

# **UACES 45<sup>th</sup> Annual Conference**

**Bilbao, 7-9 September 2015**

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SHAPING THE COMMON EUROPEAN ASYLUM SYSTEM THROUGH THE  
PROTECTION OF HUMAN RIGHTS: The jurisprudence of the European Court of  
Human Rights as a tool for circumscribing the discretionary powers of states in the  
*Dublin System*

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I. INTRODUCTION

States party to the 1951 Geneva Convention are initially obliged to provide access to a procedure that establishes the condition of refugee to foreigners who have managed to reach their territory or who are under their jurisdiction. They must also respect the principle of *non-refoulement*, expressed in article 33 of the Convention, although its scope is broader than stipulated in the article<sup>1</sup>: (1) the profile of protected persons

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<sup>1</sup> Article 33 of the 1951 Geneva Convention establishes: ‘Prohibition of expulsion or return (“refoulement”) 1. 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./ 2. The benefit of

covers more than just those who meet the definition of refugee as it is also applicable to all asylum seekers (Tomuschat, 1992: 258; Julien-Laferrière, 1990: 56) and; (2) the *non-refoulement* rule is currently considered a general principle of international law which not only protects refugees from persecution but also everyone subjected to torture or inhuman or degrading treatment (Lauterpacht-Bethlehem, 2003: 163). The *non-refoulement* rule only permits the return of persons to safe states. The right not to suffer torture or inhuman treatment is considered absolute, i.e. it has no exceptions. The connection between this right and *non-refoulement* means that no state can reject a person before establishing whether such rejection contravenes the prohibition to suffering torture or inhuman or degrading treatment (see Bossuyt, 2010, in the European context). Given that it is impossible to establish *a priori* whether this risk exists and determine whether a person is a refugee, the principle of *non-refoulement* must govern the actions of states in the attempts of persons under their jurisdiction to enter the territory. For this reason, states are obliged to grant provisional protection to asylum seekers, at least until it has been established that they are not at risk in their country of origin or a safe country to which they can be transferred (i.e., rejected). The link between the *non-refoulement* principle and absolute rights means that the exceptions to non-rejection in the Geneva Convention can no longer be applicable, at least if this might involve a risk of violating human rights or the right not to suffer torture or inhuman or degrading treatment<sup>2</sup>. Asylum may even be considered a general principle in international law that goes beyond protection against *non-refoulement* (Gil-Bazo, 2015: 4).

The obligatory nature of *non-refoulement* makes it an element that helps connect asylum (protection in a state's territory), which is essentially discretionary, to the observance of general principles of international human rights law. Some authors refer to this rule as a *jus cogens* norm or peremptory and unrepealable norm (Gros, 1984: 710; Flauss, 2001: 117, respectively)<sup>3</sup>, which is at the heart of public order in the

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the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'.

<sup>2</sup>In the case of the prohibition of torture and inhuman or degrading treatment, the ECtHR has considered this to be an *absolute* right (among others, *Chahal v. the United Kingdom*, n° [22414/93](#) (ECtHR, 15.11.1996,§96). Furthermore, this idea is supported by the wide acceptance of the UN Convention against Torture and the degree of consensus on the issue among the international community in the second half of the 20th century.

<sup>3</sup>Many authors use the declarations of the United Nations High Commissioner for Refugees (UNCHR) as the basis to defend this aspect. Thus, the conclusions from his 1983 report categorised this rule as a 'basic

international community (Mariño, 2002: 464). Others maintain that it constitutes a *general principle* in international law (Eberhard, 1985: 456; Fourlanoss, 1986: 149; Julien-Laferrière, 1990: 56-57). Furthermore, the obligation stemming from *non-refoulement* is accepted as a general principle among states whether or not they are parties to the Geneva Convention (Plender, 1989: 96).

The Geneva Convention, together with more important conventions on the international protection of human rights (international civil and political rights Covenants, UN Convention against Torture, Convention on Rights of the Child and, in the European context, the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR), customary law and general principles on the protection of persons establish an international asylum regime and the legal basis for states' asylum function. Asylum seekers, who include refugees, are people for whom the states of their nationality or habitual residence have stopped fulfilling their function of protecting them and, outside their country, are at the mercy of the international community. This means that other states have to provide substitute protection to persons exercising their function of asylum.

In the European Union (EU), all member and associate states are parties to the Geneva Convention on the Status of Refugees and to the main agreements on the protection of human rights (among them, the ECHR). For this reason, they consider each other to be *safe states* for asylum seekers and refugees. Based on this, and given the improved space for the free movement of persons, they considered it enough to establish a mechanism that attributed responsibility for examining each asylum application lodged in the common territory to a single state. Thus, states would avoid the abuse of asylum regimes. This mechanism is known as the *Dublin System* and permits states to transfer asylum seekers from one state to another (considered responsible). In the system, states may use their discretion not to perform these transfers, mainly for family, humanitarian, cultural reasons or due to internal demands (such as constitutional requirements).

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principle that is becoming a *peremptory norm of international law*'. The 1984 Cartagena Declaration on Refugees also stated 'the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*' (§III-5)).

However, in recent years the European Court of Human Rights (ECtHR) has issued a number of sentences that undermine the Dublin System by demonstrating that, occasionally, the states party to the system are not *safe states* for asylum seekers. On these occasions, states must refrain from making transfers to a state responsible for examining an asylum application if it is *unsafe*, using their discretionary power not to apply the Dublin System, if necessary. If states transfer asylum seekers in these circumstances, they would be violating the principle of *non-refoulement*, directly (if the destination state fails to observe any of the absolute, fundamental human rights, such as the right not to suffer torture or inhuman or degrading behaviour) or indirectly (if it could lead to the person being sent to a third unsafe state).

The main aim of this study is to examine the cases in which the ECtHR has stated that the transfer of an asylum seeker to another state party to the Dublin System has or could represent a violation of the ECHR and, therefore, the principle of *non-refoulement*. It will also examine the jurisprudence of the European Court of Justice (CJEU) on the issue, which generally represents a lower level of protection of human rights. The two circumstances in which transfers are no longer legitimate are: (1) when there is ‘systemic flaw’ in the destination state’s asylum system; and (2) when asylum seekers are in a situation of special vulnerability not properly considered in the transfer. The study will conclude with some final reflections on how these sentences affect the structural principle of EU law of mutual trust between member states.

## II. THE DUBLIN SYSTEM III

### a. The legal context: from the Schengen Convention (1990) to the second phase of the *Common European Asylum System* (2011-2013)

From the 1980s onwards, three factors led to a degree of crisis in the asylum law regime: firstly, changes in the phenomena of forced migrations (Ogata, 2005; Bade, 2003: 360-367; Myron, 1995); secondly, the new approach states started to adopt with respect to these migratory flows, as challenges to security; and thirdly, in Europe, the prospect of the internal market with free movement of people (Single European Act, 1986) and creating a stronger area of freedom, security and justice (Amsterdam Treaty, 1997). These factors contributed to European states adjusting their asylum regimes with the aim of avoiding responsibility for forced migratory flows (the myth of ‘zero immigration’ was referred to) with a progressive devaluation of protection systems,

classified as a race to the bottom (to avoid becoming destination states for asylum seekers) (Overbeek, 1995: 15; Hailbronner, 1992: 920-2). These adaptations aimed to prevent the departure from the place of origin (with the requirement of entry visas or penalties to carriers) and entry into the country of asylum (with the creation of *international zones* and automatic, indiscriminate return to the place of origin or transit) and discourage access to an asylum procedure (running down reception systems, detaining applicants, implementing admissibility procedures with fewer procedural guarantees). One such mechanism was the return of asylum seekers to safe states, either other EU member states or another non-community state (applying readmission agreements).

To the extent that, as stated above, the principle of *non-refoulement* does not prohibit transfer to safe states, in the EU a mechanism was established to coordinate the transfer (on occasions, readmission) of asylum seekers *ad intra*: the so-called *Dublin System*, which was first applied on 26 March 1995, with the Convention implementing the Schengen Agreement<sup>4</sup>. Given that since their beginnings, the regulations arising from Schengen were a subsidiary part of the community legal system<sup>5</sup> (Blanc, 1991: 723) and would replace it in the future, once it came into effect, the Dublin Convention on the state responsible for examining asylum applications lodged with the participant states among the EU members replaced the content of the Convention implementing the Schengen Agreement corresponding to that of the Dublin Convention<sup>6</sup> (which gave the *system* its name)<sup>7</sup>. After the Amsterdam Treaty, the EU assumed the power to adopt a community norm on the matter of European asylum policy covered by the Convention, and the Dublin Convention was replaced by Council Regulation 343/2003 (Phase 1 of development the Common European Asylum Systems, CEAS), in turn replaced by Regulation 604/2014, known as Dublin III (phase 2 of the CEAS)<sup>8</sup>. The Dublin System consists of this regulation and two further ones to complete it in practical terms<sup>9</sup>.

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<sup>4</sup> Official State Gazette (BOE) 24.3.1995, no. 71, p. 9213.

<sup>5</sup> Articles 134 and 142.1 of the Schengen Convention.

<sup>6</sup> Protocol on the consequences of the adoption of the Dublin Convention on certain stipulations in the Convention applicable to the Schengen Agreement, BOE 9.7.1997, no. 163, pp. 21089-21090.

<sup>7</sup> The Convention implementing the Schengen Agreement was adopted on 19 June 1990, four days after adopting the Dublin Convention (15 June) and the contents of Chapter 7 of Title II of the former corresponded to the contents of the second convention, hence the *system* is known by the name of the first convention adopted, which was also common to all European Community member states (it was a complementary communitarian act) and specifically regulated the regime.

<sup>8</sup> Regulation (EU) 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for

This asylum seeker transfer mechanism among EU member states was mainly established on mutual trust among all the states as being safe for asylum seekers and that equivalent asylum reception and procedure regimes were applied in all. In this case, mutual trust was not based on prior material harmonisation, practically non-existent until the implementation of the *Tampere* programme (1999-2004), but on the idea that the minimum international standard of treatment and protection of refugees and asylum seekers was guaranteed by the fact that all the states were parties to the 1951 Geneva Convention on the Status of Refugees and the EHCR. The principle of mutual trust is a basic regulatory principle in the European Union in areas where states must apply decisions adopted in other states (Brouwer, 2013: 136), the observance of which is, on occasions, obligatory in the EU regulatory framework<sup>10</sup>. But it does not guarantee that asylum regimes are similar among participating states, nor that the chances of being granted asylum are similar. Indeed, not even after the second phase of asylum system harmonisation among the states could this be ensured<sup>11</sup>.

b. The *Dublin System*: Ordinary criteria for allocating responsibility and discretionary clauses

The purpose of the Dublin System is to avoid secondary movement of asylum seekers between member states and, initially, to ensure that the applications for protection of asylum seekers who have arrived in the common free-movement space will be analysed by a (single) member state, which will be responsible for their reception while the procedure lasts. Thus, the system is intended to prevent distortions

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international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31-59.

<sup>9</sup> Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) 604/2013 (...), and amending Regulation (EU) 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1-30; and Commission implementing Regulation (EU) 118/2014 of 30 January 2014 amending Regulation (EC) 1560/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2014] OJ L 39/1-43.

<sup>10</sup> As established in the Opinion of the CJEU (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, §194.

<sup>11</sup> Apart from the Dublin Regulation, in its second phase, the CEAS is formed by: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9-26; 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) [2013] OJ L 180/96-116; and 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) [2013] OJ L 180/60-95.

in a free-movement area caused by ‘asylum shopping’ (once in the common space, choosing the state in which to apply for asylum based on individual interests), successive or simultaneous asylum applications and asylum seekers *in orbit* (those for whom no-one accepts the responsibility of examining the application for protection, arguing that there is another safe state to which they constantly return). To do this, the system establishes criteria to assign a state the ‘responsibility’ for examining an asylum application lodged in the common space and procedures for transfer to that state. All other states can reject a new asylum application presented by the same person and transfer this person or resend them to the state responsible. The idea of transferring groups of asylum seekers from one EU state to another to organise the operation of the asylum function in a free-movement environment is teleologically adequate because it permits better application of the Geneva Convention (Escobar, 1991), although this is only possible in a context of high commitment to the protection of human rights and refugees.

Yet although the theory is sound, in practice, formal participation in international conventions has not proved enough to guarantee the application of human rights and international standards on the protection of refugees. The justification for applying the principle of mutual trust among European states has been weakened through ECtHR findings that occasionally these states are not safe for asylum seekers. The ECtHR has issued two condemnatory sentences on two states participating in the system, as well as other admissibility decisions and judgements which permit certain limits to the transfer of asylum seekers to be established. Some of these limits represent a loss of mutual trust between states with respect to the application of similar or equivalent standards of protection and as to whether they are *safe* states for asylum seekers. In other cases the limits stem from the need to give adequate consideration to the particular vulnerability of asylum seekers due to being minors or members of a family unit, as well as their status as asylum seekers. In these cases, the transfer may only take place when the destination state can offer full, specific guarantees with respect to human rights.

In the first phase of developing the CEAS, the criteria (ordered and assigned a hierarchy) for assigning responsibility to examine an asylum application were, basically the criterion of maintaining the family unit and the *principle of authorisation* (Hurwitz, 1999:648). Firstly the state responsible for receiving the asylum seeker and processing the protection application is the one where a member of the refugee’s or, secondarily,

the asylum seeker's family is located (in the *Dublin III* regulation, protection of the family unit in the case of minors is extended to the legal presence of siblings or other relatives<sup>12</sup>). Secondly, responsibility lies, successively, with the state that issued a residency authorisation, a visa (permitting the applicant to enter the Schengen space) or the state that has land, sea or air borders through which the asylum seeker entered irregularly into the common space from a third country (responsibility based on the latter ends 12 months after entry)<sup>13</sup>. Finally, the system establishes a closure clause whereby, in the last resort, the first state in which the protection application has been presented will be responsible for examining it.

In the *Dublin II* regulation, these criteria are supplemented by two stipulations which states may apply initially on a discretionary basis. The first is the so-called sovereignty clause by which 'each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down' in the Regulation<sup>14</sup>. This clause is an option enabling states to participate in the responsibility assignment system without waiving internal constitutional requirements or their international asylum function as sovereign states. The second is the so-called humanitarian clause which permits an asylum application to be examined for family, cultural or other reasons by a "non-responsible" state<sup>15</sup>.

### III. EXCEPTIONS TO THE SAFE EUROPEAN COUNTRY FOUNDING PRINCIPLE OF THE DUBLIN SYSTEM ACCORDING TO THE JURISPRUDENCE OF THE ECtHR

Although the Dublin System has never been highly effective (it is calculated that only 3% of asylum applications lodged with member states end in transfer), it is still considered by the states as an essential element of the CEAS (Williams, 2015: 9). However, the reinterpretation of discretionary clauses as obligatory in cases where there is a risk of human rights violations raises serious questions regarding the system.

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<sup>12</sup> Article 8 of Regulation 604/2013.

<sup>13</sup> Articles 5-14 of Regulation 343/2003; and 15 of Regulation 604/2013.

<sup>14</sup> Article 3.2 of Regulation 343/2003; and 17.1 Regulation 604/2013 .

<sup>15</sup> Article 15 of Regulation 343/2003; and 17.2 Regulation 604/2013 .

a. Structural failures in the asylum system in a member state: *M.S.S. versus Belgium and Greece*

As stated above, the Dublin System involves a group of sovereign states coordinating to exercise their asylum function so that only one examines an asylum application lodged in the space formed by the states and the others recognise the decision as valid. In all cases they may return the applicant to the state responsible and, if the decision is negative, can refuse to examine a new asylum application lodged by the same applicant in the same situation and consider it inadmissible. This system is based on the idea that all states participating in the system are safe because they respect the main conventions on the protection of refugees and human rights which they are a party to. Furthermore, the legitimacy of the system lies in the false idea that states' international protection systems are similar and equivalent and therefore asylum seekers have the same chances of obtaining protection in each. The fact that this is not altogether true is a source of criticism as to the legitimacy (or fairness) of the whole system, and raises questions as to how far it implies abandonment of the states' asylum function, or, indeed, a failure to meet the obligation implicit in the Geneva Convention whereby states provide applicants with procedures to determine whether they are refugees<sup>16</sup>.

Thus, if the assumption that all states respect the human rights that form the common basis of protection for people is shown to be false and it is concluded that not all states are safe for asylum seekers (all or some), then mechanical application of the Dublin System would be illegal: (a) due to violation of the norm of the protection of human rights involved; and (b) due to violation of the *non-refoulement* principle in general international law.

The judgement of the ECtHR in the case of *M.S.S versus Belgium* represented recognition at the highest level that in a specific case a EU member state participating in the Dublin System was not a safe state for asylum seekers in general<sup>17</sup>. In this case the

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<sup>16</sup> This control has been exercised by internal courts, such as the House of Lords, judgement of 19 December 2000, *R. versus Secretary of State for the Home Department, ex parte Adan*; *R. versus Secretary of State for the Home Department, ex parte Aitseguer*, *IJRL*, vol. 13-1/2, 2001, 202-229.

<sup>17</sup> *M.S.S. v Belgium and Greece* [GC] App n° 30696/09 ECHR 2011. The ECtHR had already established 'that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims'

ECtHR considered Belgium to have violated articles 3 (right not to suffer torture or inhuman or degrading treatment) and 13 (right to effective remedy) for having transferred the applicant to Greece in applying the Dublin System. Greece was the state responsible for examining M.S.S.'s asylum application, as he had entered the Schengen space across its borders. M.S.S. was an Afghan asylum seeker who lodged an asylum application in Belgium because he had worked as an interpreter for Belgian nationals participating in international missions. In Greece, the applicant was arrested several times and was not received in accordance with European standards. Greece was found guilty of violating the right not to suffer to inhuman or degrading treatment because of both the condition of his arrest and the 'situation of extreme material poverty' the applicant was forced to suffer<sup>18</sup>. The ECtHR took into account M.S.S.'s vulnerability as an asylum seeker in considering that a threshold in humiliating treatment and lack of respect for human dignity had been reached, i.e. 'inhuman treatment'<sup>19</sup> and also the general situation of Greece for asylum seekers characterised by a 'particular state of insecurity and vulnerability in which asylum seekers are known to live'<sup>20</sup>. Thus the ECtHR ruling was based on the idea that the situation suffered by M.S.S. was common to all or most asylum seekers, i.e. that the asylum reception and processing system were clearly inadequate (and failed to meet the requirements of the CEAS). At that time, Greece, as the ECtHR describes the situation based on the information from the UNHCR and NGOs, was (and continues to be) a 'failed asylum state'.

The ECtHR considered that in this case, despite the fact that the principal organisational rules of the Dublin System were established in a community regulation, the transfer of asylum seekers from one state to another did not strictly arise from the states' international obligations, as they could also make use of the sovereignty clause. Based on the powers of judgement still maintained by the participating states, Belgium would have had to examine whether the applicant's rights would be respected in Greece

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although it declared the case inadmissible on its merits: *T.I. v. the United Kingdom* [déc.] App n° 43844/98, ECHR 2000-III, § 456-457.

<sup>18</sup> *M.S.S. v Belgium and Greece* [GC] App n° 30696/09 ECHR 2011§252 .

<sup>19</sup> 'The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection', *Ibid.* §251

<sup>20</sup> *Ibid.* §259; and §255 'The Court notes in the observations of the Council of Europe Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations (see paragraph 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason, the Court sees no reason to question the truth of the applicant's allegations'. On this judgement, *see* Clayton, 2011; Mallia, 2011; Moreno-Lax, 2012.

and, if necessary, activate the clause to prevent transfer to an unsafe state. The M.S.S. sentence meant the sovereignty clause was no longer absolutely discretionary and had become the guarantee of asylum seekers' human rights within the Dublin System.

The CJEU had to rule on a prejudicial issue in a similar case, in which the British and Irish authorities proposed sending asylum seekers to Greece in application of the Dublin System. Firstly, the CJEU accepted the idea that application of the Dublin System could not be based on a 'conclusive presumption' that the participating states respected human rights<sup>21</sup>. Secondly, however, it placed crucial importance on the principle of mutual trust between European states, on the organisational purposes of the system, and on the legitimacy of assuming they are all safe states to consider as unacceptable 'that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003'<sup>22</sup>. Finally, the CJEU considered that the transfer could be cancelled in most serious cases of a risk of inhuman or degrading treatment due to systemic flaws in a state:

'if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision'<sup>23</sup>.

The content of this jurisprudence was transferred to article 3.2 of Dublin III regulation 604/2013 in the second phase of the CEAS<sup>24</sup>.

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<sup>21</sup> '(A)n application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights'; *N.S and M.E and others*, C-411/10 y C-493/10 (CJEU 21.12.2011), EU:C:2011:865, §99.

<sup>22</sup> *Ibid.* §82.

<sup>23</sup> *Ibid.* §86. This jurisprudence confirms the sentence *Shamso Abdullahi*, C-394/12 (CJEU 10.12.2013) EU:C:2013:813.

<sup>24</sup> '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'.

The scope of the limitation to the discretionary nature of the sovereignty clause due to the risk of human rights violations was narrower in the CJEU interpretation in the N.S. sentence than that of the ECtHR in M.S.S., because it suggested a transfer could only be prevented when there were ‘systemic flaws’ in a state’s asylum system. According to the CJEU, only one case of this type could destroy the mutual trust between states without destabilising the Dublin System with an excessively open interpretation of the sovereignty clause (Labayle, 2012: 510-518). The CJEU sentence is not incompatible with the M.S.S. sentence: (a) because it refers only to the case of systemic flaws in a state’s asylum regime (as in the case of Greece) and not to the risk of specific individual violation of a person in a destination state (Bruycker-Labayle, 2014: 738); and (b) because in certain circumstances, a risk of human rights violation could constitute a ‘systemic flaw’ in itself (Lübbe, 2015: 139). However, it does represent a narrower interpretation of the sovereignty clause as a limit to the discretionary powers of a state with respect to the Dublin System than that of the ECtHR (Costello, 2012: 91).

b. Special vulnerability of the applicants: *Tarakhel versus Switzerland*

The ECtHR once again referred to its jurisprudence, with respect to the CJEU, in the judgement for the case *Tarakhel versus Switzerland* of November 2014. This proposed compliance with the ECHR on the transfer of an Afghan family from Switzerland to Italy, the country of entry into the Schengen space. The applicants alleged that transfer to Italy would violate their right to not suffer inhuman or degrading treatment (article 3) and their right to family life (article 8), as in Italy a reception adapted to their particular family situation with six minors would not be guaranteed. The ECtHR stated that, unlike Greece in the case of M.S.S., Italy was not a state with systemic flaws in its asylum regime, although there were ‘serious doubts as to the current capacities of the system’<sup>25</sup>.

The ECtHR also specified its interpretive guideline. On considering the risk of violating ECHR rights, the ECtHR examine ‘the applicant’s individual situation in the light of the overall situation prevailing in (a country) at the relevant time’<sup>26</sup>. In other words, there are two elements to take into account: (1) the general situation in the destination country; and (2) the particular situation of the applicant, in this situation. For

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<sup>25</sup> *Tarakhel c. Suisse* [GC], n° 29217/12, 4 November 2014, §115.

<sup>26</sup> *Ibid.* §101.

the ECtHR, the assumption that states participating in the Dublin System respect human rights may be refuted when ‘substantial grounds have been shown for believing’ that a person faces a real risk of suffering treatment contravening the ECHR in the destination state. And, distancing itself from the CJEU in the case of N.S., it specified:

‘The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person’s removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established’<sup>27</sup>.

Finally the ECtHR issued a ruling of conditional violation against Switzerland. Bearing in mind the ‘extreme vulnerability’ of the young asylum seekers and the uncertainty regarding the applicants’ reception conditions in Italy, the ECtHR ruled that ‘were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention’<sup>28</sup>. Thus, although not directly condemning Switzerland because the transfer had not occurred, a number of procedural demands were added to the transfer of asylum seekers with special needs, in the event of doubts regarding the reception provided in the destination state. The *Tarakhel* sentence was at odds with the CJEU N.S. sentence, which placed particular importance to mutual trust between states (Costello-Mouzourakis, 2014: 410).

The CJEU also took into account the special vulnerability of some asylum seekers in two cases that were resolved with interpretations sensitive to this vulnerability. In the judgement *K* of November 2012, it was considered that in situations of dependence, the sentence ‘Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States’ of article 15.2 of Dublin II Regulation 343/2003 (that contained the humanitarian clause), meant that

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<sup>27</sup> Ibid. §104.

<sup>28</sup> Ibid. §122. Bearing also in mind the special vulnerability of the victims, the ECtHR considered there to have been a violation of the right not to suffer inhuman or degrading treatment in the case of a family with five under-age children (one of whom had cerebral paralysis) expelled from the reception system and exposed to conditions of ‘dénouement extrême’ for four weeks: *V.M. et autres c. Belgique*, n° 60125/11 (ECtHR 7.7.2015) (see on the consideration of vulnerability in ECtHR jurisprudence, Besson, 2014).

states were “normally” obliged to keep those persons together<sup>29</sup>. In other words ‘a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen’<sup>30</sup>. With this interpretation, activation of the humanitarian clause in the aforementioned cases of dependence was now obligatory. In Dublin III Regulation 604/2013, dependence is separated from the humanitarian clause to become a new criterion for assigning responsibility (article 16) the application of which, due to its link with protecting human rights, is a priority with respect to criteria based on the authorisation principle.

Finally, in a further case, the CJEU interpreted the stipulations assigning responsibility for examining an asylum application lodged by a minor in the sense that, as a general rule, it was convenient not to transfer minors to one state or another to avoid dragging out the procedure for determining the responsible state for longer than strictly necessary, ‘Since unaccompanied minors form a category of particularly vulnerable persons’<sup>31</sup>.

Thus, the interpretive environment in the European Union is not averse to considering potential vulnerability of asylum seekers. Even so, it is necessary to reassess the effective operation of the Dublin System to establish a less coercive system, based on solidarity and in full agreement with respecting human rights when assigning responsibility to examine asylum applications (Guild 2015: 11).

#### IV. FINAL REMARKS

The ‘discretionary’ clauses in the Dublin System play a relevant role in mechanisms to guarantee human rights. Thus, they are no longer instruments for discretionary use by states when there is a risk of human rights violations in an asylum seeker’s destination state. In this context, they are legal instruments that serve to update the principle of *non-refoulement* when applying the CEAS. Two parameters must be examined to determine the risk of human rights violations in a transfer based on the Dublin System: the general situation in the destination state and the particular situation of the applicant, especially in cases of special vulnerability (families, children), on top of the vulnerability inherent in the condition of asylum seeker (or foreigner in an irregular situation). The existence of systemic flaws in a state’s asylum regime is not the

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<sup>29</sup> *K and Bundesasylamt*, C-245/11 (CJEU 6.11.2012), EU:C:2012:685, §44.

<sup>30</sup> *Ibid.* §46.

<sup>31</sup> *M.A et al.*, C-648/11 (CJEU 6.6.2013), EU:C:2013:367 §55.

only element to consider in the obligatory activation of the sovereignty or humanitarian clauses<sup>32</sup>. However, as these flaws exist, the burden of argument with respect to the specific and individual risk in a given case may be lower (Morgades, 2015: 767).

The sovereignty and humanitarian clauses can only be truly ‘discretionary’ when strong compliance with human rights in the reception and asylum systems of the states participating in the Dublin System is assumed. If this assumption becomes weaker as ‘systemic flaws’ are identified in some states, or when there is a risk of human rights violations in situations of particular vulnerability for applicants, the clauses become guarantors of respect for human rights and are no longer (completely) discretionary. In addition, the foundations on which the principle of legitimate trust is built, in short, the origin of the whole Dublin System, are weakened. For this reason, the legitimacy of maintaining the Dublin System relies on establishing efficient mechanisms within the European Union that enable the risk of human rights violations and the risks arising from an insufficiently harmonised asylum system to be identified and, if necessary, establishing temporary suspension of transfers between states. Both when ‘systemic flaws’ are detected in a state and when the risk of human rights violations is specific and linked to a situation of special vulnerability, the transfer cannot take place. But, as situations in the former case represent a breach of the principle of legitimate trust, those in the latter represent a weakening of the legitimacy of the common asylum system, as they demonstrate that the opportunities for obtaining protection in the different European states are not equivalent.

Respect for the essential core of the international asylum regime, which is the principle of *non-refoulement* interpreted to protect human rights, continues to be a responsibility that states cannot renounce through the application of the mutual trust principle in European Union law. This trust cannot be based on absolute assumptions that human rights are observed by European states, nor can justify the transfer of asylum seekers to unsafe European states. In this sense, the words of Sandra Lavenex remain valid, years after they were spoken: ‘the normative provisions of the European refugee regime tend to weaken the individual state’s commitment under the international refugee regime in so far as they establish a system of redistribution which diffuses

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<sup>32</sup>For the CJEU, unlike the ECtHR, if the transfer is not possible, the state in which the applicant is located must examine the responsibility assignment criteria, but will assume responsibility for examination of the application if the applicant’s situation would worsen ‘by using a procedure for determining the Member State responsible which takes an unreasonable length of time’; Ibid. §108.

responsibility and blurs accountability among particular states' (Lavenex, 1999:165). Since the *M.S.S.* and *Tarakhel* sentences, it is the ECtHR that stands as guarantor of the principle of *non-refoulement* in Europe, at least in the case of the risk of inhuman or degrading treatment in a destination state. This clearly shows both the regulatory flaws in the CEAS as an instrument for harmonisation and coordination of asylum regimes in member states and the difficulties for the bodies that oversee compliance with European Union law, especially since the approval of the EU Charter of Fundamental Rights.

## BIBLIOGRAPHY

- Bade, Klaus J., *Europa en movimiento. Las migraciones desde finales del siglo XVIII hasta nuestros días* (traducción de Mercedes García Garmilla), Barcelona: Crítica, 2003.
- Besson, Samantha, "La vulnerabilité et la structure des droits de l'homme: L'exemple de la jurisprudence de la Cour Européenne des Droits de l'Homme", in Laurence Burgorgue-Larsen, *La vulnérabilité saisie par les juges en Europe*, Paris, Pédone, 2014, 59-85.
- Blanc, Hubert, "Schengen: le chemin de la libre circulation en Europe", *RMC*, n°351, 1991, 722-726.
- Bossuyt, Marc, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant*, Bruxelles: Bruylant, 2010.
- Brouwer, Evelien, "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", *Utrecht Law Review*, vol. 9-1, 2013.
- Bruycker, Philippe de, Henri Labayle, "Chronique de la jurisprudence consacrée à l'Espace de liberté, de sécurité et de justice", *CDE*, vol. 50-3, 2014, 719-781.
- Clayton, Gina, "Asylum Seekers in Europe *M.S.S v Belgium and Greece*", *HRLR*, 11-4, 2011, 758-773.
- Costello, Cathryn, "Dublin-case NS/ME: Finally, an end to blind trust across the EU?", *A&MR* n° 2, 2012, 83-92.
- & Minos Mouzourakis, "Is ¿How Bad is Bad Enough? Good Enough?", *A&MR* n° 10, 2014, 404-411.
- Eberhard Jahn, "Refugees", *Encyclopedia of Public International Law*, vol. 8, Amsterdam: Elsevier Science Publishers, 1985, 452-456.
- Flauss, Jean-François, "Les droits de l'homme et la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés", in Vincent Chetail et Jean-François Flauss (eds.), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: Bilan et perspectives*, Brussels: Bruylant, 2001, 91-131.
- Fourlanos, Gerassimos, *Sovereignty and the Ingress of Aliens*, Stockholm: Almqvist & Wiksell International, 1986.

- Gil-Bazo, M<sup>a</sup>Teresa, “Asylum as a General Principle of International Law”, *IJRL*, vol. 27-1, 3-28.
- Gros Espiell, Héctor, “Derechos humanos, derecho internacional humanitario y derecho internacional de los refugiados”, in Christophe Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge/Studies and essays on international humanitarian law and Red Cross principles, en l'honneur/in honour of Jean Pictet*, Geneva, The Hague: Comité International de la Croix-Rouge-Martinus Nijhoff Publishers, 1984, 699-711.
- Guild, Elspeth et al., *Enhancing the Common European Asylum System and Alternatives to Dublin. Study for the LIBE Committee PE 519.234*, Brussels, European Parliament, 2015.
- Hailbronner, Kay, “Perspectives of a harmonization of the law of asylum after the Maastricht summit”, *CMLR*, vol. 29, 1992, 646-677.
- Hernández, Concepción, “El Convenio de aplicación del acuerdo de Schengen y el Convenio de Dublín: una aproximación al asilo desde la perspectiva comunitaria”, *RIE*, vol. 20, núm. 1, 1993, 53-98.
- Hurwitz, Agnès, “The Dublin Convention: A Comprehensive Assessment”, *IJRL*, vol. 11, n° 4, 1999, p. 648.
- Julien-Laferrrière, François, “Le traitement des réfugiés et des demandeurs d'asile au point d'entrée”, *RUDH*, 1990, 53-58.
- Labayle, Henri, “Droit d'asile et confiance mutuelle: Regard critique sur la jurisprudence européenne”, *CDE*, vol. 50-3, 2014, 501-534
- Lauterpacht, Elihu /Daniel Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion”, Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law*, Cambridge: Cambridge University Press, 2003, 87-177.
- Lavenex, Sandra, *Safe third countries: extending the EU asylum and immigration policies to Central and Eastern Europe*, Budapest/New York: Central European University Press, 1999.
- Lübbe, Anna, “ ‘Systemic Flaws’ and Dublin Transfer: Incompatible Tests before the CJEU and the ECtHR?”, *IJRL*, vol. 25-1, 2015, 135-140
- Mallia, Patricia, “Case of M.S.S. v. Belgium and Greece: A catalyst in the re-thinking of the Dublin II Regulation”, *RSQ*, vol. 30-3, 2011, 126-128.
- Mariño Menéndez, Fernando, “La singularidad del asilo territorial en el ordenamiento internacional y su desarrollo regional en el derecho europeo”, in Fernando Mariño Menéndez (ed.), *El Derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial Canosa*, Madrid: Trotta, 2002, 463-482.
- Moreno-Lax, Violeta, “Dismantling the Dublin System: M.S.S. v. Belgium and Greece”, *European Journal of Migration and Law*, n° 14, 2012, 1-31
- Morgades Gil, Sílvia, “El sistema de *Dublín* y la garantía del respeto del derecho a no sufrir tratos inhumanos o degradantes: Límites más allá de la pérdida de la confianza mutua. TEDH- sentencia de 4.11.2014 (Gran Sala), *Tarakhel c. Suiza*, 29217/12”, *Revista de Derecho Comunitario*

*Europeo*, 2015, n°51, 749-768.

Myron, Weiner, *The Global Migration Crisis. Challenge to States and to Human Rights*, Nova York: Harper Collins College Publishers, 1995.

Ogata, Sadako, *The Turbulent Decade. Confronting the Refugee Crises of the 1990s*, Nova York, Londres: W.W. Norton & Company, 2005.

Overbeek, Henk, "Towards a new international migration regime: globalization, migration and the internationalization of the state", Robert Miles, Dietrich Thränhardt (eds.), *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, Londres-Madison: Pinter Publishers- Fairleigh Dickinson University Press, 1995, 15-36.

Richard Plender, "The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research", Centre d'Étude et de Recherche de Droit international et de Relations internationales, *Le droit d'asile*, Dordrecht...: Kluwer Academic Publishers, 1989, 63-96.

Tomuschat, Christian, "A Right to Asylum in Europe", *HRLJ*, vol. 13-7/8, 1992, 257- 265.

Williams, Richard, *Beyond Dublin. A Discussion Paper for the Greens/EFA in the European Parliament*, 18 March 2015 <[www.greens-efa.eu](http://www.greens-efa.eu)>