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DUBLIN IV REGULATION, THE SOLIDARITY PRINCIPLE AND PROTECTION OF HUMAN RIGHTS – STEP(S) FORWARD OR BACKWARD?

ABSTRACT

The paper analyzes the proposal to amend the core element of the Common European Asylum System, Dublin IV Regulation, from two different perspectives – principle of solidarity between Member States and protection of asylum seekers' human rights. An in-depth analysis is provided of novel solutions introduced by Dublin IV, their comparison with provisions contained in Dublin III, as well as an intersection of current state of negotiations between Member States within relevant EU institutions with a view to reach an acceptable version of the future document. The focus is on two important issues. Firstly, does Dublin IV enhance solidarity between Member States or does it do the exact opposite – further regresses the poor level of solidarity attained in Dublin III? Solidarity principle is implemented through a number of Dublin IV provisions, such as those concerning equitable distribution of applicants for international protection, the new fairness mechanisms and corrective allocation mechanisms. However, it remains to be seen whether these and other mechanisms based on solidarity principle will have any meaningful effect and whether there are any realistic prospects of applying them in practice, especially taking into account rather negative previous experiences. Secondly, changes brought by Dublin IV are analyzed from the perspective of human rights protection. This part of the paper focuses on certain problematic issues that emerge with regard to the level of human rights protection guaranteed by the Regulation and its compatibility with relevant standards established in the case-law of both the Court of Justice of the European Union and the European Court of Human Rights. Namely, application of a number of provisions contained in Dublin IV may easily result in violations of asylum seekers' human rights, right to family life and prohibition of torture in particular. This may seriously weaken the protection of fundamental rights of asylum seekers, especially rights of vulnerable asylum seekers, attained through the jurisprudence of two European courts. In the two enumerated operative parts of the paper attempts are made to assess the position of Dublin IV changes as compared not only to its currently applicable counterpart, but also to common European standards born out of application of Dublin system in practice, from the perspectives of both the principle of solidar-

ity and human rights protection. It appears that the proposed Dublin IV Regulation tends to sacrifice protection of human rights for the sake of the principle of solidarity. Since attainment of solidarity in practice is not warranted, the proposed regulation may end up making both the principle of solidarity and protection of human rights illusions rather than imperatives, making way for a preferred but highly debatable aim of a more functional asylum system.

Keywords: *Dublin system, Asylum, Solidarity, Human Rights*

1. DUBLIN IV PROPOSAL IN LIGHT OF THE DUTY OF SOLIDARITY OF EU MEMBER STATES

The principle of solidarity is usually regarded by scholars as the flip side of the general principle of loyalty,¹ which is thought to be established by virtue of Article 4(3) TEU. In his attempt to concisely describe the significance of the principle of loyalty, Klamert claims that “loyalty has been central to the development of Union law since the 1960s, and ... it still shapes its structure today.”² That author distinguishes solidarity from loyalty by assigning to the former the qualities of being “rather political and non-binding than legally binding.”³ Such perspective is deeply rooted in one of the initial provisions (Article 2) of TEU, which lists solidarity among social values that are common to the Member States (MS), together with pluralism, non-discrimination, tolerance, justice and equality. In respect of relations between MS, however, a prominent invocation of solidarity is encompassed in Art. 222 of the TFEU, in which obligation “to act jointly in the spirit of solidarity” is bestowed upon both the EU and its MS in cases of terrorist attacks and natural and man-made disasters.

The migration crisis presented test for assessing the level of solidarity among EU MS: since according to Dublin III, which was in force when the crisis broke out in 2015, the country in which an illegal immigrant first entered the EU was responsible for processing that person’s asylum application, Greece and Italy were faced with the greatest burden of accommodating the tremendous influx of immigrants in order to have their asylum applications processed.⁴

¹ A comprehensive list of scholarly opinions to such effect has been offered by Klamert. Klamert M., *The Principle of Loyalty in EU Law*, Oxford 2014, p. 31, footnotes 8 and 9

² *Ibid.*, p. 1

³ *Ibid.*, p. 35

⁴ For a discussion of the challenges that the migrant crisis posed to the Member States from the perspective of judicial cooperation in criminal matters and police cooperation, see Lukić, M., *The New Theatre of the Struggle for EU Unity - Judicial Cooperation in Criminal Matters and Police Cooperation Confronts Member States Sovereignty*, *Annals of the Faculty of Law in Belgrade*, No. 3, 2016, 140-153

According to one of the external studies commissioned and relied upon by the EU Commission, Dublin III showed significant shortcomings in respect of capacity to provide efficient mechanisms for dealing with a large influx of refugees: “Dublin III was not designed to deal with situations of mass influx, which has severely reduced its relevance in the current context and has undermined achieving its objectives... Dublin III was not designed to ensure fair sharing of responsibility and does not effectively address the disproportionate distribution of applications for international protection.”⁵ The large number of applicants with which Greece was faced resulted in practices that were perceived by other EU MS as amounting to “systemic flaws in asylum procedures and reception conditions.”⁶ Due to such perceptions most other MS assumed responsibility for asylum applications they received without undertaking formal Dublin III assessment in cases involving Greece.⁷

In response to the 2015 migrant crisis, the Council of the EU enacted two provisional measures in September 2015. Both were aimed at alleviating the burden posed by the physical presence of large number of immigrants on Italy and Greece, and both were based on TFEU Article 78(3) and Article 80, which had authorized the Council to adopt provisional measures if “one or more MS are confronted by an emergency situation characterized by a sudden inflow of nationals of third countries”, in line with the “principle of solidarity and fair sharing of responsibilities.” Both decisions set forth the terms of relocation of asylum seekers from Italy and Greece to other MS, and thus represented explicit departure from Dublin III criteria. The first decision of the Council enabled relocation of 40,000 asylum seekers from Italy and Greece to other MS, without stipulating the obligation of any particular MS to receive any number of subject persons.⁸ The second decision, which was enacted only a week later, set forth mandatory quotas of asylum seekers that all other MS were obligated to accept from the total of 120,000 persons that were to be relocated from Greece and Italy.⁹

⁵ Evaluation of the Dublin III Regulation, Final Report, DG Migration and Home Affairs, 4 December 2015, p. 4

¹ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf [Accessed 07 April 2018]

⁶ *Ibid*, p. 10

⁷ *Ibid*, p. 10; Evaluation of the Implementation of Dublin III Regulation, Final Report, DG Migration and Home Affairs, 18 March 2016, p. 20,

https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf [Accessed 07 April 2018]

⁸ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJL 239/146

⁹ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJL 248/80

Slovak and Hungarian governments sought annulment of the latter decision before the CJEU, citing, *inter alia*, breaches of the principle of institutional balance, competences of national parliaments, the principles of subsidiarity and proportionality, legal certainty, representative democracy, sound administration, essential procedural requirements, as well as the failure to meet requirements under Art. 78(3) TFEU. CJEU dismissed these actions on all counts.¹⁰ The reasoning of the judgment is important for the interpretation of the principle of solidarity, since the Court considered application of the principle of solidarity by the Council to have been mandated by Art. 80 TFEU.¹¹

The cited articulation should be juxtaposed to the role the principle of solidarity was assigned in the opinion of Attorney-General Kokott in *Pringle*, in the case in which compliance of ESM, the key instrument with which sovereign debt crisis of the Eurozone was tackled, with EU law was assessed. In that opinion, solidarity was cited as the ground for narrow interpretation of the prohibitions contained in Art. 125 TFEU (pertaining to assumption of liabilities of MS by the Union or by other MS).¹² The juxtaposition shows that the necessity of addressing the migrant crisis forced the Court to promote the principle of solidarity from an interpretative tool to a legally binding principle. The described advancement of legal significance does not contravene the common denominators of the role of solidarity in tackling the financial-sovereign debt¹³ and the migrant crisis, established by Goldner Lang: in both cases solidarity-based mechanisms arose from economic necessity and political reality, and in both cases lack of mutual trust was evident.¹⁴

The key feature of the Dublin IV proposal¹⁵ that concerns solidarity is the so-called corrective allocation mechanism, which would be automatically applicable if a MS is faced with a number of asylum seekers that is disproportionately high

¹⁰ Judgment of the Court (Grand Chamber) of 6 September 2017, *Slovak Republic and Hungary v Council of the European Union*, Joined Cases C-643/15 and C-647/15, ECLI:EU:C:2017:631

¹¹ *Ibid.*, paras. 251-253

¹² View of Attorney-General Kokott delivered on 26 October 2012, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, Case C-370/12, ECLI:EU:C:2012:675

¹³ For a detailed overview of the escalating response the EU deployed against the sovereign debt crisis, including the significance the principle of solidarity had in articulation of such response, see: Lukić, M., *Transformation Through Rescue - A Legal Perspective on the Response of the European Monetary Union to the Sovereign Debt Crisis*, *Annals of the Faculty of Law in Belgrade - Belgrade Law Review*, No. 3, 2013, 187-198; Lukić, M., *The Euro as Trojan Horse of European Unification - Subduing Member State Sovereignty in the Name of Austerity and Solidarity*, *Pravo i privreda*, No. 4-5, 2013, 555-572

¹⁴ Goldner Lang I., *The EU Financial and Migration Crises – Many Facets of EU Solidarity*, in Biondi, A., Dagilyte, E., Küçük, E. (eds.), *Solidarity in EU Law: Legal Principle in the Making*, Edward Elgar Publishing, 2018 (Forthcoming)

¹⁵ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for interna-

in relation to the size of its population and the level of its GDP. It is proposed that each MS be assigned a reference key, indicating the share of the burden it may share based on said criteria. The reference keys would then be applied for the purpose of determining the maximum number of asylum seekers that each MS may accommodate, which would be done by apportioning the total number of asylum seekers in the EU over the course of the preceding 12 months proportionately to reference keys. The corrective allocation mechanism would be activated if an MS would face a number of asylum seekers greater than 150% of its reference number.

If one considers the high level of economic integration of EU Member States, as well as the freedoms of movement within the EU, it becomes clear that the EU as a whole is the jurisdiction of destination for asylum seekers, and, consequently, that only acting as a whole it may address that problem both efficiently and in line with its own values. For those reasons the corrective allocation mechanism does not seem to be an ambitious articulation of solidarity, but indeed a very basic precondition, essentially a *conditio sine qua non* of the continuation of the EU. If countries exist within the EU which are not prepared to share the burden of processing of asylum applications in proportion to their strength, then such countries simply do not share the values of the EU and are not prepared to undertake obligations that are commensurate to rights they already enjoy at the level of integration that the EU has attained thus far.

2. DUBLIN IV PROPOSAL AND PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

Enhancing protection of asylum seekers' human rights was not among explicit aims of the proposal to reform the Dublin system. Instead, the proposal focuses on improving the system's capacity to efficiently determine a single MS responsible for examining the application for international protection by shortening the time limits for taking relevant steps within the asylum procedure, ensuring fair sharing of responsibilities between MS by introducing a corrective allocation mechanism in cases of large influx of asylum seekers and discouraging abuses and preventing secondary movements of the applicants within the EU.¹⁶ The focus is thus on improving the position of MS and not the position of individuals, although individuals may and will surely benefit from making the whole Common European Asylum System more efficient. However, if one takes into consideration the fact

tional protection lodged in one of the Member States by a third-country national or a stateless person (recast), Brussels, 4.5.2016 COM(2016) 270 final, 2016/0133 (COD), (Dublin IV Proposal)

¹⁶ *Ibid.*, pp. 2-3

that application of Dublin III Regulation¹⁷ resulted in cases of human rights violations established by the two European courts, the question to be asked is whether an opportunity has been lost to avoid or at least bring to a minimum potential future violations of basic human rights.

This part of the paper shall tackle three fundamental human rights which have proven to be prone to violations while implementing Dublin III Regulation – prohibition of torture, inhuman or degrading treatment,¹⁸ right to liberty and security¹⁹ and right to private and family life²⁰. Even though the authors of the Dublin IV Proposal claim that it “is fully compatible with fundamental rights and general principles of Community as well as international law”,²¹ such an assertion needs to be tested through an analysis which would encompass a number of steps. Firstly, the comparison has to be made between provisions contained in the currently applicable Dublin III Regulation and the Dublin IV Proposal in order to check whether any modification has been introduced that would reflect human rights protection. Secondly, relevant jurisprudence of the two European courts will have to be assessed since particular provisions, although *prima facie* fully compatible with human rights standards may have adverse implications when being applied. Finally, novel solutions will be analyzed against already existing case-law so as to assess whether space for potential human rights violations has been completely avoided or at least brought to a minimum.

2.1. Prohibition of torture, inhuman or degrading treatment and its relevance for Dublin transfers – any improvement regarding the safe third country concept and vulnerable categories of asylum seekers?

Prohibition of torture is of relevance in regard to a number of Dublin Regulation provisions, namely the rules on the safe third country concept and those relating to protection of vulnerable asylum seekers, unaccompanied minors and persons with serious health problems in particular.

¹⁷ 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 [2013] OJL180/31 (Dublin III Regulation)

¹⁸ Article 3 of the European Convention on Human Rights (European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union (Charter of Fundamental Rights of the European Union [2012] OJC326/391, CFREU)

¹⁹ Article 5 ECHR and Article 6 CFREU

²⁰ Article 8 ECHR and Article 7 CFREU

²¹ Dublin IV Proposal, p. 13

The safe third country concept is mentioned without further definition or explanation in Article 3 of both Dublin III and Dublin IV Regulation dealing with access to the procedure for examining an application for international protection. No change has been made with regard to paragraph 2 which explicitly states that the transfer of an applicant to the MS primarily designated as responsible according to relevant criteria laid down in the Regulation, will not be carried out if “there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union”. In such a case, two options are left at the disposal of the given MS. It shall either continue to examine other criteria in order to establish whether another MS can be designated as responsible, or if no other criterion is applicable, the determining MS will become the MS responsible for examining the application.

However, a change has occurred in the Dublin IV Proposal by deleting paragraph 3 of Article 3 of Dublin III Regulation which provides that “any MS shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU”.²² New paragraph 3 instead provides that before applying the criteria for determining a MS responsible, the first MS in which the application was lodged shall examine whether the application is inadmissible because a country which is not a MS is considered as a safe third country for the applicant, pursuant to Article 38 of Directive 2013/32/EU. The same paragraph also requires that the MS examines the application in an accelerated procedure when the applicant may, for serious reasons, be considered a danger to the national security or public order of the MS.

These modifications imply that an obligation is introduced for the MS to examine whether an application is inadmissible on the basis of the safe third country concept or prone to examination in an accelerated procedure. Should the MS consider the application as inadmissible on the aforementioned ground, there is no obstacle for the applicant to be returned to the safe third country and the MS which conducted the inadmissibility procedure will be considered to be the responsible MS. In other words, the purpose of this modification is to avoid situations in which MS transfer among each other applicants whose applications are either inadmissible or they represent a security risk. The aim is thus on reducing Member States’ own burden, decreasing the number of MS which would deal with a particular applicant and cutting the financial costs of multiple procedures and transfers.

²² 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 [2013] OJL180/60 (Directive on asylum procedures)

Such a conclusion should be considered from the perspective of a number of cases decided by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) dealing with Dublin transfers and the resulting violations of the prohibition of torture, inhuman or degrading treatment. Namely, would these changes have any consequences to problematic situations similar to circumstances of well-known and very important cases of *N.S. and M.E.* before the CJEU and *M.S.S. v Belgium and Greece* decided by the ECtHR? In both of these cases, asylum seekers were returned to another MS which was considered to be the MS responsible for examining the asylum application according to Dublin criteria, despite the fact that its asylum system faced systemic deficiencies and significant problems. In the case *N.S. and M.E.*, the CJEU confirmed that the obligation of a MS to respect fundamental rights in the context of applying transfers according to Dublin Regulation precludes the application of a conclusive presumption that the MS which Dublin Regulation indicates as responsible actually observes fundamental rights of the EU.²³ Article 4 of the CFREU must, therefore, be interpreted as meaning that the MS may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Dublin Regulation “where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision”.²⁴ It may be concluded that CJEU’s interpretation of relevant provisions of Dublin II Regulation actually influenced the novel provision of Article 3 of Dublin III Regulation and that no similar problems would subsequently appear in practice.²⁵ However, the 2015 case of *Shiraz Baig Mirza*²⁶ showed further prob-

²³ Case C-411/10 *N. S. v Secretary of State for the Home Department* and Case C-493/10 *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905, par. 105

²⁴ *Ibid.*, par. 106; Lenart considers the *NS* judgment to be ground-breaking for a number of reasons. Not only did the CJEU consistently follow the case law of the ECtHR, it also confirmed the rebuttable character of the presumption of observance of fundamental rights among the EU MS and obliged MS to examine the situation of asylum seekers in the MS responsible in accordance with the Dublin Regulation before requesting them to take charge of the applicant. Finally, and most importantly, it imposed the obligation upon MS to apply the so called sovereignty clause in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers, rendering it in certain circumstances no longer a ‘sovereignty clause’ but, in fact, a duty. Lenart, J., *Fortress Europe: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *Merkourios-Utrecht Journal of International and European Law*, No. 28, 2012, p. 17

²⁵ Xing-Yin, N., *The Buck Stops Here: Fundamental Rights Infringements Can No Longer Be Ignored When Transferring Asylum Seekers Under Dublin II*, *Boston College International & Comparative Law Review*, No. 37, 2014, p. 84

²⁶ Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* [2016] ECLI:EU:C:2016:188

lems in applying these provisions. A Pakistani national travelled through Serbia on its way to the EU. It applied for asylum in Hungary but continued its trip to Austria while his application was still under examination. On its way to Austria, he was stopped and interviewed in the Czech Republic. The Czech authorities issued a take back request to Hungary which was the MS responsible according to Dublin criteria and the Hungarian authorities accepted it. However, the then applicable Hungarian asylum legislation considered the admissibility of asylum application before its examination on the merits, a consequence of which would be the return of the asylum seeker to the Republic of Serbia which was on the Hungarian list of safe third countries. It appeared from the documents submitted in the course of the proceedings that Czech authorities were not informed of the Hungarian practice to consider Serbia as a safe third country. CJEU considered that “the right to send an applicant for international protection to a safe third country may also be exercised by a Member State after that Member State has accepted that it is responsible”.²⁷ Furthermore, the Court was of the opinion that Dublin III Regulation must be interpreted as not precluding the sending of an applicant to a safe third country when the MS carrying out the transfer to the MS responsible has not been informed “either of the rules of the latter Member State relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities”.²⁸

Such a position of the CJEU is in stark contrast with the relevant standards established by the European Court of Human Rights. The often cited judgment of the ECtHR in the case *M.S.S. v Belgium and Greece* interpreted the term “systemic flaws”, later used in both Dublin III and IV Regulation, as encompassing three different aspects – conditions of reception and detention, conditions of utmost poverty to which asylum seekers were exposed and risk of chain refoulement.²⁹ The Court concluded that Belgium authorities could not apply the presumption that applicable standards would be respected in Greece.³⁰ They had to examine in which way Greek authorities actually applied their asylum legislation in practice. The Court could not accept that Belgium authorities were unaware of the existing irregularities in the Greek asylum procedures, identified in numerous reports of

²⁷ *Ibid.*, par. 53

²⁸ *Ibid.*, par. 63

²⁹ Mole, N, *et al.*, *Priručnik o međunarodnim i evropskim standardima u oblasti azila i migracija i njihova primena i relevantnost u Republici Srbiji*, AIRE Centar i Međunarodna organizacija za migracije, Beograd, 2018, p. 78

³⁰ Regarding reasons for ECtHR’s departure from its earlier approach in similar cases, see: Fullerton, M., *Asylum Crisis Italian Style: The Dublin Regulation Collides With European Human Rights Law*, Harvard Human Rights Journal, No. 29, 2016, p. 99

various international bodies and organizations.³¹ By not requiring the relevant MS to be informed of the rules of the receiving MS relating to the sending of applicants to safe third countries or of the relevant practice of its competent authorities, CJEU obviously chose to ignore the potential risk of chain refoulement and subsequent violation of the prohibition of torture as a consequence of applying the safe third country concept and interpreted Dublin rules in a manner that cannot be said to be fully compatible with well-established human rights standards. Needless to say those adequate guarantees are also missing in the Dublin IV Proposal.

ECtHR cases in which vulnerable asylum seekers claimed that their transfer in accordance with the Dublin Regulation would lead to violations of the rights guaranteed by the Convention, prohibition of torture in particular, are also of relevance when examining the amendments introduced by Dublin IV Proposal. When it comes to particularly vulnerable categories of asylum seekers, the European Court of Human Rights introduced additional procedural restrictions in cases of the application of the Dublin system. Namely, it established requirements of procedural nature that need to be met in order for the return of the vulnerable asylum seeker to be carried out.³² Making return within the Dublin system conditional upon the provision of individual, very specific, detailed and reliable guarantees that vulnerable asylum seekers would be received and accommodated in accordance with their special needs is definitely a positive novel in the context of standards for overturning the assumption that human rights are respected in the EU MS.³³ In the absence of systemic deficiencies in the asylum procedure and

³¹ *MSS v Belgium and Greece* [GC] (2011) 53 EHRR 2, paras. 344-359

³² Applications brought against Italy have contributed to the initial introduction and further progressive development of requirements of a procedural character that need to be met in order for the return to be carried on. Namely, in *Mohammed Hussein v. the Netherlands and Italy* decided in 2013, the ECtHR considered that Dutch authorities needed to inform competent Italian authorities in due time, and that Italian authorities should have guaranteed that vulnerable asylum seekers, a mother with two minor children, would enjoy special reception conditions, in accordance with relevant Italian laws. *Mohammed Hussein v the Netherlands*, App No. 27725/10 (ECHR, 2 April 2013), par. 77. In *Halimi v Austria and Italy*, the Court accorded special significance to Italian authorities' 'observation' that the applicant would be allowed to apply for asylum upon return to Italy, as well as their 'assurance' that he would be included in protection programme and accommodated in accordance with medical documentation issued by Austrian authorities. *Halimi v Austria and Italy*, App No. 53852/11 (ECHR, 18 June 2013), paras. 68-69. The Court further raised procedural restrictions in applying relevant Dublin rules in *Tarakhel v Switzerland*, by requiring that the return would be conditional upon the provision of additional, individual, very specific, detailed and reliable guarantees by Italy that the family would be accommodated in conditions adapted for children and their age. *Tarakhel v Switzerland* (2015) 60 EHRR 28, par. 121

³³ Although ECtHR did not forbid the return of the family from Switzerland to Italy, it became clear that in assessing whether human rights are respected in the EU MS, it would be necessary not only to apply the systemic deficiencies test which is of general character and applies to all asylum seekers, but also to assess these deficiencies from the stand point of individual circumstances and special needs of vulne-

reception conditions, the emphasis is placed on examining the individual circumstances of the asylum seeker in a situation of special vulnerability.³⁴ The *Tarakhel v Switzerland* case further elaborated on the issue of circumstances due to which violation of Article 3 ECHR may occur in cases when vulnerable categories of asylum seekers are sent back to another Council of Europe member. The Court considered that returning a family with six minors to Italy would represent a violation of Article 3 since the Italian asylum system was not able to provide for a proper response to asylum seekers in need of enhanced support. In other words, the general systemic flaws test cannot lead to a final answer to the question whether there is a risk of torture or inhuman or degrading treatment.³⁵ Equal relevance should, in such cases, be accorded to an assessment of individual circumstances of vulnerable asylum seekers.³⁶

Returning to Dublin IV Proposal, it remains to be assessed whether its provisions adequately transpose human rights standards established through the case-law of ECtHR. The rights of unaccompanied minors have been said to be strengthened through better defining the principle of the best interest of the child and by setting out a mechanism for making a best interest of the child determination in

rable asylum seekers. What is more, the ECtHR in the *Tarakhel* case chose not to consider conditions in which the family with six minors was placed during their first stay in Italy. Zimmermann explains such an approach by asylum seekers' special vulnerability and believes that this vulnerability released them from the obligation to prove that they were exposed to torture or human or degrading treatment during their initial stay in Italy. Zimmermann, N., *Tarakhel v. Switzerland: Another Step in a Quiet (R) evolution?*, Strasbourg Observers, December 1, 2014, available at:

[<http://eulawanalysis.blogspot.rs/2014/11/tarakhel-v-switzerland-another-nail-in.html>] Accessed 07 April 2018

³⁴ Krstić, I., Čučković, B., *Praksa Evropskog suda za ljudska prava u odnosu na primenu Dablin regulative*, Pravni život, No. 12, 2016, p. 114

³⁵ Vicini is of the opinion that an "interpretation in accordance with Article 52(3) EUCFR would consider the 'systemic failures' criterion adopted by the CJEU not as a threshold under which there is no potential violation of Article 4, but rather as a condition that might exempt the asylum seeker from proving his/her individual risk". Vicini, G., *The Dublin Regulation Between Strasbourg and Luxembourg: Re Shaping Non-Refoulement in the Name of Mutual Trust?*, European Journal of Legal Studies, No. 8/2, 2015, p. 65

³⁶ The Court found that, in the absence of reliable information on the specific institution in which the family would be placed, material reception conditions, as well as the respect of family unity, it cannot be considered that the Swiss authorities had sufficient guarantees that, if the family was to be returned to Italy, they would be treated in a manner that would be appropriate to the age of their children. *Tarakhel v Switzerland* (2015) 60 EHRR 28. In other words, the ECtHR did not completely prohibit the return of the Tarakhel family to Italy, but made the return conditional upon the provision of additional, individual, very specific, detailed and reliable guarantees by Italy that the family would be accommodated in conditions adapted for children. For divergent practice of ECtHR in cases similar to *Tarakhel*, see in particular: Rubin, A., *Shifting Standards: The Dublin Regulation and Italy*, Creighton International and Comparative Law Journal, No. 7, 2016, pp. 148-151

all circumstances implying the transfer of the minor.³⁷ The proposal clarifies that the MS where the minor first lodged the application would be responsible, unless it is demonstrated that such a solution would not be in its best interest. The proposal further claims that this rule would allow a quick determination of the MS responsible and thus allow minors swift access to the procedure. In addition, before transferring an unaccompanied minor to another MS, the transferring MS shall make sure that that MS will take the necessary measures under the asylum procedures and reception conditions Directive without delay.³⁸

However, it may be noticed that the proposal focuses on the specific category of unaccompanied minors and insists on the application of the best interest of the child principle in relation to them. It neither deals with minors in general, including accompanied minors, or with other categories of vulnerable asylum seekers such as asylum seekers with serious health problems whose transfer to another MS could be considered as violation of Article 3 of the Convention.³⁹ It follows that specific situation of minor asylum seekers accompanied by one or both parents, such as was the case in the *Tarakhel* judgment, would not benefit of either special guarantees or procedures in the newly to be established Dublin system. Systemic flaws test provided in Article 3 of the Dublin IV Proposal remains the only safeguard, whereas ‘individual circumstances’ test is left outside the Dublin system despite its growing recognition and significance in the jurisprudence of the ECtHR.

Does Dublin IV Proposal bring any improvements as regards respect for the prohibition of torture, inhuman and degrading treatment? If one leaves aside guarantees introduced for unaccompanied minors,⁴⁰ its provisions do not seem to reflect relevant human rights standards. The only consequence that follows from introduced modifications is that a MS has a duty to examine whether an application is inadmissible on the basis of the safe third country concept. Should the MS consider the application inadmissible, the applicant may be returned to the safe third country. Should the MS consider the application to be admissible, it will continue the procedure for determining the responsible MS in accordance with Dublin criteria and in the course of that procedure, it may apply the take charge or

³⁷ Dublin IV Proposal, pp. 13-14

³⁸ *Ibid.*, p. 17

³⁹ For relevant ECtHR case-law regarding application of Dublin Regulation to asylum seekers with health problems, see: *D. v UK*, (1997) 24 EHRR 425; *N. v UK* (2008) 47 EHRR 39

⁴⁰ However, even provisions regarding unaccompanied minors have been criticized by the doctrine from the stand point of human rights protection. For example, Hruschka believes that relevant provision of Dublin IV Proposal (Article 10(5)) “potentially infringes the rights of the child and appears to be at variance with the principle that the best interests of the child have to be a primary consideration in all action taken on behalf of minors”. Hruschka, C., *Enhancing efficiency and fairness? The Commission proposal for a Dublin IV Regulation*, ERA Forum, No. 17, 2016, pp. 530-531

take back procedures established by the Regulation. This means that the so called Dublin transfers among MS will continue to occur with all the problems that they seem to have been causing while being applied within the Dublin III Regulation. In other words, *M.S.S.* and *Tarakhel* scenarios are still possible. The only situation in which they would not occur is the one where either Belgium or Switzerland considers that applicants come from a non-EU MS which may be assessed as safe. Otherwise, transfers to Greece or Italy, or any other MS, would be carried on with the only formal obstacle being the ‘systemic flaws’ test, not the ‘individual circumstances’ test. Such a remark calls for another observation in terms of the prohibition of torture, inhuman and degrading treatment - the safe third country concept remains to be one of the most problematic and controversial EU law inventions.

2.2. Dublin IV rules on asylum detention and their compatibility with the right to liberty and security

Detention of asylum seekers may violate a number of human rights, namely right to liberty and security, right to private and family life, as well as the prohibition of torture, especially in regard to detention conditions. Since regulation of detention conditions is the subject matter of the Directive on standards for the reception of applicants for international protection,⁴¹ detention of asylum seekers will not be examined from the perspective of violation of Article 3 ECHR. The focus will instead be on potential repercussions of Dublin IV Proposal on the right to liberty and security of asylum seekers, i.e. Article 5 ECHR.

Dublin IV Proposal is claimed to reinforce this right only by shortening the time limits under which an asylum seeker may be detained, since other relevant guarantees, such as exceptional character of asylum detention as well as detention in accordance with the principles of necessity and proportionality, were already contained in Dublin III Regulation.⁴² However, the Dublin IV Proposal itself provides for information on the review of detention practices that occurred within Dublin III Regulation. It claims that “practice of detention, reported as often used by 21 of 31 countries, varies considerably in regards to the stage of the procedure: some authorities resort to detention from the start of the Dublin procedure, others only when the transfer request has been accepted by the responsible Member State.

⁴¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJL180/96 (Directive on reception conditions)

⁴² For a detailed analysis of Dublin III Regulation provisions dealing with detention which were completely new as opposed to Dublin II, see: Peers, S., *Reconciling the Dublin system with European fundamental rights and the Charter*, ERA Forum, No. 15, 2014, pp. 491-493

These divergent practices create legal uncertainty as well as practical problems.”⁴³ According to new Article 29, where an asylum seeker is detained, the period for submitting a take charge request or a take back notification shall not exceed two weeks from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply on a take charge request. Such reply shall be given within one week of receipt of the take charge request. Failure to reply within the one-week period shall be tantamount to accepting the take charge request and shall entail the obligation to take the person in charge, including the obligation to provide for proper arrangements for arrival.

However, the crucial question is whether problems arising in practice were due to long detention periods and long intermediary phases in transfer procedures, or whether the problem laid in the very reasons for ordering asylum detention and the fact that Article 31 of the 1951 Geneva Convention on the Status of Refugees,⁴⁴ which is explicitly referred upon even by the Dublin IV Proposal, is often disregarded in practice.

According to ECtHR case-law, depriving asylum seekers of their liberty can be neither unreasonably long nor arbitrary. What is more, ECtHR introduced “the less stringent measures test” when assessing violation of Article 5 (1) ECHR in cases that relate to detention of migrants.⁴⁵ In a case concerning an HIV positive asylum seeker from Cameroon, the Court recalled that Article 5 (1) generally authorizes the lawful detention of a person against whom action is being taken with a view to deportation. It, however, stressed the fact that the authorities had information regarding her identity, that they knew that she lived at a fixed address known to these same authorities and that she always presented herself when required. Since the applicant was infected with HIV and her state of health had deteriorated during the detention, the Court was of the opinion that the authorities should have considered less severe measures capable of safeguarding the public interest while at the same time protecting applicant’s right to liberty. The Court set a standard that there must exist a relation between the detention of the applicant and the aim pursued, in violation of Article 5 (1) ECHR.⁴⁶ The similar line of reasoning was followed by ECtHR in *Popov v France* case which concerned a family from Kazakhstan which was placed in detention after their application for inter-

⁴³ Dublin IV Proposal, p. 11

⁴⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, *United Nations, Treaty Series*, vol. 189, p. 137

⁴⁵ *Yoh-Ekale Mwanje v Belgium* (2012) 56 EHRR 1140, par. 124

⁴⁶ *Popov v France*, App Nos 39472/07 and 39474/07 (ECHR, 19 January 2012), par. 119

national protection was rejected. The Court found violation of Article 5 ECHR in relation to children, but could not establish the same conclusion as regards their parents. The Court considered that less severe measures were at the disposal of the competent authorities as regards children, since detention should always be considered as a measure of last resort. Finally, in *S.D. v Greece*, ECtHR stressed that, when it comes to detention, a clear distinction should be made between asylum seekers and other categories of migrants,⁴⁷ whereas in *Saadi v the United Kingdom* and *Amuur v France*, it insisted upon wide range of measures that would reflect asylum seekers' status, exceeding those that would apply to irregular migrants.⁴⁸

It again appears that Dublin IV Proposal provisions dealing with detention of asylum seekers failed to take into account relevant standards established through the jurisprudence of the European Court of Human Rights. The exclusive focus on shortening relevant time limits does not assure the respect of the right to liberty of asylum seekers. It neither eliminates various interferences with this right that application of detention provisions may entail. As seen from the case-law analyzed above, detention of asylum seekers may lead to violation of Article 5 ECHR even in cases when applicable time frames are fully complied with. In other words, the less severe measures test combined with the individual circumstances test may prevail and, if not respected, lead to violation of the right to liberty. Dublin IV Proposal failed to take into account these considerations when allegedly reinforcing the right to liberty, just as it again simply ignored the necessity to consider specific situation of vulnerable asylum seekers by introducing clear and unequivocal safeguards in case of their detention.

2.3. The right to asylum seekers' family reunification as an element of the right to private and family life – the only genuine reinforcement of human rights that reflects the relevant case-law of ECtHR

There are two ways in which protection of family life will be reinforced by Dublin IV Proposal, one of which may be considered a consequence of a direct influence of the case law of ECtHR. Firstly, the definition of family members is extended to include the sibling or siblings of an applicant. Secondly, family relations which were formed after leaving the country of origin but before arriving to the territory of the MS will also be considered as protected by the principle of family unity.⁴⁹ These two novelties have different justifications. Siblings are considered as family members by the ECtHR in its jurisprudence and by widening the definition

⁴⁷ *S.D. v Greece*, App no 53541/07 (ECHR 11 September 2009), par. 65

⁴⁸ *Saadi v UK* (2008) 47 EHRR 17, par. 75, *Amuur v France* (1996) 22 EHRR 533, par. 43

⁴⁹ Article 2(1)(g) Dublin IV Proposal

of family relations to encompass siblings, authors of Dublin IV Proposal showed readiness to include this important right to family life standard.⁵⁰ On the other hand, the extension to families formed during transit may be considered to reflect realities brought about by recent migratory crisis since asylum seekers tend to spend longer time in the transit countries, i.e. countries situated between the country of origin and the MS of first entry.

Both changes will undoubtedly enhance protection of family life which may be violated in asylum cases in two ways. First of all, principle of family unity may, under certain circumstances, become a criterion for determining MS responsible for examination of an asylum application.⁵¹ Dublin IV Proposal rules are rather clear in this regard and there seems to be no space for further enhancing right to family life through ECtHR standards since the Court itself applies a restrictive approach by considering that States should control entry and stay of foreign nationals on their territories and that Article 8 does not imply that States have to respect the choice of family members to gather on the territories under their respective jurisdictions.⁵² The Dublin IV Proposal, what is more, appears to introduce higher standards in this regard by making the family unity principle the only relevant criterion for applying the so called sovereignty or discretionary clause provided in Article 19(1).⁵³ Secondly, Article 8 ECHR may become of relevance in cases of Dublin transfers and deportation. However, in this regard standards established in the case-law of ECtHR seem to be met since Dublin IV Proposal explicitly provides that family members to whom the allocation procedure applies will be allocated to the same Member State and that the corrective allocation mechanism should not lead to the separation of family members.⁵⁴

3. CONCLUDING REMARKS

Even more than during the financial and sovereign debt crisis, the migrant crisis brought the principle of solidarity into the limelight of policy-making and legislative action. Mandatory quotas for accepting asylum seekers, which constituted a provisional measure of the Council, have been fiercely disputed by certain Central

⁵⁰ See: *A.S. v Switzerland* App No 39350/13 (ECHR, 30 June 2015), paras. 44-52

⁵¹ Articles 11, 12 and 13 of Dublin IV Proposal

⁵² See: *Gül v Switzerland* (1996) 22 EHRR 93, par. 38

⁵³ New Article 19 states that "(B)y way of derogation from Article 3(1) and only as long as no Member State has been determined as responsible, each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person based on family grounds in relation to wider family not covered by Article 2(g), even if such examination is not its responsibility under the criteria laid down in this Regulation"

⁵⁴ Article 41(2) Dublin IV Proposal

European countries. Dublin IV is designed to transform such provisional measure into a permanent corrective mechanism. The principle of solidarity is cited as grounds for enactment of both mechanisms.

From a conceptual and logical perspective, however, one may argue that dealing with the migrant crisis was not a matter of solidarity, for solidarity assumes existence of two distinct subjects, whereby one acts in line with solidarity with the other. The migrant crisis, however, targeted the EU as a whole, and, consequently, required the response of the entire EU. The fact that most migrants attempted to reach Germany or the United Kingdom was of secondary significance, since the high level of economic integration and freedoms of movement within the EU meant that an immigrant, once admitted, would have been effectively free to choose where to reside.

Furthermore, although the sudden and large influx of asylum seekers concerned the EU as a whole, it had a direct negative effect on only certain parts of certain countries. In view of the burden it presented upon affected local communities, such influx was comparable to terrorist threats and natural and man-made disasters in respect of which solidarity was mandated under Art. 222 TFEU.

Considering the stated perspective, the corrective allocation mechanism proposed within Dublin IV seems to be a natural and minimal means for preserving the integrity of EU legal system, values and political interests, as well as for upholding solidarity with the regions most affected with the influx of asylum seekers. Such an assessment is further affirmed if the issue is conceived from a broader perspective of the present phase of EU unification: an union which on the verge of becoming a full-fledged, and sovereign, super-state, should be able to distribute the burden of coping with extraordinary challenges equitably among its constituents.⁵⁵

Protection of human rights, although not envisaged as one of the aims of replacing Dublin III Regulation with its Dublin IV successor, will face enhancement in certain aspects whereas in others it may be expected to either regress or at best stay at the same unsatisfactory level. ECtHR's constantly growing case-law relating to Dublin system will further continue to evolve, and even though ECtHR has no competence to review applications against acts of the EU, it still may assess compatibility with ECHR of MS measures that apply or implement EU law. The presumption that fundamental rights protection in the EU system can normally

⁵⁵ A brief overview of the degree of progress towards a sovereign super-state may be found in: Lukić, M., *How Long Before Bundle of Treaties Becomes Sovereign? A Legal Perspective on the Choices before the EU, South Eastern Europe and the European Union - Legal Aspects*, SEE/EU Cluster of Excellence in European and International Law (ed.) Verlag Alma Mater, Vol. 1, 2015, 127-137

be considered to be equivalent to that of the Convention system, established in the *Bosphorus* case,⁵⁶ has often been rebutted on a case-by-case basis where it is shown that the protection of ECHR rights was manifestly deficient.⁵⁷ By not including ECtHR standards relating to prohibition of torture and right to liberty in asylum cases, particularly those concerning vulnerable categories of asylum seekers, drafters of the Dublin IV Proposal obviously chose to disregard basic human rights on account of making the Dublin system more functional and tailored according to Member States' preferences, at the same time leaving the door wide open for further Dublin case-loading before ECtHR.

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