Europeanization and Globalization 1

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New Europe – Old Values?

Reform and Perseverance

Springer

Europeanization and Globalization

Volume 1

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ISSN 2366-0953 ISSN 2366-0961 (electronic)
Europeanization and Globalization
ISBN 978-3-319-02212-3 ISBN 978-3-319-02213-0 (eBook)
DOI 10.1007/978-3-319-02213-0

Library of Congress Control Number: 2015955147

Springer Cham Heidelberg New York Dordrecht London

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Foreword

Opatija Jean Monnet Interuniversity Centre of Excellence organized the third consecutive conference in the *Legal Culture in Transition series*. In 2013, it took place on 10–11 May, less than two months before the expected accession of Croatia to the European Union. This volume contains papers presented at the Conference, updated to match the state of affairs on 31 December 2014.

This book explores the reactions to Europeanization and globalization in times of economic distress, including the transformation of European values in national legal cultures. The authors explore how European values, tradition and new legal challenges interconnect and dictate the paths of transition between old and new Europe. The first chapter starts with a question: can Roman Legal Tradition play the role of an identity factor in the transition to a new Europe? Can it be considered as a general value identifying a new Europe, built on a minimum core of principles—*persona, dominum, obligation, contract and inheritance*—composing the entire European private law tradition? The following chapters attempt to provide possible responses to the question: what is Europe today? The answers diverge, depending on the research area. The inherent dichotomy of human rights protection in Europe and the concept of "one law, one court" are investigated in the second chapter, while the third chapter focuses on asylum and the relationship between the Court of Justice of the EU and the European Court of Human Rights, as well as the interdependence between these institutions. The next three chapters concentrate on matters of equal treatment and nondiscrimination. The first contribution of this section reflects on the crisis and methodological and conceptual issues faced by modern antidiscrimination law. It is followed by a specific analysis of the empowerment of women or gender balancing in company boards. The third contribution examines the impact of Croatian antidiscrimination law on private law relations. The next chapter deals with the issue of social rights in Croatia and their regulation in the context of new European values.

The immense challenges posed by the market integration imperative and democratic transition have brought about different reactions in the national legal systems and legal cultures of both old and new Member States. As such, Europe

has effectively been reunited, but the question of the convergence of national legal cultures remains. This is the focal point of the remaining chapters, which discuss various issues, including the internal market, competition law, consumer welfare, the liberalization of network industries and the EU capital market. The level of EU activity in these areas offers conclusive evidence that old and new paradigms are evolving and shaping the future of the EU.

Rijeka, Croatia — Nada Bodiroga-Vukobrat
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25 March 2015

Acknowledgments

We express our thanks to European Commission and Jean Monnet Chair programme for their helpful support, which was essential for this enterprise. Also, we owe our sincere gratitude to the *Springer Verlag* for recognizing the value of our efforts and for its continued support to our scientific endeavors.

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Abstract The Council of Europe and the European Union are major players and partners in the domain of policy-shaping strategies on the European continent, with significant and ever-growing impact on international community as a whole. Although the *ratio* and ideas behind their establishment were not the same (economic versus humanistic), they have, over the time, acquired a similar attitude towards a number of legal issues, including protection of human rights and fundamental freedoms. Unlike the Council of Europe, which perceived human rights as a cornerstone of its founding pillars, the EU took a longer way to incorporate them in its priority areas. The latter shift was, however, rapid, and these days one is witnessing a large-scale cooperation instituted between respective regional organisations with the aim of creating a human-rights-friendly environment. The purpose of this paper is to shed light on one particular segment of their cooperation in the field of human rights protection—asylum law. For the fact that Europe attracts a large contingency of people looking for better life and new beginnings, asylum matters have moved swiftly to the forefront of the Council of Europe and EU standard-setting policies. Nevertheless, the existence of two parallel legal regimes has not led to an inconsistent asylum policy. In order to illustrate the Council of Europe and EU distinctive approaches to asylum, as well as their manifold interplay in the respective arena, the paper summarises the most notable pieces of their legal and regulatory framework and offers an insight into some of the leading asylum cases brought before the European Court of Human Rights and the Court of Justice of the European Union.

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N. Bodiroga-Vukobrat et al. (eds.), *New Europe - Old Values?*,
Europeanization and Globalization 1, DOI 10.1007/978-3-319-02213-0_3

1 Introduction

The Council of Europe and the European Union (hereinafter: the EU) are major players and partners in the domain of policy-shaping strategies on the European continent, with significant and ever-growing impact on international community as a whole. Although the *ratio* and ideas behind their establishment were not the same (economic versus humanistic), they have, over the time, acquired a similar attitude towards a number of legal issues, including protection of human rights and fundamental freedoms. Unlike the Council of Europe, which perceived human rights as a cornerstone of its founding pillars, the EU took a longer way to incorporate them in its priority areas. The latter shift was, however, rapid, and these days one is witnessing a large-scale cooperation instituted between respective regional organisations with the aim of creating a human-rights-friendly environment. The purpose of this paper is to shed light on one particular segment of their cooperation in the field of human rights protection—asylum law. For the fact that Europe attracts a large contingency of people looking for better life and new beginnings, asylum matters have moved to the forefront of the Council of Europe and EU standard-setting policies.

The section following the introductory remarks gives an overview of the most crucial moments in the chronology of cooperation between the Council of Europe and the EU, observed from the angle of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) and the related case law of the two core European judicial organs: the European Court of Human Rights (hereinafter: the ECHR) and the Court of Justice of the European Union (hereinafter: the CJEU). A special emphasis is put on recent developments of historical significance related to the accession of the EU to the European Convention and peculiar legal consequences thereof.

Section 3 focuses on the so-called Dublin system, a set of norms and mechanisms introduced to regulate a vast area of the asylum policy within the EU. The analysis keeps track with the steps taken in the creation of a common European asylum system, i.e. the three codification stages and their outcomes. Despite being of EU provenance, the respective system serves as a solid legal basis in asylum matters adjudicated by both European courts.

Finally, the section preceding the conclusion highlights some of the leading asylum cases that demonstrate a close interrelation and interdependance of the European courts and their case law in the area of European asylum policies. The subsection on the ECHR case law summarises the most notable facts, elements and standards derived from the judgements in the cases of M.S.S. v. Belgium and Greece, T.I. v. the United Kingdom and K.R.S. v. the United Kingdom, as well as Mohammed Hussein and Others v. the Netherlands and Italy, and Mohammed v. Austria. In the same vein, the CJEU case law is elaborated in another subsection; namely, the authors draw attention to the cases of N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform; Meki Elgafaji, Noor Elgafaji

v. Staatssecretaris van Justitie; and Shamso Abdullahi v. Bundesasylamt. The purpose of this case law overview and analysis is to sum up major rules, theories and standards originating from the judgements, as well as to find the points of convergence and differentiation between the ECHR and the CJEU in asylum matters.

2 Convention for the Protection of Human Rights and Fundamental Freedoms: A Bridge Between the Council of Europe and the European Union

Although the idea of the accession of the EU to the European Convention is more than three decades old,[1] the legal prerequisites for this, in the European judicial and legislative practice, historical step have been shaped only in the last couple of years. The legal ground for this positive shift in the human rights protection on the European continent is set in the Treaty of Lisbon (2009)[2] and Protocol No. 14 to the European Convention (2010).[3] Despite clearly defined formal preconditions, the EU has not yet become a party to the European Convention, so violations of rights and freedoms stipulated therein by bodies and institutions of this supranational organisation cannot appear as the subject of applications before the ECHR. However, the judicial practice is tailoring legal rigidity and formalism and reflects a tendency towards growing bonding between conventional and communitarian laws, thus making the European Convention a living instrument.

It is not uncommon that rulings of the ECHR touch upon issues belonging to the domain of the EU and its law, which is supported by selected asylum cases analysed in this paper. Besides, the EU Member States' duty of respecting the rights and obligations stipulated by the European Convention already exists on an individual basis since they are all signatories thereof. For that reason, a legal gap can only arise in the context of a lack of jurisdiction of the ECHR over violation of conventional

[1] See Omejec (2013), p. 120.

[2] In this light, Article 6 § 2 stipulates that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (...)". The referring provision has been supplemented by Protocol (No 8) relating to Article 6 § 2 of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, which, as an annex to the Treaty on European Union and to the Treaty on the Functioning of the European Union, regulates the issue of the specific characteristics of the Union and Union law. Another relevant provision is Article 6 § 3, according to which "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". Treaty of Lisbon, Official Journal of the European Union, C306, Vol. 50, 17 December 2007.

[3] Pursuant to Article 59 § 2, "The European Union may accede to this Convention". Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4. XI. 1950, European Treaty Series, No. 5.

rights and freedoms by bodies and institutions of the EU on one hand and due to the assumption that the ECHR does not formally apply the EU law on the other hand. The accession of the EU to the European Convention will trigger at least two positive changes. First of all, the EU legal system will be subject to independent external control of the ECHR. Second, the change will generate modifications of the current relations of the Member States with the EU and establishment of a system of shared responsibility for breaches of conventional rights and duties arising from the EU law.[4] Although the accession to the European Convention is not going to expand the competences of the EU, this change should provide individuals with a higher level of legal certainty and stronger human rights protection (resulting from the synergy of the Charter of Fundamental Rights of the EU, the European Convention and general principles) and contribute to uniformity in the implementation of the EU law.[5] Furthermore, this will pave the way for the possibility of revision of judgements of the CJEU by the ECHR in cases of alleged violations of the European Convention by institutions of the EU or by the EU Member States when applying EU law.[6]

Human rights protection is not incorporated *expressis verbis* in the founding treaties of the European Communities, but already in 1969, the CJEU confirmed its jurisdiction to rule on violation of fundamental rights granted by general principles of Community law.[7] The CJEU is featured by a several decade-long tradition of reference to conventional law, both to European Convention provisions and to the ECHR's case law that has exercised major influence on the modernisation of these provisions. The first reference to the European Convention was made in 1975, passing the judgement in the case of *Roland Rutili v. Minister of the Interior*,[8] whereas in 1979, in the case of *Liselotte Hauer v. Rheinland-Pfalz*, the European Convention was acknowledged a special status among other international treaties on human rights protection.[9] The 1980s launched a new phase in conventional

[4] See Omejec (2013), p. 120.

[5] See Stubberfield (2012), p. 118.

[6] See Zuijdwijk (2011), p. 819.

[7] *Erich Stauder v. City of Ulm*, Case 29/69, Judgement of 12 November 1969, European Court Reports, 1969, p. 425. Later judgements have confirmed the standpoint that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice". See e.g. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, Judgement of 17 December 1970, European Court Reports, 1970, p. 1134. In the years to follow, the Court was, in regard to human rights protection, inspired by constitutional traditions common to the Member States and guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, Case 4/73, Judgement of 14 May 1974, European Court Reports, 1974, p. 507).

[8] *Roland Rutili v. Ministre de l'intérieur*, Case 36/75, Judgement of 28 October 1975, European Court Reports, 1975, p. 1232.

[9] *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, Judgement of 13 December 1979, European Court Reports, 1979, pp. 3745–3746. The conclusion that the European Convention

rights protection since the provision on the duty to respect the European Convention became part of the fundamental documents of the European Community—first the 1986 Single European Act[10] and then the 1992 Treaty on the European Union,[11] the 1997 Treaty of Amsterdam,[12] the 2000 Charter of Fundamental Rights of the European Union[13] and the 2007 Treaty of Lisbon.[14] Since then, the number of cases that stress the relevance of the European Convention for *acquis communautaire* is continually growing and the respect for fundamental rights has grown into a condition for the legality of Community acts.[15] Still, despite the importance of the European Convention for the EU legal order, it cannot be said to have primacy and direct effect thereon and the CJEU is trying to maintain autonomy within the EU system.[16]

The promotion of the synergy between conventional and communitarian laws has been equally facilitated by the ECHR whose early twenty-first century jurisprudence deems fundamental rights protection within these two systems as being "equivalent".[17] In addition, ECHR judgements have drawn attention to the great importance of the CJEU for fundamental rights protection due to "the dependence of the effectiveness of the substantive guarantees of fundamental rights on the mechanisms of control set in place to ensure their observance".[18]

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has a special significance for the EU among other international treaties for the protection of human rights can be found in some later cases as well. See e.g. *Elliniki Radiophonia Tileorassi Anonimi Etairia (ERT AE) and Panellinia Omospondia Syllogon Prossopikou ERT v. Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas and Nicolaos Avdellas and Others*, Case C-260/89, Judgement of 18 June 1991, p. I-2963.

[10] See the preamble to the 1986 Single European Act, Official Journal of the European Communities, No L 169/2, 29 June 1987.

[11] See Article F(2) of the Treaty on European Union (Treaty of Maastricht), Official Journal of the European Communities, C 191, 29 July 1992.

[12] See Article 6 (ex Article F) (2) of the Consolidated Version of the Treaty on European Union (Treaty of Amsterdam), Official Journal of the European Communities, C 340, 10 November 1997.

[13] See the preamble to and Articles 52 § 3 and 53 of the Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/01, 18 December 2000. The Charter sets forth that the meaning and scope of the rights it protects and the rights granted by the European Convention match in both documents. Hence, they constitute the fundamental standards of human rights protection in the EU, though the EU is entitled to provide for even more extensive protection if need be.

[14] See supra, note 2.

[15] See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgement of 30 June 2005, para. 159.

[16] See Velutti (2014), p. 78.

[17] The term of "equivalent" is not a synonym for the expression "identical", but it is viewed in a more flexible manner, i.e. as "comparable". Indeed, "any requirement that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued". *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Judgement of 30 June 2005, paras. 155 and 165.

[18] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, para. 338.

Elaboration of the case law of the ECHR and of the CJEU in the domain of human rights protection can be seen as an opportunity to assess the compatibility and similarity of the European Convention and Charter of Fundamental Rights as the starting points of this protection. The following sections provide for an insight into legislative and judicial developments in the sphere of the protection of human rights and fundamental freedoms in the area of asylum law in the context of the close connection of the ECHR and the CJEU.

3 The So-Called Dublin System: A Nexus Between the ECHR and the CJEU in the Field of Asylum Law

The interdependence between the conventional and communitarian systems and the reference of the ECHR to judgements of the CJEU and *vice versa* are particularly evident in the field of asylum policy. This is a complex and delicate area that requires a comprehensive approach of actors at a national, supranational and international level. The fact that it is aimed at protection of the rights and freedoms of people who belong to an underprivileged and a vulnerable population group in need of special protection[19] gives this segment of European policies in the area of human rights protection a special accent. Seeking asylum is, for many, the only way to escape political persecution in their home countries, and the receiving states are often seen as a chance for a new beginning in line with the human rights principle of admission to safety.[20] Due to the particular jurisprudence role of the ECHR and the CJEU within the European asylum system, this judicial duet has been described as "regional refugee law courts",[21] while the ECHR is also considered "the asylum court".[22] While exercising these functions, the two courts repeatedly touch upon, analyse, interpret and criticise the so-called "Dublin system", a set of rules in the field of asylum introduced by the EU.

Generally speaking, the asylum matters in the EU are regulated both by primary and secondary Union laws. When it comes to primary legislation, the right to asylum is granted by Articles 18 and 19 § 2 of the Charter of Fundamental Rights, Article 78 of the Treaty on the Functioning of the European Union, Articles 73i and 73k of the Treaty of Amsterdam and Article 61 § 2 of the Treaty of Lisbon. Secondary legislation entails regulations and directives adopted during the recent

[19] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, para. 251. Though the perception of asylum seekers as a "vulnerable population *group*" was criticized by judge Sajóin in his partly concurring and partly dissenting opinion to the same judgement. In his words, although asylum seekers can be vulnerable and underprivileged, "they are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion" and "they are not socially classified, and consequently treated, as a group".

[20] Avci (1999), p. 205.

[21] See more Velutti (2014), p. 77.

[22] See Bossuyt (2012), pp. 203–245.

development of the European common asylum system, which are further elaborated in the lines below.[23]

The 1999 EU Summit meeting of the European Council in Tampere, Finland,[24] opened the first stage in the definition and implementation of a common European asylum system within the EU.[25] Until its completion in 2005, a number of legal instruments embraced by the colloquial term "the Dublin system" had been adopted due to the proactivity of European institutions. The legal framework generated in such a way includes the following documents: Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention,[26] Council Regulation 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 ("the Dublin II Regulation"),[27] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003,[28] Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States ("the Reception Directive"),[29] Directive 2004/83 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 ("the Qualification Directive")[30] and Directive 2005/85 of 1 December 2005 on minimum standards on procedures in the Member States for granting and withdrawing refugee status in the Member States ("the Procedures Directive").[31] The new legal framework set minimum common standards in the field of the reception of asylum seekers, asylum procedures, conditions governing eligibility for international protection and rules for determining which

[23] See Stubberfield (2012), pp. 119–121 and 125–128; Lavrysen (2012), pp. 208–222.

[24] See Vedsted-Hansen (2005), pp. 369–370; Guild (2006), pp. 642–645; Staffans (2010), pp. 278–279.

[25] The origins of the process of harmonisation of European policies on asylum stretch back to the mid-1980s of the twentieth century. See Joly (1994), pp. 159–160; Teitgen-Colly (2006), p. 1505.

[26] See Official Journal L 316, 15 December 2000.

[27] See Official Journal of the European Union, L50, 25 February 2003. The Dublin Regulation substituted the 1990 Dublin Convention for determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities ("Dublin Convention"), Official Journal C254, 19 August 1997. See more Hurwitz (1999), pp. 646–677. This change was inevitable since the then Dublin system suffered from severe deficiencies. Still, according to Marx, it was conceptually regarded as "a reasonable basis for the elaboration of strategies, policies and legal doctrines in the field of asylum". Marx (2001), p. 9.

[28] See Official Journal L 222, 5 September 2003.

[29] See Official Journal L 31, 6 February 2003. See more Lavrysen (2012), pp. 216–218.

[30] See Official Journal L 304, 30 September 2004. See more Lavrysen (2012), pp. 211–215.

[31] See Official Journal L 326/13, 13 December 2005. See more Ackers (2005), pp. 1–33; Lavrysen (2012), pp. 215–216; Teitgen-Colly (2006), pp. 1520–1544.

Member State is responsible for asylum application. In the next phase, these regulations were subject to further improvement (e.g. through actions taken to upgrade the mechanism for suspending transfers) and harmonisation in order to create a common European asylum system by 2012.[32] Finally, in mid-2013, the third phase in the development of the common European asylum system has begun. It has started with the adoption of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), the so-called "Dublin III Regulation".[33] The legal corpus belonging to the asylum domain was also enriched by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).[34] Among all these documents, Dublin II Regulation is labelled as the cornerstone of the emerging common European asylum system.[35]

During the last couple of years having preceded the third phase, the Dublin system faced serious criticism. Due to the transfer of asylum seekers in the Member States that were, according to Dublin II Regulation, responsible for examining the asylum application, it came to an overload of the asylum system of the states located on the external borders of the EU and, consequently, to violation of the fundamental rights of asylum seekers. There was no solidarity mechanism that would evenly distribute responsibilities among Member States in accordance with their possibilities and capacities. Such circumstances generated a wide-ranging discussion on the possibility of suspension of automatic "Dublin transfers", due to which some Member States (Greece and Hungary before all) were facing enormous pressure to their national asylum systems.[36] In order to tackle these issues, EU Member States have presented their new approach to asylum in Dublin III Regulation, which attempts to achieve a higher level of solidarity and burden sharing in asylum cases among Member States; to prevent deficiencies in national asylum systems that are overloaded by a large number of asylum applications; to protect asylum seekers from violations of their rights due to systemic flows in some Member States; and, instead of suspension of the Dublin rules on transfers, to

[32] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, paras. 63–64 and 78. See also Haddad (2010), pp. 92–93.

[33] See Official Journal of the European Union, L180, 29 June 2013.

[34] See Official Journal of the European Union, L180, 29 June 2013.

[35] Lenart (2012), p. 11.

[36] However, although the respective possibility may seem as an eligible solution at first glimpse, the system itself has some hidden dangers. First of all, the proposal for suspension is related to the situation when there are systemic flaws in the national asylum system of a Member State, the repercussions of which involve violation of human rights, and not to the situation when this system is simply overloaded. Moreover, due to the transfer of responsibilities to another Member State, suspension mechanisms may become a certain reward to a Member State that does not respect the EU asylum legislation.

ensure warning mechanisms that could indicate deficiencies threatening to grow into a much more complex crisis. The introduction of new rules into the asylum system represents a pivotal moment both for asylum seekers in the Member States and for European courts.

Generally speaking, the issue of protection of the fundamental rights of asylum seekers in Europe has turned out to be a hot potato, particularly during the debate on the problem of "Dublin transfers", i.e. in the last couple of years.[37] According to Stubberfield, the EU Member States have generally failed to meet the requisite human rights obligations in the area of asylum law, i.e. to prevent, investigate, deter and prosecute. For that reason, the respective author believes that the accession of the EU to the European Convention and the consequential expansion of the jurisdiction of the ECHR to the EU institutions will improve the current asylum law standards and their efficient implementation.[38] This shaping of a common European asylum system has led not only to bonding between the ECHR and the CJEU but also to encouragement of a "transnational judicial dialogue between national courts".[39]

The next section gives an overview of the most significant asylum cases of the ECHR and the CJEU, which serve as a basis for a concise analysis of the issues of violation of European Convention rights due to ill-treatment in the event of refoulement under the Dublin legislation. It is a fast-developing area of case law, especially in relation to the ECHR, that imposes a number of legal challenges on the European legal order defined by documents of the Council of Europe and the EU. For example, in 2012, as many as about 960 cases related to the Dublin system were pending before the ECHR.[40] The greatest share of the analysed judgements refer to the Dublin system in a narrower sense (the Dublin Convention and Dublin II and III Regulations), which strive to determine which EU Member State bears responsibility for examining an asylum application lodged in one of the Member States by a third-country national. The fundamental rule says that only one Member State can be responsible for examining an asylum application. The purpose of such a rule is twofold. First of all, it prevents unfavourable situations in which asylum seekers are sent from one state to another, and, second, asylum seekers are prevented from successively submitting several asylum applications. The state that is responsible for an asylum seeker is obliged to take charge of that person and process the application. When considering the application, all the specificities of the case shall be taken into account, so the Member State in which the application has been submitted may call upon another Member State to take over the competence for the respective asylum seeker if the former finds the latter responsible for the case. This is the so-called sovereignty clause that has been referred to in

[37] For more details on the third phase of the establishment of a common European asylum system, see Velutti (2014), pp. 39–49.

[38] See Stubberfield (2012), pp. 117, 119, and 127–129.

[39] See Lambert (2009), pp. 519–543.

[40] See Lenart (2012), p. 17.

exceptional cases by now.[41] The judicial practice of the ECHR and the CJEU has laid down several important standards in this light. Notably, an asylum seeker must not be transferred to a Member State whose asylum system has severe systemic deficiencies,[42] whereas asylum seekers shall benefit from minimum reception conditions.[43] The appertaining standards are analysed in the below overview of judgements.

4 Selected Case Law in the Field of Asylum: Dublin Cases

4.1 ECHR Asylum Case Law

4.1.1 M.S.S. v. Belgium and Greece (2011)

The challenging case of M.S.S. represents a major contribution of judicial practice to the development of standards and mechanisms on the EU Member State's responsibility for examining asylum applications lodged by third-country nationals, i.e. to the issue that is in EU law stipulated by the so-called Dublin II Regulation.[44] The applicant, an Afghan national, was subject to expulsion from the Belgian and Greek territory in application of the respective Regulation,[45] while the action of the

[41] European Court of Human Rights, Press Unit, Factsheet—"Dublin" Cases. www.echr.coe.int/Documents/FS_Dublin_ENG.pdf. Accessed 8 March 2015.

[42] E.g. *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, Judgement of 21 December 2011, para. 86; *M. S. S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, paras. 85, 194, 284, 300, 312, 321, 323–325, 330, 334, 343, 347, and 410.

[43] E.g. *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Inté rieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, Judgement of 27 December 2012, paras. 36–62; *M. S. S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, para. 250; *Sharifi v. Austria*, Application no. 60104/08, Judgement of 5 December 2013, para. 35.

[44] See supra, note 26.

[45] While travelling from Afghanistan, the applicant entered the EU through Greece where he was shortly detained. For the fact that he did not apply for asylum, the Greek authorities issued an order instructing him to leave the country. At his final destination, in Belgium, he applied for asylum at the Aliens Office, with no identity papers, after which he was placed in the reception centre for asylum seekers. Since the applicant irregularly crossed the Greek border, Belgium referred to Greece, inviting it to take charge of the asylum application by making reference to the provision of Article 10 § 1 of the Dublin Regulation. The provision stipulates that an application for asylum shall fall within the competence of the EU Member State that the asylum seeker irregularly entered first. Since Greece did not make its observations thereto within the deadline set forth in Article 18 § 1, Belgium acted in accordance with § 7 of the same Article regulating that such situations imply a *tacitus consensus* rule. *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, paras. 1, 3, 9, 10, 11, 13, and 14.

authorities of both Member States was deemed by the Court as a breach of Article 3 (prohibition of torture) and Article 13 (right to an effective remedy) taken in conjunction with Article 3.[46] The case was an excellent opportunity for the ECHR to analyse the asylum system of both organisations—the Council of Europe and the EU—and to decide upon possible non-compliance of the Member States' action with Community law[47] and the European Convention while respecting the key document in the referring domain at universal level: the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[48] The given sources clearly demonstrate that the asylum system is characterised by a multi-level legal framework that is a compound of legal regulations at international, European and national level.[49]

The case has ascertained that arbitrary detention of asylum seekers in appalling conditions, deficiencies in the asylum procedure and the lack of an effective access to judicial proceedings in Greece (due to which the applicant was sent back to his country of origin without any examination of his reasons for having fled the country) amounted to serious violation of the European Convention. *In concreto*, those are actions that amount to inhuman or degrading treatment or punishment, prohibition of which is regarded as one of the most fundamental values of democratic societies in contemporary international law.[50] Except being viewed as separate actions, these violations of human rights were also analysed in the context of the right to an effective remedy.[51]

Although Belgium acted in compliance with Dublin II Regulation by returning the applicant to Greece, the Court held the former responsible for violation of Article 3 since it, when making such a decision, failed to take into consideration serious omissions of the Greek authorities in handling asylum seekers. Pursuant to Article 46 of the Convention on binding force and execution of judgements, Greece

[46] Article 3 on prohibition of torture regulates that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment", whereas Article 13 on the right to an effective remedy prescribes that "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". Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950, European Treaty Series, No. 5.

[47] Apart from the aforementioned "Dublin asylum law", meaning the Treaty on European Union and the Treaty on the Functioning of the European Union (both as amended by the Treaty of Lisbon) and the Charter of Fundamental Rights of the European Union. See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, paras. 57–61.

[48] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. http://www.refworld.org/docid/3be01b964.html. Accessed 8 March 2015. All the EU Member States have ratified the Convention.

[49] See more Velutti (2014), pp. 10–29.

[50] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, para. 218. See also Van Boven (2010), p. 181; Alston and Goodman (2012), pp. 238–240; Crawford (2012), pp. 642–643; Carey et al. (2012), p. 73.

[51] For more details on access to an effective remedy in asylum procedures, see Reneman (2008), pp. 65–98; Staffans (2010), pp. 275–277.

was required to, without delay, keep on examining the applicant's request and, in the meantime, to restrain from deporting the applicant.[52]

The value of the judgement is multiple. It primarily lies in the fact that the ruling was derived from combined interpretations of procedural and substantive provisions of communitarian and conventional laws, which supports the standpoint that these two legal systems interact, are connected to the highest possible extent and are mutually intertwined in the field of protection of human rights and fundamental freedoms. Hence, the ECHR examined the transfer of the applicant from Belgium to Greece in accordance with the mechanism established under the EU law.[53] The judgement also proves that both courts deal with the same or similar issues in the area of asylum policy. By way of comparison, the M.S.S. judgement is in that regard similar to the judgement of the CJEU in the case of *Commission of the European Communities v. Hellenic Republic*[54] in which the Greece's failure to fulfil its obligations under the Reception Directive was reaffirmed. Besides, in some of its reasoning on Dublin Regulation, Qualification Directive, sovereignty clause, etc., the ECHR referred to a number of judgements of the CJEU.[55] The ECHR has perceived the issue of treatment of asylum seekers from the viewpoint of the EU Member States, drawing attention to the difficulties faced by the Member States located at the external borders of the EU when struggling with an increasing influx of asylum seekers and migrants[56] and to the duty of other Member States to take part in the burden sharing.[57] Furthermore, the case has demonstrated that the link between communitarian and conventional laws most often encompasses Article 3 (sometimes in conjunction with Article 13) of the European Convention and standards of Dublin Regulations.[58] Zuijdwijk has justifiably singled out this case as one of the best examples of interplay between EU law and the European Convention in the post-Lisbon era.[59] Finally, this was the first case that challenged the presumption of the safe country,[60] i.e. the standpoint that the secondary Member

[52] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, para. 402.

[53] See Zuijdwijk (2011), p. 816.

[54] *Commission of the European Communities v. Hellenic Republic,* C72/06, Judgement of 19 April 2007.

[55] E.g. judgements in the Petrosian case (C-19/08, judgement of 29 January 2009), the Elgafaji case (C-465/07, judgement of 17 February 2009), the Salahadin Abdulla and Others case (joined cases C-175, 176, 178 and 179/08, judgement of 2 March 2010), the N.S. case (C-411/10, judgement of 21 December 2011). See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, paras. 81, 82, and 86.

[56] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Judgement of 21 January 2011, para. 223. See also Concurring opinion of judge Rozakis in the M.S.S. judgement.

[57] See more Uçarer (2006), pp. 219–240.

[58] See more Wouters (2009), pp. 221–315; Battjes (2009), pp. 583–621.

[59] Zuijdwijk (2011), p. 807.

[60] For more details on the concept of a "safe country", see Heilbronner (1993), pp. 31–65; Achermann and Gattiker (1995), pp. 19–37.

State in which an asylum application has been lodged is supposed to deport the asylum seeker to the Member State where the applicant first entered the EU, guided by mutual trust.[61]

4.1.2 T. I. v. the United Kingdom and K. R. S. v. the United Kingdom

The cases of T. I. v. the UK[62] and K. R. S. v. the UK[63] represent another major contribution to discussions on the interrelation between the Dublin asylum law and the European Convention.

The scope of the former case keeps track with the fate of a Sri Lankan national who fled his native country where he was an object of torture carried out by pro-government and terrorist Tamil organisations respectively. He first arrived to Germany where he claimed asylum, but once his appeal was rejected,[64] he illegally travelled to the UK and again applied for asylum. Pursuant to the then effective rule on jurisdiction, according to which the responsibility for examining an application for asylum is incumbent upon the Member State responsible for controlling the entry of the alien into the territory of the Member States,[65] the UK referred to Germany requiring acceptance of the responsibility for the applicant's asylum request, which was eventually done by the latter. The applicant complained that the UK's order to remove him to Germany violates Articles 2 (right to life), 3 (prohibition of torture), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the European Convention because such a decision would result in his forcible extradition to Sri Lanka where his rights are likely to be violated again.

When adjudicating the case, the ECHR drew attention to the fact that the European Convention does not grant the right to political asylum *expressis verbis* but that, nevertheless, its case law clearly establishes that the prohibition stated in Article 3 entails the duty of states not to expel a person to a country where substantial grounds have been shown for believing that (s)he would face a real risk of being subjected to treatment contrary to the respective provision. In other words, the ECHR promotes prohibition of refoulement, which is usually denoted as prohibition of "the forced direct or indirect removal of an individual to a country or

[61] See Brouwer (2013), pp. 135–147.

[62] Third Section Decision as to the Admissibility of Application no. 43844/98 by T. I. v. the United Kingdom, 7 March 2000.

[63] Fourth Section Decision as to the Admissibility of Application no. 32733/08 by K. R. S. v. The United Kingdom, 2 December 2008.

[64] Namely, the German authorities assumed the standpoint that the applicant was not the victim of inhuman treatment that might be attributed to the Sri Lankan state and thus there is no danger of his return to the south of the country where he is sufficiently safe from political persecution. See T. I. v. the UK, 7 March 2000, para. 2.

[65] Article 7 § 1 of the Dublin Convention. See Official Journal L 316, 15 December 2000.

territory where (s)he runs a risk of being subjected to human rights violations".[66] When evaluating the situation in the country of origin, states shall take account of the absolute character of Article 3 and incorporate acts of persons or group of persons who are not public officials into the situations stipulated thereby.[67]

A well-established rule of international law says that countries have the right to control entry, residence and expulsion of aliens on their territory,[68] and that was the starting point of the ECHR in the case analysis. Although Germany was, in line with the Dublin system, in charge of examining the asylum application, the ECHR warned that sending the applicant back to Germany could be an intermediary stage in the ultimate return to his country of origin where there was a danger of his persecution. The ECHR was of the opinion that the UK deportation of the applicant to the state that was in charge of his application according to the Dublin Convention might both mean respect for the said act and possible violation of the purpose and object of the European Convention. In other words, the UK was not eligible to refer to the provisions of the Dublin Convention if such action would produce implications for the protection of fundamental rights. Even after an indirect removal of the asylum seeker to an intermediary country, the transferring state bears the responsibility for the seeker's rights and freedoms. When applying the Dublin Convention, the latter state is obliged to pay attention to the correctness of the intermediary country's asylum procedure in order to prevent the asylum seeker from being removed to his native country without a previous investigation of the risks that might bring to violation of Article 3 of the European Convention. Moreover, when implementing the Dublin Convention, it should be taken into account that its effectiveness may be undermined in practice by different approaches of contracting states to asylum matters.

After having thoroughly analysed all the facts, the ECHR declared the application inadmissible. It concluded that there was no risk of German expulsion of the applicant and thus of violation of Article 3, whereas the UK had not failed in its obligations deriving from the respective provision. After declaring this part of the application manifestly ill-founded, the ECHR saw no necessity to separately investigate the violations of Articles 2 and 8 of the European Convention.

[66] On such occasions, the concept of refoulement implies negative and positive obligations of states. The negative ones include prohibition on removal, prohibition on extradition, prohibition on indirect refoulement and prohibition on rejection at the frontier and beyond (including the open sea), while the positive obligations comprise the obligation to admit (a right to asylum, to enter and to remain), obligations after removal (they must at least include an acknowledgment that Article 3 has been violated) and the obligation to install procedural safeguards. See Wouters (2009), pp. 25–31 and 317–345; Stubberfield (2012), pp. 121–122 and 133–140.

[67] This reasoning of the ECHR represents a shift from the usual viewpoint that acts of torture can be committed only by acting in an official capacity. See Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46 of 10 December 1984.

[68] See Crawford (2012), pp. 608–610.

The complaints regarding the violations of Article 13 were also proclaimed manifestly ill-founded.[69]

In a case similar by its substance, K. R. S. v. the UK,[70] an Iranian national claimed asylum in the UK, but since his previous destination was Greece, the UK referred to it and made a request to accept the responsibility for the applicant's asylum claim, which Greece did. Due to an overload of the asylum system in Greece and the flaws arising therefrom, the ECHR tried to provide an answer to the question of how to make the application of Dublin Regulation more flexible, according to which Greece, due to the fact that it often appears to be the first EU Member State that is entered by asylum seekers when arriving in Europe, shall be in charge of asylum applications. Just like in the T. I. case, the UK's obligations under Articles 3 and 13 were being considered, and after an analysis of relevant communitarian and conventional laws and the undertakings of the UK and Greece in the asylum procedure, the Court drew the conclusion that the action of the respective states was fair and effective and the application was manifestly ill-founded.

The above two cases exemplify that the issue of refoulement becomes particularly important in situations in which asylum seekers use Greece as a transitory state on the way to their final destination where there is a lesser danger of refoulement and where their rights can be protected in a more efficient manner. However, the Greek's duty to examine applications of all the asylum seekers who used it as the first country of entry is not absolute, and Dublin Regulation itself foresees an exception thereto. Accordingly, Article 3 § 2 sets forth that "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 (the so-called "sovereignty" clause). 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 (...)".[71] Another solution that softens the Greek's duty as the first country of entry is the application of Rule 39 of the Rules of Court regulating the issue of interim measures. Pursuant to Rule 39, the ECHR "may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings".[72] Those measures have been asked for in almost all Dublin cases. From the procedural point of view, the measures are part of the procedure before the ECHR and shall be binding for the states in the case. Asylum seekers deem them as a refuge from the strict rules of Dublin Regulation since in case of an approval of a request for an interim measure by the ECHR, the applicant's expulsion is suspended for as long as the Court

[69] For more details on the case of T.I. v. the United Kingdom, see Noll (2001), pp. 176–180.

[70] K. R. S. v. the United Kingdom, 2 December 2008.

[71] Dublin Regulation, see Official Journal L 316, 15 December 2000.

[72] European Court of Human Rights, Rules of Court, Registry of the Court, Strasbourg, 1 January 2014. www.echr.coe.int/Documents/Rules_Court_ENG.pdf. Accessed 8 March 2015.

considers the application. Depending on an applicant's situation, the Court is entitled to lift the measure during the proceedings.[73] Ultimately, some other EU measures in the field of asylum policy could serve as a corrective of Dublin Regulation. For example, the measures foreseen by two Council Directives—the one laying down minimum standards for the reception of asylum seekers and the other on minimum standards on procedures in the Member States for granting and withdrawing refugee status.[74]

4.1.3 Mohammed Hussein and Others v. the Netherlands and Italy

Like in its earlier cases, in the case of Mohammed Hussein and Others v. the Netherlands and Italy, the ECHR was also invited to decide on possible violations of the human rights of asylum seekers in situations in which they ask for the jurisdiction for their asylum request in a state other than the state that should be in charge of it according to Dublin II Regulation. This case encompassed the possibility of assigning the jurisdiction for an asylum request of a Somali national and her two children to the Netherlands, which was the desired final destination of the applicants, instead of seeking it in Italy through which Hussein entered the EU.[75]

In order to avoid multiple asylum applications and give asylum seekers a guarantee that their case will be dealt with by a single Member State, Dublin II Regulation lays down a general rule, according to which the Member States are obliged to specify which state is in charge of examining asylum applications lodged on their territory based on the hierarchy of objective criteria stated in Articles 5–14 of the Regulation. In the event of illegal entries to the EU from a third country, this rule appears rather simple at first sight since the responsibility shall be borne by the state that was entered first by the applicant. However, if suggested otherwise by the above objective criteria, Article 17 of the Regulation ensures that another Member State can take charge of the asylum seeker.

The ECHR dealt with the case by making reference to the relevant EU law (the aforementioned directives and the Dublin II Regulation) and judgements of the CJEU. *In concreto*, what served as the Court's guiding light was the ruling in the joined cases of N.S. v. Secretary of State for the Home Department and M. E., A. S. M., M. T., K. P., E. H. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform,[76] which set focus on transfers under the terms of Dublin

[73] See Factsheet—"Dublin" Cases, www.echr.coe.int/Documents/FS_Dublin_ENG.pdf. Accessed 8 March 2015.

[74] See supra, notes 29 and 31.

[75] Third Section Decision as to the Admissibility of Application no. 27725/10 by *Samsam Mohammed Hussein and Others v. The Netherlands and Italy*, 2 April 2013.

[76] *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, Judgement of 21 December 2011, para. 86.

II Regulation. Special attention was drawn to the presumption that the common European asylum system is based on mutual trust and compliance of action of other Member States with Union law and fundamental rights and to the fact that this presumption is rebuttable in its nature.[77] In order to enable transfer of jurisdiction, a few relevant criteria need to be met. Firstly, an asylum seeker may be transferred to the "Member State responsible" only in cases of "systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers which amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision".[78] On the other hand, minor infringements of the rights granted by the directives should not exempt the Member States from the duties imposed by Dublin II Regulation. According to the judgement, "such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union".[79] Moreover, a request for transfer of jurisdiction cannot be based on the fact that the economic situation in the expelling country is better than the one in the country of return. Consequently, none of the Member States is bound to cater for a home or particular standard of living to everyone within its jurisdiction.[80]

Like in previously illustrated cases, the applicants in this case also referred to violations of Articles 3, 8 and 13 with respect to both states. The Court rejected the complaints as being manifestly ill-founded (and in terms of Article 8, wholly unsubstantiated as well) since the applicants' status did not even reach the minimum level of severity required for treatment to fall within the meaning of Article 3, while the remedy within the meaning of Article 13 was accessible. When it comes to the latter criterion, it should be emphasised that the respective provision does not guarantee that the remedy is bound to succeed.[81]

4.1.4 Mohammed v. Austria

One of the most recent asylum cases in which the ECHR was deciding on action of the EU Member States regarding Dublin II Regulation has seen confirmation of violation of Article 13 taken in conjunction with Article 3. A Sudanese national arrived to Austria via Greece and Hungary, and Austria required his transfer to Hungary in line with Dublin Regulation. The proceedings resulted in the decision that the Austrian immigration police did not pay due attention to specific

[77] *Samsam Mohammed Hussein and Others v. The Netherlands and Italy*, 2 April 2013, para. 28.
[78] *Samsam Mohammed Hussein and Others v. The Netherlands and Italy*, 2 April 2013, para. 28.
[79] *Samsam Mohammed Hussein and Others v. The Netherlands and Italy*, 2 April 2013, para. 28.
[80] *Samsam Mohammed Hussein and Others v. The Netherlands and Italy*, 2 April 2013, para. 70.
[81] *Samsam Mohammed Hussein and Others v. The Netherlands and Italy*, 2 April 2013, paras. 75, 79, 81, and 85.

circumstances of the case (primarily, inappropriate detention practices and inhuman detention conditions in Hungary, as well as a real risk of refoulement to Serbia) while examining his asylum claim. As a consequence, such examination was not considered an effective remedy, due to which the applicant was deprived of *de facto* protection from forced transfer during the proceedings related to his asylum application.[82] When examining the interrelation between the justifiableness of transfers under Dublin II Regulation and the scope of the State's obligations under Article 13, the ECHR stressed that the appertaining duties shall depend on the nature of the applicant's complaint, but in every single case, the remedy required must be "effective" in practice as well as in law. If this rule is correlated to utterly important Article 3, which happened in this case, the effectiveness of a remedy shall imperatively imply (a) close scrutiny by a national authority, (b) independent and rigorous scrutiny of any claim that is suspected to involve substantial grounds for real risks of treatment contrary to Article 3, (c) particularly prompt response and (d) the applicant's access to a remedy with an automatic suspensive effect.[83] The Court again applied Rule 39 of the Rules of Court because it found that the rule was in favour of the applicant's right not to be expelled until further notice.

4.2 Court of Justice of the European Union Case Law on Asylum with Regard to the European Convention

In the last couple of decades, the EU has turned into a major actor in the field of asylum law.[84]

Generally speaking, the CJEU is more restrictive than the ECHR with respect to legal obligations of the EU Member States in the area of human rights protection.[85] A certain discrepancy and a lack of uniformity are evident in the domain of asylum law too. The grounds for this difference are not to be found in legal regulations. The basic EU document in the field of human rights protection, the Charter of Fundamental Rights, contains the same provision on prohibition of torture,[86] which is crucial in the sphere of asylum law, as the European Convention. Unlike the Convention, the Charter stipulates the right to asylum as well, referring to the

[82] *Mohammed v. Austria*, Application no. 2283/12, Judgement of 6 June 2013 (final, 6 September 2013), paras. 1, 3, 4, 76, 79, 84–85, 87, and 98.

[83] *Mohammed v. Austria*, Application no. 2283/12, Judgement of 6 June 2013 (final, 6 September 2013), paras. 69 and 72.

[84] See Lavrysen (2012), pp. 199 and 240.

[85] The standpoint has been depicted by Butler and De Schutter stating that "the ECJ does ensure that the EU legislator respects human rights, but it does little *to protect* human rights". Quoted according to Stubberfield (2012), p 125. But see Grabenwarter and Pabel (2013), pp. 290–295.

[86] Article 4, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/01, 18 December 2000.

provisions of the Geneva Convention of 28 July 1951, the Protocol of 31 January 1967 relating to the status of refugees, the Treaty on European Union and the Treaty on the Functioning of the European Union.[87] The Charter also provides the EU with the possibility to cater for more extensive protection of human rights and fundamental freedoms than the one granted by the Convention. This is governed by Article 52 § 3, which also regulates the interrelation between these two documents. It is designated in a way that "in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention, the meaning and scope of those rights shall be the same (...)".[88]

The first case in which the Court of Justice of the EU interpreted Dublin II Regulation was the 2009 Petrosian case,[89] though this case did not suggest a link between EU law and the European Convention as it happened in the judgements of the ECHR denoted in previous sections. However, the CJEU did seize the opportunity to make a comparison between these two legal systems, and the authors first single out two major cases, the subject matter of which is in a narrow connection with the case of M.S.S. *In concreto*, in 2011, the Court delivered an exceptionally important judgement for interpretation of sovereignty clause in joined cases of *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*.[90] The cases follow the fate of asylum seekers from Afghanistan (N.S. case) and Afghanistan, Algeria and Iran (M.E. case) who were to be returned to Greece pursuant to Dublin II Regulation by the United Kingdom and Irish authorities respectively. The judgement primarily dealt with interpretation of the Article 3(2) of the Regulation (the sovereignty clause) and the fundamental rights of the EU enshrined in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights (on human dignity; prohibition of torture and inhuman or degrading treatment or punishment; right to asylum; protection in the event of removal, expulsion or extradition; and right to an effective remedy and to a fair trial).[91] One of the most relevant issues on which the Court has laid down its standpoint was whether the decision adopted by a Member State to examine a claim for asylum, which is not its responsibility, falls within the

[87] Article 18, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/01, 18 December 2000.

[88] Article 18, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, C 364/01, 18 December 2000.

[89] *Migrationsverket v. Edgar Petrosian and Others*, e.g. judgements in the Petrosian case (C-19/08, judgement of 29 January 2009), the Elgafaji case (C-465/07, judgement of 17 February 2009), the Salahadin Abdulla and Others case (joined cases C-175, 176, 178 and 179/08, judgement of 2 March 2010), the N. S. case (C-411/10, judgement of 21 December 2011).

[90] *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, Judgement of 21 December 2011, para. 86.

[91] *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, Judgement of 21 December 2011, paras. 1–2.

scope of EU law (as stipulated by Article 6 TEU and Article 51 of the Charter). The term of "EU law" also encompassed the European Convention, which provisions on fundamental rights constitute the general principles of the Union's law. The Court responded positively to the respective question.[92] What appeared to be questionable as well was the issue of whether the Member State that should transfer the asylum seeker to the Member State that is responsible for him/her according to Dublin II Regulation is obliged to assess the compliance, by the latter Member State, with the fundamental rights of the EU. In regard to this issue, it was also doubtful what should be done if it is acknowledged that the Member State responsible is found not to be in compliance with fundamental rights. Is the Member State that should transfer the asylum seeker obliged to accept responsibility for examining the asylum application? The Court called upon the principle of mutual confidence, which leans on the assumption that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the European Convention. It did recognise though the possibility of the system to experience major operational problems in a given Member State, which lead to a substantial risk that asylum seekers may be treated in a manner incompatible with their fundamental rights. In case of validation of substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, the transfer would be incompatible with that provision. The scope of this case spanned an assessment of the Greek asylum system. Before all, the Court made its observations about the disproportionate burden that has to be borne by Greece and not by other Member States due to the fact that the former state occurs to be the point of entry in the EU of almost 90 % of illegal immigrants. In that light, the Court referred to the judgement of the ECHR in the case of M.S.S., which ascertained that Belgium had, by transferring the applicant to Greece, infringed the provision of Article 3 of the European Convention due to a systemic deficiency in the Greek asylum procedure and reception conditions of asylum seekers at the time of the transfer of the applicant. Taking account of the disclosed facts, the CJEU drew the conclusion that EU law precludes the application of a conclusive presumption that the Member State responsible observes the fundamental rights of the EU.[93] A particularly interesting part of the judgement related to the issue of whether the extent of the protection conferred on an asylum seeker by the general principles of EU law, and, in particular, the rights set out in Articles 1 (human dignity), 18 (the right to asylum) and 47 (the right to an effective remedy) of the Charter is wider than the protection conferred by Article 3 of the European Convention. The Court abstained from providing a precise and unambiguous

[92] *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, Judgement of 21 December 2011, paras. 55 and 69.

[93] *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, Judgement of 21 December 2011, paras. 70, 72, 79–81, 86–89, and 105.

answer, and instead it only generally indicated that the answer was incorporated in the answer to the earlier questions. That reasoning shows that the scope of the referring provisions of the Charter correlates to the provision of the European Convention.[94] Since this case, like the case of M.S.S. to which the CJEU has made reference on several occasions, confirmed serious systemic problems in Greece, Zuijdwijk thinks that courts in the United Kingdom and Ireland will be reluctant to transfer the asylum seekers to Greece in the future.[95]

Re-examination of the interrelation between EU law and the European Convention can be found in the 2009 *Elgafaji Case* too, the scope of which included refusal of Iraqi nationals' applications for temporary residence permits in the Netherlands.[96] The applicants were spouses, the husband was Shiite Muslim and the wife Sunni Muslim, who were, as they were targets of death threats in Iraq, sure of the risk of serious and individual threat to which they would be exposed were they to be returned to their country of origin. When passing the judgement, the Court drew a parallel between the scope of Article 15(c)[97] of 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, in conjunction with Article 2(e)[98] of that directive, and the scope of Article 3 of the European Convention. The Court stressed that "the fundamental right guaranteed under Article 3 of the European Convention forms part of the general principles of Community law, observance of which is ensured by the Court" and that "Article 15 (b)[99] of the Directive corresponds, in essence, to Article 3 of the European Convention. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the European Convention, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the European Convention". Nevertheless, the conclusion ended with the allegation that "the interpretation of Article 15(c), in conjunction with Article 2(e) thereof, is fully

[94] *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, Judgement of 21 December 2011, paras. 109 and 115.

[95] See Zuijdwijk (2011), p. 830.

[96] *MekiElgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, e.g. judgements in the Petrosian case (C-19/08, judgement of 29 January 2009), the Elgafaji case (C-465/07, judgement of 17 February 2009), the Salahadin Abdulla and Others case (joined cases C-175, 176, 178 and 179/08, judgement of 2 March 2010), the N. S. case (C-411/10, judgement of 21 December 2011).

[97] Article 15(c) views "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" as an element of "serious harm" which represents grounds for subsidiary protection.

[98] Article 2(e) determines who is to be regarded as "a person eligible for subsidiary protection".

[99] Article 15(b) puts "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin" into the elements of "serious harm" which represents grounds for subsidiary protection.

compatible with the European Convention, including the case-law of the ECHR relating to Article 3 of the European Convention".[100]

The European Convention has also been referred to in one of the most recent asylum cases, the 2013 *Abdullahi Case*.[101] The case was focused on 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 through the fate of a Somali national who entered the EU through Greece and lodged an application for international protection in Austria. The Bundesasylamt rejected the application as inadmissible and ordered the applicant's removal to Hungary. When filing an appeal against that decision, the applicant warned about the bad asylum situation in Hungary in the light of Article 3 of the European Convention, but the Bundesasylamt esteemed that the applicant's removal would not affect her rights under Article 3 of the Convention.[102] It is interesting that the CJEU did not make observations to the European Convention in its judgement. Instead, it decided to shape its standpoint on inhuman or degrading treatment by means of Article 4 of the Charter on Fundamental Rights.[103]

5 Conclusion

Over the decades, the Council of Europe and the EU have worked closely on human rights and fundamental freedoms standard setting, thus transferring the same concern for human rights onto their respective judicial organs. Due to disparate initial *ratio* of the two international organisations, the standpoint of the two Courts towards human rights protection was considerably different for some time. However, in the Lisbon and post-Lisbon era, which witnessed the entry into force of the Charter of Fundamental Rights and the establishment of the legal prerequisites for the accession of the EU to the European Convention, the gap between the Council of Europe's and EU's human rights perception has narrowed. This particularly holds true in the area of asylum law. Both Courts deal with similar problems of asylum seekers (refoulement, sovereignty clause application etc.), apply the same asylum legal standards (before all the European Convention and the Dublin System) and deliver judgements with the same or similar reasoning, frequently referring to one another's decisions. The existence of two parallel legal regimes has not

[100] *MekiElgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, e.g. judgements in the Petrosian case (C-19/08, judgement of 29 January 2009), the Elgafaji case (C-465/07, judgement of 17 February 2009), the Salahadin Abdulla and Others case (joined cases C-175, 176, 178 and 179/08, judgement of 2 March 2010), the N. S. case (C-411/10, judgement of 21 December 2011), paras. 17–26, 28, and 44.

[101] *Shamso Abdullahi v. Bundesasylamt*, C-394/12, Judgement of 10 December 2013.

[102] *Shamso Abdullahi v. Bundesasylamt*, C-394/12, Judgement of 10 December 2013, paras. 1–2 and 27–30.

[103] *Shamso Abdullahi v. Bundesasylamt*, C-394/12, Judgement of 10 December 2013, para. 64.

led to an inconsistent asylum policy. However, the CJEU still retains a more restrictive stance in asylum matters than the ECHR does, although such discrepancy is not validated by current law.

It is expected that the potential accession of the EU to the European Convention will improve and strengthen the position of asylum seekers in the EU Member States since the new system should afford double-level judicial protection. Namely, the Luxembourg court will be bound by judgements of the Strasbourg court, which will be also granted the right to revise the former Court's rulings in cases of alleged violations of the European Convention by institutions of the EU or by the EU Member States when applying EU law. Taking into account deficiencies and flaws in the current European asylum system and in national asylum legislations, it is beyond any doubt that the improvement of the asylum legal framework will retain high priority on the agenda of both the Council of Europe and the EU. Measures to follow should be aimed at further advancement of the position of asylum seekers through softening of the sovereignty clause and even distribution of burdens. It is to conclude that the crucial role in crystallising the European asylum policy will be played by the Luxembourg and Strasbourg courts, which have already contributed to turning the asylum law analysed in this paper into living instruments.

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