state is carried out, the transfer is considered to violate Article 3 of ECHR.

5.2 Dublin III remains incompliant with human rights law

2. Is the EU law regulating preconditions for prohibiting Dublin transfers in compliance with human rights law, in particular the ECtHR case law?

After assessing the Dublin III Regulation regarding transfers and the relevant the CJEU case law and comparing these EU law norms to the human rights law norms set up by the ECtHR, I reach the conclusion that the Dublin III Regulation is not in compliance with the human rights law of the ECtHR. This is important, since the ECtHR's position is legally binding and must be followed by the EU Member States. Even the CJEU, despite its reluctance, is obliged to interpret the EU Charter in the light of the ECHR and the ECtHR case law.

The Dublin III Regulation Article 3(2) codifies the *NS/ME* case law of *systemic deficiencies*, but it does not reflect the Strasbourg case law following the *Tarakhel* ruling which requires thorough and individualised assessments in all cases. This is problematic, as the CFREU Article 52(3) calls for consistency between the Charter and the ECHR. The EU Charter rights, such as Article 4 of the CFREU which matches Article 3 of the ECHR, shall therefore coincide with the rights in the ECHR. The provisions shall have the same meaning and scope, determined not merely by the convention text but also in accordance with the relevant case law of Strasbourg and Luxembourg. This bridge between the EU law and ECHR law made by Article 52(3) CFREU is termed a 'dynamic reference', meaning it also includes the jurisprudence of the Strasbourg court. Hence the dominant position is that the ECHR standards shall be coherently followed by the EU Member States.

Even post-*M.S.S.* the CJEU case law was ambiguous and at least semi-divergent from Strasbourg case law. However, one may safely state that there is a discrepancy between the post-*Tarakhel* and the latest CJEU case *NS/ME* rulings. As of yet, the CJEU has not responded to the *Tarakhel* ruling. Perhaps, the CJEU is perplexed by an uncomfortable political situation regarding migration in the EU, and awaits the European Parliament and European Council to pass the Dublin IV Regulation. Member States are nonetheless obliged to follow *Tarakhel* as the Strasbourg case law remains the latest point of reference. The UNHCR, the European Parliament and ECRE all refers to the *Tarakhel* case and supports its interpretation of what human rights requirements that are to be imposed upon Dublin transfers. This acknowledgement from the international community in human rights law supports the conclusion that the ECtHR's ruling must be followed by the EU.

The EU law's incompliance with human rights law regarding the prohibitions of Dublin transfers can be derived to that the EU law lacks requirements of individual assessments and guarantees for asylum seekers,

which the ECtHR case law stipulates. The EU law reserves the prohibitions of Dublin transfers for situations of systemic deficiencies in a Member State's asylum system, which vastly limits the possibility to prohibit Dublin transfers. The EU law therefore fails to take into account the asylum seekers individual situation through assessments and offers of individualised guarantees. Consequently, the Dublin III Regulation remains incompliant with human rights law.

5.3 Dublin IV ignores *non-reofulement* considerations

3. What changes does Dublin IV envision regarding prohibitions of Dublin transfers, and are these changes compatible with human rights law, especially the principle of non-refoulement?

In conclusion, the Commission's Dublin IV Regulation Proposal envisions changes regarding the prohibitions of Dublin transfers that are incompatible with human rights law, especially the principle of *non-refoulement.* In contrast, the European Parliament Amendment is more coherent with the principle of *non-refoulement.* Depending on whether the European Parliament's amendments to the Commission's Proposal is passed or if the Commission's proposal will be passed, the answer to the question will differ. If the Commission's proposal were to be passed, the impact on prohibiting transfers on ground of *non-refoulement* would be not even unaltered, but the diminished. As the Commission's Proposal for a Dublin IV Regulation leaves Article 3(2) unaltered, there is no progress made on coherency with the human rights law requirements set up by the ECtHR case law. As the Commission's proposal leaves the provision unaltered, the problems for both the asylum seekers and Member States as to implementing the Dublin Regulation will remain.

Several institutions, both those within the EU such as the European Parliament, key actors in the international refugee law such as the UNHCR, esteemed NGOs such as ECRE has criticised the lack of amendments to the problematic Article 3(2). However, if the EU passes the European Parliament's suggested amendment of Article 3(2), the Dublin IV Regulation will take crucial step closer to coherence with the ECtHR case law in the issue of *non-refoulement* for Dublin transfers. At the date of writing, it remains to be seen whether the European Parliament's suggested amendment of Article 3(2) of the Dublin IV Regulation will be passed. Hence, the impact is as of yet unclear. It could be a leap forward for human rights within the EU's asylum acquis, or a blunder that maintains the troublesome incoherence with human rights law that currently persists.

The Commission's proposed Article 3(3) that introduces of admissibility checks which aims to return asylum seekers to 'safe-countries' raises questions regarding several procedural guarantees and safeguard that are protected by fundamental rights. To place the admissibility check prior to the determination of the responsible Member State may compromise the procedural guarantees and safeguards for asylum seekers since an application can become inadmissible solely on the notion of 'safe-country' options. This results in a non-individual assessment of the application for international protection. Furthermore, a procedure which rejects asylum claims without any individual assessment, risks violation of the principle of family union and the best interest of the child. The concept of whether a country is a safe third-country must be tried not in general, but through an individualised assessment based on the specific needs of the particular asylum seeker, according to *Tarakhel* ruling of the ECtHR. Otherwise, there is a risk that the Member State will violate the right to an effective remedy and return asylum seekers to a country where he or she may be subject to inhumane or degrading treatment.

The withdrawal of procedural guarantees and safeguards for unaccompanied minors that departs from the Member States where they are obliged to be

present is also problematic, found in the Commission's proposed Article 8(2) and Article 10(5). This may have a negative impact on the prohibition of Dublin transfers from a human rights law perspective, as transfers that should be prohibited on grounds of *non-refoulement* will be carried out due to the absence of procedural guarantees and safeguards. The proposed provisions are therefore incompatible with both CJEU of *MA* and ECtHR case law of *M.S.S.* and *Tarakhel* regarding fundamental rights and effective access to remedies for asylum seekers. The issue clearly illustrated how important procedural guarantees and safeguards is in order to protect the right to *non-refoulement* for asylum seekers. Especially the withdrawal of guardians and legal representatives for unaccompanied minors is fundamentally breaching the right to an effective remedy, as the remedy in practice becomes useless for the child without any support to effectively access the remedy.

As I have scrutinizing the Commission's Dublin IV Proposal searching for provisions that may have an impact on the prohibition of Dublin transfer, I can therefore conclude that the impact is overwhelmingly negative. In some cases it leaves current provisions, such as Article 3(2), unamended although it is incoherent with the human rights law requirements set up by the ECtHR. Several new provisions that the Commission proposed, such as Article 3(3), Article 8(2) and Article 10(5) raise serious concerns regarding procedural guarantees and safeguards for asylum seekers subjected to transfers under the Dublin System, especially for unaccompanied minors. The absence of procedural guarantees and safe guards in the aforementioned provisions causes them to violate both the case law of the CJEU and the ECtHR, and should therefore be removed.

For further research studies, I would recommend an assessment of the corrective allocation mechanism that is proposed by the Commission in Article 34-45. I encountered these provisions in my analysis of the Dublin IV Regulation. Although they concern the general large-scale efficiency of the Dublin System and therefore falls outside the frames of this analysis, it

seems as an interesting topic that would require a lengthy and rigorous study. The corrective allocation mechanism has been replaced by the European Parliament Report, who instead suggested an automatic relocation mechanism. The main topics regarding these is the solidarity amongst Member States, and the fair share distribution of asylum seekers. Naturally, there is a connection between how efficient the asylum system operates, and how well fundamental rights is protected. Therefore, an analysis of these provisions would be an interesting EU law topic.

5.4 End remarks

Writing this thesis has aggravated my concerns for the fundamental rights of refugees in Europe. The Commission has proposed a recast of the Dublin IV Regulation that fails to consider fundamental rights in the name of increased efficiency. Its punitive approach towards e.g. unaccompanied minors is especially worrying. At least, the European Parliament has stood firmly and maintained a position as a fundamental rights guardian of the European Union. With the upcoming election in May 2019 this may very well change, if refugee-hostile nationalist parties wins more MEP seats in Brussels.

The proposed Dublin IV Regulation is currently debated in the EU Council, who despite several meetings are yet to reach an agreement. This indicates that the political will of the Member States governments diverges greatly amongst the Member States. It remains to be seen whether the Dublin IV Regulation will be passed at all, and if so how the Dublin IV Regulation will be formed. All parties seems to agree that the Dublin System is in great need of a reform, the problem is in which direction that reform should lead. In my opinion, any direction taken must be compatible with human rights law. The continued EU ignorance of the rulings of the European Court of Human Rights is worrying, as this court's decisions are highly respected amongst almost all Member States. If the Commission's proposal were to be passed, it risks to severely undermine the authority of the Strasbourg court.

In my opinion, it is time for the EU to let the *Tarakhel* ruling have the same impact on Dublin IV, as the *M.S.S* ruling had on Dublin III. Refugees have human rights and those rights must be respected by the EU. The rights developed in the Strasbourg court may be a bit hard for the EU to chew, as it shatters the illusion that all EU Member States are safe countries for asylum seekers. However, as the European Parliament, the UNHR and ECRE repeatedly points out, compliance with human rights law is not a choice but an obligation of all Member States and of the European Union.

My thoughts lead me to the famous tale of H.C. Andersen, *The Emperor's new clothes*, where no one dares say that they do not see a suit of clothes as the emperor parades wearing a piece of clothing that is allegedly invisible to those incompetent. The truth naturally being, that the emperor has no clothes. To draw an analogy, the EU dare not say that the fundamental rights granted amongst the Member States, in fear of questioning the principle of mutual recognition. The illusion is disapproved by the Strasbourg court which voices the concerns of those thousands of applicants appealing that the Dublin transfers are not compatible with the ECHR. It remains to be seen whether the Commission amends the Dublin IV Proposal in order to genuinely strengthen fundamental rights, or whether the human rights violations in the EU remains invisible.

The lack of fundamental rights considerations in the Commission's proposal makes Dublin transfers possible in a higher regard than before, but impossible for a human rights perspective. Therefore, I dare say that the Commission's proposal is making Dublin transfers (im)possible.

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