THE DUBLIN REGULATION BETWEEN STRASBOURG AND LUXEMBOURG: RESHAPING *NON-REFOULEMENT* IN THE NAME OF MUTUAL TRUST?

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This article addresses one of the most challenging inconsistencies in the case law of the ECtHR and the CJEU. It critically analyses the judgments delivered by these two courts on the compatibility of the Dublin Regulation with the fundamental rights enshrined in the ECHR and in the EUCFR, respectively. On the one hand, the article proposes an interpretation of the judgments which is able to reconcile the two different approaches concerning EU Member States' obligations under the Dublin Regulation. On the other, it argues that an irreconcilable interpretation of the principle on non-refoulement *underlies the different thresholds established by the two courts in order to rebut the mutual trust presumption. This divergent interpretation is deemed to trigger a violation of Articles 52 and 53 of the EUCFR.*

Keywords: EU law, ECHR, EUCFR, non-refoulement, Dublin Regulation.

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I. INTRODUCTION

The recent judgment of the European Court of Human Rights (ECtHR) in *Tarakhel v. Switzerland*[1] offers a pretext for reconsidering whether the EU Dublin regulation complies with the protection of fundamental rights. This regulation establishes a hierarchy of criteria in order to identify a single Member State responsible for the examination of an asylum claim lodged by a third-country national. The *Tarakhel* case is not the first time that these criteria have fallen under judicial scrutiny. In the *M.S.S.*[2] and *N.S.*[3] cases, both from 2011, the ECtHR and the Court of Justice of the European Union (CJEU), respectively, considered whether the returns to Greece implemented by the Member States on the basis of the Dublin regulation complied with the European Convention on Human Rights (ECHR) and the European Union Charter of Fundamental Rights (EUCFR). Following these landmark cases, a high degree of inconsistency has affected the dialogue between these two Courts. Although the EU legislator[4] seems to have endorsed the principles laid down in *M.S.S.*, the CJEU appears to have developed an autonomous interpretation of the regulation. This dialogue is likely to be further affected by the recent Opinion 2/2013 of the CJEU, concerning the accession of the EU to the ECHR.[5]

The Dublin regulation is grounded on the presumption that all EU Member States, as well as the States bound by its provisions on the basis of bilateral agreements,[6] observe the fundamental rights of the European Union. Although in agreement with the relative character of this presumption, the jurisprudence of the European Courts diverges over the conditions that might rebut the 'mutual trust' between Member States. Furthermore, a first glance at the case law might suggest that the ECtHR and the CJEU also infer different consequences from the exclusion of such presumption. Clearly, when a State does not respect or ensure the fundamental rights enshrined in Articles 3 ECHR and 4 EUCFR,[7] other

[1] *Tarakhel v. Switzerland* App no 29217/12 (ECtHR, 4 November 2014).
[2] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).
[3] Case C-411/10 and 493/10 *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* ECLI:EU:C:2011:865.
[4] The Preamble of the recast Dublin III Regulation (n 10) reads as follows: '[w]ith respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.'
[5] Opinion 2/2013 on the Accession of European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms of 18 December 2014, ECLI:EU:C:2014:2454.
[6] Iceland, Liechtenstein, Norway and Switzerland, that have associated themselves with the EU regime on the abolition of border controls (the Schengen agreements).
[7] These provisions prohibit torture and other inhuman and degrading treatment. As pointed out by Ippolito, in *N.S.* the CJEU failed to say 'whether violations of fundamental rights other than in Article 4 may be sufficient to avoid a

Member States cannot safely return an asylum seeker to its territory.[8] The return cannot be executed even though the Dublin regulation designates such State as the only Member State competent to assess his/her asylum claim. Even if both the ECtHR and the CJEU share this view, there seems to be no common and clear understanding on how the Member States, having jurisdiction over an asylum seeker that cannot be returned to the competent State, ought to behave in such cases.

Following an introductory overview on the evolution of the Dublin Regulation and its role within the Common European Asylum System, this paper analyses the shortcomings, which have attracted scrutiny of the European Courts.

This paper then argues that there is little room to reconcile the interpretative approach adopted by the EU judges on the conditions to overcome the mutual trust principle with Strasbourg jurisprudence on Article 3 of the ECHR. Indeed, the interpretative approach adopted by the CJEU is inconsistent with Articles 52(3) and 53 of the EUCFR. These Articles provide that the Charter provisions corresponding to ECHR provisions must be given the same meaning and scope as the rights laid down by the Convention and that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, inter alia, in the ECHR.

The situation is rather different when it comes to the consequences deriving from the rebuttal of the compliance presumption. It is argued that the statements of the two European Courts can be read as providing a set of non-conflicting obligations that Member States must fulfill when a return to the Competent State under the Dublin regulation cannot be executed. On the one hand, the obligations imposed by the CJEU are not in breach of the Convention provisions; on the other, the mechanism of diplomatic assurances recently suggested by the ECtHR in *Tarackel*, though apparently incompatible with the mutual trust principle, might turn out to be a workable path for preserving the functioning of the Dublin Regulation by simultaneously granting the respect of fundamental rights.

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transfer/referral pursuant to the criteria of the Dublin II Regulation'; Francesca Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?' (2015) 17 European Journal of Migration and Law 1, 24.

[8] Indeed, arts 3 ECHR and 4 EUCFR are commonly interpreted as implicitly enshrining the principle of *non-refoulement*, according to which an individual cannot be returned to a territory where his life and freedom are endangered.

II. The Dublin Regulation and The Common European Asylum System

The 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 (Dublin II)[9] has recently been replaced by Regulation No 604/2013 of the European Parliament and of the Council (Dublin III).[10] Indeed, the EU legal instruments on asylum have been reformed between 2011 and 2013. The reformed legislation finds its legal basis in Article 78 of the Treaty on the Functioning of the European Union (TFEU)[11] and is articulated in the Common European Asylum System (CEAS).

Besides the distribution of competence for examining asylum claims between the Member States,[12] the CEAS regulates the reception of asylum seekers (Reception Directive),[13] the procedures for obtaining the international protection (Procedures Directive),[14] as well as the conditions and the content of this protection (Qualification Directive).[15]

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[9] Council Regulation 343/2003 [2004] OJ L50/1. The first paragraph of art 78 TFEU reads as follows: 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

[10] 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) [2013] OJ L180/31.

[11] This provision corresponds to former art 63 of the Treaty on the European Community.

[12] The Dublin regulation is completed by Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L180/1.

[13] Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

[14] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.

[15] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9. The CEAS is further completed by the

With the recent reform, the CEAS has entered its so-called 'second phase'[16] aimed at the harmonization of the EU asylum policy. The recast instruments are now being implemented in the Member States and it is certainly too early to estimate the effects of their application. The term for the transposition of the directives has expired only a few months ago, the only exception being the Qualification Directive, which had to be transposed by 21 December 2013.[17] Nevertheless, even a superficial reading of the recast provisions dampens any optimism regarding eventual harmonization. The new legislation, reproducing as it does the minimum standards scheme, continues to leave a high margin of discretion to the Member States.

The harmonization of national asylum legislations ought to be a precondition for the Dublin criteria and mechanisms to work fairly and efficiently. The Dublin Regulation, in fact, leaves asylum seekers bereft of any choice concerning the country where they can lodge their claim. There is a single State competent for examining an asylum application[18] and this State is identified on the basis of objective and hierarchical criteria set forth in the Regulation.[19] This mechanism means that the asylum seeker cannot lodge an application in a different Member State, even when his/her claim is rejected by the competent State (this is the so-called 'one chance rule'). Given the lack of uniform standards of protection within the Member States, the Dublin system entails rather unfair treatment for asylum seekers.[20] The reception conditions and the chances of being

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Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive) [2001] OJ L212/12. This Directive was not triggered by the recent reform.

[16] This second phase was originally conceived by the Hague Program, adopted by the European Council in 2004.

[17] Art 39 of the Recast Qualification Directive of 2011.

[18] 'The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible' (Dublin III Regulation, art 3(1)).

[19] The criteria are to be applied in the order in which they are presented in the Regulation and on the basis of the situation existing when the asylum seeker first lodged his/her application with a Member State (Dublin III Regulation, art 7). Firstly, the Regulation set forth the criteria applicable to minor asylum seekers and other criteria based on the principle of family unity, applicable to all applicants whose family members reside in the EU territory (arts 8-11). Secondly, the Dublin criteria indicate as State competent the Member State which issued a residence document or a visa to the applicant (art 12). Thirdly, the Regulation gives relevance to the (legal or illegal) entry or stay in the EU territory (art 13).

[20] Interestingly, Evelien Brouwer argues that, in cases in which the mutual trust principle is not in the interest of the individuals, a '(higher level of the) harmonization of law is necessary' ('Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 Utrecht Law Review 135, 136-137). This assumption might apply, for instance, to the Dublin System and the European Arrest Warrant, both implying a risk of violation of art 3 ECHR.

granted international protection vary considerably depending on which State is elected as competent by the Regulation criteria.

The unfairness towards asylum seekers is not the only reason why the Dublin Regulation has been criticized. As a matter of fact, its unfairness extends to the Member States. Despite representing a residuary criterion within the hierarchy set forth by the Regulation, the provision most commonly applied to determine the State competent is Article 10. This provision links irregular entry to the responsibility for the examination of an asylum claim: 'where it is established [...] that an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum.'[21] This criterion clearly penalizes the Member States on the external borders of the European Union, especially the Mediterranean States.[22] Hence, the Dublin Regulation is also criticized for not being compatible with the principle of solidarity, included by the Lisbon Treaty in Article 80 TFEU.[23]

The feature of the Dublin criteria and mechanisms, which attracted the scrutiny of the European Courts, is their foundation on the principle of mutual trust.[24] As mentioned above, the whole system is grounded on the presumption that all the Member States and the States bound by the regulation by virtue of bilateral agreements[25] observe EU law, particularly EU fundamental rights and freedoms.[26] On the basis of this presumption, the Member States consider themselves reciprocally as 'safe countries'.[27]

The presumption of compliance covers the principle of *non-refoulement*[28] set forth by the 1951 Geneva Convention relating to the Refugee Status,[29] the

[21] Dublin III Regulation, art 13(1) (former art 10(1) of Dublin II).
[22] Eiko Thielemann, 'Why Asylum Policy Harmonization Undermines Refugee Burden-Sharing' (2004) 6 European Journal of Migration and Law 47, 58; Maria-Teresa Gil-Bazo 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited' (2006) 18 International Journal of Refugee Law 571, 578.
[23] See *inter alia* Roland Bieber, Francesco Maiani, 'Sans solidarité point d'Union européenne : Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile' (2012) 2 Revue Trimestrielle de Droit Européen 295.
[24] Satvinder S. Juss argues that the Dublin system is 'still anchored in the mind-set of colonial Europe. It assumes that every area in Europe - from Sicily in the south to Scandinavia in the north - is a safe territory for a refugee to access protection once he or she gets there'; 'The Post-Colonial Refugee, Dublin II, and the end of non-refoulement' (2013) 20 International Journal on Minority and Group Rights, 310.
[25] Iceland, Liechtenstein, Norway and Switzerland, that have associated themselves with the EU regime on the abolition of border controls (the Schengen agreements).
[26] Case C-411/10 and 493/10 (n 3), para 83.
[27] The same presumption justifies Protocol 24 on asylum for nationals of Member States of the European Union, attached to the TFEU.
[28] The third Recital of the Recast Regulation Preamble reads as follows: 'Member States, all respecting the principle of *non-refoulement*, are considered as safe countries

European Convention on Human Rights and the EU Charter of Fundamental Rights.

III. SYSTEMIC FAILURES: THE TENSION BETWEEN MUTUAL TRUST AND THE PROTECTION OF FUNDAMENTAL RIGHTS

The question of the judicial dialogue between the European Courts is at the core of a very lively debate concerning Opinion 2/2013 of the CJEU on the accession of the European Union to the ECHR.[30] Although this first attempt to formalize the relationship between the Strasbourg and the Luxembourg Courts failed,[31] the jurisprudence of the two Courts continues to interact in a number of fields[32] and this interaction is partially regulated by EU law provisions.

According to the EU Court of Justice, the European Convention on Human Rights has a 'special significance' within the EU legal order.[33] This special significance has been codified by Article 6 of the Treaty on the European Union (TEU), according to which 'fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

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for third country nationals.' The whole European asylum policy is bound by the respect of this principle by virtue of art 78 TFEU.

[29] Nevertheless, the *non-refoulement* principle proclaimed by art 33 of the Geneva Convention differs from the ones elaborated within the Council of Europe and the EU for two main reasons. Firstly, its application only protects the 'refugee' from being returned 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' It is not contended that such protection equally extends to asylum seekers. Nevertheless, the need for the threat to be motivated by one of the conventional grounds considerably diminishes the extent of the protection against expulsion. Secondly, unlike art 3 ECHR, art 33 does not proclaim an absolute principle of *non-refoulement*. The same provision provides an exception to its application in the second paragraph: '[t]he benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

[30] Opinion 2/2013 on the Accession of European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms of 18 December 2014, ECLI:EU:C:2014:2454.

[31] The Opinion delivered by the CJEU has declared the Draft Convention on the Accession of the EU to the ECHR incompatible with the EU founding Treaties.

[32] Specifically on the interaction of the two Courts in the field of immigration and asylum Sonia Morano-Foadi and Stelios Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 European Journal of International Law 1071.

[33] Case C-402/05 and C-415/05, *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2005] ECLI:EU:T:2005:332, para 283.

Moreover, Articles 52 and 53 of the EU Charter of Fundamental Rights regulate the articulation of this Charter with the ECHR. Article 52(3) provides that the Charter provisions corresponding to ECHR provisions must be given the same meaning and scope of the rights laid down by the Convention, without preventing EU law from granting more extensive protection. According to Article 53, 'nothing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

This paper addresses one of most challenging inconsistencies between the two European courts' jurisprudence. Both the ECtHR and the CJEU have delivered judgments on the compatibility of the Dublin Regulation with the fundamental rights enshrined, respectively, in the ECHR and the EUCFR. This section outlines the principles and statements emerging from these judgments. The two courts share the view that the mutual trust presumption, on which the Dublin Regulation is based, must be rebuttable in order to ensure that asylum seekers are not returned to territories in which they would face inhuman and degrading treatment. The threshold to rebut this presumption is, nonetheless, different in the ECtHR and the CJEU case law. While the first Court gives relevance to the individual risk the asylum seeker would face if returned to the State competent according to Dublin criteria, the second focuses on the general situation of the national reception system and establishes a higher threshold to rebut the mutual trust presumption. This higher threshold, clearly aimed at preserving the mutual trust principle, is only met when a Member State asylum system suffers from 'systemic failures'. Following a detailed analysis of the case law, this section argues that the restrictive interpretation proposed by the CJEU is not compatible with the clauses set forth in Articles 52 and 53 of the Charter.

1. *The Dublin Regulation and* Non-Refoulement*: The* M.S.S. *Case of the ECtHR*

The right of asylum is not explicitly protected by the European Convention on Human Rights. Nonetheless, in a number of decisions the ECtHR has applied Articles 3 (prohibition of torture), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) in order to grant substantial protection to asylum seekers. As a matter of fact, the Strasbourg judges recognize the peculiar status of these applicants as members of a 'particularly underprivileged and vulnerable population group in need of special protection.'[34] Hence, the

[34] *M.S.S.* (n 2) para 251.

Court acts in practice as an 'asylum court'[35] despite the lack of a specific legal basis in the provisions of the Convention.

The cornerstone of the protection granted to asylum seekers is undoubtedly Article 3 of the Convention. The ECtHR has constantly inferred from Article 3 the principle of *non-refoulement*. According to the well-known formula elaborated by the Court, the decision by a Contracting State to expel an individual 'may give rise to an issue under Article 3, and, hence, engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country.'[36] The principle of *non-refoulement* deriving from Article 3 has an absolute character[37] and offers an additional protection against indirect *refoulement*,[38] i.e. against the expulsion to the territory of a State from which there is the risk that the person would be further expelled and exposed to inhuman or degrading treatment in a third country.

The principle of *non-refoulement* elaborated by the Strasbourg Court extends its effect to the field of application of the Dublin Regulation. The Grand Chamber of the ECtHR, in *M.S.S. v. Belgium and Greece*, has partially 'dismantled'[39] the competence-sharing system created by the Dublin II Regulation. Belgium has been condemned for a violation of Articles 3 and 13 of the Convention. By returning the applicant to Greece, Belgium exposed him to widespread inhuman and degrading treatment caused by the insufficiency of the Greek reception system. Moreover, the applicant faced the risk of being further repatriated from Greece to his country of origin, given the documented practice of the Greek authorities to return asylum seekers without granting them access to a fair asylum procedure.[40] According to the Court, Belgium thus violated the principle of *non-refoulement* both directly and indirectly.

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[35] Marc Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court' (2012) 8 European Constitutional Law Review 203.

[36] *Soering v. United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para. 91; *Cruz Varas v. Sweden* App no 15576/89 (ECtHR, 20 March 1991), para 69; *Vilvarajah v. United Kingdom* App no 13163/87 (ECtHR, 30 October 1991), para 103; *Ahmed v. Austria* App no 25964/94 (ECtHR, 17 December 1996), para 39.

[37] *Saadi v. Italy* App no 37201/06 (ECtHR, 28 February 2008), para 127.

[38] *T.I. v. UK* App no 43844/98 (ECtHR, 7 March 2000); for a more recent judgment see *Hirsi Jamaa and others v. Italy* App no 27765/09, (ECtHR, 23 February 2012), para 146.

[39] Violeta Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 European Journal of Migration and Law 1.

[40] The findings of the Court concerning the Greek international protection system have been recently reconfirmed in *Sharifi and others v. Italy* App. no 16643/09 (ECtHR, 21 October 2014).

Interestingly, in this case the Court departed from its statements in *Bosphorus*,[41] according to which the Dublin Regulation could have escaped from Strasbourg judicial review. By returning the applicant to Greece, Belgium had acted in accordance with a European Union Regulation. In principle, this could suffice for the equivalent protection presumption to apply and hence to exclude the competence of the ECtHR. Nonetheless, Article 3(2) of the Dublin II Regulation[42] provided a 'sovereignty clause' according to which 'each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in [the] Regulation.' According to the Strasbourg Court, the discretion left to the States, which may refrain from transferring the applicants, renders the *Bosphorus* presumption inapplicable to the case of Dublin transferals. Such transferals, in fact, do not strictly fall within the State international legal obligations.[43]

2. The CJEU Jurisprudence on the Dublin Regulation: The Systemic Failures Criterion

As noted above, the principle of mutual trust between the EU Member States underlies the criteria and mechanisms established by the Dublin Regulation. According to the CJEU, this principle is fundamentally important in EU Law, as it allows the creation and the maintenance of an area without internal borders. This mutual trust principle requires Member States to assume that all other Member States respect EU law and particularly the fundamental rights recognized by EU law. The CJEU agrees with the ECtHR that this presumption must be relative. Nonetheless, it has set a higher threshold to rebut the compliance presumption in order to protect the EU principle of mutual trust.

As a matter of fact, the CJEU reacted to the 'external' evaluation of the Dublin Regulation by the ECtHR a few months after the *M.S.S.* judgment. In the *N.S.* case,[44] the CJEU takes note of the principles laid down in *M.S.S.*[45] and follows the path traced by the Strasbourg Court by claiming that the presumption of compliance with the fundamental rights of the European Union, on which the Dublin Regulation is based, cannot be absolute.[46] An absolute presumption would be incompatible with the law of the European Union[47] and with the obligation to interpret the Dublin Regulation in accordance with fundamental rights.[48] In fact, according to

[41] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* App. no 45036/98 (ECtHR, 30 June 2005), paras 152-165. The Netherlands, third intervening State in *M.S.*, objected to the competence of the Court on the basis of the equivalent protection principle (para 330 of the judgment).
[42] This provision corresponds to what is today art 17(1) of the Dublin III Regulation.
[43] *M.S.S* (n 2), paras 339-340. Similarly, *Tarakhel* (n 1), paras 88-91.
[44] *N.S.* (n 3).
[45] ibid, paras 88-90.
[46] ibid, para 104.
[47] ibid, para 105.
[48] ibid, para 99.

the CJEU, Article 4 of the EUCFR[49] 'must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 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.'[50]

As an institution of the European Union, the Luxembourg Court obviously aims to preserve the functioning of the Dublin system. According to the CJEU, not any infringements of the European asylum legislation can overcome the presumption of compliance underlying the Dublin Regulation.[51] Only the presence of major operational problems[52] can impede the regular implementation of the competence-sharing system. The threshold established by the Court is reached when the State responsible suffers from 'systemic flaws in the asylum procedure and reception conditions for asylum [...], resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State.'[53]

The subsequent case law of the CJEU progressively complicated the dialogue with the ECtHR. According to the CJEU's judgment in *Abdullahi*, an asylum seeker can challenge the identification of the Member State competent, resulting from the criteria set forth by the Regulation, only 'by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State.'[54] Therefore, the assessment of the applicant's individual risk is neither necessary nor sufficient to rebut the mutual trust

[49] This provision proclaims the prohibition of torture and other inhuman and degrading treatment. According to art 52(3) of the Charter, the Luxembourg Court confers to such provision the same meaning and scope as art 3 ECHR.

[50] *N.S.* (n 3), para 106 (emphasis added).

[51] ibid, para 85: 'if the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realization of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.'

[52] ibid, para 81.

[53] ibid, para 86.

[54] Case C-394/12 *Abdullahi c. Bundesasylamt* [2013] ECLI:EU:C:2013:813, para 62.

presumption and to suspend the transferals under the Dublin Regulation.[55] The CJEU has established 'a high barrier against the setting aside of the principle of mutual trust'[56] in order to ensure the capability of the Regulation to serve its primary objectives, which is 'to organize responsibilities among the Member States, ensure speed in the processing of asylum applications[57] and prevent forum shopping[58]'.[59]

In a number of decisions preceding the *Tarakhel* judgment, the ECtHR acknowledged and indeed seemed to approve the 'systemic failures' criterion. The Strasbourg Court, in fact, has declared manifestly ill-founded (in a rather systematic way[60]) the applications of asylum seekers who had been repatriated or were about to be repatriated to Italy by virtue of the Dublin Regulation. Though taking into account, in principle, the individual circumstances of the applicants, the Court rejected their applications with a stereotyped formula which borrows the terms used by the CJEU: 'while the general situation and living conditions in Italy of asylum seekers, accepted refugees and aliens who have been granted a residence permit for international protection or humanitarian purposes may disclose some shortcomings [...], *it has not been shown to disclose a systemic failure* to provide support or facilities catering for asylum seekers as members of a particularly vulnerable group of people, as was the case in *M.S.S. v. Belgium and Greece*.'[61]

In this complicated judicial dialogue, the *Tarakhel* judgment has definitely shed light on the position of the Strasbourg Court. The latter Court has refused to acknowledge the systematic failures criterion by instead emphasizing the relevance of the applicant's individual situation.

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[55] 'As the exceptional situation as described in N.S. does not relate to the characteristics of an individual asylum seeker, Member States are obliged to take exceptional situations into account on a general basis and not as a matter of evidence provided within the context of assessing the admissibility of an individual application.' Opinion of AG Jääskinen in Case C-4/14, *Bundesrepublik Deutschland v. Kaveh Puid* [2013] ECLI:EU:C:2013:244, para 23.

[56] ibid, para 62.

[57] Recital 4 of the Dublin II Regulation. See also Case C-245/11 *K v Bundesasylamt* [2012] ECLI:EU:C:2012:685, para 48.

[58] Opinion of AG Trstenjak in *N.S.* (n 3), para 94.

[59] Opinion of AG Jääskinen, in *Puid* (n 55), para 62.

[60] Maura Marchegiani, 'Il Sistema di Dublino Ancora al Centro del Confronto tra Corti in Europa: Carenze Sistemiche, Problemi Connessi alle 'Capacità Attuali del Sistema di Accoglienza' e Rilievo delle Garanzie Individuali nella Sentenza Tarakhel C. Svizzera' (2014) 5 Ordine Internazionale e Diritti Umani 1113.

[61] *Mohammed and others v. the Netherlands and Italy*, App no 40524/10 (ECtHR, 27 August 2013), para 78 (emphasis added). See further *Abubeker v. Austria and Italy* App no 73874/11 (ECtHR, 18 June 2013); *Halimi v. Austria and Italy* App no 53852/11, (ECtHR, 18 June 2013); *Miruts Hagos v. The Netherlands and Italy* App no 9053/10 (ECtHR, 27 August 2013); *Hussein Diirshi and others v. the Netherlands and Italy* App no 2314/10 (ECtHR, 10 September 2013).

3. *The ECtHR Emphasizing the Relevance of an Individual Assessment in Tarakhel*

The *Tarakhel* judgment concerned a family of Afghan nationals who had lodged a protection claim in Switzerland. This State, which is bound by the Regulation by virtue of a bilateral agreement with the EU,[62] intended to repatriate the applicants in Italy, where they had first been identified.[63] The Court acknowledged that the situation in Italy was rather different to the one found in Greece in the case *M.S.S.*[64] The Italian protection system, unlike the Greek one,[65] did not present systemic failures. This difference led the Court to adopt a different approach.[66] In the absence of generalized and documented violations, the ECtHR has deemed it necessary to assess the individual risk that the applicants would face if expelled to Italy, the competent State under the Dublin Regulation. As a matter of fact, it has been acknowledged that 'while the structure and overall situation of the reception arrangements in Italy cannot [...] in themselves act as a bar to all removals of asylum seekers to that country, the data and information [considered] nevertheless raise serious doubts as to the current capacities of the system.'[67] Accordingly, in the Court's view, 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded.'[68]

According to the well-established case-law of the ECtHR, 'to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim.'[69] While not implying an obligation to provide the asylum seeker with a house[70] or financial assistance,[71] the obligation of a contracting State under Article 3 ECHR is engaged 'in respect of treatment where an applicant, who [is] wholly dependent on State support,

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[62] Association agreement of 26 October 2004 between the Swiss Confederation and the European Community regarding criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 53 of 27 February 2008).

[63] Italy was therefore the State responsible by virtue of art 10(1) of the Dublin II Regulation.

[64] *Tarakhel* (n 1), para 114: 'the current situation in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment [...] where the Court noted in particular that there were fewer than 1,000 places in reception centers to accommodate tens of thousands of asylum seekers and that the conditions of the most extreme poverty described by the applicant existed on a large scale.'

[65] ibid, para 114.

[66] ibid, para. 59.

[67] ibid, para 115.

[68] ibid, para 120.

[69] ibid, para 94.

[70] *Chapman v. the UK* App no 27238/95 (ECtHR, 18 January 2001), para 99.

[71] *Müslim v. Turkey* App no 53566/99 (ECtHR, 26 April 2005), para 85.

[finds] herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.'[72]

The applicants claimed that, during their stay in Italy (ten days before leaving for the Netherlands and hence to Switzerland), they were hosted in a reception center with poor hygiene conditions and without any privacy. Because of the specific situation of the applicants, a family with minor children,[73] the Court found that Switzerland would have acted in breach of Article 3 of the Convention by repatriating them to Italy without obtaining assurances from the Italian authorities that on their arrival they would be received in facilities and in conditions adapted to the age of the children, and that the family would be kept together.[74]

A more recent decision[75] has confirmed that the individual situation of the applicants and not the general situation in Italy was the basis of the ECtHR findings in *Tarakhel*.[76] The Court has in fact declared manifestly unfounded the application of an adult 'able young man with no dependents'.[77] According to the Court, the applicant has not established that, if returned to Italy, he would face 'a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3.'[78] This decision has explicitly acknowledged the principles laid down in *Tarakhel,*[79] but has come to a different conclusion in light of the individual situation of the applicant.

In its *Tarakhel* judgment, the ECtHR clarified that the implementation of the Regulation may affect the protection of fundamental rights, and especially of the principle of *non-refoulement* set forth in Article 3 of the

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[72] *M.S.S.* (n 2), paras 252-253; *Budina v. Russia* App no 45603/05 (ECtHR, 18 June 2009).

[73] 'The Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant [...]. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.' See *Tarakhel* (n 1), para 99; *Popov v. France* App no 39472/07 and 39474/07 (ECtHR, 19 January 2012), para 91.

[74] ibid, para 120.

[75] *A.M.E. v. the Netherlands* App no 51428/10 (ECtHR, 5 February 2015).

[76] This was put into question in the joint partly dissenting opinion of judges Casadevall, Berro-Lefèvre and Jäderblom, who have argued that the Grand Chamber in *Tarakhel* departed 'from the Court's findings in numerous recent cases' and justified 'a reversal of [the Court] case-law within the space of a few months'. It would appear that the *Tarakhel* judgment relied on previous case-law, which also concerned the situation in Italy. Indeed, the ECtHR clearly stated that the reception conditions in Italy cannot in themselves act as a bar to the removal of asylum seekers to the Italian territory under the Dublin Regulation. Particular caution and additional requirements are nevertheless required when the return concerns vulnerable asylum seekers.

[77] ibid, para 34.

[78] ibid, para 36.

[79] ibid, paras 28 and 35.

Convention, in a number of cases which are not included in the CJEU interpretation. According to the CJEU, the criteria and mechanisms of the Dublin Regulation might be disapplied only in exceptional circumstances that essentially coincide with the collapse of a national protection system. Conversely, in the ECtHR jurisprudence, the presence of systemic failures is a sufficient, but not a necessary condition to rebut the presumption of compliance with fundamental rights. This means that, between the regular and lawful implementation of the Dublin Regulation and the collapse of a national system there are a number of circumstances that might compromise asylum seekers' rights.[80] Member States shall take into due account all these circumstances in order to implement the Regulation in accordance with the ECHR as well as the EUCFR.

4. The Interpretation of the CJEU Inconsistent with the EUCFR

Article 4 EUCFR prohibits torture and other inhuman and degrading treatment and hence corresponds to Article 3 of the European Convention on Human Rights.[81] In accordance with Article 52(3) of the Charter, the CJEU has interpreted this provision as implicitly stating the principle of *non-refoulement*. Nevertheless, in the Luxembourg jurisprudence, Article 4 EUCFR seems to have a narrower meaning and scope than Article 3 ECHR. As a matter of fact, according to the CJEU, Article 4 is to be interpreted as meaning that the Member States may not transfer an asylum seeker if they cannot be unaware of the systemic deficiencies in the protection system of the State responsible. Therefore, the Member States must consider the general situation in the receiving country to assess whether the repatriation of the asylum seeker is incompatible with the principle of *non-refoulement* proclaimed by Article 4 of the EU Charter.

Conversely, according to the ECtHR jurisprudence, the individual circumstances of the applicants must be duly considered in assessing a potential violation of Article 3.[82] The applicant's individual situation can be disregarded only if there is a generalized risk determined by widespread and systemic violations. As the Court has stated in *M.S.S.*,[83] in such exceptional circumstances, it is implicitly proved that the applicant would be individually affected by a large-scale risk of inhuman and degrading treatment. The adoption of this approach in asylum seekers' claims extends beyond the field of application of the Dublin Regulation.[84] This is likely to be the result of the EU asylum legislation's influence on

[80] Steven Peers, 'Tarakhel v Switzerland: Another nail in the coffin of the Dublin system?' (2014) EU Law Analysis, 4 November 2014.

[81] See Explanations relating to arts 4 and 52(3) of the Charter of Fundamental Rights. Nonetheless, it should not pass unnoticed that the EU Charter explicitly proclaims the principle of *non-refoulement* in art 19, also corresponding to art 3 ECHR according to the Explanations. One might well wonder why the Court is so reticent concerning the applicability of this Charter provision.

[82] *M.S.S.* (n 2) para 219.

[83] *M.S.S.* (n 2) para 359.

[84] See, for instance, *Sufi and Elmi v. UK*, App no 8319/07 and 11449/07 (ECtHR, 28 June 2011), para 293; and *Saadi* (n 37), para 132.

Strasbourg jurisprudence; suffice it to mention the Qualification Directive, which provides subsidiary protection to the civilian or the person whose life is seriously threatened by reason of indiscriminate violence.[85]

An interpretation in accordance with Article 52(3) EUCFR would consider the 'systemic failures' criterion[86] 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.[87]

In light of the case law of the EU Court, the scope of Article 4 of the Charter, proclaiming the prohibition of torture, is narrower than that of Article 3 ECHR in so far as the application of the former provision is not triggered in the presence of an individual risk. Moreover, the high threshold established by the CJEU to rebut the mutual trust principle, which is based on Article 4 of the Charter, may affect human rights and fundamental freedoms as recognized by the Convention, in breach of Article 53 of the Charter. As a matter of fact, the repatriation of the Tarakhel family to Italy, perfectly compatible with Article 4 EUCFR as interpreted by the CJEU, would have amounted to a breach of Article 3 ECHR. A *revirement* in the CJEU jurisprudence is, therefore, sorely needed in order to ensure an interpretation of Article 4 of the Charter compatible with the clauses set forth by Articles 52 and 53 of the same Charter and to prevent further litigation.[88] Nevertheless, a spontaneous 'adjustment'[89] in the jurisprudence of the CJEU seems to be highly unlikely in light of the recent statements of the CJEU in the Opinion 2/2013, concerning the accession of the EU to the ECHR. Interestingly, this Opinion was delivered only a few weeks after the *Tarakhel* judgment of the ECtHR. It

[85] Art 15(c) of the Directive. This provision was interpreted by the CJEU as meaning that the more generalized is the risk, the less the person who claims protection must demonstrate an individual risk; C-465/07, *Elgafaji v. Staatssecretaris van Justitie* [2009] ECLI:EU:C:2009:94.

[86] For an analysis of the genesis and the rationale of this criterion (whose scope extends beyond the implementation of the Dublin system) vis-à-vis the mutual trust principle, see Armin Von Bogdandy, John Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 Common Market Law Review 59.

[87] Cathryn Costello, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?' (2012) 2 A&MR 83, 89. This interpretation is adopted by the UK Supreme Court in *EM (Eritrea)*, 19 February 2014: '[v]iolation of Article 3 does not require (or, at least, does not necessarily require) that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings' (para 42). This judgment has strongly influenced the ECtHR decision in *Tarakhel* (n 1, para 104).

[88] Guy Goodwin-Gill 'Budeserepublik Deutschland v. Kaveh Puid (E.C.J.) [notes]' (2014) 53 International Legal Materials 341.

[89] Claire Vial, 'La méthode d'ajustement de la Cour de justice de l'Union européenne : quand indépendance rime avec équivalence' in Caroline Picheral, Laurent Coutron (eds), *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme* (Bruylant 2012), 93.

clearly emerges from the Opinion that the CJEU is reluctant to permit external interferences in its field of competence, especially when these interferences are deemed to threaten the primacy and autonomy of EU law.

The interpretative divergences between the European courts are to be read in light of the broader tension, raised by the Opinion in question, between the autonomy and the primacy of EU law and fundamental human rights. The fundamental importance of the mutual trust principle in EU law, which allows for the creation and the maintenance of an area without internal borders,[90] excludes the possibility for Member States to 'check whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'[91] This clearly offers a justification for the approach adopted by the CJEU in *Abdullahi*, which excludes the relevance of the individual risk faced by an applicant. As a result, for the sake of protecting the mutual trust principle, the CJEU seems to have created a new principle of *non-refoulement* which only applies to intra-EU removals. The violation of this principle is only triggered when a Member State, to which an individual has to be returned, suffers from systemic deficiencies that make it highly likely (if not certain) that he/she would face inhuman and degrading treatment upon return. This intra-EU principle of *non-refoulement* is clearly different and less protective than the one inferred by the ECtHR from Article 3 of the Convention. Consequently, insofar as the *Bosphorus* equivalent protection presumption is not applicable to Dublin removals, the Member State acting in accordance with this newly created principle of *non-refoulement* remains exposed to ECtHR scrutiny.

IV. Composing The ECtHR and The CJEU Jurisprudence on State Obligations

Separate from the conditions to rebut the presumption of compliance is the question of the consequences deriving from the rebuttal of such presumption. This final section focuses on the obligations of the Member States having jurisdiction over an asylum seeker whose application shall be examined, according to the Dublin Regulation criteria, by another Member State that does not comply with the EU asylum legislation. This analysis aims to assess, firstly, whether the obligations imposed on the Member States by the CJEU are compatible with the ECHR and, secondly, whether the obligation introduced by the ECtHR in *Tarakhel*, to request and obtain diplomatic assurances from the State responsible under the Dublin Regulation, can be reconciled with the mutual trust principle.

1. The Twofold Obligation Set Forth by the CJEU Compatible with the ECHR

In *M.S.S.*, the ECtHR imposed on the Contracting States a general obligation of abstention from returning an asylum seeker to the competent

[90] Opinion 2/2013 (n 30), para 191; see also *N.S.* (n 3), para 83.
[91] Opinion 2/2013 (n 30), para 192.

State when there are substantial grounds for believing that, if returned, he/she would face the risk of inhuman and degrading treatments. In addition, the reference to the sovereignty clause set forth by Article 3(2) of the Regulation (now Article 17(1) of the Recast), has been interpreted as imposing on the returning State a duty to examine the asylum application.[92] It is, nonetheless, unlikely that the Strasbourg Court intended to impose such an obligation. As mentioned above, the ECHR provisions do not explicitly protect the right to asylum. The Contracting States act in compliance with the ECHR insofar as the asylum seekers under their jurisdiction enjoy the fundamental rights set forth by this Convention. These rights do not include the right to apply for asylum. A different interpretation would merely be 'wishful legal thinking'.[93]

In the *N.S.* case, the CJEU precisely defined the content of the obligation of the States having jurisdiction over an asylum seeker who cannot be repatriated to the State responsible under the Dublin Regulation. This is meant to be a twofold obligation.

Firstly, the Member State, faced with systematic failures in the State identified as competent, must continue to examine the criteria set forth in the Dublin Regulation 'in order to establish whether one of these criteria enables another Member State to be identified as responsible for the examination of the asylum application.'[94] One might argue that the interpretation of the CJEU is inconsistent with the principle laid down in *M.S.S.* by the ECtHR for providing the States with an alternative means to escape from the examination of the asylum application. Nonetheless, provided that the return to another State identified as competent on the basis of alternative Dublin criteria does not trigger a risk of violation of Article 3 ECHR, the additional obligation conceived by the CJEU seems perfectly compatible with the Convention. Again, the ECHR provisions do not explicitly protect the right to apply for asylum, but only prevent the asylum seeker from being repatriated to a country in which he/she would face inhuman and degrading treatment. The expulsion of the asylum seeker to a Member State that does not respect and protect the fundamental rights guaranteed by the EU is explicitly prohibited by the CJEU.[95] If the latter Court acknowledged that the individual risk faced by a specific applicant might also rebut the compliance presumption, the protection from his/her expulsion to the noncompliant Member State would in principle suffice to ensure the observance of the ECHR.

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[92] See *inter alia* Giuseppe Morgese, 'Regolamento Dublino II e applicazione del principio di mutua fiducia tra Stati membri: la pronunzia della Corte di giustizia nel caso N.S. e altri' (2012) Studi sull'integrazione europea 158.

[93] Kay Hailbronner, 'Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?', in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (International Studies in Human Rights Series, Springer 1988)

[94] Case C-411/10 and 493/10 (n 3), para 107

[95] ibid, paras 94 and 106.

Secondly, according to the CJEU and only as a subsidiary means, where it is impossible to identify another State competent according to the Dublin criteria or where such an identification procedure would be excessively detrimental to the asylum seeker, the State must exercise the sovereignty clause and proceed to the assessment of the asylum claim.[96] Nonetheless, in response to a preliminary ruling introduced by a German judge, the Luxembourg Court has argued that no obligation for the Member States to examine an asylum claim can be inferred from Article 3(2) of the Regulation.[97] In the *Puid* case, the CJEU clarified that the competence of the State having jurisdiction over the asylum seeker derives from Article 13 of the Dublin II Regulation (corresponding to Article 3(2) of the Recast Regulation).[98] This provision, in fact, established that '[w]here no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.' By virtue of Article 13, the State having jurisdiction over the asylum seeker, being the Member State in which the application was lodged, became the State responsible for examining the asylum claim. The transfer of competence to the returning State in presence of systemic flaws in the Member State identified as competent by virtue of the Dublin criteria is now codified by Article 3(2) of the Dublin III Regulation, which entered into force in January 2014. This obligation is, nonetheless, conditional on the impossibility of identifying another State competent on the basis of the Regulation criteria.

The findings of the CJEU in *Puid* were based on the assumption that the Dublin Regulation does not confer individual rights on the asylum seekers, but only regulates the sharing of competence among the Member States.[99] The Luxembourg Court has answered in the negative the preliminary

[96] ibid, para 108: 'The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.'

[97] Case C-4/14, *Bundesrepublik Deutschland v. Kaveh Puid* [2013] ECLI:EU:C:2013:740, para 37. See also the Opinion of AG Jääskinen in this case (n 55), para 70: 'a substantive obligation on the Member State in which the application for asylum was first lodged cannot be derived from the first sentence of Article 3(2). This provision clearly aims at permitting *any* Member State with which an application for asylum has been lodged to take the position of the Member State responsible in accordance with its sovereign discretion. This might be done, for example, for political, practical or humanitarian reasons. In other words, this provision authorizes, but does not compel, the Member States to examine asylum applications' (footnotes omitted).

[98] ibid, para 36.

[99] Opinion of Advocate General Jääskinen in *Puid* (n 55), paras 58, 59 and 73. See also Opinion of AG Trstenjak in Case C-620/10 *Kastrati* [2012] ECLI:EU:C:2012:10, para 29: 'the objective of Regulation No 343/2003 is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance or rejection of their asylum applications.'

question raised by the German judge: there is no judicially enforceable claim, in the hands of asylum seekers, to compel a Member State to examine their applications for asylum based on a duty of that Member State to exercise its competence pursuant to Article 3(2) of the Dublin II Regulation. As argued above, an obligation to examine an asylum claim is not even inferable from the ECHR provisions. Therefore, the interpretation of the Regulation proposed by the CJEU is not incompatible with the Convention, *a fortiori* in light of the Recast Regulation that explicitly imposes on the Member State the duty to assess the application of the asylum seeker who cannot be repatriated to the Member State competent.[100]

From this perspective, insofar as the future case law of the CJEU will acknowledge that the individual risk suffered by an asylum seeker might rebut the compliance presumption, the EU legislation is likely to offer a more extensive protection than the ECHR.

2. Diplomatic Assurances and Mutual Trust: An Alternative Reading of the Tarakhel *Judgment*

Concerning the findings of the Strasbourg Court in *Tarakhel*, as far as there is an agreement on the existence of a wide range of circumstances which might entail a risk of inhuman and degrading treatment under Article 3 ECHR (besides the extreme hypothesis of the dramatic collapse of a national protection system), it should not be surprising that the content of States' obligation varies depending on the seriousness of this risk.

As mentioned above, the Strasbourg Court claims that, though not acting as a bar to all removals of asylum seekers to Italy, the conditions of the Italian protection system might entail the risk of inhuman and degrading treatment for the applicants.[101] Hence, the circumstance that the Italian system, unlike the Greek one, does not suffer from systemic deficiencies undoubtedly excludes an automatic suspension of the 'Dublin returns' to Italy but, at the same time, is likely to alter the regular application of the Regulation. The lesser seriousness of the shortcomings in the Italian reception system allows for the formulation of a 'softer obligation': no examination of the asylum claim or exercise of the sovereignty clause is demanded in this case. Nonetheless, the transfer to Italy is conditional: 'it is [...] incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together.'[102]

[100] Even if such obligation remained conditional to the impossibility to identify another State competent on the basis of the Regulation criteria.
[101] *Tarakhel* (n 1), para 120.
[102] ibid, para 120.

According to the ECtHR, such assurances must consist of sufficiently detailed individual guaranties. The Court considered insufficient the intent expressed by the Italian authorities[103] to allocate the family in an ERF funded reception center in Bologna.[104] This approach is consistent with the previous case law of the Court. In particular, in the *M.S.S.* judgment the ECtHR denied the validity of agreements formulated in vague and stereotyped terms without mentioning individual guarantees based on the applicant's situation.[105]

The Court has failed to provide definitive indications concerning the substantial and formal requirements that these assurances must meet to be considered reliable. Interestingly, the ECtHR has omitted any reference to its previous case law on diplomatic assurances.[106] Therefore, the respect of the principle of *non-refoulement* in implementing the Dublin Regulation continues to largely fall within the realm of the Member States' discretion.

The key question is nonetheless whether this 'soft' obligation to obtain diplomatic assurances is compatible with the principle of mutual trust. As the CJEU has recently claimed in its opinion on the EU accession to the European Convention on Human Rights, 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that [...], save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.'[107] Therefore, one may well argue that the request for diplomatic assurances, if automatized, might be in breach of the mutual trust principle.[108] Nevertheless, when diplomatic assurances are

[103] The Italian declaration was referred to the Court by the Swiss government during the hearing (para 75 of the judgment).
[104] ibid, para 121.
[105] *M.S.S.* (n 2), para 354. Moreover, in this judgment the Court argued that, in order to be reliable and to produce effects, the assurances must be obtained before the repatriation of the asylum seeker is disposed (and not only previous to its execution).
[106] Suffice it to mention the judgment of the ECtHR in *Saadi v. Italy* (n 37) in which the Court has indicated a number of requirements, such as the reliability of the authorities issuing the assurances and the assessment of the general human rights conditions in the territory of destination. For an overview on these criteria see Alice Izumo, 'Diplomatic Assurances against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' (2010) 42 Columbia Human Rights Law Review 233. One might nonetheless argue that the criteria set forth in *Saadi*, a case involving a risk of torture, are too demanding for the 'Dublin Returns', which are intra-EU repatriations supported, though not in absolute terms, by the principle of mutual trust between the Member States.
[107] Opinion 2/2013 (n 30), para 192. The risk that, following the accession, the respect of the ECHR would demand a systematic check of other Member States' compliance with fundamental rights makes the Court concluding that 'accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law' (para 194).
[108] See also Opinion of AG Jääskinen, in *Puid* (n 55), para 62: 'the principle of mutual trust may not be placed under question through systematic examination, in each procedure entailing an application for asylum, of the compliance of other Member States with their obligations under the Common European Asylum System.'

requested and obtained, the application of the Dublin Regulation is only conditional and not impeded, as it might be in presence of systemic failures. Moreover, the exchange of assurances might be seen as an enforcement of the principle of cooperation which underlies the Dublin Regulation.[109]

In a way, these considerations bring to mind the *M.S.S.* judgment. It seems indeed that the ECtHR, as it did in *M.S.S.*, is suggesting to the EU an interpretation of the Dublin Regulation, which would be capable of ensuring the compatibility of its implementation with the ECHR without sacrificing the mutual trust presumption. The EU would certainly feel more comfortable to undertake a jurisprudential shift aimed at granting the respect of Articles 52 and 53 of the Charter if this shift did not put the mutual trust principle in danger. Indeed, imposing on Member States a 'soft' obligation to obtain diplomatic assurances, in cases in which an asylum seeker would face an individual risk upon return to an EU Member State, is a small price to pay in order to save the implementation of EU asylum policy from the ECtHR scrutiny.

V. CONCLUDING REMARKS

This paper was dedicated to an analysis of the divergences between the CJEU and the ECtHR jurisprudence concerning the implementation of the Dublin Regulation. The analysis has shown that the CJEU approach, which is justified by the protection of the mutual trust principle in EU law, is in breach of the clauses set forth by Articles 52 and 53 of the EUCFR and exposes the Member States to the judicial scrutiny by the ECtHR, as the *Tarakhel* case clearly showed. One may argue that the CJEU has reshaped the principle of *non-refoulement* for intra-EU removals by stating that the mutual trust principle can only be rebutted in the presence of systemic deficiencies, therefore excluding any relevance for the individual risk faced by an asylum seeker.

In *Tarakhel*, the ECtHR has proposed an interpretation which enables Member States to implement the Dublin Regulation in accordance with the ECHR and the EUCFR. By assuming the existence of a wide range of circumstances which might entail a risk of inhuman and degrading treatment under Article 3 ECHR (besides the extreme hypothesis of the dramatic collapse of a national protection system), the ECtHR made the content of the state obligation dependent on the seriousness of the risk faced by the applicant. In the presence of systemic failures, which make it highly likely (if not certain) that the applicant would face inhuman and degrading treatment in the State competent, the Member States cannot return the applicant to this country. In cases in which the risk of inhuman and degrading treatment is not proven by the general situation in the State competent, but is instead motivated by individual circumstances, a softer

[109] Marchegiani (n 60), 1114.

obligation lays on Member States: that of obtaining from the receiving country assurances that the applicant will be taken in charge in adequate reception conditions and will have access to a fair and efficient asylum procedure.

This interpretation ensures compliance with both mutual trust and the *non-refoulement* principle and therefore represents a workable way for the EU to implement its common asylum policy in conformity with the EUCFR provisions.