



REPUBLIKA HRVATSKA
SVEUČILIŠTE U ZAGREBU
PRAVNI FAKULTET



Pravni fakultet u Zagrebu
Katedra za europsko javno pravo

Lana Radišić

The Impact of the Dublin System on the Development of the EU
Asylum Law

Diplomski rad

Mentor: prof.dr.sc. Iris Goldner Lang

Zagreb, rujan 2019.

Izjava o izvornosti

Ja, Lana Radišić, 0066231909 potvrđujem da je moj diplomski rad izvorni rezultat mojega rada te da se u njegovoj izradi nisam koristio/-la drugim izvorima do onih navedenih u radu.

Lana Radišić

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1. Introduction

The migration wave that hit Europe in the second half of 2015 marked the beginning of serious and significant challenges for all the Member States, as well as for the European institutions. Being unable to give prompt and efficient solutions, the European Union faced an unprecedented migration crisis. In other words, the migration wave clearly has shown weaknesses in the Dublin system that was adopted in order to regulate responsibility of the Member States for migrants and their movement upon entering the EU territory. In particular, the crisis has pointed out its inflexibility in terms of these exceptional circumstances. Due to the lack of unified solution, the Member States were trying to find some answers to questions triggered by this mass influx of people on the European territory. This led to serious divisions between them, refusal of cooperation and widespread mistrust of citizens towards the European institutions, which placed EU border states under intense pressure. Only because of their geographical position they faced major problems and were delegated to take on ultimate responsibility. Time has shown that the migrant crisis has taken on a broader contest, that is humanitarian crisis of the EU. It has become clear that dealing with this issue is of vital importance for the EU future. This knowledge resulted in offering a few proposals in order to

reshape the Dublin system. Alongside the proposals that came outside the EU institutions, the Commission gave its proposal for the reform known as Dublin IV. The question is will this new proposal provide answers that Europe desperately needs. The main hypothesis of this paper is that Dublin system and its latest modification, Dublin IV cannot provide neither long-term solutions for the EU concerning current problems nor adequate legal framework for dealing with mass influx of migrants coming onto EU territory in the future. In the first part of this paper I will give a short summary on the development of migration in Europe and explain general terms which I found important for understanding the crisis. In the second part I will try to give a historical perspective of the Dublin system in a view to clarifying its purpose as well as problems in its implementation during this period. In the third part attention will be given to the reform of the Dublin system. I will analyze some proposals outside the EU institutions, but also Dublin IV, the proposal given by the Commission. In the end I will make a short summary of all fundamental assumptions that will be made in this paper and their impact on the future of the EU.

2. Migration and its development on territory of EU

a) Historical overview of the migration process on territory of EU

The migration wave that we witnessed in Europe during 2015/2016 demonstrates why it is necessary to regulate the question of immigration on the EU territory. Obviously the crisis has shown some deficiencies in the system developed through years but a similar migration process on the EU territory had been occurred much earlier, already after World War II. As the migration processes were seen in the sixties, seventies and eighties, they can be considered a persistent historical phenomenon of society. When discussing migration processes in the EU prof. Mirjana Morokvašić Muller distinguishes in her paper; the fall of the Berlin Wall, the German Unification, the violatate disintegration of Yugoslavia and the implosion of the Soviet Union.¹ 1989 year is considered to be a turning point in the history of migration processes. That was the time of so-called „mass movements of people“ caused by serious political changes in Central and Eastern Europe.² Only in 1989 more then 1,3 million of people

¹ Morokvašić Muller Mirjana, Migration in Europe in Nineties, Revija za sociologiju, Vol. 33 No. 1-2, 2002.g. str. 89

² Zlatković Winter Jelena, Suvremena migracijska kretanja u Europi; Migracije i etničke teme 20(2004), 2-3; 161-170

emigrated from the countries which were members of former Warsaw Pact.³ In the nineties significant migration waves were caused by the war on the territory of former Yugoslavia. Several millions of people fled their homes and immigrated in countries such as Germany, Italy, Denmark, Hungary, Switzerland and other territories within former Yugoslavia.⁴ Apart from wartime and post-war circumstances, there are many reasons why people decide to emigrate among which there are better working condition, quality of education and family unification. Everett S. Lee in his Theory of Migration divides the factors that determine the decision to migrate by explaining them through push and pull factors. According to him when a person decides to migrate, he/she takes into account all the positive and all the negative characteristics of the area of origin and area of destination.⁵ Nonetheless, it is vitally important to understand that unlike voluntary migration, the freedom of choice is not possible when migration is forced. In fact, people leave their homes for fear of their and their family safety. This crisis has happened exactly on that basis. The mass influx of people on the territory of the EU is a consequence of difficult economic and social situation in the Arab world, caused by the Arab Spring.

³ Ibidem, p.162

⁴ Zarchi Mohammad Javad Asayesh, Migracije unutar istočnog bloka nakon raspada komunizma, *Politička misao*, Vol. XXXIV, 1997., br. 3, str. 71

⁵ Everett S. Lee, A Theory of migration, *Demography*, Vol. 3 No. 1, (1966), str.47-57

Introducing necessary political changes and attempt to create the system of democracy caused demonstration, civil war and political unrest in some countries, especially in Syria and Libya. Instead of necessary political changes, there was an alarming situation of insecurity. These events caused a flow of refugees and migrants flocking towards the EU.

b) Basic terms and definitions

A vast number of people struggling to get into the EU territory, horrors and fears they went through on their journey and powerlessness of the EU to respond to crises hit the headlines. Some terms associated with the crisis can often be heard in public. Above all, it is necessary to make a clear distinction between these terms in order to understand the issues they raise. First of all, the migrant is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status.⁶ As it can be seen, there is no any formal legal definition, a very broad definition is accepted instead. Unlike migrants, refugees are according to the Geneva Convention, persons who are outside their country of origin for

⁶ UN, Refugee and Migrants, <https://refugeesmigrants.un.org/definitions>, 07.07.2019.

reasons of fear, persecution, conflict, generalized violence, or other circumstances that have seriously disturbed public order and, as a result, require international protection.⁷ In order to consider someone refugee, first it has to be established that their fear of persecution is well-founded. However, there are circumstances when it is very hard to individually examine each person. When there is a massive number of people, a member of the group can be considered a refugee, *prima facie* opinion, on the basis of initial perception, in the absence of any evidence or information pointing to the contrary.⁸ A person who was not a refugee when they left their country, but who becomes a refugee at a later date, is called a refugee "sur place".⁹ In the light of all the foregoing considerations and reasons why they decided to go to Europe, we can consider this crisis a refugee crisis in the EU.

After entering the EU territory a person can apply for asylum as a form of international protection. At that point the person becomes an asylum seeker; an individual who is seeking international protection. Therefore, not every asylum seeker

⁷ Geneva Convention Relating to the Status of Refugee, 28.7. 1951 and her Protocol from 1967, Resolution 429 (V), adopted by the General Assembly of the United Nations on 14 December 1950.

⁸ Doc.dr.sc Gordanka Lalić Novak, doc.dr.sc Radojka Kraljević, Priručnik za edukatore; Zaštita izbjeglica i ranjivih skupina migranata, Hrvatski crveni križ, 2014.

⁹ United Nation High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979

will ultimately be recognised as a refugee. However, one is a refugee not because he or she has applied and attained asylum, but because he/she fulfils the criteria for being a refugee. Another important principle established by the Geneva Convention is the principle of non refoulement. This principle prohibits the States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations.¹⁰ Since 1999, the EU has been working on creating the Common European Asylum System. The EU agreed that this system will be based on full and inclusive application of the Geneva Convention and its Protocol.

3. Development of Dublin system

a) Dublin Convention

The First important document for regulating movements onto Union's territory is the Schengen Convention¹¹, under which

¹⁰ United Nation Human Rights, Office of the High Commissioner, The principle of non-refoulement under international human rights law, <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>, 07.07.2018

¹¹ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic

Member States agreed to remove controls at their common borders and introduce freedom of movement for all nationals of signatory EU states, other EU states or non-EU countries. Despite the document by which EU tried to simplify movement of people, different rules provided in national legislation of each country created several issues. First of all, there was possibility for third country nationals to apply for international protection no matter if they already gain it in other member state- a so called asylum shopping.¹² Another issue was that applications are always submitted in countries where there is a higher standard of reception conditions or social security assistance. Furthermore, there is a problem, so called *refugee in orbit*, that refers to a refugee who, despite not being returned directly to a country where they may be persecuted, is denied asylum or is unable to find a State willing to examine their request, and are shuttled from one country to another in a constant search for asylum.¹³. These problems, that are further underlined by the Schengen Convention, the Member States decided to sort out. They adopted measures in order to establish criteria for determining State responsibility for examining applications for asylum lodged in

of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019 - 0062 (Schengen Convention)

¹² UNHCR; International Thesaurus of Refugee Terminology; European Commission; Migration and Home Affairs; https://ec.europa.eu/home-affairs/content/asylum-shopping_en 24.6. 2019

¹³ Ibid., https://ec.europa.eu/home-affairs/content/refugee-orbit_en 24.6.2019

one of the Member States. In other words, rather than creating a common system and harmonising substantive or procedural rules on asylum, they determined fixed uniform criteria for the allocation of responsibility to one single State.¹⁴ Mentioned criteria was established and provided in the Dublin Convention.¹⁵ In Chapter VII Schengen Convention there are similar conclusions on how to regulate movement of third country nationals, but they are just passing solutions with the view to establishing a borderless internal market. Moreover, the Schengen Agreement originally involved only France, Germany, Belgium, Luxembourg and the Netherlands and „must be seen as a few states moving ahead faster than the community as a whole“. ¹⁶ Because of that, Contracting Parties signed the Bonn Protocol according to which the rules on the responsibility for asylum application provided in Schengen Convention were no longer applicable when the Dublin Convention was put into force. Criteria for determining responsible Member State provided in Dublin Convention are; family reunification, valid residence permit, valid visa and in the case of irregular entry of third country national, the Member State through which this person

¹⁴ Clotilde Marinho and Matti Heinonen, 'Dublin after Schengen: Allocating Responsibility for Examining Asylum Applications in Practice' (1998) 3 EIPASCOPE, p. 2

¹⁵ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities [1990] OJ C 254/01 (1997) (Dublin Convention)

¹⁶ ECRE, 'Report on the Application of the Dublin II Regulation in Europe' (ECRE & ELENA 2006), p. 8

entered the EU territory. Although the Schengen Convention also met this criteria, another step forward is made in the Dublin Convention. There is an established hierarchy between these criteria, in order of which they were provided in the Convention. Another difference between these two Conventions is that Dublin Convention provided obligation for the Member States to examine applications in accordance with its national laws and its international obligations.¹⁷ In the Dublin Convention there are two clauses that constitute possible exception from the established criteria. The first one is a sovereignty clause, that gives a Member State the right to examine an application presented by an alien, as long as he/she agrees, even though it would not be competent according to the criteria set out in the Convention.¹⁸ The second one is humanitarian clause, that gives possibility to Member State, even when it is not responsible under the criteria laid out in this Convention, that for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires.¹⁹ So, both cases requires the consent of the applicant. Despite this effort to provide system that operates smoothly, statistics and practice have shown that Dublin Convention didn't reach its

¹⁷ Dublin Convention, Art. 3(3)

¹⁸ Op.cit. Marinho,Heinonen

¹⁹ Dublin Convention, Art. 9(1)

objectives. One of the major criticism related to evidence. Convention provides that the Member State responsible for a person's presence on the territory of the Member States is responsible for any subsequent asylum claim depending upon the availability of evidence relating to the individual's immigration history. The problem with this provision is that in many cases there isn't any evidence of person's immigration history because it did not exist in the first place or because it has been destroyed or there is lack of evidence.²⁰ Even though all States are applying the same international rules, there are considerable divergences in their national legislation. These divergences made some Member States „better option“ for applicants, who seek to apply to the most liberal State.²¹ Convention was criticized also by the NGOs, because it did not take into account the preference of asylum seekers in choosing the responsible State.²² UNHCR in its observation on Convention explain its concern. According to the Convention, State must examine applications in accordance with its international obligation, so it can return third country national as long as the principle of non refoulement is respected. It was believed that this provision would be misuse. Since there is no mutual

²⁰Commission of the European Communities, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States, SEC (2000) 522 Commission staff working paper, para. 30

²¹ op.cit. Marinho, Henon p.8

²² Ibid.

consensus on the term „safe third country“, each state can make different evaluation of safety conditions in the third country. It can result in chain deportations and breach of the principle non refoulement.²³ After all this criticism, Commission concluded that this Convention had not had a „noticeable effect on the demand for asylum within the EU“. ²⁴

b) Dublin II

After everything that was said about the Dublin Convention and considering all the issues that arrised from its implementation, the need for harmonisation was crystal clear. Treaty of Amsterdam²⁵ introduced important amendments to the EU funding treaties which had strong influence on the Dublin Convention. This new Treaty required replacement of the Dublin Convention by a Community instrument and adoption of the special measures in the field of asylum. All required measures and objectives were specified in Action Plan.²⁶ As a result, Dublin II Regulation²⁷ was adopted. The main difference was its legal nature. This new

²³ UNHCR, Impelmetation of the Dublin Convention: Some UNHCR Observations, 1.May. 1998.

²⁴ Op.cit. Marunho, Henon

²⁵ Treaty of Amsterdam, Official Journal C 340, 10.studenog 1997.g.

²⁶ Action Plan of the Council and the Commision on how best to implement the provisions of the Treaty of Amsterdam on an area of Freedom, Security and Justice, Justice and Home Affairs Council, 1999/C

²⁷ Council Regulation (EC) No. 343/2003, Offical Journal of European the European Union, 18.February 2003. (Dublin II Regulation)

act was given a status of Regulation, which means that it is directly binding on all Member States. Furthermore, in the case Van Gend & Loos²⁸ court ruled that *„independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage“*. This way individuals are entitled to seek protection of their rights before European courts. Another important innovations are; expansion of definition of a family member, more attention is given to the unaccompanied minors, shorter time frame is provided for *take charge* request and, in case of missing deadlines, responsibility for examining the application for asylum is placed on the Member State in which the application was lodged.²⁹ Another important tool that served to improve and facilitate implementation of Dublin II Regulation is the *„Eurodac“* database.³⁰ Eurodac is a system where fingertips of asylum-seekers, irregular border crossers and illegal residents are stored. Its purpose is to establish the identity of these persons, to compare them and in that way ensure effective application of Dublin Regulation.³¹ Commission in its report on

²⁸ See Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Judgment of the Court of 5 February 1963.

²⁹ Dublin II Regulation, Art. 2 (9), 6, 17

³⁰ Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316/1

³¹ UNHCR, Impelmentation of the Dublin Convention: op.cit. p. 10

the evaluation of this Regulation stated that although there are some concerns that remain on the effectiveness of the system, the objectives of Dublin Regulation have been achieved.³² Nevertheless, the European Parliament regarding the report of the Committee on Civil Liberties, Justice and Home Affairs express dissatisfaction with the current system.³³ First of all, the geographical position of some Member States imposes a disproportionate burden of share on them. States on external borders had to deal with most applications and were put under a lot of pressure. Southern Member States are also faced with asylum applications made by irregular immigrants who are rescued when in distress on their way to Europe. Furthermore, although family unity is mentioned first in the hierarchy of criteria provided in the Dublin Regulation, this provision is not often applied.³⁴ Beside Parliament, UNHCR also expressed their concern.³⁵ In addition to this warnings on deficiencies of Dublin II Regulation, the number of claims by third country nationals before ECHR for protection of their rights was growing. *Soering vs. United Kingdom* is the first case in which the ECHR concluded that „*extradition of a fugitive may give rise to an issue under*

³² Report of the Commission to the European Parliament and the Council on the evaluation of the Dublin system {SEC(2007) 742}, Brussels, 6.6.2007 COM(2007) 299 final, p. 13

³³ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2008-0287&language=EN#title1> 05.07.2019

³⁴ Ibid.

³⁵ See more; The Dublin Regulation, UNHCR A Discussion Paper. April 2006

*Article 3 European Convention on Human Rights, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention".*³⁶ In the meantime, to establish the EU minimum standards in asylum procedure and to limit the margin of discretion left to the Member States when examining the applications, three directives were adopted; the Qualification Directive, the Procedures Directive and the Reception Conditions Directive.³⁷ However, these EU standards permit certain differences between Member States but they did not manage to establish harmonisation of practise between them. Conditions in Greece resulted in an increased number of application to the ECHR to preclude transfers to that country. Very important

³⁶ Case of Soering v. The United Kingdom, Application no. 144038/88, p. 91, 7. July 1989

³⁷ Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 (Asylum Procedure Directive 2004), Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12 (Qualification Directive 2004), Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States [2003] OJ L 31/18 (Reception Conditions Directive 2003

judgement for jurisprudential development in Dublin transfers was reached in the case M.S.S v. Belgium and Greece. In this case „the Court held that there had been a violation of Article 3 (prohibition of degrading treatment) of the Convention both because of the applicant's detention conditions and because of his living conditions in Greece".³⁸ That means that the legal commitments to provide reception conditions, in particular under the EU Reception Conditions Directive together with asylum seekers' particular vulnerability, create specific positive obligations under Article 3.³⁹ The CJEU followed the ruling in MSS case and in the case N.S v. United Kingdom⁴⁰ explained in detail the prohibition of transfers. The CJEU held that it cannot be concluded that "any infringement of fundamental rights will affect the obligations of the other Member States to comply with the Dublin Regulation".⁴¹ So, „if there are 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, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with the Dublin

³⁸ M.S.S. v. Belgium and Greece Application no. 30696/09, 21. January 2011

³⁹ Cathryn Costello and Dr. C. Costello, Dublin case NS/ME: Finally, an end to blind trust across the EU?, A&MR 2012 Nr. 02 - 83

⁴⁰ C-411-10 and C-493-10, Joined cases of N.S v. UK and M.E v. Ireland, 21.12.2011

⁴¹ Ibid. p. 82

Regulation.”.⁴² After MSS and N.S case there is a a whole line of case-law in which both the ECHR and CJEU futher elaborate what was said in MSS and N.S.⁴³ These important findings on Dublin transfer had strong impact on the future of the Dublin system.

c) Dublin III

This abovementioned development of the case-law of the competent courts, showed the need to improve regulation mechanisms in the field of migration. The next logical step was the re-cast of Dublin II Regulation. In the light of these consideration, the Dublin III Regulation⁴⁴ was adopted. This new regulation is aimed to clearly define the responsibility of Member State following the cases before the ECHR and the CJEU. Article 3.2 states that where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions in that Member State, the determining Member State shall continue to

⁴² Ibid, p. 86

⁴³ C.K and Others v. Slovenia C-578/16PPU, 16. February 2017., Abdullahi Case C-394/12, ECLI:EU:C:2013:813, 10. December 2013, Case of Tarakhel v. Switzerland, Application no. 29217/12, 4. November 2014

⁴⁴ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

examine the criteria set out in Dublin III Regulation in order to establish whether another Member State can be designated as responsible. Furthermore, for the first time Regulation provided detention rules. The detention is only justified if there is a significant risk of absconding. In those cases Member States were required to act in accordance with the rules provided for detention in the section V of the Regulation. Another further step was made by giving the applicants ... "the right to an effective remedy, in the form of an appeal or a review against the transfer decision." Innovations are also made regarding broader interpretation of family member, right to informations provided in art.4 and right to personal interview provided in art.5 in order to discuss each case individually. The purpose of this re-cast was to fill the shortcomings that were observed in the practical application of Dublin II Regulation.

4.Reform of Dublin system

a) Situation in EU after adoption of Dublin III Regulation and difficulties associated with its application

In 2015/2016 we witnessed an unforeseen arrival of refugees and irregular migrants on the EU territory. Statistics have shown

that a total of 4,4 million people immigrated to one of the EU Member State during 2017 among whom there were an estimated 2,0 million citizens of non-EU countries.⁴⁵ Beside that in 2015 and 2016 there were recorded 2,3 million illegal crossings.⁴⁶ This migration crisis is caused by a situation in Libya, Somalia, Syria, Afganistan and other third countries from which people are running, at all costs. Many of them were prepared to risk their lives in order to escape from these countries and reach the territory of the EU. Surely, the EU was not ready for this. Member States didn't have a solution for that migration wave and it became obvious that Dublin III Regulation can not be applied at the time of crisis. Its application gives rise to several problems.

First of all, its criteria and mechanism for determining State responsibility are imposing dispropriate burden on border countries like Italy and Greece. Because of their geographical position and rule of first entry set out in Dublin Regulation, they were responsible for most of the asylum applications. There for, the Dublin system was criticized because of his unfairness.⁴⁷ Another important criticism on the Dublin Regulation is about its efficiency. Even though the rule of the

⁴⁵<https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf>
9.7.2019

⁴⁶<http://www.europarl.europa.eu/news/hr/headlines/society/20170629ST078630/a-zil-i-migracije-u-eu-u-cinjenice-i-brojke> 4.7.2019

⁴⁷ Bianca Garces-Mascarenas, Why dublin „doesn't work“, Notes Internacionals CIDOBS 135; November 2015

first entry is clearly established, in practice it doesn't work successfully because it happens frequently that applicants seek asylum in a different country to the one they arrived. According to Eurostat and Frontex statistics, 64,625 out of the 170,000 irregular arrivals in Italy sought asylum there.⁴⁸ In practice, there were also problems with transfer to the country of first entry. In fact, returns to Greece were banned according to various judgements of the ECHR and CJEU because of systemic deficiencies in its asylum procedure and reception conditions. Another obstacle for transferring asylum seeker is that there is a problem with communication between Member States and their cooperation. Many of them do not accept requests, because of lack of evidence or simply do not respond.⁴⁹ Moreover, there is also criticism regarding member states reference to asylum seekers. In the report submitted by the ECRE it is said that fair and efficient examination of asylum applications is not guaranteed in all member states.⁵⁰ In fact, in many states there were various deficiencies; duration of procedure for examination asylum application, accommodation capacities and reception conditions. Malfunctioning of the Dublin system was clearly seen in the development of the Western Balkan route⁵¹. What happened there was that migrants entered the EU territory through Greece.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Greece, Macedonia, Serbia, Croatia, Hungary, Slovenia, Austria, Germany.

Due to the situation in Greece and two important judgements in MSS and NS, all Dublin transfer to Greece were suspended. Therefore, although Greece was a state of first entry, migrants could not be transferred there. Most of the migrants did not want to apply for asylum neither in Greece nor in Croatia (the second EU state on Western Balkan route). Not only that Greece, Croatia and other Western Balkan countries allowed entry to people who did not meet required legal conditions, but also they organised and facilitated their further movement to other states along the route. So, the Western Balkan route was created on the tacit agreement between the Western Balkan states to organize transfers contrary to the Dublin rules in order to ensure that migrants reach their desired destination.⁵² Preferred destination for the majority of them was Germany. This route is clear example that exceptional circumstances require considerable modification. Even though, this route proved to be a successful tool for regulating mass influx of migrants, the CJEU stuck to the Dublin rules and decided to shut their eyes to reality. In the joined cases *A.S and Jafari*⁵³ the CJEU ruled that "*the fact that the border crossing took place in a situation notable for the arrival of an exceptionally large number of third-country*

⁵² Iris Goldner Lang, *Croatia and EU Asylum Law, : Playing on the Sidelines or at the Centre of Events?*, In V. Stoyanova and E. Karageorgiou (eds.), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis*, Brill, 2018, pp. 93-112.

⁵³ *A.S. v. Slovenia* (C-490/16) and *Jafari* (C-646/16), 26. July 2017

nationals wishing to obtain international protection can have no effect on the interpretation or application of that provision"⁵⁴. So, allowed entry on the Member States territory of the third country nationals who did not fulfill entry conditions of the third country nationals, *must be regarded as an „irregular crossing irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals.*⁵⁵ So, the CJEU decided to stand for formalistic approach. However, Advocate General Sharpstone in her Opinion took a radically different approach. She significantly differ times of „normal situation“ and humanitarian crisis which occurred in the 2015/2016. In her opinion she stated that *„It is evident that the border crossings that took place in the present cases were not 'regular'. But I do not accept that those border crossings are properly to be classified as 'irregular' within the meaning of Article 13(1) of the Dublin III Regulation, which results in the Member State whose border was crossed 'irregularly' becoming responsible for determining a subsequent application for international protection*"⁵⁶. There for, she concluded; *„the words*

⁵⁴ Para.42 in *A.S v. Slovenia*

⁵⁵ Para.92 in *Jafari*

⁵⁶ Opinion of Advocate General Sharpston, delivered on 8.June 2017. Case *A.S. v. Slovenia* (C-490/16) and *Jafari* case (C-646/16) ECLI:EU:C:2017:443 para. 186

'an applicant has irregularly crossed the border into a Member State' in Article 13(1) of the Dublin III Regulation do not cover a situation where, as the result of a mass inflow of third-country nationals seeking international protection within the European Union, Member States allow the third-country nationals concerned to cross the external border of the European Union and subsequently to travel through to other EU Member States in order to lodge applications for international protection in a particular Member State".⁵⁷ Having in mind that Dublin III Regulation gives rise to issues on both sides, the one of the Members States and the one of asylum seekers, this system that was developed through years has been called into question.

b) Dublin IV

Since the Dublin III was not capable of functioning at the time of crisis, the EU have decided to recast this Regulation. Instead of a comprehensive reform, the Commission proposed to supplement current rules with corrective allocation mechanism.⁵⁸ The aim was to establish a sustainable and fair system for determining the member state responsible for examininig an asylum application,

⁵⁷ Ibid., para. 190

⁵⁸ Briefing EU Legislation in progress, European Parliament; http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%29586639_EN.pdf, 29.7.2019

reinforce the Eurodac system, prevent secondary movements and achieve greater convergence in the asylum system.⁵⁹ On May 4, 2016, the European Commission has published Dublin IV proposal that intends to amend the Dublin system.⁶⁰ Clearly, neither Dublin convention nor Dublin Regulations were designed to function in a situation like this, so its ineffectiveness comes as no surprise. Although, Dublin IV is based on the same principle as Dublin III Regulation some important changes are proposed. First of all there is a new corrective allocation mechanism the purpose of which is to manage with disproportionate number of asylum applications in one member state and to provide a fairer system between Member States. This mechanism applies where the automated system indicates that the number of applications for international protection in responsible Member State is higher than 150% of the reference number for that Member State.⁶¹ The reference number for each Member State shall be determined by a reference key that is based on two criteria; the size of the population (weighting 50%) and total GDP (weighting 50%). The good part of this new system is that it will impose an obligation on all of the states to assume responsibility in dealing with

⁵⁹ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a thirdcountry national or a stateless person (recast), 2016/0133 (COD)

⁶⁰ Ibidem.

⁶¹ Ibidem, Art.34

this huge issue for the whole European Union. This way we can get a fair share of responsibility between Member States. Imposing such obligation on all Member States according to their reference number might be a way of dealing with this crisis and assuring that every state has an important role in it but there are some problems that remain even if this system is applied. States on external borders like Greece and Italy that for sure are the ones who assumed a far greater share of responsibility in this crisis cannot be completely satisfied. Namely, once this mechanism is triggered the relocation will happen next year. Therefore, in case of unforeseen and sudden increase, the Member States on external borders will have to cope with present influxes and relocate asylum seekers the next year.⁶² In other words, if the crisis happens again we do not have an effective and a long-term solution. Moreover, this proposal will burden these countries even more heavily because they have sole responsibility for transfer to third countries. An innovation in this proposal is the admissibility procedure whose aim is to determine whether an applicant has entered the EU from a non-EU state regarded as safe. If this is the case, individual grounds for an asylum are no longer examined in the EU, so this procedure provides a

⁶² Pierre Georges Van Wolleghem, *If Dublin IV were in place during refugee crisis... A simulation of the effect of mandatory relocation*, Paper ISMU, January 2018

transfer to a safe third country or a first country of asylum.⁶³ Another innovation is art. 37 that provides a solidarity contribution of EUR250,000 that Member State can pay to another Member State that is willing to take in the asylum seeker. So, contrary to its purpose, this can be a perfect way for the states to avoid their responsibility. There is an absurd situation where the crucial point is to assure that all the states participate in dealing with the crisis, but on the other side there is a sum of money that can be paid in order to allow Member State to buy themselves out of system.⁶⁴ There is not any limit on how many times Member States can pay to be out of this system so this fair sharing of responsibility doesn't affect the Member States as long as they accept financial implications. Another very questionable provision in this proposal is about remedies. The Commissions' proposal is that there is a drastic restriction of the scope of appeals, so the applicant is entitled to appeal only against transfers to a member state where systemic flaws entail a risk of inhuman or degrading treatment or transfers in breach of family criteria⁶⁵ laid down in the regulation. Reason for this proposal is Abdullahi judgement⁶⁶ in which Court explains that in situation when one member state agrees to take

⁶³ German NGO Policy paper, Refugee policy in Europe- no to this Dublin IV Regulation, December 2016

⁶⁴Sarah Progin-Theuerkauf, The >>Dublin IV<< Proposal: Towards more solidarity and protection of individual rights?, sui generis, 2017., S.61

⁶⁵ Dublin IV, art. 10, 13,18

⁶⁶ CJEU Case C-394/12, Abdullahi, ECLI:EU:C:2013:813, 10. December 2013,p. 60

charge of the applicant for asylum „the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter“.⁶⁷ But, this judgement was overruled by Ghezelbash judgement⁶⁸ in which Court has ruled that under Dublin III Regulation, applicants have the right to appeal against transfer on the grounds that the criteria have been misapplied.⁶⁹ So, it is very clear that this new provision would constitute a distinct regression.⁷⁰ Furthermore, there is another serious criticism regarding this provision; it would violate a right to an effective remedy, provided in Art. 13 of the European Convention of Human Rights.⁷¹ However, Article 28 of Dublin IV proposal provides some improvements in remedy system. There is an obligation for a Member State to wait for a decision on the appeal.⁷² So there is an automatic suspensive effect unlike Dublin III Regulation in which there is just a

⁶⁷ Ibidem.

⁶⁸ CJEU Case C-63/15, Ghezelbash, ECLI:EU:C:2016, 7. June 2016, p.61

⁶⁹ Dr. Francesco Maiani, The Reform of the Dublin III Regulation, June 2016, p.40

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Dublin IV, Art. 28(3)

possibility of this effect if the competent authorities decide so, acting ex officio.⁷³ Changes are also made in order to prevent uncontrolled secondary movements of persons. The Commission proposed that applicants must apply in the member state either of first irregular entry or in the case of legal stay, in that member state.⁷⁴ If the applicant doesn't observe the rules, the member state must examine the application in accelerated procedures. This provision cannot fully resolve problems of secondary movements because it can function only in the situations in which a person is registered. People often avoid registration while border states try to escape their obligations due to the massive influx of people and pressure put on them. There for, there is another provision that in theory and in an environment of mutual trust and solidarity might be effective, but in practice and especially at time of crisis it shows its deficiencies. Dublin IV proposal is an urgent measure made by the Commission with a view to dealing with problems that occurred during 2015/2016 and establishing a system that will be efficient in all conditions. Even though we can accept that there is recognition of some serious issues and intent to deal with them, in practice this set of rules cannot function and it is obvious that there are too many gaps in this proposed system.

⁷³ Dublin III , Art. 27(4).

⁷⁴ Dublin IV proposal art.

c) Some new proposals outside European institutions

After recognizing certain issues of this Commission proposal, it became clear that it cannot give us satisfactory answers. If Dulin IV is not the right answer to this crisis the question is what to do to overcome it? Some member states decided to close their borders. Accepting their approach and closing the borders would not be in compliance with important international acts that also have a central role in the EU legal system. If states cannot comply with the provisions of the acts that form a basis on which the EU is developed, what is the point of this union anyway? We might create some new rules that will be regarded as progress only if we understand the purpose of the EU from its very beginning. Clearly, this solution cannot be accepted either.

Having in mind its seriousness and relevance, some academics were trying to find the best solution to deal with this massive asylum crisis. Italy is one of the country that was under a huge pressure because of its geographical position. One proposal gives Italy a central role in overcoming this crisis. The study was conducted by Di Pasquale C., Marrucci G., Valesini G. under

the supervision of Milena Gabanelli.⁷⁵ The authors of this study see Italy as „major hotspot network“ for handling the first phase of arrival and reception of asylum seekers.⁷⁶ In short, several Italian buildings were found where it would be possible to lodge asylum seekers and organize services for them such as; education, health care, language support. During this first phase which last approximately 6 months, asylum seekers are identified and trained in required skills. After this, each Member State accepts its quota of people. A very important part of this proposal is that asylum seekers are allowed to express and explain their preferences for a particular Member State.⁷⁷ After analyzing this proposal, it is true that this is a good way to put an end to smuggling networks by which asylum seekers are trying to reach their preferred country because Italy will be the only one that is responsible for examining their application. Another important step is that people are able to go through this 6 month programme during which they gain skills that are required in a country that is planned as their final destination. Beside interest of asylum seekers, this proposal takes into account interest of the Member States and their labour market. By making asylum seekers more readily employable and in the same time reducing costs of their arrival is an only way in

⁷⁵ S. Angeloni, F.M.Spano, Asylum seekers in Europe: Issues and solutions, Int. Migration & Integration (2018) 19:473-495

⁷⁶ Ibid.

⁷⁷ Ibid. p.486

which we can assume that states will be willing to cooperate. The costs for this program are huge; total annual costs could amount to 2.165 billion euros approximately.⁷⁸ Moreover, after case with ship Aquarius and acts and statements of Italian Minister of Home Affairs, Matteo Salvini concerning asylum seekers, it is obvious that there is lack of political will for this solution in Italy. Another problem is citizens' point of view. For many of them asylum seekers pose a threat to the country's security and are reluctant to accept that this earlier mentioned programme is happening in their city, region or village. Even though this solution puts Italy in the center and gives it crucial role it cannot function if each state doesn't accept its share of the burden. So, political will, solidarity among states and a strong resolution to deal with these problems are crucial factors. Another reasonable comment is given by a few authors.⁷⁹ They are drawing attention to Temporary Protection Directive⁸⁰. Authors are suggesting that instead of recasting Dublin III Regulation, European institutions should consider activating temporary protection mechanism. This mechanism provides that, in crisis

⁷⁸ Ibid.

⁷⁹ See: M Ineli-Ciger, 'The Missing Piece in the European Agenda on Migration: The Temporary Protection Directive' (EU Law Analysis, 8 July 2015, N. Bačić Selanec, A critique of EU refugee crisis management; On Law, Policy and Decentralisation, CYELP 11, (2015) P.73-114

⁸⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

situation, all the Member States share responsibility for protecting refugees on the basis of solidarity.⁸¹ This is the system that is made for crisis situation in case of mass influx of refugees onto the Union territory, so its conjugation with this situation is pretty obvious. Although there are problems with the application of this mechanism, that are based on textual ambiguities of its provisions⁸², I cannot find a plausible explanation for not calling on the Commission to consider this system as a possible option for this situation and also for making it permanent solution for all the inflows of refugees onto the Union's territory which are very likely to happen in the future.

d) Cooperation with third countries

In order to bring the curtain down on irregular migration, the EU laid great emphasis on cooperation with third countries. That was set out in The Agenda on Migration⁸³ that was adopted in 2015. This cooperation with third countries started with EU-Turkey deal whose aim was to stop the flows of irregular migration from Turkey to Europe. The idea was to control that

⁸¹ Ibid.

⁸² See more: N. Bačić Selanec, A critique of EU refugee crisis management; On Law, Policy and Decentralisation, CYELP 11, (2015) p.99-102

⁸³ Communication from the Commission to the European Parliament to, the Council, the European Economic and Social Committee and the Committee of the regions; A European Agenda on Migration, Brussels, 13.5.2015 COM(2015) 240 final

every person who irregularly comes from Turkey to Greece is returned. The benefit of the EU is quite clear; in that way it can externalize their border control and reduce the number of people who enter the EU territory without examining their asylum application. The motive for Turkey to enter such deal is financial. This deal pledged 3 billion euros of European funds to improve the humanitarian situation for refugees in Turkey.⁸⁴ The main problem is that neither Greece neither Turkey can be considered as a safe country for refugees. There for, asylum seekers who came to Greece or were returned to Turkey were faced with inhuman conditions for living and serious difficulties.⁸⁵ Beside this cooperation that occurred between the EU and Turkey, some Member States started to enter into agreements with third countries in order to prevent asylum seekers from entering their territory. It stands to reason that the most interested one was Italy that represents the EU external borders and because of that was under a huge pressure when the crisis happened. So, Italy decided to reactivate the Italian-Libyan treaty from 2008.⁸⁶ This treaty was suspended because the ECHR ruled in

⁸⁴ <https://helprefugees.org/news/eu-turkey-deal-explained/> 15.08.2019

⁸⁵ Doğuş ŞİMŞEK, Turkey as a "Safe Third Country"? The Impacts of the EU-Turkey Statement on Syrian Refugees in Turkey, Perceptions, Winter 2017, Volume XXII, Number 4, pp. 161-182., Report of the Special Rapporteur on the human rights of migrants Francois Crepeau, Mission to Greece, UN General Assembly, April 2013

⁸⁶ Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2008. <http://eumigrationlawblog.eu/wp->

*Hirsi Jamaa*⁸⁷ case that Italy is violating the principle of non-refoulement by returning refugees in the Libya. Even though, Libya is considered a heavily unstable and non-safe country, Italy reinforced the agreement. The main part of this agreement are obligations for both sides. Libya is obliged to control migration flows through Libya to Europe and Italy will in return give financial support. Practically, migrants who try to pass through Libya to get to Italy through a popular Mediterranean route will be intercepted by Libyan coast guards and transferred back to reception centres in Libya waiting to be returned to their country of origin. The problem with this treaty is that by pushing back migrants to Libya Italy is violating the principle of non refoulement as situaion in Libya at the time was chaotic. First of all, Libya is still facing civil war and it cannot be, considered as safe country, by any means. Moreover, conditions in this reception centres in Libya for migrants are unsafe and degrading. They have very little or no access to health care, food, safe drinking water, shelter or education.⁸⁸ So, their fundamental rights are called into question. Even though this cooperation was meant to be a way of dealing with the crisis, reality has shown us that this is only an act of shifting

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⁸⁷ Case of *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23.12.2012

⁸⁸ United Nations Support Mission in Libya;

https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf,
22.08. 2019

responsibility to other countries at the cost to fundamental rights. It is also very important to note that despite the violation of fundamental human rights and international law, this cooperation will not represent the solution of all problems. By closing Mediterranean route alternative irregular routes (Egypt or Algeria) will open and there will be increased number of people who are in need of protection in Libya.⁸⁹

5. Conclusion

The crisis which peaked in 2016 showed that Europe is divided more than ever. Clearly, existing rules provided in Dublin III Regulation were not able to reach satisfactory solutions. From the beginning of the crisis the EU insisted on its implementation. Although some Member States opposed and decided to make steps they find necessary to be ready to cope with such unprecedented influx of people, European Institutions clung like a leech to existing legislation. This resulted in chaotic situation; closing of borders, overcrowded countries, unbalanced distribution of responsibility, many tragic events and

⁸⁹ See more : The Italy- Libya Memorandum of understanding EU IMMIGRATION AND ASYLUM LAW AND POLICY, Refugee migrants crisis in europe: scenarios; <https://www.ifrc.org/Global/Photos/Secretariat/201702/170329%20Central%20-%20West%20Med%20Scenarios%20-%20final.pdf>

intervention of humanitarian organizations. There for, nowadays, there is at least consent that the need to find long-term solution is essential for the future of the EU. However, road towards the solution is not so easy. The Dublin system from its beginning was not meant to deal with any exceptional situation in a field of migration, especially in the terms of crisis. Its history shows that it is designed to define responsibility of the Member States for third country nationals that come on the EU territory. There for, any provision about its implementation in the crisis was not mentioned nor in the Dublin Convention, nor in Dublin II, nor Dublin III Regulation. After analyzing development of the Dublin system and its latest modification I found my hypothesis from the beginning of this paper correct. I can not help but believe that the Commission proposal of Dublin IV would not be effective solution. Not only that there are many shortcomings in the content of the proposal, but also the starting point from which they are developed is not suited to addressing this challenge. Other proposals that came outside European Institutions give rise to further questions but deserve more attention and chance to elaborate them in detail. Either the Commission should consider some of them or there is need to focus on adoption of completely new legal framework (not the reform of Dublin system) that will be put into effect only in crisis situation. There for, the refugee crisis remains a monkey on Europe's back and the search for the right answer is

still open. It will be very hard to find the suitable one. There is interest for all the Member State to reach lasting settlement but what is missing is political will and recalling of the fundamental principles of the EU from its very beginning. Therefore, this topic is and will likely be in the future the burning issue of society.

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