The ill-founded design of the Dublin System through the case-law of the ECHR and the CJEU and the role of strategic litigation with a special focus on Greece.

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Table of Contents

Abstract

The current mass influx of migrants and asylum seekers that the European Union is facing, has brought the debate about the Dublin System and the overall assessment of the European Union's Policy on Migration and Asylum at the forefront of the political agenda. The European Court of Human Rights and the Court of Justice of the European Union have repeatedly identified many of the inconsistencies of the Dublin System over the last 8 years. Many scholars have advocated that the Dublin System is ill founded and no judicial efforts can deliver a significant and meaningful change. Apart from the past and the current status of the Dublin System and EU's Migration and Asylum Policy, it is important to observe the role that strategic litigation had through this procedure and the role that it is expected to play in the future

Looking away from the facts that surround the Dublin's System history and evolvement, the current mass influx situation has become a prominent problem for the EU to solve. The approximately 1,3 million people who have crossed the European borders (mainly from Greece) have generated an avalanche of legislative reforms and of political radicalization across the continent. In order for this situation to be handled the EU is not only considering legislative measures and reforms, but also proceeds with bilateral agreements with neighboring countries. Especially the EU -Turkey Agreement has raised a lot of concerns about the low level of respect for fundamental rights.

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Abbreviations

Abbreviation	Meaning
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECHR	European Court for Human Rights
ECRE	European Council of Refugees and Exiles
EU	European Union
PoC	Persons of Concern
UNHCR	United Nations High Commissioner for Refugees

Introduction

European Union finds its self at the core of the "refugee crisis". There is a lack of efficient institutions capable to handle the mass influx. This is proven by the fact that the Union proceeds to continuous legislative amendments[1], the creation of ad hoc mechanisms[2] and the rushing of bilateral agreements with third countries[3], in order to find a solution. But is the problem for the EU as big as its politicians present it?

The aim of this thesis is create an argumentative line that would not simply include case law and legislative amendments of the Dublin System, but it will also create a bond between the political, the judicial and the present reality of events and the way they can be influenced by the tool of strategic litigation.

In more detail, this thesis will attempt to assess the value of the historical evolution of the Dublin Regulation. Through the years, since it entered the European Agenda in the 1990s', the Dublin System was completely different compared to its current form. Through the historical analysis it will be projected that the Dublin System, is a reflection of the Political balance or unbalance of the European politics through the years. Migration and border controls consist one of the most, if not the most sensitive area of one state's capacity to act in a sovereign manner. Therefore, through this analysis the evolution from the Dublin Agreement to the Dublin II Regulation and then to its 2013 Dublin III Recast Regulation will be examined. It will be further analyzed how the main principle of mutual trust has been affected and to what extend this has changed the

[1] Why a new European Agenda on Migration?: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/index_en.htm

[2] EUROPEAN BORDER AND COAST GUARD AGENCY LAUNCHES TODAY: http://frontex.europa.eu/news/european-border-and-coast-guard-agency-launches-today-CHIYAp

[3] *EU-Turkey Agreement* (statement), 18 March 2016: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/, also, *The European Union and Afghanistan reach an arrangement to tackle migration issues :* http://europa.eu/rapid/press-release_MEX-16-3282_en.htm , also, *Joint Way Forward on migration issues between Afghanistan and the EU :*

function of the Regulation as it was perceived at the beginning, altering also the capacity for member states to make sovereign decisions under different circumstances.

Moving forward, this thesis aims to examine and practically reflect the historical evolution of the Dublin Regulation with the judgements of the European Court of Human Rights and the Court of Justice of the European Union. Both Courts, over the course of the years, have reached to several judgements that had an immense impact on the design and the implementation of the Dublin Regulation. Apart from that, the case law that was produced by the two Courts has also generated, in many occasions, the revisiting of the Regulation by the European authorities in order to amend or to alter its design.

For the purposes of the thesis, it is critical to review the major impact that the case law had in the reformed form of the current Dublin Regulation Needless to say, these landmark cases that were delivered by the two Courts, reflected the results of meticulously planned litigations strategies that targeted specific inconsistencies of the Dublin Regulation and its implementation on the national level. Apart from any targeted inconsistencies, these litigation strategies have created several "agendas of cases" targeting specific countries. Mainly, as the weakest member state and the perfect example to the exposure of the problematic nature of the Dublin Regulation, Greece was primarily targeted in the case law of both of the Courts.

Finally, after collecting all these information, the thesis aims to explain the powerful dynamics that strategic litigation carries as a tool for achieving changes through the judicial system. As such a tool, it will be examined under what circumstances strategic litigation can be used in order to address and respond to the immense risk of human rights violations that migrants and asylum seekers are facing in Greece, since August 2015. For this analysis, Greece is preferred because it perfectly reflects all the

aspects and the impacts of the chosen and implemented European Policy towards asylum and Migration as we as the constant belief that the Dublin System is simply in need of reform in order to respond to what is perceived as a temporary situation.

The wanted outcome is to prove, in other words, that although the ECHR and the CJEU with their judgements have pointed out many of the elements that expose the ill-founded nature of the Dublin Regulation (System), they didn't go too far. Although, litigation strategies were built up, and Greece was the perfect example of the Dublin's ill-founded implementation and design, these strategies didn't go too far either. And although, all of the above (ECHR's and CJEU's judgements and litigation strategies) have indeed generated significant changes, they haven't done enough. As a consequence, the mass influx situation has stretched out all of the pre-existing malfunctions. Instead of being proactive and identifying the obvious gaps, the EU is standing numb before of the challenges. Now that the need for judicial activism and active strategic litigation are the only solution EU has before reviving the ghosts of right-wing rhetoric, racism and extremely conservative political agenda, now all the checks and the balances of the European System seem inadequate.

1. The evolution of the Dublin Regulation and its current and continuous challenges.

The aim of this first chapter is to demonstrate the historical evolution of the Dublin Regulation, ever since it entered the European Agenda in 1990s until today, as a continuous fight between the notion of solidarity and the preservation of member states' sovereignty. Historical analysis will make it clear to the reader that the Dublin Regulation was always and continues to be a flawed domain of European politics. Besides its inefficiencies, the Dublin Regulation was always considered as the cornerstone of the European Asylum Policy that is in need of reforms, instead of a radical replacement procedure[4]. This way, it is intended to demonstrate that the Dublin System in its current form (the Dublin III Regulation) was inherently ill – founded and that the "refugee crisis" is not necessary relevant to that.

Furthermore, this chapter stresses out that the "refugee crisis" enters (and in a very problematic way) the framework of European Union's Policy only because the European Institutions decided to amend all relevant asylum policies in the middle of this crisis. Although a solution is not hard to find, political tensions, political unwillingness, economic instability, right – wing rhetoric, the "terrorist threat" rhetoric, Euroscepticism and chronic ineffectiveness make this time, the worst timing for radical reforms. Under this conclusion, we will present possible future alternatives for the Dublin Regulation.

Finally, along with the historical analysis, the basic design and implementation principles of the Dublin Regulation are reflected in the case law of the European Court of Human Rights and the Court of Justice of the European Union. These principles,

[4] Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission: http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/

adequately, prove the ill-founded nature of the Regulation, regardless of the current mass influx situation. After all, both Courts have managed, over the years, to point out many of the Dublin's System deficiencies.

1.1. The evolution of the Dublin System from the 1990's until the ongoing mass refugee influx.

Under the European Community all member states had ratified the International Convention related to the Status of Refugees[5] (hereinafter the "Geneva Convention") of 1951. That meant that all member states accepted an international definition of who can be granted the refugee status along with the principles of the Convention; hence, national legislation was implemented granting international protection. The differences in the national legislations of the Member States, as well as the lack of a responsibility allocating mechanism by the international legal framework, soon caused two major problems: the *asylum shopping phenomenon*[6] and the *refugees in orbit*[7].

In order for the Member States to tackle secondary movements and to facilitate the free movement of EC nationals the Schengen Agreement was signed in 1985[8] (later on the Schengen Convention was signed in 1990 and put into force in 1995), followed by the Dublin Convention in 1990. The aim of the Schengen Agreement was the

[5] Convention Related to the Status of Refugees (the Geneva Convention) 1951 and the Additional Protocol 1967: http://www.unhcr.org/1951-refugee-convention.html

[6] See: "Asylum shopping or multiple applications refers to the phenomenon where "third-country nationals apply for international protection in more than one Member State with or without having already received protection in one of those Member States". 'EMN Glossary & Thesaurus' European Commision - Migration and Home Affairs http://ec.europa.eu/dgs/home-affairs/what-we do/networks/european_migration_network/glossary/index_a_en.htm#asylumshopping

[7] See: Refugees in orbit are "refugees who, although not returned directly to a country where they may be persecuted, are denied asylum or unable to find a State willing to examine their request, and are shuttled from one country to another in a constant search for asylum". 'UNHCR International Thesaurus of Refugee Terminology' UNHCR http://www.refugeethesaurus.org/hms/refugee_obj.php?type=terms&id=40#a40

[8] 'Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders' [1990] OJ L 239/19 (Schengen Convention)

abolishment of internal border controls for the free circulation of individuals (country nationals') and the creation of an external border[9]. To this direction more cooperation among member states was agreed in the domains of asylum and migration (among others).

It was evident that the Schengen Convection was an agreement among few member states. As an improvement the Dublin Convention (Dublin I[10]) was ratified by all member states and entered into force in 1997. The main principle of the Dublin Convention was to determine the member state responsible for the examination of an asylum application that was lodged within the European Community (authorization principle)[11]. In contrast with the Schengen Convention, the Dublin Convention offers a hierarchy of criteria that would determine the responsible state[12]. The responsibility mechanism was completed with the insertion of the *sovereignty clause* [13]and the *humanitarian clause*[14]. Other basic elements of the Dublin Convention was the entertainment of the *"safe third country*[15]" idea and the recognition of the international law obligation of the *"non-refoulement*"[16].The Dublin Convention was supplemented in 2000 with the EURODAC[17] system. The aim of EURODAC was to collect and provide access to all necessary information that would make the determination of the responsible country easier and in the most efficient way.

[9] Schengen Convention, Chapter 1 & 2; 'The Schengen Area and Cooperation' Eur-Lex http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm

[10] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities [1990] OJ C 254/01 (1997) (Dublin Convention)

[11] Dublin Convention, art. 3.2

[12] Dublin Convention art. 4-8.

[13] Dublin Convention, art 3.4.

[14] Dublin Convention, art 9.

[15] Hurwitz 'The 1990 Dublin Convention: A Comprehensive Assessment', 647

[16] ECRE, 'Position on the Implementation of the Dublin Convention in the light of the lessons learned from the implementation of the Schengen Convention', §9

[17] Council Regulation (EC) 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention [2000] OJ L 316/01 (Eurodac Regulation)

Therefore, the allocation mechanism is installed in the EC (Schengen and Dublin Convention) but these two Conventions were concluded outside the EU legal framework, proving at this early stage the little political willingness of further cooperation. More harmonization on national legal level was needed in order for the system to be more efficient. With the introduction of the Maastricht treaty in 1992, the European Union was created and along that the three pillar system[18]. The third pillar included the cooperation in the fields of common interest such as asylum policy. With the Treaty of Amsterdam in 1997 both the Dublin Convention and the Schengen acquis were integrated into the framework of the European Union moving policies that had to do with free movement from the third to the first pillar. That gave the monopoly to the Commission to initiate and benefit from the use of qualified majority voting in the Council.

Meanwhile, after the 1999 Tampere European Council a roadmap was set in order to establish a common asylum and migration policy and the creation of the Common European Asylum System (CEAS)[19]. CEAS was established under the Hague Program of 2004 for the implementation of a common procedure and a uniform status for those who are granted asylum and subsidiary protection[20].

CEAS included four Directives and two Regulations:

1. The Dublin Regulation
2. The EURODAC Directive 2001[21]
3. The Temporary Protection Directive of 2001[22]

[18] Treaty of Maastricht on European Union: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0026
[19] CEAS: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
[20] Council of the European Union 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' (2004) OJ C 53/1 (The Hague Programme)
[21] Supra 13
[22] Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States

4. The Reception Conditions Directive of 2003[23]

5. The Qualification Directive of 2004[24]

6. The Asylum Procedures Directive[25]

In 2003 the Dublin Convention was superseded by the Dublin II Regulation[26]. Dublin II was a better version of the Convention, but at the same time it was very modest in covering some gaps in the asylum policy. The biggest change was that it was binding for all member states and it had a direct effect[27]. Overall, the philosophy the "Dublin philosophy" remains the same when it comes to the allocation of the responsibility for the examination of an asylum application; hence, the member state who played the most significant role for the irregular entrance of a third – country national is responsible for him/her. It was clear, once again that the border – line member states, mostly at the south and southeast border of the Union were called to manage the biggest share of the burden[28]. According to ECRE the Dublin Regulation causes and uneven financial burden to these countries, which only due to their geographical location, are obliged to stand the disproportionate allocation of the burden of the European Asylum policy[29]. In addition, Dublin II failed to resolve the "refugees in orbit" phenomenon[30], raised alarming concerns about reception conditions in many countries[31], many different national

in Receiving Such Persons and Bearing the Consequences Thereof [2001] OJ L 212/12 (7 August 2001) (Temporary Protection Directive 2001)

[23] Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States [2003] OJ L 31/18 (Reception Conditions Directive 2003)

[24] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12 (Qualification Directive 2004)

[25] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 (Asylum Procedure Directive 2004)

[26] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003], OJ L 50/1 (Dublin II Regulation)

[27] Dublin II Regulation, epilogue and art 288 TFEU (ex. Art. 249 Treaty of Amsterdam)

[28] CRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' (March 2008), 11

[29] Commission of the European Communities, 'Green Paper on the Future Common European Asylum System' (COM (2007) 301 final)

[30] ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' (March 2008)

[31] Supra 28

policies derogated from the general European standards causing major inconsistences[32], in many occasions a *de facto* denial of access to asylum procedures was monitored[33] and finally there was a huge divergence in recognition rates[34].

1.1.1. The inefficiency of the Dublin II Regulation and the recast Dublin III Regulation.

Surprisingly, when the Dublin II Regulation was evaluated by the European Commission three years after its enforcement[35], the overall conclusion was that despite the low level of national legislative adjustment by the Member States, the basic goals of the Regulation were achieved. This optimistic perspective of the Commission can only be justified, if someone observes that the avalanche of cases in the ECHR and the CJEU that targeted the implementation of the Dublin Regulation, started after 2008 and raised main fundamental rights issues[36]. Despite the Commission's optimism the flawed nature of the Dublin II Regulation was prominent. Therefore, the Commission, quickly took the initiative and in 2008 released a proposal for the recast of the Regulation, incorporating significant humanitarian reforms following some of the ECHR and CJEU case law.

[32] Supra 28
[33] Supra 28
[34] The Dublin Transnational Project, 'Dublin II Regulation: Lives on Hold - European Comparative Report' (European Comparative Report 2013),
[35] Commission of the European Communities, 'Report from the Commission to the European Parliament and the Council on the Evaluation of the Dublin System' (COM(2007) 299 final) (hereinafter: Commission Report (COM(2007) 299 final))
[36] *See* The (reformed) Dublin III Regulation—a tool for enhanced effectiveness and higher standards of protection?", Constantin Hruschka, ERA Forum (2014) 15:469–483: ""The case law covered a number of important themes starting with the time limits for transfers in the case of appeals. Prior to the recast the CJEU had also issued judgments on the principle of non-refoulement and on the use of the sovereignty clause, on the application of the Dublin system in the case of withdrawal of the asylum application, on the application of the Reception Conditions Directive13 during Dublin procedures, on the application of the "dependency clause" of Article 15 (2) of the Dublin-II-Regulation, on the obligation to investigate in cases of envisaged transfers, and on the application of Article 6 (2) of the Dublin-II-Regulation (concerning unaccompanied minors with no family members (or relatives) in the Dublin area) and the best interests of the child."

Until that point in the Union's history, one can clearly observe that asylum policy is not a domain that European solidarity flourishes. There is a great political unwillingness for a drastic change and the Dublin System is considered as the unquestionable means and the end of the European Asylum Policy[37]. As we know now, the worst was yet to come. The major crackdown of the Dublin System came in 2011, when the CJEU but most importantly the ECHR, came to put an end to the Dublin's System *mutual trust*[38] principle with the case *M.S.S. v Belgium and Greece* (Application No. 30696/09, GC Decision)[39] and the *NS v SSHD* case[40]. Simply, the ECHR stated that the *mutual trust idea* which is at the core of the Dublin System is an illusion, is simply false. The Court found a violation of Article 3[41] and Article 13[42] of the ECHR, stating basically that Belgium has violated the applicant's rights by implementing a Dublin transfer of the applicant to Greece, since the detention and living conditions in Greece amount to inhumane and degrading treatment. The Court went on to mention that, Belgium was responsible for securing the applicant's rights and not rely on the presumption that an EU member state is undoubtedly a safe third – country. This

[37] Dirk Vanheule, Jianne van Swelm and Christina Boswell, 'The Implementation of Article 80 TFEU on the Principle of Solidarity and fair sharing responsibility, including its financial implications, between Member States in the field of border checks, asylum and migration' (European Parliament Study, Directorate General for Internal Policies PE 453.167 / 2011), 75

[38] Regulation (EU) No 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 International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast) [2013] OJ L 180/31 (Dublin III Regulation)

[39] M.S.S. v Belgium and Greece (Application No. 30696/09, 21st of January 2011): https://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwii7Oz0nIfNAhUoDZoKHdqhCGIQFggaMAA&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D001-103050%26filename%3D001-103050.pdf%26TID%3Dnubefaxeep&usg=AFQjCNHBhaWr4-0Mvtl6tIEaUqnP0XeqXg&sig2=XGl7bWzsqISQNoxnejPm4g&bvm=bv.123325700,d.bGs

[40] N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform , C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: http://www.refworld.org/docid/4ef1ed702.html [accessed 5 November 2016]

[41] ECHR, ARTICLE 3: Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[42] ECHR, ARTICLE 13: Right to an effective remedy: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

decision resulted the halt of Dublin transfers from other member states to Greece and will be analyzed in detail in the second chapter.

Before the M.S.S. case, both the Stockholm Program[43] of 2009 and the Asylum Policy Plan of 2007[44] had already identified many of the deficiencies of the Dublin System, defining the inconsistencies in national legislation as the major challenge of the Dublin System walking towards an effective CEAS. To that direction, EASO[45] (European Asylum Support Office) was established in 2010 in order to assist and strengthen the practical cooperation among member states towards a higher legislative and practical harmonization. All these led to the recast of the Dublin II Regulation, forming the Dublin III Regulation which was flanked by second-phase directives[46].

Again, the Dublin III Regulation followed the same mentality as a responsibility allocating mechanism. The aim is to have one claim per state. Of course Dublin III was an improved version of the previous Regulations, including many amendments that are aligned with the case law of the ECHR and the CJEU of the previous years[47]. In the process form Dublin II to Dublin, it is important to observe that the discretionary clauses have been significantly y amended. The recast, with articles 4[48] and 5[49] has introduced

[43] The Stockholm Programme (2009), 32
[44] Commission of the European Communities, 'Policy Plan on Asylum. An Integrated Approach to Protection Across the EU' (COM(2008) 360 final)
[45] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office [2010] OJ L 132/11 (EASO Regulation)
[46] The second – phase of reformed Directives included: 1) the Qualifications Directive of 2011; 2) The Reception Conditions Directive of 2013; 3) The Asylum Procedures Directive of 2013; 4) The EURODAC Regulation of 2013 and the Temporary Protection Directive remains unchanged. The three Directive no longer provide minimum standards but uniform statutes and procedures for Member States, aiming to increase in asylum law but also in practice of EU member states.
[47] See e.g.: ECRE, 'Report on the Application of the Dublin II Regulation in Europe' (ECRE & ELENA 2006); UNHCR, 'The Dublin II Regulation. A UNHCR Discussion Paper' (2006); ECRE, 'Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered' (March 2008); The Dublin Transnational Project, 'Dublin II Regulation: Lives on Hold - European Comparative Report' (European Comparative Report 2013).
[48] Regulation 604/2013: Article 4: Right to information: 1. As soon as an application for international protection is lodged within the meaning of Article 20(2) in a Member State, its competent authorities shall inform the applicant of the application of this Regulation
[49] Regulation 604/2013: Article 5: Personal interview 1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4.

the right to information and with articles 27 (5)[50] and (6)[51], the Member States have the obligation to offer effective legal remedy and support to the asylum seekers that have lodged an asylum application.[52] It took only two years for the Commission to revisit the Dublin III Regulation and admit that it is not working as it should have[53]. Dublin Transfers are widely suspended for several countries (Greece, Bulgaria, Hungary).

One of the major deficiencies of the Regulation and the concept of the Dublin System as it is, is the mere implementation of the System on a national Level. Because of the vagueness and the continuous new challenges of the reality of the Regulation, national Courts tend to have many questions to address to the CJEU for preliminary ruling concerning the implementation of the Dublin Regulation.[54]

All in all, the Dublin System, never actually prevented secondary movements, never replied to the phenomenon of "refugees in orbit" and never managed to harmonize national asylum legislations. Still perceived by the Commission as the uncontested truth and the cornerstone of the European Asylum System, the Dublin Regulation was never subject to complete rejection or complete replacement. For a system that doesn't work, the Dublin System appreciates a lot of support from the Commission and many of the member states[55]. The Solidarity ideal which calls for practical support under Article 80

[50] Regulation 604/2013: Article 27: Remedies: (5) Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.
[51] Regulation 604/2013: Article 27: Remedies: (6) Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favorable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.
[52] These changes in the Dublin III Regulation (recast) respond to the judgments of the ECHR in the cases of MSS and Hirsi.
[53] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European Agenda on Migration' (COM(2015) 240 final)
[54] Filzwieser, Christian. "The Dublin regulation vs the European convention of human rights: a non-issue or a precarious legal balancing act?" Forced Migration Online, available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5364 (accessed October 9,2016).
[55] Minos Mouzourakis, ''We Need to Talk about Dublin' – Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union' (December 2014) Refugee Studies Centre Working Paper No. 105

of the TFEU seems to be used in a monolithic way and not as a legal base of extensive change in the European Asylum Policy.

1.1.2. The general design and implementation principle of the Dublin System.

The Dublin System was built upon the observation of some systemic problems that were caused by the unstructured movement of migrants and asylum seekers between the EU Member states. As it has been already shown from the historical analysis of the Dublin System, it has come a long way of continuous changes and challenges. Besides, until this point in the Union's history, one can clearly observe that asylum policy is not a domain that European solidarity flourishes. There is a great political unwillingness for a drastic change and the Dublin System is considered as the unquestionable means as well as the end of the European Asylum Policy. As it is known now and as it has been already mentioned, the worst was yet to come.

To start with, it is essential to observe the main principles of the Dublin's System ruling its design and implementation, that have remained unchanged and uncontested over time. Firstly, as it has been already mentioned, the Dublin System was implemented as a system that targeted the reduction of the "refugees in orbt" and the "asylum shopping" phenomena[56]. Directly linked to that, another main principle of the Dublin

[56] The fading promise of Europe's Dublin System: EU Asylum: Towards 2020 Project, Migration Policy Institute Europe, Susan Fratzke, March 2015 : https://www.google.gr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjJr_Se-6XQAhVF_ywKHS3OC4sQFggpMAI&url=http%3A%2F%2Fwww.migrationpolicy.org%2Fsites%2Fdefault%2Ffiles%2Fpublications%2FMPIe-Asylum-DublinReg.pdf&usg=AFQjCNGowJoj9AkyOtIpKX0RQn6AiADPPQ&sig2=OSOQM-MeYznjkCmIgUQkEQ&bvm=bv.138493631,d.bGg

System is the reduce of the waste of resources and procedural bureaucracy. Therefore, the Dublin System works as a responsibility allocating mechanism which, unfortunately, overpasses the fact that it causes an extra burden on the "border states".

Additionally, in order to be understandable, it is necessary to observe which are the necessities of compliance with the Dublin System for the Member States. The Dublin Regulation is a part of the European Union's legislation, therefore it applies between the Member states and the European Union. Accordingly, the Dublin Regulation and its implementation needs to be in compliance with the Charter of Fundamental Rights of the European Union. Apart from the Charter, the Dublin Regulation, as a European Legislation, needs to be in accordance with International Human Rights Law, and especially in accordance with the European Convention on Human Rights.

Another core principle of the Dublin System is reflected in its mandatory and strict design in terms of implementation. In terms of implementation, the question is whether there is a violation or an overstep of the authority of member states and their sovereignty discretion when they are implementing EU Law. To this question, the Court of Justice of the European Union has answered that when a State is implementing EU law within the meaning of the Charter, the state can rely on their national norms in so far as the "level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of the EU law are not thereby 'compromised'.[57]

Also, the Dublin System is based on the principle of mutual trust. As a general value of the EU, mutual trust or mutual recognition or interstate trust, represents the idea that all member states share the same values and respect the law of the European Union and the International Law. At the same time, mutual trust is at the basis of interstate

[57] The Sovereignty of the European Court of Justice and the EU's Supranational Legal System, Hakan Kolcak, Inquiries Journal, Social Sciences, Arts and Humanities, (2014), Vol. 6, No04.

judicial recognition and respect with interstate effective consequences. Mutual trust has allowed the European Union to create, so far, a Union of free movement of services, goods and people and to reach a certain level of harmonization of law and policies. When it comes to the Dublin regulation, mutual trust represents the belief that Member states respect the rights of asylum seekers and respect EU and International law. It also means that all EU member states are considered as safe countries.

Apart from the respect to the general spirit of the law, starting from the Charter of Fundamental Rights of the EU[58], we can see which rights, that are included in it, are relevant to asylum seekers and should be interpreted as important for the Dublin System. The formerly mentioned are found in Article 4[59] for the prohibition of torture and inhuman or degrading treatment or punishment, in Article 18[60] for the right to asylum, in Article 24[61] for the principle of the best interest of the child and in Article 47[62] for the right to an effective remedy. This provisions of the Charter are "addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the power

[58] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: http://www.refworld.org/docid/3ae6b3b70.html [accessed 5 November 2016]

[59] EUCFR: Article 4: Prohibition of torture and inhuman or degrading treatment or punishment
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[60] EUCFR: Article 18 : Right to asylum: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

[61] EUCFR: Article 24: The rights of the child, 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. , 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

[62] EUCFR: Article 47: Right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised,defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice

of the Union as conferred on it in the Treaties"[63]. Also under the Lisbon treaty, the Charter is currently binding upon Member States. In other words, the Member States are obliged to ensure the protection of the rights in the fields of law that are protected by Union law.

Another basis for mutual trust, although not explicitly referred to in the Regulation, is found in the fact all Dublin states are signatories of the ECHR and are bound to comply with the non-refoulement principle in Article 3[64] and the right to effective remedies in Article 13[65]. As mentioned above, Article 3 ECHR obliges states not to expel a person to a country where there is a real risk that he or she will be subjected to inhuman or degrading treatment, or torture. This prohibition of refoulement is also included in Article 33[66] of the Refugee Convention and Article 4[67] of the EU Charter on Fundamental Rights. In the following chapters and after reviewing the case law from the ECHR and the CJEU it will be evident that for both Courts the mutual trust principle is considered problematic. This has been confirmed by both the ECHR and the CJEU, that when it comes to transfers of applicants under the Dublin II/III Regulation the mutual trust and the presumption of compliance of the responsible member states with the ECHR and the Charter of Fundamental Rights of the European Union, is not irrebuttable.

[63] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: http://www.refworld.org/docid/476258d32.html [accessed 5 November 2016]

[64] ARTICLE 3 Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[65] ARTICLE 13 Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[66] Article 33 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 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 judgment of a particularly serious crime, constitutes a danger to the community of that country

[67] Supra no 59

Finally, as an implementation precondition, as a principle and as a massive flaw of the Dublin System is the fact that the request of the applicant is not taken under consideration[68]. Given the fact that although there is a harmonization of the legislation among member states there are many differences that throw the Dublin System out of balance. Different recognition rates per member state[69], different social services[70] and effective and speedy procedures[71] make the asylum seekers to spend money and invest time to travel illegally to these countries. That is the reason that most applicants ready to be transferred are opposing to this decision. It is reasonable under these circumstances that someone who has gone through a lot to get to where he is has no intention of returning to a country (mostly the member states of the southern borders) that he deliberately chose to leave[72].

After all, form the above mentioned core values of the Dublin System it can be concluded that its design and implementation principles be vaguely prepared. Apart from vague, they have been proven unstable and inadequate through time. In theory the Dublin System was well equipped, until reality came and challenged its effectiveness with a very fundamentally political and practical way. This specific issue will be examined later in this thesis.

1.2. The mass influx as the "exception" to the Dublin "rule".

[68] Jones, Will, and Alexander Teytelboym. "Choices, preferences and priorities in a matching system for refugees." Forced Migration Review no. 51 (January 2016): 80-82. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

[69] Delanec, Nika Bačić. "A CRITIQUE OF EU REFUGEE CRISIS MANAGEMENT: ON LAW, POLICY AND DECENTRALISATION." Croatian Yearbook Of European Law & Policy 11, (January 2015): 73-114. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

[70] How the E.U. Could Suffer from Denmark's Refugee Policy, Susan Martin, February 10, 2016: http://fortune.com/2016/02/10/eu-denmark-refugee-policy/

[71] Europe's migrant acceptance rates: http://www.economist.com/blogs/graphicdetail/2015/09/daily-chart, see also: Asylum statistics Data extracted on 2 March 2016 and on 20 April 2016. Most recent data: Further Eurostat information, Main tables and Database. Planned article update: March 2017 : http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics

[72] Europe's Refugee Crisis Spawns A Billion-Dollar Industry, Nick Robins – Early, Huffington Post: http://www.huffingtonpost.com/entry/europe-refugees-smuggling-industry_us_55ef1426e4b093be51bc400f

The Dublin System, since it is found at the core of the EU Migration and Asylum Policy, could not have stayed uninfluenced by the mass refugee influx that EU is facing over the last three years. The world is witnessing the greatest refugee crisis since the Second World War with the UN Refugee Agency reporting that 4, 2 millions[73] of people have been displaced from their homes in Syria since the beginning of the civil war in 2010. Moreover, Syria, in 2014, replaced Afghanistan as the first source of refugees[74]. The hesitance of the international community to respond deliberately and effectively to the Syrian crisis is reflected in the several resolutions of the Security Council[75] which do not go as far as the use of the Chapter VII provisions for the use of force[76]. The European Union is a safe haven for many of these refugees who arrive in thousands at the Union's southeastern doorstep, which are the Italian, but mostly the Greek borders[77].

Although, the case law of these two Courts has shaped over the years the European Asylum Policy, it is evident that the emergency of the situation calls for a direct response to this humanitarian crisis within the borders of the European Union. In order to understand and monitor these legislative and operational initiatives we will use Greece as a case study. Being located at the eastern doorstep of Europe and receiving the vast majority of arrivals, Greece plays a central role on the evolution of the European Asylum Law and consists one of the main actors in most of the operations.

[73] See UNHCR , *Syrian Regional Refugee Response, Inter- agency Information Sharing Portal,* http://data.unhcr.org/syrianrefugees/regional.php

[74] Elias Groll, "A record year of misery: The world has never seen a refugee crisis this bad", *Foreignpolicy.com,* June 18, 2015, http://foreignpolicy.com/2015/06/18/a-record-year-in-misery-the-world-has-never-seen-a-refugee-crisis-this-bad/

[75] Security Council Resolution 2249, 'Called for member states to take all necessary measures on the territory under the control of ISIS to prevent terrorist acts committed by ISIS and other Al-Qaida affiliates', S/RES/2249 (20 November 2015), available from: http://www.securitycouncilreport.org/un-documents/search.php?IncludeBlogs=10&limit=15&tag=%22Security%20Council%20Resolutions%22+AND+%22Syria%22&ctype=Syria&rtype=Security%20Council%20Resolutions&cbtype=syria

[76] UN Charter, Chapter 7 : *Actions with respect to threats to the peace, breaches of the peace and actes of aggression*.

[77] According to the monitoring agencies of the UNCHR in the Mediterranean Sea, approximately 920.000 arrivals have been recorded in the Mediterranean countries which are on the borders of Europe, in 2015. In detail,more than 750.000 arrived in Greece, 150.000 arrived in Italy and approximetly 4.000 arrivals have been recorded in Spain. 51% of them come from the Syrian Arab Republic. (Source: UNHCR , *Refugees/Migrants Emergency Response, Greece data snapshot (09 Dec.*) - data.unhcr.org/Mediterranean)

The European Union tries to confront this humanitarian crisis which increases dramatically in population and needs[78]. Unfortunately, the response of the European Union, until this day should be characterized as problematic (at least)[79]. Consequently, although it is proven the Dublin System is not applicable under the current circumstances the European legal framework does not tend to reflect the idea of burden sharing, which is essential to the European asylum law but it is enforcing a "not in my back yard" strategy.[80]

Already, more than a million of people had entered (mostly irregularly through Greece) the European Union's external borders by December 2015. This mass influx wave (which still continues) was a combination of economic migrants and asylum seekers. Although, ever since 2013 with the Lampedusa tragic shipwreck and 2014 with the Farmakonisi shipwreck, migrants and refugees continuously arrived on the southern borders of the Union, the EU decided to confront the situation somehow by introducing the European Agenda on Migration only in September 2015.

Coming to the analysis of the Agenda we see that the Agenda was three – dimensional. The third dimension included the patching up of the Union's legal and operational framework on asylum. This third dimension comes to prove the fact that, no matter what, Dublin is still considered as the cornerstone of CEAS. The third dimension, activates Article 78[81] of the TFEU, the value of solidarity among member states and

[78] The arrivals that were recorded in October 2014 were approximetly 22.000 in comparison with 220.000 arrivals recorded in October 2015 (Source: UNHCR , *Refugees/Migrants Emergency Response, Visual Representation: Comparison of the Mediterranean Sea Arrivals)*

[79] Trauner, Florian. "Asylum policy: the EU's 'crises' and the looming policy regime failure." Journal Of European Integration 38, no. 3 (April 2016): 311-325. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

[80] Velluti, Samantha. Reforming the Common European Asylum System: Legislative developments and judicial activism of the European Courts. [electronic resource]. Practical Cooperation, Solidarity and External Dimension, pag.536 n.p.: Berlin, Heidelberg : Springer Berlin Heidelberg : Imprint: Springer, 2014., 2014. CEU Library Catalogue, EBSCOhost (accessed November 13, 2016).

[81] TFEU, Article 78: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-v-area-of-freedom-security-and-justice/chapter-2-policies-on-border-checks-asylum-and-immigration/346-article-78.html

imposes a "relocation" procedure[82]. The relocation is perceived as the ultimate solution for releasing the burden from the border – line member states (namely Italy and Greece). Article 78 is perceived as a temporary derogation from the "Dublin Logic" of the allocation of the responsibility among member states. Until today, the relocation scheme seems to fail, proving once more that no middle – ground solutions are capable to answer the chronic deficiencies of the European Asylum Policy. The final results of the European Agenda on Migration are yet to come. The widespread instability leaves no room for predictions of the outcome.

One of the main malfunctions of the Dublin System is that it held captive refugees in the State that gave them the necessary papers. For example, Syrians are repeatedly told that cannot choose the country that they want to reside. Undoubtedly, for every sovereign state migration flaws are problematic, chaotic and cause fear and confusion. But under the current circumstances it is more than obvious that the refugee crisis was created not because of the big number of the arrivals, but mainly because of the political deadlock that is more preferable to solve internal micro political issues than collectively addressing the Union's challenges.

Despite all of the above, the European Commission insists to believe that the Dublin System is irreplaceable and needs to stay in position. The current mass influx is only a derogation due to the inefficiencies of the Greek State which happens to be the one geographically closest to the areas shuttered by war. As the European Commission

[82]Member States' Support to Emergency Relocation Mechanism: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf

believes, this situation will be temporarily handled with bilateral agreements and small amendments[83] and the "Dublin order" will be re-established once more.[84]

The position described here does not wish to predict the future of the Dublin Regulation in abstract. This effort is mainly focused in demonstrating, though the historical revision of the Regulation, that the Dublin System was never a trustful effective mechanism even under no pressing times. The current "refugee crisis" only intensifies the flaws of the System, but does not cause its ineffectiveness). As a result, the biggest challenge for the future of the Dublin Regulation is to manage to justify its existence. Followed by many amendments, judicial criticism, violation of a series of fundamental rights and operating under current suspension, the Dublin System looks hardly convincing and effective. Unfortunately, the so called "refugee crisis" has caused tremendous political tensions[85] proving once more that there is no political will for the creation of real common European asylum policy with true solidarity among member states.

In conclusion, according to the European Asylum Policy's evolution, as it is given here in this analysis, the only truly effective alternative is the creation of a true Common European Asylum System, by creating a Common European Asylum Area. All Directives and Regulations should be incorporated under a true CEAS, therefore the Dublin System will cease to exist. Under such mechanism, individuals who are granted international protection status will be able to get their application approved by one specific member state but they will be recognized by the Union as a whole. This way,

[83] Commission recommends extending temporary internal border controls for a limited period of three months: http://europa.eu/rapid/press-release_IP-16-3501_en.htm
[84] Juncker Commission presents third annual Work Programme: Delivering a Europe that protects, empowers and defends: http://europa.eu/rapid/press-release_IP-16-3500_en.htm
[85] Slovakia calls Visegrad summit to oppose migrant quotas: http://www.euractiv.com/section/justice-home-affairs/news/slovakia-calls-visegrad-summit-to-oppose-migrant-quotas/

the individuals who are granted international protection by the EU will be free to travel and work without limitations in any of the 28 member states. For the revision of their cases and for all other bureaucratic issues, responsible would be the authorities of the state where the individual has a residence permit and not the state that approved his/her application. Unfortunately, such a plan is not a topic of the discussions surrounding the framing of the new CEAS, therefore new amendments will take place to the Dublin Regulation, which due to its inherently malfunctioned structure will continue to be inefficient.

2. Changing the Dublin System through the case-law of the CJEU and the ECHR.

Over the years and especially within the last decade, many cases have been brought before the European Court of Human Rights based on violations from the behalf of the Member States in relation to the implementation of the Dublin Regulation in all its forms. In many cases, implementing the Dublin Regulation lead to multiple violations of the fundamental rights of applicants and asylum seekers. In many occasions, a "line of cases" can be observed which in most occasions are the byproducts of interstate strategic litigation techniques which will be analyzed in the fourth charter. As a "line of cases" is considered an ensemble of multiple cases have been brought or initiated by specific states and they target specific parts of the Dublin Regulation and its implementation and design. Therefore, this chapter wants to explore the line of cases

that have to do, mainly, with potential risk of inhumane and degrading treatment and the principle of mutual trust that runs through the mentality of the EU's law in terms of implementation and the standards of respect for the fundamental rights of the individuals.

On the same pace, the Court of Justice of the European Union has faced and managed the questions brought before it, by the Member States, concerning the implementation of the Dublin Regulation, in all its forms. Although, usually, the CJEU walks mostly in the ECHR's steps, it is less activist than the Strasbourg Court and always reminds its supremacy in relation to the ECHR. Therefore, in this chapter, following the case law of the ECHR also, in a parallel manner, the relevant case – law of the "Dublin cases" of the CJEU will be examined. Since, both Courts have tremendously affected the current existence of the Dublin System, it is really important to get acquainted with the cases, their facts, their outcomes and their impacts on the 2013 recast of the Dublin Regulation. This way, this analysis will approach the "lines of cases" that address specific issues that have been raised. It will become evident that these lines of cases follow a similar argumentative pattern and are focusing on specific countries. Following this chapter and after the reader is familiar with the important case law, the value and the effectiveness of the strategic litigation before the two Courts will be much more evident (it will be analyzed in the 4th Chapter).

2.1. The ECHR relevant case law based on the violations of fundamental rights of the applicants by the member states, while implementing the Dublin Regulation.

The case-law of the ECHR will be divided in a way that will demonstrate and reflect the impact of the *MSS v. Belgium and Greece* case. Following the main ECHR case law it will be apparent how the Court built up its narrative before and after the MSS case, bringing the biggest and most affective judgement of the Court with a massive impact regarding the EU Migration and Asylum Policy. This chapter will focus on the *MSS case* and its precedents and later outcome. In the latter line of cases Greece is the main country that is affected or responsible. Following Greece and the *MSS case*, this chapter examines cases that have a similar to the MSS case argumentative line, but they focus on Italy and Hungary. Finally, some cases that cover other inconsistencies of the Dublin System will be examined. These cases will cover the issue of family reunification, detention conditions and lengthy procedures and how the vagueness of the Dublin Regulation has caused an unharmonized national implementation pattern.

2.1.1. The MSS-line of cases and Greece

Through this analysis four cases will be describted: the *KRS v United Kingdom* case, the *MSS v Belgium and Greece* case, the *Sharifi v Austria* case and the *Safaii v Austria* case. This part is devoted to the description of the facts and the outcome of the cases because, it is of high importance for this analysis, to get acquainted with the exact reality of these cases and understand how the ECHR reached its decision in its one of them.

Firstly, in the case of *K.R.S. v The United Kingdom*[86] *(Application No. 32733/08, 2nd December 2008),* the applicant, an Iranian national who had crossed the European Union's borders irregularly through Greece, reached the United Kingdom, where he lodged his application for asylum[87]. Later, when it was discovered that the applicant had crossed the EU's borders through Greece (which according to the "Dublin Regulation" mentioned above is the responsible Member State for the examination of the application), the British authorities launched the relevant Dublin Procedure in order for Greece to take back the applicant[88]. The Greek authorities agreed to take back the applicant, but before his transfer to Greece the procedure was halted due to the proceedings before the Court acting on interim measures.[89]

Under the applicant's claim, there is a violation of his rights under Articles 3 and 13 of the European Convention for Human Rights. In its judgment, the Court examined the submitted reports from International Organizations[90], as well as the applicant's arguments. Although the Court noted out the responsibility of the United Kingdom to ensure that the fundamental rights of the applicants should be guaranteed upon his return to Greece and not to apply the "Dublin Regulation" immediately without any previous consideration, it finds no reason for the return not to happen[91]. The court found no violation of Articles 3 and 13 for the case and called for the interim measures to be lifted and for the return to take place, since sufficient guarantees have been provided by the Greek Government to the British authorities[92]. Lastly, the Court pointed out "that were any claim under the Convention is to arise from those conditions [meaning the concerns

[86] K.R.S. v. United Kingdom, Application no. 32733/08, Council of Europe: European Court of Human Rights, 2 December 2008, available at: http://www.refworld.org/docid/49476fd72.html [accessed 5 November 2016]
[87] Supra no 86
[88] Supra no 86
[89] Supra no 86
[90] UNHCR, Amnesty International, Helsinki Committee
[91] Supra no 86
[92] Supra no 86

about the asylum procedures in Greece], it should be pursued by the Greek domestic authorities and thereafter in an application to this Court"[93].

Secondly, in the case of *M.S.S. v Belgium and Greece* (Application No. 30696/09, 21st of January 2011)[94] the applicant, an Afghan national, who left Kabul in 2008 and managed to reach the island of Lesbos on the December of the same year, after crossing, irregularly, the European borders and entering the European Union[95]. While, looking more into the important facts of this case, it is mentioned that he didn't apply for asylum in Greece and while he was issued to leave the country, he traveled his way to Belgium through France, where he made his application for asylum at the relevant Belgian authorities[96]. As a result of that, the Austrian authorities became aware of his prior entry to the EU through Greece, by identifying his fingerprints through the EURODAC system[97]. The applicant was detained by the Belgian authorities, who began the relevant procedure, under the Dublin II Regulation, for Greece to take back and proceed with his application. The Greek authorities did not reply to the Belgian authorities within the given period of two months, which amounts to a "automatic" acceptance[98]. For that reason, the Belgian authorities proceeded to the expulsion. Since the Belgian authorities had no obligation to implement the provision of Article 3 (2) of the Dublin Regulation, they had no reason to believe that Greece would fail its obligations under the Union's Law and the Geneva Convention. Besides, the applicant's efforts to prohibit his transfer, the Belgian authorities rejected all his legal initiations. Lastly, no interim measures were

[93] Supra no 86
[94] M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: http://www.refworld.org/docid/4d39bc7f2.html [accessed 5 November 2016]
[95] Supra paras 19-24
[96] Supra paras 31-35
[97] Supra paras 18
[98] Supra paras 36 - 37

accepted by the Court in order to result a possible prohibition of his transfer. Finally, the applicant was to returned to Greece on the 15th of June 2009[99].

Upon his arrival to Greece, the applicant was detained while he lodged his application for asylum and then, later on, he was released. He was, also, requested to present himself to the relevant Headquarters of the Greek Asylum Service to complete his asylum application in detail. Failed to do so, and after the contact of the applicant with his lawyer, the Court decided to enforce interim measures against Greece under Rule 39[100] of the Court, concerning the expulsion of the applicant.

Following these events, the applicant tried to flee the country with a false Bulgarian identity and passport which resulted his arrest and his subsequent imprisonment[101]. He was shortly released and provided with a "pink card". After several renewals of his card and the failed attempt for social support about accommodation, the applicant tried again to leave the country. He was again arrested and transferred to Northern Greece facing expulsion to Turkey, which was revoked at the last moment[102]. Through the course of all the events, the applicant was informing his lawyer about his actions.

The main issue of the case was, if the mere interstate action of expulsion of the applicant from Belgium to Greece would generate a violation of the applicant's rights, along with the question, if the conditions, under which the applicant was leaving in Greece, consist of a violation of his rights under the ECHR[103].

[99] Supra paras 33
[100] *Rule 39*, Rules of the Court: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
[101] Supra no 86, Paras 43
[102] Supra no 86, paras 192
[103] Supra no 86, paras 48-53

In its assessment the Court found that, at the time the countries of the European Union that are in the northern borders have troubles abiding with the full implementation of the Union's law. The returns based on the Dublin Regulation procedure only over burden the already fragile asylum system in these countries[104]. Also the Court recognizes that the burden becomes even greater under the current economic crisis that Greece undergoes, while facing a disproportionate number of applications compared to the capacities of some state[105]. But, because of the absolute character of Article 3 the Court finds a violation from Greece under Article 3 of the ECHR because of the applicant's living conditions in detention and outside of imprisonment[106]. Also, the Court found a violation of Article 13 in conjunction with Article 2 because of the prolonged procedure of the asylum application and the danger of a refoulement of the applicant back to Afghanistan[107].

While reinforcing its activist role, the Court proceeded and found a violation of 3 of the ECHR by the Belgian Government for the expulsion of the applicant to Greece. Also, the Court found again a violation of Article 3 by the Belgian government for exposing the applicant to inhumane and degrading detention and living conditions in Greece[108]. In order to justify this assessment, in comparison to previous relevant case – law the Court stated that additional international observations since the *K.R.S. case* have been brought in front of the Court and verified the fact that Belgium should not take for granted that Greece can follow up to the Dublin Regulation provisions[109]. On the contrary, Belgium should have been proactive. Finally, the Court also found a violation

[104] Supra no 86, paras 222
[105] Supra no 86, paras 223
[106] Supra no 86, paras 231
[107] Supra no 86, paras 283-285, 321-322
[108] Supra no 86, paras 245
[109] Supra no 86 , paras 329

of Article 13, in conjunction with Article 2, because of the lack of effective remedy against the expulsion order of the applicant by the Belgian authorities[110].

So as the CJEU set forward the "systemic breaches" criteria (with the *NS v SSHD case*, which will be analyzed in the next chapter) and the ECHR the "systemic failure"[111] criteria in the *MSS case*, the ECHR comes back to step on the aftermath of the *MSS v Belgium and Greece* case with the *Tarakhel case*[112]. With this case the ECHR added a new precondition for a transfer to happen. In this particular judgement, the Court asked the Swiss government to request and obtain guarantees from the Italian authorities "with regard to the adequacy of reception conditions for children and to the unoty of the family".[113] This decision is also an opportunity for ECHR to project and reinforce its interpretation's supremacy with regard to the non refoulement principle of Article 3 of the ECHR.[114]. Practically, the ECHR lowers the criteria for preventing a transfer, in comparison to the CJEU approach. The Courts marked the state obligation to proceed with an individualistic approach in any case and to proactively examine in what ways the relevant applicant may face any violation of his rights under the ECHR, not just to examine if the applicant due to verified systemic failures of the asylum system of a member state the applicant is at risk of violation of his rights under article 3 of the ECHR.[115] Basically, with the Tarakhel case the Court added an additional criterion to the those already mentioned in the MSS case. The judgment said that member states should offer procedural guarantees in case of a vulnerability for ensuring that the

[110] Supra no 86, paras 360 - 361
[111] Battjes, Hemme, and Evelien Brouwer. "The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?." Review Of European Administrative Law 8, no. 2 (July 2015): 183-214. Academic Search Complete, EBSCOhost (accessed October 9, 2016).
[112] Tarakhel v. Switzerland, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, available at: http://www.refworld.org/docid/5458abfd4.html [accessed 13 November 2016]
[113] Tarakhel, paras 120-122
[114] See also Cathryn Costello & Minos Mouzourakis, 'Reflections on Tarakhel: Is "How Bad is Bad Enough" Good Enough?' Asiel & Migratierecht 2014, Nr. 10, p. 404-411, see p. 408.
[115] This is similar to the 'generally unstable situation' approach applied in Salah Sheekh v The Netherlands, App no 1948/04, ECHR 2006-IX, paras 147–48.

receiving state has the appropriate reception conditions. The sending member states can check that by requiring assurances in order to proceed to a transfer when the applicant belong to a vulnerable group.[116]

Thirdly, in the case of *Sharifi v. Austria* (Application No.60104/08, 5th of December 2013)[117], the applicant, an Afghan national, he was expulsed back to Greece from Austria. In Greece he he had lodged an application for the violation of his rights under Article 3 of the ECHR concerning his transfer to Greece, because of the situation that the applicant is facing in the country.[118] In the merits, the Court reminds that despite the "Dublin's Regulation" framework, when a Member State is transferring and applicant to another Member State, it is still responsible to make sure that the intermediary country's asylum system is sufficient to guarantee that there will be no removal, direct or indirect, of the applicant, to his country of origin. Without his application to be examined under the light of Article 3 of the ECHR concerning the living conditions that will expect him there (*citing M.S.S. v. Belgium and Greece*). The Court in its assessment, found that at the time (2008) that the expulsion was ordered and realized by the Austrian authorities, there was a vast range of sources which provided conflicting information of the situation of the Asylum procedures in Greece (something that is also reflected in the case K.S.S. v. the United Kingdom)[119]. As a result, the Court found no violation of Article 3 of the ECHR, mainly stating that anything before the case of M.S.S. v. Belgium and Greece, cannot be revoked as a violation which a Member

[116] Morgades-Gil, Sílvia. "The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?." International Journal Of Refugee Law 27, no. 3 (October 2015): 433. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[117] Sharifi v Austria, Application no. 60104/08, Council of Europe: European Court of Human Rights, 5 December 2013, available at: http://www.refworld.org/docid/52c5383a4.html [accessed 5 November 2016]
[118] Supra no 117, paras 6
[119] Supra no 117, paras 8

State knew or should have known, rejecting, in that way, any retroactive influence that the case might cause if any violation was to be found.[120]

Fourthly, in the case of Safaii v. Austria (Application No. 44689/09, 7h of May 2014)[121], the applicant, an Afghan national, came to Austria in 2008 along with his wife. At first, the both of them have crossed the European borders irregularly and entered in Greece. From there he managed to reach Austria with the help of a trafficker. When he reached Austria, the applicant applied for asylum in the Austrian authorities.[122] Both of them were expelled back to Greece (his wife in 2008 and he himself in 2009) after the consideration of the Austrian authorities to enforce the "Dublin Regulation" under which, Greece) as of being the first country of entrance) is responsible for the examination of their asylum applications. At the time, the Austrian authorities found no ground for any further consideration that would indicate any potential problems that the applicants might face upon their return to Greece. The Court reached the conclusion that the case is inadmissible[123]. This case had the same reasoning as the case of Mohammadi v. Austria [124](Application No. 71932/12, 3rd of July 2014) and so the Court found no violation of their rights.[125]

Finally, from the four main cases, the Court gave a definite answer to the principle of mutual trust with the *MSS* case (which will be analyzed also, in the 3rd Chapter). Through this cases, a set of arguments have been raised in relation to the situation of the asylum system in Greece. Greece is perceived and proven to be the weak point of the Dublin System. Strategic litigators managed to point out this fact and reflect it

[120] Supra no 117, paras 41
[121] Safaii v. Austria, Application no. 44689/09, Council of Europe: European Court of Human Rights, 7 May 2014, available at: http://www.refworld.org/docid/536ca07d4.html [accessed 28 September 2016]
[122] Supra no 121, paras 33-37
[123] Supra no 121, paras 53
[124] Mohammadi v. Austria, Application no. 71932/12, Council of Europe: European Court of Human Rights, 3 July 2014, available at: http://www.refworld.org/docid/53b521674.html [accessed 28 September 2016]
[125] Supra no 121, paras 27-32

adequately before the ECHR. Although the Court identified the problem of unbalanced allocation of responsibility within the Dublin System, the Court remained very careful in its wording and maintained a "conservative activist"[126] approach. This is proven by the rest of the cases that surround, in this chapter, the MSS line of "Dublin Cases".

2.1.2. The MSS-line of cases in relation to Italy and Hungary.

In this subchapter, for the same reasons as in the previous one, it is considered to be important for the reader to get familiar with five cases that they are based on the argumentative line of the MSS case but they are targeting Italy and Hungary, instead of Greece. The initial aim of these cases was to achieve a similar result that would effectively dismantle the principle of mutual trust and by consequence the Dublin System itself. The five cases, that will be examined, are: *the Mohammed Hussein v The Netherlands and Italy* case, *A.M.E. v The Netherlands* case, the *A.S. v Switzerland* case, the *Mohammed v Austria* case and the *Mohammadi v Austria* case.

Firstly, the two following cases are similar in many aspects. The greatest difference between them is the timeframe and the changes that have taken place over the course of these three years (2013 – 2015). In the case of *Mohammed Hussein v. The Netherlands and Italy (Application No. 27725/10, 18th of April 2013)*[127], the applicant is a Somali national who had crossed irregularly the European borders and reached Italy

[126] Velluti, Samantha. Reforming the Common European Asylum System , Legislative developments and judicial activism of the European Courts. [electronic resource]. n.p.: Berlin, Heidelberg : Springer Berlin Heidelberg : Imprint: Springer, 2014., 2014. CEU Library Catalogue, EBSCOhost (accessed November 13, 2016).
[127] Samsam Mohammed Hussein and Others v. the Netherlands and Italy, Application no. 27725/10, Council of Europe: European Court of Human Rights, 2 April 2013, available at: http://www.refworld.org/docid/517ebc974.html [accessed 28 September 2016]

in 2008. Additionally, she gave birth to her two children born in 2009 and 2011[128]. The applicant lodged her application for asylum before the Italian authorities and she was granted subsidiary protection. After the awarding of her status she was provided with the appropriate residence permit and travelling documents[129]. The applicant travelled to the Netherlands in 2009 and applied again for asylum withholding any information about her subsidiary protection status provided by Italy[130]. Once this was known to the relevant authorities of the Netherlands and in accordance with the "Dublin Regulation", the transfer of the applicant to Italy was introduced. Under Rule 39 of the Court, interim measures were put into place once the application before the Court was lodged. The applicant claimed that upon her return to Italy, she will be a subject of violation of her rights under Article 8[131], 3, and 13 of the ECHR. In its assessment, the Court found the application unanimously inadmissible and the claims of the applicant ill – founded[132]. The Court considered, that the fact that despite the shortcomings of the Italian State concerning the Asylum procedure there is no reason for the Court to doubt the capacity of the Italian authorities to respect and fulfil its obligations under the ECHR.

In that spirit follows the case *A.M.E. v. The Netherlands (Application No. 51428/10, 5th of February 2015)*[133]. The applicant, a Somali national who had crossed irregularly the borders of the European Union and reached Italy in 2009. In Italy the applicant lodged his application for asylum and he was granted subsidiary protection, provided with a residence permit and travelling documents[134]. The applicant travelled to

[128] Supra no 127, paras 7- 10
[129] Supra no 127, paras 13-15
[130] Supra no 127, paras 17
[131] ECHR: ARTICLE 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[132] Supra no 127, paras 84-86
[133] A.M.E. v. the Netherlands, Application no. 51428/10, Council of Europe: European Court of Human Rights, 5 February 2015, available at: http://www.refworld.org/docid/54d4e4274.html [accessed 28 September 2016]
[134] Supra no 133, paras 6

the Netherlands in later 2009, where he applied again for asylum, withholding the fact that he had been granted subsidiary protection in Italy[135]. The relevant authorities in the Netherlands, once they were informed of the former case of the applicant and in accordance with the "Dublin Regulation" procedure, they started the expulsion procedure of the applicant from the Netherlands to Italy[136]. Under Rule 39 of the Court, interim measures were put into place once the application was lodged before the Court. The applicant complained that upon his expulsion to Italy his rights under the ECHR will be violated. To be more exact, he claimed that his rights under Article 3 will be violated be the Italian authorities and due to the shortcomings of the Italian Asylum System[137]. The Court assessed that all the claims of the applicant were ill – founded and requested the lift of the interim measures and the execution of the expulsion finding his application unanimously inadmissible[138]. Here the Court also mentioned that the case law of *Tarakhel v Switzerland* and *M.S.S. v Belgium and Greece* are not applicable to this case.

Secondly, in the case of *A.S. v Switzerland (Application No. 39350/13, 30th of June 2015)*[139], the applicant, a Syrian national of Kurdish dissent and entered Switzerland through Italy on an unknown date and lodged his application for asylum in 2013[140]. Via the EURODAC System it was traced that the applicant had irregularly crossed the European borders and entered through Greece to the European Union on the 16th of August 2012, and in Italy, on the 21st of January 2013. The applicant had two sisters living in Switzerland, who did not fall under the necessary criteria set out by the

[135] Supra no 133, paras 7
[136] Supra no 133, paras 23
[137] Supra no 133, paras 27-38
[138] Supra no 133, paras 38
[139] A.S. v. Switzerland, Application no. 39350/13, Council of Europe: European Court od Human Rights, 30 June 2015, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-v-switzerland-application-no-3935013-30-june-2015 , [accessed 28 September 2016]
[140] Supra no 139, paras 10-13

"Dublin Regulation" in order to proceed with family reunification.[141] Under the Dublin III Regulation the procedures for the applicant's transfer had been initiated when the applicant appealed on the measure and submitted his application to the Court[142]. His arguments were that, under the Dublin Regulation, the necessary time of 12 months was not expired since he left Greece, therefore, Greece is still responsible for him[143]. In that case, the precedent of the *M.S.S. case* would prohibit his transfer to Greece. Secondly, he claimed that his severe health problems (post-traumatic stress and back pains due to the tortures he suffered while imprisoned in Syria), made him completely dependent of the Swiss health care system[144]. On the contrary, the applicant claims that in Italy he would not be able to have the same health care access due to the malfunction of the Italian Asylum System. Thirdly, in Switzerland the applicant has his two sisters. He is completely dependent on them and his health situation is directly linked with their support.

In its assessment the Court said that, first of all due to date inconsistences, is it crucial to say that the applicant (during his trip from Greece to Italy) he might have exited the "Dublin Area", and this not something that can be determined. Continuing, the Court found no violation of Article 3 under the ECHR while examining the expulsion of the applicant to Italy, stating that, unless there are exceptional circumstances, the mere existence of an illness cannot pose an obligation on a Contracting State to refrain from implementing an expulsion. Also, despite the shortcomings of the Italian System, it is common logic that a similar, or the same treatment can be also met in Italy. Also, the Court found no violation of Article 8, concerning any possible disruption of the applicant's family life, since the existence of adult family members does not pose any

[141] Supra no 139, paras 14-17
[142] Supra no 139, paras 25
[143] Supra no 139, paras 29
[144] Supra no 139, paras 44

obligation for the Contracting States to host, for an indefinite period of time, an alien in their territory.

Thirdly, In the case of *Mohammed v Austria (Application No. 2283/12, 6th of June 2013)*[145], the applicant a Sudanese national, lodged an asylum application in Austria in 2010. It has been found that the applicant had crossed irregularly the European borders from Greece and then from Hungary he made his way to Austria. The Austrian authorities, in accordance with the Dublin II Regulation, asked for a transfer of the applicant to Hungary and detailed him. He initially refused to be transferred. As a result, an extension of his detention was ordered and a new date for expulsion was agreed. In the meantime, the applicant, lodged a second asylum application to the Austrian authorities, but this did not have a suspensive effect on his transfer. Also the applicant raised the argument that a transfer back to Hungary would expose him to inhumane and degrading treatment, due to the shortcomings of the asylum system in Hungary and in accordance with the relevant UNHCR country's report.

The Court considered that the applicant's second asylum request could not be considered as abusive[146]. It observed that, owing to the absence of suspensive effect, Mr. Mohammed could have been transferred to Hungary while the application was still being processed, in spite of the fact that he had an arguable claim of violation of Article 3. It concluded that the applicant had been deprived of protection against forced transfer in the course of the processing of his second asylum application while having an arguable claim under Article 3. Therefore, it found a violation of Article 13 in conjunction with Article 3[147].

[145] Mohammed v Austria, Application No. 2283/12, Council of Europe: European Court of Human Rights, 6 June 2013, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-mohammed-v-austria-application-no-228312
[146] Supra no 145, paras 80
[147] Supra no 145, paras 106

In contrast, the Court did not find an independent violation of Article 3 in case of transfer to Hungary. It noted in this respect, that UNHCR had never requested EU Member States to refrain from transferring asylum seekers to Hungary under the Dublin Regulation and that it had welcomed in December 2012 a package of legislative amendments adopted by the Hungarian Parliament that eliminated detention of asylum seekers who filed their applications immediately upon arrival and introduced guarantees concerning detention[148]. It therefore concluded that Mr. Mohammed would not be subject to treatment in violation to Article 3 in Hungary. Finally, given that the applicant had not submitted his individual reasons to flee his country and seek asylum, the Court was not in a position to assume a real risk for Mr. Mohammed upon deportation to his country of origin[149].

Fourthly, in the case of *Mohammadi v. Austria (Application No. 71932/12, 3rd of July 2014)*[150], the applicant is an Afghan national who entered Austria in 2012 and lodged his application for asylum as a minor at the Austria authorities. The applicant was an unaccompanied minor and had no other relatives in any other Member State of the European Union. He entered the European borders by reaching irregularly to Greece and from then he traveled through F.Y.R.O. Macedonia and Serbia to Hungary[151]. According to his allegations, he was arrested and detained (although he was a minor) by the Hungarian authorities and forced to lodge an application for asylum in Hungary. After his release he left and reached Austria, where he applied again for Asylum and

[148] Supra no 145, paras 117
[149] Supra no 145, paras 120
[150] Mohammed v Austria, Application No. 2283/12, Council of Europe: European Court of Human Rights, 6 June 2013, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-mohammed-v-austria-application-no-228312
[151] Supra no 150, paras 20

refused to return to Hungary under the "Dublin II Regulation", because of the potential violation of his rights under Articles 3 and 5 upon his return to the country[152].

In its assessment, the Court indicated that, after considering the observations of several international organizations, concerning the situation of the Asylum procedure in Hungary and based on its case law, the Court indicated that the applicant would not be at risk of degrading and inhumane treatment and he would not be arbitrarily detained in Hungary[153]. Therefore, the Court called for the withdraw of the interim measures of Rule 39 of the ECHR and found no violation under article 3 or 5 of the ECHR concerning the rights of the applicant[154].

Finally, as it can be observed by the above explained case-law the Court never proceeded into depth about doubting again the principle of mutual trust among member states and its impact on the Dublin Regulation, orienting as the main exception to the mutual trust rule, the State of Greece.

2.1.3. Other important "Dublin cases" reflecting mainly on detention conditions

A major workload of the ECHR's case law, which forms a very important line of "Dublin cases", is devoted to detention conditions. In the case of *Aslya Aden Ahmed v Malta*[155], *(application no 55352/12, 9th December 2013)*, the applicant a Somali national, crossed irregularly the European Borders and reached by boat to Malta. She was kept into custody and later on, she filled her application for asylum in the relevant authorities

[152] Supra no 150, paras 27
[153] Supra no 150, paras 68
[154] Supra no 150, paras 100
[155] Aden Ahmed v. Malta, Application No. 55352/12, Council of Europe: European Court of Human Rights, 23 July 2013, available at: http://www.refworld.org/docid/52025bb54.html [accessed 28 September 2016]

of the State. Providing false information, her application for asylum was rejected[156]. After her application, she escaped from the detention center and reached the Netherlands where she applied for asylum. Following the "Dublin Regulation": the responsible authorities of the Netherlands turned down her asylum application and returned the applicant to Malta. She was put again into a detention center. The applicant, already two months pregnant and later on miscarried, tried to make a new claim for asylum in order to be reunited with her family in Sweden[157]. Her claims were rejected. Before the Court, the applicant claims a violation of her rights under the ECHR concerning Article 3 of the Convection for the circumstances of her detention[158]. The Court reaches to the conclusion, in its judgment that although there is no fear of the applicant to be returned back to Somalia, the cumulative effect of the detention conditions have in deed amounted to inhumane and degrading treatment and thus to a violation of Article 3 of the ECHR[159].

Furthermore, the applicant claimed a violation of her rights under Article 5 (4)[160] of the ECHR since the examination of the lawfulness of her detention had become a lengthy procedure and which had as a result for the Court to find a violation under Article 5 (4) since the implementation of the right had lost its effective character. The same approach was followed for the complaint of the applicant, that her rights have been violated under Article 5 (1)[161] of the ECHR for her unlawful prolonged detention[162].

[156] Supra no 155, paras 12
[157] Supra no 155, paras 13
[158] Supra no 155, paras 43
[159] Supra no 155, paras 107
[160] ECHR: Article 5 Right to liberty and security: 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
[161] ECHR: ARTICLE 5 Right to liberty and security 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
[162] Supra no 155, paras 146

In the case of *M.D. v Belgium (Application No. 56028/10, 14th November 2013*)[163], the applicant a third country national for Guinea – Bissau, has submitted his application for asylum in Belgium in 2010. Through the EURODAC system it has been proven that the applicant crossed through Greece the European Union's borders in 2008[164]. The applicant was detained for a long time in Belgium and he was not released until the expiration of the maximum of detention time that he could serve under Belgian law. The applicant argument was that there is a violation of his rights under article 5 (4) of the ECHR for the procedure of his application and his detention, and under Articles 13 and 3, concerning his deportation to Greece.

The Court in its assessment, found a violation of Article 5(4) because the appeal to the Court of Cassation, despite being only on procedural grounds not challenging the merits of the request for release, elongated the detention, which was ended not by judicial review but by automatic time-limit expiration[165]. Concerning Articles 13 and 3, the Court reminded that this has been settled down with the M.S.S. v Belgium and Greece case and that the Belgian authorities had taken responsibility for the examination of the asylum application. The same reasoning is also followed at the *Firoz Muneer v Belgium case (Application No. 56005/10, 11th April 2013).*[166]

Basically, with the Tarakhel case the Court added an additional criterion to the those already mentioned in the MSS case. The judgment said that member states should offer procedural guarantees in case of a vulnerability for ensuring that the receiving state has the appropriate reception conditions. The sending member states can check that by

[163] M.D. v. Belgium, Application no. 56028/10, Council of Europe: European Court of Human Rights,14 February 2014, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-md-v-belgium-application-no-5602810-14-february-2014 , [accessed 28 September 2016]
[164] Supra no 163, paras 17
[165] Supra no 163, paras 56
[166] Firoz Muneer v. Belgium, Application no. 56005/10, Council of Europe: European Court of Human Rights,11 July 2013, available at: http://www.asylumlawdatabase.eu/en/content/ecthr-firoz-muneer-v-belgium-application-no-5600510-11-july-2013 [accessed 28 September 2016]

requiring assurances in order to proceed to a transfer when the applicant belong to a vulnerable group.[167]

2.2. The CJEU relevant case law reflecting on the implementation of the Dublin Regulation

The case law of both the Courts has proven to be of great significance for the everyday life of the Regulation. It covers a big number of legal issues that had emerged. For this statement to be proven, it is necessary to run to specific case law and match the cases with their named impact on the Dublin System. Time limits for transfers in the case of appeal have been clarified by the CJEU with Case C-19/08[168], Petrosian, the principal of non – refoulement and the use of the sovereignty clause have been clarified by CJEU with the cases C-411/10 and C-493/10[169], N.S. and Others as well as the case C-4/11[170], Kaveh Puid that came after Dublin's Recast to confirm the former decisions, what needs to be done in case of a withdraw of an asylum application has been clarified by the CJEU through C-620[171], Kastrati, concerning the Reception Directive during a Dublin Procedure via CJEU's case C-179/11[172], CIMADE and GISTI, the issue of

[167] Morgades-Gil, Sílvia. "The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?." International Journal Of Refugee Law 27, no. 3 (October 2015): 433. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).

[168] C-19/08 Migrationsverket v Edgar Petrosian, Nelli Petrosian, Svetlana Petrosian, David Petrosian, Maxime Petrosian, 29-01-2009, available at: http://www.asylumlawdatabase.eu/en/content/cjeu-c-1908-migrationsverket-v-edgar-petrosian-nelli-petrosian-svetlana-petrosian-david , [accessed 28 September 2016]

[169] N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform , C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, available at: http://www.refworld.org/docid/4ef1ed702.html [accessed 28 September 2016]

[170] Bundesrepublik Deutschland v. Kaveh Puid, C-4/11, European Union: Court of Justice of the European Union, 14 November 2013, available at: http://www.refworld.org/docid/52d7bb664.html [accessed 28 September 2016]

[171] C-620/10 Migrationsverket v Nurije Kastrati, Valdrina Kastrati, Valdrin Kastrati, 03-05-2012, available at: http://www.asylumlawdatabase.eu/en/content/cjeu-c-62010-migrationsverket-v-nurije-kastrati-valdrina-kastrati-valdrin-kastrati , [accessed 28 September 2016]

[172] Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, C-179/11, European Union: Court of Justice of the European Union, 27 September 2012, available at: http://www.refworld.org/docid/506425c32.html [accessed 28 September 2016]

further investigation of possible transfers via CJEU's case C-245[173], K and on uncompanied minors and the best interest of the child via C-528/11[174] Halaf case and C-648/11[175] MA and Others case.

2.2.1. The facts and the judgments of the chosen CJEU case law

In order to understand the ill – founded nature of the Dublin Regulation and its weaknesses it is important to get acquainted with the facts and the judgments of the Courts, since the description of the facts is a unique source of information that reflects the implementation of the Dublin regulation on the national level. Therefore, in this subchapter the aim is to see how the court responded to the preliminary questions of the States or to the issues raised by the civil society in relation to the design and the implementation of the Dublin System.

Starting in a chronological turn, in the case of *Migrationsverket v Edgar Petrosian, Nelli Petrosian, Svetlana Petrosian, David Petrosian, Maxime Petrosian, (29-01-2009)*[176], the decision of the Court concerns the interpretation of Article 20.1 and 20.2[177] of the Dublin II Regulation and the time limit for transfers in the case of a lodged appeal.

[173] K. v. Bundesasylamt, C 245/11, European Union: Court of Justice of the European Union, 6 November 2012, available at: http://www.refworld.org/docid/50a0cd8e2.html [accessed 28 September 2016]
[174] C-528/11, Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet, 30-05-2013, available at: http://www.asylumlawdatabase.eu/en/content/cjeu-c-52811-zuheyr-frayeh-halaf-v-darzhavna-agentsia-za-bezhantsite-pri-ministerskia-savet , [accessed 28 September 2016]
[175] MA, BT, DA v Secretary of State for the Home Department (Reference for a preliminary ruling from Court of Appeal (England & Wales) (Civil Division)), C-648/11, European Union: Court of Justice of the European Union, 19 December 2011, available at: http://www.refworld.org/docid/503502752.html [accessed 13 November 2016]
[176] Supra no 168
[177] Dublin II Regulation, 343/2003: Article 20 1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:… 2. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylumwas lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

As we look into the facts, the Petrosian family, asked for asylum in Sweden in 2006, after the rejection of their request in France. The Swedish authorities acting accordingly to the Dublin Regulation, started the relevant procedures for the French authorities to take back the applicants. To this decision, the applicants lodged an appeal and requested for their application to be examined in Sweden, a claim that was rejected. In ruff lines, the question was to determine the exact time that an issued transfer starts to be applicable if there is a lodged appeal. To this question the CJEU answered that Article 20 (1) and 20 (2) of the Dublin II Regulation No 343/2003, that established 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 are to be interpreted as meaning that, where the legislation of the requesting Member state provides a suspensive effect of an appeal"[178], the transfer is strictly implemented only after the examination and the final decision upon the merits of the case. Only then and pending on the decision of the appeal, the transfer can or cannot take place.

Proceeding, in the case of *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10, (21 December 2011)*[179]. In this case, the CJEU reflected on the ECHR's *MSS case*. In these joined cases, on the one hand, in the case C-411/10, an Afghan national has entered irregularly into the European Union through Greece in 2008 where he was arrested and latterly expelled to Turkey where he was detained. From then on, he managed to travel from Turkey to the UK. Consequently, the UK has issued a transfer to Greece. The applicant asked the

[178] Patrosian, paras 28-31: http://www.asylumlawdatabase.eu/en/content/cjeu-c-1908-migrationsverket-v-edgar-petrosian-nelli-petrosian-svetlana-petrosian-david#content
[179] Supra no 169

Secretary of State to accept responsibility because of a possible breach of his fundamental rights under the EU law, the ECHR and the Geneva Convention.

In the case of NS v SSHD the CJEU, apart from the obligation of the sending member state to observe any systemic deficiencies in the asylum system of the receiving state, the Court also pointed out, that upon the rejection of the transfer the sending state should continue to examine if there is another responsible member state for this applicant. This shouldn't happen, in a way that "worsen the situation where the fundamental rights of the applicant have been infringed" and not in a way that would cause a timely lengthy procedure. Also in the NS judgement the court established that Member States are still bounded by the EU Charter of Fundamental Rights even when the EU law allows them to take a more sovereign decision.[180]

Stepping upon the judgement of the NS case, in 2013 the CJEU released a judgement concerning procedural rights with the case *Abdlluahi v Bundesasylum*t [181] and said that even if a receiving state has accepted responsibility for an applicant in the basis of the Dublin criteria, the applicant can appeal on that decision and needs to prove that his transfer will result to a violation of his/her fundamental rights due to a systemic deficiency.

Also, the case of *C-493/10 M.E. and Others v. Refugee Applications Commissioner, Minister of Justice, Equality and Law Reform*[182] is a case of five appellants who are from Afghanistan, Iran and Algeria. All of them have crossed irregularly the European borders through Greece and travelled to Ireland. Ireland has issued the transfer of the applicants to Greece. So both the Court of Appeal of the UK

[180] NS: paras 38-44
[181] C-394/12, Shamo Abdullahi v Bundesasylamt, 10-12-2013, available at: http://www.asylumlawdatabase.eu/en/content/cjeu-c-39412-shamso-abdullahi-v-bundesasylamt
[182] Supra no 169

and the High Court decided to stop the progress of the application and turned to the CJEU for explanatory questions.

The outcome was that, as far as it concerns the C-411/10 case the Court responded that when a Member State acts under Article 3(2)[183] of the Dublin regulation, it exercises a discretionary power, which given the fact that, at the end of the day, it is the implementation of EU law, the Member State needs to exercise it with the meaning of Article 51(1)[184] of the Charter for Fundamental Right of the EU.

The Court implies that a transfer must be halted and not take place where in the receiving state, (which is also responsible under the Dublin II Regulation) the applicant is in real risk of inhuman and degrading treatment and is treated in a manner incompatible with fundamental rights. That lays upon the existence of systemic flaws in the asylum system and in the reception conditions of a Member State and not upon the slightest suspicion of mishandling of an applicant[185]. For that to be assessed, the Court explains, that all member states should not assume and take for granted that all participating states are implementing and respecting fundamental rights, including those of the Geneva Convention, the ECHR, the Charter (para. 78, 100).

So member states may not transfer an asylum seeker, to the state responsible under the Dublin II Regulation, when "they cannot be unaware that systemic deficiencies in

[183] Dublin II Regulation, 343/2003: Article 3. 2. By way of derogation from paragraph 1, 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 this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

[184] EUCFR: Article 51 Field of application 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

[185] M.E. and Others, paras 82

the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds"[186] for violating Article 4 of the Charter. In this judgement the Court also referred to the case of MSS v Belgium and Greece and identified the described situation of the asylum system in Greece at the time as an example of systemic deficiencies in the asylum procedure and at the reception conditions.

The Court also guided in a way, the Member States on how they could assess if another State is in compliance with the Charter considering the fundamental rights of asylum seekers[187]. Therefore, the sending Member State "must continue to examine the criteria set out in Chapter III of the Regulation in other to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application" (Para. 96). But this procedure should not take an unreasonable time length and worsens the situation of the applicant. In such occasion the sovereignty clause should be applied.

Additionally, in the case of *K. v. Bundesasylamt, C 245/11, (6 November 2012),*[188] the CJEU gave another important judgement. The Court had to answer the preliminary questions concerning the interpretation and the clarification of the implementation of the humanitarian clause. Looking at the facts of the case the applicant firstly submitted her application for asylum in Poland and before the release of the decision upon her application, the applicant traveled to Austria to join her adult son, his wife and their three children. She went on, and applied for asylum also in Austria. Before any decision upon her application, the Austrian authorities issued that Poland is the responsible state for her application. But, due to the fact that the applicant and her daughter-in-law has a

[186] M.E. and Others, paras 111
[187] Supra no 169, Paras 91
[188] Supra no 173

codependency relation and she offers her valuable support, the court turned to the CJEU for preliminary ruling. Basically the Austrian authorities asked for clarification concerning the application of article 15 (the humanitarian clause) and article 3.2 (the sovereignty clause) of the Dublin II regulation.

The Court responded that the sovereignty clause in article 3.2 is subsidiary to the humanitarian clause of article 15. Also the Court in this case clarified that the term "normally keep" in 15.2 of the 343/2003 Directive, practically impose an obligation to that member state in case of vulnerability to proceed and take charge of an applicant.

In the same manner, in the case of *C-620/10 Migrationsverket v Nurije Kastrati, Valdrina Kastrati, Valdrin Kastrati, (03-05-2012)*[189] the facts describe a family from Kosovo (namely the mother and her underage children) seeking a way to go to Sweden and reunite with the father of the family. The mother as she has already an issued visa by France is not accepted as an asylum seeker in Sweden and her application is rejected. Furthermore, France has agreed to take back the applicant. On the moment, the applicant withdraws her asylum application in Sweden and asked for a residence permit on the grounds of staying with her husband.

After long litigation of the case in the national Courts, the Stockholm Administrative Court of Appeal referred some questions to the CJEU, practically asking the Court to clarify and define the impact that a withdrawal of an asylum application has on the implementation of the Dublin procedure. The Court responded that since there were no previous rulings upon that matter, the issue needs to be further clarified. The Court noted that since an asylum application is withdrawn and since the examination of the case is terminated, then by all means, the application of the Dublin II Regulation and

[189] Supra no 171

all its ongoing procedures are terminated as well. As for the Member State in which the person that withdraw its application is, the same state is responsible to determine the status of that person, unless another state has already take charge for this specific applicant. As a result, this decision brought some changes to the 343/2003 Regulation and they are reflected in the current Dublin III implementation

Following the previous case-law, in the case of *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, C-179/11, (27 September 2012)*[190] these two human rights organizations challenged a circular in French law which excluded any applicant in a Dublin process of transfer from benefits and aid. Based in the logic that since the applicant is in expectance of a transfer process and since another state has already taken charge, then this applicant is no more the sending state's responsibility. The CJEU held that the obligations of a Member State towards an applicant expecting a Dublin transfer end only by the time the transfer is completed. For that reason, the state is responsible to implement as appropriate its duties towards the implementation of the Reception Conditions Directive. The results of this case are incorporated into the Dublin III Regulation.

In the case of *Bundesrepublik Deutschland v. Kaveh Puid, C-4/11(4 November 2013)*[191] the applicant is an Iranian person who fled from his country and after crossing irregularly the EU border he was registered in the EURODAC system by the Greek authorities. After his EURODAC registration the applicant traveled to Germany where he lodged his asylum application. After the German authorities tracked his entrance through Greece they called for the latter to take charge of the applicant and refused to

[190] Supra no 172
[191] Supra no 170

review his application. The Administrative Court stopped the transfer procedure since (according to the precedent case-law of the CJEU) the applicant upon return to Greece, faces a high risk of his rights to be violated. Responding to the forth question of the Higher Administrative Court asking for clarification, if the sovereignty clause poses an obligation of the state of the current residence of the applicant to have the obligation to review his/hers application if a Dublin transfer is not applicable. The Court said that in this case, the state of the current state of the applicant has no obligation on reviewing the applicants claim but needs to keep on examining any further criteria under Chapter III of the Dublin II Regulation, in order to establish another state as the responsible one, if this is the case.

To that statement of the Court, the CJEU returns with the case of Kaveh Puid. In 2013 the CJEU came across a case similar to that of NS since the applicant Kaveh Puid, after crossing irregularly the borders of the EU through Greece he found himself in Germany. Based on the questions set before the Court, the CJEU stood by its decision under the NS case saying that the enforcement of the sovereignty clause is sometimes obligatory when there are systemic flaws on the asylum system of the responsible state, but in this case the Court remarked and clarified, that no matter the deficiencies of the asylum system in the responsible member state, the applicant is not automatically granted the right to oblige the currently hosting state to examine his/hers application. The member state still needs to imply the Dublin criteria and look for possible other responsible member states no matter the lengthy of the procedure within reasonable expectations. This is another reassurance for the value of the Dublin System and its logic from the part of the CJEU.

Also of great importance for this case is the opinion of the Advocate General concerning the Dublin Regulation and its nature, which partially explains the faith that

the EU puts in the Dublin system. Basically, the Advocate General said that the Dublin Regulation is primarily a set of "organizational rules" that regulate the relations between member states and does not grant as it is rights to asylum seekers. In the case of Shamso Abdullahi of the 10 December 2013 the CJEU ruled that this opinion of the Advocate General is viable instead under article 19 for an effective remedy of the Dublin II Regulation the systemic flaws of the country responsible cause a real risk of violation of article 4 of the CFREU. Also this restrictive approach on the right to appeal of the decision of which state will end up to be the responsible state for the examination of the asylum application, is nothing more, than an additional affirmation of the CJEU towards the Dublin principal of mutual trust as the corner stone of the System that no matter the situation is the rule and any derogation from it is just the exception.

3. Reflecting case law's impact in transforming the Dublin System.

While Member states are implementing the Dublin Regulation, they are implementing Union's law. That means that the implementation and the incorporation of the Regulation and the CEAS Directive need to be in conformity with the European Union's Charter of Fundamental Rights, as well as, with the European Convention on Human Rights to which all EU's member states are a part of. For that reason, it is important to see how these two legal documents affect with their interpretation the

implementation of the Dublin Regulation, and by consequence the resulting case-law from the two corresponding Courts.[192]

Starting with the EU Charter of Fundamental Rights and how it is relevant with the rights of asylum seekers, there are Article 4[193], Article 18[194], Article 24[195] and Article 47[196]. Besides the Charter calls for all articles that resemble articles from the ECHR to be interpreted in the same way, but at the same time they are capable to afford higher protection than those of the ECHR.[197] Needless to mention the fact, that the ECHR has no explicit right to asylum.

In this chapter, an analysis of the role of that relevant case law from the Court of Justice of the European Union will be provided. These cases have palyed a significant role, over the years, in the amendments of the Dublin System. The case law of CJEU has successfully targeted many of the problematic issues of the Dublin's System design. It has marked out many of the disturbingly vague points of the regulation and it has been proven to be a significant feedback for the misconduct caused by relevant national

[192] Battjes, Hemme, and Evelien Brouwer. "The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?." Review Of European Administrative Law 8, no. 2 (July 2015): 183-214. Academic Search Complete, EBSCOhost (accessed October 9, 2016).

[193] EUCFR, Article 4: Prohibition of torture and inhuman or degrading treatment or punishment: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[194]EUCFR, Article 18: Right to asylum: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

[195] EUCFR, Article 24: The rights of the child: 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity., 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration., 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

[196] EUCFR, Article 47: Right to an effective remedy and to a fair trial Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[197] EUCFR, Article 53: Level of protection: Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

legislation and the implementation of the Dublin system on a national level. The inconsistencies of the Dublin System had been pointed out by scholars and international NGOs from the beginning, and had advocated successfully the ill-founded nature of the regulation, pushing forward to amendments and changes for the protection of human rights.

Apart from the Court of Justice of the European Union, also the European Court of Human Rights seems to lead a parallel way with CJEU, as it has an equally important impact on the amendment of the Dublin System. It has, actively, clarified, through its case law, the fact both the design and the implementation of the System are in need of great reform in order to secure the respect of human rights.

The two main aims of the 2013 Dublin recast were "the effectiveness of the Dublin system and the protection granted to applicants under that system"[198]. The recast, while aiming to enhance the effectiveness of the Dublin system, had to overcome and resolve the constructive challenge that was created by the fact that Dublin II Regulation was the first legal act of CEAS that entered into force. While already there is a legal European set up concerning refugee and migration law, the Dublin System finds itself incompatible and hard to implement to the last detail. The Dublin Regulation has always been proven hard to implement, as well as challenging.[199] But besides the difficulties the Dublin Regulation is the uncontestable corner stone of CEAS. Anything else is considered to be a derogation from the rule.[200]

The big changes of the Dublin III Regulation will be further examined in this chapter. Starting from a fundamental change, the 2013 recaste recognizes that the 5

[198] Recital 9 of the Dublin III Regulation.
[199]
[200] Check: Report from the European Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM(2007) 299 final, 6 June 2007.

grounds that are declared by the Geneva Convention are not enough and do not correspond to all situations of well-founded fear of persecution. Therefore, the European Union adopts and legislates for the coexistence of two different statuses the refugee status and subsidiary protection. From a practical view point that eliminates the abuse of the system, that means that with the expansion of the international protection grounds that the EU is offering there is no (there should be no) more abuse from applicant of a potential legalization of their stay over humanitarian protection or non-refoulement provision, by risking ending up with a precarious status. Also, the family reunification clause for people granted international protection has been expanded.[201]

In more detail, main changes between the Dublin II Regulation and its 2013 recast are the time limits for taking back requests that have been altered by the recast. Practically this leads to a potential of maximum 11 month-long procedure to complete an asylum application process if no appeal is lodged. Unfortunately, procedural issues when it comes to the appeals procedures are not clarified by the Dublin III recast.[202] As the recast moves forward it is also marked that a transfer needs to take place "in a humane manner and with full respect for fundamental rights and human dignity" in the form of supervised departures[203].

On another note, in order to enhance protection standards for the applicants through the case law, more attention has been payed in the protection of the best interest of the child, in the sense that transfers of unaccompanied manors should not take place under the Dublin criteria of state responsibility if the unaccompanied minor has no

[201] Hruschka, Constantin. "The (reformed) Dublin III Regulation-a tool for enhanced effectiveness and higher standards of protection?." ERA Forum 15, no. 4 (December 2014): 469. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[202] Hruschka, Constantin. "The (reformed) Dublin III Regulation-a tool for enhanced effectiveness and higher standards of protection?." ERA Forum 15, no. 4 (December 2014): 469. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[203] Dublin III Regulation, Art. 29.1 (2)

family members of other legal guardians in the receiving Member State. In that occasion, responsible for the examination of the case of the accompanied minor is solely te Member State of its current residence. This is a clear reflection upon the CJEU's case law, and specifically the case MA and Others. But at the same time, although there is an effort in securing the best interest of the child, the EU does not move radically forward by naming and defining what it really means, "the best interest of the child" which can be also seen as a system flaw of political unwillingness. Finally, "concerning the family unity at large, the recast has radically upgraded the dependency clause (Article 16) into a quasi-criterion, which is interpreted as a reinforcement of the protection of family unity."[204]

3.1. The importance of the cases of NS and MSS, and the not so practical dismantling of the principle of "mutual trust".

Starting with the European Court for Human Rights, the Court targets the role of the Dublin System as a responsibility allocating mechanism, based mostly on cases about Article 3, Article 8 and Article 6. Although the ECHR does not contain direct provisions on a "right to asylum", it offers a wide cover for the protection of the rights of asylum seekers' rights.[205]

Regarding the criteria for the determination of the responsible state, they stay the same in the 2013 recast. But here it can be easily observed that in the 2013 recast there is a clear reflection of *the NS and the MSS case* delivered by the CJEU and the ECHR. So in articles 3(2) and (3), it is clarified that in order for a take back/tack charge transfer

[204] Hruschka, Constantin. "The (reformed) Dublin III Regulation-a tool for enhanced effectiveness and higher standards of protection?." ERA Forum 15, no. 4 (December 2014): 469. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[205] Nuale Mole and Catherine Meredith, Asylum and the European Convention on Human Rights (Council of Europe 2010), 19

to happen the sending state needs to assess before the transfer any potential "systematic flaws in the asylum procedure and in the reception condition for applicants in that (the receiving) Member State, resulting in a risk of inhuman and degrading treatment within the meaning of article 4 of the Charter of Fundamental Rights of the EU".[206]

In the context of the CJEU, the cases *C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* are the response to the *M.S.S.* The first case considered the transfer of an Afghan applicant from the UK to Greece and the second one concerned multiple asylum seekers who challenged the transfer from Ireland to Greece. Both national Courts referred questions to the CJEU. The cases were examined jointly and the Court reached the judgment that mere infringement of provisions in the EU asylum law can in itself not be sufficient to prevent a transfer. On the contrary, there should be a series of 'systemic deficiencies' in the asylum procedure or reception conditions for a violation to be established. With this decision, although the Court responds to the MSS, it seems that it raises the threshold for the restriction of transfers from EU member states to a specific member state. Also, the Court said that the prohibition of the transfer does not create at the same time an obligation for the member state at the time to examine the application. The Dublin criteria should be followed, also, in this case.[207] This changes in the case of no other responsible state. [208]

Finally, the MSS opened up the critique of the Dublin Regulation System, putting its allocating characteristics of the asylum and migration policy responsibility at

[206] Hruschka, Constantin. "The (reformed) Dublin III Regulation-a tool for enhanced effectiveness and higher standards of protection?." ERA Forum 15, no. 4 (December 2014): 469. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[207] Joined cases C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform [2011] ECR I-13905, §96
[208] Joined cases C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform [2011] ECR I-13905, §§97-98

the center of the discussion. This effort is mainly focused in demonstrating, though the historical revision of the Regulation, that the Dublin System was never a trustful and effective mechanism even under no pressing times. The current "refugee crisis" only intensifies the flaws of the System, but does not cause its ineffectiveness). As a result, the biggest challenge for the future of the Dublin Regulation is to manage to justify its existence. Followed by many amendments, judicial criticism, violation of a series of fundamental rights and operating under current suspension, the Dublin System looks hardly convincing and effective. Unfortunately, the so called "refugee crisis" has caused tremendous political tensions[209] proving once more that there is no political will for the creation of real common European asylum policy with true solidarity among member states. The Court said and I quote: the state (in this case Belgium) *'knew or ought to have known that he had no guarantee his asylum application would be seriously examined by the Greek authorities', and 'it was in fact up to the Belgian authorities … not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice.'*[210]

In 2011, both the European Court of Human Rights and the Court of Justice of the European Union put an end at the principle of "non-rebuttable trust" when this trust as taken for granted can lead to systematic violation of fundamental rights of the individuals. "Blind Mutual Trust" had been heavily criticized and therefore these judgements were welcomed by both scholars and human rights activists. This has also

[209] Slovakia calls Visegrad summit to oppose migrant quotas: http://www.euractiv.com/section/justice-home-affairs/news/slovakia-calls-visegrad-summit-to-oppose-migrant-quotas/
[210] M.S.S. para 358

shaped the relationship between the state and the asylum seeker and their responsibilities considering the burden of proof.[211]

Practically what the Court said in the NS case is that in some cases the activation of the sovereignty clause of the Dublin Regulation 343/2003 is mandatory. Some can say that this decision apart from dismantling the idea of mutual trust among the member states, as a precondition and a blind affirmation of the well-founded nature of the system, is maybe the only way for the European commission to argue in favor of the Dublin System as it is. In more details, what I am trying to argue is that none of the Courts went on so far to criticize the very core and the very idea of the Dublin system as a system that is not in need of reform but its very design is mend to cause systemic violations of fundamental rights one way or another.[212]

As A. Lubbe (March 2016) has described, there is a need to distinguish the way the two courts have established the criteria of systemic flaws and to see in what way this is arguable in an asylum case.[213] On the one hand, when the Court invokes the argument of systemic flaws means, in means that such an argument can be presented before the Court and it responds to a continuous flaw in the asylum system of a Member State that affects directly the applicant and can be amended with procedural reforms.[214] On the other hand, the Court will not accept as an argument in order to prevent a transfer due to "violations of law to an unfortunate series of events". The reason is because this situation

[211] Evelien, Brouwer. "Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof." Utrecht Law Review no. 1 (2013): 135. Directory of Open Access Journals, EBSCOhost (accessed October 9, 2016).
[212] Morgades-Gil, Sílvia. "The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?." International Journal Of Refugee Law 27, no. 3 (October 2015): 433. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[213] Lübbe, Anna. "'Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?." International Journal Of Refugee Law 27, no. 1 (March 2015): 135. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 9, 2016).
[214] Supra

may occur in an unforeseeable way and cannot be prevented via procedural reforms.[215] What, Lubbe is also pointing out in her article is that "[I]f an asylum system produces errors constantly, because five case officers are dealing with thousands of applications, that would be a systemic flaw… [A] systemic flaw is a structure or structural void within the asylum system that produces errors in cases passing that part of the system".[216] All in all there is a clear division between the importance of an argument for a systemic flaw in contrast with a observed major malfunction in that same asylum system.

The Courts responded to the facts of the cases before them, said that, unfortunately, besides what was believed mutual trust must be considered as rebutted and therefore in some cases, member states are obliged to refrain from completing a transfer to the originally responsible member state.[217]

The preliminary questions that were referred to the CJEU on the NS v SSHD case by the UK and the Irish Courts have to do with the fact the UK had already ratified the Asylum and Immigration Act that, explicitly rejected, an irrebuttable concept of mutual trust and the belief that all member states are considered without any doubt "safe countries". Therefore, in order for the national courts to be able to reach a judgement they turned to the CJEU for answers. Unfortunately, the Court, although it verified the fact that the mutual trust principle is no irrebutable and all procedures should happen in a way that does not worsen the situation of the applicant od prolongs unnecessarily the procedure of the process of the asylum application at a Member state. on the other hand, both Courts, although they said that in order to reach a decision they are taking under

[215] Supra
[216] Supra
[217] See Cathryn Costello, Dublin-case NS/ME: 'Finally, an end to blind trust across the EU?',A&MR 2012 Nr. 02, p. 83-92

consideration the reports and observations of INGOs[218], the Courts gave no clear guidelines to the Member States to be able to assess under specific criteria if a member state will put the fundamental rights of the applicant in risk of violation because of systemic flaws in the national asylum procedure. Additionally, the CJEU indicated that the applicant should be the one to initiate a procedure and bring evidence that would prove a claim and overrule a arranged transfer. For that, the CJEU also said that the Member States have the obligation to provide the necessary procedural guarantees.

Basically the CJEU and the ECHR described the same criteria only that the phrasing was different. The CJEU when assessing the NS case talked about "systemic deficiencies" in the receiving state that the member state planning a transfer "cannot be unaware". Alternatively, the ECHR when assessing the MSS case, said that Belgium "knew or ought to know" that the Greek Asylum System would put the rights of the applicant at risk of multiple violations. Additionally, both Courts agreed that the burden of proof of any potential rights' violations upon transfer, is not solely carried by the asylum applicant but it is also a responsibility of the sending state.

Another indicator of the unclear stand of the ECHR towards the Dublin System and its deficiencies is the fact that in most cases that include a transfer to another member state and the claimant raises issues about his safety, the Court applies Rule 39 for interim measures, in order to avoid any possible violation of the claimant's rights and to give the necessary time for the proceedings to be concluded.[219] Also at several occasions

[218] Also applicable in this case: C-528/11, Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet, 30-05-2013, available at: http://www.asylumlawdatabase.eu/en/content/cjeu-c-52811-zuheyr-frayeh-halaf-v-darzhavna-agentsia-za-bezhantsite-pri-ministerskia-savet , [accessed 28 September 2016]

[219] *Mohammed v Austria*, , *Tarakhel v Switzerland*,; *Sharifi and Others, Sharifi v Austria*, *Mohammadi v Austria*.

many member states have (for different reasons) suspended transfers and take an individualistic approach.[220]

3.2. The impact of the case-law upon the "discretionary clauses" of the Dublin Regulation.

There is a division and a differentiation from the Dublin II to the Dublin III regulation when it comes to the discretionary clauses, (meaning the sovereignty clause and the humanitarian clause as they are formed in Dublin II). In not all cases, of course, the states have the obligation to enforce the sovereignty clause, on the contrary in many cases they still have a large margin of appreciation not to do so. Besides, what the CJEU established as a test is that a state has the obligation to enforce the sovereignty clause after exhausting any other effort trying to find another responsible member state (without this procedure taking an unreasonable amount of time). This is to prevent the transfer of an applicant to the state responsible, in case in that state, systemic flaws in the asylum procedure and at the reception conditions can be observed. These flaws create an imminent risk of violation of Article 4 of the CFREU for the right to freedom from torture and inhuman or degrading treatment.

[220] In the *MSS* case, the UNHCR addressed a letter to the Belgian government asking for the suspension of transfers to Greece, *MSS*, above n 14, paras 194–95.

In the new regulation, the Dublin III Regulation 604/2013 the sovereignty clause[221] and the humanitarian clause[222] are included in an article dedicated to the "discretionary clauses". In Dublin III these clauses have been rearranged and accommodated and are responding (to some extend) to the case – law of the CJEU and the ECHR. Now, under article 8 there is the part of the humanitarian clause that refers to unaccompanied minors but the difference is that it has a narrower scope. The recast requires that an unaccompanied minor should be reunited with a relative that is "legally present" to another member state and can take care of the child (something which is assessed on a case by case examination). The new sovereignty clause can be found in 17.1[223] and the new humanitarian clause can be found in Article 17.2[224] of the Dublin III Regulation.

[221] **GENERAL PRINCIPLES**
Article 3
2. By way of derogation from paragraph 1, 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 this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

[222] **HUMANITARIAN CLAUSE**, **Article 15:**
1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.
2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.
3. If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.
4. Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.
5. The conditions and procedures for implementing this Article including, where appropriate, conciliation mechanisms for settling differences between Member States concerning the need to unite the persons in question, or the place where this should be done, shall be adopted in accordance with the procedure referred to in Article 27(2).

[223] 1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation. The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant. The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken.

[224] 2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a

Consequently, the discretion of the Member State against these clauses is not as discretionary or sovereign as it might seem, but they are highly codependent of the mere malfunction of the Dublin System and of the interpretations given upon the implementation of the Regulation by the CJEU and the ECHR. To this day, both of the Courts have admitted that the principle of non-refoulement in order to avoid inhuman and degrading treatment, to prevent torture and to secure family unit are the defining factors that regulate in practice how discretionary or not the discretionary clauses are for member states.

Apart from family unity, the rest of the criteria are based on the idea of "which state contributed the most to the entrance of this person inside the borders of the European Union". The sovereignty clause (article 3.2 of the Dublin II Regulation – article 17.1 in Dublin III Regulation) is practically a respect form for the sovereign right of the state to provide asylum. With *the MSS case* the sovereignty clause became the practical guarantee for saving and ensuring the respect of fundamental rights in the EU. It also became a practical floating wood and savior of the Dublin System in general. In other words, the judgement calls for member states/forces them to assume responsibility.

With the NS v SSHD case the CJEU, following the judgment on the MSS case by the ECHR, said that although mutual trust is the cornerstone of the Dublin System it shouldn't be taken for granted even if "the Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee nobody

first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing. The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation. The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based. Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it.

will be sent back to a place where they again risk being persecuted"[225]. Also, "the presumption underlying the Dublin mechanism that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable"[226]

As for the Dublin III Regulation, there was an effort to amend the discretionary clauses in a way that would be focused especially at the right to family unity. In the recast the discretionary clauses can be found in article 17 that represents and embodies in some way the former sovereignty clause and the humanitarian clause of the Dublin II Regulation. On the other hand, it seems that according to the case-law from the CJEU indicates that it is rather difficult for article 17 to be invoked in practice, in family related cases.[227]

In conclusion, it can be assessed that the 2013 recast rearranged the discretionary clauses in a very strategic way. Firstly, the rearrangement responded, to a great extent, to the case law produced by the ECHR and the CJEU. At the same time, one the one hand, it could be argued that the recast diminished even more the sovereignty of the member states in their decision making procedures. On the other hand, the discretionary clauses are rearranged in a way that does not change the main "Dublin" principles (as they have been already analyzed. The main malfunctions of the Dublin System are not addressed for radical reform but they are rather protected.

[225] NS v SSHD para. 104
[226] NS v SSHD para. 105
[227] CJEU, Case C-411/10 and C-493/10, N.S. and Others, 21 December 2011, ECLI:EU:C:2011:865. The outcome of this judgment was reconfirmed by the CJEU after the recast process had ended in the judgement, Case C-4/11, Puid, 14 November 2013, ECLI:EU:C:2013:740.

3.3. The Dublin as the "cornerstone of CEAS" and the Greek exception.

The Dublin Regulation, is to this day, believed to be the uncontestable cornerstone to the CEA System, despite the current mass influx situation, which is only perceived as an exception or temporary extraordinary circumstances. But, the Dublin System seems to include an inherently unbearable inequality between the Northern border-states of the European Union[228]. It is a reality, that although the Dublin System is standing long before the past 7 years, over the course of this time it has been significantly challenged over the fact that the migration and refugee flaws have been dramatically increased[229]. Therefore, the border member states and especially Greece and Italy are the ones that are obliged to deal with the door-keeping of the Union's borders.[230]

As it has been already analyzed in this chapter, the principle of mutual trust, that runs through the Dublin Regulation, has been predominantly targeted by both the ECHR and the CJEU. Looking back at the case law, it is useful to observe that, many cases have been strategically litigated before the two Courts, in order to specifically achieve this major change to the Dublin System[231]. The *MSS and the NS* cases are found at the center of an enormously significant caseload that effectively argues against the mutual trust principle of the Dublin Regulation. At the center of this strategically litigated line of cases, Greece is found to be the weakest point of the Dublin System. Greece represented

[228] Dalakoglou, Dimitris. "Europe's last frontier: The spatialities of the refugee crisis." City 20, no. 2 (April 2016): 180-185. Academic Search Complete, EBSCOhost (accessed November 13, 2016).
[229] Bajekal, Naina. "Europe's New Border Crisis." Time 186, no. 7 (August 24, 2015): 48-51. Academic Search Complete, EBSCOhost (accessed November 13, 2016).
[230] Battjes, Hemme, and Evelien Brouwer. "The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?." Review Of European Administrative Law 8, no. 2 (July 2015): 183-214. Academic Search Complete, EBSCOhost (accessed October 9, 2016). And Minos Mouzourakis, ''We Need to Talk about Dublin' – Responsibility under the Dublin System as a Blockage to Asylum Burden-Sharing in the European Union' (December 2014) Refugee Studies Centre Working Paper No. 105
[231] Papataxiarchis, Evthymios. "Being 'there': At the front line of the 'European refugee crisis' - part 2." Anthropology Today 32, no. 3 (June 2016): 3-7. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

the full reflection of the Dublin's vagueness, unbalance and disproportional allocation of responsibility.

Additionally, the rethinking of the mutual trust principle, had (as this analysis has shown) a tremendous impact on the interpretation of the discretionary clauses of the Dublin Regulation in its 2013 recast. Discretionary clauses and the way they were interpreted by the two Courts, have, by consequence, a tremendous impact on the decisions a member state can make, while implementing the Dublin Regulation. Although discretionary, these clauses ended up being more of an obligation for all member states[232]. This is because, the reframing of the discretionary clauses in the 2013 recast was envisaged as a possible and practical solution to the deficiencies of the Dublin System (mostly found in the EU Southern-border countries).

The European Commission and the member states, baring the political cost of their unwilling and conservative internal politics, have chosen to prefer short-term and costly solutions, when it comes the European Migration and Asylum Policy, in order to confront any problems, instead of a more effective and radical approach[233]. To this conclusion, Greece was the perfect member state to blame, something that was also supported by the continuous judgments delivered by both the ECHR and the CJEU.

Short-term solutions are preferred because they usually have immediate answers to imminent problems. The Dublin System crisis is not an exception to this rule. Following the *MSS and NS* judgements, a suspension of transfers under the Dublin Regulation was put in place for Greece. Starting from April 2011, after the report of the

[232] "From eurocrisis to asylum and migration crisis: Some legal and institutional considerations about the EU's current struggles." Common Market Law Review, December 2015., 1437, Publisher Provided Full Text Searching File, EBSCOhost (accessed November 13, 2016).
[233]Chou, Meng-Hsuan. "The European Security Agenda and the 'External Dimension' of EU Asylum and Migration Cooperation." Perspectives On European Politics & Society 10, no. 4 (December 2009): 541-559. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

French Socialist Member of the European Parliament Silvie Gilliaum[234], all member states were advised to refrain from implementing the Dublin Regulation and stop calling Greece to take back applicants who have entered the EU territory through the Greek borders. This procedure was followed by the judgments of the ECHR in December 2011 with the MSS case.

For Greece, guarding its borders is an objective challenge. No country with the geological characteristics of Greece can seal and protect effectively its borders without using violent means in order to discourage any trespassing. Besides, after the suspension of transfers under the Dublin regulation from other European countries to Greece, this has created a pull factor. In more practical terms, starting from 2011 (which is long before the mass influx of mainly Syrian refugees), Greece became the desired entrance point of the European borders, since individuals could easily traffic themselves to other European countries and these countries could not return them to Greece.

Apart from the general suspension of transfers to Greece casting some serious doubts upon the stability of the Dublin System, under the current mass influx situation many countries have unilaterally decided to halt the transfers under the Dublin Regulation to several European countries. For example, Sweden has suspended transfers of asylum seekers to Hungary[235]. Same is the case with Finland. Also national courts in Austria, Belgium, Germany, Denmark, France, Luxemburg and Norway have also issued judgements in favor of the suspension of transfers of asylum seekers under the Dublin Regulation to Hungary, especially for vulnerable cases[236]. At the same time, Italy, as

[234] Supra 230
[235] Kurowska, Xymena, and Patryk Pawlak. The politics of European security policies. n.p.: London : Routledge, 2012, n.d. CEU Library Catalogue, EBSCOhost (accessed November 13, 2016).
[236] Krumm, Thomas. "The EU-Turkey refugee deal of autumn 2015 as a two-level game." Alternatives: Turkish Journal Of International Relations 14, no. 4 (Winter2015 2015): 20-36. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

well as Greece, as another major entrance point of the European borders was also exempted from any possible transfers under the Dublin Regulation due to the high number of newly arrived migrants and asylum seekers that the country is already hosting[237]. Besides, this was the central idea of the Relocation procedure. The idea was to halt all "Dublin" transfers to Italy and Greece (for Greece that was already the case) and relocate asylum seekers from these two countries to other EU member states on the basis of a quota system. Apart from Hungary, the Italian Council of State has also decided to suspend all temporarily all "Dublin" transfers to Bulgaria as well due to potential risk of inhuman and degrading treatment.[238]

From the above mentioned facts, this analysis reached to the conclusion that what started with Greece, has now become a contagious reality for the entire EU's perception of the Union's Migration and Asylum Policy[239]. Although Greece was never acquainted sufficiently to respond to the minimum of the expectations that run out of the EU legislation, it was proven to be the easy target of a well litigated strategy of cases that practically marginalized Greece from the rest of the Schengen area countries[240]. But, although the problem was temporarily solved with the suspension of the "Dublin" transfers to Greece, the EU complex never gave a second though on which fundamentally ill elements of the Dublin System were obviously reflected in the Greek case. Now, reality has overcome political inefficiency and has created an overwhelming political deadlock[241]. Despite the evident character and impact of this deadlock, the

[237] Supra 234
[238]ITALY: COUNCIL OF STATE SUSPENDS TRANSFERS TO HUNGARY AND BULGARIA, AIDA, (29/09/16): http://www.asylumineurope.org/news/29-09-2016/italy-council-state-suspends-transfers-hungary-and-bulgaria
[239] Innes, Alexandria J. "The Never-Ending Journey? Exclusive Jurisdictions and Migrant Mobility in Europe." Journal Of Contemporary European Studies 23, no. 4 (December 2015): 500-513. Business Source Premier, EBSCOhost (accessed November 13, 2016).
[240] Andersson, Ruben. "Europe's failed 'fight' against irregular migration: ethnographic notes on a counterproductive industry." Journal Of Ethnic & Migration Studies 42, no. 7 (June 2016): 1055-1075. Academic Search Complete, EBSCOhost (accessed November 13, 2016).
[241] Funk, Marco. "Trickery in Dublin's shadow." Forced Migration Review no. 51 (January 2016): 19-20. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

Dublin System keeps falling apart via unilateral judiciary or political decisions, via the re-endorsement of border controls and the suspension of the Schengen Treaty and via the unwillingness of the majority of the European countries to solve a problem that has not (not yet at least) reached their "back yard".

Nevertheless, under the current circumstances, the short-term solution that the EU uses in order to confront the mass influx is the EU – Turkey deal which was signed in March 2016 between the two parties[242]. The results of this agreement are an ongoing debate.

4. The importance of strategic litigation in changing the Dublin System with a special focus on Greece.

This chapter aims to provide an analysis of the role of strategic litigation. It is really important, after viewing the structure of the Dublin Regulation, its historical progress and the significant impact of the case-law of the ECHR and the CJEU to the Dublin System to understand the dynamic of strategic litigation. As a tool strategic litigation has been used in "Dublin cases" and has achieved the major breakthrough to the Dublin's mutual trust principle.

Additionally, this chapter aims to highlight the current situation of the potential human rights violations that migrants and asylum seekers are facing in Greece. After the

[242] Mallia, Patricia. "Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation." Refugee Survey Quarterly 30, no. 3 (September 2011): 107. Publisher Provided Full Text Searching File, EBSCOhost (accessed November 13, 2016).

complete closure of the Greek – F.Y.R.O. Macedonian borders and after the enforcement of the EU – Turkey agreement many concerns have been raised for current and future high risk of massive human rights violations as the Greek authorities continue to reinforce the EU decisions and the EU – Turkey agreement[243].

Finally, after reviewing what strategic litigation is and what it can possibly do, and after understanding the highly fragile situation that is currently happening in Greece, this analysis will present the opinions of important Greek strategic litigators and human rights activists, on how the understand the line of cases have already been brought against Greece before the ECHR and the CJEU and what could possibly be the role of strategic litigation standing in front of this massive potential human rights violations.

4.1. What is strategic litiagation and why it is important for the reform of the European Migration and Asylum Policy?

Strategic litigation or else impact litigation or public interest litigation is the procedure of the ongoing monitoring of potential human rights violations that can provide the basis for identifying cases that should be litigated as a part of an overall strategy of the justice sector reform. In other words, it can be characterized as a judicial activism, since the goal is to achieve practical changes, not through politics or legal amendments but through the judicial system[244]. For this reason, the success of a litigation

[243] Toktas, Sule, and Hande Selimoglu. "Smuggling and Trafficking in Turkey: An Analysis of EU–Turkey Cooperation in Combating Transnational Organized Crime." Journal Of Balkan & Near Eastern Studies 14, no. 1 (March 2012): 135-150. Academic Search Complete, EBSCOhost (accessed November 13, 2016).
[244] Galanter, Marc. "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change." Law & Society Review, 1974., 95, JSTOR Journals, EBSCOhost (accessed September 28, 2016)

strategy is a combination of the rightfully chosen cases, placed in the right time before the right litigators, who will cease the opportunity and turn to the correct judicial authority basing this act on an established litigation strategy that is backed up by a solid argumentative pre-existing line of cases.

Although this is not an absolute, strategic litigation has the power to bring more light to certain issues, by bringing them to the surface and provoking publicity[245]. Unfortunately, no one can verify that intensive legal efforts to litigate a legislative change over the years will have the needed attention from the media, or that they will motivate and inspire more the society. In most occasions, this is not the case. On the other hand, strategic litigation has a more direct and pressing impact on politicians. Especially when it comes to international courts, all governments have the obligation to respond to their decisions. Also, strategic litigation can operate as a tool that will provoke the right responses where the already established mechanisms seem not to be adequate.

Practically, a strategic litigation is an argumentative line of a series of similar cases that are distributed in time and try to achieve a long term goal. This strategy, is by necessity, built upon individual cases. Practically, when it comes to strategic litigation, an individual is told that they can bring their claim before an international court. Based on this claim it is possible to achieve something much bigger that will influence also the lives of others[246]. Strategic litigation represents the meticulous work done by strategic litigators.

The repeated character of the cases has to do with the fact that strategic litigation, is a plan that targets the overturn of an ill-founded legal issue. Taking this under

[245] Buchinger, Kerstin, and Astrid Steinkellner. "Litigation before the European Court of Human Rights and Domestic Implementation: Does the European Convention Promote the Rights of Immigrants and Asylum Seekers?." European Public Law 16, no. 3 (September 2010): 419-435. Business Source Premier, EBSCOhost (accessed September 28, 2016).
[246] Supra no 244

consideration, it is reasonable to understand that under one litigation strategy fall multiple cases that are similar in terms of facts, legal systems and expected outcomes[247]. Their aim is to a pursue long – term interest. This way they have the opportunity to gain deep knowledge upon a legal issue. In this prolonged procedure, the role of the strategic litigators is to anticipate. This anticipation focuses both on the efforts that the litigator needs to do in order to locate and promote the right cases that fit into a specific argumentative line, but also a strategic litigator needs to anticipate the results of its efforts. For that reason, when a litigation strategy is planned, relevant cases are assessed one by one in order to be able to evaluate the argumentative line that the case offers and to what extend that fits to the general argumentative line of the litigation strategy. One of the aims of strategic litigation is to address core legal issues and try to amend them through the judicial system. Unfortunately, in most cases the existing rules tend to help and serve the dominant interests. For strategic litigators this is an additional obstacle that they need to observe and get prepared to face adequately.

It is critical to establish that a strategic litigator could be a single lawyer, a Non-Governmental Organization, an International Organization or even the government. Strategic litigation is a tool useful for both national and international use, in regional and international courts. For this to happen, strategic litigators, are lawyers who, on an everyday basis, have to look and research for the appropriate case load that will adequately address the strategy of the litigated goal[248]. These lawyers, in order to achieve this long-term shot, they have to be innovative and practically think outside the box. For that to happen, it is more than evident, that some of the indispensable necessities to build a litigation strategy is funding independence, trained lawyers and field experts that are

[247] Tolley, , Howard. "Interest Group Litigation to Enforce Human Rights." Political Science Quarterly, 1990., 617, JSTOR Journals, EBSCOhost (accessed September 28, 2016).
[248] Van Schaack, Beth. "With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change [article]." Vanderbilt Law Review no. 6 (2004): 2305. HeinOnline, EBSCOhost (accessed September 28, 2016).

capable to identify the strengths and the weaknesses of a case.For a strategic litigator, a part of the litigation "game" is lobbying in order to influence to the biggest way possible the wanted outcome[249]. Therefore, it is to expected that strategic litigators are more likely to be interested in their "bargaining reputation", they have better access to the needed expertise based on each case.

Apart from their individual work and after they have identified a suitable case, lawyers are encouraged to cooperate with local or international NGOs, with country experts, asked for support from international forums, scientists or even the civil society in general[250]. Established cooperation and communication among the litigators and the rest of their surrounding society, as well as, the international scheme, is considered essential for a strategy to be successful. During the overall design of a litigation strategy, it is needed for the litigators, but also for the foundations and the future of the campaign its self to conduct as many communications as possible and to collect as many information as possible for reliable sources[251].

One of the main concerns when it comes to the planning of the strategy, is this fine line between the overall scope of the strategy (what is foreseen to be achieved) and the individual interest of the person whose case is brought before the judicial authorities[252]. It cannot be unseen that in many occasions a litigation strategic means that some cases are taken over by litigators while they have small chances of a fruitful outcome for the individual applicant, simply because they serve the evolution of the litigation strategy itself. Although the individual's interests are at stake, it is necessary, in order to build an

[249] Cavallaro, James L., and Stephanie Erin Brewer. "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court." The American Journal of International Law, 2008., 768, JSTOR Journals, EBSCOhost (accessed September 28, 2016).
[250] Supra no 248
[251] Scott, Matthew. "A role for strategic litigation." Forced Migration Review no. 49 (May 2015): 47-48. Academic Search Complete, EBSCOhost (accessed September 28, 2016).
[252] Farell Mat. "A Deficit of Protection – Economic, Social and Cultural Rights in Ireland. The role of litigation: Giant Leaps and Baby steps." Amnesty International Conference (2012) (accessed September 28, 2016)

argumentative line, to bring before the judiciary authorities cases that are going to be "lost".[253] Unfortunately, this a "trial and error" tactic that is used by strategic litigators in order to procedurally force, over time, the judiciary to create and evolve a narrative. The main cost in this situation is the individual's interest which can be sacrificed in order to serve a higher goal.

Apart from that, litigation strategies with the scope of overturning a legal practice, are not usually welcomed, since it is believed that in most occasions such an overturn of practice will act as the "floodgate" of continuous changes or it will bring a massive amount of cases before National or International courts. Therefore, this makes (in many cases) the Courts really reluctant on whether they are willing to proceed with their activist role or if they need to adhere to the notion of the state undoubtable state's sovereignty.

When it comes to the Dublin cases several elements can be observed. It is indeed hard to push for a strategic litigation agenda, especially within the European Union. It is understandable that it took almost four decades for the European Community to establish a common space of freedom of movement for its own citizens[254]. Nevertheless, it is clear that for all states, they are more than reluctant to permit anything that could compromise their sovereignty and their autonomy. Uncontrolled arrivals of foreigners and the control of the national borders remain at the core of the national agenda, and are always considered as immense problems for the sovereign state. Therefore, it is almost impossible to say that in such an atmosphere, strategic litigation has the absolute power

[253] Supra no 252
[254] UNHCR, "Strategic Litigation and International Refugee protection: Trends and Best Practices.", Second Annual Roundtable, Geneva June 2014, (accessed September 28, 2016).

to address all potential risks of human rights violations caused by the implementation of EU policy on migration and asylum on a national level[255].

When we are looking at "Dublin" cases before the European Court of Human Rights or the Court of Justice of the European Union, we often forget that no matter the fraction of the legal system that these cases touch, or no matter the reason, these cases always reside to the very notion of state sovereignty and the feeling of the sovereign state that loses the ground beneath its feet[256].

When we are looking at the countries that are brought before the two Courts, it is important to observe that there is a separation between long-standing immigration countries and countries for which receiving migration flaws is more of a recent story. Countries like Austria, Germany, France and the UK are mostly immigration countries when countries like Italy, Greece and Bulgaria were mostly emigration countries.[257] A fact that has been drastically changed over the course of the current mass refugee influx.[258] What is also remarkable to observe is that regardless of the past experience or inexperience all states seem to confront with great sensitivity issues concerning questions of state sovereignty and the regulation of entry and stay of immigrants and asylum seekers.[259]

Unfortunately, especially now, and especially when we are talking about the sensitive domain of migration, it is even harder to build up a solid litigation strategy. Recently, in Europe, what stands out is a right wing rhetoric, a nationalistic approach, a

[255] Guttmann, Egon. "The Refugee in Litigation." The International and Comparative Law Quarterly, 1959., 730, JSTOR Journals, EBSCOhost (accessed September 28, 2016).
[256] Strategic Litigation, European Council on Refugees and Exiles: http://www.ecre.org/our-work/strategic-litigation/
[257] Strategic Litigation for Refugee Rights Empowerment - See more at: http://asylumaccess.org/strategic-litigation-refugee-rights-empowerment/#sthash.5oJgETSO.dpufh
[258] In the midst of hostile reforms, strategic litigation protects asylum seekers' rights, http://www.asylumaid.org.uk/midst-hostile-reforms-strategic-litigation-protects-asylum-seekers-rights/
[259] Dia Anagnostou, 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-Related Policies', The International Journal of Human Rights, 2010.

Euroscepticism problematic and a major economic and social instability, reinforced by the treat of terror and the neighboring battled and unstable countries[260]. Besides, for many years, the expansion of the European Union was considered as a solid policy for the future and current protection of the European Union, Ironically, this is not the case, and even more ironically this is especially proven in the case of Greece.

While considering this, it is important to notice that under the ECHR there is no clear right that refers to the right to asylum. The case is the same also for the Protocols. Over the last decade, it is easy to observe that the workload of the ECHR with cases that are relevant to the EU' Migration and Asylum policy have been geometrically multiplied. The reason is that apart from the vagueness and the ill-founded nature of the currently existent designed system, the unprecedented number of arrivals of migrants and asylum seekers (only during the last 4 years). The increased needs made the EU's System exposed to the dangers of its own vagueness. However, this might be considered an interdependent phenomenon: does the lack of cases result in an absence of actors and institutions supportive of human rights litigation, or is it rather the other way round?[261]

It is easy to observe that several countries have a specific "agenda" of cases that are brought against them before the ECHR and the CJEU. This is because of standard deficiencies that specific national systems have. Therefore, in these cases strategic litigation can be observed[262]. The aim is to tackle with an articulated plan to target through the European judicial system a legal and a practical change. The freedom that the member states used to appreciate on controlling the entrance and the stay of aliens

[260] Engage in strategic litigation, http://www.endvawnow.org/en/articles/948-engage-in-strategic-litigation.html
[261] Psychogiopoulou, Evangelia. "Does Compliance with the Jurisprudence of the European Court of Human Rights Improve State Treatment of Migrants and Asylum Seekers? A Critical Appraisal of Aliens' Rights in Greece." Journal Of International Migration & Integration 16, no. 3 (August 2015): 819. Publisher Provided Full Text Searching File, EBSCOhost (accessed October 4, 2016)
[262] "European Courts and The Rights of Migrants and Asylum Seekers in Greece" Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System, Oñati International Series in Law and Society, (2014)

in their territories has been deteriorated mostly within the context of Europe's economic and political integration[263]. Specifically, what is important for the continuation of the analysis of this chapter is how strategic litigation has affected Greece and how it can affect the country (and the entire Dublin System) in the future. The line of strategic litigated cases before the ECHR against Greece have been already analyzed in the previous chapters.

4.2. The current situation in Greece reflects all possible reasons why the Dublin System should be replaced.

This analysis collects and demonstrates with facts the current situation that the practical ring-fencing of Greece has as a result. Two crises have created unprecedented pressure on Greek reception and protection systems: Greece is going through a major economic crisis which began in 2008[264]. The economy has shrunk 25%, the unemployment rate is steadily increasing from 27% and successive governments have enforced severe austerity measures and cuts in public spending[265]. The capacity of the Greek State to implement national and EU Law provisions is severely hindered, both in terms of financial resources but also due to the limited institutional capacity.

Simultaneously, Greece has witnessed an unprecedented wave of mixed migration flows, which are rapidly increasing, where the numbers of new arrivals in need of

[263] Project report prepared for the JURISTRAS project funded by the European Commission, DG Research, "Strasbourg Court Jurisprudence and Human Rights in Austria: An overview of Litigation, Implementation and Domestic Reform." March 2007 : http://www.echr.coe.int/LibraryDocs/JURISTRAS-2007-EN-Austria.pdf

[264] Carastathis, Anna. "the politics of austerity and the affective economy of hostility: racialised gendered violence and crises of belonging in Greece." Feminist Review 109, no. 1 (February 2015): 73-95. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

[265] Borg-Barthet, Justin, and Carole Lyons. "The European Union Migration Crisis." Edinburgh Law Review 20, no. 2 (May 2016): 230-235. Academic Search Complete, EBSCOhost (accessed November 13, 2016).

international protection in the first 6 months of 2015 are six times higher than the respective numbers of 2014[266].

In 2015, Greece received 851,319 refugees and migrants, the vast majority of which crossed from Turkey by boat. Though irregular border crossings from Turkey to the Greek islands have taken place in large numbers in the last two years, 2015 saw a dramatic increase in the number of persons arriving on the Greek shores, or attempting on unseaworthy dinghies, with 91% of the arrivals coming from the world's top-ten refugee producing countries.[267] By year end 38% of arrivals were from Syria, 26% from Iraq, and 24% from Afghanistan, with 55% of those arriving in 2015 being women and children, among which there are a number of people with special needs, including survivors of shipwrecks. Upon conclusion of the administrative processes in the islands, the vast majority of people arriving passed through Greece to other EU Member States.

Since the 18th November 2015, authorities in the Former Yugoslavian Republic of Macedonia (FYROM) prevented asylum seekers from certain nationalities (excluding Iraqis, Syrians and Afghans) from crossing the Greek-FYROM border, whereas in February 2016, the borders with FYROM were definitely shut. This left more than 50,000 persons "stranded" in Greece, remaining in temporary reception facilities (camps), with poor conditions, and limited access to supportive legal and psychosocial assistance[268].

On 14 September 2015, the Council of the EU adopted the Decision to relocate 40,000 persons in need of international protection from Italy and Greece, of which 16,000 from Greece alone. On 22 September 2015, the Council adopted the Decision to

[266] Supra 265
[267] Refugees/Migrants Emergency Response – Mediterranean: http://data.unhcr.org/mediterranean/country.php?id=83
[268] Supra 268

relocate 120,000 more persons from Italy and Greece. According to this Decision, 50,400 persons out of these 120,000 will be relocated from Greece[269]. The combination of the two Council Decisions leads us to a total of 66,400 persons to be relocated from Greece to other Member States over a period of 2 years. These persons, eligible to relocation, will need to submit an asylum application in Greece. This procedure has seen delays due to EU Member States' slow opening of quotas, and complex individualized cases.

Furthermore, the problems identified with regards to administrative detention, such as (i) the use of detention (legal grounds), characterized by a lack of an individual assessment on the elements of necessity and proportionality, (ii) the non-examination of alternatives to detention, (iii) the lack in procedural guarantees (i.e. access to free legal aid and information) within detention and (iv) the substandard detention conditions, including the lack of appropriate services (i.e. medical care/ screening), the lack of reception facilities and informal push backs continue to be part of the operational context in Greece vis-à-vis mixed migration flows and asylum management[270].

The number of persons granted status has increased since the operationalization of the new asylum system has greatly increased, and is expected to further increase in 2017 following increase of registration capacity through the operation of more Regional Asylum Offices; this will bring a greater need for legal assistance throughout the asylum procedure; furthermore, integration perspectives continue to be very limited, if not inexistent.

Following 18 March EU summit decisions and regulations applied in the border between Greece and the Former Yugoslav Republic of Macedonia, the provisions agreed

[269] Supra 268
[270] Supra no 268

between the EU and Turkey to stem the large-scale arrival of refugees and migrants to Greece and beyond into Europe came into effect[271]. The Greek authorities transferred to the mainland refugees and migrants who had arrived on the islands before the 20th of March, and identified some 30 military sites and other establishments in various locations ranging from Athens/ Attica, central Greece mainland, and the Northern region of Macedonia to host an estimated number of approximately 50,000 people currently remaining in the country[272].

Seven months after the European Union (EU) and Turkey launched a plan to limit the flow of persons of concern to Europe via the Mediterranean Sea, approximately 60,000 still remain in Greece. The EU-Turkey arrangement facilitates the return of "irregular migrants" crossing the Mediterranean from Turkey who arrived in Greece after March 20, 2016 as well as the EU resettlement of one Syrian refugee staying in Turkey for every Syrian readmitted by Turkey from the Greek islands. The returns do not necessarily exclude asylum seekers and refugees, as the EU has reclassified Turkey as a safe third country where asylum seekers can apply for protection. Legal onward movement of people aiming to reach other EU countries is no longer a viable option due to closed borders and restrictive asylum policies in Greece's neighboring countries; thus, Greek authorities are working to accommodate and process individuals stranded in the country.

On the mainland, 36,382 people reside in government sanction sites of varying quality, with many ill-equipped to host populations and lacking in key services.[273] Formal sites are scattered across the country and are structured to accommodate between

[271] EU Migration Crisis Update - May 2016: http://www.msf.org/en/article/eu-migration-crisis-update-may-2016
[272] Supra no 268
[273] Updated Site profiles as of October 2016; UNHCR Greece; October 17, 2016

200 and 4,000 persons[274]. On the Greek islands, the five "hotspots" originally intended to expedite screening and registering new arrivals have been converted into closed detention centers to hold individuals who entered Greece after March 20. Conditions in the detention centers are poor, and many are overcrowded despite a slowdown in arrivals to the islands. At present, nearly 14,000 people are residing in these centers on the islands and it is expected that many of them will eventually be resettled to the mainland[275].

The availability of authoritative information continues to be a significant gap. As people of concern were moved from the informal sites, they were often unaware of exactly where they would be going and what services they would find. This continues to be the case as some of these people are being resettled into apartments and other accommodation facilities, while others are being moved and shifted to new sites, either because the previous ones were considered unfit or because of tensions arising between different communities. At present, there are approximately 9,000 regirstered asylum seekers residing in apartments with limited access to both information and the full range of services available in camps[276].

Additionally, asylum seekers continue to struggle with accessing the asylum processing system. All of this exacerbates the stress and uncertainty experienced by all persons of concern and contributes to the broad needs for establishing appropriate SGBV prevention and response programming, as well as mental health and psychological stress support systems because they do not exist the extend needed. Further, given their official "status" as a refugee or migrant, individuals may not seek care or support for protection risks and violations (for example: human trafficking or sexual or gender-based violence).

[274] What are the main humanitarian challenges in Greece?: https://www.rescue.org/country/greece#what-are-the-main-humanitarian-challenges-in-greece
[275] Supra no 275
[276] Supra no 268

During 2016, 87% of the arrivals came from the world's top-ten refugee producing countries[277]. As of October, the majority of People of Concern came from Syria (47%)[278], followed by Afghanistan (25%) and Iraq (15%). Based on arrivals from January 2016, the demographic of the arrivals stands at 37% children, 21% women and 42% men. Of particular concern is the increasing numbers of unaccompanied children (UAC) and other vulnerable families and children who are arriving on the islands[279].

Whilst in 2016 the number of refugees and migrants arriving by sea to Greece has not reached the levels of those in 2015 (168,457 arrivals to date compared to over 856,700 arrivals in 2015), the situation for people of concern has been exacerbated by the closure of the Greece-FYROM border and the implementation of the EU Turkey agreement. As of 24th October 2016, there are 60,910[280] people stranded in Greece; this population includes families and children. Influxes of mixed migration flows are expected to continue to enter Greece in 2017, while PoCs also continue to seek to cross borders to migrate further North in Europe. Further changes to the political nature of the emergency, developments at asylum and migration policy level in Greece and in the EU, coupled with evolvements in countries of origin of PoCs, such as Syria, Iraq, Afghanistan and Pakistan, will remain, resulting in fluctuating numbers of PoCs that are difficult to anticipate. In addition, PoCs in Greece continue to seek to exit and cross into neighbouring countries to reach destinations in Northern Europe or seek to return to Turkey and face high risks associated with unsafe migration[281].

[277] Supra no 275
[278] All numbers from UNHCR portal on the refugee response http://data.unhcr.org/mediterranean/country.php?id=83 (13 OCT 2016 figures)
[279] Supra no 279
[280] Supra no 279
[281] Supra no 279

The crisis continues to overwhelm the Greek State, which is already suffering from a severe economic crisis. To date there is still no overarching refugee response strategy from the Greek Government and service provision and responsibility related to refugees cut across multiple line ministries and is not clearly defined[282]. The Greek economic and political crisis has generated a set of operational and protection challenges of a scale and scope never experienced in Greece, and now further compounded by a largely static refugee and migrant population. Based on the challenges the Government of Greece is facing in the implementation of asylum, family reunification, relocation and assisted voluntary return procedures, there will remain a large number of PoC (People of Concern) in Greece who will require ongoing support throughout 2017. Child protection specific interventions will remain essential considering that some 37% of the population of concern are children. The scale of need has required a strong protection-oriented response based on cooperation not only with the authorities but also between NGOs, UN and volunteer actors[283].

4.3. Strategic litigation in Greece and why it would be important especially under the current circumstances.

Through the entire thesis, it has been demonstrated that most of the amendments that have occurred and have transformed the Dublin System reflect the result of the adjustment of the European Union to the judgments of the European Courts for Human Rights and of the Court of Justice of the European Union. These cases have been successfully litigated based on a strategy before both of the Courts. What was of a great

[282] Supra no 275
[283] Surpa no 268

interest for this analysis is, while observing that most landmark "Dublin" cases target Greece, and while Greece bears the hardest share of the burden of the "refugee crisis", it would of tremendous importance to research the opinions of Greek activists and strategic litigators on this matter.

For this reason, and for this section of the analysis of this chapter, the results of this research will be concluded. The research conducted for this analysis included 8 personal interviews in the form of an open-response questionnaire with prominent Greek human rights defenders and strategic litigators.

At first, through this research, an effort is made in order to understand to what extend Greek strategic litigators and prominent civil society actors understand the impact that litigation strategies have targeted Greece before the ECHR and the CJEU and to what extend this reality has produced significant changes to the current Dublin System. All participants recognize that in general, strategic litigation has achieved significant changes in the law and the practice of the Dublin System, affecting all the stages of its reforms and raising public awareness throughout the European Union. Surprisingly, this research concluded that it is not a general belief that it is easy to observe that several countries have a specific "agenda" of cases that are brought against them before the ECHR and the CJEU because of standard deficiencies that specific national systems have. In more detail the research has proven that although, to a large extent, Greek strategic litigators do not believe that it is currently highly relevant for the Courts to receive cases targeting one specific country. on the contrary, the participants from their experience are arguing that, under the current circumstances it is less about an "agenda" of cases against one single state and it is more about an "agenda" of cases surrounding specific types of violations that occur under the implementation of the Dublin System (e.g. Article 3, ECHR violations).

Continuing the research, the participants were asked to respond according to their experience, to what extent they believe that strategic litigation on cases can have a direct impact on the reforms of the Dublin Regulation. Surprisingly, the outcome was divided. On the one hand the research concluded that experience shows that ECHR decisions can affect the EU legislation. The most profound example is the MSS case. Still there are a lot more to litigate like for example the definition of family members that enter the obligatory family reunification scheme. Also, especially for the Dublin System the MSS cases represents the perfect proof of how the case of the ECHR can affect EU legislation. The MSS case (2011) had an impact on Dublin System. If it wasn't there, Dublin would have applied for Greece. So, there has been a direct impact and there could be further impact. Certainly, as it demonstrated that the Dublin system is flawed, well before it was effectively abandoned in the past year with more than one million refugees traveling in daylight through so many European countries to be accepted in Northern countries. Additionally, it was concluded that strategic litigation has been an effective response, in the past, answering the Dublin's System deficiencies and can have a prolonged effect. This is because monitoring on Decisions (cases won, like the M.S.S.) can block for long, in practice, the enforcement of some of its provisions and thus discredit the regulation's "image". This is also the case because even inadmissibility decisions (like Al Ahmad v. Greece and Sweden) can expose inefficiencies (and the ECtHR's stance as well, which is evidently influenced by politics as regards refugees). On the antipode of this perception, the research identified the opinion that strategic litigation cannot be as effective in amending the inefficiencies of the Dublin System because there is no such political will at the moment. On the contrary, new systems are created, such as the relocation, which threaten the proper enactment of the existing Dublin regulation, giving more power and margin of appreciation to the member states to accept refugees or not.

One of the first aims of this research is to understand to what extend strategic litigation is or was a cultivated practice in Greece. In more detail, as it was reflected in the previous chapters, Greece is a country which is found at the center of the "blame game" of the mass influx situation, a country which had received and continues to receives many convictions by the ECHR and the CJEU for "Dublin" related cases and the country which is bearing the political and practical cost of the delivery on behalf of the entire European Union the EU – Turkey Agreement. An agreement which has raised immense concerns regarding its low respect for fundamental rights and its potential future high risks of multiple human rights violations cannot be overseen, since the other half of the agreement, Turkey, is far from a safe-third country. Recognizing the severity of the situation and the well-established case against Greece, the participants were requested to reflect from their professional experience, if they believe that in Greece, strategic litigation on asylum cases before the ECHR is extensively developed.

The research has shown the collective realization of the majority if the participants that strategic litigation is not developed in Greece concerning asylum cases. Elaborating this statement, it has been shown that strategic litigation concerning asylum cases is a phenomenon that was developed in Greece, only during the last five years, following mainly, the MSS case. To the former situation of no litigation strategies have contributed the general situation of the country which is deeply affected by the economic crisis, the small number of interested strategic litigators and the fact that the majority of lawyers or other potential strategic litigators lack of the essential training. In addition, to this situation contributed the fact that any available funding was inefficient, the relevant NGOs were (and still are) overloaded with irrelevant bureaucratic issues and there was a very low public interest concerning asylum issues and the general impact of the EU Migration and Asylum Policy.

Following the MSS case and under the light of the current situation of the country, as it is established, strategic litigation made its appearance. To the impression of the author, Greek strategic litigators should be interested into finding cases that could effectively overturn through the judicial system the inadequacy of the Dublin System and the immense apparent danger of mass human rights violations, because all of the facts are available to them to a great extent. Unfortunately, this analysis reaches to the conclusion that there is a few number of strategic litigators and civil society actors who are actively interested into using strategic litigation in order to tackle the inconsistencies of the Dublin System and respond effectively to the current situation. On the contrary very few are interested into tackling specific aspects of it (detention, vulnerability, living conditions). It recently has become much more rich because of pending cases (children, women alone with children, disabled refugees, lgbt refugees, freedom of movement after recognition a.o.). But most of them are addressing issues of detonation and detention conditions, establishing their arguments upon the already and long standing case – law of the two Courts concerning these two issues.

Continuing the research, the participants were asked if, according to their opinion, the role of strategic litigators working in Greece, is of tremendous importance, concerning the exposure of possible human rights violations under the current circumstances of the mass influx situation. A collective recognition of the fact that strategic litigation's role is pivotal was concluded by this research. In more details, strategic litigation could be used in order to expose and to fight detention, inadequate reception procedures, mostly inefficient accommodation, lengthy asylum procedures and the potential risk of human rights violations that will occur while implementing the EU - Turkey deal. Unfortunately, what the participants unanimously recognized is that for strategic litigation to be successful in this field there has to be collaboration and

communication between different actors, the government, strategic litigators, civil society actors and the other European actors, which is absolutely absent at the moment. Apart from the importance of strategic litigation its role is limited by the current legal framework. Strategic litigation can be surpassed new legal regulations. In addition to that its role can be envisaged as primordial as Greece refuses to reform itself unless it is faced with extensive and sustained naming and shaming and with paying large sums of money as compensation.

Proceeding with more detailed issues, the participants were asked to name what are the greatest challenges and risks of strategic litigation of asylum cases. The participants reflected that the main challenges are to find funding or other financial resources that would provide prosperity for the litigation strategy as well as independence from any potential pressure. Also, and especially under the current circumstances of continuous moving of populations it is hard to keep communication with the applicants and provide them with the necessary interpretation services. Additionally, as a major challenge of strategic litigation when targeting the radical change of the Dublin System, was the fact that it is really hard to expect a practical change, since the current situation is a result of political willingness or unwillingness and reflects a predominant political compromise no matter the consequences.

Although almost all participants recognize that strategic litigation can be a response to the difficult circumstances that asylum seekers are currently facing in Greece, they do also recognize the possible obstacles that these procedures embody. Apart from these major challenges, other problems have been identified as the political backlash that a potential litigation strategy could achieve, the danger that in the end there would be an expend of valuable resources on a case that may be difficult to win given the political set-up. Another issue named was the major danger that strategic litigators

face in order to identify the appropriate cases and attracting public awareness without risking the safety of the client, especially when this client is a member of a vulnerable group. To be more exact, it is hard to protect a client from the members of their community, since in most cases people are living piled up in camp sites all around Greece and at the same time far-right groups are continuously targeting clients whose case has received the interest of the media.

Conclusion

This thesis created an argumentative line between the Dublin's System past, its present and its future challenges. Concluding all observation, through the first chapter, the aim was to collect all necessary information in order to primarily follow and understand the historical evolution of the Dublin Regulation. As it was shown, in less than 25 years of existence the Dublin System has managed to change its form and shape multiple times according to the willingness or the unwillingness of all member states of the EU towards a collective European Asylum and Migration Policy. It has become evident that the Dublin Regulation has always been a polemic issue of European politics. Besides, through the legislative amendments, it can be observed that mainly, the Dublin Regulation and its amendments never had a proactive impact, rather than a more responsive approach to an already existing and continuously evolving problem.

The incapacity of the Dublin System to respond effectively to a series of inefficiencies was the result of its ill-founded nature. The main design and implementation principles of the Dublin System were primarily designed vaguely and in a short-term view of the importance of an EU Migration and Asylum Policy for the future

of the Union. Finally, it has been identified that due to all the above mentioned problematic characteristics of the Dublin System, the argument that the current mass influx situation is responsible for the failure of the Dublin System is a rather simplistic approach of the reality.

Through the second chapter it was achieved to continue this logical bond between the inconsistencies of the Dublin System (as they are described in the previous chapter) and their practical reflection in the implementation of the Regulation on the national level. As it has been evident through the case law that was examined, the vagueness of the Dublin Regulation, as well as, the unbalanced and disharmonized national perception of migration policy has caused major inconsistencies among all member states and have resulted a series of fundamental rights violations.

This chapter went on and reflected the case in a very specific way. The analysis follows a specific argument which starts with the fact that a line of cases of major importance have caused the fragmentation of the principle of mutual trust when implementing the Dublin Regulation. These cases, have Greece as the center of their facts and of their argumentative line as the weakest point of the Dublin System. Following this observation, this chapter reflected the strategically litigated attempts to project the formerly mentioned results against more European countries (mainly Hungary and Italy). But this goal was not achieved. It is clear that both Courts have not practically rejected the Dublin System. Both Courts with their judgments simply served the will of the European Union countries to treat Greece as the exemption to the undoubtable rule of the Dublin System. This is why short-term solution were advocated instead of a radical reform or replacement of the current European approach on Asylum and Migration Policy.

Through the analysis of the third chapter it was shown that the Dublin system can be characterized as disproportional since its primary is that the country that facilitated the entrance of one person pass the European borders would be the country responsible to examine the asylum application. This puts a practical burden in those Member States that are located in the border of the EU and especially to those countries which are geographically located close to region with many tensions, meaning Italy and Greece. Unfortunately, this disproportional function of the Dublin System creates a vicious circle of ineffectiveness. Simply, it is unreasonable to expect a single or two member states to confront with such a magnitude of arrivals and at the same time to implement and correspond to the expectations of the European legislation in terms of time limits, reception conditions, procedural guarantees and judicial effectiveness.

This is Article 80 of the Treaty of the Functioning of the European Union which calls for solidarity and the obligation of assistance among member states (this article was, actually, introduced during the travaux preparatoires of the Lisbon Treaty by the Greek Representatives and it was strongly advocated). Unfortunately, this hardcore situation is because of the fact that most EU countries are indifferent to the refugee crisis since refugees do not want to go there any way. A big number of EU countries have open far – right rhetoric policies expressed in their internal political life.

Contrary to all believes, people will keep on being on the move. The situation in Syria will not stop being horrible. So the flows do not seem to stop. On the contrary they will increase. And while the road through Greece will be closed, other smuggling paths will be invented and the result will be the fragmentation of the flows and the dispersion of its roots. Even so people will keep on having all the same destination, which is Western Europe.

Finally the analysis is completed in the fourth capter. This chapter primarily presented the "tool" of strategic litigation. Strategic litigation, in general acts like a tool. It seeks to achieve significant changes in the law (national or international), in the current practices or implementation of a legislation. It also targets the effective stimulation of the public awareness. In order for a litigation strategic to be created, the use of test cases is found to be of great importance.

Furthermore, this chapter aimed to present the current situation of migrants and asylum seekers in Greece after the closure of the "Balkan route" and after the EU - Turkey deal. The aim was to describe the living conditions, the numbers, the challenges and the mass risk of fundamental rights violations these people face in their everyday. This presented situation, is the result of the long-lived ill-founded Dublin System and the current political deadlock, as both of them have been presented in previous chapters.

Finally, a research conducted for the completion of this chapter aimed at representing the opinions of Greek strategic litigators and civil society actors. The main expectation was to understand to what extend these actors realize the impact that strategic litigation had on "Dublin" cases against Greece and towards a reform of the Dublin System. Additionally, it was expected to understand to what extend these actors believe that strategic litigation can respond effectively to the current situation of high risk of mass human rights violations of migrants and asylum seekers in Greece. Although no uniform opinion was formed, it was identified, that although Greece is found at the center of this "crisis", strategic litigators and civil society actors find themselves incapable of effectively responding to the presented challenges.

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