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Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof

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1. Introduction

The Dublin Regulation or Regulation 343/2003 allocates the responsibility of Member States for the assessment of individual asylum applications within the EU.[1] It allows Member States to transfer an asylum seeker to another Member State if this latter state is considered responsible according to one of the so-called Dublin criteria. In what are considered to be landmark cases with regard to the meaning of mutual trust in the Area of Justice, Security and Freedom, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) made clear in 2011 that 'non-rebuttable trust' is not allowed when this would jeopardize the protection of the fundamental rights of the individual.[2] Both judgments have been welcomed by commentators, as putting an 'end to blind trust', or even implying 'the Death of Mutual Trust' or 'Dismantling the Dublin System'.[3] However, questions remain as to whether the considerations of both courts offer clear and practical tools for both the administration as well as the national courts. This contribution analyzes both judgments, assessing when or in which specific circumstances national authorities (including courts) are obliged to consider 'trust' to be rebutted and what this means for national procedures in practice. Considering more specifically the relationship between the state and an asylum seeker and the burden of proof during the asylum procedure, this contribution will address the following questions:

1) Who is responsible for the rebuttal of trust? Does the asylum seeker have sole responsibility in putting forward information that his or her rights are at risk in the second state, or does a state have its own task in assessing the human rights situation in the second state, regardless of whether the applicant has submitted information?
2) What kind of information is necessary to 'rebut trust'? This question not only relates to the substance of proof (should the information address the individual risks for the asylum seeker or may it also

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1 Regulation 343/2003, OJ L 50, 25.2.2003. Entry into force 17 March 2003.

2 ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, appl. no. 30696/09 and CJEU, Case C-411/10, *NS v SSHD*, 21 December 2011, hereafter respectively the *M.S.S.* and *NS* cases.

3 See C. Costello, 'Dublin-case NS/ME: Finally, an end to blind trust across the EU?', 2012 *A&MR*, no. 02, pp. 83-92; V. Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece', 2012 *European Journal of Migration and Law* 14, pp. 1-31; and in reaction to the opinion of the AG in the case *NS v SSHD*: S. Peers, *Court of Justice: The NS and ME Opinions – The Death of 'Mutual Trust'?*, Statewatch opinion no. 148, <http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf> (last visited 16 December 2012).

concern the general situation in the second state?) but also to the sources of proof: which information is to be taken into account, reports from international organisations, NGOs, diplomatic assurances?
3) When should the rebuttal of trust take place? Which procedural guarantees or safeguards are necessary in order to allow the asylum seeker to submit information against his or transferral?

Before explaining the 'Dublin mechanism' and the meaning of both judgments, I will briefly consider the meaning of mutual trust within the more general legislative framework of the European Union (EU) and its relationship with the harmonization of law. I will then analyze the meaning of the 2011 judgments for the application and rebuttal of mutual trust within the Dublin system. Although this contribution addresses in particular the implementation of mutual trust in asylum law procedures, the Dublin system is just one example illustrating the possible tension between the recognition of mutual trust, on the one hand, and the protection of fundamental rights, on the other.[4] As I will argue below, the conclusions of the European courts may become relevant with regard to the application of mutual trust in other fields of EU law, such as, for example, the European Arrest Warrant. Finally, some remarks will be made on what these judgments tell us about the relationship between the ECtHR and the CJEU and the multilayered human rights system in the EU.

2. Mutual trust in EU law

2.1. No cooperation without trust

Mutual recognition and mutual trust have always been the cornerstones of the cooperation between the EU Member States. One of the first judgments in which the CJEU (implicitly) applied the principle of mutual recognition for the protection of the free market within the EU (then the EC) is the well known judgment in the case *Cassis de Dijon* or *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*.[5] In this judgment, the CJEU ruled that Member States cannot apply specific rules of national legislation (the fixing of a minimum alcohol content for alcoholic beverages) to the importation of goods, 'provided that they have been lawfully produced and marketed in one of the Member States'. With this conclusion, the CJEU obliged Member States to 'trust' the legislation or practice of other Member States with regard to the production and marketing of alcoholic beverages in order to prevent 'measures having an equivalent effect to quantitative restrictions on import', as prohibited in the former Article 30 EC Treaty. Whereas 'mutual trust' can be described as the reciprocal trust of Member States in the legality and quality of each other's legal systems, 'mutual recognition' refers to the products of these systems. Based on the principle of mutual recognition, national authorities, including courts, recognize or enforce the decisions of the authorities of other Member States. If these principles were initially meant to safeguard the free movement of products and services, mutual recognition and mutual trust became increasingly important for the cooperation in not only criminal and civil law, but also immigration law. With the expansion of EU powers within the field of Justice, Security and Freedom, the establishment of mutual trust became one of the central goals in, first, the Tampere Conclusions of 1999, and later the Stockholm Programme of 2009.[6]

2.2. No trust without harmonization?

There is an ongoing tension between mutual trust on the one hand, and the prerequisite for that mutual trust, namely a certain level of the harmonization of law or policies in the different Member States, on the other. On the one hand, mutual trust can be considered as a tool for exactly those areas where Member States are reluctant to develop harmonized rules and where they rather apply foreign decisions or laws when this is considered necessary for the achievement of specific goals. On the other hand, the execution or recognition of measures or laws of other states requires, or at least suggests, a minimum level of a

4 See on this subject the proposals by the Meijers Committee: H. Battjes, E. Brouwer, P. de Morree & J. Ouwerkerk, *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights* Utrecht: Forum Institute for Multicultural Affairs, 2011.
5 Case C-120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, see Para. 14.
6 OJ C 115, 4.5.2010.

harmonised approach: whether this concerns the quality or security requirements for the importation of certain goods, standards for the recognition of certificates, or the protection of fundamental rights for cooperation in criminal or migration law matters. In *Cassis de Dijon*, the CJEU explicitly referred to the lack of harmonized applicable law and to the fact Member States applied different minimum requirements in relation to the alcohol content of various spirits. The CJEU underlined the necessity to respect the separation of powers between national authorities and the Community in fields where no such harmonization had taken place. However, in this case, taking into account the principle of proportionality and the fact that the alcohol content of the beverages to be imported was lower than the limit fixed by the receiving state, the CJEU found the German import restrictions to be too excessive and therefore prohibited.

In the field of criminal law, we see a comparable discussion dealing with the question of to which extent 'mutual trust' can be applied, even when there is a lack of harmonization. In the case of *Gözutok and Brügge*, the CJEU confirmed the application of the *ne bis in idem* principle, implying an obligation of mutual recognition between Member States with regard to decisions taken within their national criminal procedures.[7] In this judgment, the CJEU stressed that the harmonization of EU law is not a prerequisite for mutual trust. The case concerned the question whether Member States were obliged to take into account extrajudicial settlements in criminal law procedures, even when these settlements were not allowed or were provided for in their own laws. According to the CJEU, Article 54 of the Schengen Implementing Agreement (SIA), including the *ne bis in idem* principle, necessarily implies that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States 'even when the outcome would be different if its own law were applied'.[8] This means that if in the first state (the Netherlands) a discontinuation of prosecution through a settlement has taken place (regardless of whether a court is involved), a discontinuation which is not applied in the second state, the *ne bis in idem* principle bars further prosecution in the latter state. The CJEU explicitly held that the EU legislator did not make the application of Article 54 or the *ne bis in idem* principle 'conditional upon harmonization, or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred'.[9] With this judgment, the CJEU confirmed the transnational application of the *ne bis in idem* principle to protect the individual against double criminal proceedings: from a domestic legal principle, the *ne bis in idem* principle developed, according to Vervaele, into a 'transnational human right'.[10]

The aforementioned examples, *Cassis de Dijon* and the application of the *ne bis in idem* principle in criminal law, have in common that in these fields of law 'mutual trust' is in the interest of the individual. Whereas in the case of *Cassis de Dijon* the goal of mutual trust is the free movement of goods or the protection of the internal market, in the application of *ne bis in idem* in European criminal law, the goal of mutual trust is the protection of the right of the individual not to be judged or sentenced twice for the same offence. Within the field of criminal law, the Framework Decision on the European Arrest Warrant (EAW) of 2002 is an example of mutual trust which is not always in the interest of the person at stake.[11] In my view, there is a parallel between the execution of this Framework Decision, providing that arrest warrants issued by one state are to be executed by another state, and the implementation of the Dublin Regulation. When a state considers executing an arrest warrant by another state, it is possible that the individual opposes his or her extradition to this state on the basis of Article 3 European Convention on Human Rights (ECHR), thereby invoking the inhuman or degrading detention conditions in that state. This claim based on Article 3 ECHR, a provision which offers absolute protection against inhuman or degrading treatment or torture, obliges national courts to decide whether the arrest warrant has to be executed or not. In the Netherlands, case law dealing with EAW establishes that mutual trust is the rule

7 Cases C-187/01 and C-385/01, 11 February 2003.
8 See Para. 33.
9 Para. 32.
10 J.A.E. Vervaele, 'The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights', 2005 *Utrecht Law Review* 1, no. 2, p. 117.
11 Framework Decision 2002/584 on the European Arrest Warrant and the surrender procedures between Member States, 13 June 2002, OJ L 190, 18.7.2002. See also Vervaele, supra note 10, p. 116.

and courts only allow few exceptions to the execution of a EAW, arguing that all EU Member States are bound by Article 3 ECHR, or requiring the individualisation of evidence of the alleged risk.[12]

Where, as with regard to the Dublin Regulation or the European Arrest Warrant, the application of mutual trust does not necessarily result in a favourable decision for the individual involved, or even risks violating his or her right under Article 3 ECHR, one could argue that in these fields of law the (higher level of the) harmonization of law is necessary for the implementation of mutual trust, or, where such a harmonised approach cannot be attained, a lower threshold for the applicant with regard to the burden of proof is necessary. I will come back to this question below.

3. Mutual trust in asylum law

In this section, I will explain, first, the meaning and content of the principle of mutual trust in the Dublin Regulation and then describe the earlier case law of the ECtHR dealing with the implementation of the Dublin Regulation. Analyzing the conclusions of the 2011 judgments of the European courts, relevant criteria dealing with 'rebuttal of trust' and the burden of proof for the national asylum procedures will be explored.

3.1. The Dublin mechanism

Within asylum law, the principle of *mutual or interstate trust* implies that Member States establish a mutual trust in the quality and lawfulness of each other's laws. The Dublin system was set up in order to secure that only one state is responsible for examining the claim for asylum. The Dublin system, allocating the responsibility for asylum applications on the basis of specific criteria, is based on mutual trust, in other words on the assumption that each Member State respects the rights of asylum seekers in accordance with European and international law. Therefore, if an applicant arrives in another Member State which has no primary responsibility according to the Dublin criteria, he or she can be sent back to the responsible state. Articles 6 to 14 of the Dublin Regulation set out, in a hierarchical order, the different criteria determining which state is responsible for the examination of an asylum application. Priority is given to humanitarian conditions, including the presence or residence of family members in a Member State and the principle that family members applying for asylum should remain together, even if formally different Member States are responsible for examining their applications.[13] Second, the responsibility of a State is determined by the Member State's role with regard to the travelling and entry of an asylum seeker into EU territory, including by which state a residence document has been issued or a visa requirement has been waived; or in which state the borders have been irregularly crossed by the applicant; or in which international transit area the applicant applied for asylum. It should be stressed that within the Dublin hierarchy of criteria, the asylum seeker's own choice or interest, namely the first Member State in which he or she lodges an application, is the last factor to be taken into account when determining the responsible state.[14]

For the implementation of the Dublin Regulation, the presumption of trust more specifically implies that all Member States are safe countries for the asylum seeker. The second preamble to the Dublin Regulation refers to the Refugee Convention to which all Member States are parties and to the 'Common European Asylum System'. Since the Tampere conclusions of the European Council in 1999, by which the heads of the Member States agreed to establish a Common European Asylum System, different instruments have been adopted by which a certain minimum level of asylum rules have been established: the Procedures Directive, the Qualification Directive, the Reception Conditions Directive, and the Directive on Subsidiary Protection.[15] Another basis for mutual trust, although not explicitly referred to in the Regulation, is found in the fact all Dublin states are party to the ECHR and are bound to comply

12 See also J. Ouwerkerk, 'Strafrechtelijke samenwerking in de Europese Unie: Interstatelijk vertrouwen als weerlegbaar vermoeden', 2012 *Ars Aequi* 61, no. 10, pp. 735-739.

13 Articles 6, 7, and 14 of the Dublin Regulation.

14 See Articles 9, 10, 11, 12 and 13.

15 Respectively Directive 2005/85, OJ L 326, 13.12.2005; Directive 2004/83, OJ L 304, 30.09.2004; Directive 2003/9, OJ L 031, 6.2.2003; and Directive 2001/55, OJ L 212, 7.8.2001.

with the non-refoulement principle in Article 3 and the right to effective remedies in Article 13 ECHR.[16] As mentioned above, Article 3 ECHR obliges states not to expel a person to a country where there is a real risk that he or she will be subjected to inhuman or degrading treatment, or torture. This prohibition of refoulement is also included in Article 33 of the Refugee Convention and Article 4 of the EU Charter on Fundamental Rights.[17]

3.2. ECtHR: T.I. v UK *and* K.R.S. v UK

In 2000, in the case of *T.I. v UK*, the ECtHR emphasized the expelling or transferring state's own responsibility with regard to the protection of non-refoulement even when taking into account the notion of a 'safe third state' under the Dublin mechanism.[18] The case concerned the transfer of a Sri Lankan asylum seeker by the United Kingdom to Germany on the basis of the predecessor of the Dublin Regulation: the Dublin Convention. The applicant contended that as Germany did not recognize persecution by non-state agents as a ground for refugee status, he risked, in violation of Article 3 ECHR, being expelled by Germany to his country of origin, Sri Lanka. Differentiating in this judgment for the first time between direct and indirect refoulement, the ECtHR held that the fact that Germany was a party to the ECHR did not absolve the United Kingdom from verifying the fate that awaited the asylum seeker it was about to transfer to that country. The judgment therefore made clear that mutual trust based on the Dublin system cannot be absolute and that states are not only responsible for protecting asylum seekers against direct refoulement but also against indirect refoulement. In its conclusions, however, the ECtHR found that there was no reason to believe that Germany would fail to honour its obligations under Article 3 ECHR and to protect the applicant from removal to Sri Lanka if he submitted credible grounds demonstrating that he risked being ill-treated in that country. The ECtHR did not clarify when, exactly, this mutual trust must then be considered to be 'rebutted', but only stated that to 'the extent therefore that there is the possibility of such a removal, it has not been shown in the circumstances of this case to be sufficiently concrete or determinate.'[19] Although the ECtHR acknowledged that there was considerable doubt that the applicant would either be granted a follow-up asylum hearing or that his second asylum claim would be granted by the German authorities, it held that German law provided sufficient safeguards for the applicant to prevent his expulsion to Sri Lanka in breach of Article 3 ECHR.

In 2008, in the case of *K.R.S. v UK*, the ECtHR dealt with the application of an Iranian asylum seeker against his expulsion by the UK to Greece under the Dublin Regulation.[20] The ECtHR upheld its earlier conclusion with regard to a Contracting State's own responsibility under Article 3 ECHR when transferring an asylum seeker to another state. As in the *T.I.* judgment, it found no violation of Article 3 ECHR because of the lack of evidence that the asylum seeker, when removed to Greece, would run the risk of being faced with ill-treatment contrary to Article 3 ECHR. The ECtHR found that 'on the evidence before it', Greece did not at the time of the decision remove people to Iran, therefore it could not be said that there was a risk that the asylum seeker would be returned there upon his arrival in Greece.[21] This decision seems to be grounded on three considerations:

– first, the UK authorities had obtained assurances from the Greek 'Dublin Unit' that the asylum applicants would have the right to appeal against possible expulsions;

16 See H. Battjes, 'Mutual Trust in Asylum Matters: the Dublin System', in H. Battjes et al., *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law. Reconciling Trust and Fundamental Rights* Utrecht: Forum Institute for Multicultural Affairs, 2011, p. 10.

17 See K. Wouters, *International Legal Standards for the Protection from Refoulement*, 2009.

18 ECtHR, 7 March 2000, *T.I. v United Kingdom*, Decision as to the admissibility of the claim no. 43844/98.

19 Decision *T.I. v United Kingdom*, no. 43844/98, section dealing with 'the position of the applicant as a failed asylum-seeker if returned to Germany'.

20 ECtHR, 2 December 2008, *K.R.S. v United Kingdom*, Decision as to the admissibility of the claim no. 32733/08.

21 Interestingly, in *K.R.S. v UK*, the ECtHR already acknowledged that 'if Greece were to recommence removals to Iran, the Dublin Regulation itself would allow the United Kingdom Government, if they considered it appropriate, to exercise their right to examine asylum applications under Article 3.2 of the Regulation'. As we will see below, this option was later defined as an obligation by the CJEU in *NS v SSDH*.

– second, there was nothing in the materials before the ECtHR suggesting that returnees would be prevented from applying for an interim measure against negative decisions of the Greek authorities; and
– third, Greece, as a Contracting State, was bound by the obligations in the ECHR, including Article 3, and therefore every returnee could lodge an individual application under Article 34 ECHR (including a request for an interim measure under Rule 39 of the Rules of Court).

The decision of the ECtHR in *K.R.S. v UK* could be criticised as allowing Member States to apply the Dublin Regulation not taking into account practical deficiencies in the European asylum system and the specific circumstances in the Member State at stake. This criticism is also related to the fact that during the proceedings reports by the UNHCR, the Norwegian Organisation for Asylum Seekers, the Helsinki Committee, and Amnesty International dealing with the situation in Greece had been submitted to the ECtHR. These reports provided evidence of the deficiencies in the Greek asylum process, the arbitrary detention of asylum seekers, and the poor or failing reception conditions for, amongst others, unaccompanied minors.[22] Although the ECtHR acknowledged that the detention conditions in Greece raised concerns, also considering the obligations of Greece under the Reception Directive 2003/9 and Article 3 ECHR, it held that claims arising from those conditions should be dealt with first by the Greek domestic authorities and could then be submitted to the ECtHR. Despite this criticism, it is important to underline that also in *K.R.S. v UK* the ECtHR made it clear that it did not consider this presumption of trust to be irrebuttable, reasoning that in 'the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant'.[23]

3.3. ECtHR: M.S.S. v Belgium and Greece

In *M.S.S. v Belgium and Greece* of 21 January 2011, the ECtHR finally decided not to accept the presumption of trust with regard to the treatment of asylum seekers in Greece. This case concerned an Afghan asylum seeker who had been transferred by Belgium to Greece and he thereby submitted a claim against Belgium and Greece for violations of his rights under Articles 3 and 13 ECHR. In its judgment, the ECtHR condemned both Belgium and Greece. Although the condemnation of Belgium is more relevant for the subject of this contribution, a few words on the decision concerning Greece should also be made.

3.3.1. Responsibility of Greece under Articles 3 and 13 ECHR

The Strasbourg Court found that Greece had violated Article 3 ECHR because of the poor living conditions and the detention conditions of asylum seekers. Furthermore, it held that Greece had violated Article 3 in conjunction with Article 13 ECHR because of the deficiencies in the asylum procedures and the risk the applicant faced of being returned directly or indirectly to his country of origin 'without any serious examination of the merits of his asylum application and without having access to an effective remedy'.[24] According to the ECtHR, the Greek authorities did not have due regard to the specific vulnerability of asylum seekers and were mainly responsible because of 'their inaction'. The applicant found himself living on the streets for several months, with no resources or access to sanitary facilities, and without any means for providing for his essential needs. The applicant was, according to the ECtHR, a victim of humiliating treatment. The authorities showed a lack of respect for his dignity and this situation 'without no doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation'.[25] In earlier judgments, when assessing the poor living and hygiene conditions of detainees in prisons, the ECtHR already found a violation of the right of protection against inhuman or degrading treatment, implying

22 The UNHCR repeatedly raised his concerns with regard to the situation in Greece and the consequences for asylum seekers when returned to Greece pursuant to the Dublin Regulation: see for example a memorandum of 30 November 2005 and the UNHCR's position on the return of asylum seekers to Greece, 15 April 2008.
23 See Part B. 'The responsibility of the United Kingdom' in the decision *K.R.S. v United Kingdom*, 2 December 2008, no. 32733/08.
24 Para. 321.
25 Para. 263.

a positive obligation on the part of the state under Article 3 ECHR.[26] In *A.A. v Greece* from 2010, the ECtHR extended this positive obligation under Article 3 ECHR to the living conditions of asylum seekers in detention centres, dealing, amongst other things, with the failure of the Greek authorities to provide appropriate medical assistance to the applicant.[27] Now, in *M.S.S.*, the scope of Article 3 ECHR was further extended to the living conditions of asylum seekers in general, implying a positive obligation for the state to offer them basic needs: food, hygiene and a place to live. To support this extension, the ECtHR described asylum seekers as members of 'a particularly underprivileged and vulnerable population group in need of special protection'.[28]

To justify its condemnation of Greece under the ECHR, the ECtHR also referred to the establishment of the aforementioned Common European Asylum System. According to the ECtHR, the Greek authorities were obliged to comply with their own legislation, transposing Community legislation including Directive 2003/90 laying down minimum standards for the reception conditions of asylum seekers.[29] One could argue that this reference implies a differentiated approach between states bound and states not bound by EU standards of asylum and migration law.[30] However, it seems valid to reason that according to the ECtHR, when an individual state has already raised its own standards under Article 3 ECHR, by its obligation to comply with EU legislation, it is no longer entitled to violate this higher level of protection.

3.3.2. Responsibility of Belgium: indirect and direct refoulement

Dealing with Belgium's responsibilities under Article 3 ECHR and the consequences of this judgment for the application of mutual trust, it is important to underline that Belgium was condemned for both indirect and direct refoulement. Indirectly, because by returning the applicant to Greece, he was threatened with expulsion by this country to Afghanistan were his life would be in danger, and directly because in Greece the applicant was exposed to inhuman and degrading treatment because of the poor living and detention conditions.

With regard to the claim of indirect refoulement, the ECtHR confirmed in *M.S.S.* its conclusions in the aforementioned cases: 'When they apply the Dublin Regulation (…) the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention'.[31] At the time of the applicant's expulsion, the Belgian authorities 'knew or ought to have known that he had no guarantee his asylum application would be seriously examined by the Greek authorities'.[32] The ECtHR found that it was the task of the Belgian authorities to verify how the Greek authorities applied their asylum law in practice: 'The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable.'[33] According to the ECtHR, these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources. Different to its conclusions in the earlier *K.R.S.* decision, the Strasbourg Court now concluded that in such circumstances, even the safety net of international law, such as the possibility to appeal under Article 34 ECHR and to request for an interim measure on the basis of Rule 39 of the Rules of Court, did not provide adequate protection. The ECtHR concluded that 'the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the

26 See *Kudla v Poland*, 26 October 2000, no. 30210/96, Para. 92.
27 ECtHR, *A.A. v Greece*, 22 July 2010, no. 12186/078.
28 *M.S.S. v Belgium and Greece*, see Paras. 251, 254 and 263. Hemme Battjes raises some doubts with regard to the practical meaning of this criterion of vulnerability for the interpretation of Article 3 ECHR, see his annotation H. Battjes, EHRM 21 January 2011, 30696/09, *JV* 2011/68.
29 Paras. 250, 263.
30 Only 25 states of the 47 Contracting Parties to the Council of Europe are bound by the Reception Directive, see also H. Battjes, EHRM 21 January 2011, 30696/09, *JV* 2011/68.
31 See Para. 342.
32 See Paras. 347-352, 358.
33 See Paras. 346-347, and 358-359.

present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR'.[34] Therefore, according to the ECtHR, by transferring the applicant to Greece the Belgian authorities 'knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment'.[35]

3.3.3. Burden of proof?

Dealing with the question of whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, the ECtHR rejected the claim of the Belgian Government that the asylum seeker had not informed the authorities of the reasons why he did not wish to be transferred to Greece ('failed to voice his fears').[36] As the general situation was known, the ECtHR held that 'the applicant should not be expected to bear the entire burden of proof' and a more active role of the transferring state was required: '[I]t was in fact up to the Belgian authorities (…) not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice.'[37]

Reading the *M.S.S.* judgment, one could find three reasons why the ECtHR, contrary to its earlier decision with regard to the situation in Greece in the *K.R.S.* case, now found a violation of Article 3 ECHR by Belgium. First, the ECtHR referred to new information, including 'numerous reports and materials' added to the information available at the time of its decision in the *K.R.S.* case, supporting the conclusion that Greece would not comply with its obligations under Article 3 ECHR.[38] Second, the Strasbourg Court found that the current Belgian policy, aside from the aforementioned procedural gap not allowing asylum seekers to submit reasons militating against their transferral, was based on a systematic application of the Dublin Regulation to transfer asylum seekers to Greece, 'without so much as considering the possibility of making an exception'.[39] Also the lack of procedural safeguards for the applicant to rebut the presumption of trust underlying the Dublin transfers to Greece was criticized by the ECtHR. The procedure followed by the Belgian Aliens Office in the application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece, also because the form which the Aliens Office filled in contained no section for such comments.[40] Finally, the ECtHR held that the diplomatic assurances given by Greece to Belgium did not amount to sufficient guarantees. In this case, these guarantees were sent after the Belgian order to leave the country was issued and, furthermore, the agreement was 'worded in stereotyped terms', not containing a guarantee concerning the applicant in person.[41] It should be noted that also in the *K.R.S.* case, the Greek Dublin Unit only provided assurances to the UK in more general terms, assuring that asylum applicants in Greece would have a right to appeal 'against any expulsion decision and to seek interim measures from this Court under Rule 39 of the Rules of Court'. It must be assumed that the lack of procedural guarantees in the Belgian system and the available information on the actual treatment of the applicant in Greece were reasons why the ECtHR in *M.S.S.* no longer considered the diplomatic assurances to be sufficient.

In its conclusions supporting its findings with regard to Belgium, the ECtHR also addressed the reform of the European asylum system since 2008, including a Commission proposal aimed at strengthening the protection of asylum seekers and including a possibility of a temporary suspension of Dublin transfers 'to Member States unable to offer them a sufficient level of protection of their fundamental rights'.[42] Although not making this explicit, the ECtHR seems to use this proposal as another reason supporting its deviation from its earlier conclusion in *K.R.S.*, arguing that even the EU legislator would acknowledge the necessity to allow exceptions to the rule of mutual trust. Meanwhile, however, the Commission proposal has been

34 Para. 353.
35 Paras. 366-367.
36 Para. 346.
37 Paras. 352 and 358.
38 Paras. 343-347.
39 Para. 352.
40 Para. 351.
41 Para. 354.
42 Para. 350.

rejected by the Member States represented in the Council, and the option to temporarily suspend Dublin transfers has been replaced by a more political proposal for an 'evaluation and early warning mechanism'.[43]

4. CJEU: *NS v SSHD*

4.1. Dublin and the sovereignty clause

In *NS v SSHD*, the CJEU answered preliminary questions by UK and Irish courts dealing with the transfers of Afghan asylum seekers to Greece under the Dublin Regulation. One of the (for this contribution most relevant) questions was whether the discretionary power in Article 3(2) of the Dublin Regulation, allowing a Member State to deviate from the Dublin responsibility rules, under certain circumstances could turn into an obligation. This question was affirmed by the CJEU: if necessary to protect the fundamental rights of the applicant, in this case the protection against refoulement as laid down in Article 4 of the EU Charter on Fundamental Rights, a Member State must itself examine the application in accordance with the sovereignty clause in Article 3(2) of the Dublin Regulation.[44] Following the line of the ECtHR, the CJEU explicitly stated that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that the applicant's fundamental rights will be observed, even if, and I quote: 'the Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted.'[45] Based on grounds which will be developed in the next section, the CJEU concluded that 'the presumption underlying the Dublin mechanism (…) that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.'[46]

4.2. Burden of proof?

Referring to the general findings of the ECtHR in *M.S.S.* with regard to the situation in Greece, the CJEU underlined the responsibility of Member States 'including the national courts', not to transfer an asylum seeker to a Member State where 'they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions amount to substantial grounds for believing that asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[47] Even if the CJEU did not further define the investigative task of the national authorities or courts of the transferring state, its ruling implies that they are obliged to assess the consequences of the application of mutual trust in the light of the non-refoulement principle, and must have the power to do so.

According to the CJEU, there must be 'substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[48] This is in conformity with the general principle underlying asylum law procedures that the primary responsibility lies with the asylum seeker to submit grounds to the effect that his or her transfer to another Member State would result into a violation of his or her rights under Article 4 of the EU Charter on Fundamental Rights. However, the reference to 'where they cannot be unaware of systemic deficiencies' could be understood as meaning that even if the asylum seeker does not submit this claim him/herself, the Member State can be held responsible under Article 4 of the Charter. This conclusion, shifting the burden of proof onto the national authorities, seems fair especially where it concerns the implementation of the Dublin system, as a decision to transfer an asylum seeker to another Member State falls completely outside the control or influence of the asylum seeker. Therefore, it seems justified to require the transferring state to substantiate that this transfer does not violate the fundamental rights of the asylum seeker when the

43 See the new proposal in Council document nos. 16782/11, 4 November 2011 and 5806/12, 31 January 2012.
44 *NS v SSHD*, Para. 98.
45 *NS v SSHD*, Para. 75.
46 *NS v SSHD*, Para. 104.
47 *NS v SSHD*, Paras. 94, 106.
48 *NS v SSHD*, Para. 86.

state may be 'aware of systemic deficiencies' in the asylum procedure and in the reception conditions of asylum seekers in the responsible state.

With regard to the question of when the presumption of trust must be considered to be rebutted, the CJEU held that not 'any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No. 343/2000'.[49] Underlining that the Common European Asylum System is based on mutual confidence and a presumption of compliance, the CJEU argued that it would not be compatible with the aim of the Dublin Regulation if 'the slightest infringement' of the asylum directives (dealing with procedural guarantees, reception conditions, and the qualification of refugee status) would be sufficient to prevent the transfer of an asylum seeker to another Member State. The judgment makes clear that, as mentioned above, '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 Article 4 of the EU Charter are necessary to rebut the presumption of trust.[50] However, it is not entirely clear whether this is an absolute minimum requirement or whether it is possible that the infringement of other rights as well may result in the obligation to derogate from the Dublin mechanism. The latter, broader interpretation seems to be supported by the general conclusion of the CJEU that 'European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No. 343/2003 indicates as responsible observes the fundamental rights of the European Union'.[51] In its judgment, the CJEU referred to the fact that Greece is the point of entry in the European Union of almost 90% of illegal immigrants, resulting in a disproportionate burden for Greece compared to other Member States. The Court furthermore underlined that Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and the fair sharing of responsibility between the Member States.[52] This explicit mentioning of the principle of shared responsibility between the EU Member States seems to imply that the CJEU does not allow Member States to rely too easily on the principle of mutual trust when implementing the Dublin system.

5. Dublin and the rebuttal of trust – the necessity of procedural guarantees

The aforementioned judgments of the ECtHR and the CJEU confirm the primary responsibility of the asylum seeker to submit evidence that he or she will be treated in violation of Article 3 ECHR or Article 4 of the Charter. However, the judgments also underline the necessity of the availability of procedural guarantees for asylum seekers to submit evidence against their transfer to another Dublin state. According to the ECtHR in *M.S.S.*, Member States must 'make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention'.[53] As we saw above, the Belgian procedure left no possibility for the applicant to state the reasons militating against his transfer to Greece, also because the form which the Aliens Office filled in contained no section for such comments.[54] Dealing with the claim based on Article 13 in conjunction of Article 3 ECHR against Belgium, the ECtHR referred to the problems inherent in the 'extremely urgent procedures' as applied in Belgium with regard to the Dublin transfer to Greece. According to the ECtHR, the examination of the Article 3 ECHR complaints by (certain divisions of) the Aliens Appeal Board was not thorough, limiting their examination 'to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation.' Furthermore, the ECtHR found that 'even if the individuals concerned did attempt to add more material to their files along these lines

49 *NS v SSHD*, Para. 82.
50 *NS v SSHD*, Para. 106.
51 *NS v SSDH*, Para. 105.
52 *NS v SSDH*, Paras. 87 and 93.
53 Para. 342.
54 Para. 351.

after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention'.[55]

In *NS v SSDH*, the CJEU implicitly underlined the importance of procedural guarantees. The reason for the UK courts to submit their preliminary questions to the CJEU in *NS v SSDH* was related to the amendment in 2004 by the UK legislator of the Asylum and Immigration Act, adding the notion of 'irrebuttable statutory presumption that EU Member States are safe for the purpose of refusal'.[56] This legislation made it impossible for national courts to assess the situation in the second state when dealing with appeals against Dublin transfers. As we saw above, the CJEU found that European Union law precludes such a 'conclusive presumption' that the other Member State, indicated as the responsible state under the Dublin Regulation, observes the fundamental rights of the European Union.[57] Furthermore, the CJEU referred to the duty of Member States not to 'worsen a situation where the fundamental rights of that applicant have been infringed', for example by using a procedure determining the responsible state 'which takes an unreasonable length of time'.[58]

Dealing with the question of which sources of evidence may be used to 'rebut mutual trust', both judgments are not very clear on the precise meaning of reports by NGOs and international organisations, diplomatic assurances of the responsible state, or Rule 39 letters of the ECtHR. Although it is clear that both courts take the aforementioned information into account, they do not formulate precise criteria as to the credibility and content of this evidence. In this judgment, the CJEU referred to the information taken into account by the ECtHR in *M.S.S.*: 'regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian Minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No. 343/2003'.[59] Concluding that this information enables Member States to assess the functioning of the asylum system in the responsible Member State, the CJEU rejected the submissions of the Belgian, Italian, and Polish Governments claiming that Member States lack the instruments necessary to assess compliance with fundamental rights by that Member State.

Recent case law in the Netherlands has established that courts may decide differently when assessing evidence submitted by asylum seekers against their Dublin transfer.[60] Although it is impossible to put the weight of the evidence in precise, formal standards, some further guidelines could be useful.

6. Conclusions

6.1. Dublin, rebuttal of trust, and procedural guarantees

The judgments of the CJEU and the ECtHR make clear that despite the creation of the Common European Asylum System, asylum law in the different Member States, including procedural guarantees, reception conditions and the definition of persons in need of protection, is only harmonized to a limited degree. Both European courts emphasize the obligation of Member States, including national courts, to assess the risk of refoulement when transferring an asylum applicant under the Dublin Regulation to another Member State. This principle of 'rebuttable trust' is to be welcomed as an important and necessary deviation from a systematic application of the Dublin system. The judgments also clarify that, even if the asylum seeker does not submit this claim him/herself, a state can be held responsible for transferring a

55 Para. 389.
56 Costello, supra note 3, pp. 84-85.
57 *NS v SSDH*, Para. 105.
58 *NS v SSDH*, Para. 108.
59 *NS v SSDH*, Para. 90.
60 Compare Rechtbank Arnhem, 20 April 2012, LJN BW6779 and Rechtbank Zwolle, 9 July 2012, LJN BX1322 reaching an opposite conclusion with regard to the claim under Article 3 ECHR and the risk of refoulement in Hungary. Both courts took into account information on the ill-treatment of refugees and asylum seekers in Hungary, including information from the UNHCR in respectively October and April 2012; interim measures of the ECtHR suspending transfers to Hungary (January and May 2012), a judgment of the ECtHR by which Hungary was condemned for the ill-treatment of detained asylum seekers (*Lokpo-Toure*, Judgment of 20 September 2011, appl. no. 10816/10).

person to another state where the transferring state knows or could have known that this person would face a real risk of being subjected to inhuman or degrading treatment. Unfortunately, the precise duties of the transferring state, including the national courts, in assessing the situation and risks for the individual in the other Member State remain unclear, although both European courts emphasize the importance of procedural guarantees, condemning the systematic application of Dublin transfers and the lack of effective means for the asylum seeker to 'rebut' the presumption of trust underlying his or her transfer to another Member State. These conclusions are important guidelines for the implementation of the Dublin Regulation; however, further standards have to be developed concerning the right of an asylum seeker to submit evidence against a Dublin transfer. These standards may include criteria concerning the time available for the asylum seeker to rebut proof, the possibility to add further evidence at a later stage of the asylum procedure, which sources of information can be used to rebut trust, and the necessity of suspensive legal remedies against Dublin decisions.

6.2. Dublin: lessons for the European Arrest Warrant?

The application of mutual trust in the areas of asylum and criminal law establish the necessity not only of the further harmonization of human rights standards within the EU, but also of the necessity to allow exceptions to mutual trust. Although further case law of the CJEU has to be awaited, it is not unlikely that the conclusions in *NS v SSHD*, and indirectly those of the ECtHR in *M.S.S.*, will also become relevant with regard to other fields of EU law which are based on the principle of mutual trust, such as, for example, the European Arrest Warrant.[61] In her opinion of October 2012, dealing with mutual trust and the implementation of the European Arrest Warrant, Advocate General Sharpston explicitly refers to the conclusions of the CJEU in *NS v SSHD*.[62] She underlines that both courts accept that fundamental rights may affect the legislative obligation of a Member State to transfer a person to another state and that as regards Article 3 ECHR and the equivalent provisions in Article 4 of the Charter, 'they consider that the test should be whether there are "substantial grounds for believing" that there is a "real risk" that the provision in question will be infringed in the State to which the person in question would otherwise fall to be transferred'. Emphasizing that the Framework Decision 'does not seek to harmonise or approximate the laws of the Member States concerning the reasons for, and the procedures leading to, the service of an arrest warrant on a person suspected or convicted of committing a criminal offence', Sharpston concludes that the principle of mutual trust necessarily entails that each of the Member States recognises the criminal law of the others, and that therefore the refusal of surrender may only take place in exceptional circumstances.[63] In her opinion, the Advocate General refers to an earlier judgment of the ECtHR in *Garabayev v Russia*, concerning the question whether the extradition of the applicant by Russia to Turkmenistan violated his right under Article 3 ECHR.[64] In this judgment, the ECtHR held that 'in assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from "the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"'.[65] Questioning whether the CJEU should adopt the same test laid down by the ECtHR, Sharpston argues that the criterion in *Garabayev v Russia* that a potential breach be established 'beyond reasonable doubt' imposes the burden of proof too much on the person concerned and this may be impossible in practice to satisfy. She therefore suggests, as an appropriate test, that the requested person 'must persuade the decision-maker that his objections to the transfer are substantially well founded'.[66] This criterion, however, seems to imply that solely the individual bears the burden of proof, without any task or role for the transferring authorities, which, in my view, affects his or her legal position even more. In this regard, it should be noted, however, that the Framework Decision on the

61 See also J. Ouwerkerk, 'Strafrechtelijke samenwerking in de Europese Unie: Interstatelijk vertrouwen als weerlegbaar vermoeden', 2012 *Ars Aequi* 61, no. 10, p. 738.
62 Opinion of 18 October 2012, in the Case C-396/11 (*Ministerul Public v Radu*), see Paras. 76-77.
63 Ibid., Para. 97.
64 ECtHR *Garabayev v Russia*, 7 June 2007, appl. no. 38411/02.
65 Ibid., Para. 76.
66 AG Sharpston, supra note 62, Paras. 84-84.

European Arrest Warrant includes rules and possibilities for the individual to invoke (non-optional) grounds for the non-execution of the arrest warrant in case of breaches of fundamental procedural requirements. Also, in criminal law procedures there might be the possibility that past infringements in the criminal law procedure can be remedied. Based on these conditions, one could argue that the aforementioned criterion is more justified to apply with regard to the European Arrest Warrant, and less to the Dublin Regulation. Of course, the judgment of the CJEU in this case has to be awaited, but the opinion of Sharpston illustrates the difficulties concerning the burden of proof when allowing exceptions to the principle of mutual trust in both EU criminal law and asylum law.

6.3. M.S.S. *and* NS v SSHD*: the test for the multi-level human rights system*

Finally, taking into account the expanding role of the CJEU as a second European human rights court, next to the currently much disputed role of the Strasbourg Court, one could argue that the Lisbon Treaty, giving binding effect to the Charter of Fundamental Rights and providing for the future accession of the EU to the ECHR, does increase the complexity of human rights in the EU and its relationship with the ECHR, rather than increasing the human rights protection itself.[67] In my view, the *NS v SSHD* case shows that the CJEU, applying Article 4 of the EU Charter on the one hand and referring to the conclusions of the ECtHR in the earlier M.S.S. case with regard to Article 3 ECHR on the other, tries hard to combine the best of both worlds. The two judgments illustrate the close relationship between the EU and the ECHR, and the willingness of the two courts to take note of each other's judgments. Nevertheless, questions remain with regard to the equivalent interpretation of human rights under the two human rights systems and how the development of the EU framework of human rights influences the scope or content of the rights in the ECHR. The increasing number of preliminary questions raised by national courts before the CJEU dealing with the implementation of EU migration law establish that national courts seem to be able to cope with the multi-level human rights system in Europe, and are increasingly aware of the application of EU law and the necessity to seek a uniform interpretation of these rules.[68] Quoting Van Elsuwege: 'taking into account the blurred boundaries between the scope of application of EU law and national law as well as the overlap of fundamental rights as protected in the national constitutions, the Charter and the ECHR, there is no alternative to pluralist adjudication'.[69]

67 S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', 2011 *Human Rights Law Review* 11, no. 4, pp. 645-682, see p. 682.

68 See my contribution 'Effective Remedies for Third Country Nationals in EU law: Justice Accessible to All?', in E. Guild & P. Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, 2012, pp. 377-399.

69 P. Van Elsuwege, 'New Challenges for Pluralist Adjudication after Lisbon: The Protection of Fundamental Rights in a Ius Commune Europaeum', 2012 *Netherlands Quarterly of Human Rights* 30, no. 2, pp. 195-217, see p. 216.