

(Re-)inventing the Dublin
System:
Addressing Uniformity and
Harmonization through *Non-
Refoulement* Obligations

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Introduction

Recent events unfolding in the European Union (EU) have taught us that responsibility-sharing under the current Dublin Convention and Regulations (Dublin System), has long failed its lofty goals. To adequately address the ongoing needs of massive influxes of asylum claimants into EU member states, a centralised system processing these claims is necessary, instead of allowing individual member states to interpret their own compliance with *non-refoulement* obligations.

A larger role should be played by the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) in order to curtail EU member state sovereignty to champion the rights of individual asylum claimants. Now more than ever, the right against *refoulement* must be safeguarded amidst internal strife on the political front.

In order to achieve true uniformity and harmonization by adhering to *non-refoulement* obligations, the Dublin System as it is must be reformed to include an enlarged role of the ECtHR and CJEU in the adjudication of cases involving state discretion, a forum for the individual asylum claimants to be heard, as well as a centralised distribution system that processes asylum applications through a pooling of resources from EU member states.

First, this paper will explain the history and purpose of the Dublin System,¹ followed by why it fails. Second, this paper will explore the importance of addressing this failure. Finally, this paper will offer recommendations to address this failure through adhering to *non-refoulement* obligations.

Part I:

1.1 History and Purpose of the Dublin System

The Dublin System was fixed by the European Council in its meeting in Strasbourg on the 8th and 9th of December, 1989 as a result of discussions with the aim to harmonise the EU asylum policies.² The Dublin System is made up of three key pieces of legislation, namely, the Dublin Convention (1990) and the subsequent Dublin II (2003) and Dublin III (2013) Regulations, and three key directives, namely, the Qualification Directive (2011/95/EU), the Asylum Procedures Directive (2013/32/EU), and the Reception Conditions Directive (2013/33/EU).

The purpose of the Dublin System is to establish the mechanism and criteria for allocating state responsibility for processing asylum claims among EU member states.³ Other purposes of the

¹ The Dublin System is made up of the Dublin Convention (1990), the Dublin II Regulation (2003), and the Dublin III Regulation (2013); Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1997] OJ C254/1 (Dublin Convention); Council Regulation (EC) No 343 / 2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1 (Dublin II Regulation); Council Regulation (EC) 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 (Dublin III Regulation).

² *ibid* (n 1) Preamble.

³ *ibid*.

Dublin System include increasing efficiency in processing asylum claims, preventing forum-shopping, and harmonising EU member states' compliance with EU laws.⁴ Despite these lofty goals, the Dublin System has been criticised by various sources. The section below will explore commentaries from these sources and cases from the ECtHR which illustrate the concerns raised from these sources, including how the principle of *non-refoulement* is violated.

1.2 Failures of the Dublin System

a) Commentaries from Various Sources

The Dublin System has been cited by academic commentators,⁵ the United Nations High Commissioner for Refugees (UNHCR),⁶ the ECtHR,⁷ as well as EU member states themselves⁸ to have failed its lofty goals. For instance, there are serious delays in the examination of asylum claims and even some claims that are never heard.⁹ Further, excessive detention has been cited by the European Council on Refugees and Exiles (ECRE) in order to enforce transfers of asylum claimants, leading to, in some instances, separation of families, and the denial of an effective opportunity to appeal against such transfers.¹⁰ A further problem cited by ECRE is the inability of refugees to be integrated into the community of member states where their claims were made since these claims were determined by member states with which they have no particular connection.¹¹

Several cases at the level of the ECtHR also illustrate the failure of the Dublin System in allowing member states to adhere to their international obligations, including the inability of member states to protect asylum claimants and refugees against *refoulement*. The principle of *non-refoulement* is the right of the asylum claimant or refugee not to be sent back to his or her country of origin to face persecution.¹² *Non-refoulement* has entered into customary international law¹³ and is a *jus cogens* norm, meaning that it is non-derogable and EU member states must

⁴ European Council on Refugees and Exiles, 'What is the Dublin System?' <<http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html>> accessed 21 May 2016.

⁵ Such as: Olga Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Direction* (TMC Asser Press 2007) 16; Guy S Goodwin-Gill, Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007).

⁶ Such as: United Nations High Commissioner for Refugees, 'Moving Further Toward a Common European Asylum System: UNHCR's statement on the EU asylum legislative package' (2013).

⁷ Such as: *MSS v Belgium and Greece* App No 30696/09 (ECHR, 21 January 2011) (MSS); *TI v The United Kingdom* App No 43844/98 (ECHR, 7 March 2000) (TI).

⁸ For example: French President Francois Hollande has publicly condemned the Dublin System: "Frankly, the Dublin process, in its present form, is obsolete" in Daniel Thym, 'Beyond Dublin – Merkel's Vision of EU Asylum Policy', EU Immigration and Asylum Law and Policy, 26 October 2015; Foreign Minister Peter Szijjarto of Hungary stated: "The Dublin system is dead" in Marton Dunai, 'Hungary says EU's Dublin rules 'dead'; won't let migrants come back', Ruth Pitchford (ed), Thomson Reuters UK, 11 November 2015.

⁹ European Council on Refugees and Exiles, 'Dublin Regulation'.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33.

¹³ Customary international law is comprised of widespread and uniform state practice as well as *opinio juris*, which is the subjective belief of States that they are bound by a legal norm.

comply with the principle regardless of whether they are state parties to the Refugee Convention.¹⁴

Three cases, in particular, illustrate the point. In *MSS v. Belgium and Greece*, the ECtHR held that there were deficiencies in the Greek authorities' examination of the asylum application when the asylum claimant faced a real risk of being removed directly or indirectly to his country of origin without a serious examination of the merits of this case.¹⁵ Greece was found to be in violation of Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) on right to effective remedy.¹⁶ In *TI v. the United Kingdom*, the ECtHR found the United Kingdom responsible for failing to ensure that the applicant was not, as a result of the United Kingdom's decision to expel, exposed to treatment contrary to Article 3 of the ECHR.¹⁷ This case is demonstrative of the United Kingdom's indirect violation of *non-refoulement*. In *Sharifi and Others v. Italy and Greece*, the ECtHR held that Greece violated Article 3 and 13 of the ECHR for detaining asylum claimants in inhumane conditions, with no access to toilets, food or medical assistance.¹⁸ This case is demonstrative of Greece's violation of the *non-refoulement* principle. All of these cases demonstrate the systemic deficiencies of the Dublin System, so that substantive and procedural failures must be addressed in order to safeguard the asylum claimant's right against *refoulement*.

This paper argues that there are three failures of the Dublin System contributing to the inability of EU member states to adhere to their international obligation against *refoulement*. Each of these three failures will be examined individually below.

b) The Three Failures of the Dublin System

The three failures of the Dublin System explored in this paper are: first, it accords an overly wide margin of appreciation to States; second, asylum claims procedures lack substantive and procedural safeguards; and third, the existence of double standards, which is the idea that there is one standard existing under international law, while another standard exists under domestic implementation of that international standard with regards to asylum applications. Another failure of the Dublin System not explored in this paper is the failure of the Dublin System to efficiently process the claims of the asylum claimants, leading to instances where asylum claimants may be held in detention or have their liberties stripped away while awaiting a determination of their claim.¹⁹

¹⁴ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, s III(5); Jean Allain, 'The Jus Cogens Nature of Non-Refoulement', (2002) 13(4) IJRL 533, 538.

¹⁵ MSS (n 7).

¹⁶ United Nations Committee Against Torture, *AD v Netherlands*, Comm No 96/1997, UN Doc CAT/C/23/D/96/1997, para 7.3; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, 4 November 1950, ETS 5, art 3 (ECHR).

¹⁷ TI (n 7).

¹⁸ *Sharifi and Others v Italy and Greece* App No 16643/09 (ECHR, 21 October 2014); European Database of Asylum Law, 'ECtHR – Sharifi and Others v Italy and Greece, Application No 16643/09', 2.

¹⁹ Reem Abu-Hayyeh and Frances Webber, 'Unwanted, Unnoticed: An Audit of 160 Asylum and Immigration-Related Deaths in Europe', Briefing No 10, March 2015, 9-13; United Nations High Commissioner for Refugees, 'The Dublin Regulation: Asylum in Europe' <<http://www.unhcr.org/protection/operations/4a9d13d59/dublin-regulation.html>> accessed 11 June 2016.

i) *Margin of Appreciation Accorded Too Widely*

“Margin of appreciation” is a doctrine created by the ECtHR, most notably interpreted and applied in its jurisprudence, under which the ECtHR accords deference to EU member states when they carry out their duties under international law. Interpretive differences among EU member states are permitted when they examine the same international norm.²⁰ Although procedural safeguards are in place to ensure that a State’s exercise of its discretion is done in good faith,²¹ and that the discretion is subjected to review by international courts and tribunals,²² the doctrine itself is an unsettled area of law,²³ and is therefore in need of further refining and clarification. In asylum applications, the margin of appreciation granted to States enable States to decide unilaterally, without input from the asylum claimant, how to adjudicate an application, including whether there are any appeal mechanisms or opportunity for the asylum claimant to be heard during the process.²⁴ It is argued that the margin of appreciation accorded to States is exercised too widely where the State decides, without input from the asylum claimant, to not grant the asylum claimant a chance to appeal his or her application after a rejection decision, as well as not according the asylum claimant an opportunity to be heard either orally or through written submissions.

Moreover, when States exercise their margin of appreciation too widely, it inevitably leads to a higher likelihood of rejected asylum applications and increased chances of subsequent *refoulement* of the asylum claimant back to persecution. For example, the presence of bias in the asylum official’s decision-making is an example of illegitimate decision-making that may result where the State exercises its margin of appreciation too widely, which would affect the State’s interpretation and application of international law obligations.²⁵ This illegitimate decision-making process makes the asylum application procedure unfair and unpredictable. Unpredictable asylum claims procedures make it more difficult for asylum claimants to properly prepare their applications and, as a result, a higher likelihood of their applications being rejected leading to a heightened possibility of *refoulement* back to persecution. The presence of bias can take many forms, including but not limited to not considering relevant factors or considering irrelevant factors when examining an asylum application.

²⁰ Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2006) 16:5 EJIL 907, 910 (Shany); The level of deference accorded depends on the particular international court and tribunal adjudicating, the level of expertise of the national authority in question, as well as the factual circumstances surrounding the case in question; International Criminal Tribunal for the Former Yugoslavia, ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’ (2000), para 50; Donoho, ‘Autonomy, Self-Government, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights’ (2001) 15 EILR 391, 457; Greer, ‘Constitutionalising Adjudication under the European convention on Human Rights’, (2003) 23 OJLS 405, 409.

²¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 26; Akande and Williams, ‘International Adjudication on National Security Issues: what Role for the WTO?’ (2003) 43 VJIL 365, 389-391.

²² Shany (n 20) 910-911.

²³ *ibid* (n 20) 909; Wherein international courts and tribunals have issued conflicted decisions on its use, for instance, the ECtHR has applied in its *Handyside* decision, that the doctrine applies to domestic legislators and to judicial bodies, while World Trade Organization (WTO) Dispute Settlement Body and its Appellate Body has stated in the *Asbestos* case, that the doctrine applies to WTO members.

²⁴ See, for example: section ii) below regarding lack of substantive and procedural safeguards.

²⁵ Shany (n 20) 924, where “all institutions [...] have inherent biases, which affect the way they interpret and apply international law”.

Under international and EU law, the State is required to accord the asylum claimant with an opportunity to challenge the decision of a rejected application through a judicial review process, where the administrative decision-making of the asylum official is brought before the courts.²⁶ A State's margin of appreciation is therefore exercised too widely when it unilaterally decides not to release reasons for rejecting asylum applications, disallowing the asylum claimant from properly preparing his or her case to seek an effective remedy in contravention of the ECHR. Further, releasing asylum application decisions without reasons make it more difficult for asylum claimants to prepare for or find sufficient grounds for appealing the rejection, creating a higher likelihood of being *refouled* back to persecution. A State's unilateral decision not to allow an appeal or to not have an appeal mechanism in place is also evidence of a margin of appreciation that is too wide. Not having a recourse to appeal is a procedural failure of the State which increases the likelihood of leading to the *refoulement* of the asylum claimant back to persecution when a reject at first instance is the only available forum for the asylum claimant to make his or her case.

Under international and EU law, there is a right to legal assistance,²⁷ without which it will be demonstrative of the State exercising its margin of appreciation too widely. The lack of legal assistance or availability of interpreters to assist are also procedural failures which are indicative of the State's margin of appreciation being accorded too widely. For instance, if a State interprets its international legal obligation as one that merely involves providing a forum (first instance or appeal) for the asylum claimant to make his or her case, but legal assistance and / or interpreter services were unavailable, the asylum claimant again will not be able to fully and properly prepare a case before the tribunal, leading to a higher likelihood of being *refouled* back to persecution. Where the State provides access to adjudication in letter but not in spirit, such as not providing the asylum claimant with legal assistance with an interpreter where the asylum claimant does not speak the language, it is demonstrative of the State having interpreted its margin of appreciation too narrowly and at the expense of the asylum claimant.

A wide margin of appreciation is demonstrative of a failure of the Dublin System that must be addressed in order to safeguard the rights of the asylum claimant. Next, this paper turns to the lack of substantive and procedural safeguards which is another failure of the Dublin System that must be addressed.

ii) *Lack of Substantive and Procedural Safeguards*

Substantive Failures

A substantive failure of the EU asylum claims procedure is demonstrated in instances where EU asylum officials fail to consider relevant factors or take irrelevant factors into consideration when making asylum applications decisions.

Consideration of irrelevant factors not only detract the asylum officer from making a decision based solely on merits of the application, but may also prevent the officer from considering

²⁶ *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2; ECHR (n 16) art 6 and 13; *Mendel v Sweden* App No 28426/06 (ECHR, 12 February 2010).

²⁷ ICCPR (n 26) art 14(3)(d); ECHR (n 16) art 6(3)(c).

relevant factors. This is illustrated in the Australian case of *M70/2011 and M106/2011 v. Minister of Immigration and Citizenship & Anor*,²⁸ in which the Minister of Immigration and Citizenship was found to have considered irrelevant factors when making his decision to process an Afghan adult and minor intercepted on the high seas.²⁹ Despite an assessment from Australia's Department of Foreign Affairs & Trade (DFAT) showing that Malaysia is not a party to the Refugee Convention and therefore is not bound to the obligations of that treaty providing minimum rights, no meaningful access to health care for refugees, and inadequate standards in immigration detention centres, the Minister unilaterally, without input from the asylum claimant, deemed Malaysia a "safe" third country to which to send the asylum claimants.³⁰ The failure of the Minister to consider *relevant* factors, including the assessment made by DFAT, may eventually lead to indirect *refoulement* of the asylum claimants back to persecution where they cannot be properly processed in Malaysia.

The Minister also considered *irrelevant* factors, including the asylum claimant's Shi'a religion, and basing its decision on sending the claimant to Malaysia by suggesting that the claimant "would [not] be more at risk of harm than any other Shi'a Muslim in Malaysia".³¹ When an officer fetters his or her discretion in arriving at a decision to reject the asylum claimant by failing to consider relevant factors and / or considering irrelevant factors, the asylum claimant is more likely to be removed from the jurisdiction of the State and *refouled* back to his or her country of origin to face persecution.

Procedural Failures

An example of procedural failure within the EU asylum claims procedure is where EU asylum officials exercise bias in their processing of asylum applications. This is evidenced in the case of *MSS v. Belgium and Greece*, where the ECtHR held that, for returns under the Dublin Regulation, both the returning and receiving EU member state are found in violation of Article 13 of the ECHR as a result of procedural failures.³² Procedural failures also include not having the right to be heard for asylum claimants who otherwise have a legitimate claim.³³ *Refoulement* back to persecution is deemed to have occurred when a State violates the fundamental human rights of the asylum claimants, and when the State does not have procedural safeguards in place

²⁸ *M70/2011 and M106/2011 v Minister of Immigration and Citizenship & Anor* [2011] HCA 32 (Australia).

²⁹ *ibid* (n 28) paras 3 and 5 (Decision of French CJ).

³⁰ *ibid* (n 28) paras 28, 39 and 40; Article 33(1) of the Refugee Convention permits the removal of a refugee to a "safe" third country where there is no danger that the refugee might be sent from the "safe" third country back to persecution; Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion,' in E Feller, V Turk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 122 (Lauterpacht); cited in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 (Australia), 172.

³¹ *ibid* (n 30) para 39.

³² *MSS* (n 7) paras 293, 389-393; Procedural failures such as the absence of the suspensive effect of appeals where the asylum application is before the court pending a determination; Jens Vedsted-Hansen, 'The Asylum Procedures and the Assessment of Asylum Requests' in Vincent Chetail, Celine Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar Publishing 2014), 448.

³³ For instance, the right to be heard is codified in the Refugee Convention (n 12) art 32(2).

to ensure proper and fair treatment of asylum claimants such as according them an opportunity to be heard.³⁴

Jurisprudence from the ECtHR has emphasised that a real risk of *refoulement* back to persecution may result where there is a failure to examine the *merits* of the asylum claimant's applications.³⁵ Therefore, the Dublin system fails in not properly examining the application of the asylum claimant before a rejection was given. For example, in situations where due process is not accorded the asylum claimant, the asylum claimant is not receiving fair and proper treatment, and therefore, legitimate applications are sometimes treated as illegitimate.³⁶ For asylum claimants whose applications are not properly assessed for truth and accuracy, their applications are more likely rejected, and may increase the likelihood of their *refoulement* back to persecution. The emphasis is on the *merits* of the application, so that on one hand, where state discretion has been exercised too widely through improper examination of asylum claims, *refoulement* back to persecution of the asylum claimant may occur. On the other hand, if properly exercised with due process for the asylum claimant, *refoulement* back to persecution may be prevented.

Proper investigation of the *merits* of the application also involves an assessment by the sending EU member state on whether the recipient member state of the asylum claimant has sufficient resources and proper procedural safeguards to receive the asylum claimant without violating indirect *refoulement*. ECtHR jurisprudence has repeatedly emphasised the need to conduct proper investigation, the failure of which will increase the likelihood of *refoulement* of the asylum claimant back to persecution.³⁷ Properly-trained EU asylum officials on how to handle vulnerable asylum claimants such as pregnant mothers, unaccompanied minors, and the elderly may also be a step towards a fairer asylum claims procedure.

iii) *The Existence of Double Standards*

Double standards refer to the discrepancies between international and EU standards versus domestic implementation of those standards. Double standards exist due to the variation in domestic legal systems, and the relative differentiation in interpretation the domestic courts give to international and EU standards and obligations. This presents a problem because it leads to inconsistency in the law. Unpredictability in the law is especially challenging when it contributes to an unstable asylum claims procedure within the Dublin System, where asylum claimants are potentially exposed to massive human rights violation or persecution if sent back home. The protection of asylum claimants and refugees against *refoulement* is paramount, as is evident through the various international law instruments and principles mentioned in Part II below. Although the purpose of international law is to define the rights and obligations of States, if double standards exist, the legitimacy of international law will come into question, including whether States should be obliged to follow international law. The problem of double standards must therefore be addressed, both in terms of how to harmonise the dichotomy between

³⁴ *Sale v Haitian Ctr Council, Inc*, 509 US 155 (1993); Inter-American Court of Human Rights, Report No 51/96, Case 10.675, *Haitian Centre for Human Rights* (United States), 13 March 1997; Case C-249/13 *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques* [2014] (Boudjlida).

³⁵ *Mohammad v Austria* App No 2283/12 (ECHR, 6 June 2013).

³⁶ For example, an individual has a right to seek asylum under international law in *Universal Declaration of Human Rights* (as reflective of customary international law), 10 December 1948, 217 A(III), art 14(1).

³⁷ *Tarakhel v Switzerland* App No 29217/12 (ECHR, 4 November 2014) (Tarakhel); MSS (n 7).

international and EU standards, and a uniform implementation among EU member states on the domestic implementation of the international and EU standards.

As demonstrated above, the three failures of the Dublin System contributing to the inability of EU member states to adhere to their international *non-refoulement* obligations are: a wide margin of appreciation, lack of substantive and procedural safeguards, and the existence of double standards. In Part II below, this paper turns to the reasons for the need to address these failures, including a brief overview of the principle of *non-refoulement* as it is under international law, exceptions to the principle, and the principle as applicable in the EU context.

Part II:

2.1 Importance of Addressing the Failures of the Dublin System

The importance of addressing the failures of the Dublin System cannot be stressed enough, mainly because of the increased likelihood of asylum claimants being sent back to persecution where their applications for asylum are rejected.

2.2 Principle of *Non-Refoulement*

a) What it is

Non-refoulement is a central tenet in international refugee law. *Non-Refoulement* is the right of an asylum claimant or a refugee not to be sent back to their originating country to face persecution, and is violated when a State sends back (*refoules*) an asylum claimant or a refugee to his or her country of origin to face persecution.³⁸ *Non-Refoulement* is an obligation that binds all States, regardless of whether they are contracting parties to the Refugee Convention.³⁹

The burden of proof lies on the asylum claimant to demonstrate that he or she is fleeing from a “well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group, or political opinion”.⁴⁰ The facts which need to be proven by the asylum claimant are the background and personal experiences which give rise to a “well-founded fear of persecution” and the resulting unwillingness of availing him or herself to State protection.⁴¹ Instead of the criminal standard of “beyond reasonable doubt” or the civil standard of “balance of probabilities”, the standard of proof required for an asylum claimant to establish that he or she is telling the truth is the lower standard of a “reasonable degree of likelihood”.⁴² Other similar terms include: “a reasonable likelihood” or “a real possibility” or “real risk”, which all have the same meaning.⁴³

³⁸ Refugee Convention (n 12) art 33; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

³⁹ United Nations High Commissioner for Refugees, ‘UNHCR Note on Diplomatic Assurances and International Refugee Protection’, Geneva, August 2006, para 15 (UNHCR Note).

⁴⁰ United Nations High Commissioner for Refugees, ‘Note on Burden and Standard of Proof in Refugee Claims’, 16 December 1998, para 6.

⁴¹ *ibid* (n 40) para 7.

⁴² *ibid* (n 40) para 8; United Kingdom Government, Home Office, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’, Version 9.0, 6 January 2015, 11, s 5.2.

⁴³ *ibid*.

In adjudicating the truthfulness of the asylum claimant, the adjudicator should take into consideration the following: a) the reasonableness of the facts alleged; b) the overall consistency and coherence of the claimant's story; c) the corroborative evidence adduced by the claimant in support of his or her statements; d) the consistency with common knowledge or generally known facts, and e) the known situation in the country of origin.⁴⁴ Given the complexity of the situations that may be experienced by the asylum claimant, combined with personal trauma that he or she may be experiencing, the adjudicator need not be fully convinced as to each and every factual assertion that is made by the asylum claimant.⁴⁵ In establishing a "well-founded fear of persecution", both subjective (fear) and objective (well-founded) elements must be proven by the asylum claimant.⁴⁶ Further, "a well-founded fear of persecution" must be proven to be reasonably possible.⁴⁷ Factors for the adjudicator to consider when evaluating objective well-foundedness of persecution include: a) factual considerations; b) personal circumstances of the claimant; and c) situation in the country of origin.⁴⁸

b) Scope and Content

Direct *refoulement* occurs when a State *refoules* an asylum claimant or a refugee back to his or her country of origin to face persecution.⁴⁹ Indirect *refoulement* occurs in the context of the EU when the second recipient State sends an asylum claimant or a refugee back to his or her first recipient State (the first State where he or she first lodged his or her asylum application) where there is a high likelihood that the first recipient State will not properly process or will reject the legitimate asylum application.⁵⁰ The sections below will examine the scope and content of *non-refoulement* within the context of the Refugee Convention and as it pertains to those who are protected, those who are bound, exceptions to the principle, when cessation occurs, and when an internal flight alternative is available to the asylum claimant.

i) Who is Bound?

All States are bound by the principle of *non-refoulement* whether or not they are parties to the Refugee Convention by the simple fact that the principle has entered customary international law, which binds all States.⁵¹

ii) Who is Protected?

Asylum claimants and refugees are protected under this principle. Asylum claimants who demonstrate that they experienced a "well-founded fear of persecution" regardless of whether

⁴⁴ *ibid* (n 40) para 11.

⁴⁵ *ibid* (n 40) para 12.

⁴⁶ *ibid* (n 40) para 13.

⁴⁷ *ibid* (n 40) para 17.

⁴⁸ *ibid* (n 40) para 18.

⁴⁹ Refugee Convention (n 12).

⁵⁰ Moira Sy, 'UNHCR and Preventing Indirect *Refoulement* in Europe' (2015) 27:3 IJRL 457, 478.

⁵¹ UNHCR Note (n 39); On customary international law, see: International Court of Justice, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, 20 February 1969, ICJ Rep 3, para 74.

they have been formally recognised as a refugee by national decision-makers are nonetheless protected by the principle.⁵²

iii) *Exceptions to Refoulement*

While the principle of *non-refoulement* is a *jus cogens* norm⁵³ and therefore is non-derogable, asylum claimants or refugees are nonetheless not accorded Convention protection if they fall under certain exceptions. For instance, Article 33(2) and Article 1F of the Convention clearly enumerate the grounds where an asylum claimant or a refugee will *not* be offered Convention protection.⁵⁴

Article 33(2) applies to asylum claimants or refugees who are a “danger to the security of the country in which he [or she], or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community” of the State processing their applications.⁵⁵ The provision applies not only to refugees but also to persons who are *prima facie* refugees pending the outcome of their asylum application.⁵⁶ The word “danger” denotes an interpretation from the State since it is not strictly defined in the Refugee Convention.

Article 1F applies to asylum claimants or refugees who have committed a “crime against peace, war crime, crime against humanity”, “non-political crime outside the country of refuge”, or “acts contrary to the purposes and principles of the United Nations”.⁵⁷ The evidentiary threshold for establishing an Article 1F exception is an unsettled area of the law,⁵⁸ and the onus is on the State (or UNHCR) to demonstrate that the threshold has been met, with the benefit of the doubt given in favour of the asylum claimant.⁵⁹ However, a reverse onus situation occurs such that the asylum claimant has the onus of proof where, “the individual has remained a member of a government clearly engaged in activities that fall within the scope of Article 1F”.⁶⁰ The difference between Article 33(2) and Article 1F is that, Article 33(2) deals with the *treatment of*

⁵² Lauterpacht (n 30) 116.

⁵³ See (n 14).

⁵⁴ Refugee Convention (n 12) art 33(2) and 1F.

⁵⁵ *ibid* (n 54) art 33(2).

⁵⁶ United Nations High Commissioner for Refugees, ‘Commentary on the Refugee Convention 1951 Articles 2-11, 13-37’, October 1997, 135.

⁵⁷ Refugee Convention (n 12) art 1F.

⁵⁸ Mathias Holvoet, ‘Harmonizing Exclusion under the Refugee Convention by Reference to the Evidentiary Standards of International Criminal Law’, (2014) 12 JICJ 1039-1056, 1047, where “the UNHCR and the UK Supreme Court interpret the standard in such a way that it comes close to the evidentiary threshold required for a criminal conviction, civil law countries such as The Netherlands and France have interpreted the standard as a fairly low one that can be met relatively easily. The Canadian Supreme Court’s position can be situated somewhere in between those two extremes by equating the ‘serious reasons for considering’ standard with the ‘reasonable grounds to believe’ standard, requiring something more than mere suspicion”.

⁵⁹ United Nations High Commissioner for Refugees, ‘Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, 4 September 2003, UN Doc HCR/GIP/03/05, para 34.

⁶⁰ *ibid* (n 59) para 19.

refugees, rather than their recognition as refugees,⁶¹ while Article 1F deals with the *status* of refugees, forming part of the definition of refugees.⁶²

Cessation of Refugee Status

Refugee status, although granted by a State, may be revoked in certain circumstances. For instance, the asylum claimant ceases to be a refugee when he or she voluntarily re-avails him or herself to the protection of his or her country of origin,⁶³ voluntarily re-acquires his nationality,⁶⁴ acquires a new nationality and enjoys the protection of the country of his new nationality,⁶⁵ and so on.⁶⁶ Of particular importance is that cessation occurs when the circumstances which give rise to a “well-founded fear of persecution” for the asylum claimant ceases to exist.⁶⁷ An example of when this happens is the end of a civil war, or the availability of State protection where it was not available before.

Internal Flight Alternative Exception

Internal flight alternative is an unsettled area of international refugee law.⁶⁸ Internal flight alternative is an exception under Article 1A(2) of the Convention, where the asylum claimant has the onus of proving that he or she has availed him or herself to State protection.⁶⁹ Where there is the possibility of the asylum claimant relocating him or herself to another part of the State, the internal flight alternative exception applies and precludes the asylum claimant from being recognised as a refugee by virtue of the fact that State protection is available at another part of the State. However, caution should be had in applying this exception to ensure that the asylum claimant can “practically, safely, and legally access” another part of the State where protection is available,⁷⁰ so that he or she does not end up being *refouled* back to persecution.

c) In the context of the EU

Interestingly, the original Dublin Convention (1990) does not incorporate the principle of *non-refoulement* in its preamble or any provisions, and the words “*refouled*”, “*deport*”, “*expel*”, or “*return*” cannot be found. However, perhaps in an attempt to comply with international

⁶¹ United Nations High Commissioner for Refugees, ‘UNHCR Statement on Article 1F of the 1951 Convention’, July 2009, 8.

⁶² *ibid.*

⁶³ Refugee Convention (n 12) art 1C(1).

⁶⁴ *ibid* (n 63) art 1C(2).

⁶⁵ *ibid* (n 63) art 1C(3).

⁶⁶ *ibid* (n 63) art 1C.

⁶⁷ *ibid* (n 63) art 1C(5).

⁶⁸ United Nations High Commissioner for Refugees, ‘Guidelines on International Protection: ‘Internal Flight or Relocation Alternative’ within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’, 23 July 2003, UN Doc HCR/GIP/03/04, para 1.

⁶⁹ *ibid* (n 68) para 3.

⁷⁰ *ibid* (n 68) para 7-12.

obligations, subsequent regulations, namely the Dublin II Regulation (2003)⁷¹ and the Dublin III Regulation (2013),⁷² both incorporate the principle in their preambles. The principle of *non-refoulement* is referenced in the Returns Directive,⁷³ the Qualification Directive,⁷⁴ the Asylum Procedures Directive,⁷⁵ and the Reception Conditions Directive.⁷⁶ The three ECtHR cases as discussed prior show that the principle of *non-refoulement* has been violated by EU member states.

The above sections clarified the principle of *non-refoulement* under international law, the exceptions applicable, as well as the principle as applied in the context of the EU. Part III below examines the recommendations to address the three failures of the Dublin System, which are: including a forum to be heard for individuals, enlarging the role of the ECtHR and CJEU in their adjudication of cases involving state discretion, as well as using a centralised processing system (joint processing) to pool together the resources of EU member states.

Part III:

3.1 Recommendations to Address Present Failures of the Dublin System

In order to achieve true uniformity and harmonization by adhering to *non-refoulement* obligations, the Dublin System as it is must be reformed to include a forum for the individual asylum claimants to be heard, an enlarged role of the ECtHR and CJEU in the adjudication of cases involving state discretion, as well as a centralised distribution system that processes asylum applications through a pooling of resources from EU member states.

First, individual asylum claimants must be accorded a right to be heard. The right to be heard must include the right to be heard through both written and oral submissions. The right to be heard within the framework of the Dublin System must include more than what is currently laid out under the Dublin III Regulation for personal interview.⁷⁷ Second, a larger role should be played by the ECtHR and CJEU in order to curtail EU member state sovereignty to champion the rights of individual asylum claimants. Now more than ever, the right against *refoulement* must be safeguarded amidst internal strife on the political front. Third, to adequately address the ongoing needs of massive influx of asylum claimants into EU member states, a centralised system

⁷¹ Dublin II Regulation (n 1) Preamble para 2.

⁷² Dublin III Regulation (n 1) Preamble para 3.

⁷³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals [2008] OJ L348/98 art 5 (Returns Directive).

⁷⁴ 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 art 21 (Qualification Directive).

⁷⁵ 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 Preamble para 3, art 9(3), 28(2), 35(b), 38(1)(c), 39(4), 41(1)(b), and Annex I(c) (Asylum Procedures Directive).

⁷⁶ 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 (recast) [2013] OJ L180/96 Preamble para 3 (Reception Conditions Directive).

⁷⁷ *ibid* (n 76) art 5.

processing these claims is necessary, instead of allowing individual member states to interpret their own compliance with *non-refoulement* obligations.

a) *An Enlarged Role of the ECtHR and CJEU*

i) *Curtailling State Sovereignty*

Having an overly wide margin of appreciation means that States can act *ultra vires* the margin of appreciation accorded to them by international courts and tribunals. In some cases, States exercising their discretion *ultra vires* the margin of appreciation end up removing procedural safeguards, creating multiple and inconsistent interpretations, and placing State interests above the interests of asylum claimants. While it may be true that a wide margin of appreciation should be accorded to states based on the principle of state sovereignty,⁷⁸ the margin of appreciation accorded should not allow the state to act *ultra vires* the doctrine to the extent of violating international law and *non-refoulement* obligations. Some may argue that states should be allowed to exercise their own discretion on matters of national interest and international courts and tribunals should not interfere with state sovereignty. However, it is submitted that state sovereignty should be curtailed where the exercise of the State's sovereign prerogative leads to direct or indirect violation of international law and the absolute prohibition of *refoulement*.

To enforce absolute prohibition of *refoulement*, it may be necessary, in some circumstances, to curtail a State's sovereignty in order to force the state into compliance with international law. In these instances, international courts and tribunals should interfere with a State's sovereignty in order to safeguard individual rights. While historically, international courts and tribunals have been reluctant to impede on domestic implementation of international law, it may be necessary for the international courts and tribunals to intervene in order to safeguard the rights of asylum claimants who may otherwise be facing a combination of mass atrocities, violation of human rights, torture, or cruel, inhuman or degrading treatment or punishment if sent back to their country of origin.

ii) *Addressing Double Standards*

The double standards which exist between international law obligations and domestic implementation of international law must also be addressed through a reform of the way in which States exercise their discretion when processing asylum applications. First, a refined definition of margin of appreciation is necessary in order to address what is *intra vires* and what is *ultra vires* the margin of appreciation. Second, the dichotomy that exists between the international and / or regional standard of asylum claims processing and the implementation of that international and / or regional standard into domestic legislation must be adequately addressed.

By properly addressing the dichotomy between international standards and domestic implementation, the asylum claims procedures are standardised and more predictable, increasing the likelihood of successful applications, reducing the instances of rejected applications, and preventing *refoulement* of asylum claimants back to persecution. Third, a mechanism needs to be

⁷⁸ The idea that states are sovereign equals and should have the discretion to act as they wish. The idea that states are sovereign equals is found in Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 2(1).

established in order to ensure standardised adherence of Refugee Convention State parties to international law and *non-refoulement* obligations. This mechanism will need to be context-specific in that the unique geo-political circumstance of the State party to the Refugee Convention must be taken into consideration. Further, this mechanism will also need to take into account the resource availability and restraints of the State party. Finally, this mechanism must be put in place to limit the way states exercise their discretion to the extent necessary to ensure adherence to international law and *non-refoulement* obligations.

b) An Individual Right to be Heard

In *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*,⁷⁹ Boudjlida, an Algerian national, was asked to leave French territory within the period of a month after his application for residence permit in France was refused.⁸⁰ Boudjlida was not given the opportunity to be heard in order to make his case against having his residence permit rejected by French authorities.⁸¹ The CJEU held that the right to be heard is part of the principle of the right of good administration,⁸² the purpose of which was to provide procedural safeguards for the asylum claimant. It was held in *Boudjlida* that even though the EU council directive⁸³ did not specify under what conditions the right to be heard for a third country national⁸⁴ must be given, the right itself is a fundamental principle of EU law and therefore must be accorded.⁸⁵ Further, the right to be heard must include allowing the individual to express his or her point of view on the legality of his stay.⁸⁶ This case shows that the asylum official, or the residence permit granting authority, must accord the asylum claimant a right to be heard when deciding whether to accept or reject the application. In *Boudjlida*, the applicant was required to leave France without having the opportunity to challenge the decision to reject his permit application. If procedural safeguards such as the right

⁷⁹ Boudjlida (n 34).

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² The principle of the right of good administration is defined as: “the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union” (article 41(1)), “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken” (article 41(2)(a)), “the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy” (article 41(2)(b)), and “the obligation of the administration to give reasons for its decisions” (article 41(2)(c)) in Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art 41(2).

⁸³ Returns Directive (n 73).

⁸⁴ A Third Country National is defined as: “any person who is not a citizen of the EU within the meaning of Article 10(1) of the *Treaty on the Functioning of the European Union*” in European Commission, ‘Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions’, Brussels, COM(2011) 847 Final, 5 December 2011, 3; Article 20(1) of the Treaty on the Functioning of the European Union states that “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship” in Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 art 20(1).

⁸⁵ Boudjlida (n 34).

⁸⁶ *ibid.*

to be heard are not accorded to asylum claimants similar to Boudjlida, there is an increased likelihood that they will be *refouled* back to their country of origin to face persecution.

The right to be heard as a minimum safeguard for the asylum claimant is also supported by the UNHCR in its commentary⁸⁷ and is also codified in the Refugee Convention.⁸⁸ The right to be heard is part of the due process which a State must exercise in making the decision to accept or deny the asylum claimant as a refugee in its territory.⁸⁹ The duty to base state discretion on due process is necessary to ensure that the Refugee Convention state party does not arbitrarily expel a refugee who should be lawfully entitled to remain in its territory where a well-founded fear of persecution has been established.⁹⁰ The danger of a lack of right to be heard is that the asylum claimant not only lacks the ability to make his or her case heard, but also cannot challenge the unilateral decision of the officer to remove him or her from the state's territory, and cannot answer to any allegations against him or her.

c) A Centralised System for Processing Asylum Claims

A centralised system of processing asylum claims, or joint processing, is nothing new. In fact, joint processing models have been proposed by the EU for some time, including during the Hague Programme of 2004,⁹¹ Stockholm Programme in 2009,⁹² in the European Commission's Study of February 2013,⁹³ and in a proposal tabled by the Strategic Committee on Immigration, Frontiers and Asylum in 2014.⁹⁴ Joint processing is "the provision of support from joint teams to national processes in member states affected by 'particular pressures', operating in the framework of the national asylum law and institutions of the concerned member state".⁹⁵ The purpose of joint processing is to "help alleviate unnecessary coercion and complexity, and assist in better decision-making and enhance reception capacity".⁹⁶ The benefits of joint processing include: "improving the quality of asylum procedures by prioritising applications that are likely to be well-founded [and] supporting member states which cannot sustain large numbers of applicants",⁹⁷ assisting member states in "exchange of best practices, [as well as] contribution to a common understanding ultimately leading to increased mutual trust".⁹⁸

⁸⁷ UNHCR Note (n 39) para 14.

⁸⁸ Refugee Convention (n 12) art 32(2).

⁸⁹ UNHCR Note (n 39) para 32.

⁹⁰ *ibid.*

⁹¹ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/4 para 1.3.

⁹² The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/32 s 6.2.2.

⁹³ European Commission, Directorate-General Home Affairs, 'Study on the Feasibility and Legal and Practical Implications of Establishing a Mechanism for the Joint Processing of Asylum Applications on the Territory of the EU', HOME/2011/ERFX/FW/04, 13 February 2013.

⁹⁴ Elseph Guild, Cathryn Costello, Madeline Garlick, Violeta Moreno-Lax, Minos Mouzourakis, Sergio Carrera, 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection' (2014) European Parliament, Directorate-General for Internal Policies, 108 (Guild et al).

⁹⁵ *ibid* (n 94) 48.

⁹⁶ *ibid* (n 94) 79.

⁹⁷ *ibid.*

⁹⁸ *ibid* (n 94) 107.

According to the European Asylum Support Office, eight pilot projects⁹⁹ had been launched to develop joint processing initiatives since 2014, and so far, the implementation of these pilot projects has revealed “the significant potential of joint processing activities in enhancing mutual trust” between EU member states.¹⁰⁰ Joint processing enables EU member states to work together while enhancing mutual trust, which will increase the likelihood of cooperation among EU member states. The UNHCR has also reiterated the need for mutual recognition of asylum decisions (mutual citation) among and across EU member states and their domestic legal systems.¹⁰¹ Joint processing therefore, should enhance not only cooperation among EU member states but also mutual citation of asylum decisions, leading to a reduced likelihood of instances of double standards.

Conclusion

Despite several attempts to improve the CEAS, namely through improvements to the Dublin System in 1990, 2003, and in 2013, these attempts have been inadequate and much too late. As explained earlier, the Dublin System as it is fails because the ECtHR is according the EU member states a margin of appreciation that is much too wide, there is a lack of substantive and procedure safeguards in the Dublin System to protect the rights of asylum claimants, and the existence of double standards create instability and unpredictability of the law in an already inherently unfair asylum system. In order to address these three failures, it is suggested that the role of the ECtHR and CJEU in adjudicating cases involving state discretion to curtail state sovereignty and narrow the scope of margin of appreciation should be enlarged, a forum for an individual right to be heard to address the lack of substantive and procedural safeguards should be created, and a centralised distribution system through joint processing of asylum claims by EU member states in order to reduce instances of double standards should be implemented.

⁹⁹ These pilot projects include: Unaccompanied minors – Cyprus hosting experts from Sweden; country of origin information – Hungary hosting experts from Austria; Dublin determination – Italy hosting experts from the Netherlands, Romania, and Sweden; Registration and case management – Sweden hosting experts from Denmark and vice versa; Dublin determination – Germany hosting experts from Austria and vice versa; Vulnerability assessment – UK hosting experts from Norway, Slovenia and vice versa; Registration and case management – France hosting experts from Belgium and vice versa; and Registration and case management – Belgium hosting experts from the Netherlands and vice versa.

¹⁰⁰ Guild et al (n 94).

¹⁰¹ United Nations High Commissioner for Refugees, ‘Asylum and International Protection in the EU: The Next Five Years?’, 16 May 2014, 2.