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Fitting EU asylum standards in the Dublin equation: recent case law, legislative reforms, and the position of Dublin «associates»

1. Introduction

When the Dublin system¹ was first established, it was not accompanied or preceded by harmonisation measures in the field of asylum. True, all Dublin States were (and are) parties to the 1951 Convention on the Status of Refugees (CSR) and to human rights treaties such as the European Convention of Human Rights (ECHR). However, these international «common standards» were interpreted and applied in widely different manners throughout the Dublin area². This «harmonisation-free» approach was of course deeply problematic. To restate a well-known argument: unless and until a «level field of protection» is established among the Dublin States, the Dublin system operates as an «asylum lottery» for protection seekers³.

The problem persists to this day. As the EU institutions have acknowledged, the establishment of a «level field of protection» is still a long way off⁴. Some steps in the right direction have nonetheless been taken. To put it like recital 5 of the Dublin Regulation (DR)⁵, «[the] implementation [of the 1990 Dublin Convention] has stimulated the process of harmonising asylum policy». Dublin is now part and parcel of a Common European Asylum System (CEAS), alongside with three Directives laying down minimum standards on: (a) the reception of asylum seekers (Reception Conditions Directive, RCD)⁶; (b) asylum procedures (Asylum Procedures Directives, APD)⁷; and (c) the criteria to qualify for refugee status or subsidiary protection, as well as the rights attached to these statuses of «international protection» (Qualification Directive, QD)⁸.

As I have just noted, there is a clear *normative* link between these two components of the CEAS: «For the Dublin system to function adequately, all Member States have to provide *harmonised and adequate* standards of protection for asylum-seekers»⁹.

This notwithstanding, until quite recently, *positive* legal links between responsibility-sharing under Dublin and harmonisation under the Directives have been virtually non-existent. Leaving aside the fact that the Dublin Regulation itself makes no reference to the Directives, which were for the most part adopted later in time, the «dissociation» between the Dublin system and EU asylum standards has been apparent both in judicial and legislative practice.

In court, countless challenges have been mounted against Dublin transfers on the argument that protection and reception standards were much lower in the responsible State than in the sending State. Quite naturally, these challenges have been framed and discussed in terms of compatibility with the principle of *non-refoulement* under international law. Perhaps less obviously, sustained references to EU

standards have been rarely if ever made in this context, even though such standards are indeed meant to tackle the very problem of disparity (see e.g. recital 7 QD).

As for «legislative» practice, it suffices to note that the EU institutions themselves have treated the Dublin system and EU asylum standards as separable components of the CEAS. True, both are binding for the 26 EU States that fully participate in the CEAS (hereafter: CEAS States). However, international agreements have been passed with Denmark, Iceland, Norway, and Switzerland (hereafter: associate States)¹⁰, to the effect that these States participate in the Dublin system without being bound by the EU Directives.

This state of «dissociation» is still the norm today. However, recent developments suggest that it might be, so to speak, an infant disease of EU asylum law.

De lege lata, the beginnings of an evolution are apparent in a handful of cases. Courts across Europe have started to discuss the permissibility of Dublin transfers by reference to compliance with EU standards in the responsible State.

De lege ferenda, the proposal to recast the Dublin Regulation (Recast Proposal, RP)¹¹, tabled by the Commission in December 2008 and commented on the pages of this review by Mathias Hermann¹², might open up new perspectives for greater integration between Dublin and EU standards.

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¹ On the general features of the Dublin system see amongst others Achermann, *Das Erstasylabkommen von Dublin*, ASYL 4/1990, 12; Brandl, *Distribution of asylum seekers in Europe? Dublin II Regulation determining the responsibility for examining an asylum application*, in: Dias Urbano De Sousa/De Bruycker, *L'émergence d'une politique européenne d'asile*, 2004, 33; Bogdański, *L'association de la Suisse au système de Dublin*, in: Kaddous/Jametti Greiner, *Accords bilatéraux II Suisse-UE*, 2006, 389.

² See in particular Noll, *Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law*, *Nordic Journal of International Law*, 2001, 161.

³ See ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered*, March 2008, 5.

⁴ European Council, *Stockholm Programme*, doc. CNS 17024/09, § 6.2.1; European Parliament resolution of 10 March 2009 on the future of the Common European Asylum System (OJ 2010 C 87/E 10), § 3. See also ECRE, *op. cit.*

⁵ Regulation (EC) n° 343/2003 (OJ 2003 L 50/1).

⁶ Directive 2003/9/EC (OJ 2003 L 31/18).

⁷ Directive 2005/85/EC (OJ 2005 L 326/13).

⁸ Directive 2004/83/EC (OJ 2004 L 304/12).

⁹ European Commission, SEC (2008) 2962, 15, emphasis provided.

¹⁰ The association agreements are published respectively in OJ 2006 L 66/38 (Denmark), OJ 2001 L 93/40 (Iceland and Norway), OJ 2008 L 53/5 (Switzerland). For an analysis of the Dublin association agreement with Switzerland (DAA CH), see Epiney/Meier/Egbuna-Joss, *Schengen/Dublin*, in: Thürer/Weber/Portmann/Kellerhals, *Bilaterale Verträge I & II Schweiz – EU*, Handbuch, 2007, 903; Bogdański, *op. cit.*; Cornu, *Les aspects institutionnels des Accords d'association de la Suisse à Schengen et à Dublin*, in: Kaddous/Jametti Greiner, *op. cit.*, 2006, 207.

¹¹ COM (2008) 820 final.

¹² Hermann, *Die Vorschläge der Europäischen Kommission zur Änderung der Dublin-Verordnung*, ASYL 3/09, 10.

The present article sets out and discusses these two evolutions. Space precludes an exhaustive analysis – and *a fortiori* a full discussion of the intricate legal problems surrounding challenges to Dublin transfers. What is meant is, instead, a first analysis of the emerging orientations, of their legal sustainability, and of their implications – including for associate States and for their «harmonisation-free» participation in the Dublin system.

Before turning to these matters, it is necessary to briefly recapitulate the role of international standards in the functioning of the Dublin system.

2. International standards and Dublin transfers

For our «recapitulation» we may take as a point of departure a minor event that occurred during the negotiations on the Recast Proposal. In the Recast Proposal, the Commission has included a rule granting semi-automatic suspensive effect to appeals against Dublin transfers¹³. A Member State delegation has objected that this would not be «justified by the principle of non-refoulement», and argued that «no appeal should be granted» at all¹⁴.

Such a categorical claim would be justified if made in the context of a federal asylum system. In Switzerland, for instance, asylum seekers are attributed to cantons, and such «attribution» decisions cannot by definition be challenged on *non-refoulement* grounds¹⁵. The fact is, however, that Dublin transfers in the CEAS are an entirely different matter.

To begin with, «attribution decisions» in Switzerland have no incidence on the outcome of the asylum claim, which is adjudicated by a federal authority under uniform federal law. Within the CEAS, by contrast, asylum claims are adjudicated by the Member States¹⁶ under (harmonised) national standards, and their outcome can *de facto* vary dramatically depending on which State is responsible for them¹⁷.

In addition, and more to our point, Dublin transfers amount to the removal of asylum seekers *between* States, not *within* the jurisdiction of the same State. As such, they fall squarely within the scope of the *non-refoulement* principle under international law. The European Court of Human Rights (ECtHR) has made the point tersely:

«The [...] indirect removal [...] to an intermediary country, which is also a Contracting State, does not affect the responsibility of the [sending state] to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the [sending State] rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish [...] international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting

States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution»¹⁸.

As a matter of international law, therefore, every State proposing to transfer an asylum seeker under the Dublin system must ensure that such removal does not result in direct or indirect *refoulement*.

It is true that, in discharging this duty, the sending State may rely on a presumption that all other Dublin States are «safe» for the applicant. To begin with, all Dublin States are parties to both the ECHR and the Geneva Convention, and the presumption is that they will respect their obligations under these instruments («interstate trust»: see recital 2 DR)¹⁹. The risk of onward removal in breach of the ECHR is further mitigated by a second factor: since all Dublin States are subject to the jurisdiction of the ECtHR, the Court itself is (presumably) in a position to prevent onward expulsion in breach of the Convention²⁰.

All these presumptions, however, have the sole effect of facilitating the task of the sending State – not of removing its duties and responsibilities. In fact, Dublin transfers are a special kind of «safe third country removals». Under international law, such removals require *inter alia* a «meaningful assessment» of whether the responsible State will extend to the asylum seeker «effective protection» against ill-treatment and *refoulement*²¹.

3. EU standards and Dublin transfers: emerging approaches in the case law

It is worth pointing out that the duties recalled above flow from *international* law. Furthermore, the «meaningful assessment» that the sending State must carry out focuses on

¹³ Hermann, op. cit., § 2.5.

¹⁴ Doc. CNS 14283/2009, footnote 1 at Article 26.

¹⁵ See Loi fédérale sur l'asile (RS 142.31), art. 27(3).

¹⁶ See art. 72(2e) TFEU.

¹⁷ See European Parliament, op. cit.; ECRE, op. cit. See also Trummer, Asylrechtsharmonisierung in Europa: die nächsten Schritte, ASYL 1/10, 22, § 5.

¹⁸ ECtHR, T.I. v. United Kingdom, req. 43844/98, ECHR 2000-III. In ECtHR, K.R.S. v. United Kingdom, req. 32733/08, 2 December 2008, the Court found that «this ruling must apply with equal force to the Dublin Regulation». See also Goodwin-Gill, The individual refugee, the 1951 Convention and the Treaty of Amsterdam, in: Guild/Harlow, Implementing Amsterdam, 2001, 141, 146: «[n]otwithstanding the movement towards closer union, in international law each Member State is [...] responsible for promoting universal respect for, and observance and protection of, all human rights and fundamental freedoms».

¹⁹ Battjes, European Asylum Law and International Law, 2006, § 7.4.3.

²⁰ ECtHR, K.R.S., op. cit. This (overconfident) ruling of the Court has been somewhat nuanced in the subsequent ECtHR, Kaplan v. Germany, req. 43212/05, 15 December 2009. On the obstacles that might render access to the Court a wholly theoretical possibility, see Council of Europe Commissioner for Human Rights, Third party intervention under article 36(2) ECHR, doc. CommDH(2010)9, 10 March 2010, § 28.

²¹ See in particular Lauterpacht/Betlehem, The scope and content of the principle of non-refoulement, in: Feller/Türk/Nicholson, Refugee Protection in International Law, 2003, 87, § 89 ff.

compliance with *international* law in the responsible State²². At first sight, therefore, EU standards do not and should not come into the picture.

Yet, as noted in the introduction, some courts are making sustained reference to EU standards in Dublin cases. On what grounds?

Broadly speaking, two approaches seem to be emerging. Under the first approach, EU standards are seen to be relevant because they concretise the relevant international standards (see 3.1). The effect of this approach is potentially double: consideration of EU standards may both facilitate Dublin transfers (3.1.2), or subject them to a more rigorous scrutiny (3.1.3). Under the second approach, EU standards are considered as relevant *per se* in assessing for the legality of Dublin transfers (see 3.2).

3.1 EU standards as a concretisation of the relevant international standards

3.1.1 Introductory remarks

Several provisions of the EU Directives are meant to «add more detail»²³ or, if one prefers, to «concretise»²⁴ the relevant international standards. Articles 6 to 10 of the Qualification Directive provide the clearest example. By attributing a specific meaning to key terms such as «actors of persecution», «acts of persecution», or «reasons of persecution», these provisions purport to «guide the competent national bodies of Member States in the application of the Geneva Convention» (recital 16, QD).

Of course, not all the provisions of the EU asylum Directives have such an «interpretive» character. The EU Directives also lay down «autonomous» standards having no obvious counterparts in international law. Subsidiary protection status provides an interesting illustration. The criteria to qualify for this form of protection are largely, though not exclusively, drawn from ECtHR case law (see recital 25 QD)²⁵. By contrast, status rights are an entirely original creation of the European legislator, going well beyond the naked *refoulement* prohibitions derived from the ECHR²⁶.

I should add that drawing a line between «interpretive» and «autonomous» EU standards may sometimes be difficult. One might query, for instance, what provisions (if any) of the Asylum Procedures Directive are meant to codify requirements flowing from the CSR. On the one hand, the CSR does not lay down explicit rules on status determination. On the other hand, respect for the *non-refoulement* principle presupposes «fair» procedures, respecting certain guarantees²⁷. Did the EU legislator consider that some procedural standards are implied in the CSR, and if so which ones? In this specific case, recital 13 APD provides some guidance by enumerating a list of guarantees that the EU legislator regarded as necessary «in the interest of a correct recognition of those persons in need of protection as refu-

gees within the meaning of Article 1 of the Geneva Convention».

Be that as it may, and conceding that the exact identification of «interpretive» provisions in the Directives may be difficult in some cases, the point remains. The object and purpose of several EU standards is to lay down what we may call a «minimum binding interpretation» of the relevant international standards – particularly, of everything that relates to *non-refoulement*. This is the conceptual basis for the two jurisprudential lines considered below.

3.1.2 EU standards as a basis for specific safety presumptions

In the case of *K.R.S.*, the European Court of Human Rights had to deal with the familiar issue of whether a Dublin transfer to Greece would amount to *refoulement* under article 3 ECHR.

In dismissing the claim, the Court relied principally on two findings: (a) that *de facto*, Greece did not carry out removals to the applicant's country of origin, and (b) that the applicant could in any event prevent expulsion in breach of art. 3 ECHR from Greek territory, if need be by lodging an application with the Court itself.

Both arguments are quite problematic²⁸, but they need not be discussed here. What matters for our purposes is that in rejecting the claim, the Court also noted the following:

«The Dublin Regulation, under which [the] removal would be effected, is one of a number of measures agreed in the field of asylum policy at the European level and must be considered alongside Member States' additional obligations under [the Reception and Procedures Directives]. *The presumption must be that Greece will abide by its obligations under those Directives*»²⁹.

To be sure, the Court's decision provides no explanation as to how Greece's presumptive abidance by the Directives might mitigate the risk of an article 3 violation. Some indications can nonetheless be gleaned from the way in which the Court summarises the Directives³⁰. In doing so, the Court points out some of the guarantees enshrined in the Direc-

²² See e.g. UNHCR 1996, Considerations on the «safe third country» concept, July 2006, 2; Goodwin-Gill/McAdam, *The Refugee in International Law*, 2006, 390 ff.

²³ Storey, *EU Refugee Qualification Directive: a Brave New World?*, *International Journal for Refugee Law*, 2008, 1, 8.

²⁴ VG Düsseldorf, 13 L 1840/09.A, 8 December 2009, *InfAuslR* 2/2010, 85, 87.

²⁵ On the difference in scope between art. 3 ECHR and art. 15 QD, see ECJ, C-465/07, *Elgafaji*, [2009] ECR I-921, § 28.

²⁶ Storey, *op. cit.*, 6 f.

²⁷ See Battjes, *op. cit.*, § 6.2.1. See also Kälin, *Rechtsfragen im Zusammenhang mit der geplanten Revision des Asylgesetzes*, *ASYL* 4/01, 3.

²⁸ On Greece's *refoulement* practice, see UNHCR, *Observations on Greece as a country of asylum*, December 2009. On the difficulties in accessing the ECtHR from Greece, see Council of Europe Commissioner for Human Rights, *op. cit.*

²⁹ ECtHR, *K.R.S. v. UK*, *The Law I.B.*, 17, emphasis provided.

³⁰ *Ibidem*, Relevant European Union and domestic legislation.

tives, such as the «right to remain [...] pending the examination of the asylum application», the right to «appropriate linguistic assistance and a personal interview», and the «right to an effective remedy before a court or tribunal».

It is submitted that the Court considered these specific guarantees as a concretisation of the general requirements flowing from articles 3 and 13 ECHR, e.g. a «meaningful assessment of the applicant's claim», and «independent and rigorous scrutiny» on appeal³¹.

In this optic, the obligations of the responsible State under the Directives become relevant because they establish a series of specific presumptions that «ECHR-relevant» rights and facilities will be afforded – e.g. that the asylum procedure will be carried out by qualified personnel and, where needed, with the help of an interpreter (see art. 4, 8, and 11(3) APD).

To confirm this point, it is worth noting that some national judges, in assessing the compatibility of Dublin transfers with the ECHR or CSR, have more or less explicitly adopted this line of reasoning³².

Could principled objections be raised against this presumptive argumentation? Not in my view. Indeed, presuming that CEAS States will abide by the Directives is not different from presuming that State Parties will observe their obligations under the ECHR and CSR – a presumption that is widely accepted³³. And to the extent that EU standards accurately reflect and concretise the relevant international standards, compliance with the former may well establish compliance with the latter.

There are nonetheless risks in the process – that is, risks that this sort of presumptive reasoning might be misused, to the effect of undermining the centrality and the integrity of international protection standards.

The first risk is that of deducing from the Directives presumptions that have no basis therein. The Directives are complex documents: they do establish a number of important rights, but at the same time they allow for numerous and substantive qualifications and exceptions³⁴. In reading the *K.R.S.* decision, for instance, one cannot dispel the impression that the ECtHR failed to consider how weak the right to an «effective» remedy is under art. 39 APD.

K.R.S. also illustrates a second risk: excessive focus on the *obligations* flowing from the Directives, precluding careful consideration of the realities on the ground. The ECtHR recalls for instance the right to an interpreter under the Procedures Directive, but fails to consider the established fact that qualified interpreters are rarely available in Greek asylum procedures³⁵. True, presumptions are made to avoid a detailed analysis of the facts of each case. However, as pointed out by the Austrian *Asylgerichtshof*, the authorities of the sending State must be prepared to push their enquiry beyond formal obligations under the Directives, and indeed beyond their formal transposition in national law, to consider the actual practice of the responsible State³⁶.

There is a final risk to be mentioned: that of presuming too readily that obligations under EU standards meet (or

exceed) obligations under the relevant international standards – which are, and remain, the central yardstick for assessing the legality of removals. In this context, without going in too many details, it is worth quoting the remark made by UNHCR, that «[s]ome provisions in the first phase instruments, notably in the Qualification Directive and the Asylum Procedures Directive, do not or do not fully reflect international standards or *may lead to breaches of international law*»³⁷.

3.1.3 EU standards as binding interpretation for the sending State

Considering EU standards as a «concretisation» of international standards is the conceptual basis, as we have just seen, for the following proposition: that, if binding on the responsible State, the Directives give rise to «human rights-relevant» safety presumptions. From the same conceptual basis, however, one may also derive a reverse proposition: that a sending State, if bound by the EU Directives, cannot transfer an asylum seeker to a State whose practice is not in line with EU «interpretive» standards³⁸.

Since the end of 2008, several German administrative courts have been suspending Dublin transfers to Greece precisely on this argument³⁹.

³¹ In the decision, one can find further evidence that the Court gives relevance to «extra-conventional» sources insofar as they can translate in the legal categories of the ECHR, which is its sole reference text (see art. 32 ECHR). Thus, in taking note of the criticism addressed by UNHCR to Greek asylum procedures, the Court notes: «the weight to be attached to such independent assessments of the plight of asylum seekers must inevitably depend on the extent to which those assessments are couched in terms similar to the Convention».

³² See e.g. UK High Court of Justice, *EW v. SSHD*, [2009] EWHC 2975 (Admin.), § 111 (claim that effective remedy against «degrading» conditions of destitution would be unavailable in Italy; dismissed on grounds that art. 39 APD requires signatory States to give a right to an effective remedy, and that the presumption that Italy will comply has not been rebutted); Austrian *Asylgerichtshof*, S8 226976-2/2008, 23 September 2008, II, § 3.4.1 (in considering the contention that a removal may breach art. 3 ECHR for medical reasons, finds that it may now be presumed, on the basis of the Reception Conditions Directive, that access to medical treatment is guaranteed in all Member States).

³³ See again Battjes, *op. cit.*, 7.4.3.2. and further references.

³⁴ See De Bruycker, *Le niveau d'harmonisation législative de la politique européenne d'immigration et d'asile*, in: Julien-Laferrrière/Labayle/Edström, *La politique européenne d'immigration et d'asile: bilan critique cinq ans après le Traité d'Amsterdam*, 2005, 45.

³⁵ See e.g. UNHCR, *Observations on Greece as a country of asylum*, December 2009, 7, 9, 11, 16.

³⁶ Austrian *Asylgerichtshof*, S13 402093-1/2008, 27 October 2008.

³⁷ UNHCR, *Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, 6, emphasis provided, footnotes omitted.

³⁸ For an earlier statement of this position, see Maiani, *La Suisse, le système de Dublin et l'influence du droit communautaire sur son droit d'asile*, in: Epiney/Haag/Heinemann, *Le défi des frontières – Mélanges en l'honneur de Roland Bieber*, Baden-Baden, 2007, 812, 819.

³⁹ E.g. VG Düsseldorf, 13L 1645/08.A, 6 November 2008; VG Berlin, VG 34.L 57.09 A, 27 February 2009.

The suspension decision rendered on 8 December 2009 by the *Verwaltungsgericht (VG) Düsseldorf* provides as good an illustration as any⁴⁰. In essence, the *VG* proceeded in three moves. As a first thing, it considered the «safe third country» rule enshrined in art. 16(2) of the German Constitution (GG), whereby EU states are all «normatively» deemed safe, and interim judicial protection against transfers is in principle excluded. This rule, so the *VG* contended, is premised on respect for the CSR and ECHR in the destination State. Secondly, the *VG* noted that the obligations flowing from these Conventions have been «concretised», so far as EU States are concerned, by the Directives on asylum. Based on these two considerations, it finally posited that an exception to the «safety presumption» under art. 16 GG should be made – and interim suspension granted – when a third State or EU State, in spite of its obligations, does not guarantee at least in the essentials («*im Kern*») protection in line with the relevant European and international standards.

Some would argue that the first step of this reasoning is wrong as a matter of German Constitutional Law⁴¹. However, and this is what is significant for our purposes, the argument developed by *VG Düsseldorf* appears to be entirely sustainable as a matter of international and EU Law.

The first point to recall is that, obviously, neither the CSR nor the ECHR require compliance with EU standards in the destination State as a precondition to safe third country removals. To this I would add that no explicit provision of EU Law lays down such a requirement: as far as safe third country removals are concerned, EU legislation only requires respect for *international* standards in the destination State⁴².

Yet, EU standards come into the picture insofar as (a) they concretise international standards («*Kernanforderungen des [...] europäischen Rechts*»)⁴³ and (b) they are binding on the responsible State.

The first point was explained above (3.1.1). To understand the second, we need to take a step back and reconsider the sending State's duty to «meaningfully assess» compliance with international standards in the responsible State.

In carrying out this assessment, obviously, the sending State must choose *a certain* interpretation of those international standards – and the question is, which interpretation?

The point was considered in *Adan and Aitseguer*⁴⁴. The facts are well known: the Secretary of State for the Home Department (SSHD) sought to remove the applicants to Germany and France under the Dublin Convention. However, Germany and France interpreted article 1A CSR differently than UK authorities: at the time, they both followed the so-called «accountability theory», whereas the UK adhered to the so-called «protection theory»⁴⁵. This divergence was relevant to the situation of the applicants, who claimed to fear persecution at the hands of non-state actors.

The argument put forward by the SSHD to overcome this difficulty was that the interpretation followed by France and Germany, though different from its own, fell

within a «range of permissible meanings» of the CSR. For its part, the House of Lords was firm in rejecting this «relativist» approach. It stressed that the CSR, and more generally human rights treaties, have in principle «one true meaning». Such «true meaning» may be established by the authoritative case law of competent international bodies such as the ECtHR – and in this case, the authorities of the sending State must obviously have regard to this interpretation⁴⁶. Failing authoritative international case law, as it is the case with the Geneva Convention, the authorities of the sending State «ultimately [...] have no choice but to apply what *they* consider to be the autonomous meaning [of the relevant international standards]»⁴⁷.

In other words, the House of Lords proscribed «double standards». If a State regards a certain interpretation of the relevant Conventions as impermissible for «internal purposes», i.e. for the examination of asylum claims, it may not regard it as permissible for «external purposes», i.e. when assessing risks of *refoulement* in a destination State in view of removing asylum seekers there.

If this approach is correct, and if it is true that some EU standards lay down a binding interpretation of the relevant international standards, then the conclusion reached by the *VG Düsseldorf* follows quite naturally. A Member State that is bound by the Directives must necessarily regard noncompliance with EU «interpretive» standards in the destination State as noncompliance with the relevant international standards.

Before concluding on this point, it is important to stress (a) that under this approach, the main focus of enquiry remains compliance with the relevant international standards, and (b) that it is not suggested that compliance with «inter-

⁴⁰ *VG Düsseldorf*, 13 L 1840/09.A, 8 December 2009, InfAuslR 2/2010, 85, 87.

⁴¹ See e.g. *VG Würzburg*, W 4 K 08.30122, 10 March 2009, arguing that art. 16 of the German Constitution is inapplicable to Dublin transfers. On the same position, Marx, *Rechtsgutachten zu den verfassungs- und europarechtlichen Fragen im Hinblick auf Überstellungen an Mitgliedstaaten im Rahmen der Verordnung (EG) Nr. 343/2003 (Dublin-II-Verordnung)*, March 2010 (on file with the author).

⁴² Concerning safe third country removals to non-Dublin States, see articles 27 and 36 APD. The Dublin Regulation is notoriously silent on the issue. Yet, recital 2 links the «safety» of all Dublin States to the fact that they all respect «the principle of non-refoulement», whose only sources were, at the time when the Regulation was adopted, the CSR and human rights treaties.

⁴³ *VG Düsseldorf*, op. cit., 87.

⁴⁴ House of Lords, *Adan and Aitseguer*, *International Journal of Refugee Law*, 2001, 202.

⁴⁵ On the «accountability» v. «protection» theory issue, see among many Kälin, *Non-state Agents of Persecution and the Inability of the State to Protect*, *Georgetown Immigration Law Journal*, 2000–2001, 41.

⁴⁶ Of course, this does not rule out divergences on the interpretation and practical implementation of article 3 ECHR, the ECtHR jurisdiction and case-law notwithstanding: see e.g. Pretzell/Hruschka, *In Search of a Universal Definition of Human Rights in the Context of the Dublin Convention*, *Journal of Immigration, Asylum and Nationality Law*, 2002, 97.

⁴⁷ House of Lords, *Adan and Aitseguer*, op. cit., 214, emphasis provided. On this issue, see Noll, op. cit.

pretive» EU standards in the responsible State necessarily means that the transfer is permissible. As noted above, EU standards are at present far from fully or adequately reflecting international standards. Furthermore, and crucially, EU standards lay down a *minimum* binding interpretation. They preclude Member States from adopting a less favourable interpretation, for «internal» as well as for «external» purposes. By contrast, they leave to Member States all latitude to adopt a more favourable interpretation. A sending State may therefore be satisfied that the responsible State respects EU standards, and at the same time consider that it does not respect the *international* standards on its own interpretation.

The remark made by the *VG Düsseldorf*, that «Kern» European standards *and* international standards must be respected in the responsible State, is clear evidence that there is no necessary confusion on this point.

3.2 Compliance with EU standards as an autonomous condition for Dublin transfers

In annulling Dublin transfers to Greece, other German administrative courts have gone much further than the *VG Düsseldorf*. They have, in fact, posited that when the responsible State does not comply with EU standards *as such*, as opposed to «interpretive» or «Kern» standards, Dublin transfers are impermissible. Various argumentations have been deployed to sustain this position, but space precludes considering them all. As an illustration, I will set out the line of argument chosen by the *VG Frankfurt* in a judgment of 8 July 2009⁴⁸, which is increasingly finding resonance in German-speaking literature⁴⁹.

The argumentation developed by the *VG Frankfurt* is centred on a systematic interpretation of the EU asylum *acquis*. The *VG* first considers the preamble of the Dublin Regulation, highlighting in particular recitals 4 (objective of guaranteeing access to status determination procedures), 5 (progressive establishment of the CEAS, and role of the Dublin system in stimulating harmonisation), and 15 (objective of ensuring full respect for the Right to Asylum, as enshrined in art. 18 of the EU Charter). From these references, the *VG* derives the proposition that the Dublin Regulation must be interpreted in light of the whole EU asylum *acquis*. More pointedly, the *VG* comes to the conclusion the Dublin system *presupposes* the existence of a CEAS as it has found expression in the Directives. In this perspective, the *VG* posits that Dublin transfers are acceptable *insofar* as asylum seekers' rights are guaranteed in all Member States *by virtue of the Directives* (or, as expressed a few lines below, that the Dublin Regulation guarantees access to an asylum procedure *in accordance with the Directives*). The implication is all too clear, and has been set out above: if the practice of the responsible State discloses (serious) breaches of the Directives⁵⁰, then the sending State has no choice but to apply the sovereignty clause.

Before any other considerations, it is worth pointing out that the judgment is by all means remarkable – in particular, it stands well above the average of Dublin cases for its careful analysis of the conditions prevailing in the responsible State. One may query, however, whether the argumentation set out above does not take systematic interpretation too far.

To begin with, the Regulation's preamble provides scant support for the strong proposition, made by the *VG*, that the Dublin Regulation intends to ensure access to an asylum procedure «in conformity with the Directives». Moreover, the central contention that the Dublin system *presupposes* harmonisation does not sit well with the development and present state of EU asylum law. As noted in the introduction, the Dublin Regulation was adopted *without* harmonisation. One could perhaps disregard this circumstance in considering the evolution of the CEAS since. However, as also recalled in the introduction, Dublin membership extends *today* to associate States that are not bound by the EU Directives. In the absence of strong textual underpinnings in the Regulation, it is perhaps going too far to contend that the EU legislator intended to link together participation to the Dublin system and subjection to, or compliance with, EU standards as such.

In short, the argument of *VG Frankfurt* may seem to be overstretched in the present state of the law. This does not mean, of course, that it lacks merit as a *normative* argument. In and of itself, making Dublin transfers conditional on full compliance with EU standards in the responsible State would constitute an important step forward towards suppressing the «asylum lottery».

And, I should add, it would not threaten the centrality of international protection standards, unless one committed the fallacy of focussing on EU standards *instead of* international standards. The judgment delivered by the *VG Frankfurt* demonstrates, however, that this fallacy can be easily avoided. Indeed, the *VG* specifically points out that «serious violations of the [Directives] *or* of national and international fundamental rights» are all apt to making a Dublin transfer illegal⁵¹.

3.3 The implications for associate States

The present position of associate States *vis-à-vis* EU standards can be summarised as follows. On the one hand, as recalled several times, associate States have no obligation whatsoever to implement EU asylum standards. On the

⁴⁸ *VG Frankfurt*, 7 K 4376/07.FA(3), InfAuslR 10/2009, 406. For an alternative argumentation, see *VG Würzburg*, op. cit.

⁴⁹ See e.g. Hruschka, Überlegungen zum Rechtsschutz im Dublin-Verfahren, ASYL 3/09, 3, 4.1; Lehnert/Pelzer, Effektiver Rechtsschutz im Rahmen des EU-Asylzuständigkeitssystems der Dublin-II Verordnung, Zeitschrift für Ausländerrecht und Ausländerpolitik, 2010, 41, 42–43.

⁵⁰ On this requirement of «seriousness» and its justification, see *VG Frankfurt*, op. cit., 412.

⁵¹ *Ibidem*, free translation, emphasis provided.

other hand, the normative argument that Dublin should go hand in hand with harmonisation also applies to them, regardless of their formal position. Indeed, several commentators have pointed out, with different accents, the possibility, advisability, or necessity of «euro-compatible» asylum standards in the associate States⁵². The latter have, for their part, shown different sensitivities to the argument, from the fundamentally «euro-friendly» position of the Norwegian government⁵³, to the uncharacteristic (and almost ostentatious) neglect for EU standards displayed by the Swiss administration in the latest reforms on asylum.⁵⁴

None of the jurisprudential approaches examined above fundamentally alters the position of the associate States. Nonetheless, all of them open the perspective of a «two-speed» Europe of Dublin, and some of them have the potential to place additional pressure on associate States to align to EU standards.

The general thrust of the approach embodied in *K.R.S.* («specific safety presumptions») is that obligations under EU standards *facilitate* Dublin transfers to CEAS States. This argument basically goes to the benefit of associate States, rather than generating pressure on them. In transferring an asylum seeker to a CEAS State, Swiss or Norwegian authorities could e.g. presume that access to health care will be provided in the terms of art. 15 RCD, regardless of whether they are themselves bound by this provision⁵⁵.

Some problems could arise, by contrast, if the approaches followed by *VG Düsseldorf* and/or *VG Frankfurt* gained widespread acceptance among the authorities and courts of the CEAS States. In this scenario, the failure by associate States to meet some (or all) of the EU asylum standards would eventually *hinder* the transfer of asylum seekers from CEAS States to associate States. Such a situation could be problematic in several respects.

In the first place, being labelled as an «unsafe» country by a Dublin partner would be hardly acceptable for countries that have a long-standing humanitarian tradition, such as Switzerland and Norway⁵⁶.

Secondly, and perhaps more importantly, associate States have a vested interest in keeping Dublin cooperation as smooth and problem-free as possible. If the CEAS States were to encounter systematic difficulties in transferring asylum seekers to a particular associate State, the latter would probably face EU demands to «solve the problem» – i.e. to align its standards, so far as necessary, to European standards.

For the time being, this is of course a rather speculative scenario. The approaches advocated by the *VG Düsseldorf* and by the *VG Frankfurt* have not (yet?) gained widespread acceptance. Furthermore, there has been no difficulty that I am aware of in transferring asylum seekers to Denmark, Iceland, Norway, or Switzerland.

The trend is nonetheless set in that direction – a slowly increasing pressure in favor of euro-compatibility. And as we will see immediately, such pressure would rise steeply if the Recast Proposal was adopted in its present form.

4. EU standards and the Dublin system under the Recast Proposal

4.1 Introductory remarks

In devising the successor to the Dublin Regulation, the Commission has steered well clear of revolutionary temptations, adopting instead an avowedly incremental approach. The Recast Proposal, in fact, preserves the main features of the Dublin system as we know it today.

Nonetheless, the reforms proposed by the Commission are far from being insignificant. In comparison to the Dublin Regulation, the Recast Proposal includes more generous rules on family reunification, as well as strengthened legal safeguards for asylum seekers. In an optic of burden-sharing, it also includes the possibility to suspend transfers to States that are subject to particular pressures⁵⁷. And, more to our point, it includes significant new linkages to EU harmonisation measures.

On the one hand, it includes a number of new formal references to the EU Directives, which are disseminated throughout the Recast Proposal (4.2).

On the other hand, it includes a new mechanism for the suspension of transfers to Dublin States where the level of protection «is not in accordance with Community legislation» (4.3).

4.2 Ensuring «consistency»: the Proposal's references to EU standards

4.2.1 A summary typology of references

One of the stated objectives of the Recast Proposal is to «ensure consistency with developments in the EU asylum *acquis*, in particular with the Asylum Procedures Directive,

⁵² See e.g. Bogdański, *op. cit.*, 394; Epiney/Waldmann/Egbuna-Joss/Oeschger, *Die Anerkennung als Flüchtling im europäischen und schweizerischen Recht*, Jusletter, 26 Mai 2008, 3 and 43; Maiani, *op. cit.*; Trummer, *op. cit.*, § 6. In a different context, but in the very same sense, see UNHCR, *Considerations*, *op. cit.*, 3 and 5.

⁵³ See Vevstad, *Norwegian Proposal to Clarify Refugee Status, Forced Migration Review* 23 (May 2005), 56; Norwegian Justice and Police Department, *Norsk flyktning- og migrasjonspolitikk i et europeisk perspektiv*, Report to the Parliament n. 9 (2009–2010), 19 March 2010, 77 f.)

⁵⁴ For the reforms engaged in 2004 and 2005, see Maiani, *op. cit.* For the ongoing reform of asylum procedures, see DFJP, *Rapport explicatif relatif à la modification de la loi sur l'asile et de la loi fédérale sur les étrangers concernant le remplacement des décisions de non-entrée en matière*, 16 December 2009 – barely mentioning the existence of relevant EU standards – as well as Matthey, *Commentaire relatif aux propositions de modifications de la loi sur l'asile concernant le remplacement des décisions de non-entrée en matière*, ASYL 1/10, 3.

⁵⁵ The Swiss *Bundesverwaltungsgericht* is indeed already deriving presumptions on the treatment of foreigners in CEAS States based on the Directives. See e.g. case E-6006/2009, 7 October 2009.

⁵⁶ For this argument, see JICRA 2006/18, § 8.2.

⁵⁷ See, for analysis and further references, Hermann, *op. cit.*

with the Qualification Directive, and with the [Reception Conditions Directive]»⁵⁸.

This logic of consistency is pervasive, and it finds expression in many provisions having different legal significance.

First of all, the Proposal redefines the scope of the Dublin system by reference to the conceptual categories of the EU asylum *acquis*: instead of applying to applications for the recognition of refugee status under the CSR (see art. 1 and 2(c) DR), the system would apply to applications for «international protection», including subsidiary protection, under the Qualification Directive (see art. 1 and 2(b) RP).

Much in the same vein, the Proposal redefines the scope of some responsibility criteria on the basis of EU concepts. For instance, art. 9 RP provides for the reunification of the asylum seeker with his family members residing in a Member State as «beneficiaries of international protection» (art. 2(f) RP), rather than as «refugees» under the CSR (as currently provided by art. 7 DR.).

Finally, and beyond these «definitional» references, the Proposal includes a series of direct references to compliance with EU standards in the operation of the Dublin system.

The key example here is article 18(2) RP, which spells out the obligation of the responsible State to examine the asylum application. In itself, the provision does not differ significantly from art. 16(1b) DR⁵⁹. However, art. 18(2) RP specifies that the examination must be conducted «within the meaning of article 2(d)». In its turn, art. 2(d) RP defines the «examination of an application» as an examination «in accordance with [the Procedures and Qualification Directives]». This is very different from art. 2(e) DR, which refers to the examination of asylum applications «in accordance with national law».

As a second, similar example one may take article 3(3) RP. Like the corresponding rule in force – art. 3(3) DR – this provision reserves the right of Member States to apply safe third country clauses. However, under the current provision, such clauses may be applied «pursuant to [...] national laws». Under article 3(3) RP, by contrast, safe third country clauses would be applied «subject to the rules and safeguards laid down in [the Procedures Directive]».

4.2.2 The implications for associate States

From the perspective of the associate States, of course, all the provisions quoted above raise an uncomfortable question: would they oblige them, albeit indirectly, to apply EU standards from which they have opted out (Denmark) or to which they had not originally committed (EFTA States)?

The problem is less pressing for what we have called the «definitional» references. In fact, one could hardly read into art. 1 and 2(c) RP an obligation to *apply* the Qualification Directive. It is nonetheless the case that this kind of references would generate some applicative problems for (and in relation to) associate States. For instance: could a Member State ask Switzerland to «take charge» of an ap-

plicant under art. 9 RP, in a case where the applicant had a family member residing there by virtue of «provisional admission» status⁶⁰? At the very least, applying the Recast Proposal to associate States would require a constant exercise in «superposing» EU legal categories to the national legal categories of the associate States.

Provisions such as art. 18(2) and 3(3) RP would, for their part, raise problems of a different magnitude. On a literal reading, these provisions *do* require all Dublin States, respectively, to examine protection claims «in accordance» with the Directives, or to apply safe third country rules «subject» to the Asylum Procedure Directive. Would that be their effect, including *vis-à-vis* the associate States?

On the pages of this review, Mathias Hermann has expressed doubts in this regard⁶¹. If I understand correctly his reasoning, his starting point is that the associate States could not in principle be subjected, through a unilateral act of the EU, to an obligation to apply the EU Directives. This would exceed the terms of the association to Dublin, and amount in fact to a unilateral modification of treaty obligations. A different conclusion, in his view, would only be justified to the extent that noncompliance with EU standards would undermine the functioning and principles of the Dublin system. This, as he indeed notes, is a difficult criterion to apply – indeed many different positions are possible (see above 3.1.3 and 3.2). Eventually, in discussing whether art. 3(3) RP could legitimately impose on the associate States the requirement of respecting EU standards on safe third countries, he refrains from offering a definite conclusion.

For the reasons given below, I would fully agree with the contention that the situation is legally ambiguous. By contrast, I am not entirely won over by the reasons offered for it.

As a preliminary remark, I have reservations on the «unilateral imposition» argument. Let us accept, for the sake of the argument, that an amendment to the Dublin Regulation had indeed the purpose and effect of binding all Dublin States to respect for EU standards. In my view, this could not be equated to a unilateral modification of the association agreement. The reason is, simply, that Dublin associates have a choice⁶². They may accept the modification, and so *agree* to a modification of the agreement. But they may also reject it and seek an agreed solution in the Mixed Committee – or failing this, walk out of the association (see e.g. art. 4(7) DAA CH).

⁵⁸ COM (2008) 820 final, 4.

⁵⁹ Except for the important point that the responsible State will have to «reopen» the cases which it had closed as «implicitly withdrawn»: on this issue, see UNHCR, Comments on the Recast Proposal, March 2009, § 6.

⁶⁰ For a comparison between subsidiary protection and «provisional admission» under Swiss Law, see Petermann/Kaufmann, Die Subsidiäre Schutzform, in: UNHCR/SFH, Schweizer Asylrecht, EU-Standards und internationales Flüchtlingsrecht – Eine Vergleichsstudie, 2009, 67.

⁶¹ Hermann, op. cit., § 2.3 and 3.

⁶² See Cornu, op. cit., 232, stressing that Switzerland retains «*toute son autonomie de décision*».

One could, of course, still query whether such a far-reaching amendment would fall under the agreements – i.e. whether it would indeed constitute a «development» of the Dublin *acquis* that the associate States would be expected to accept (see e.g. art. 1(3) DAA CH). This is a potentially complex matter of treaty interpretation. Surely, such a development would not correspond to the conception that e.g. Switzerland may have had of the association to Dublin – one which did not contemplate any «short-circuit» with harmonisation⁶³. However, this conception has not found any clear expression in the association agreements, or in the declarations thereto. And the plain letter of the agreements stipulates that associate States shall accept and apply «the acts and measures [...] amending [...] the [Dublin Regulation]» without exception. In other words, States such as Switzerland would surely have a point, politically, in objecting that harmonisation did not come originally in the «Dublin deal». They would nonetheless have a hard time in persuading their EU counterpart that *amendments* to Dublin, *indirectly* imposing some measure of harmonisation, would not fall within the terms of the agreement. The Commission, for one, made its views clear on this point. In the Recast Proposal, it plainly stated that «the associated countries shall accept the Dublin/Eurodac *acquis* and its development without exception»⁶⁴.

Arguably, therefore, a Dublin reform could well have the purpose and effect of tying up the participation in the system with the observance of EU standards, and still be put to associate States as a «development» to accept or reject. The point that concerns us is another: would the Recast Proposal have such purpose and effect?

As noted above, purely textual considerations suggest that it would: the literal meaning of provisions such as art. 18(2) and 3(3) RP is that all «Member States», including the associate States (see e.g. art. 1(5) DAA CH), have to apply the EU standards referred to. The fact is, however, that neither the Recast Proposal nor its accompanying documents disclose a clear legislative intention in this sense – save perhaps concerning art. 3(3) RP⁶⁵. The impression one gets from these documents, rather, is that the Proposal has been drafted exclusively with the situation of the CEAS States in mind, without *giving thought* to the implications for the associate States⁶⁶. This justifies, at least, a question: are the new references in art. 18(2) and 3(3) RP really intended to reaffirm (for CEAS States) and impose (for associate States) the obligation to apply the Directives in the operation of the Dublin system? Or are they, rather, a mere terminological adjustment – the implementation of «rules on legislative drafting»⁶⁷?

This fundamental ambiguity is probably destined to linger on in the adopted text. The provisions that we have examined above have not been amended so far, neither by the European Parliament, nor during Council negotiations⁶⁸. Indeed, they have not given rise to any discussion. Associate States might want to seek clarification in the Mixed Committee before the adoption of the Proposal (see

art. 2 and 3 DAA CH). Or they may want to let the matter rest, and try to interpret away any obligations to apply EU standards at a later stage – of course, at their own peril.

Before turning to other matters, it is worth pointing out a rather straightforward implication of the provisions examined above, especially art. 2(d) RP. As we have just seen, it is unclear whether they would impose on the associate States an *obligation* to respect EU standards. Most certainly, however, they would lend support to the argumentation developed by the *VG Frankfurt* in the judgment examined above (see above, 3.3). Whether obliged or not, associate States would therefore probably face increased pressure to adapt, for the sake of not hindering the smooth functioning of the Dublin system (see above, 3.4).

As we will see immediately, the establishment of the suspension mechanism foreseen in article 31 RP would have the same effect, though on a different scale.

4.3 The «suspension mechanism» and «adequate» protection standards

4.3.1 Risks and opportunities for refugee protection

If finally adopted, art. 31(2) and (3) RP would give the Commission the power to suspend Dublin transfers to a Member State where the level of protection «is not in accordance with Community legislation».

Several commentators, including UNHCR, have supported the establishment of this mechanism, arguing that it would provide an effective means to prevent removals to «dysfunctional or overstretched asylum systems»⁶⁹. Others have been far less enthusiastic. In the article cited above, Mathias Hermann has expressed the concern that the new mechanism – by linking the permissibility of transfers to compliance «with Community legislation» – might obscure the obligation of individual Member States *not* to transfer an individual to a State where the CSR and ECHR are not respected⁷⁰. Personally, I share both UNHCR's support for the proposal, and the concern expressed by Mathias Hermann – though perhaps not as acutely as he does.

⁶³ See e.g. the Message of the Federal Council on the ratification of the Bilateral Agreements II, FF 2004 5737. See also Jametti Greiner, *Würdigung der Assoziierungsabkommen der Schweiz zu Schengen und Dublin*, in Kadous/Jametti Greiner, *op. cit.*, 195, 205; Bogdański, *op. cit.*, 394.

⁶⁴ COM (2008) 820, 11.

⁶⁵ See the Commission's Impact Assessment, SEC (2008) 2962, 20 and 50.

⁶⁶ By comparison, see the clues given in the Return Directive Proposal as to the position of Schengen associates (see SEC(2005)1175, 2).

⁶⁷ This expression is taken from the Detailed explanation of the Proposal (COM (2008) 820 Annex), and it does not solve our interpretive problem, since it refers to art. 2(b).

⁶⁸ See the EP legislative resolution of 7 May 2009, P6_TA-PROV(2009)0377; *doc. CNS 17167/09*, 16 December 2009.

⁶⁹ UNHCR, *Comments on the Recast Proposal*, March 2009, § 5.1.

⁷⁰ Hermann, *op. cit.*, § 2.4.

As the Greek case abundantly shows, the «suspension mechanism» would bring a valuable *addition* to the individualised responses of the Member States. At the same time, it is critically important to avoid sending the wrong message to the Member States – i.e. that the central «safety» standards are the EU standards, and that as long as the Commission does not take action, transfers may continue whatever the situation in the responsible Member State. For my part, I am not sure that art. 31 RP would generate confusion on this point. As we have seen above (3.2.) EU and international standards can coexist as autonomous criteria for the permissibility of Dublin transfers. Moreover, recital 17 RP evokes the «examination», by the courts of the sending State, «of the legal and factual situation in the Member State to which the applicant is transferred in order to ensure that international law is respected». Finally, recital 29 RP makes it clear that «with respect to the treatment of persons falling within the scope of this Regulation, Member States» would still be «bound by obligations under instruments of international law to which they are party». To dispel any residual risks of a misunderstanding, perhaps, the continuing relevance of international standards, and the continuing (individual) responsibility of Member States to respect them, could be spelled out more explicitly in the preamble of the Regulation.

4.3.2 *The implications for the associate States*

In institutional terms, art. 31 RP would subject all the Member States to Commission supervision, and the legal criterion for this supervision would be compliance with EU standards. As recalled above, associate States are included in the concept of «Member States» for Dublin purposes (see e.g. art. 1(5) DAA CH). Therefore, they would also be subject to this form of oversight.

This may appear to be odd for States that are not bound by EU standards (*ex hypothesi*: above, 4.2.2). Yet, such an objection would not carry much weight.

The purpose of the procedure would not be to sanction noncompliance with an obligation. Rather, it would be to objectively assess whether the protection standards in a State are too low to allow for the transfer of asylum seekers there⁷¹. «Compliance with EU standards» would merely be the criterion set to the *monitoring authority*, i.e. to the Commission, and it would not necessarily presuppose or imply an *obligation to respect* EU standards on the part of the State subject to supervision.

What would this change, then, for associate States? As we have just stated, art. 31 RP would not in itself impose on them an obligation to respect EU standards. Nonetheless, it would significantly increase the pressure to adopt EU or «equivalent» standards. The reasoning is the same as that set out in section 3.3 above. But of course, the political significance of a *generalised* suspension decreed by the Commission would be incomparably greater than that of an individual judicial decision.

5. Concluding remarks and outlook

All the developments that we have examined in this article disclose a trend towards closer integration between the Dublin system and EU asylum standards.

As I have argued, this trend holds both opportunities and risks for the protection of refugees in Europe. Under the first jurisprudential approach that we have examined, EU standards are seen as adding yet another layer of «safety» presumptions – one more. Still, if not handled improperly e.g. through inaccurate deductions from the text of the Directives, the argument is acceptable in principle. Moreover, it could be seen as complementary to the other emerging approaches – under which compliance with (some or all) EU standards is considered as a minimum precondition for the legality of transfers. To be sure, risks are implied also in these approaches – e.g. the risk of «flattening» international standards to EU standards, or of marginalizing them entirely. None of these methodological pitfalls is however unavoidable. In fact, the case law examined above demonstrates that EU standards can acquire relevance *without* displacing international standards, while potentially introducing a measure of consistency in safety assessments – i.e. mitigating the «asylum lottery effect».

Quite apart from their merits and drawbacks, one might also say that all the developments commented above are, so to speak, natural: they reflect the trend towards establishing a Common European Asylum System – i.e. a construction whose elements are more closely and more coherently knitted together than is the case today. The aspiration to achieve a higher degree of consistency is particularly visible throughout the Recast Proposal, which if approved in its present form would also introduce a centralised monitoring on compliance with EU standards throughout the Dublin area.

All these developments raise some challenges for the associate States.

The «harmonisation-free» form of association, which they currently enjoy, was conceived at a moment when no binding harmonisation of asylum law was yet in place. It rested on the idea that the common membership in the Geneva and ECHR regimes would dispel any «disparity» problems. In this perspective, associating third states that are long-standing and respectable parties to the Conventions, could well appear as a relatively unproblematic move⁷².

⁷¹ For an interesting parallel, see art. 25 of Directive 95/46/EC (O) 1995 L 281/31) concerning the transfer of personal data to third countries.

⁷² See Hailbronner, *The Concept of «Safe Country» and Expeditious Asylum Procedures: A Western European Perspective*, *International Journal of Refugee Law*, 1993, 31.

This was, however, a 1990s concept – which, admittedly, had its belated spring in the 2004 agreement with Switzerland. We are now in 2010. The transformation of Dublin into a constituent element of a Common European Asylum System, and the advances of this system towards greater internal consistency, might revoke the whole concept into question.

Already under existing law, the evolution of the case law described above might slowly increase the pressure to adapt to EU standards. The Recast Proposal, if adopted in its current form, would determine a steep rise in pressure. On a strong reading, it might be seen to entail fully-fledged obligations for *all* Dublin States to apply EU asylum standards in the treatment of persons subjected to the Dublin procedure. On a weaker, perhaps more plausible reading, it would in any case make the adoption of EU standards a much more pressing issue than it is today.

This is not to say that the «harmonisation-free» model of association is threatened of swift extinction. In this article, I have merely described the beginnings of a story, which is still to be told for the most part. In the end, the case law approaches that I have examined might be of no consequence for the associate States, and the Recast Proposal might be tailored to their needs.

Still, it would be worth considering the sustainability of a «harmonisation-free» association in a long-term perspective. Here is an excerpt from the Stockholm Programme⁷³:

«It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.»

If this objective came to be achieved within the EU, and if Dublin was part of the scheme as it surely must, it would become even more difficult than it is the case today to associate States that have no obligation whatsoever to make their asylum standards «equivalent».

But then again, the pragmatic would surely say «wait and see». After all, the road to the Common European Asylum System is paved with good intentions – and lofty statements unfulfilled.

⁷³ Stockholm Programme, op. cit, § 6.2.1.