The Viability of Mutual Trust in European Union Human Rights Law
An Analysis of the Scope of the Principle of Non-refoulement for Transfers of Asylum Seekers under the Dublin Regulation

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“Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people.”

- HANNAH ARENDT

(“The Perplexities of the Rights of Man”)
Abstract

In January 2014, the United Nations High Commissioner for Refugees released its report on the situation of asylum in Bulgaria, calling upon European Union Member States to suspend transfers of asylum seekers to Bulgaria under the Dublin Regulation. From a European law perspective, this raises major concerns putting into question the very *raison d’être* of the EU: the principle of mutual trust.

This paper analyses the viability of mutual trust in the context of the protection of fundamental refugee rights in the European Union. The principle of mutual trust between Member States is an important tool for European cooperation. However, it is not an absolute principle. Especially in policy fields which are intrinsically linked with human rights, mere formal trust cannot be upheld. Thus, even where harmonized rules exist, it must be assessed whether there is in fact a sufficient common ground available throughout the European Union to justify the application of mutual trust.

A common policy, such as the Common European Asylum System, under no circumstances exempts participating states from their obligations under international customary law and treaty-based human rights law. Irrespective of the underlying premises that facilitate an efficient cooperation between European Union Member States, states are bound to comply with their obligations on the international level.

Based on a comprehensive case law analysis, this paper assesses the interrelation and mutual influence between European Union asylum law and international norms of human rights and refugee protection. Further, it comments on the European Court of Justice’s failure to provide a clear legal test for the rebuttal of mutual trust under the Dublin Regulation.
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I. Introduction

In January 2014, the United Nations High Commissioner for Refugees (“UNHCR”) released its report on the situation of asylum in Bulgaria, calling upon European Union Member States to suspend transfers of asylum seekers to Bulgaria under the Dublin Regulation.1 According to the UNHCR’s observations, “asylum seekers in Bulgaria face a real risk of inhuman or degrading treatment, due to systemic deficiencies in the reception conditions and asylum procedures.”2 Similar deficiencies had previously led to a suspension of transfers of persons to Greece.3 From a European law perspective, this development raises major concerns putting into question the very raison d’être of the EU: the principle of mutual trust.4

The principle of mutual trust in spite of diversity, is regarded as one of the fundamental conditions for the functioning of the European Union, and for the creation of an area of freedom, security and justice.5 Ever since Cassis de Dijon, mutual trust has expanded as a fundamental basis for European integration, harmonization and loyal cooperation in numerous fields of law. However, recent developments in the case law of both the Court of Justice of the European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”) indicate that the EU must accept limitations to the unconditional principle of mutual trust in areas where non-derogable human rights are at stake. In the light of the EU’s future accession to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),6 the dialogue between the ECtHR and the CJEU receives additional significance, as it provides some foretaste of how the two courts will interact once the EU has acceded to the ECHR. The issue of refugee and asylum rights is a very interesting field in this regard, as both courts have been active in the interpretation of European and international human rights law in relation to this topic. Although the right to asylum is not formally mentioned in the ECHR, the ECtHR has recognized the right to international protection, in particular the prohibition of refoulement, based on Art. 3 ECHR. The EU Charter of Fundamental Rights (“Charter”), on the other hand, explicitly provides for refugee protection in Art. 18 (right to asylum) and Art. 19 (prohibition of refoulement).

The now binding force of the Charter and the provision for accession of the EU to the ECHR will most likely increase the complexity of the relationship between the two European courts.7 Moreover, the gradual establishment of the Common European Asylum System (“CEAS”) has led to an increasing involvement of EU institutions in the application of international refugee law and related human rights standards.8 Since the European Union received the Nobel Peace Prize in 2012 “for its successful struggle for peace, reconciliation and for democracy and human rights”,9 it is important to question whether the post-Lisbon constitutional complexity will enhance human rights safeguards in the European Union. This paper aspires to assess the emerging legal uncertainties for asylum seekers and for national

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2 UNHCR Observations on Bulgaria, 2 January 2014, p. 3.
5 NS, para. 83.
6 See Art. 6(2) TEU.
judicial authorities which must apply seemingly diverging human rights standards under EU and international law.\textsuperscript{10}

While public debate and media coverage on European asylum policy predominantly focus on human rights violations on the EU’s common external borders, this paper will adopt a different point of view. More specifically, it will focus on the internal premises within the European common territory, which have led to violations of international refugee law and universal human rights norms inside the EU. In this context, the paper will assess the viability of the European principle of mutual trust within the Dublin system of transfers of asylum seekers in view of the overarching international principle of non-refoulement. It will be shown that the European system of mutual recognition based on unconditional trust cannot be applied to policy fields which require a high degree of individual human rights protection under European and international law. Based on an analysis of international, European and national case law, it will be demonstrated that the European Court of Justice has thus far failed to provide a sufficiently clear standard of proof for the rebuttal of trust in coherence with the established thresholds under the ECHR.

II. The international legal framework concerning non-refoulement

II.1 International Law

The prohibition of “expulsion or return” (refoulement) of aliens seeking international protection is a fundamental principle of international refugee law. It is enshrined in Article 33(1) of the 1951 Geneva Convention Relating to the Status of Refugees,\textsuperscript{11} which states that “[n]o Contracting Party 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.” The intention of the drafters of this article was to ensure that refugees would “not be returned, either to their country of origin or to other countries where they would be at risk”.\textsuperscript{12} This clearly puts the rights of the refugee in the center of the obligation, and also restricts the return to intermediary countries.\textsuperscript{13} Nevertheless, Art. 33(2) of the Refugee Convention allows for refoulement under certain, exceptional conditions.

Reflected in numerous subsequent international treaties, declarations and wide-spread state practice,\textsuperscript{14} the principle of non-refoulement is now recognized as a part of customary international law binding on all states, and is also applicable to asylum seekers whose status has not yet been formally determined.\textsuperscript{15} Accordingly, the universal prohibition of refoulement restricts all government measures which could potentially have the effect of returning an alien to the frontiers of territories where he or she would be under threat. This prohibition also includes indirect refoulement.\textsuperscript{16}

International refugee law is regarded as a specialized area of human rights protection, safeguarding the rights of a specifically vulnerable group of persons.\textsuperscript{17} Consequently, the norms developed under international refugee law, such as the universal principle of non-

\textsuperscript{10} Douglas Scott, ‘The CJEU and the ECtHR after Lisbon’, 153.
\textsuperscript{12} Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law (3rd edn, OUP 2007) 204.
\textsuperscript{13} Ibid, 205.
\textsuperscript{14} See, for example, Art. 3 of the 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) (A/RES/2132 (XXII) of 14 Dec. 1967); Art. II(3) 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; and Art. 22(8) of the 1969 American Convention on Human Rights.
\textsuperscript{16} UNHCR Note on international protection (2001) para. 16. Indirect refoulement will be discussed in the following section, see below.
\textsuperscript{17} J. Mink, ‘EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment’ (2012) 14 European Journal of Migration and Law 119, 130 [Mink, ‘EU Asylum Law and Human Rights’].
refoulement, have been refined in the general context of international human rights law. For instance, as non-refoulement is closely correlated with the absolute prohibition of torture, the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides some guidance for interpretation, reaffirming the peremptory nature of the principle of non-refoulement. This paper, however, shall focus on the scope of the principle of non-refoulement on the European regional level, and refer to international law only where it is relevant to the European context.

II.2 European Convention of Human Rights

On the European level, one of the most sophisticated sources of human rights standards are the ECHR and the related jurisprudence of the ECtHR. Although the right to asylum and the principle of non-refoulement are not explicitly laid down in the text of the ECHR, the ECtHR recognizes asylum seekers as a particularly vulnerable group under the Convention. In its comprehensive case law related to the absolute prohibition of torture and inhuman or degrading treatment or punishment, the Court of Human Rights has gradually extended the scope of non-refoulement beyond Art. 33 of the Refugee Convention by consistently emphasizing the absolute and non-derogable nature of Art. 3 ECHR. This means that unlike the Refugee Convention, the ECHR does not allow for any exceptions to the principle, not even if national security is at stake. Primarily, Art. 3 is read in conjunction with Art. 1 ECHR, obliging Member States to secure access to human rights for all individuals within their jurisdiction, including illegal immigrants.

Since the right not to be subjected to torture under Art. 3 ECHR is absolute, the principle of non-refoulement prohibits direct as well as indirect refoulement. Thus, Member States violate Art. 3 not only when an individual is sent to a country where he or she may be at risk directly; the principle also covers the expulsion to a country from which the individual might subsequently be removed to a third state where a real risk of inhuman or degrading treatment exists. This additional extraterritorial dimension of non-refoulement is proof for the peremptory obligation imposed on Member States and the high degree of responsibility and duty of care connected with the expulsion of foreigners. In the following sections, it will be discussed in how far this strict principle is applicable to the transfer of asylum seekers between Member States of the European Union. For this purpose, it is important to note that Member States’ human rights obligations under the ECHR are not affected by EU law and even take precedence over EU obligations on the international level.

II.3 European Union Law

Within the framework of European immigration control, the principle of non-refoulement is primarily applicable to illegal immigrants and must therefore be distinguished from expulsion.

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18 Mink, ‘EU Asylum Law and Human Rights’, 130.
20 See, in particular, Art. 3, which enshrines the principle of non-refoulement: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
21 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at <http://www.refworld.org/docid/3ae6b3a94.html> (accessed 3 June 2014). It has been consistently reaffirmed by the Committee against Torture that Art. 3 of the Convention against Torture is a non-derogable provision, which permits no exceptions to the principle of non-refoulement. (See Goodwin-Gill and McAdam, The Refugee in International Law 301).
22 See, for instance, Salah Sheekh v The Netherlands App no 1948/04 (ECtHR, 11 January 2007) [Salah Sheekh] para. 141.
23 Chahal v UK App no 22414/93 (ECtHR, 15 November 1996) [Chahal] paras. 79 and 82.
24 See, for instance, Salah Sheekh v The Netherlands App no 1948/04 (ECtHR, 11 January 2007) [Salah Sheekh] para. 141.
25 See, in particular, Art. 3, which enshrines the principle of non-refoulement: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
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27 See, in particular, Art. 3, which enshrines the principle of non-refoulement: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
28 See, in particular, Art. 3, which enshrines the principle of non-refoulement: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”
or deportation of any foreigners lawfully residing in the Union.\textsuperscript{29} However, the EU does not operate in a ‘legal vacuum’\textsuperscript{30} and is in any case directly bound to comply with international customary law.\textsuperscript{31} Thus, the customary norm of non-refoulement creates direct obligations for the EU itself, even though it is not a member of the Refugee Convention.

Additionally, pursuant to Art. 6(3) TEU, fundamental rights as guaranteed by the ECHR constitute general principles of EU law, and the case law of the ECtHR on Art. 3 ECHR has in fact had considerable influence on the national and supranational level within the EU.\textsuperscript{32} Consequently, Art. 4 of the now binding EU Charter has the same scope and meaning as Art. 3 ECHR.\textsuperscript{33} Moreover, Art. 19(2) of the Charter states that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” This provision directly incorporates the principle of non-refoulement and is meant to be a codification of the ECtHR’s case law regarding Art. 3 ECHR.\textsuperscript{34}

Additionally, the Lisbon Treaty warrants the Union new competences on asylum, which will augment the relevance of international refugee law for EU institutions. Pursuant to Art. 67(1) TFEU, the European area of freedom, security and justice must respect fundamental rights, such as the right of non-refoulement, the right to respect for family life and the right not to be subjected to inhuman or degrading treatment.\textsuperscript{35} Art. 78 TFEU, which constitutes the legal basis for adopting EU measures in the field of asylum, explicitly requires the European Union to adhere to the Refugee Convention and its Protocol. Accordingly, the CEAS is based on the full and inclusive implementation of the Refugee Convention, to which all European Member States are contracting parties.\textsuperscript{36} This implicates that the validity of CEAS measures which are not coherent with the Refugee Convention could now be challenged at EU level.\textsuperscript{37} Central EU legislative acts forming part of the CEAS have therefore explicitly incorporated the principle of non-refoulement.\textsuperscript{38}

However, as will be discussed below, the European Union’s special legal order requires that the principle of non-refoulement is generally only applicable with regard to non-Member States. This specific European reading of the principle has led to particular tension in view of the universality of human rights and the non-derogable nature of non-refoulement.

### III. Particularities of the European Asylum System

#### III.1 The right to asylum as a human right in the EU

The importance of human rights is frequently highlighted as a central feature of the EU. According to Art. 2 TEU, the EU “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” Moreover, since the entry into force of the Lisbon Treaty, the Charter has the same legal status as the Treaties themselves.\textsuperscript{39} Fundamental rights thus apply to EU institutions, bodies, offices and agencies, as well as to the Member States themselves whenever they are acting within the scope of EU law.\textsuperscript{40} While upholding the rights

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\textsuperscript{29} Goodwin-Gill and McAdam, \textit{The Refugee in International Law} 201.

\textsuperscript{30} Mink, ‘EU Asylum Law and Human Rights’, 128.

\textsuperscript{31} C-162/96 Rucke GmbH & Co v Hauptzollamt Mainz: [1998] ECR I-03655, para. 45: “The European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law.”

\textsuperscript{32} Goodwin-Gill and McAdam, \textit{The Refugee in International Law} 310.

\textsuperscript{33} Explanation on Art. 4, see Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17 [Explanations CFR].

\textsuperscript{34} See Explanation on Art. 19(2), Explanations CFR.

\textsuperscript{35} See Damian Chalmers, \textit{European Union Law} (CUP 2010) 503-505 [Chalmers, \textit{EU Law}].

\textsuperscript{36} See NS, para. 4. Although they are not Member States of the European Union, the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Principality of Liechtenstein participate in the Dublin system discussed below.


\textsuperscript{38} See Art. 21 of the Recast Qualifications Directive 2011/95/EU, and Arts. 4 and 5 of the Return Directive 2008/115/EC.

\textsuperscript{39} See Art. 6(1) TEU.

guaranteed in the ECHR as minimum standards, Art. 52(3) of the Charter clearly indicates that the EU has the authority to provide even more extensive human rights protection within its legal realm.

Indeed, the Charter codified the ECTHR’s case law on non-refoulement in Art. 19 and explicitly recognizes the right to asylum in Art. 18. It can therefore be considered to go beyond the ECHR minimum guarantees with regard to the rights of asylum seekers. Accordingly, “the right to be granted asylum has become a subjective right of individuals under the Union’s legal order.”41 The ECJ’s judgment in Salahadin Abdulla reaffirmed that refugee rights form part of the EU’s fundamental values.42 The measures constituting the CEAS should thus primarily aim at the protection of the integrity of persons at risk.43 Under this premise, any failure to have due regard to individual human rights in the context of asylum policies does not seem to be reconcilable with the basic tenet of protecting the individual integrity of asylum seekers.

This constitutional dimension of human rights of refugees within the EU provides the relevant framework for the following analysis of the concrete particularities of European Asylum law. It has to be emphasized that the EU is an organization based on the rule of law and that any violations of human rights thus undermine its own foundation.44 It further follows from the universality of human rights that respect for the rights of the individual should be the center of concern, which cannot be limited solely or mainly to EU citizens.45

III.2 De-territorialization of migration control

Control over migration is considered to be one of the core competences of a sovereign national state.46 The obligation of states to provide international protection to refugees and their power to grant asylum are therefore mainly derived from the concept of territorial sovereignty.47 This has several implications for states’ general perception of asylum policies: firstly, only limitations to territorial sovereignty can constitute legitimate limits to the power to grant asylum; secondly, other states must respect territorial sovereignty and may, therefore, generally not interfere with national asylum policies.48

However, this is decisively different for the European Union, being a supranational organization “of its own kind”, in which Member States have limited their sovereign rights.49 Originally, the abolition of internal border controls for goods and persons within the European Communities was primarily aimed at economic objectives and did not provide for human rights.50 Being a sub-branch of human rights law, European asylum policy was hence traditionally intergovernmental, emphasizing Member States’ national sovereignty.51 However, with the introduction of human rights obligations on EU level this has been changing. One of the most prominent reasons for establishing a “Common Area of

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42 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland [2010] ECR I-1532, paras. 51-54.
43 See in general: S.B. Zarévac, ‘The CJEU and the CEAS’, 53-71. Note that already in 1963, in Case 26/62 Van Gend en Loos, the European Court of Justice clearly stated that the Treaties create rights referring ‘not only to governments, but to peoples’.
45 See Art. 2 TEU, which explicitly mentions the human rights of persons belonging to minorities and does not mention any requirement of citizenship. See also: Colin Harvey, ‘Judging Asylum’ in P. Shah, The challenge of asylum to legal systems, p. 175.
48 Ibid., 117.
49 Case 26/62 Van Gend en Loos v Nederlandsche Administratie der Belastingen (1963) ECR I. See also Chalmers, EU Law, 15.
51 Note that the first European intergovernmental cooperation on asylum developed outside the Community’s framework, through the adoption of the Dublin Convention in 1990. The 1992 Treaty of Maastricht then for the first time provided for limited EU competences in the field of asylum and migration, still largely based on intergovernmental cooperation. See C. Kaunert and S. Leonard, ‘The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards supranational governance in a common area of protection?’ (2012) 31 Refugee Survey Quarterly 3-7 [Kaunert and Leonard, ‘EU Asylum Policy after Lisbon’].
Protection”, was the fact that common external borders and in particular the Schengen area necessarily required a common European asylum policy, because “a foreigner crossing [the external border] will – as a rule – not be subject to further control when he moves from one Member State to another. The Union therefore needs common criteria for who qualifies as a refugee and common rules of procedure that have to be observed. The EU also needs rules to determine which Member State is competent to decide on an individual asylum claim.”

Considering the traditionally strictly national scope of migration control, the European common policy of asylum and immigration is quite unique: it operates in a common territory consisting of the territories of 28 Member States, which share a common external border, thus de-territorializing protection obligations within the EU. Arguably, this can have negative consequences, as national governments may be tempted to become inactive or even disregard their international duties, relying on the fact that protection obligations no longer fall within their sovereign responsibilities. Additionally, as the European Union is seen as one common territory, it could be argued that the principle of non-refoulement would logically only be applied in relation to third states and not within the Union itself. However, the ECtHR has made clear that a common policy by an international organization such as the EU under no circumstances exempts states from their obligations under international human rights law:

“(…) where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.”

Whatever their design, any measures adopted by the European Union in the field of asylum must thus ensure that human rights remain ‘practical and effective’. By implementing those measures, Member States are obliged to adhere to their international obligations, including the principle of non-refoulement.

III.3 The principle of mutual trust in European asylum policy

A prominent example of the conflicting obligations originating from the de-territorialization process is the duty of mutual trust between EU Member States. Given the EU’s cooperative approach towards immigration and asylum, an argumentation based on territorial sovereignty of the nation state is no longer feasible in the relations between states. Instead, a high degree of solidarity and fair sharing of responsibility between Member States is required for the proper implementation of their common policies. In this context, the principle of loyal cooperation enshrined in Art. 4(3) TFEU is relevant, which stipulates that Member States shall, in full mutual respect, assist each other in carrying out tasks under EU law. However, Art. 4(3) seems to qualify this principle, prohibiting measures that could jeopardize the attainment of the Union’s objectives, including human rights. Closely linked with the principle of loyalty, the principle of mutual recognition emerged in the CJEU’s case-law, in the beginning mainly related to the free movement of goods in the internal market. In Cassis de Dijon the Court ruled that in the absence of harmonized rules, Member States must recognize products lawfully manufactured according to the national standards in another Member State.

While ‘mutual recognition’ was developed with regard to free movement of products in the internal market, it is based on a more general reciprocal trust in the legality and quality

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55 Waite and Kennedy v Germany App no 26083/94 (ECtHR, 18 February 1999), para. 67.
57 See Art. 80 TFEU.
of each other’s legal systems. Gradually, a binding and “more general principle of mutual trust between the authorities of the Member States” was established by the CJEU. This presumption of trust implicates that “Member State’s competent authorities are in principle bound by documents and decisions originating from other Member States and that they do not systematically call into question the accuracy of particulars provided by the competent authorities in the home state on their own initiative and motivated by general suspicion”. As such, the principle strictly prohibits Member States from adopting measures that could potentially interfere with other Member States’ autonomy; this even applies to unilateral measures intended to obviate a violation of EU law by another Member State.

The principle of mutual trust has become the *raison d’être* of European Union cooperation, and has been extended to a number of legal spheres, such as criminal and immigration law. It is an essential element of the European legal order, without which such extensive cooperation as well as free movement would be impeded by burdensome double controls, and eventually fail due to minor differences in national laws or practices. However, it must be noted that the presumption of trust is a *conditional* principle within the Union and should not be interpreted as a blank cheque for competent authorities to behave passively. The CJEU itself stated – in relation to the internal market – that “in case of manifest inaccuracies, the national authority may, if it so wishes, approach the other Member State for additional information.”

To clarify the scope and meaning of mutual trust in the field of asylum law, a distinction between ‘formal’ and ‘substantive’ *(in concreto)* trust should be drawn. *Formal trust* is determined by formal facts (e.g. the fact that a country has ratified a certain treaty), which provide reasons to presume that a state complies with certain standards. An example for formal trust would be the fact that all EU Member States are contracting parties to the ECHR and the Refugee Convention, and therefore obliged to adhere to the prohibition of torture and the principle of non-refoulement. The application of the concept of formal trust implicates that once a state has implemented a certain legal instrument, its compliance with its obligations will no longer be questioned by other states. *Substantive trust*, on the other hand, depends on the concrete circumstances of an individual case, even after a legal instrument has been formally implemented.

As will be discussed below, the CEAS and in particular the Dublin Regulation operate on basis of the formal presumption that fundamental rights and other international obligations are equally upheld in all 28 Member States. By contrast to the situation in *Cassis de Dijon*, common rules do exist in the field of asylum: the EU Asylum Directives provide harmonized minimum standards concerning asylum procedures, reception conditions, and the application of the ‘refugee’ definition. The harmonization measures initiated with the Treaty of Maastricht were adopted in order to discourage asylum shopping by preventing that certain Member States would be more attractive than others for asylum-seekers. Consequently, reciprocal reliance on equal minimum standards in Member States’ asylum practices is not

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64 See: Chalmers, *EU Law* 594 and Art. 82 TFEU.
68 See Dörig, ‘German Courts and the CEAS’, 776.
69 See Asylum Directives listed in the bibliography.
only legally required in the secondary legislation, but seems justifiable based on formal trust.

Nevertheless, even where harmonized rules do exist, it must be assessed whether there is in fact a sufficient common ground available throughout the Union to justify the application of mutual trust. For this, an *in concreto* test of mutual trust in each situation is necessary, taking into account that the rationale behind the principle of mutual trust is the enhancement of European cooperation while promoting its core values and fundamental principles. As a consequence, exceptions to mutual recognition should be allowed to protect overriding rights or principles developed on European or international level. In particular, the absolute character of the principle of non-refoulement necessarily requires a possibility to rebut mutual trust. In fact, recently, numerous reports and court decisions have indicated that in spite of the harmonization process, significant discrepancies between Member States’ interpretation and implementation of the Asylum Directives persist and have led to severe human rights violations in several countries. In asylum law, a system based on mere formal trust thus seems to be counter-productive, as it inhibits the effective protection of fundamental rights. In the following sections it will therefore be shown that a substantive, not a formal, threshold must be applied to rebut mutual trust whenever human rights are at stake.

### III.4 The Dublin system and mutual trust

The CEAS is closely linked with the common management of the European external borders and “the progressive creation of an area without internal borders”. It consists of a number of instruments of EU secondary legislation, such as the Procedures Directive, the Qualifications Directive, the Receptions Conditions Directive and the Return Directive, which all establish common minimum standards of asylum law to be applied in the Member States. Additionally, it encompasses structures for the practical cooperation between Member States, such as the European Asylum Support Office (EASO) and the EUROPDAC data base. This current legal framework is the result of the evolution of secondary legislation in the area of freedom, security and justice since the 1990s. This paper, however, focuses on the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (“Dublin Regulation”), the recast of which entered into force in July 2013. In the following paragraphs, the core objectives and mechanisms of the Dublin system will be explained before entering an analysis of the corresponding case law in the next section; subsequently, the amendments in the recast Regulation (“Dublin III Regulation”) will be discussed briefly.

The main objective of the Dublin Regulation lies in allocating the responsibility for processing an asylum application by a third country national to only one single Member State in each case (Art. 3(1)), in order to deter multiple claims and asylum shopping throughout the Union. By increasing the efficiency and certainty between Member States regarding responsibility for asylum applications, the criteria in the Regulation actually are meant to

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71 See section III.4 below.
72 Janssens, Mutual Recognition, 29.
73 Janssens, Mutual Recognition, 206.
75 Preamble of Dublin III, 25th recital; see above, section III.2.
76 See Asylum Directives listed in Bibliography.
78 All subsequent references to Articles in the Dublin Regulation are based on the text of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (“Dublin III Regulation”) [2013] OJ L180/31. Note that the basic premises of the Regulation have not been changed, which is why the Dublin III Regulation can be used to explain the central features of the Dublin System since 2003.
contribute to improving protection for the individuals concerned.\textsuperscript{79} Additionally, the underlying idea of “burden-sharing” suggests a fair distribution of responsibilities and solidarity between the Member States.\textsuperscript{80} Solidarity is intrinsically connected with mutual trust as essential element of the Dublin system: \textsuperscript{81} the system is based on the assumption that the national asylum systems of all Member States provide similarly high standards of protection.\textsuperscript{82} This constitutes a primarily formal mutual trust, based on the Member States’ participation in the CEAS and their expected compliance with international norms, such as the principle of non-refoulement.\textsuperscript{83}

The responsibility for asylum claims is determined according to a hierarchical order of criteria set out in Chapter III of the Dublin Regulation (see Art. 7(1)). These criteria include aspects of family reunification (Arts. 8 - 11), the place where a residence permit or visa was issued (Art. 12) and the application in international zones (Art. 15). Yet, irregular entry into the common territory (Art. 13), which is the fourth criterion in the hierarchy, is the one most frequently applicable,\textsuperscript{84} whenever an applicant coming from a third country has illegally crossed the border into a Member State by land, sea or air, the Member State through which the person entered is responsible for examining the application for international protection.\textsuperscript{85} If none of the criteria applies, the default rule is that responsibility is assigned to the first Member State where an asylum application was lodged (Art. 3(2)).\textsuperscript{86} National authorities receiving an asylum application will use these criteria to determine the Member State responsible for processing the claim, and may decide to transfer the individual concerned to the Member State responsible. However, an inherent, additional feature of the Dublin system is the “sovereignty clause” enshrined in Art. 17(1), which allows Member States to assume responsibility for an asylum application by their own discretion.\textsuperscript{87}

Under the Dublin Regulation, all Member States are considered as “safe countries” for third-country nationals.\textsuperscript{88} This ‘safe country’ notion encompasses two presumptions: firstly, all Member States are regarded as safe countries of origin, meaning that they are countries that do not produce any refugees themselves;\textsuperscript{89} secondly, States participating in the Dublin system are considered to be safe countries of asylum, where asylum seekers can enjoy asylum without any danger.\textsuperscript{90} These unconditional presumptions appear to be highly problematic under international law, as the Refugee Convention precludes discrimination based on the country of origin (Art. 3) and does not provide for a geographical limitation. The ‘safe country of origin’ notion has in fact been criticized by the UNHCR as being “inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees”, in so far as the presumption would lead to a whole group of asylum seekers being

\textsuperscript{79} See Preamble of Dublin III. 5th recital.
\textsuperscript{80} Cf. Preamble of Dublin III, 22\textsuperscript{nd} recital; see also Gina Clayton, ‘Asylum Seekers in Europe: M.S.S. v Belgium and Greece’ (2011) 11 Human Rights Law Review 758, 760.
\textsuperscript{81} 22\textsuperscript{nd} recital of the Preamble of Dublin III.
\textsuperscript{83} 3rd recital of the Preamble of Dublin III. The concessions to formal trust in the Dublin III Regulation will be discussed in section V below.
\textsuperscript{85} Note that there are only limited possibilities for refugees to enter the common external border legally. It has been criticized that the EU has not made sufficient effort to ensure legal access of asylum seekers in accordance with the right to seek asylum enshrined in Art. 14 of the Universal Declaration of Human Rights. (cf. B. Vandvik, ‘The Future of Asylum in Europe? A View from the European Council on Refugees and Exiles’ in Goudappel and Raulus, The Future of Asylum in the European Union, 137). However, the issue of the protection of the EU’s external borders is beyond the scope of this paper.
\textsuperscript{86} Cf. NS, para. 19.
\textsuperscript{87} Note that exercising the discretionary power under Art. 17(1) of the Dublin Regulation is considered as implementation of EU law. Therefore, a Member State is bound by the Charter of Fundamental Rights, see Art. 51(1) of the Charter, when deciding whether to examine an asylum claim which is not its responsibility according to the Dublin criteria (cf. NS, para. 69).
\textsuperscript{88} See Recital (3) of Dublin III.
\textsuperscript{89} UNHCR, Background Note on the Safe Country Concept and Refugee Status Submitted by the High Commissioner to the Sub-Committee of the Whole on International Protection, 11-12, U.N. Doc. EC/SCP/68 (July 3, 1991) para. 3.
\textsuperscript{90} Ibid., para. 3.
effectively precluded from obtaining refugee status, which could lead to violations of the principle of non-refoulement. To facilitate mutual trust in EU Member States as ‘safe countries of asylum’, the EU adopted the Reception Directive; this Directive aspires to safeguard the implementation of minimum standards for the reception of asylum seekers in EU Member States, i.e. with respect to material reception conditions, health care and the right to information. Nonetheless, considering the diverging interpretation and application of the minimum standards, and the evidently alarming humanitarian situation for asylum seekers in Member States such as Greece, the ‘safe country of asylum’ presumption also seems to have been refuted by now.

It follows from the above that the rules of the Dublin system can only be applied as long as the EU Directives are correctly and uniformly implemented in all participating states, thereby excluding any flaws de jure and de facto in the asylum systems which could curtail the effective protection of asylum seekers’ rights. As an unconditional presumption of safety is not congruent with international refugee law, the principle of mutual trust would have to be significantly qualified to ensure coherence with international obligations. However, considering its prominent role for European cooperation as such, the established principle of mutual trust cannot be repudiated that simply. Particularly, due to the fact that the Dublin system’s smooth functioning is intrinsically based on the existence of mutual trust, courts have been quite hesitant to question the viability of mutual trust. The following section will illustrate the conflicts faced by courts in relation to the principle of mutual trust in asylum cases dealing with Dublin transfers.

IV. The Refutability of the Principle of Mutual Trust

IV.1 The ECtHR’s response to mutual trust under the Dublin System

As the European Union is not subject of the direct scrutiny by the Strasbourg Court, the ECtHR has diligently respected the EU as an autonomous, separate legal system, and has shown utmost caution not to interfere with its exclusive competences. Hence, in spite of the massive number of applications involving the Dublin Regulation filed with the Court of Human Rights, the ECtHR was initially quite reluctant to overtly question the EU principle of mutual trust. However, due to the increasing impact of EU legislation on asylum practices in the Member States, the ECtHR eventually had to balance EU norms against the ECHR. That the “presumption of safety” underlying the Dublin system could potentially create a conflict with the prohibition of refoulement was first established in T.I. v UK in 2000; the Court ruled that the fact that Germany was a Member State of the ECHR did not generally exempt the UK from its obligation under Art. 3 ECHR to verify whether an asylum seeker would be effectively protected against refoulement after a Dublin transfer there. Nonetheless, the Court found that in the concrete case of T.I., the German legal system provided sufficient safeguards to prevent the refoulement of the applicant. The potential refutability of mutual trust was subsequently confirmed in K.R.S. v UK, where the ECtHR again found that there

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91 Ibid., para. 5. Note that in para. 14 of the same Background Note, the UNHCR recognizes the Dublin Convention, the predecessor of the current Dublin System, as “positive development”. Given the recent debate on major deficiencies in the Dublin system, it appears necessary to apply the UNHCR’s notes on the ‘safe country’ notion also to the European context.
92 See NS, para. 27.
95 Cf. Dörig, ‘German Courts and the CEAS’, 778.
96 Douglas Scott, ‘The CJEU and the ECtHR after Lisbon’, 642.
98 T.I. v UK App no 43844/98 (ECtHR, 7 March 2000)
99 Ibid, p. 15.
100 Ibid, p. 18.
was not sufficient proof to establish that the return of an asylum seeker to Greece at the time constituted a breach of Art. 3.\textsuperscript{101}

Although the Court of Human Rights had established that the principle of mutual trust could not \textit{per se} be regarded as irrebuttable under the ECHR, the actual legal threshold for setting aside the duty of trust in relation to a risk of \textit{refoulement} remained rather vague. The judgment in \textit{K.R.S.} still largely relied on formal trust: the ECtHR stated that “in the absence of any proof to the contrary, it must be presumed that Greece will comply [with its obligations under the asylum Directives] in respect of returnees”.\textsuperscript{102} It has been criticized that the ECtHR in \textit{K.R.S.} gave precedence to the merely formal existence of the Asylum Directives in spite of ample empirical evidence of serious flaws in the Greek asylum system.\textsuperscript{103}

Yet, in 2011, in the case \textit{MSS v Belgium and Greece}, the ECtHR for the first time condemned an EU Member State (Belgium) for a breach of Art. 3, arising from a Dublin transfer of an asylum seeker to Greece. Due to the importance of mutual trust as essential principle of European cooperation, this judgment has had significant repercussions for the European Union. The \textit{MSS} decision for the first time pronounced the shocking truth, namely that not all EU Member States are automatically safe countries of asylum. National authorities applying the Dublin Regulation were thus no longer allowed to invoke \textit{formal} trust, but on the contrary, had an obligation “to first verify how the Greek authorities applied their legislation on asylum in practice”.\textsuperscript{104} The ECtHR considered that the Belgian authorities ought to have recognized that the extreme material poverty and lack of safety, which the applicant was facing in Greece, had reached a sufficient degree of gravity so that his removal to Greece amounted to \textit{refoulement} under Art. 3 ECHR.\textsuperscript{105}

The legal test applied by the ECtHR corresponds to the requirements for an Art. 3 ECHR violation, taking into account the “particularly underprivileged and vulnerable” situation of the applicant as asylum seeker, and his need for special protection.\textsuperscript{106} In its reasoning, the Court of Human Rights made use of supplementary information provided by the UNHCR and independent human rights organizations.\textsuperscript{107} Nevertheless, the wide-spread nature of the inhuman treatment of asylum seekers in Greece was merely taken as proof to establish the truth of the allegations brought forward by the applicant, and did not constitute the legal test as such.\textsuperscript{108} On the contrary, the ECtHR emphasized that “the fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable”, thus implying the necessity of an \textit{individual} rather than general legal test.\textsuperscript{109} Also the Court’s final conclusion on Greece’s breach of Art. 3 is unequivocally based on an individual test, consisting of the individual applicant’s precarious living conditions, prolonged uncertainty and the “total lack of prospects of his situation improving”\textsuperscript{110} Thus, while the abundant availability of reports by the UNHCR and NGOs aggravated the Belgian authorities’ failure to notice the individual risk for the applicant, it did not as such change the legal test applicable to non-\textit{refoulement}. Nevertheless, the legal threshold applied in \textit{MSS} led to various misconceptions as will be illustrated in the following sections.

\textsuperscript{101} \textit{K.R.S. v UK} App no 32733/08 (ECtHR, 2 December 2008) [\textit{K.R.S.}].

\textsuperscript{102} See \textit{K.R.S.}, fifth paragraph of the section “The Responsibility of the United Kingdom”.

\textsuperscript{103} See Costello, ‘Courting Access to Asylum’, 320.

\textsuperscript{104} \textit{MSS}, para. 359.

\textsuperscript{105} \textit{MSS}, para. 258.

\textsuperscript{106} \textit{MSS}, para. 232 and 251.

\textsuperscript{107} \textit{MSS}, para. 255.

\textsuperscript{108} \textit{MSS}, para. 255.

\textsuperscript{109} \textit{MSS}, para. 359.

\textsuperscript{110} \textit{MSS}, para. 263.
IV.2 The CJEU’s reaction to MSS v Belgium and Greece

Shortly after the ECtHR’s groundbreaking judgment in MSS, the Luxemburg court for the first time confirmed the refutability of mutual trust in relation to Dublin transfers to Greece. In NS/ME v SSHD, the CJEU emphasized the importance of non-refoulement as central principle of CEAS, and highlighted the European Union’s commitment to the Refugee Convention and fundamental rights. Accordingly, although mutual trust is an intrinsic premise of the Dublin system, Member States are not authorized to interpret European secondary legislation in a manner that would conflict with the fundamental rights protected by the EU legal order. The CJEU therefore confirmed that formal trust is not concordant with the absolute prohibition of torture and inhuman or degrading treatment; the mere ratification of human rights treaties by a Member State is clearly not sufficient to conclude that fundamental rights are actually observed in practice. The CJEU therefore ruled as follows:

“To ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of [the Dublin Regulation] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter.”

More specifically, if information from sources such as the ones used in MSS (e.g. UNHCR reports and unanimous reports by recognized international NGOs) indicates that a particular Member State is no longer a safe country of asylum, national authorities are allowed to abandon the principle of mutual trust: they are, under certain circumstances, able to assess the functioning of the asylum system in the Member State responsible before transferring an individual under the Dublin Regulation. In this manner, the ECI cautiously tried to bring Art. 4 of the Charter in line with the previous MSS judgment on Art. 3 ECHR. Nonetheless, although the relativization of mutual trust is indeed an unprecedented concession by the CJEU, the legal test does not seem to be fully coherent with the ECtHR’s reasoning in MSS. While MSS refers to the reports documenting a wide-spread situation as sufficient means of evidence, the CJEU suggests that the existence of systemic deficiencies in a Member State is in itself the legal threshold to set aside the duty of mutual trust. The presumption of trust therefore remains the default rule, refutable only on the basis of publicly accessible evidence documenting wide-spread systemic deficiencies.

Such conflicting interpretations of non-refoulement fail to provide sufficient guidance to national authorities, which are responsible for implementing EU law as well as the ECHR. Although the national courts in the Member States manifestly showed difficulties in applying NS in light of standing ECtHR case law (see following section), the CJEU has not appreciated its recent opportunity to clarify the ambiguity. In its judgment in Puid of November 2013, the CJEU merely reiterated the NS judgment. By this, it also avoided commenting on the Opinion by Advocate General Jääskinen, which had proposed a rather unfortunate elaboration of the NS test. According to Jääskinen, NS entails a two-fold legal test to be applied to Dublin transfers, consisting of a substantial and evidential threshold: firstly, the existence of systemic flaws in the asylum system in the Member State responsible constitutes the substantial requirement to suspend transfers; secondly, “the evidential standard

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111 NS, paras. 104.
112 NS, para. 4 and 7.
113 NS, paras. 15 and 75.
114 NS, para. 77-78.
115 NS, paras. 99 and 103.
116 NS, para. 94, emphasis added. See also para. 106.
117 NS, para. 91.
120 Cf. MSS, para. 287.
121 See C-4/11 Bundesrepublik Deutschland v Kaveh Puid (Grand Chamber, 14 November 2013) para. 30 [Puid].
is set out to the point where it has become notorious that asylum seekers cannot be transferred to the Member State concerned.”

Consequently, Jääskinen reaffirms that the CJEU aimed at establishing a very high barrier against the setting aside of mutual trust under the Dublin Regulation. He thus submits that the principle of non-refoulement can only become applicable between two EU Member States in exceptional situations. In his view, such exceptional situations do not relate to the individual situation of an asylum seeker and must therefore be assessed on a general basis and not in the context of an individual application.

Jääskinen’s reasoning appears to suggest a prohibition to conduct an individual case-by-case analysis, requiring only a general, systemic assessment of the situation in the Member State responsible. In the sections below, the two main reasons why this approach is particularly troubling will be examined: firstly, such a high threshold will be unreasonably difficult to meet, and is clearly not accurate in light of the established case law relating to Art. 3 ECHR; secondly, in the absence of a clarification of the legal test applied in NS, national courts may be unable to cope with the conflicting legal standards under EU law and international human rights law. It is thus all the more worrisome that in its judgment in Puid the CJEU chose not to comment on the argument submitted by the Advocate General.

IV.4 N.S. and Puid in the context of established ECHR case law

Neither the EU Charter nor the CEAS operate in a legal vacuum and can therefore not be interpreted isolatedly of other relevant legal instruments, particularly the ECHR. Long before the entry into force of the Lisbon Treaty, the CJEU had emphasized that the fundamental rights guaranteed in the ECHR, especially Art. 3, form part of the general principles of EU law and must thus be observed by the Court.

Today, Art. 52(3) of the Charter entails that the CJEU is not authorized to interpret Art. 4 of the Charter in a way that would attenuate the ECtHR’s interpretation of Art. 3 ECHR. However, the existing case law of the ECtHR has adopted quite the opposite approach to what seems to be suggested in NS and Puid; accordingly, an individual assessment is required to determine a real risk of an Art. 3 ECHR violation.

In Sufi and Elmi, the ECtHR emphasized that the general situation in a country is only used “in the most extreme cases” to establish such a risk. Although the decision in Sufi and Elmi was dealing with a situation of indiscriminate violence in a third country (Somalia), it shows that the general situation in a receiving country is not the default legal test under the ECHR. On the contrary, if the general situation in a country is not so serious as to constitute a violation of Art. 3 per se, the ECtHR is obliged to examine the applicant’s specific personal situation upon return there.

Within the scope of Art. 3 ECHR, ill-treatment is thus subjective and depends on all the circumstances in a case. As recently as in September 2013, in K.A.B. v Sweden, the ECtHR reaffirmed that the “assessment must focus on the foreseeable consequences of the removal of the applicant to the country of destination, which must be considered in the light

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123 AG Opinion Puid, para. 62.
124 AG Opinion Puid, para. 65.
125 AG Opinion Puid, note 23.
128 Cf. Soering v UK App no 14038/88 (ECtHR, 7 July 1989), para. 88, where the ECtHR emphasized the absolute character of Art. 3 ECHR, allowing for no derogations in any (individual) situation. Moreover, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.” (para. 89, emphasis added). Note that Member States’ responsibilities concerning expulsion to another Contracting State have to some extent even become more stringent since Soering, in particular with regard to the non-derogable nature of Art. 3 ECHR. (See Stapleton v Ireland App no 56588/07 (ECtHR, 4 May 2010), para. 30. Note that this was a European arrest-warrant case, not directly related to asylum-seekers).
129 Sufi and Elmi v UK App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011), para. 218. See also NA v UK App no 25904/07 (ECtHR, 17 July 2008), para. 115.
130 F.H. v Sweden App no 32621/06 (ECtHR, 20 January 2009), para. 93.
131 Salah Sheekh v The Netherlands App no 1948/04 (ECtHR, 11 January 2007), para. 137.
of the general situation there, as well as his personal circumstances.” Subsequently, in B.K.A. v Sweden, the ECtHR considered the general human rights situation in the country of origin of the applicant (Iraq), while having due regard to the specific circumstances of the individual. Only because both elements did not reach a sufficient degree of severity, the deportation of the applicant was found not to entail a violation of Art. 3 ECHR.

In the CJEU’s case law relating to international protection, the guiding role of the ECtHR’s jurisprudence for determining the scope of the prohibition of torture in the EU legal order has been reaffirmed. A general legal test based on systemic failures is therefore not sustainable under EU human rights law, as the established ECtHR case law on non-refoulement clearly imposes an absolute obligation not to deport an alien, if this entails a “real and personal risk” of ill-treatment to the individual.

IV.3 National courts’ difficulty to cope with the ambiguity created by the CJEU

It seems quite remarkable that in NS, the CJEU did not take due account of the existing ECtHR case law. This has led to considerable uncertainty for national courts, whose duty it is to apply EU law. The following recent example of a case in the United Kingdom will illustrate this conflict between the CJEU’s ruling and the Member States’ obligations under the ECHR.

In the case EM (Eritrea) & others v SSHD, the England and Wales Court of Appeal had to deal with four cases of persons who had entered the EU through Italy and subsequently travelled to the UK. All applicants claimed that a transfer to Italy would entail a real risk of inhuman and degrading treatment in violation of Art. 3 ECHR. While transfers to Greece had been suspended, it was not clear how to apply MSS and NS to removals to other Member States. The Appeals Court adopted a very radical interpretation of the NS judgment, maintaining that the threshold for non-refoulement had been raised by the CJEU. In spite of convincing evidence of a substantial risk for the individual applicants, the contention that Italy was in systemic breach of its material obligations was declared to be unfounded. Therefore, the Appeals Court rejected the applicants’ claim, stating that in the absence of the existence of a systemic deficiency, it was “required to deem conditions for refugees in Italy (…) to be compliant with the state’s international obligations, whatever the evidence to the contrary.” Interestingly, the Appeals Court even recognized that this threshold was diverging from the established international standards, but found itself bound to adhere to Luxemburg’s case law. From this it becomes evident that the principle of mutual trust has by now become so deeply enshrined in EU cooperation that Member States are highly reluctant to question the principle.

However, the legal test in the NS judgment cannot be read without taking into account peremptory obligations under international law such as the prohibition of non-refoulement. Therefore, the UK Supreme Court disagreed with the Appeals Court in its revision of EM (Eritrea). In February 2014, the Supreme Court ruled that the critical legal test remained the one articulated in Soering. It maintained that “practical realities” must be capable of

132 K.A.B. v. Sweden App no 886/11 (ECtHR, 5 September 2013), para. 72. See also Vilvarajah and others v United Kingdom, App nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR, 30 October 1991), para. 108.
133 Cf. B.K.A. v Sweden App no 11161/11 (ECtHR, 19 December 2013), para. 46.
134 Egeäfjä, Summary of the Judgment, para. 1.
135 Mawaka v The Netherlands App no 29031/04 (ECtHR, 1 June 2010), para. 45.
136 See, for instance, Saadi v Italy App no 37201/06 (ECtHR, 28 February 2008), para. 126.
137 England and Wales Court of Appeal, EM (Eritrea) and others v SSHD, Judgment of 17 October 2012 [2012] EWCA Civ 1336.
138 Court of Appeal, EM (Eritrea), para. 1.
139 Court of Appeal, EM (Eritrea), para. 61.
140 Cf. Court of Appeal, EM (Eritrea), para. 63.
141 Court of Appeal, EM (Eritrea), para. 71.
142 Court of Appeal, EM (Eritrea), para. 61.
144 UK Supreme Court, EM (Eritrea), Judgment of 19 February 2014 [2014] UKSC 12, para. 58.
rebutting the presumption of compliance in light of the real risk of an Art. 3 ill-treatment for an individual applicant.\textsuperscript{145} Therefore, the Supreme Court rejected the narrow, isolated interpretation of \textit{NS}, stating that an “exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice. There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection. (…) as a matter of practical experience, gross violations of Art. 3 rights can occur without there being any systemic failure whatsoever.”\textsuperscript{146} In accordance with the approach adopted by the ECtHR in \textit{MSS}, the Supreme Court judgment emphasizes that systemic failings can be used as proof to establish a real risk of an Art. 3 violation, but do not constitute the necessary legal threshold as such.\textsuperscript{147}

In view of this sharp-sighted legal reasoning by the UK Supreme Court, it seems all the more disappointing that the CJEU has not managed to clarify \textit{NS} on its own. The misleading decision produced by the UK Appeals Court clearly shows that in the absence of unambiguous guidance by CJEU case law, national courts may struggle with the tension between the principle of mutual trust and human rights obligations. To facilitate the uniform implementation of the CEAS and the Charter in all Member States, it is thus of crucial importance that the CJEU eliminates any doubts concerning the correct application of peremptory human rights standards within the framework of EU asylum law. For this purpose, it appears to be necessary to revoke the requirement of “systemic deficiencies” for the rebuttal of mutual trust.

\section*{V. Short commentary on the changes in Dublin III}

Unfortunately, in spite of the evident deficiencies in the Dublin Regulation, “a radical reform of the Dublin rules was never seriously considered”.\textsuperscript{148} In fact, the Member States preferred to focus on an enhancement of the efficiency of the Dublin system rather than improving the level of protection for asylum seekers within it.\textsuperscript{149} With regard to efficiency, a number of amendments have been made in relation to information sharing and stricter time limits.\textsuperscript{150} For instance, the Regulation now includes clear deadlines for requesting another Member State to take back an asylum seeker (Art. 23(2) and 24(2)), and a duty to accept back an individual who has been transferred to another Member State in error (Art. 29(3)). The protection standards for asylum seekers have been raised by agreeing on additional legal safeguards, such as a better right to information (Art. 4) and the introduction of a right to a personal interview before any transfer takes place (Art. 5(1)).\textsuperscript{151} Another novelty is the codification of the case law on the right to an effective remedy (Art. 27(1)) and the suspensive effect of an appeal against a Dublin transfer (Art. 27(3)(a)).\textsuperscript{152} In addition, Art. 3(2) now codifies the CJEU’s ruling in \textit{NS}, but no formal procedure for suspending transfers was included, as was originally proposed by the Commission.\textsuperscript{153} An early warning procedure (Art. 33) is intended to address possible refugee crises in Member States, but does not guarantee the suspension of transfers as such.\textsuperscript{154}

Although these new rules can be noted positively, the recast Regulation lacks a true reform of the central premises of the Dublin system which constitute a threat to fundamental

\textsuperscript{145} UK Supreme Court, \textit{EM (Eritrea)}, para. 68.
\textsuperscript{146} UK Supreme Court, \textit{EM (Eritrea)}, para. 48.
\textsuperscript{147} UK Supreme Court, \textit{EM (Eritrea)}, para. 63.
\textsuperscript{149} Ibid.
\textsuperscript{150} Ibid.
\textsuperscript{151} Note that this is in line with ECtHR case law, which requires a personal interview of asylum seekers before removal, see in general \textit{Nasimi v Sweden} App no 38865/02 (ECtHR, 16 March 2004) and \textit{Charahili v Turkey} App no 46605/07 (ECtHR, 13 April 2010).
\textsuperscript{152} Regarding the case law on the right to an effective remedy, see \textit{MSS}, paras. 289-293, and \textit{Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary} [1986] ECR 651, paras. 17-19.
rights protection. The default presumption in Dublin III is still that all EU Member States are to be considered safe countries of asylum. Therefore, the responsibility to review the Dublin transfer mechanisms in light of international human rights and refugee law still lies with the European Courts. A priority for the CJEU should now be to establish clear requirements for the rebuttal of mutual trust and the suspension of transfers, having due regard to fundamental rights and the international prohibition of non-refoulement.

VI. Conclusion

In conclusion, it is quite unfortunate that the CJEU has failed to ensure that the Dublin system is interpreted in a way that guarantees the “practical and effective” implementation of fundamental rights throughout the EU. The examples of NS and EM (Eritrea) demonstrate the complexity of the current EU human rights system, which has led to a considerable degree of legal uncertainty for individuals as well as for national courts. Moreover, the diverging interpretations of non-refoulement by the CJEU and the ECtHR illustrate that the relationship between EU law and the different levels of human rights norms is not sufficiently defined yet. It is clear that mere formal trust can no longer be upheld in European asylum law, considering the realities in the Member States: at least since MSS no doubt remains that not all EU Member States are automatically safe countries of asylum. Unfortunately, the recast of the Dublin Regulation did not significantly reform the safe country notion. However, the UNHCR’s recent call to stop Dublin transfers to Bulgaria is proof that the issues dealt with in MSS were not a one-time occurrence. Therefore, an unequivocal legal test for the rebuttal of mutual trust within the Dublin system needs to be established sooner rather than later. This legal test must be coherent with the ECtHR’s case law on Art. 3 ECHR, requiring an individual assessment of the risk of refoulement.

Based on the foregoing, it is clear that asylum policy is closely linked to territory, requiring a sovereign entity that is responsible for the respective territory. Therefore, the geographical unification of the 28 EU Member States may require further steps in order to ensure the effectiveness and practicability of overriding individual rights in the CEAS. The fact that Member States are obliged to adhere to EU law on the one hand, and on the other hand must bear full responsibility for violations of international law resulting from their duties under EU law, leads to a situation of conflicting norms and legal uncertainty. Hence, the EU’s accession to the ECHR and to the Refugee Convention seems necessary to address the de-territorialization of asylum law and to ensure that international protection obligations linked to the territorial area as a whole can be invoked not only before national authorities, but also be scrutinized at an independent supranational level.

Lastly, the center of attention of the CEAS should always be the protection of the human rights of the individual asylum-seeker, who finds him or herself in a particularly vulnerable position vis-à-vis any government. As Hannah Arendt noted, persons who flee persecution and human rights violations face the risk of losing legal status not only in their own, but in all countries. Yet, the very essence of the right to asylum is to provide special protection to these particularly underprivileged and vulnerable persons. As Nobel-Peace prize winner and organization based on the rule of law, the EU has an obligation to prevent a situation of “rightlessness”, emphasizing the universality of human rights regardless of nationality or country of origin.

155 Ibid. It should be recalled that various authors had previously called for a reform of the fundamental premises underlying the Dublin system, see e.g. Langford, ‘The Other Euro Crisis’, 238. However, such concerns are not adequately addressed in the Dublin III Regulation.

156 See 3rd recital of Dublin III.

157 Waite and Kennedy v Germany, para. 67, see section III.2 above.


List of Abbreviations

CEAS: Common European Asylum System
CJEU: Court of Justice of the European Union (Luxemburg)
EASO: European Asylum Support Office
ECJ: European Court of Justice (Luxemburg)
ECtHR: European Court of Human Rights (Strasbourg)
EU: European Union
EUCFR: EU Charter of Fundamental Rights
EURODAC: European Dactyloscopy (European fingerprint database to identify asylum seekers and illegal immigrants)
MSS: M.S.S. v. Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)
NGO: Non-governmental Organization
NS: Joined Cases C-411/10 and C-493/10 N.S. v SSHD and M.E. and Others v Refugee Applications Commissioner [2011] ECR I-13905
SSHD: Secretary of State for the Home Department
TEU: Treaty on European Union
TFEU: Treaty on the Functioning of the European Union
UK: United Kingdom
UNHCR: United Nations High Commissioner for Refugees
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