DEFICIENCIES OF THE DUBLIN REGULATION AND THE SOLIDARITY REMEDY EXEMPLIFIED BY ANALYSING CASES M.S.S. V. BELGIUM AND GREECE AND TARAKHEL V. SWITZERLAND

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Keywords:

Dublin Regulation, Common European Asylum System, European Court of Human Rights, solidarity, burden sharing, fundamental rights, reception conditions.

ABSTRACT

This paper focuses on one of the cornerstones of the Common European Asylum System: the Dublin Regulation. It will be shown that the principles building the core of the Dublin System are difficult to reconcile with the realities in the overburdened southern and eastern Member States of the European Union. Special weight will be given to the issues of solidarity with the frontline states and burden sharing among the parties to the Regulation, without which basic rights such as dignity and security for asylum seekers cannot be guaranteed throughout Europe. Through analysing two landmark decisions, M.S.S. v. Belgium and Greece and Tarakhel v. Switzerland in front of the European Court of Human Rights, it will be shown that the incorrect or negligent use of the Dublin Regulation can lead to serious violations of fundamental rights of the asylum seekers.

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1. INTRODUCTION

The issues of migration and asylum are currently dominating the media. On a daily basis journals inform about boats transferring hundreds of people across the Mediterranean Sea to the southern border of the European Union (EU). The life in Europe seems promising enough to risk losing everything. The massive influx of asylum seekers leaves both politicians and civilians restless, and creates chaos in the overburdened frontline states. While this paper does not intend to extensively discuss the political and legal implications of the current migration crisis, nor the exceptional solutions taken in the aftermath of several particularly devastating boat accidents, it will focus instead on one of the cornerstones of the European asylum system: the Dublin Regulation.

The question this paper aims to discuss is how the underlying, theoretical principles of said legal document are affecting the realities of the asylum seekers and the Member States forming the external border of Europe and how the current situation could be remedied. Triggered by the aggravated migration situation in Europe the flaws of the Dublin Regulation have been outlined in the past years, both by academia and the media.[2] However, new insights into the Regulation are further necessary, as the Member States are not likely to be able to agree on a new, improved instrument. With this paper I aim to provide a concise summary of expressed critics and an overview of the intrinsic problems of the Dublin Regulation. Further, I would like to elaborate why in my opinion the only viable solution to the current migration crisis is the establishment of a solidarity-based system among the European states.

In order to do so, I will start with a brief introduction to migration law in Europe in general and the Dublin Regulation in particular. Following this introduction, the article will concentrate on the insufficiencies of the Dublin Regulation, which in certain cases causes asylum claims to be processed without guaranteeing the respect of the fundamental rights of the asylum seekers. In order to receive a clearer picture of the practical consequences the disrespect of fundamental rights might cause, a closer look will be taken at two cases in front of the European Court of Human Rights (ECtHR), namely the landmark decision M.S.S. v. Belgium and Greece and the recent case Tarakhel v. Switzerland. The analysis of these two judgments will further outline some of the problems the Dublin Regulation bears in itself and highlight the solutions the Court suggested in order to improve the situation of the applicants.

2. EUROPEAN MIGRATION AND ASYLUM FRAMEWORK

While the number of people fleeing to Europe these days constitutes an important influx in comparison to the past years, migrants and refugees arriving in the EU are by no means new

2 For further information see for example ECRE, Dublin Regulation. http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html, accessed 8 May 2016.

phenomena. Especially due to the conflicts in Syria and Iraq, the instabilities in Afghanistan and Eritrea and since 2014 in the Ukraine, migration was a core topic in the EU during the past few years. According to the European External Action Service (EEAS) migration is "at the heart of the political debate in the EU and, for a few years now, is one of the strategic priorities of the external relations of the Union".[3] However, it was only in the early months of 2015 when the situation reached a point where the term 'migrant crisis' started to be widely used by European political leaders and the media.[4] According to the United Nations High Commissioner for Refugees (UNHCR) in 2015 more than one million migrants and refugees reached the shores of Europe by sea. Greece, followed by Italy, received the lion's share of the arrivals.[5] Overwhelmed by the increasing number of arriving people these two southern European states asked for help from the other Member States of the EU. After a number of particular devastating boat accidents, several meetings were held at the EU level in order to address the migration crisis and to respond to the aggravated situation in the Mediterranean. Among the proposed solutions the option of emergency relocation between the Member States has caused a great deal of discussions, with governments from United Kingdom and certain central and eastern European states strictly opposing the plan to distribute refugees more evenly in Europe.[6] When it comes to migration questions it seems that the so-called Union breaks into separate states again, adding complexity to possible political solutions in order to resolve the current situation.

Also the framework of the European legal regulations concerning immigration law reflects the complexity of the issue. Since 2007 the legal measures taken by the EU in order to deal with third-country nationals (TCNs) are laid down in Articles 78 and 79 of the Treaty on the Functioning of the European Union (TFEU). Articles 78 (1) and (2) and also Articles 79 (1) and (2) are outlining the importance of a common policy on asylum. The goal of this common policy on asylum is to create a space of freedom, security and justice, for those who are forced to flee to the EU.[7] A common approach to asylum and migration seems to be a necessary condition for the EU, seen

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3 EEAS 2015, Migration and Asylum in External Relations. http://www.eeas.europa.eu/migration/index_en.htm, accessed 15 March 2016.

4 In this context it is important to distinguish the terms 'refugees' and 'migrants', as their treatment under modern international law varies significantly. The 1951 Refugee Convention, which is ratified by the majority of countries and is the key legal document for defining who is a refugee, states in Article 1 that this status is given to all persons fleeing their country "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". On the other hand, migrants do not flee armed conflicts or persecution, but choose to move mainly because of economic reasons and try to improve their lives by finding work abroad.

5 UNHCR, Refugees/Migrants Emergency Response – Mediterranean. http://data.unhcr.org/mediterranean/regional.php, accessed 15 March 2016.

6 European Council 2015 A, Special meeting of the European Council, 23 April 2015 – statement. http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/, accessed 18 March 2016; Croft 2015, EU countries' resistance could frustrate migrant relocation plan, Swissinfo, 27 May 2015. http://www.swissinfo.ch/eng/reuters/eu-countries--resistance-could-frustrate-migrant-relocation-plan/41455038, accessed March 18th, 2016.

7 TFEU 2007, Articles 78 and 79; Morano-Foadi 2015, p. 117-118.

that with the entry of the Schengen Convention in 1990 the internal border control of the largest part of the EU was abolished and the free movement of persons within the European Internal Market was introduced.[8] It was in 1999 during the 'Tampere Conclusions' when the EU formally started to talk about the so called Common European Asylum System (CEAS): based on the 1951 Refugee Convention clearly formulated minimum standards should be provided, which should be applied by all EU Member States when processing asylum questions.[9] The outcome of an asylum application should not depend on where the asylum seeker applies and the cases should be examined in a fair and effective way, guaranteeing protection throughout Europe. Nowadays, the CEAS consists of several crucial directives, such as the revised Qualification Directive, which sets out common grounds justifying international protection.[10] Also among the directives is the revised Dublin Regulation.[11]

3. THE DUBLIN REGULATION

The Dublin Regulation is a EU law, which determines the responsible state for evaluating asylum claims from TCNs arriving to Europe. Since 1997 it supersedes the Schengen Convention, which also laid down certain rules in order to determine the responsible state for processing asylum applications.[12] On the basis of the 1997 Dublin Convention, in the frame of the CEAS the Dublin Regulation (also called the Dublin II Regulation) was adopted and entered into force in 2003. The latest changes to the Dublin Regulation were undertaken in 2013, enforcing the so-called Dublin III Regulation, which applies to all the 28 EU Member States, as well as to four Associate States.[13] Its main objective – to establish criteria and mechanisms for determining the Member State[14] responsible for examining an application by a TCN – has stayed the same over the years.

Criteria for the establishment of the responsible Member State are namely family considerations, recent possession of visa or residence permit in a Member State, illegal entry to a Member State and legal entry to a Member State. The idea behind these criteria is that the responsibility for the examination of the application should be given to the state, which contributed the most to the presence of the asylum seeker in the territory where the Dublin Regulation applies. If however none of these criteria applies it is upon the first Member State, where the asylum seeker arrived, to examine the application.[15] The fact that in each case only one contracting state is responsible

8 Hailbronner 2000, p. 1, 375.
9 Wierich 2011, p. 227.
10 European Commission 2015 A, Common European Asylum System. http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm, accessed 20 March 2016.
11 The other directives are the Asylum Procedures Directive, the Reception Conditions Directive and the EURODAC Regulation. The latter two are further discussed in Chapters 3 and 4.2.
12 Schengen Implementation Agreement 1990, Articles 28-38.
13 'Associate States' is the denomination for the states adhering to the Schengen Convention without being part of the EU. They are namely Norway, Iceland, Switzerland and Liechtenstein.
14 In this paper 'Member State' refers to the 32 'Dublin countries', except if specifically stated otherwise.
15 Hailbronner 2000, p. 385; European Commission 2015 B, Country responsible for asylum application (Dublin). http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm, accessed 17 March 2016.

for processing the asylum application is seen as beneficial for both the Member States and the applicants. Seen that applicants can only apply in one country (a principle unofficially referred to as the 'one-chance-only principle') ensures that the limited economic resources of the 'Dublin Countries' are used efficiently, by preventing a situation where several states examine the same application in order to determine whether the asylum seeker should be granted protection or not. Also, this principle tries to undermine the intention of asylum seekers to apply in a parallel or successive manner to different states - so called 'asylum-shopping'.[16]

In order to avoid abuses of the Dublin Regulation, the fingerprints of the asylum seekers are registered in the country, where the applicants arrive, and are afterwards transmitted through the European Dactyloscopy (EURODAC) database. This procedure is of particular necessity seen that an important part of the asylum seekers travel without documents or with false identities.[17] At the same time, the fact that only one state is responsible for the examination of the application, is also beneficial for TCNs seeking for protection: not only does this procedure guarantee a relatively rapid decision-making, it also avoids the risk of 'refugees in orbit', where the responsibility for processing the asylum claim is passed from one Member State to another. Such a suspension of granting protection to a potential refugee would not only leave the asylum seeker in a desperate situation, it could even violate Article 3 of the European Convention on Human Rights (ECHR), which prohibits degrading treatment.[18]

4. INSUFFICIENCIES OF THE DUBLIN REGULATION

While the rapid determination of the responsible Member State is in theory beneficial for both the asylum applicants as well as the parties to the treaty, in practice the situation is more complicated. On the tenth anniversary of the Dublin II Regulation, in 2013, a research group consisting of Réfugiés-Cosi, the European Council on Refugees and Exiles (ECRE), the Hungarian Helsinki Committee and their respective national partners, published a comparative study regarding the application of the Regulation in different Member States. The assessment was quite disillusioning and highlighted different areas where improvement is necessary. According to these organizations the underlying principles of the Dublin Regulation need to be revised in order to grant better protection for refugees and more efficient use of the Member States' resources.[19] Summarized, the problem is mainly two-folded: the core problem lies in the fact the parties to the Dublin Regulation are affected by the influx of asylum seekers in different extent due to their geographical location. Frontline states, receiving the highest amount of asylum

16 Hailbronner 2000, p. 1, 383; Morano-Foadi 2015, p. 130.
17 Hailbronner 2000, p. 401; European Commission 2015 C, Identification of applicants (EURODAC). http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/identification-of-applicants/index_en.htm, accessed 17 March 2016.
18 Battjes 2006, p. 388; Nathwani 2003, p. 145.
19 ECRE 2013, p. 5; ECRE 2008, p. 29.

applications, are overwhelmed by the massive administrative and logistic effort related to the arrival of TCNs. This in turn leads to very practical shortages, forcing people in need to live in devastating conditions and violating their fundamental right to dignity and security.

4.1 Burden Shifting instead of Burden Sharing

When dealing with the migration influx in Europe, solidarity among the Member States should be shifted to the center of the conversation. In connection to the asylum policy this principle is enshrined in the TFEU, implying that the responsibility to offer adequate protection should be shared between the Member States of the EU.[20] Also the preamble of the Dublin II Regulation mentions the "spirit of solidarity".[21] ECRE reminds the reader that solidarity is a "longstanding core principle of the European project".[22] Also the 1951 Refugee Convention mentions in its preamble the importance of solidarity between states, by stating that "the grant of asylum may place unduly heavy burdens on certain countries" and that "a satisfactory solution [...] cannot therefore be achieved without international co-operation".[23] However, the criteria serving to determine the responsible Member State, which supposedly are based on "objective, fair criteria both for the Member States and for the persons concerned"[24], cannot be seen as distributing the responsibility equally among Member States. Especially the 'irregular entry' and 'first entry' criteria allocate responsibility to the frontline Member States, such as Greece, Italy, Malta and Hungary, as they are better accessible across the Mediterranean or the Balkan Route than the rest of the Member States. The question arises whether it is 'fair' and in accordance with the principle of solidarity to leave the responsibility to deal with the highest amount of asylum seekers to these southern and eastern countries, which themselves partially struggle with severe financial and economic problems. The system is problematic, as it leaves the responsibility to states, which are not able to properly secure their borders. The Dublin Regulation therefore might encourage states to restrict the access to their territory, which goes against the right for protection of refugees. Another question that arises is whether it is fair towards the 'person concerned' to determine the state responsible for the asylum application according to criteria, which do not take into consideration the ability of the state in question to provide adequate facilities for the asylum seekers.[25] It can therefore be said that with the establishment of the Dublin Regulation the burden of asylum proceedings has not been shared among the Member States, but has rather been shifted towards states, which are geographically closer located to countries or regions that are prone to crisis and from where persons are forced to flee.[26]

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20 TFEU 2007, Article 67 (2).
21 Dublin II Regulation 2003, Preamble recital (8).
22 ECRE 2008, p. 26.
23 Refugee Convention 1951, Preamble.
24 Ibid, Preamble recital (4).
25 Lenart 2012, p. 13-17. This point was addressed by the ECtHR in several cases and will be discussed in Chapter 4.
26 Hailbronner 2000, p. 401.

Further, in accordance with the solidarity principle, Member States should apply the same standards when processing asylum applications, in order to avoid migrant flows to Member States with lower admission barriers. However, while this intention is again logical in theory, its implementation in reality appears to cause substantial difficulties. For example the admission of asylum claims vary widely from one Member State to another: while in 2014 the overall first-instance recognition[27] rate was at 45% in the EU, the rate of positive decisions vary considerably across its different Member States. At the top of the list there are Bulgaria and Sweden, with respectively 94% and 74% of first-instance recognition, while Croatia and Hungary trail behind the rest of the EU with 11% and 9% of initial admission.[28] These diverging numbers can partially be explained by the different origin of the asylum applicants, which do not all benefit from the same protection; but nevertheless they show that international protection is not applied in a coherent way among the Member Sates. This leads to the phenomenon of 'asylum lottery', making the decision of an application dependent on where it is submitted, and contributing to an unjust distribution of asylum seekers.[29] The differences in proceeding asylum applications, which cannot only be seen in the diverging rates of recognition of first instances, but also in the differing conditions of reception facilities, length of detention and quality of treatment, are problematic for the application of the Dublin II Regulation: in accordance with the determination of one responsible state, asylum seekers can be sent back to the country where they entered illegally or arrived first. This however presupposes that the Member States have to be sure that the other parties to the Dublin Regulation are 'safe countries', which means that they comply with human rights provisions and respect certain standards when granting protection.[30] This principle of 'Mutual Trust' should however not be taken for given, as it will be shown with the M.S.S. v. Belgium and Greece and Tarakhel v. Switzerland cases.

With the adoption of the Dublin III Regulation certain important improvements were made, such as the introduction of an early warning, preparedness and crisis management mechanism, in case of particular pressures, which could cause problems in national asylum systems, or provisions in order to better protect applicants.[31] However, the underlying problems described above have for the most part not been adequately addressed. As an example it can be stated that in 2014 five EU Member States have been responsible for the procession of 72% of the

27 ‚First-instance recognition rate' refers to the share of positive decisions in the total number of asylum decisions, reached by the authority acting as a first instance of the asylum procedure in the receiving country. See Eurostat Statistics Explained, Glossary: Asylum recognition rate. http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Asylum_recognition_rate, accessed 28 March 2016.

28 ECRE 2015 A, p. 17-18.

29 Ibid, p. 18; Lenart 2012, p. 3, 9.

30 Nollkaemper 2013, p. 362-363.

31 European Commission 2015 A, Country responsible for asylum application (Dublin). http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/examination-of-applicants/index_en.htm, accessed 20 March 2016.

asylum applications EU-wide, showing that the burden is still unequally distributed.[32] At the moment the idea of a resettlement and relocation plan, based on criteria such as population size and Gross Domestic Product (GDP) of the Member State, is intensively discussed.[33] Like the two decisions allowing emergency relocations from Italy and Greece of a total of 160 000 people, such a measure would grant the frontline Member States a certain relief.[34] While these are important steps towards burden sharing it seems that currently economic reasons, as well as pressure from national political parties, make the establishment of a solidarity-based migration policy a difficult and almost utopic undertaking in Europe.

4.2 Violation instead of Protection of Fundamental Rights

The missing cooperation within the Dublin System does not only constitute a problem because it shows a lack of solidarity, but mostly because it results in inadequate reception conditions in the frontline states, which also struggle to provide a timely processing of the asylum applications. The poor reception and procedural standards in certain countries are one of the main reasons for the increase in the criticism of the Dublin Regulation in the last few years.[35] While the Reception Conditions Directive lays down in its preamble that applicants should be granted standards of reception, which "ensure them a dignified standard of living [...] in all Member States"[36], this is a further theoretical provision, which is not met by all the parties to the Directive. Nobody should be deprived from the most basic needs such as food, clothing, housing, health care and employment[37]; however, this is exactly what happens in countries overwhelmed by high numbers of asylum seekers. Taking a closer look at Greece and Italy, the two countries with the inglorious reputation of having the "worst welfare provision"[38], the extent of the miserable conditions becomes evident.

In Greece, even with the financial support of the EU through the 'Greek Action Plan on Asylum and Migration Management' and with the emergency support provided by the European Asylum Support Office (EASO)[39], the conditions in reception centers are not reaching the minimum standard laid down by EU law and international human rights law. The reception capacity is largely insufficient, even for the most vulnerable persons such as unaccompanied minors or

32 European Commission 2015 D, p. 13.
33 Ibid, p. 19-22.
34 European Council 2015 B, Justice and Home Affairs Council, http://www.consilium.europa.eu/en/meetings/jha/2015/09/22/, accessed 18 March 2016; ELENA 2015, p. 17.
35 Lenart 2012, p. 11.
36 Reception Conditions Directive 2013, Preamble recital (11).
37 European Commission 2015 E, Reception conditions, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/reception-conditions/index_en.htm, accessed 24 March 2016.
38 Domokos & Grant 2011, Dublin regulation leaves asylum seekers with their fingers burnt, the Guardian, 7 October 7 2011. http://www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers, accessed 23 March 2016.
39 The EASO is an agency of the EU that supports the establishment of the CEAS and assists Member States to fulfill their obligations when assessing asylum applications.

victims of torture. During a recent fact finding mission on behalf of the Asylum Information Database (AIDA) it was found that in certain Greek reception centers the conditions in cells are substandard; lacking natural light, appropriate health care and adequate nutrition for infants. In certain reception centers the asylum seekers are effectively detained and deprived of their liberty. In other cases, the asylum seekers are actually sent to detention centers, due to the lack of open accommodation. ECRE urges the Greece government especially to abstain from detaining unaccompanied children, as it can never be in the best interest of the child to spend a prolonged period of time in detention centers.[40] While in Italy the conditions are said to be better than in Greece, certain accommodation centers are still heavily overcrowded. Further, in practice there is only limited possibility for integration and socialization.[41] A lot of asylum seekers, even if they are recognized as refugees, end up sleeping on the street, deprived from a stable accommodation and the possibility to live a life in dignity. The desperate situation leads some of the asylum seekers to burn their fingertips, in the hope to escape the Dublin System and the stored information on EURODAC. Sadly, the rights asylum seekers have on paper are not translated into reality.[42]

Besides the material reception problems also the administrative procession of the asylum claims leads to difficulties. Due to the massive influx of asylum seekers and the limited capacities of the authorities of the border Member States, a fair and efficient examination of the asylum claims often cannot be guaranteed, leaving the applicants in a state of uncertainty and anxiety.[43] The information given to the asylum seekers concerning the Dublin Regulation and the further steps of their application tend to be inadequate due to communication difficulties. Finally, restricted access to legal advice and lawyers makes it difficult for asylum seekers to appeal a transfer decision, even if in theory this right is granted in every Member State.[44] The lack of necessary infrastructure leads to situations where the obligations laid down in the 1951 Refugee Convention, EU law and the ECHR cannot be fulfilled.[45] Especially human dignity, which is declared to be inviolable by the Charter of Fundamental Rights of the EU[46] and is seen as "the very essence of the Convention"[47], is not always guaranteed in the current system.[48] When dealing with asylum cases the ECtHR has most frequently considered Article 3 of the ECHR, which lays down the prohibition of torture, inhuman or degrading treatment or punishment. However, also other

40 AIDA 2015 A, p.4-24.
41 AIDA 2015 B, p. 62-65.
42 Domokos & Grant 2011, Dublin regulation leaves asylum seekers with their fingers burnt, the Guardian, 7 October 7 2011. http://www.theguardian.com/world/2011/oct/07/dublin-regulation-european-asylum-seekers, accessed 23 March 2016.
43 ECRE 2013, p. 5.
44 Ibid, p. 7.
45 Peers 2012, p. 3.
46 Charter of Fundamental Rights of the European Union 2000, Article 1.
47 Pretty v. the United Kingdom 2002, § 65.
48 ECRE 2015 B, p. 15-17.

articles of the Convention can be relevant to asylum issues, especially in cases of refusal of asylum or transfer of the asylum seeker. Questions could for example be raised in relation to Article 2 (right to life), Article 5 (right to liberty and security of the person), Article 6 (right to a fair trial) and Article 8 (protecting the right to respect for family and private life).[49]

The Recast Reception Conditions Directive, which entered into force in July 2015, addressed certain problematic points, especially regarding detention grounds, the protection of unaccompanied minors and vulnerable persons in general, by clarifying the duty to conduct an individual assessment with concerned people.[50] Still, there is much room for improvement. Even without addressing the underlying problems, there are certain measures, which can be taken. There could for example be a closer monitoring of national practices, especially by the Council of Europe Commissioner for Human Rights, who should continue to urge the Member States to respect the principles enshrined in the ECHR while implementing the Dublin Regulation. Also, better communication and detailed, continuous information for asylum seekers regarding their application status should ensure that the applicants have a better overview regarding their progress in the asylum procedure. Especially in the case of a transfer decision, the concerned person should be notified within a reasonable period before the removal takes place.[51] A further important improvement would be to better respect the best interests of the child, resulting in a strict compliance with the family-related responsibility criteria and increased efforts to trace family members of unaccompanied minors. Reuniting them with relatives in other Member States should be seen as the primary consideration when establishing the responsibility for the examination of their asylum application in order to ensure the principle of family unity. In cases where the age of the unaccompanied person is disputed, the benefit of the doubt should be applied.[52]

5. EXEMPLIFYING CHALLENGES OF THE DUBLIN SYSTEM THROUGH CASE-LAW

It is not astonishing that a system, which puts at risk fundamental rights of asylum seekers, leads to a considerable amount of cases. Seen that there is no international Refugee Court, the decisions taken by the ECtHR[53] when dealing with immigration cases are of great importance when evaluating Europe's asylum procedures.[54] The ECtHR, which has even been referred to

49 Mole & Meredith 2010, p. 23; Lenart 2012, p. 9.
50 European Commission 2015 E, Reception conditions, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/reception-conditions/index_en.htm, accessed 24 March 2016.
51 ECRE 2013, p. 10-11.
52 Council of Europe 2015, p. 11.
53 Also the Court of Justice of the EU (CJEU) has dealt with immigration cases. For more information on the relationship between the CJEU and the ECtHR, as well as the CJEU's judgments in certain immigration cases see further, for example, Morano-Foadi 2015.
54 Ibid, p. 120.

as "Asylum Court"[55], is open to individual applicants and its task is to examine alleged violations of the ECHR. The 28 EU Member States, as well as the four Associate States, are Parties to the Convention and are therefore bound by the rights enshrined in the Convention, also when applying EU law such as the Dublin Regulation. They are further bound by the judgments of the ECtHR.[56] In relation to the Dublin Regulation there have been several decisions by the ECtHR in the past years. Two of the cases, namely the M.S.S. v. Belgium and Greece and Tarakhel v. Switzerland, will be looked at in more detail now, as they illustrate in a more practical manner the challenges in connection with the Dublin System.

5.1 M.S.S. v. Belgium and Greece

The M.S.S. v. Belgium and Greece case is truly a landmark decision, not only because it was the first successful and admissible case regarding the Dublin II Regulation, but also because it pointed out the obligations of the Member States to respect human rights and to apply the Dublin System in a way that is coherent with the ECHR.[57]

The applicant, an Afghan national, entered the EU in 2008 through Greece, where the authorities registered his fingerprints. Without applying for asylum he continued to Belgium, where he submitted an asylum claim. Through EURODAC the Belgian authorities were informed that the applicant had arrived in Greece. The Aliens Office decided not to grant the applicant the right to stay and ordered him to return to Greece, under reference to the Dublin Regulation. Despite two appeals of the applicant and a letter of the UNHCR, highlighting the deficiencies of the conditions for asylum seekers in Greece, the Belgian authorities argued that there was no reason to believe that Greece would fail its obligations under EU law and the 1951 Refugee Convention.[58] The applicant was transferred back to Greece under escort in 2009, where according to his claims he was detained in appalling conditions, amounting to inhuman and degrading treatment. The detention, as well as the subsequent treatment of his asylum application, which left him living on the street in extreme poverty, constituted a violation of Article 3 ECHR according to the applicant.[59]

Even though the ECtHR took into consideration the extensive burden Greece as a state forming the external borders of the EU had to endure because of the arrival of asylum seekers, it stressed that this did not discharge a state from respecting the provision of Article 3 ECHR. The detention and living conditions of the applicant did indeed constitute an inhuman and degrading treatment. Also the deficiencies of the examination of the asylum request by the Greek authorities constituted a violation of the Convention, namely Article 13 ECHR taken in

55 Bossuyt 2012, p. 203.
56 Council of Europe 2010, p. 1-2.
57 Lenart 2012, p. 15-16.
58 M.S.S. v. Belgium and Greece 2011, §§ 9-28.
59 Ibid, §§ 206, 235, 263.

conjunction with Article 3.[60] The Court went a step further and declared that also Belgium, by sending the applicant to a state where he had to endure inhuman treatment and by failing to properly examine the request and providing the applicant with an effective remedy, was also in violation of Articles 3 and 13 ECHR.[61]

With this decision, the Court effectively abolished the 'Mutual Trust' principle between the Member States. The Belgian authorities are criticized for having relied on the Dublin Regulation "systemically", even though there was a risk the applicant's rights would not be respected after the transfer.[62] The presumption of safety has to be refuted if the applicant is transferred to a state where the conditions of the asylum procedure could violate fundamental rights. The Member States, before relying on the Dublin Convention, therefore have a positive obligation to protect asylum seekers by verifying the actual compliance of the receiving state with the treaties it adheres to. With this decision one of the main ideas of the Dublin Regulation – namely that asylum applicants can be sent back to the Member States responsible for them – is shaken. Member States such as Belgium, which rely on the 'take back' clause almost automatically, are no longer allowed to do so, because this rule does not reflect the often devastating realities in the countries that according to the Dublin Regulation are responsible for the procession of the asylum claims.[63] Instead of relying on the 'safe state' principle, Belgium should have applied the 'sovereignty clause' laid down in the Dublin Regulation: this clause allows a state to examine a asylum application lodged with it by a TCN, even if under the general criteria of the Dublin Regulation said application would not fall under its responsibility. Belgium would then have become the Member State responsible for the application and would have taken on the obligations connected to this responsibility.[64]

Until this day transfers back to Greece under the Dublin Regulation are suspended.[65] Also, the Dublin III Regulation expressly mentions in Article 3 (2) that in case there is a risk of inhuman or degrading treatment a new state should be established, to take over the responsibility of processing the asylum application.[66] A comprehensive solution, which would address the underlying problem of Member States, which are not safe enough to receive transfers, is however still not found. The discussion concerning the inclusion of a clause allowing the suspension of the Dublin Regulation in case of an exceptional burden in certain Member States, did not lead to a success.[67] Nevertheless, in the light of the recent migration crisis it seems that the Dublin Regulation can de facto be lifted in certain exceptional cases.

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60 Ibid, §§ 223, 321.
61 Ibid, §§ 367-368, 396.
62 Ibid, §§ 359, 366.
63 Moreno-Lax 2012, p. 28-29.
64 Dublin II Regulation 2003, Article 3 (2); M.S.S. v. Belgium and Greece 2011, § 339.
65 AIDA 2015 A, p. 4.
66 Dublin III Regulation 2013, Article 3 (2).
67 Boeles et al. 2014, p. 266.

5.2 Tarakhel v. Switzerland

The Tarakhel v. Switzerland case, which is a more recent judgment, shows firstly that also under the Dublin III Regulation problems with transfers arrive and secondly that the ECtHR is determined to provide special protection to particularly vulnerable people.

The case concerns an Afghan family, having fled through Turkey to Italy, where their identification was stored with the EURODAC system. Due to the poor living conditions in the reception center, the lack of privacy and the climate of violence, the family travelled to Austria and from there to Switzerland, where they applied for asylum in 2011. The Swiss authorities declined their request, and ordered the return of the family to Italy, stating that there was no evidence that the Italian asylum system did not comply with public international law.[68] When the case came in front of the ECtHR the judges made sure to distinguish the situation in Italy from the reception conditions in Greece, as described in the M.S.S. v. Belgium and Greece case. Nevertheless, it was admitted that the family's fear of being left without accommodation or being placed in reception centers that were already considerably crowded and where possibly violent conditions would rule, was justified.[69] While the Court has already found in the M.S.S. case that asylum seekers are "a particularly underprivileged and vulnerable population group in need of special protection"[70], the judges stressed that in casu the 'special protection' was of increased importance, seen that the case concerned a couple with four minor children. In order to guarantee the fulfillment of their specific needs and the protection of their vulnerability the judges decided that Switzerland would be in violation of Article 3 ECHR by transferring the family back to Italy, unless the Swiss authorities would first obtain individual guarantees from the responsible persons in Italy that the conditions of the facilities are adapted to the needs of the children and that the family would not be separated.[71]

In contrast to the M.S.S. case, the Court did not decide on a complete ban of transfers to Italy, and not even on a complete ban of returns of families with children. With the Tarakhel judgment the Court gave a very nuanced decision, specific to the particular situation of this family. This case, and the resulting practice of having to obtain concrete guarantees before a Dublin transfer of a particularly vulnerable person, can be seen as situated between the two extreme positions of the 'Mutual Trust' principle and the complete ban of transfers to a certain Member State, such as Greece. While it is contrary to the 'Dublin spirit' and the reliance of the proper fulfillment of the obligations of the parties to it, this decision shows the importance and the priority the Court allocates to the protection of the most vulnerable people.[72] Switzerland, since the decision of the ECtHR, has suspended all Dublin returns to Italy in cases involving children, before having

68 Tarakhel v. Switzerland 2014, §§ 8-19.
69 Ibid, § 120.
70 M.S.S. v. Belgium and Greece 2011, § 251.
71 Tarakhel v. Switzerland 2014, §§ 119-122.
72 Zimmermann 2014, Tarakhel v. Switzerland: Another Step in a Quiet (R)evolution?, http://strasbourgobservers.com/2014/12/01/tarakhel-v-switzerland-another-step-in-a-quiet-revolution/, accessed 26 March 2016.

obtained concrete guarantees for every case. Also the other Member States proceed with caution when transferring asylum seekers back to Italy.[73] The new procedure of providing individual guarantees takes into consideration personal circumstances of the applicant and individually interprets if their fundamental rights would be respected in case of a transfer. However, this procedure also leaves an enormous burden on the Italian procedural system. Also, like the M.S.S. case, it does not provide a solution regarding the overcrowded reception centers. This judgment reaffirms that there are flaws in the Dublin System and that there cannot be a presumption that fundamental rights are in practice observed in every Member State. Most of all, it shows that there is an urgent need of an effective implementation of a harmonized CEAS. Until then the Tarakhel decision needs to be applied across Europe in order to ensure the protection of the most vulnerable asylum seekers.[74]

6. CONCLUSION

The Dublin System looks good on paper: by allocating the responsibility of the assessment of asylum claims to one Member State, it not only prevents 'asylum shopping' and 'refugees in orbit', it also guarantees a rapid decision for the applicants and an effective use of the resources of the Member States. However, the Dublin Regulation failed to provide adequate solutions in the past years and also during the current migration crisis. By allocating the responsibility of processing the asylum claims to the state, where the applicants irregularly crossed the borders or arrived first, the Dublin System shifts the burden to the states forming the external border of Europe. The massive influx of asylum seekers in countries such as Greece, Italy and Hungary led to the malfunction of the asylum processing and to disastrous conditions in reception centers. While the criteria might seem objective in theory, they prove to be unfair and ineffective in practice, leading to violations of fundamental rights and the failure of assisting people in need. This was confirmed by the ECtHR in cases such as M.S.S. v. Belgium and Greece, in which the Court abolished the principle of 'Mutual Trust'; another principle, which looks better on paper than in reality. In the Tarakhel v. Switzerland judgment the Court further stressed the obligation of every Member State to ensure the individual protection of the most vulnerable asylum seekers. While these decisions protect the rights of the applicants who would have been returned to the Member State they arrived to, they do not take away the initial burden of the frontline states, which led to the violation of the fundamental rights in the first place.

In my opinion, solidarity has to be intrinsic in the asylum policy of Europe – solidarity with the overburdened frontline states, but also with the countries outside Europe, struggling with far more refugees than we are. In order to facilitate the frontline Member State's task there is a need for burden sharing, be it through the activation of the 'sovereignty clause' of less

73 ELENA 2015, p. 4, 8.
74 Ibid, p. 16, 18-20.

targeted Member States or a more extensive relocation plan. It is because of situations like the one we find ourselves in that the relevant migration documents stress the importance of solidarity among the Member States. Yet, while Europe should stand as a Union in order to resolve the current migration questions, the opposite takes place: states turn away from each other, blaming one another and closing their borders in the hope that anyone but themselves takes care of the people arriving in Europe. Politicians do not shy away from the instrumentalization of the migration topic for the achievement of their proper goals – going as far as spreading the impression that migration and terrorism are two sides of the same coin. This leads to the formation of massive civil movements, demonstrating against asylum seekers and depicting them as the root of all evil, destroying Europe as we know it.

To enforce a solidarity-based policy under these circumstances is an ambitious and challenging task. Yet we have to remember that the closing of borders contravenes basic refugee protection rules and leaves people in devastating situations, separated from Europe – a continent so proud of its human rights values and principles – merely by barbed wire. Closing access possibilities at the western Balkan borders without guaranteeing new openings will not stop the migration flow; it will rather create alternative routes to Europe, adding even more pressure to the already overburdened frontline states Greece and Italy. While it is necessary to provide financial support to these states, funding alone is not enough to resolve the current situation. An overreaching distribution system needs to be elaborated, in which every Member State has to accept its individual responsibility, in order to ensure the protection of the fundamental rights of asylum seekers and the fulfillment of basic humanitarian standards.

It is time to revise the Dublin System and introduce profound amendments to the current migration regulations. Only this way fundamental rights of the asylum seekers can be guaranteed. Once the fundamental rights of asylum seekers are ensured, and all the Member States fulfill the minimum obligations under EU and international law, a well-functioning CEAS can be implemented, which will assure a harmonized and solidary asylum policy throughout Europe.

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